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PROPER PLEADINGS PREVENT PREEMPTION PROBLEMS

By: Michael J. Warshauer

Every lawsuit begins with the drafting of the complaint. Whether we are in state court or federal court, the process is the same. We institute all of our actions with what is, in most jurisdictions, a complaint that meets the minimal requirements known as “notice pleading.” It is pretty simple actually – name the parties, claim the defendant did something wrong in a general way, and assert some damages.¹ That’s it. The lawsuit should be ready to serve as the vehicle for a successful recovery. Even a federal judge cannot make us plead our complaints with more specificity than is required by the Federal Rules of Civil Procedure.²

But before we send that simple complaint to the courthouse, we must take a moment to think about the six-hundred-pound, yet often invisible, gorilla known as “federal preemption.” Once this monkey is on our back, it can be hard to shake. That is why it is important to keep in mind that proper pleadings prevent preemption problems. Our initial pleadings affect whether or not federal law preempts our state law claims, be it by express, implied, or complete field preemption.³

In considering preemption law in the context of drafting complaints, it is sufficient to understand that federal preemption arises from the Supremacy Clause of the Constitution.⁴ Simply put, the laws of the United States shall be the supreme law of the land. With the growth of federal statutory and regulatory law in the last several decades,

federal preemption must be considered in just about every area of law that we plaintiffs' lawyers practice. The preemption gorilla likes to be known by acronyms like FDCA, FIFRA, SLUSA, FMVSS, NHSTA, FRA, RLA, and ERISA to name but a few. Every area of statutory and regulatory law presents potential problems that must be considered when drafting a complaint that touches upon the subject matter addressed.

Most of the preemption case law arises out of situations where a court has determined that some or all of a plaintiff's claims are barred as a result of federal preemption. Thus, at that point in time the plaintiff is required to defend the claims on appeal after they have been struck down. The point here is to anticipate those problems at the outset so as to avoid that defensive position on appeal. To do so, lawyers who draft more lawsuits than they craft appellate briefs need, as a starting point, a basic understanding of how federal law affects our lawsuits from both a procedural and substantive perspective. With this context in mind, the first affect of federal preemption (here, any federal law that is relevant to our cause of action) is procedural in nature, as our lawsuits can be removed from state to federal court if we are not careful in the drafting of our complaints. While removal is not technically a "preemption" issue, for our purposes here we consider it as part of the preemption paradigm because federal law may dictate our choice of venue and jurisdiction.

Two additional, and more classically "preemption" issues, must also be considered when drafting the complaint. The first is the necessity of considering affirmatively using federal law – one that preempts state law explicitly or **implicitly**, as a weapon against the preemption gorilla. The second is to think about hiding from the

gorilla by drafting pleadings that dodge the preemptive statute or regulation – particularly where that law at issue eliminates all or part of a cause of action.

REMOVAL

If our case is removed from our chosen state court to federal court this is not technically a federal preemption issue. Indeed, the determination of the effect of federal law’s preemption of state law is supposed to be identical in both state and federal courtrooms.⁵ However, that technical distinction is beside the point when the topic is drafting lawsuits. If a federal statute or regulation dictates how or where our action will be resolved in a manner that differs from where and how it would be resolved in the absence of that federal law, then preemption has occurred – perhaps not the express, implied, or field preemption in the classic federal preemption sense; but that gorilla has affected the case regardless. Sometime we can hide from the gorilla and avoid preemption with well-drafted pleadings; sometimes he finds us anyway.

Article III, § 2 of the United States Constitution gives federal courts exclusive jurisdiction of defined cases and controversies. In 28 U.S.C. 1441 “Congress has provided for removal of cases from state court to federal court when the plaintiff’s complaint alleges a claim arising under federal law.”⁶ That may seem simple enough: just don’t assert a federal cause of action and removal, and indeed federal preemption in the classic sense is impossible. Unfortunately, it is not that easy. The preemption gorilla has around it some slippery bananas we have to dodge first. To avoid subjecting the case to removal, and incurring the “preempting” of our choice of venue and jurisdiction, we need to recall from law school some basic civil procedure rules relating to the drafting and interpretation of complaints, namely the “well-pleaded complaint rule” and the

“artful pleading rule.” The differences between these two rules is important in deciding how to craft an initial pleading to avoid removal based on federal subject matter, and control, to the extent possible, other preemption problems.

The “well pleaded complaint rule” provides, in its simplest terms, that what is alleged in the complaint governs what the lawsuit is about.⁷ “Congress has not authorized removal based on a defense or anticipated defense federal in character.”⁸ Raising a defense based on federal preemption is referred to as “conflict preemption” or “defensive preemption” but that alone is not enough to “preempt” the plaintiff’s choice of a state law forum and serve as the vehicle for a removal petition. As noted, a defendant cannot remove a case to federal court based on its defenses to the plaintiff’s claims. Instead, the United States Supreme Court has “long held that ‘[t]he presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.”⁹ Therefore, the best way to avoid having our venue and jurisdiction choice “preempted” is to avoid asserting a federal cause of action.

Again, it is not quite that simple. The problem is that the “artful pleading rule,” a corollary to the “well-pleaded complaint rule,” provides that a plaintiff cannot avoid preemption by failing to plead necessary federal questions. The “artful pleading rule” should only come into play where the area of law at issue is completely and totally covered by federal law, as is the case in “field preemption”.¹⁰ Whether there is field, or complete preemption, as it is sometimes known, is a question of Congressional intent. If Congress intended to replace state law with federal law there is complete preemption; if

Congress merely intended to regulate the activity but not preempt state law relating to the consequences of violating that federal law, then there is merely ordinary preemption (express or implied), which does not completely eviscerate state law and does not serve as a basis for removal from state to federal court.

It has been said that artful pleading “allows the court to ‘recharacterize’ the complaint as arising under federal rather than state law and thus conclude that removal is proper.”¹¹ Although the “artful pleading rule” has, for purposes of removal from state to federal court, been mostly limited to cases arising under ERISA and LMRA it is sure to be more of a problem in the future as the Bush Administration diligently works to provide corporate America with an ever broadening regulatory framework designed to preempt state law accountability. The point that we have to keep in mind when drafting a complaint is that even when we make no mention of federal law at all, we might find our venue and jurisdiction choice “preempted” as a result of the artful pleading rule. Where this is likely, notice pleading will not suffice; instead, a specific effort to avoid the federal question is necessary.

HUG THE PREEMPTION GORILLA

Even though the artful pleading rule does not often allow an otherwise well-pleaded complaint to be removed from state to federal court, federal preemption is a problem whether the case is removed or not. This big boy seems to be everywhere. So, instead of running from the gorilla, accept the inevitable, embrace the federal law as providing the standard of care violated by the defendant, and cast the complaint accordingly. That is, if we can’t outrun the gorilla, make him our friend by using him against the defendant.

Because the federal preemption gorilla is in just about every tree in the jungle, we need to draft our complaints accordingly. It's true that if we have a product claim where there is a federal statute that strictly defines the expected performance of the defendant, but does not bar state law claims relating to a breach of its standards, there is technically no preemption of the state law cause of action. But, that technical nicety is not the point. In other words it does not matter if our cause of action is preempted by express or implied preemption. The reality is that if there is a federal standard it can serve to usurp a standard defined by state law (common or statutory) and it becomes the de facto state standard. In other words, the cause of action is not preempted, only the definition of the standard of reasonable conduct is. For example, if there was an FMVSS standard that required taillights to be round, a state standard demanding that they be square is preempted. However, if the taillight involved was octagonal, a state law product liability cause of action complaining about the shape of the taillight would not be preempted, as long as the standard of care demanded is consistent with the federal standards. Thus, only the definition of the standard of care is preempted.

Where federal statutes or regulations impose a particular standard, which has been violated by the defendant, we should assert that violation of the federal law in our complaint. In the taillight example, we would not assert the failure to have square taillights; rather we would assert the failure to comply with federal law requiring round ones. In such circumstances the existence of a federal law or regulation touching on the subject matter at issue is not always a bad thing. If the defendant's conduct violates federal law or regulations, preemption does not become the enemy. Instead, by acknowledging the federal law and regulations as setting forth standards of care that

governed the defendant's conduct, we preserve our state cause of action -- albeit as defined differently than our state law provides.

In this manner of pleading, the first element of basic negligence principles (duty) is satisfied by proving a violation of a federal statute or regulation. If such a violation can be proven, that deviation from federal standards should be affirmatively asserted in the complaint, which at the same time makes it clear that we are not traveling under a federal cause of action, but are instead continuing to rely on state law as our cause of action. Federal law merely sets the standard of conduct that was violated.

Sometimes federal regulations impose only minimum standards, in which case state law can provide for higher or different standards of action. In others, like the tail light example above, the federal standards define the exact way the defendant is expected to act. We have to know the difference and plead accordingly. If there is no explicit federal standard, we should assert in the complaint that the applicable federal law merely sets forth a minimum standard, which is not offended by compliance with a higher state standard. While setting forth the minimum standards set by the federal law, the complaint should go further to assert that state law demands more. This will work – *unless* the defendant can demonstrate that the duty imposed by state law *conflicts* with, or *impedes* compliance with, the federal requirements.

If the complaint acknowledges that a potentially preemptive federal law applies, (either by express or by implied preemption), the complaint must also demonstrate that the state law duty does not conflict with the defendant's ability to comply with the federal standards. Federal statutes that set forth minimum standards only preempt those state laws that directly conflict with, or frustrate the purpose of, the federal law. Supplemental

and complimentary state laws are not preempted.¹² In these circumstances, it is essential to claim in the complaint that the state law duty demanded of the defendant can be met without impeding the defendant's ability to comply with the federal minimums. This is exactly the methodology used in *Harris v. Great Dane Trailers*,¹³ in which the plaintiff alleged that the trailer was inadequately reflectorized. Despite the existence of federal regulations addressing markings on tractor-trailers, the court allowed this claim to proceed because FMVSS 108 provided only minimum standards without specifying exact requirements that would have preempted state law demands for a better or different system of reflectors.

HIDE PREEMPTION FROM THE GORILLA

There will be times when federal law is written so that what would otherwise be a valid state law cause of action simply does not exist. ERISA is an extreme example where, because of field preemption, it is very difficult to find any state cause of action relating to an ERISA insurer's conduct. Having this difficulty in mind in the complaint drafting stage might allow us to think of causes of action or even potential defendants not affected by the preempting statute. ERISA like statutes, with their nearly total preemptive effect, are not the only time that we need to try to hide from the preemption gorilla. Federal statutes and regulations that do not occupy the entire field of law must also be "plead around".

In an admittedly oversimplified example, there is no cause of action available under either state or federal law relating to an automobile manufacturer's *choice* of passive restraint systems, so long as the system chosen complies with FMVSS 208.¹⁴ We can give up on these cases or we can hide from the preemption gorilla by, for example,

asserting that whatever device chosen was either designed wrong or manufactured improperly. In other words, don't attack the choice; attack the implementation of that choice. Accordingly, our complaint will not assert that the manufacturer should have installed an airbag, but instead will assert that the seat bottom is too soft, or there is no proper knee bolster, or the anchoring is wrong, or the warnings and instructions were inadequate. Find the tree the gorilla is in and draft around it.

Another way of hiding the banana from the preemption gorilla is to look for savings clauses in the federal regulation or statute at issue providing that the regulation does not preempt state law standards where there are unique or special design related circumstances. In such circumstances it is important to allege these circumstances in the complaint. Railroad grade crossing cases come to mind as examples of this method of avoiding federal preemption. Oversimplifying once again, there is no cause of action relating to claims that a train was traveling too fast if it was within the maximum speed allowed by the FRA. However, if "unique local conditions" can be shown to exist, then a cause of action might survive because the otherwise preemptive laws are irrelevant to the facts as alleged.¹⁵

Where there is either express, implied or field preemption that comes into play we are forced to cast our complaints to make it crystal clear that we are not just trying to artfully plead around otherwise perilous preemptive laws. Indeed, we have to draft our lawsuits to name defendants and identify causes of action that utilize the law to our advantage, or demonstrate clearly that the claims are not covered by a federal statute or regulation that would otherwise be preemptive.

The key to successful avoidance of preemption's pernicious perils is to consider the problems at the outset and plead in a manner that is best suited to avoid, or take advantage of, federal law. While usually the author is a proponent of short minimalist complaints without a lot of facts, there is certainly a very strong argument for the proposition that where there is a concern that the gorilla known as preemption might jump on our back, we should draft long complaints with lots of counts to take the preemption issue head on and attempt to eliminate the defense before it is even asserted. At a minimum we should draft our complaints to give ourselves several backups in case a count or two is eaten by the gorilla. We should plead state law claims, which assert that there is no reliance on federal law, and state law claims that assert a violation of federal law is the breach of duty that gives rise to the state law cause of action. Stating at the outset how your action relates to federal law can go a long way in avoiding having it gobbled up when it need not be. Asserting multiple causes of action allows us to abandon some if necessary, or even lose one on summary judgment, without having the gorilla throw us out the front door.

In addition to pleading claims we can win, it is also important to avoid claims we can't win. The problem is not so much that one case is lost. The problem arises when a preemption decision relating to a claim that should not have been raised is used as authority to throw out the next claim touching on the same issue. We plaintiff's lawyers have to make sure that if we are going to continually fight tough fights, we do so with the best facts and best pleadings possible to protect the state of the law. Finally, what is most important is to have studied the law first, decided on the best way to plead, avoid or take

advantage of federal law, and, wherever possible, choose defendants to whom the protections of preemption do not apply.

¹ Fed. R. Civ. P. Rule 8(a) provides:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

² *E.g., Wynder v. McMahon*, 360 F.3d 73 (2nd Cir. 2004)(reversing district court's dismissal of complaint for plaintiff's failure to comply with specific conditions on the form and content of complaint).

³ For an excellent basic primer on the current state of preemption law, see Leslie A. Brueckner, *A Turning of the Tide for Preemption: New Developments in Preemption Law Bode Well for Plaintiffs in Products Cases*, Trial, November 2005.

⁴ U.S.C.A. Const. Art. VI, cl. 2.

⁵ Take for example the split of cases that existed before the Supreme Court ruled in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913 (2000) – the state courts that had considered the issue were not finding preemption, while the federal courts considering the same issues were.

⁶ *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 472, 118 S. Ct. 921 (1978).

⁷ 28 U.S.C. § 1441(b).

⁸ *Rivet*, 522 U.S. at 472.

⁹ *Id.* at 475.

¹⁰ *E.g., Metropolitan Life Ins. Co v Taylor*, 481 U.S. 58, 63-66, 107 S.Ct. 1542 (1987); *Avco Corp. v. Machinists*, 390 U.S. 557, 560, 88 S.Ct. 1235 (1968).

¹¹ Tristen K. Green, *Complete Preemption – Removing the Mystery from Removal*, 86 Cal. L. Rev. 363, 366 (1998).

¹² *See, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615 (1984) (Where federally licensed nuclear facility was found to have violated Oklahoma tort law regarding plutonium contamination sustained by laboratory analyst, award of punitive damages was not preempted by federal law.)

¹³ 234 F.3d 398 (8th Cir. 2000).

¹⁴ *See, Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913 (2000)

¹⁵ *See, e.g., CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732 (1993).