Bond

INFORMATION MEMO
TOXIC TORT AND
ENVIRONMENTAL LITIGATION

SEPTEMBER 2016

What Does a Reformed TSCA Mean for Private Rights of Action Under State Law?

As we reported, on June 22, 2016, President Obama signed the *Frank R. Lautenberg Chemical Safety Reform for the 21st Century Act* (the Act) into law, enacting the Toxic Substances Control Act's (TSCA) first reform in its four decades of existence. In the debate over the bill, within and across cameral and party lines, the timing of preemption under the Act was a major source of disagreement. The Act's passage resolved these disagreements, raising new questions regarding preemption: how far has the Act extended federal preemption of state actions related to chemical safety? How might the Act affect common law tort actions?

Preemption Under TSCA Post-Reform

According to 15 U.S.C. § 2617(a), subject to certain enumerated exceptions, states are prohibited from enacting or continuing to enforce:

- Statutes or administrative actions requiring information development about a chemical substance or category of chemical substances when a rule, consent agreement, or order has been issued by EPA regarding tests of chemical substances or mixtures, manufacturing and processing notices of new, or significant new uses of, chemicals, and regulation of chemical substances and mixtures.[1]
- Statutes, criminal penalties, or administrative actions "prohibit[ing] or otherwise restrict[ing] the manufacture, processing, or distribution in commerce or use of chemical substances" for which, consistent with the scope of EPA's risk evaluation, either a final agency determination has been made that "the chemical substance does not present an unreasonable risk of injury to health or the environment," or a final rule is promulgated.[2]
- Statutes or administrative actions necessitating notification of use of a chemical substance when EPA already has specified a significant new use and required notification.[3]

For each of these areas, preemption occurs upon EPA action.[4] Similarly, as soon as EPA defines the scope of a risk evaluation for a chemical substance, States are preempted from establishing any new statute, criminal penalty, or administrative action prohibiting or restricting a chemical labeled a "high-priority" substance.[5] If, during this process, EPA concludes a chemical substance or mixture presents an "unreasonable risk" of injury to health or the environment, EPA must establish a rule (1) prohibiting or otherwise restricting the manufacture, processing, distribution, use or disposal of the substance, (2) stating the effects of the chemical substance or mixture on health of humans and the environment and the magnitude of exposure, the benefits of the chemical substance or mixture, and the "reasonably ascertainable economic consequences of [a] rule;" and (3) considering whether alternatives will be reasonably available as a substitute when a restriction or prohibition takes effect.[6]

Actions that EPA may take by rule or order includes prohibiting or restricting the manufacturing, processing, or distribution of a substance; limiting the amount that can be produced or distributed; prohibiting or restricting a substance for a particular use or a particular use at a specified concentration; or requiring minimum warnings or instructions for use.

1 *See* 15 U.S.C. §§ 2617(a)(1)(A), 2603-2605.
2 *See* 15 U.S.C. §§ 2617(a)(1)(B), 2605(i)(1), 2605(a), 2605(b)(4)(D).
3 *See* 15 U.S.C. §§ 2617(a)(1)(C), 2604.
4 *See* 15 U.S.C. § 2617(a)(2).
5 *See* 15 U.S.C. § 2617(b)(1).
6 *See* 15 U.S.C. § 2605(a) and (c).

Once EPA makes a rule restricting or prohibiting a chemical substance or mixture, under TSCA's preemption provisions, that rule will preempt state statutes, criminal penalties, or administrative actions "prohibit[ing] or otherwise restrict[ing] the manufacture, processing, or distribution in commerce or use of chemical substances."[7]

But, how will EPA's restrictive or prohibitive rules impact other state actions, like common law causes of action? Will an EPA rule on a chemical substance or mixture preempt tort causes of action or be dispositive in determining elements of a cause of action?

The answer is probably no – in addition to amending TSCA's preemption provision, the Act also incorporated a robust savings clause explaining how actions taken under TSCA will not interfere with or be dispositive in determining private rights of action.[8] The Act leaves open a possibility, however, that EPA actions under TSCA will influence the outcome in toxic tort lawsuits.

TSCA's New Savings Clause

Common Law Preemption, or Lack Thereof

The savings clause asserts that, related to TSCA, there will be "[n]o preemption of common law or statutory causes of action for civil relief or criminal conduct."[9] Specifically, the law provides that nothing in TSCA, the Act, or any "standard, rule, requirement, standard of performance, risk evaluation, or scientific assessment" implemented under TSCA will "preempt, displace, or supplant any State or Federal common law rights or . . . statute[s] creating a remedy for civil relief, including those for civil damage, or a penalty for criminal conduct."[10] The law's language then goes even further to make a "[c]larification of no preemption" that states neither TSCA nor the Act preempts or precludes causes of action for: (1) personal injury; (2) wrongful death; (3) property damage; (4) injury based on negligence; (5) strict liability; (6) products liability; (7) failure to warn; or (8) "any other legal theory of liability under any State law, maritime law, or Federal common law or statutory theory."[11]

These detailed provisions not only clearly anticipate suits brought related to chemical substances subject to TSCA, but also provide interpreting courts specific guidance in the event a preemption issue is raised – *i.e.*, it informs courts that private rights of action at common law generally should be permitted in spite of an action's implication of a TSCA-associated action. Indeed, when reviewing similarly broad savings provisions in other federal statutes, the Supreme Court has asserted that such a provision "assumes there are a significant number of common law liability cases to save," and thus, has permitted common law actions to proceed in spite of a purportedly applicable statute.[12]

For example, in *Sprietsma v. Mercury Marine*, the Supreme Court was called upon to determine, *inter alia*, whether "a state common-law tort action seeking damages from the manufacturer of an onboard motor is pre-empted by the enactment of the Federal Boat Safety Act of 1971" (FBSA).[13] The statute contained both a preemption provision and a savings provision. The preemption provision at issue prohibited States from establishing, effecting, or enforcing "law[s] or regulation[s]" dealing with recreational vessel and equipment safety that was "not identical to a regulation" made under the FBSA.[14] The savings provision stated, "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under state law."[15] According the Court, the express preemption of only "laws or regulations" indicated preemption only of positive enactments, not common law; and the savings clause's general reference to "liability at common law," combined with its assumption that there are a significant number of such cases to save, buttressed the conclusion that common law claims were not preempted by the FBSA.[16]

---

7 *Compare* 15 U.S.C. § 2617(a), *with* 15 U.S.C. § 2605(c).
8 *See* 15 U.S.C. § 2617(g).
9 *See* 15 U.S.C. § 2617(g)(1).
10 *See* 15 U.S.C. § 2617(g)(1)(A).
11 *See* 15 U.S.C. § 2617(g)(1)(B).
12 *E.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000).
13 *See* 537 U.S. at 54.
14 *See id.*, at 58-59 (citations and internal quotations omitted).
15 *See id.*, at 59 (citations and internal quotations omitted).
16 *See id.*, at 63.

In another case, *Geier v. Am. Honda Motor Co.*, the Supreme Court similarly found that the language of a preemption provision, combined with a broad savings clause anticipating a significant number of common law liability cases, did not expressly preempt state common law torts.[17] This Court did, however, find that the plaintiff's action, alleging a failure to install airbags in a vehicle, was impliedly preempted by a Federal Motor Vehicle Safety Standard promulgated under the applicable regulation.[18] According to the Court, since the purpose of the Standard was to have a variety of passive restraints, not just air bags, permitting a state tort claim on the grounds that the manufacturer of a vehicle did not install an air bag would conflict with the Standard's purpose and was therefore preempted.[19]

As in both *Sprietsma* and *Geier*, TSCA preempts state statutes, criminal penalties, or administrative actions, which, taken together, indicate positive enactments, while its broad savings provision excepts "common law rights" and "statutes creating a remedy for civil relief."[20] Therefore, a defense based on express preemption under TSCA likely will not pass muster in a common law action. Furthermore, it appears that the language in the Act's savings provision attempts to avoid the implied preemption result in *Geier* by explicitly enumerating that the following actions will not preempt a common law tort action: any "standard, rule, requirement, standard of performance, risk evaluation, or scientific assessment," not just, as in Geier, that "compliance with a federal safety standard does not exempt any person from any liability under common law."[21]

Effect on Private Remedies

The Act's savings clause also asserts that, related to TSCA, there will be "[n]o effect on private remedies."[22] Generally, the law provides that nothing in TSCA, the Act, or any "rules, regulations requirements, risk evaluations, scientific assessments, or orders issued pursuant" to TSCA "shall be interpreted as . . . dispositive in any civil action."[23] In keeping with this concept, the law also ensures that nothing in TSCA affects "the authority of any court to make a determination in an adjudicatory proceeding under applicable State or Federal law with respect to the admission into evidence" of TSCA or any "rules, regulations, requirements, standards of performance, risk evaluations, scientific assessments, or orders issued pursuant to" TSCA.[24] This comprehensive provision envisions the potential use of TSCA-associated actions, such as rules and risk assessments, in the very private causes of action it permits in its "no preemption" section, while prohibiting courts from holding EPA's action dispositive.

Thus, while the language asserts that TSCA-associated action will not be dispositive in any outcome, it goes on to give State and Federal courts the ultimate power to determine whether and how the TSCA-associated action will impact the outcome of a case at all. In so doing, the law, while preserving private rights of action at common law, gives courts a window to permit TSCA to impact the outcomes of private rights of action at common law in some manner.

For example, will trial courts allow a defendant to introduce into evidence an EPA finding that a substance, under the conditions of use for which a plaintiff claims injury, does not present an unreasonable risk of injury to health? Conversely, will an EPA finding that a chemical substance does present an unreasonable risk of injury, or presents an unreasonable risk of injury unless the manner of use is restricted in some fashion, be admissible to prove causation?

In New York, the Court of Appeals has held that a regulatory standard or guideline is not admissible to prove causation in a toxic tort case, because such standards and guidelines are promulgated to be protective of public health and therefore include a margin of safety. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006). Will EPA determinations under TSCA be treated similarly and be excluded from evidence? Or, because of EPA's detailed focus on safety, will they be admitted, subject to an instruction that EPA's conclusion is not "dispositive"?

17 *See* 529 U.S. 861, 868 (2000).
18 *See id.*, at 881.
19 *See id.*
20 *See infra.*
21 *See id.*, at 868 (citations and internal quotations omitted).
22 *See* 15 U.S.C. § 2617(g)(2).
23 *See* 15 U.S.C. § 2617(g)(2)(A).
24 *See* 15 U.S.C. § 2617(g)(2)(B).

By comparison, in *Bausch v. Stryker Corp.*, the Seventh Circuit found that a plaintiff bringing an action against a hip replacement device manufacturer was not preempted from using the defendant's violation of a federal statute as *prima facie* evidence of negligence, as permitted under Illinois law, because the statute at issue provided immunity from suit only to those medical device manufacturers complying with the law, which the defendant had been shown not to have done.[25] Similarly, under this provision of TSCA, a court may choose to admit in a toxic tort case certain evidence arising out of federal rules, regulations, scientific assessments, or orders, if it is otherwise permissible under applicable rules of evidence. EPA's findings, though not automatically dispositive on the question of liability, may nevertheless be introduced as relevant evidence on causation or the standard of care.

Takeaway

TSCA-associated actions will preempt state statutes, administrative actions, and criminal penalties related to chemical safety, but the Act's robust savings provision likely will not preempt state common law actions involving TSCA-regulated substances. EPA's TSCA determinations will not automatically determine the outcome of personal injury actions, but might be admissible as relevant evidence on key issues. As courts interpret these provisions, we will continue to review just how far this savings provision really goes, and the evidentiary impact of TSCA determinations on toxic tort litigation.

For more information, please contact:

Thomas R. Smith
smithtr@bsk.com
315.218.8325

Richard L. Weber
rweber@bsk.com
315.218.8375

Liza R. Magley
lmagley@bsk.com
315.218.8226

25 *See* 630 F. 3d 546, 553 (7th Cir. 2010).

BOND SCHOENECK & KING ATTORNEYS
Commitment · Service · Value · Our Bond

Bond, Schoeneck & King PLLC (Bond, we, or us), has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences.
For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. • Attorney Advertising • © 2016 Bond, Schoeneck & King, PLLC
CONNECT WITH US ON LINKEDIN: SEARCH FOR BOND, SCHOENECK & KING, PLLC
FOLLOW US ON TWITTER: SEARCH FOR BONDLAWFIRM