Legal Backgrounder

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WHY MORE ISN'T ALWAYS BETTER: STATE HIGH COURT PREEMPTS CONSUMER PRODUCT LIABILITY SUIT

by

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The facts in the case were undoubtedly tragic. While playing with a disposal lighter, five-year old Jonas Carter accidentally set fire to his six-year old sister Brittany's dress. Before the fire was put out, Brittany sustained third-degree burns to over 55 percent of her body. The lighter was child-resistant and had been approved as such by the Consumer Product Safety Commission (CSPC), but surely, plaintiffs' counsel argued in the ensuing lawsuit, the manufacturer could have made the lighter even more child resistant. "More" means "safer," right? The jury agreed, and found the defendant BIC Pen Corporation liable for $2 million in compensatory damages and $3 million in punitive damages.

But the jury was wrong. When the CPSC promulgated its regulations for child resistant lighters, it specifically considered the question whether imposing more stringent requirements for child resistance would lead to more safety. It concluded that they would not. At a certain point, lighters become so difficult to use that adults don't buy them and switch to matches or non-child resistant lighters. This outcome puts far more children at risk. The jury in Ms. Carter's case was not in a position to appreciate this balance. They had before them only one horribly injured little girl; they did not have before them the countless other little boys and girls who would be injured if their parents rejected child resistant lighters and left matches lying around. That is why the CPSC, not state juries, is charged with making the broader balancing judgment, and it is also why the recent Texas Supreme Court opinion reversing the *Carter* verdict on grounds of federal preemption is a victory for consumer safety. *See BIC Pen Corp. v. Carter*, 251 S. W. 3d 500 (Tex. 2008).

The issue of when federal law should preempt state tort litigation has received significant attention lately. Earlier this year, the United States Supreme Court issued a major ruling holding preempted most state tort law claims involving Class III medical devices. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). In the fall, the Court will address whether state tort claims involving prescription drugs should likewise be held preempted. *Wyeth v. Levine*, 06-1249 (*cert.* granted Jan. 18, 2008). A recurring plaintiff theme in these cases is that state tort law claims complement FDA safety regulation and improve public health by imposing requirements more stringent than the so-called "minimum

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standards" imposed under federal law. But as the United States Supreme Court has repeatedly recognized and as the Texas Supreme Court recognized in *Carter*, more is not always better. Federal regulators often balance competing safety factors and reach expert judgments that a specific requirement is best calibrated to protect the public health and safety of all consumers. State tort law claims based upon a myopic "more is better" approach not only conflict with and frustrate federal safety objectives, they lead to affirmatively worse safety outcomes.

The United States Supreme Court first addressed the erroneous "more is better" argument in *Geier v. American Honda Motor Co*., 529 U.S. 861 (2000). The issue in *Geier* was whether a plaintiff should be allowed to bring a state tort law claim against an automobile manufacturer for failure to install airbags, despite a prior regulatory determination by the Department of Transportation ("DOT") that airbags should not be required in all automobiles because, *inter alia*, such a requirement would create a dangerous disincentive to drivers to use seat belts. Plaintiff acknowledged that the defendant had complied with the DOT regulation, but argued that the DOT requirement was only a minimum standard. In finding plaintiff's claims impliedly preempted, the Court explained why this minimum standards view of the DOT federal requirement was incorrect:

> In petitioners' and the dissent's view, [the DOT regulation] sets a minimum airbag standard. As far as [the regulation] is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. … [T]he standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and … would thereby lower costs, overcome technical safety problems, encourage technological development and win widespread consumer acceptance – all of which would promote [the regulation's] safety objectives.

529 U.S. at 875.

The United States Supreme Court confronted this argument again in *Riegel*. Here, the question before the Court was whether a plaintiff allegedly injured by a Class III pre-market approved medical device should be allowed to bring a personal injury claim based upon a common law standard different than that imposed by FDA when it approved the device as safe and effective. Again, plaintiff argued that the federal regulatory requirement should be considered only a minimum requirement that would not be frustrated by the imposition of a different, allegedly more-safe, requirement under state law. And again, the Court explained why this argument was in error:

> State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme … the experts at the FDA [apply a cost-benefit analysis]: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

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128 S. Ct. at 1008.

Carter involved the exact same "more is better" argument, and the Texas Supreme Court's correct holding provides additional foundation for a proper understanding of the public safety concerns that are at issue in preemption decisions. The disposable lighter at issue in *Carter* had been approved by CPSC following rigorous safety testing. As required under the CPSC regulations, the lighter was tested by a panel of one hundred children (using a "surrogate lighter" identical to the real product except that it emitted a signal rather than a flame). The children were given two five-minute attempts to operate the lighter. The lighter was resistant to successful operation in 90% of the child-test panel, fully satisfying the CPSC safety standard. *See Carter*, 251 S.W. 3d at 503-04. From a lay perspective, though, one can readily understand the jury response to this regulatory approval in the face of an injured child. Ninety percent child-resistant? That's not good enough. Surely we want 100% child resistant lighters, right?

But as the Texas Supreme Court recognized, this lay judgment is necessarily based upon a narrow view of the relevant facts and, accordingly, does not reach the correct safety conclusion. Before promulgating its safety regulations, CPSC had specifically considered higher and lower child-resistant standards and set the standard at the level best calibrated to minimize accidental fires:

> One of the Commission's primary objectives was to create a standard that encouraged the manufacture of child-resistant lighters and yet did not discourage adults from using them. The Commission was concerned that if adults were unable or unwilling to use child-resistant lighters, they might switch to non-child-resistant lighters or matches, which could expose children to an even greater risk. Thus, the Commission concluded that "[r]equiring lighters subject to the rule to meet a higher acceptance criterion may, on its face, appear to increase safety," but in effect would not.

Id. at 507 (internal citations omitted). The Court explained, "a careful analysis of the provisions reveal that the testing is not merely a safety floor, but a balancing of factors that ensure the product meets carefully prescribed safety standards." *Id.* at 508-09. Thus, the Court concluded, "a common-law tort claim could impose duties that conflict with the federal regulatory scheme and therefore would stand as an obstacle to the accomplishment and execution of the full purpose and objecti[ves] of Congress." *Id.* at 509 (internal citation and quotations omitted). The Carters' claim was impliedly preempted.

Plaintiff's counsel opposing preemption arguments in products liability routinely seek to claim the moral high ground of being advocates for consumer safety. But as *Carter*, *Geier*, and *Riegel* demonstrate, their asserted state tort law claims in contravention of balanced federal safety requirements often lead to the exact opposite result. In these cases, it is preemption – not plaintiff's counsel – that is the true champion of consumer safety.

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