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National Traffic and Motor Vehicle Safety Act Partially Preempts Defective Design Claim

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Clayton Act Standing

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price under a contractual agreement. In this situation, the overcharge can be determined in advance without the complications of market forces of supply and demand. Namely, the direct purchaser will pass on the entire overcharge to its customer who is required to buy a fixed quantity of a product regardless of price. The States argued that because state tariff schedules required the utilities to pass through costs to consumers, the cost-plus contract exception applied.

However, the Court stated that a cost-plus contract situation did not exist in this case, despite the state regulation of public utilities. The utilities did not sell to their customers under a pre-existing cost-plus contract; the customers did not agree to purchase a fixed quantity of gas. In addition, the Court emphasized that under a cost-plus contract, a direct purchaser bears no portion of the overcharge and therefore suffers no injury under the Act. In contrast, in this case, the utilities had no guarantee of an established profit, and indeed they may have suffered a portion of the overcharge. Therefore, the Court held that although a cost-plus exception may exist, such an exception did not apply to the utilities in the instant case.

Hart-Scott-Rodino Does Not Apply

Finally, the States contended that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 90 Stat. 1394, as amended, 15 U.S.C. § 15c (1980), allowed the States to sue on behalf of the consumers notwithstanding their indirect purchaser status. The Court rejected this argument and reiterated its statement in *Illinois Brick* that § 4C of the HSR Act did not create any new substantive liability. Section 4C merely created a new procedural device whereby state attorneys general could bring *parens patriae* actions on behalf of injured direct purchasers.

The Dissent

The dissent premised its entire argument on the assumption that the utilities passed through the entire overcharge to their customers. The dissent contended that the majority should have decided this case based on this assumption because one of the utilities admitted this assumption, and both the district court and the court of appeals ruled according to this assumption. Assuming that a complete pass-on occurred, the dissent argued that none of the concerns present in *Illinois Brick* existed here, and therefore, the majority's dependence on *Illinois Brick* was misplaced. The dissent suggested that the majority should have followed the explicit language of § 4 which permitted recovery to those injured by antitrust violations without distinguishing between classes of customers.

First, the dissent stated that no apportionment problem existed which would support the majority's decision. Noting that public utilities are regulated, the dissent reasoned that there existed a complete pass-through of the overcharge because the utilities would undoubtedly pass through as much of the overcharge as permitted by law. In addition, the dissent found that the amount of such overcharge could have been determined easily from the customers' utility bills; the utility bills would have stated how much gas a customer bought at the illegal price. The dissent also stated that the majority's concern over the problem of proving whether the utilities would have raised their rates absent the overcharge is a problem which arises in many antitrust cases; courts frequently separate price increases related to anticompetitive conduct from those related to legitimate conduct.

Second, the dissent described the majority's concern with timing difficulties with respect to apportionment as speculative. The dissent found that regardless of the delay of the utilities in passing through the overcharge, the customers would inevitably pay for the overcharge.

Third, the dissent contended that granting standing to indirect purchasers where a complete pass-through of an overcharge existed would not decrease enforcement of antitrust laws because the indirect purchasers could easily discover the injury. In addition, the utilities have no incentive to seek damages for the amount of the illegal overcharge, since its injury only consists of a loss in sales rather than a loss of the entire amount of the overcharge. Thus, according to the dissent, in light of the evidence of a complete pass-through of the overcharge, the apportionment concerns of the majority did not compel dismissal of the States' claim.

Finally, the dissent stated that the multiple liability problem which existed in *Illinois Brick* did not exist here. Therefore, the problem of multiple liability could not justify the majority's decision. The dissent reasoned that where a complete pass-through existed there was no problem of multiple liability because the utilities and the States requested separate and distinct damages. The utilities sought damages for lost sales, whereas the States sought damages for the amount of the overcharge. Therefore, the dissent determined that since none of the concerns which existed in the *Illinois Brick* case existed here, the States had standing to sue under § 4 of the Act.

Mira Djordjic

NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT PARTIALLY PREEMPTS DEFECTIVE DESIGN CLAIM

In *Pokorny v. Ford Motor Company*, 902 F.2d 1116 (3d Cir. 1990), the United States Court of Appeals for the Third Circuit held that the National Traffic and Motor Vehicle Safety Act ("Safety Act") preempted a common law liability claim against a van manufacturer for failure to equip its vans

with air bags or automatic seat belts. However, the Third Circuit held that the Safety Act did not preempt a second claim that the manufacturer's van was defective because it lacked protective netting over the windows; the second claim created no actual conflict with federal laws and regulations.

Background

Anne Duffy Pokorny ("Pokorny"), as administratrix of the estate of John Duffy ("Duffy"), brought a defective design action in Pennsylvania state court against Ford Motor Company ("Ford"). Duffy, a police officer, was killed when the 1981 Ford police van in which he was a passenger collided with another police patrol car. The collision threw Duffy partially through the passenger side window. The van subsequently crushed Duffy when it turned over following the collision. Duffy was not wearing his seat belt at the time of the collision.

Pokorny argued that Ford should be held strictly liable for its defective design of the passenger restraint system of the 1981 van. In particular, Pokorny asserted that Ford was negligent and breached implied warranties by failing to equip its 1981 model vans with appropriate passive restraint systems for passengers. A "passive restraint system" includes any system designed to protect passengers from injury during a collision that does not require affirmative action by the passenger. Pokorny alleged that Ford should have installed air bags, automatic seat belts or protective netting on the windows in the vans to prevent fatal injuries. Upon Ford's motion, the case was removed on diversity grounds to the U.S. District Court for the Eastern Division of Pennsylvania.

In the district court, Ford moved for summary judgment on all counts. Ford argued that the action was expressly and implicitly preempted by the National Traffic and Motor Vehicle Safety Act ("Safety Act"), 15 U.S.C.A. §§ 1381-1431 (West 1982 and Supp. 1990), and by Federal Motor Vehicle Standard 208 ("Standard

208"), 49 C.F.R. § 571.208 (1980).

The Safety Act and Standard 208

The preemption provision of the Safety Act provided in part that "...no State or political subdivision of a State shall have any authority...to establish...any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C.A. § 1392(d) (West Supp. 1990).

With respect to 1981 passenger cars, safety requirements under Standard 208 required either "(1) an automatic system to protect passengers from both frontal and lateral crashes; (2) an automatic system designed to protect against frontal crashes, in combination with seat belts and a warning system; or (3) manual lap and shoulder belts with a seat belt warning system." 49 C.F.R. § 571.208 S4.2.1 (1980). In addition, manufacturers of 1981 multipurpose passenger vehicles weighing 10,000 pounds or less were also able to comply with Standard 208 by choosing one of the following options: "(1) a complete automatic protection system, or (2) a manual seat belt system." 49 C.F.R. § 571.208 S4.2.1 (1980).

The District Court

Ford maintained that it complied with Standard 208 since the 1981 van in which Duffy was a passenger contained combined lap and shoulder safety belts with a warning light and a buzzer. Ford argued that Pokorny's action created an actual conflict with the federal requirements which allowed manufacturers to choose to install either manual safety belts or passive restraint systems. Ford thus asserted that the federal requirements expressly and implicitly preempted Pokorny's common law action.

In response, Pokorny relied on the "savings clause" of the Safety Act, which provided "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt

any person from any liability under common law." 15 U.S.C.A. § 1397(k) (West Supp. 1990). Pokorny contended that Congress did not intend the Safety Act or any federal standards to preempt expressly common law actions for defectively designed vehicles. Furthermore, Pokorny asserted that no actual conflict existed between her theory of recovery and the Standard 208 option.

The district court granted Ford's motion for summary judgment. The court concluded that Pokorny's claims created an actual conflict with the safety options enumerated in the Safety Act and Standard 208. Therefore, the court held that the Safety Act and Standard 208 implicitly preempted Pokorny's claims. The court granted Ford's motion on all counts. Pokorny appealed.

The Third Circuit

Express Preemption

The Third Circuit first outlined the situations in which federal preemption of state law occurs. First, Congress may expressly preempt state law. Second, implied preemption occurs when Congress has dominated the entire field. Third, implied preemption occurs when there is an actual conflict between federal and state law. An actual conflict exists when it is impossible to comply with both state and federal law or when state law frustrates the full purposes and objectives of Congress.

Ford initially argued § 1392(d) of the Safety Act expressly preempted Pokorny's common law liability claims by providing that no state may establish a safety standard that differs in any way from the federal requirements. According to Ford, common law liability arising out of the lack of passive restraint systems would have effectively established such a conflicting state safety standard. Therefore, Ford argued common law liability was expressly preempted.

The court rejected Ford's argument because Ford only invoked §

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The Safety Act

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1392(d) of the Safety Act in support of its position without considering § 1397(k), the savings clause. The court stated that both sections must be considered in evaluating the express preemption issue. Upon its review of both sections, the court found that Congress did not intend that design defect actions such as Pokorny's be expressly preempted. The court found that the express language of § 1397(k) does not exempt Ford from common law liability merely because the company complied with a particular federal safety standard. Contrary to Ford's narrow construction of § 1397(k), the court found that the savings clause applied to matters already covered by federal standards. The court noted that when Congress wished to preempt state common law in other statutes, it so provided explicitly; in contrast, § 1397(k) did not specifically address or preempt state common law liability.

Ford then argued that common law liability, when viewed economically, produced the same effect on manufacturers as any other state regulation which was expressly preempted. While the court recognized the possibility of such a similar effect, it nonetheless deferred to the precise language of the Safety Act, as enacted by Congress. Accordingly, the court found Pokorny's common law action was not expressly preempted by § 1392(d).

Implied Preemption

Ford also asserted that Pokorny's action was implicitly preempted since common law liability created an actual conflict with the flexible approach to passenger safety intended by Congress. In order for federal law to preempt state law implicitly, the state law must create an actual conflict with the federal regulations. However, a presumption against preemption usually operates.

Initially, Ford argued that Pokorny's entire action should be

dismissed in order to preserve national uniformity in motor vehicle safety requirements. The court rejected this broad preemption argument, finding instead that while Congress had an interest in uniformity of safety standards, this interest was not a primary concern. Rather, Congress sought to improve motor vehicle safety, and preservation of common law liability advanced this interest of Congress.

In narrowly analyzing the preemption issue, the court found that Standard 208 intentionally gives manufacturers a choice of installing any of several passenger restraint options. The van in which Duffy was a passenger included one of those options, lap and shoulder belts with a warning system. The court noted that if it were to allow Pokorny's claim that the van was defectively designed due to the absence of air bags or automatic seat belts, it would undermine Congress' intent to allow flexibility for manufacturers. The court held that common law liability interfered with the regulations chosen by Congress and that Pokorny's allegation presented an actual conflict with the federal regulations.

In support of its holding, the court cited § 1410b of the Safety Act. Section 1410b prohibits any federal motor vehicle safety standard from requiring a manufacturer to provide a passenger restraint system other than a manual belt system. Under § 1410b, Congress preserved the manual belt system as a choice for manufacturers installing passenger restraint systems.

In addition, the options enumerated by the Department of Transportation in Standard 208 reflected the intent of Congress to find manufacturers in compliance with the federal regulations if the vehicles were equipped with either passive restraint systems or manual seat belts. The regulatory history behind Standard 208 demonstrates that, when the van was manufactured, the Department of Transportation refused to make air bags or automatic seat belts mandatory requirements. Thus, common law

liability for failure to provide air bags or automatic safety belts presented an actual conflict with § 1410b of the Safety Act and Standard 208. The court noted that the savings clause did not compel a contrary result; the clause did not "save" common law actions when those actions undermined federal regulations.

Pokorny contended that no actual conflict existed and that it was possible for manufacturers to comply with both state and federal guidelines. The court rejected this contention. Citing *Baird v. General Motors Corp.*, 654 F. Supp 28, 32 (N.D. Ohio 1986), the court acknowledged that a manufacturer confronted with a decision between installing passive restraint options or assuming liability for failing to do so, has only one realistic choice in light of the potential for incurring compensatory and punitive damages. Requiring a manufacturer to install passive restraint systems to the exclusion of the manual restraint system installed in the van in which Duffy was a passenger would have undermined the federal requirements. Thus, the federal requirements under the Safety Act and Standard 208 preempted Pokorny's claim regarding the failure to install air bags and automatic seat belts.

While the court determined that the Safety Act and Standard 208 preempted the claim with respect to the failure to install air bags or automatic safety belts, the court found that liability for failure to provide protective netting over the van's windows was not preempted. Liability in the second instance posed no actual conflict with Standard 208. The claim with respect to the absence of window netting preserved the flexibility of the federal requirements and did not prohibit any option set forth by Congress or by the Department of Transportation.

Ford contended that the court should not draw any distinction between the various types of passive restraint systems and that any other safety methods not contained within Standard 208 should be preempted. The court refused to

adopt Ford's argument. Instead, the Third Circuit found that imposing liability on the basis of Ford's failure to install protective netting would not undermine the options under Standard 208. Reasoning that the purpose of the Safety Act was to promote safety, the court determined that neither Congress nor the Department of Transportation intended an all-inclusive schedule which would effectively "freeze" developments and improvements in safety design. Consequently, the court held that Pokorny's claim against Ford for the manufacturer's failure to equip the van with protective netting over the windows was not preempted. The court of appeals remanded the protective netting claim to the district court.

Linda J. Urbanik

MANUFACTURER OF BOARD GAME NOT LIABLE FOR SUICIDE OF PLAYER

In *Watters v. TSR, Inc., a/k/a TSR Hobbies, Inc.*, 904 F.2d 378 (6th Cir. 1990), the United States Court of Appeals for the Sixth Circuit held that a manufacturer of a board game could not be held liable under Kentucky negligence law for the suicide of an avid player of the game. The Sixth Circuit affirmed the lower court's decision to grant summary judgment for the manufacturer of the board game. The court of appeals determined that the manufacturer of the board game had no reason to foresee that certain players of the game would be more susceptible to murder or suicide than non-players.

Background

Sheila Watters ("Watters") brought a wrongful death action against TSR, Inc. ("TSR") for the suicide of her son, Johnny Burnett ("Johnny"). Johnny, a devoted "Dungeons and Dragons" player, died due to a self-inflicted gunshot

wound. Manufactured by TSR, Dungeons and Dragons is a game in which players assume various characters' roles in imaginary ancient world "adventures," as illustrated in the TSR booklets. A player known as the "Dungeon Master" narrates the adventures. Encounters between the players depend on the roll of the dice in conjunction with tables provided in the manufacturer's published materials.

Dungeons and Dragons does not require the players to act out roles physically. The record in the present case did not indicate that the game's materials glorified or encouraged suicide or that the materials alluded to guns. In addition, both schools and libraries used the game as a learning tool and as a means to encourage creativity. TSR's records indicated that the company had sold more than a million games at the time of Watters' wrongful death action. These sales figures did not include sales by other companies which produced and sold similar role-playing games.

According to Watters, Johnny and his friends played Dungeons and Dragons constantly after school and on weekends for several years. Watters claimed that Johnny's continuous exposure to the game caused him to lose control of his will and forced him to kill himself.

District Court

In her complaint, Watters alleged that TSR violated its duty of ordinary care by disseminating Dungeons and Dragons literature and materials and violated its duty to warn that fragile-minded children who played the game might suffer psychological harm and loss of control of their mental processes. In addition, Watters alleged that TSR's actions directly and proximately caused her son's death. In support of her claim, Watters only submitted an affidavit which stated that she had read in many publications about the dangerous propensities of the Dungeons and Dragons game.

After the case was removed to the U.S. District Court for the Western District of Kentucky on the basis of diversity of citizenship, TSR moved for summary judgment on several grounds. First, TSR argued that the first amendment, as incorporated through the fourteenth amendment, precluded a Kentucky court from finding TSR liable on the basis of what the company published. TSR also asserted that it had no obligation to cease distributing the game or to warn players of its possible dangers. Finally, TSR argued that Johnny's suicide was a superseding or intervening cause of his death.

The district court granted TSR's motion for summary judgment. The court rested its decision on first amendment grounds without deciding any of the state law negligence issues including breaches of duty for disseminating the game and for failure to warn of the games' dangerous propensities.

Sixth Circuit Court of Appeals

Based on the general principle that courts will not anticipate constitutional questions, the Sixth Circuit determined it did not need to reach the constitutional arguments in order to decide Watter's appeal. Despite the fact that the constitutional question was the only one argued by the parties on appeal, the court decided that the briefs filed at the district level adequately addressed the underlying common law issues. The court found that although there was no Kentucky case law directly on point, the principles governing the case were sufficiently clear.

Under Kentucky negligence law, there is actionable negligence where a duty has been breached, and the breach results in an injury. According to the law, each person must exercise ordinary care and prevent foreseeable injury to others. The court highlighted the fundamental principle that usually liability does not exist without fault. The court noted that no courts had extended the doctrine of strict liability, which allows for liability

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