Bloomberg BNA

Product Safety & Liability Reporter™

Asbestos

High Court: Railroad Law Preempts Claims Over Asbestos Exposure in Repair Work

A federal law dating from the heyday of steam trains governs locomotive equipment and preempts claims based on a worker's exposure to asbestos-containing brakes and insulation at railroad maintenance facilities, the U.S. Supreme Court ruled Feb. 29 (*Kurns v. Railroad Friction Products Corp.*, U.S., No. 10-879, 2/29/12).

All the justices agreed that the Locomotive Inspection Act, as interpreted by a 1926 Supreme Court decision, forecloses state-law claims that the asbestos-containing products were defectively designed.

But the court split 6–3 on whether the law's preemptive effect extends to claims that the products' manufacturers should have warned welder and machinist George Corson about the dangers posed by asbestos.

The majority, in an opinion by Justice Clarence Thomas, found the failure-to-warn claims also preempted.

Justice Sonia Sotomayor, in a partial dissent joined by Justices Ruth Bader Ginsburg and Stephen G. Breyer, made a distinction between the design defect and failure-to-warn claims, saying the theory behind the failure-to-warn claims ''does not implicate a product's physical composition at all'' and so is not affected by the LIA occupying the ''field'' of locomotive equipment.

An 'Outlier' Ruling? Robert S. Peck of the Center for Constitutional Litigation PC in Washington, D.C., whose firm worked on an amicus brief in the case for the American Association for Justice, told Bloomberg BNA Feb. 29, ''This is an unusual, outlier decision.''

Peck said, ''The Court, over the last 30 years, has talked about how the type of preemption that forecloses any compensatory remedy is an unusually powerful form of preemption that the court will rarely adopt unless Congress has made it eminently clear. There's no discussion of that approach in this opinion.''

He added, ''If faced with a more modern statute that there isn't prior precedent on, the court would be hard-pressed to assume that Congress had wiped out all compensatory remedies.''

Nicholas Wittner of Michigan State University's School of Law, an expert on preemption issues, said in an e-mail Feb. 29, ''[I]t's not too often we see a field preemption case.''

Leslie Brueckner of Public Justice in Oakland, Calif., said March 1, ''This is a very extreme example of an overbroad application of federal preemption. The original statute here merely regulates the inspection of boilers on a railroad. What this decision has done is held that Congress, without saying so, impliedly preempted the entire field of railroad safety.''

Brueckner said the Supreme Court felt bound by precedent. ''The justices said that they had no choice but to adhere to this earlier ruling,'' she said. ''This is a powerful invitation for Congress to act. The notion that this statute impliedly preempts the entire field of railroad safety is inconsistent with more recent jurisprudence.''

Asbestos Exposure in Rail Yard. Corson, who worked for the Chicago, Milwaukee, St. Paul & Pacific Railroad from 1947 to 1974, installed asbestos-containing brakeshoes on trains and stripped asbestos insulation from boilers, according to the court. He developed mesothelioma, from which he later died.

In 2007, before his death, Corson and his wife sued 59 defendants, of which two, Railroad Friction Products Corp. and Viad Corp., were involved in this appeal. His executrix, Gloria Kurns, was substituted as a party after his death.

In the U.S. District Court for the Eastern District of Pennsylvania, RFPC and Viad sought, and obtained summary judgment on, preemption grounds. The U.S. Court of Appeals for the Third Circuit affirmed the decision in 2010 (38 PSLR 965, 9/20/10).

The Supreme Court granted review in June 2011 (39 PSLR 602, 6/13/11).

Octogenarian Precedent. The Supreme Court's opinion did not focus on the centerpiece of the oral argument, which was whether a locomotive in a rail yard is ''in use.'' The plaintiffs, Corson's widow and executrix, argued the trains in the repair shop were not in use and therefore did not fall within the federal act's preempted field (39 PSLR 1241, 11/14/11).

The court rejected this argument based on the interpretation of the LIA provided in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), an 85-year-old Supreme Court case.

''In *Napier*, the Court held that Congress, in enacting the LIA, 'manifest[ed] the intention to occupy the entire field of regulating locomotive equipment,' and the Court did not distinguish between hazards arising from repair and maintenance as opposed to those arising from use on the line,'' Thomas wrote.

''The pre-empted field as defined by *Napier* plainly encompasses the claims at issue here,'' he said.

Sotomayor, in her opinion, agreed that *Napier*'s interpretation of the LIA meant that the LIA occupied the field of locomotive equipment.

''Perhaps this Court might decide *Napier* differently today,'' she wrote, but the dissenters felt constrained by

 ISSN 0092-7732

the doctrine of respect for precedents—known as stare decisis—particularly as it relates to statutory interpretation.

Justice Elena Kagan, who wrote a concurring opinion, called *Napier* ''an anachronism'' but said, ''*Napier* governs so long as Congress lets it.''

For the majority, *Napier*'s sweep defeated all of the plaintiffs' arguments. Thomas also said that in addition to wiping out the design defect and failure-to-warn claims, LIA's preemptive reach extended to claims against manufacturers, even though the LIA originally applied only to common carriers, and applied to state common-law duties as well as regulations.

Wittner wrote in his e-mail, ''What's interesting to me is that Justice Thomas authored the opinion and is playing a greater role in the preemption arena. . . . We see him now writing for the Court in express and field preemption cases.''

Thomas has made clear his opposition to implied preemption through the frustration of congressional purposes. Wittner did not see anything in this opinion suggesting Thomas was ''softening his stance'' on that issue.

Peck viewed Thomas as having an ''old-style view of field preemption,'' that is, that occupying a field leaves ''no room for anything else.''

But Brueckner disagreed. ''Justice Thomas has opposed all forms of implied preemption, not just implied conflict preemption, but implied field preemption. So it's initially perplexing that he wrote the majority decision, but what he says in his decision is that the court is bound by the doctrine of stare decisis,'' she said.

''And Justice Kagan, in her concurrence, suggests that if Congress felt that that prior decision was inaccurate, Congress would have acted, but that presumes that Congress has all the time in the world to deal with everything,'' Brueckner continued. ''But hopefully this ruling will be a wake-up call for Congress to revisit this issue and clarify that it never intended to wipe out the rights of all victims of railroad accidents, railroad engine malfunctions—never intended to wipe out all their claims.''

David C. Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC in Washington, D.C., and Richard Phillips Myers of Paul, Reich & Myers PC in Philadelphia represented Corson's estate and widow.

Jonathan D. Hacker of O'Melveny & Myers LLP in Washington, D.C., represented Viad.

James C. Martin of Reed Smith LLP in Pittsburg represented RFPC.

BY MARTINA S. BARASH

The opinion is at http://op.bna.com/pslr.nsf/r?Open=mbah-8rxryy.

  PSLR ISSN 0092-7732