

## Second Circuit Applies Preemption to Bar Tort Claims With No Clear Federal Counterpart

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The power of the preemption defense is illustrated by the Second Circuit's recent opinion in *Buono v. Tyco Fire Products*, 78 F.4th 490 (2d Cir. 2023). Preemption is most effective as a shield against liability when, as in *Buono*, it bars state-law claims without pointing toward federal laws that provide potential alternative grounds for liability.

At its core, every preemption defense argues that a court must set state law aside to effectuate federal law under the Supremacy Clause of the U.S. Constitution. The Supremacy Clause provides in relevant part that "the Laws of the United States . . . shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." This principle has been applied to bar application of state laws under three discrete theories of preemption:

- (1) **express preemption**, where Congress has expressly preempted local law;
- (2) **field preemption**, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and
- (3) **conflict preemption**, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.<sup>[1]</sup>

Because of the broad scope of federal regulation, field preemption and conflict preemption often take center stage. In such situations, defendants typically argue that they should not be subject to the state-law requirements because they are already subject to comprehensive or directly contrary federal-law requirements. But *Buono* highlights that, in certain circumstances, a defendant can argue express preemption without conceding that it is subject to federal requirements at all.

In *Buono*, the plaintiff was severely injured when a colleague attempted to use a compressed air tank to test the spray nozzles of a fire suppression system developed and sold by a Tyco subsidiary. The tank ruptured and its shrapnel hit several fire extinguishers, causing a large explosion. Although the tank had been manufactured by a third party, it was sold by Tyco's subsidiary as an accessory for its fire suppression system.

Plaintiff sued Tyco under New York common law for strict products liability and negligence, basing both claims on an alleged failure to warn. Tyco moved for summary judgment, arguing that these state-law tort claims were expressly

preempted by the Hazardous Materials Transportation Act of 1975, or HMTA. The district court granted summary judgment, and Plaintiff appealed.

The Second Circuit affirmed summary judgment on express-preemption grounds. It explained that, where a statute contains an express-preemption clause, courts interpret the statute’s text without “any presumption against pre-emption” and with a focus on “the substance and scope of Congress’ displacement of state law.”<sup>[2]</sup> The preemption provision at issue in this case provided that “[state law] about any of the following subjects, that is not substantively the same as a provision of this chapter . . . is preempted.”<sup>[3]</sup> The provision then enumerated several preempted subjects, including “the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.”<sup>[4]</sup>

As the Second Circuit explained, this provision contains two requirements for preemption—a subject-matter requirement and a requirement that the state law not be “substantively the same” as the HMTA or its implementing regulations.<sup>[5]</sup> The Court found that the subject-matter requirement was satisfied because Plaintiff’s failure-to-warn claims were “about . . . marking” of the test tank, which was undisputedly qualified “for use in transporting hazardous material in commerce.”<sup>[6]</sup> And the requirement of substantive dissimilarity was also satisfied because Plaintiff’s common law claims “require[d] a less culpable mental state and thus swe[pt] more broadly than federal law.”<sup>[7]</sup>

Critically, the Second Circuit rejected Plaintiff’s argument that the preemption defense was unavailable to Tyco because Tyco was not involved in transporting hazardous materials. As the Court explained, express preemption under the HMTA “does not depend on whether the HMTA . . . actually regulates the defendant’s specific conduct at a given time.”<sup>[8]</sup> Thus, the express-preemption defense “ensures that a court does not impose certain *nonfederal* duties on the defendant, but . . . does not depend on whether Congress or an agency has imposed *federal* duties on the defendant.”<sup>[9]</sup>

Tyco’s successful defense illustrates the importance of looking beyond a defendant’s own obligations under federal law when identifying potential preemption arguments. Field-preemption and conflict-preemption arguments are often immediately apparent to heavily regulated entities that are familiar with their obligations under federal law. However, while express-preemption arguments that are not based on a defendant’s federal obligations may be less obvious, they can be just as powerful, if not more.

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<sup>[1]</sup> *Id.* at 495.

<sup>[2]</sup> *Id.*

<sup>[3]</sup> 49 U.S.C. § 5125(b)(1).

<sup>[4]</sup> *Id.*

<sup>[5]</sup> *Buono*, 78 F.4th at 496–97.

<sup>[6]</sup> *Id.* at 497–98.

<sup>[7]</sup> *Id.* at 500.

<sup>[8]</sup> *Id.*

<sup>[9]</sup> *Id.* at 501 (emphasis in original).

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