MISCELLANEOUS

FEDERAL LAW DOES NOT PREEMPT LAWSUIT AGAINST GENERIC DRUG MANUFACTURER

Mensing v. Wyeth, Inc., ____ F.3d ____ (8th Cir. 2009).

FACTS: Gladys Mensing was prescribed the medication Reglan to treat a diabetic condition, and was given the generic bioequivalent, metoclopramide. After four years of ingesting the medication, she developed tardive dyskinesia ("TD"), a severe neurological movement disorder.

Mensing brought action for failure to warn and misrepresentation against the generic pharmaceutical manufacturers, Teva, Wyeth, and UDL Laboratories, alleging that her long-term ingestion of the prescription diabetes drugs caused her to develop TD. She argued that despite mounting evidence that long term use carried a risk of TD far greater than indicated on the label, no manufacturer took steps to change the label warnings, and asserted they actually promoted the drug for long term use.

In *Wyeth*, the Supreme Court ruled that failure to warn claims against name brand manufacturers are not preempted by the Food, Drug, and Cosmetic Act

The United States District Court for the District of Minnesota dismissed Mensing's claims against the generic defendants on the basis of federal preemption. The court concluded that Mensing's failure to warn claims created an impermissible conflict with federal law because they would require generic manufacturers to deviate from the name brand drug label; they were therefore preempted. Mensing appealed.

HOLDING: Reversed.

REASONING: The court explained it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate.

Generic manufacturers are subject to the requirement that their labeling "shall be revised as soon as there is reasonable evidence of an association of a serious hazard with a drug…." 21 C.F.R. §201.57(e). This is true even where generic drug manufacturers show their drug is essentially the same as the name brand drug and their proposed label is in relevant part identical to the name brand drug label.

In considering the generic manufacturers preemption defense, the court reasoned that it must examine both Congressional intent and the presumption against preemption, and found "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Wyeth v. Levine,* ____U.S.____, 129 S.Ct. 1187, 1194-95, 173 L.Ed.2d 51 (2009). In *Wyeth,* the Supreme Court ruled that failure to warn claims against name brand manufacturers are not preempted by the Food, Drug, and Cosmetic Act ("FDCA").

Further, the court explained that Congress could have enacted an express pre-emption provision at some point during the FDCA's 70-year history, and the 1984 Hatch-Waxman Amendments to the FDCA do not explicitly preempt suits against generic manufacturers. Even when a federal law does not expressly preempt state law claims, a court may find that Congress impliedly preempted such claims by "conflict" if 1) compliance with both federal and state law is impossible, or 2) the claims would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372-73, (2000) (quotation omitted).

There is no evidence that such basis for conflict preemption was present, thus the court held that federal law does not preempt a lawsuit against generic drug manufacturers.

CONSUMER CLAIM AGAINST HOME LENDER PREEMPTED

Casey v. FDIC, 583 F.3d 586 (8th Cir. 2009).

FACTS: Mortgagors brought action in state court against their mortgage lenders under the Missouri Merchandising Practices Act and the Missouri statute prohibiting the unauthorized practice of law, alleging that lenders violated the statutes by charging a fee for preparation of loan documents by non-lawyers. The federal savings association (FSA) lenders argued that the Missouri laws in question were preempted by a federal regulation. The claims were dismissed for failure to state a Missouri law cause of action due to federal preemption grounds, and mortgagors appealed. While the appeal was pending, the Federal Deposit Insurance Corporation was substituted for one of the lenders, and it removed the case to federal court. The United States District Court for the Eastern District of Missouri denied mortgagors' motion to remand, adopted the state court's preemption decision, and transferred the appeal to the 8th Circuit along with a renewed motion to remand.

HOLDING: Affirmed.

REASONING: The court noted that state law that conflicts with or frustrates federal law or regulation is preempted. In examining whether the pertinent Missouri state laws frustrated the federal regulation 12 C.F.R. §560.2 issued under the Home Owners' Loan Act, 12 U.S.C. §§ 1461-1468, the court looked to the language of the regulation. The court held that, in deference to the agency's interpretation of its own regulation, §560.2 is designed to occupy the entire field of lending regulation for FSAs, preempting specific types of state law regulation attempts, and providing specific exceptions, which only incidentally affect FSA operations. The court held that, as applied rather than expressly mentioning FSAs, the Missouri statutes prohibiting unlicensed practice of law and fraudulent conduct in commerce fell under the scope of §560.2 "[Because] the type of law[s] in question [are] listed in paragraph (b)[,] … the analysis … end[s] there; the law[s] [are] preempted." 61 Fed.Reg. at 50966. The court held that mortgagors' claims, arguing that lenders violated state law by charging a fee for documents prepared by nonlawyers, were preempted by the federal regulation 12 C.F.R. §560.2 issued under the Home Owners' Loan Act, 12 U.S.C. §§1461-1468.

GOVERNMENT LIABLE FOR HURRICANE KATRINA DAMAGE

In re Katrina Canal Breaches Consol. Litig., ____F. Supp. 2d____ (E.D. La. 2009).

FACTS: The residents of the greater New Orleans area and surrounding parishes who were harmed by the levee breaches that occurred during Hurricanes Katrina and Rita sought the approval of a class action settlement. Under the In re Katrina Canal Breaches Consolidated Litigation umbrella, two of the myriad categories of cases are denominated "LEVEE" and "MRGO." The LEVEE litigation concerns breaches of floodwalls around the outfall canals in and around New Orleans. The Plaintiffs filed class actions against the U.S. Army Corps of Engineers ("the Corps"), various levee districts and their respective boards of commissioners, the Sewerage and Water Board of New Orleans, the Port of New Orleans, the New Orleans Public Belt Railroad, CSX Transportation, and private contractors and engineers. The multitude of complaints was consolidated into one Master Class Action Complaint. In the course of this litigation, the court issued orders dismissing the claims against all of these defendants except for the levee districts and the Sewerage and Water Board of New Orleans. Plaintiffs moved for a class action settlement.
Holding: Granted.
Reasoning: The court held that under Louisiana law, the Levee Districts are "political subdivision[s]" of the state. La. Rev. Stat. §38:281(6). The court noted that the Louisiana Constitution states that a political subdivisions shall not be immune from "suit and liability" for "injury to person or property." La. Const. art. XII, § 10(A). The court noted that the Louisiana legislature promulgated the following to further Article XII's provisions: "Any judgment rendered in any suit filed against the state, a state agency, or a political subdivision . . . shall be exigible, payable, and paid only . . . out of funds appropriated for that purpose by the named political subdivision, if the suit was filed against a political subdivision." La. Rev. Stat. §13:5109(B)(2). Thus, while the Levee Districts are not immune from suit, the court held that the Louisiana Constitution clearly prohibits any judgment creditor from seizing a Levee District's assets to satisfy that judgment, unless the Levee District has specifically appropriated such funds. The court noted that the Fifth Circuit Fifth Circuit has held that Levee Districts are not "arm[s] of the state," and thus not entitled to Eleventh Amendment immunity. *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.,* 294 F.3d 684, 692 (5th Cir. 2002). The court noted that the Vogt court's conclusion was based significantly on its finding that any judgments would not be paid from the state treasury; instead, they would be paid only from the Levee District's own funding. The court stated that the consequence of *Vogt* is clear: the Levee Districts certainly may be sued in federal court, but the Louisiana legislature has no duty to pay any judgments.

TEXAS ATTORNEY'S FEES PROVISION REQUIRES PARTY TO "GAIN SOMETHING"

MBM Fin. Corp. v. Woodlands Operating Co., L.P., 292 S.W.3d 660 (Tex. 2009).

FACTS: The Woodlands Operating Company ("Woodlands") leased 19 copiers from MBM Financial Corporation ("MBM"). Each copier was covered by a separate four-year lease with annual renewals unless notice was sent between 90 and 180 days before the end of the existing term. The lease also required Woodlands to return the copiers to a location MBM specified. After the four years, Woodlands decided not to renew the leases and asked MBM for the end-of term dates and instructions for return. MBM employees gave Woodlands the date and approved a draft termination letter from Woodlands. When the final termination letter arrived, MBM"s president changed the end of term dates without speaking with Woodlands so that the notice would be untimely. MBM also refused to designate a return location for the 19 copiers and demanded rent for another year. Woodlands sued for breach of contract, fraud, and declaratory relief. The trial court awarded Woodlands $1,000 in damages and $145,091.59 in attorney's fees. The Court of Appeals for the Ninth District of Texas affirmed the damages and part of the fee award. MBM challenged both awards and the Texas Supreme Court reviewed.
HOLDING: Reversed and rendered.
REASONING: The Texas Supreme Court analyzed whether the damage and fee awards were appropriate by addressing each award separately. The court first found that the $1,000 in damages did not qualify as either actual or nominal damages. The court explained that the only "actual" damages mentioned at trial related to wasted time that Woodlands spent trying to get MBM's cooperation, but no evidence was presented regarding value, quantity, or cost of that wasted time. The court then explained that nominal damages must be a "trifling sum," usually meaning one dollar, and $1,000 did not fall into that category. Since the damages were neither actual or nominal, the court held that a take-nothing judgment was appropriate.

If a party was permitted to seek fees under the DJA by duplicating its claims, a party could then recover attorney's fees when the "American Rule" barred the fees for those claims.

Thecourt then addressed whether the award for attorney's fees was appropriate when Woodlands recovered nothing on its claim. The court explained that Chapter 38 of the Texas Civil Practice and Remedies Code allows a litigant to recover attorney's fees after two requirements are met: (1) prevail on a breach of contract claim, and (2) recover damages. The court found that, because Woodlands recovered no damages on its breach of contract claim, it could not recover fees under Chapter 38. Woodlands argued that it was entitled to fees under the Declaratory Judgments Act, because the court of appeals affirmed part of the attorney's fee award based on the Act. The court noted that the Declaratory Judgments Act allows fee awards to either party in all cases. The court explained that the Act was in contrast with the "American Rule," which Texas has long followed, which prohibits fee awards unless specifically provided by contract or statute. The court then explained that, if a party was permitted to seek fees under the DJA by duplicating its claims, a party could then recover attorney's fees when the "American Rule" barred the fees for those claims. Woodlands argued that the declaratory relief it sought did more than duplicate the issues litigated in

its contract and fraud claims. The court found that the five declarations Woodlands obtained in judgment were in fact part and parcel, or exact duplicates of Woodlands fraud and contract claims and denied recovery of attorney's fees under that statute. The court reversed the court of appeals and rendered judgment that Woodlands take nothing.

SURETY MUST DISCHARGE ENTIRE DEBT TO BE ENTITLED TO SUBROGATION

Rabo Agrifinance, Inc. v. Terra XXI, Ltd., 583 F.3d 348 (5th Cir. 2009).

FACTS: Rabo Agrifinance loaned Veigel Farm Partners and Terra XXI approximately $1.8 million between 1997 and 1999 for conducting farming operations in Deaf Smith County, Texas. This debt was secured by: (1) a second lien on roughly 5,600 acres of real property, (2) a second lien on irrigation equipment, and (3) a first lien on other farming equipment. The irrigation was subject to a first lien for roughly $550,000. In 1999, Veigel Farm Partners defaulted on the irrigation system debt. Diversified Financial Services, which had acquired the debt, sued the debtors and guarantors in state court and obtained a roughly $550,000 judgment against various Veigel entities, including Robert Veigel. In November 2003, Ag Acceptance acquired the $550,000 judgment and first lien rights in the irrigation system from Diversified. In 2006, after filing for and completing bankruptcy and lawsuit following bankruptcy, Robert Veigel, as guarantor, paid $551,052.21 to satisfy the judgment for the debt secured by the first lien in the irrigation equipment. He then filed a notice that he claimed a right of contribution from the other defendants and later assigned his rights to Terra Partners.

The court cited the Restatement (Third) of Suretyship and Guaranty, explaining that a surety cannot receive rights of subrogation where the surety has not discharged the entire underlying obligation.

In 2007, Ag Acceptance amended their pleading to seek a judicial foreclosure on the farm equipment, including the irrigation system. The Veigel entities responded that because of the assignment of rights from Robert Veigel, Terra Partners was subrogated to the first lien interest in the irrigation equipment. The district court found that Terra Partners did not have a subrogated interest in the irrigation system.

HOLDING: Affirmed.

REASONING: Terra Partners argued that it should be subrogated as to the first lien position in the irrigation equipment because Robert Veigel paid off the judgment as a surety and assigned his subrogation rights to Terra Partners. Rabo Agrifinance countered that subrogation was improper because it would limit Rabo Agrifinance's ability to collect on the debt secured by the second lien. The court explained that Texas law recognizes three sources of subrogation rights: equitable, contractual, and statutory. Terra Partners relied on a statutory right to subrogation based on section 43.004 of the Texas Civil Practice and Remedies Code which provides: "A surety who pays on a judgment ... is subrogated to all of the judgment creditor's rights under the judgment."

The court disagreed with Terra. The court agreed with the district court, stating that a surety may not acquire a right of subrogation that will prejudice a creditor. The court cited the Restatement (Third) of Suretyship and Guaranty, explaining that a surety cannot receive rights of subrogation where the surety has not discharged the entire underlying obligation. The court noted that otherwise the surety would compete with the creditor for recovery. The court explained that because Terra Partners was assigned the surety's rights where only partial payment of the Rabo Agrifinance debts had occurred, Terra Partners' interest could not become subrogated to the first lien until all of the Rabo Agrifinance debts were paid off. The court affirmed the judgment of the district court.