Sprietsma v. Mercury Marine:

How Preemption and Administrative Law Intersect

*By Jack Park**

In its recent decision in *Sprietsma v. Mercury Marine*,[1] the United States Supreme Court again entered the swamp of tort preemption.[2] In that swamp, federal statutory or regulatory activities will preempt some, but not all, claims that common-law duties have been tortiously breached. In *Sprietsma*, the Court unanimously concluded that a common-law tort lawsuit related to propeller guards on motorboat engines was not preempted. The next preemption case will involve a different product and a different federal statute, so *Sprietsma* may not dictate its outcome.[3] To the extent that *Sprietsma* turns on the status of a regulatory decision-making exercise under administrative law, however, it implicitly provides a road map to regulators on how to avoid turning the responsibility for making such decisions over to a jury.

Rex Sprietsma sought relief in Illinois state court after his wife died in a boating accident. She had fallen overboard, and Sprietsma alleged that the manufacturer of the boat's outboard motor was negligent in failing to protect the motor with a propeller guard. Boat safety is the subject of at least one federal statute, and a federal agency has considered whether to require that such outboard motors be equipped with propeller guards. Mercury Marine contended that these federal statutory and regulatory activities preempted Sprietsma's claims. The Illinois courts agreed that the claims were preempted, but disagreed on whether the claims were expressly or impliedly preempted. In its decision, the Illinois Supreme Court relied, in part, on the United States Supreme Court's decision in *Geier v. American Honda Motor Co.*,[4] in concluding that Sprietsma's claims were impliedly preempted.[5] The United States Supreme Court unanimously disagreed, holding that Sprietsma's claims were neither expressly nor impliedly preempted.

The Court's decision is noteworthy for its treatment of the implied preemption issue and for its implications for administrative law. Before discussing those issues, this article will first address the issue of express preemption and how the Court's decision on that issue affects its treatment of implied preemption. That initial discussion will set the stage for the implied preemption and regulatory issues.

With respect to express preemption, the Court's decision was largely prefigured in *Geier*. As with the National Traffic and Motor Vehicle Safety Act, which was at issue in *Geier*, the Federal Boat Safety Act includes both a preemption provision[6] and a saving clause.[7] A preemption provision precludes states and localities from imposing standards inconsistent with those mandated by the Federal Government, while a saving clause preserves some claims from preemption. In *Geier*, the Court held that the presence of the saving clause presumed that there were claims to save, and that reading the clause to preserve some claims gave the clause room for operation.[8] In *Sprietsma*, the Court quoted the applicable portion of *Geier* to support the first point,[9] and general rules of statutory construction support the second.[10] Accordingly, neither Sprietsma's common-law claims nor Geier's were expressly preempted by the applicable statute.

Implied preemption may apply even in the absence of express preemption. The Court explained:

> Congress' inclusion of an express pre-emption clause "does *not* bar the ordinary working of conflict pre-emption principles" that find implied preemption "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[11]

The implied preemption issue in *Sprietsma* turns on the effect of the regulatory activity of the Coast Guard. In the Federal Boat Safety Act, Congress authorized the Secretary of Transportation to issue regulations "establishing minimum safety standards for recreational vessels and associated equipment" and "requiring the installation, carrying, or use of associated equipment."[12] Congress further instructed:

> In prescribing regulations under this section, the Secretary shall, among other things—
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> (1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;
>
> (2) consider relevant available recreational vessel safety standards, statistics, and data, including public and private research, development, testing, and evaluation;
>
> (3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence, or the construction or manufacture of which is begun before the effective date of the regulation, but subject to that limitation may require compliance or performance, to avoid a substantial risk of personal injury to the public, that the Secretary considers appropriate in relation to the degree of hazard that the compliance will correct; and
>
> (4) consult with the National Boating Safety Advisory Council established under section 13110 of this title about the considerations [listed in this subsection].[13]

Exemptions from the regulations are authorized when the Secretary determines that "recreational vessel safety will not be adversely affected."[14]

In 1988, pursuant to this grant of authority, the Coast Guard asked the Advisory Council to study the feasibility and safety advantages and disadvantages of requiring propeller guards on recreational boats. The Council appointed a Propeller Guard Subcommittee, which, after an 18-month review, recommended that the Coast Guard "'take no regula-

tory action to require propeller guards.'"[15] The Subcommittee found that the number of propeller guard accidents was relatively small and that propeller guards would adversely affect the operation of recreational boats and might create additional and more severe hazards. It concluded:

> "Since there are hundreds of propulsion unit models now in existence, and thousands of hull designs, the possible hull/propulsion unit combinations are extremely high. No simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost."[16]

The Advisory Council adopted the subcommittee's recommendations, and so, in turn, did the Coast Guard. For its part, the Coast Guard explained,

> "The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration."[17]

Since 1990, the Coast Guard has displayed signs of continued regulatory interest, but has not promulgated regulations. Most recently, in 2001, the Advisory Council recommended that the Coast Guard adopt four specific regulations, two of which involve retrofitting existing boats and two of which involve new boats.[18] In 2001, the Coast Guard proposed "to require owners of non-planing recreational houseboats with propeller-driven propulsion located aft of the transom to install one of two propulsion unit measures or employ three combined measures."[19] In its decision, the Court noted, however, that the Coast Guard has "not yet issued any regulation either requiring or prohibiting propeller guards on recreational *planing* vessels such as the boat involved in this case."[20]

The Court found this record of regulatory attention to be insufficient to impliedly preempt Sprietsma's claims. It explained that the Coast Guard's 1990 decision not to take regulatory action "left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation."[21] The Court then declared that the Coast Guard's action "is fully consistent with an intent to preserve *state regulatory authority* pending the adoption of specific federal standards."[22] It acknowledged: "With regard to policies defined by Congress, we have recognized that 'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate,'"[23] but characterized the Coast Guard's decision as one that was not of this character. The Court then parsed the Coast Guard's letter, observing:

> [N]othing in its official explanation would be inconsistent with a tort verdict premised on a jury's finding that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent's particular type of motor. Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of a federal policy against propeller guards.[24]

The Court contrasted the holding in *Geier*, where it gave preemptive effect to a Federal Motor Vehicle Safety Standard. In *Geier*, the Court held, in a 5-4 decision over a dissent written by Justice Stevens, that a 1984 Safety Standard allowing auto manufacturers to phase-in their introduction of passive restraint systems, such as airbags, impliedly preempted the defective design claim of a plaintiff injured while driving a 1987 Honda Accord that was not equipped with a driver's side airbag. The Department of Transportation's deliberations regarding the Safety Standard were marked by considerations of practicality, just like the deliberations of the Propeller Guard Subcommittee in *Sprietsma*. For example, the Court noted, "DOT wrote that it had *rejected* a proposed FMVSS 208 'all airbag' standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a 'backlash' more easily overcome 'if airbags' were 'not the only way of complying.'"[25] In *Sprietsma*, the Court characterized that agency regulatory decision to phase-in airbags as "an affirmative 'policy judgment.'"[26]

In making that characterization, the Court incorporated a quotation from the Solicitor General's Brief in *Geier*. In its *Geier* brief, the United States argued that, while Geier's claims were not expressly preempted, they were impliedly preempted "because a judgment for petitioners would stand as an obstacle to the accomplishment of the full purposes and objectives of the Standard."[27] The Court's minimization of the effect of the work of the Propeller Guard Subcommittee likewise gives substantial weight to arguments made by the Solicitor General in his *Sprietsma* amicus brief.

In its *Sprietsma* Brief, the United States discounted the effect of the 1990 Coast Guard letter in two ways. First, it pointed out that the letter was not an agency action having legal effect in its own right, such as a regulation, rule, or public pronouncement made at the conclusion of either a formal or informal administrative rule-making procedure. Given that the letter had

> none of the . . . indicia of an agency determination that has (or was intended to have) the force of law in its own right, there is no occasion in this case to decide what degree of formality or type of procedure would be necessary in any given context for a particular agency action to have preemptive effect.[28]

Second, the United States suggested that, even if the 1990 Coast Guard letter had the effect of law, the imposition of tort-law liability arising from the failure to install a propeller guard "would not be in conflict with any policy judgment set

forth in the letter."[29] In part, the letter "simply announced the agency's conclusion, given the evidence available at that time, that affirmative imposition of a federal propeller guard requirement could not be justified under the relevant statutory criteria."[30] Moreover, the United States argued tort lawsuits "in an individual case involving a particular type of boat or engine" did not implicate issues of universality or retrofitting.[31] Finally, the agency's bursts of interest were marshaled to show that it had not abandoned the field.

The position taken by the United States makes sense in the arena of administrative law, but still gives too little respect to the Coast Guard's and Propeller Guard Subcommittee's work. Obviously, not every federal agency letter should be treated as agency action. Even so, the effect of *Sprietsma* is to give no weight to what the Court characterizes as an "undoubtedly intentional and carefully considered" decision,[32] albeit a decision not to do something. The difference between this "undoubtedly intentional and carefully considered" decision not to do something and the "affirmative 'policy judgment'" to do something at issue in *Geier* is largely one of degree. A federal agency's "undoubtedly intentional and carefully considered" decision ought to be accorded more weight.

Federal regulators can and should take steps to give their decisions not to act preemptive weight. As the United States hints in its brief, if the Coast Guard's letter had been "a formal public pronouncement issued at the conclusion of a notice-and-comment rulemaking proceeding (and on the basis of the record and comments in that proceeding) stating that no federal safety standard requiring propeller guards would be adopted and that a propeller guard requirement of any sort would undermine boating safety,"[33] that letter might have been given preemptive effect. Clearly, federal regulators can make such pronouncements. Not only that, they should make them. Their carefully considered conclusion that promulgation of a safety standard is not appropriate should get some respect, coming as it would from individuals with experience in the field after serious consideration. The regulators can guarantee that their decisions get respect by cloaking them with the deference given to the administrative process. *Sprietsma* shows that, if the regulators do not protect their decision-making, they risk turning the regulatory decision over to a jury convened to hear a particular case.

As noted above, the Court followed the Solicitor's lead in minimizing the effect of the Coast Guard's letter. The Court concluded by rejecting a plea for uniform standards, explaining:

> [T]his interest [in uniformity in manufacturing regulations] is not unyielding, as is demonstrated both by the Coast Guard's early grants of broad exemptions for state regulations and by the position it has taken in this litigation. Absent a contrary decision by the Coast Guard, the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety.[34]

With that, the Court turned the issue of propeller guard safety over to, among others, the Illinois state courts. A state-court judgment holding Mercury Marine liable for failing to install a propeller guard or other safety feature on Sprietsma's boat would affect not only the interests of Mercury Marine, but also the interests of all manufacturers of such boats and motors. Furthermore, contrary to the expectation of the Court and the United States, such a judgment is likely to have effects outside the state in which it is rendered.

Michael Greve explains:

> Products liability litigation under state law is the paradigmatic violation of state integrity. Manufacturers have no practical way of keeping their products out of particular jurisdictions. Plaintiffs, on the other hand, get to choose their own forum and law. As a result, the most restrictive and plaintiff-friendly jurisdiction will effectively impose its liability and product norms on the entire country and redistribute income from out-of-state manufacturers (and their shareholders and workers) to in-state plaintiffs in the process.[35]

Any manufacturer found liable will have to consider how to prevent future injuries that might lead to future verdicts. This effort will necessarily run into the practicality issues that the Subcommittee identified and the Coast Guard recognized in 1990. It would also proceed in the face of the Coast Guard's inability and failure to promulgate a regulation since 1990.[36] Finally, it might well run into market resistance: The Subcommittee noted that propeller guards adversely affected performance by limiting speed, prompting the question whether a consumer would buy a planing vessel if that vessel's speed were limited by a propeller guard.[37]

As the Court observes, the parade of horribles is not certain to follow. It notes, "Because the pre-emption defense raises a threshold issue, we have no occasion to consider the merits of petitioner's claims, or even whether the claims are viable as a matter of Illinois law."[38] Even so, the rejection of the preemption defense allows the parade of horribles to prepare to make ready to mobilize. Agency regulators could have stopped the propeller guard parade and can stop such parades in the future. They should exercise this power whenever, after serious study, they make an "intentional and carefully considered" decision that promulgating a regulatory standard is inappropriate by cloaking it with administrative process.

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Footnotes

1. 123 S. Ct. 518 (2002).

2. By tort preemption, this article refers to cases in which state law or common law tort claims are alleged to be preempted by federal law. Preemption issues also arise in the ERISA and Medicaid contexts. In its current term, the Court has two Medicaid preemption cases on its

docket. *See* Ky. Ass'n of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2002); Pharmaceutical Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001), *cert. granted*, 536 U.S. 956 (2002).

3. In that regard, railroad crossing claims are preempted, see *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000), but pacemaker claims are not, see *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

4. 529 U.S. 861 (2000).

5. Sprietsma v. Mercury Marine, 757 N.E.2d 75 (Ill. 2001).

6. *See* 46 U.S.C. § 4306. That provision prohibits states and their subdivisions from:

> establish[ing], continu[ing] in effect, or enforc[ing] a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Id. In *Sprietsma*, the Court observed, "[T]he article 'a' before 'law or regulation' implies a discreteness—which is embodied in statutes and regulations—that is not present in the common law." 123 S. Ct. 518, 526 (2002).

7. 46 U.S.C. § 4311(g). That provision states, in pertinent part:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

Id. (citations omitted).

8. 529 U.S. at 868.

9. *See* 123 S. Ct. at 526.

10. *See, e.g.*, Dep't of Revenue of Or. v. ACF Indus., 510 U.S. 332, 340-341 (1994) (noting the "'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" (quoting Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) (internal quotation marks omitted in original))).

11. *Sprietsma*, 123 S. Ct. at 527 (quoting *Geier*, 529 U.S. at 869; Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)) (internal quotation marks and citations omitted in original).

12. *See* 46 U.S.C. § 4302(a)(1), (a)(2). The Secretary of Transportation delegated the authority to promulgate those regulations to the Coast Guard. *See* 49 C.F.R. § 1.46(n)(1) (1997).

13. 46 U.S.C. § 4302(c). The Advisory Council consists of 21 members, with 7 members drawn from each of three interested groups: State officials; manufacturers; and "national recreational boating organizations and . . . the general public." 46 U.S.C. § 13110(a), (b)(1).

14. *See* 46 U.S.C. § 4305.

15. *Sprietsma*, 123 S. Ct. at 525 (citation omitted).

16. *See* Brief for the United States As Amicus Curiae Supporting Petitioner at 5, *Sprietsma* (No. 01-706) (citation omitted); *see also* Brief for the Respondent at 49 n.21, *Sprietsma* (No. 01-706) ("Roughly 80 percent of propeller accidents occur at 'speeds in excess of 10 miles per hour,' and 'a skull impact at 10 mph or more in the water would be generally fatal'—'even with an idealized cushioning material, not currently known to exist.'") (citation omitted); *id*. at 49 ("Similarly, the Subcommittee found that 'it is not practical or feasible to mandate guards for specific uses' and that guards only work for boats that operate at 'slow speeds.'") (citation omitted).

17. Brief for the United States As Amicus Curiae Supporting Petitioner at 5-6, *Sprietsma* (No. 01-706).

18. *See Sprietsma*, 123 S. Ct. at 525 n.9.

19. Federal Requirements For Propeller Injury Avoidance Measures, 66 Fed. Reg. 63,645 (proposed Dec. 10, 2001). The Coast Guard estimated that this rule would "impose a $ 12 to $ 30 million economic cost on owners of approximately 100,000 non-planing houseboats." *Id.* at 63,647. The proposed regulations would also define non-planing and planing vessels as follows:

> *Non-planing vessel* means a vessel with a hull that is designed to ride through the water at any speed.
>
> *Planing vessel* means a vessel with a hull that is designed to ride on top of the water beyond a minimum speed.

Id. at 63,649.

20. *Sprietsma*, 123 S. Ct. at 526 (emphasis added). For an existing planing vessel, the Advisory Council had recommended that the Coast Guard adopt a regulation that would "'[r]equire owners of all propeller driven vessels 12 feet in length and longer with propellers aft of the transom to display propeller warning labels and to employ an emergency cut-off switch, where installed.'" *Id.* at 525 n.9 (quoting Federal Requirements For Propeller Injury Avoidance Measures, 66 Fed. Reg. at 63,647).

21. *Id*. at 527.

22. *Id*. at 527-28 (emphasis added).

23. *Id*. at 528 (quoting Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983)).

24. *Id*.

25. Geier v. Am. Honda Motor Co., 529 U.S. 861, 879 (2000) (quoting Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28,962, 29,001 (July 17, 1984) (to be codified at 49 C.F.R. pt. 571).

26. 123 S. Ct. at 529 (quoting *Geier*, 529 U.S. at 881).

27. Brief for the United States as Amicus Curiae Supporting Affirmance at 9, *Geier* (No. 98-1811).

28. Brief for the United States As Amicus Curiae Supporting Petitioner at 25-26, *Sprietsma* (No. 01-706).

29. *Id*. at 26.

30. *Id*. at 26-27.

31. *Id*. at 27.

32. *See* 123 S. Ct. at 528.

33. Brief for the United States As Amicus Curiae Supporting Petitioner at 24, *Sprietsma* (No. 01-706). (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 286-87 (1995)).

34. *Sprietsma*, 123 S. Ct. at 530.

35. Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 100 (2002) (footnotes omitted).

36. The Coast Guard's hesitation may well be laudable. The National Highway Traffic Safety Administration had to amend its airbag standard in 2000 to add new requirements, test procedures, and injury criteria to address the risks that airbags pose to small women and young children. The difficulties faced by regulators who have studied an issue counsels against tendering the question to civil juries sitting in particularized cases. *See* Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 65 Fed. Reg. 30,680 (May 12, 2000) (to be codified at 49 C.F.R. pts. 552, 571, 585 & 595) (amending "our occupant crash protection standard to require that future air bags be designed to create less risk of serious air bag-induced injuries than current air bags").

37. *See* Brief for the National Association of Manufacturers and the National Marine Manufacturers Association as Amici Curiae in Support of Respondent at 27, *Sprietsma* (No. 01-706) (noting the Subcommittee's conclusion that requiring propeller guards posed other problems including "'affecting boat operation adversely' at 'speeds of approximately 10 mph or greater.'") (citation omitted).

38. *Sprietsma*, 123 S. Ct. at 522.