Division One No. 73635-3-I
Supreme Court No. 92733-2

SUPREME COURT

OF THE STATE OF WASHINGTON

CHERI ROLLINS, an individual,

Petitioner,

vs.

BOMBARDIER RECREATIONAL PRODUCTS, INC., a foreign corporation,

Respondent.

CHERI ROLLINS' PETITION FOR DISCRETIONARY REVIEW

Dan'L W. Bridges, WSBA # 24179
McGaughey Bridges Dunlap, PLLC
Attorneys for Petitioner
3131 Western Avenue, Suite 410
Seattle, WA 98121
425 462 4000

Table of Contents

Table Of Authorities

Case Law

Washington State Law

Supreme Court

Courts Of Appeal

Federal Law

Supreme Court

Courts Of Appeal

Statutes

Regulations

Court Rules

Appendix

Rollins v. Bombardier Recretational Products, ___ Wn.App. ____ (2015)

A. Identity of Petitioner

Cheri Rollins is the petitioner and was plaintiff below.

B. Court of Appeals Decision

Ms. Rollins seeks review of Division One's published opinion.

C. Overview Of Issue On Review

Division One upheld dismissal based on Federal preemption because of the Federal Boating Safety Act (FBSA). Petitioner brought a claim alleging design negligence of a personal water craft (PWC) for not utilizing a blower.[1] Division One found preemption relying on (1) authority reversed by the US Supreme Court on the specific point Division One relies on, and (2) supposed actions of a Federal agency that create no conflict of law. If this Court does not accept review and reverse, Division One's opinion will stand as a material erosion of State's Rights.

There are two classes of preemption with the latter having three forms: (1) express and (2) implied. Express preemption lays only when state action directly conflicts a Congressional Statute. Implied preemption lays when (i) the federal government so occupies "the field" of regulation no state law may exist; or (ii) an agency passes a Regulation, published in the CFR having force of law and state action conflicts that CFR; or (iii) when the intention of Congress as expressed in law, because it is only a conflict of law

[1] A blower is a fan that pulls fresh air into a compartment creating pressure that expels the air already inside. Effectively, a blower is used to expel explosive vapors from enclosed compartments in boats.

that gives rise to preemption, is frustrated or impeded by state action.

Here, there is no express preemption; there is no Statute in conflict. Regarding implied preemption, the FBSA does not occupy the field and there is no conflicting CFR. The only CFR regarding blowers requires their use.

Regarding implied preemption over a frustration of Congressional law, the "intention" identified by Division One is not Congress's; if it exists it is the agency's. Worse, it was not even an agency intention expressed by law. If it exists, it is only in a letter. Division One interpreted a letter to mean the agency intended PWCs shall not use blowers and that intention frustrated Congress's intention there be a unified boating standard. However, a letter is not law. Even if that was the agency's intention it does not constitute a conflict of law. Worse, on a factual level there is no evidence what Division One identifies was even the agency's intention. Even worse, what Division One identifies as Congress's intention was the least of three intentions, the more important two are frustrated by preemption here.

To work around all that, Division One cites two 3rd Circuit cases asserting they hold any agency action if merely within its authority gives rise to preemption. Division One takes no account those cases were reversed (one explicitly called out by name as reversed) by the US Supreme Court. That case, Wyeth v. Levine, 555 US 555 (2009), was cited by petitoiner but is not even acknowledged by Division One's opinion. Further, although Division

One cites Sprietsma v. Mercury Marine, 537 US 51 (2002) it gives no weight to its holding, specific to the FBSA, that action of this specific agency not an actual Regulation shall not give rise to preemption.

Sprietsma analyzed the FBSA exhaustively, finding Congress' overriding intention was not total uniformity of boating standards – it was safer boating and victim compensation; holding "Congress enacted (it) to improve the safe operation of recreational boats."[2] Id. at 523. Sprietsma said "uniformity is undoubtedly important to the industry," but "the concern with uniformity does not justify the displacement of state common-law remedies that compensate victims and their families and that serve the Act's more prominent objective, emphasized by its title, of promoting boating safety." Id. (underline added).

To further those goals Congress in the FBSA provided the Secretary of Transportation may (not shall) establish minimum (not maximum or comprehensive) safety Regulations in 12 (not all) areas of boat manufacturing. 46 USC 4302. Congress said those Regulations must be Regulations, adopted as law codified in the CFR to have preemptive effect. 46 USC 4306. (No State may "establish... or enforce a law... that is not identical to a Regulation prescribed under section 4302 of this title.") Congress empowered the agency to pass Regulations, e.g., law, prohibiting

---

[2] It is undisputed BRP's PWC is a "boat" under the FBSA. PWCs, this one included, are nothing like stand up jet skis. These are substantial, hulled watercraft.

equipment if necessary for safety. Congress enacted a Savings Clause preserving state liability if it did not conflict a Regulation under the FBSA.

The APA applies to all agencies requiring a process of public notice, hearings, and codification of Regulations in the CFR before they are Regulation with force of law. The USCG under the FBSA is no different. However, an additional process was imposed by the Secretary when it delegated its roll to the US Coast Guard (USCG). The USCG must also vette all proposed Regulations through the National Boating Safety Advisory Council, created under the FBSA mandating specific participants. Sprietsma, 537 US at 57-58 and 49 CFR 1.46(n)(1) (1997).

It is critical to not ignore the difference between a Regulation in the CFR and mere agency action that may direct (in lay terms, regulate) behavior. Division One lost sight of that by its citing cases holding only Regulation by an agency may be the basis of preemption but then asserting any act that merely effects (regulates) behavior is Regulation.[3] Regulation with a capital "R" is not the same as an agency act that may regulate with a little "r." At all times in the FBSA and case law, when the word Regulation is used what is intended is a Regulation, published in the CFR.

---

[3] If the FBSA and USCG occupied the entire field of regulation, it might be said mere agency action, e.g., regulation with a little "r" short of Regulation in the CFR, may give rise to preemption. However, the Supreme Court in Sprietsma explicitly held the USCG and FBSA do not occupy the field of Regulation. Thus, the context of Cheri's argument assumes, as is true here, an area of Regulation not occupying the field and what is relied on for preemption is implied conflict preemption via conflict with an actual CFR or the intention of Congress.

This case arises out of a Personal Water Craft (PWC), designed and manufactured by respondent Bombardier (BRP) that exploded when petitioner Cheri Rollins started it. An electrical arc occurred when she engaged the starter, igniting gas vapors in the sealed hull. Mechanical ventilation (a blower) would have evacuated the vapors, preventing the explosion. Bombardier did not equip the PWC with a blower. Cheri alleges that constitutes design negligence and seeks to hold BRP accountable for not utilizing a blower in the design of any of its PWCs. Their presence would make PWCs and the boating public substantially safer.[4]

A FBSA Regulation requires blowers in all watercraft, including PWCs. 33 CFR 183.610. State liability for the lack of a blower contradicts no Congressional Statute or Agency Regulation – it is consistent with it. Albeit, Cheri does not rely on a violation of the FBSA. She asserted a basic tort claim for design negligence under the Products Liability Act.[5]

---

[4] BRP has historically asserted blowers are impractical and unnecessary given PWCs are completely sealed. That factual dispute is not before this Court nor is its merit relevant to the question of preemption. But for context, Cheri's expert in detail explains how the use of a blower could be easily achieved, cost essentially nothing if integrated in the manufacturing process, and would result in much safer PWCs. It is undisputed many PWCs explode every year in the circumstance here. It is suggested at some time in the future BRP's failure to integrate blowers will be looked back on like the original failure to equip cars with seatbelts – and if not that, a design flaw little different than exploding Pintos. For want of spending maybe a dollar or two more, the risk of explosions could be all but completely eliminated.

[5] Washington adopted the Model Uniform Product Liability Act subsuming all common law remedies. RCW 7.72.010(4). That codification of common law does not obviate the character of the claim. The Act's intention was to "eliminate" "confusion" over the variety of negligence and warranty claims "available to the plaintiff seeking recovery" and create "a single cause of action." Washington Water

Congress allowed exemptions from FBSA Regulation to be granted. That may be done by agency letter without public process. BRP asked for a letter exempting its compliance with 33 CFR 183.610 requiring a blower. The USCG provided the letter but passed no Regulation prohibiting blowers on PWCs; its exemption letter does not prohibit them, it only says BRP need not comply with the Regulation. BRP is at its will to use blowers if it wishes.

Division One found preemption based only on BRP's exemption letter, using it to springboard to its conclusion liability for not having one frustrates Congress' intent. Division One held uniformity of boating standards was Congress's paramount goal and the exemption letter proved the USCG's intention PWCs not use blowers. That has several fundamental flaws as a basis to find preemption, the effect of which renders the high standard of preemption almost meaningless.

First, Sprietsma and every case that is good law are clear it is only frustration of Congress's goals stated by Statute that give rise to implied conflict preemption – not an agency's actions where it does not occupy the field of regulation. Even if the exemption letter can be read as the USCG's goal, an agency's bureaucratic goal does not displace all 50 State's Rights.

Second, although uniformity was one of three goals, Sprietsma held it was last and "yields" to the primary goals of boating safety and victim

---

Power Co. v Graybar Elec. Co., 112 Wn.2d 847, 853-854 (1989). When Sprietsma discusses Congress's intention to not preempt state tort claims arising out of boats it is precisely the claim Cheri's brings here. Codification does not alter its character.

compensation. Division One finding uniformity for the sake of uniformity the primary goal when the Supreme Court held it is not, will kill every avenue of state remedy any time there is federal involvement because states' laws always differ. It also stands on the rejected notion a desire for uniformity means any deviation must be squashed like a bug. For years California had higher standards on automobile emissions despite the EPA issuing minimum standards (the FBSA is a minimum standard) and over time, California pushed Congress to a better standard.[6] Having a differing manufacturing standard is not the end of the world and at times can be a huge force for good.

Most importantly, even if uniformity was a goal, Division One found preemption to not "frustrate" that goal while ignoring the Supreme Court in Sprietsma held "boating safety" and "victim compensation" were higher goals. Id. It stands the concept of implied preemption on its head to find it because a lesser goal is "frustrated," while trampling over the bodies of higher Congressional goals in order to do so. If anything, Division One's opinion and preemption stand as the frustration of Congress's primary goals.

Finally third, on a factual level Division One is wrong. There is no evidence the USCG intended PWCs shall not use blowers. If that was the intention, the FBSA required the USCG to pass a Regulation prohibiting their

---

[6] At times this is referred to the laboratory of democracy. Sprietsma speaks to it, discussing the value of States having some degree of flexibility to find a better standard not only for its own citizens but to perhaps solve a problem that before had been unsolved. Again, no differently than California on car emissions.

use on PWCs. It has not. The letter exemption leaves it to BRP to decide. On this Sprietsma is on point explaining the USCG's decision to leave it to manufacturers to explore whether a piece of equipment "should have been installed on this particular kind of boat" does not imply preemption of "the states and their political subdivisions... imposing some version" of such a requirement. Sprietsma, 537 US at and 67 and 52.

"There is a strong presumption against finding (implied) preemption in an ambiguous case, and the burden of proof is on the party claiming preemption." Id. Here, that is BRP.

D. Issues Presented For Review

> When an agency does not occupy the field of Regulation, Whether its action short of Regulation preempts all States' Rights when Congress did not convey that authority.
>
> Whether BRP's letter may give rise to preemption when state liability conflicts no law and does not frustrate the will of Congress as expressed by Congress itself.

E. Facts

On August 1, 2009 a BRP manufactured PWC without a blower exploded when Cheri started it. CP 534, 53, 596, 601, 163. A blower would have prevented the explosion and made all PWCs and the boating public that much safer. CP 597-602. BRP does not put blowers on any PWC. CP 598. BRP asked for a letter exempting it from the FBSA Regulation requiring them on all watercraft. CP 300-301. The USCG gave

the letter but has passed no Regulation regarding blowers on PWCs. Its BRP letter was not adopted as a Regulation, published in the CFR.

F. Authority And Argument

1. THE CRITERIA TO ACCEPT REVIEW

Division One's decision:

(1) ...is in conflict with a decision of the Supreme Court, (both State and US Supreme Court);

(2) ...is in conflict with another decision of the Court of Appeals; and

(4) ...involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

2. DIVISION ONE ELEVATES BUREAUCRACTIC ACTION TO LAW AND FUNDAMENTALLY CHANGES THE LAW ON PREEMPTION

The bedrock upon which preemption lays is the Constitutional Framers' promise State autonomy will yield to Federal Supremacy only in the limited circumstance of an actual conflict of law. Wyeth, 555 US at 565. That must be so because "respect for the State as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly preempt state law causes of action." Id. See also Stevedoring Services of America v. Eggert, 129 Wn.2d 17, 24 (1996). That standard guarantees at some level, even when conflict is implied, the public vetting, public representation, and due process our Constitution requires. Any less makes all

50 States subservient to the unilateral actions of distant Federal employees.

> There are three forms of preemption:
>
> (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption).

Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291, 294 (7th Cir. 1997) (internal citations omitted, parenthesis in original). See also Inlandboatman's Union v. DOT, 119 Wn.2d 697, 701 (1992).

Here, there is no Statute conflicting State liability. Congress in the FBSA did not "explicitly preempt" all state law. Sprietsma, 537 US at 57, 42 USC 4302. Division One did not find it. Also, the USCG and FBSA do not occupy the field of boat regulation. Sprietsma, 537 US at 65. Division One did not find it. If preemption is to exist it can only be "implied."

"Implied preemption" can happen in one of two completely different ways that should not be confused with each other:

> Even if Congress has not occupied an entire field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict occurs (1) when compliance with both laws is physically impossible, or (2) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Inlandboatmen's, 119 Wn.2d at 702. The first occurs when there is a conflict in-fact with a Regulation (CFR). Id. If arising out of a statue (USC) preemption is "express." Neither exists here.

Division One found preemption via the second, finding liability for no blower is "an obstacle to the accomplishment and execution of the full purpose of Congress" (opinion, p. 3) based on the assertion (1) Congress' overriding FBSA purpose was total uniformity of boating standards and (2) the USCG – not Congress – expressed an intention PWCs not have blowers. Division One reasoned that because the USCG issued its letter under authority it had to issue it, that was conflict sufficent to support preemption.[7]

Division One errs. As cited in the overview, Congress' overriding intention was boating safety and compensation; uniformity was primarily an "industry concern" Congress saw a distant third. But worse, and what should be of greater concern to this Court, even if uniformity is considered, the sole source of Division One's finding a lack of it was not a Statute passed by Congress nor even a CFR, but instead a mere letter written by an agency.

When preemption is implied based on a supposed frustration of the intention of Congress, it is only a frustration of Congress expressed by Congress that will do. Inlandboatmen's said that explicitly cited above, which is itself Federal authority word for word from Sprietsma. 537 US at 54. No authority holds preemption arises because the will or intention of an

---

[7] Division One asserts at p. 6 liability for no blower would "impede the purpose of the FBSA" because it "negate(s) the Coast Guard's authority to grant exemptions." That turns the FBSA on its head. The purpose is safe boating, victim compensation and finally some level of consistency the desire for which shall yield to safety and compensation. The purpose of the FBSA is not to give exemptions from it. Also, there is a difference between the USCG exempting BRP from the Regulatory requirement of a blower and (1) that means BRP is barred from using one and (2) has immunity for not doing so. Nothing in the FBSA may be read to support that.

agency alone may be frustrated. See also Stevedoring, explaining "Congress' intent may be explicitly stated in the statute's language or implicitly contained in its (the statute's) structure and purpose." 129 Wn.2d at 24. See also Wyeth, infra, rejecting an agency can unilaterally declare its own intention of preemption without support by Congress, expressly stated in Statute. Wyeth, 555 US at 577.

To get around that, Division One cites the case of Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237, 277 (3rd Cir. 2008) as support arguing it held "federal action short of formal, notice and comment rulemaking may also have preemptive effect." (opinion, p. 6). It also cites directly Colacicco v. Apotex, Inc., 521 F.3d 253, 271 (3rd Cir. 2008).

Inexplicably, Division One ignores both were reversed on exactly the proposition it cites them for by Wyeth. Worse, Wyeth did so with essentially the identical procedural setting of this case. See 129 S.Ct. 1578 (2009).

In Wyeth a drug manufacturer was sued under state product liability law for inadequate warnings. 555 US at 561. The manufacturer argued the claim was preempted because the warning's content was Ordered by the FDA in accord with Statute directing it to issue Orders and could not be changed without the FDA's express consent. Id. at 560. The manufacturer showed the label resulted from over "17 years" of FDA Orders it complied with. Id.

Exactly as Division One held, the manufacturer argued and the

Circuit Court held in Wyeth state liability conflicting agency action created "an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress" because Congress intended the FDA to enforce warning labels and state action contrary to that administrative action frustrated the will of Congress.

Wyeth rejected the argument, overruling the portion of Colacicco cited by Fellner that was cited and relied on by Division One and held agency action standing alone, even if authorized by Congress, does not give rise to preemption. BRP had a letter it asked for excusing it from using blowers but not prohibiting their use.[8] In Wyeth the manufacturer was Ordered by the FDA on the exact content of its warning because a Statute passed by Congress told the FDA to do so. Wyeth's Order is a stronger 'action' than BRP's letter. Yet, the concept Division One uses to support its opinion was rejected; only a conflict of law gives rise to preemption. See Wyeth.

---

[8] As an aside, Bombardier argued and Division One held the exemption prohibited the use of Blowers absent USCG permission. That is untrue: (1) The letter simply does not say that. It says only BRP need not use them. (2) Nothing in the FBSA says a manufacturer is prohibited from taking action if exempted from a Regulation otherwise requiring it. The impossibility of that is clear when consideration is given to the fact the FBSA requires the USCG pass a Regulation if it wants to prohibit the use of certain equipment. 46 USC 4302. For BRP to argue or Division One to find the exemption was a prohibition from using blowers would require finding the USCG can end run Congress's expressly stated intention the USCG must pass a Regulation to do so. (3) Both Bombardier and Division One rely exclusively for this contention on a section of the Federal Register – not the CFR – where the USCG set forth a lay person description of the exemption process, expressly labeled as only that, in anticipation of considering further rule making. A lay person Federal Register explanation is not Regulation, it does not change the exemption process or its effect as codified in the CFR, and it confers not greater power on the USCG to prohibit equipment by exemption versus adopting a Regulation.

First, BRP argued and Division One held the letter prohibited BRP using a blower without approval of the USCG and it could be subject to enforcement action if it did so thus liability for a blower conflicts the USCG's supposed intention BRP not use one. That same argument was made by the manufacturer in Wyeth; its warning's language was Ordered by the FDA and could not be changed without approval.

The court first scoffed at the notion an agency would take action against a manufacturer for making its product even safer:

> ...The very idea that the FDA would bring enforcement action against a manufacturer for strengthening a warning pursuant to the... regulation is difficult to accept.

Id. More importantly for here, Wyeth held even if a manufacturer had to ask permission to change its product to make it safer, because the duty to make the product safely is the manufacturer's, if asking for permission is required to do so a manufacturer is required to do it; state liability for not doing so is not preempted. Id. Wyeth explained an argument to the contrary is "premised on a more fundamental misunderstanding" doing what an agency instructs means something is safe. Id. That is even more true here where Congress stated the FBSA's intention was only to provide "minimum" safety standards, Sprietsma, 537 US at 57, and under the FBSA the manufacturer bears ultimate responsibility for the safety of its product. See 42 USC 4311(g).

Also contrary to what Division One held, Wyeth explained the bare

fact Congress desires a Federal agency to create Regulations to provide uniformity, where Congress does not also "provide a federal remedy for consumer(s) harmed" by unsafe products, illustrates "that widely available state rights of action" remain the "appropriate relief for injured consumers." Wyeth at 573. That follows Sprietsma that specifically considered the FBSA.

Sprietsma held the FBSA's savings clause, read with its preemption clause, are clear only conflict of actual Regulation preempts state remedies because Congress only intended "to preempt (State) performance standards and equipment requirements imposed by Statute or Regulation" that are "not identical to a Regulation" but not preempt "liability at common law or under State law." Sprietsma, 537 US at 63. Again, note the word "Regulation." Congress knew how to draft the statute more broadly if that was its intention.[9]

---

[9] On this, BRP argued and Division One held the FBSA was intended to provide "broad" and "flexible" power to regulate boat safety. Opinion, p, 3 **First**, that is no excuse to preempt all 50 States' Rights if the requisites of preemption are not met. **Second**, it conflates what both BRP and Division One cited for the proposition. That phrase does not come from the Statute. It is from House Notes. It is well settled House Notes cannot enlarge or amend otherwise clear statutory language. Exxon Mobil v. Allapattah Services, 454 US 546, 577 (2005)(rejecting attempts to "amend a statute through a committee report."). **Third**, this is more impercise interchange of terms engaged in by both BRP and Division One. Case law (and the House Notes) may at times say "standard," but when it does that in regard to administrative action what it always references and requires is actual Regulation. See City of New York v. FCC, 486 US 57, 60 (1988). A Regulation may establish a standard. But, not every standard is a Regulation. Thus, when a Note indicates the agency was to be given broad and flexible "Regulatory authority to issue standards," what is still required is an actual Regulation. Finally **Fourth**, what the Note actually says is "in lieu of establishing specific statutory safety requirements, subsection (a) provides flexible Regulatory authority (again note the word: Regulation) to establish uniform standards..." All that means is instead of having to pass Regulations that spell out specifically how boats should be designed, broader "standards for the design" may be adopted and it is left to manufacturers to decide how to specifically meet them on any one boat. Neither Congress or the Agency want to be in the business of drawing boat plans. Division's One's reliance on this

Thus, Division One ignores and never responds to the Supreme Court's rule that when Congress adopts an Act whose purpose is to "establish... minimum safety achieved by federal regulation intended to provide a floor" for safety (which is what the FBSA is) that also contains (1) a preemption clause providing only state law conflicting Regulation is preempted and (2) a savings clause preserving state remedies and claims, that demonstrates Congress's intention to preserve state claims unless they conflict with an actual Regulation. Geier v. Am. Honda Motor Co., 529 U.S. 861, 870 (2000). BRP's letter is not a Regulation. If Congress intended preemption to arise from conflict with a Regulation or exemption, it would and could have easily said that. Its failure to do so cannot be ignored.

Next, Division One found liability for no blower frustrates Congress's intention of a uniform standard. That is discussed above. Sprietsma explained boating safety and retention of state remedies for injuries were the paramount objectives; uniformity was primarily an "industry concern" bothering Congress the least shall "yield" to safety and compensation. Sprietsma, 537 US at 70. "Concern with uniformity does not justify displacement of state common-law remedies." Id. If anything, finding preemption to preserve uniformity frustrates the overriding intention of Congress to promote boating safety and protect state remedies for defective boat design.

Note only serves to demonstrate the overreaching to find preemption. Where preemption exists, it should be easy to find. The presumption is, it does not exist.

Division One relied on its earlier opinion in Becker v. US Maine Co., 88 Wn.App. 103 (1997) asserting it found action short of Regulation may give rise to preemption because a decision not to take action is a decision no action should be taken and that decision, short of Regulation, gives rise to preemption. First, even if true Becker decided in 1997 is secondary to Wyeth in 2009 and Sprietsma in 2002. Second, here Division One stretches Becker beyond its actual holding and conflicts its own opinion.

Becker found liability over a lack of handrails in an open bow boat not preempted by the FBSA because although Congress in the FBSA "authorizes" the adoption of Regulations "to require the installation" of them, it did not consider them. Becker, 88 Wn.App. at 106. Fine. The FBSA authorizes the USCG to adopt Regulations prohibiting the use of various equipment, including blowers in PWCs. The USCG has not considered such a Regulation. However, even if it had that would not give rise to preemption.

Sprietsma held "it is quite wrong to view" a "Coast Guard decision not to adopt a Regulation" (again, note the word: Regulation) "as the functional equivalent of a Regulation prohibiting all States and their political subdivisions from adopting such a regulation." 537 US at 527. Sprietsma held "history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards."

Id at 65. Thus, even when the issue is broached, the Supreme Court looks for an agency's consideration of a Regulation because it is only Regulation – law – that gives rise to preemption. Division One gives no weight to the fact even Becker required the consideration be over an actual Regulation.

Division One cited Gracia v. Volvo Truck, 112 F.3d 299 (7th Cir. 1997) for the same proposition; preemption may arise by action short of Regulation. Again, Division One gives no weight to Wyeth in 2009 or Sprietsma in 2002 rejecting it under the FBSA. Resort need not be made to supposedly analogous cases when Sprietsma is on point. That aside, Gracia does not support Division One's citations.

First at p. 5 Division One holds Gracia held preemption lays if state action frustrates "the federal government's goal of maintaining uniform safety standards across the country." Simply because that was true there does not mean it is true here. Sprietsma later held some lack of uniformity by state liability for matters not Regulated does not require preemption. Supra.

Second, at p. 6 Division One holds Gracia held "federal action can have preemptive force even if it involves no regulation." Language in Gracia may imply that but it provides no support here: (1) In Gracia the 9th Circuit concluded when NHTSA considers an issue and decides not to Regulate that should be viewed as an intention there be no requirement; Sprietsma specifically held as to the USCG and FBSA that is untrue. Infra. These are

two different statutes and two different agencies. (2) It ignores in Gracia what Division One erroneously minimizes as mere "action" was an actual Regulation, passed by public process, published in the CFR stating commercial vehicles need not comply with a particular Regulation. At its footnote 3 Division One sidesteps that, asserting that was true "simply due to a key difference between the FBSA and the NTMVSA. The latter requires exemptions to be published while the former does not."

The only thing that demonstrates is the NTMVSA required a higher standard for exemptions; they had to pass whatever the NTMVSA required plus what the APA requires to be a Regulation.

But, that the FBSA has a lower standard for exemptions does not mean the standard to overcome the presumption there is no preemption is also lower. There still must be a conflict of law. What Division One casts aside in a footnote as not making any difference is all the difference.

Division One errs citing Gracia at p. 7 concluding "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." That phrase in Gracia was a citation from Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n, 461 US 375 (1983). Arkansas Elec uttered those words but it provides no support here: (1) It was decided 26 years before the holding in

Wyeth, (2) 19 years before the specific holding in Sprietsma rejecting it as to the FBSA, and (3) as Division One does with all authority, it ignores what was at issue in Arkansas Elec. was still "Regulation," that if a decision is made "to forego Regulation" that "may" – not shall – have "as much preemptive force as a decision to Regulate."

None of the requisites for implied conflict preemption are present. Perhaps: (1) if Congress held a completely uniform boating standard was the highest Congressional consideration and goal under the FBSA (Sprietsma held it was not) and perhaps (2) if the USCG actually considered whether to Regulate blowers in PWCs and issued no Regulation versus simply issuing a letter exemption, and (3) if somehow Sprietsma could be ignored holding under the FBSA a USCG decision not to Regulate cannot be taken as a decision there shall be no state action, only then would it be possible to consider whether a decision not to Regulate blowers in this case "may" (not shall) support preemption of all 50 States' Rights. But, none of that is true.

This is not inconsistent with the concept of preemption being implied. As attenuated as implied preemption may be, at its core there must still be a frustration with the intention of Congress expressed through Statute. That is how Congress expresses its intention – Statute, even if that Statute is not specific to the matter at hand.[10]

---

[10] To the extent occasional reference is made by opinions to House Notes, they are Notes used to throw light on an actual Statute. Neither BRP or Division One identify

In a complete non-sequitur Division One adopts BRP's analysis that because the USCG thought hard and consulted some stakeholders before issuing the exemption that means something. It means nothing. Either state law is preempted or it is not. Either an agency follows Congress's instructions and any additional requirements imposed (here by the Secretary and the requirement any Regulation also pass through the National Boating Safety Advisory Council, Sprietsma, 537 US 57-58), or it did not.

Spring boarding off that, Division One comments on what, ostensibly, would be the supposed unfairness to BRP to not find preemption because it interpreted the exemption as immunity from blowers all these years. It is enough to observer there is no detrimental reliance theory for preemption and even if both BRP and the USCG intended it[11] this would not be the first time an agency has been caught short not complying with its own Regulations.[12]

In Wabash Valley Power v. Rural Elect. Admin, 93 F.2d 447 (7th Cir. 1990) the Court found it was a Federal agency's intention to exercise authority granted by Congress to regulate rates over a local utility. Id. at 450. The agency wrote a letter expressing its intention to do so. Id. However, that agency's Regulations provided localities would set their rates. The agency's

---

a Statute passed by Congress evidencing an overriding Congressional purpose or intention that is frustrated. Both keep coming back to BRP's letter.

[11] There is no evidence the USCG intended its letter exemption have a preemptive effect despite how strongly BRP may want and have assumed that result.

[12] But, see also Wyeth cited above – even if the USCG wanted and intended preemption here, it cannot take that power for itself absent Regulation.

action to do something different could not support preemption when its Regulation was to the contrary:

> Its effort to preempt state regulation of Wabash's rates alone founders on a mundane obstacle: it neglected to use the procedures required by the APA.
>
> In order to preempt state authority, the REA (Rural Electrification Administration) must establish rules with the force of law. Regulations adopted after notice and comment rulemaking have this effect. Federal regulations have no less pre-emptive effect than federal statutes. Yet although ratemaking is a rule under the APA, the REA did not follow the procedures the APA prescribed for rulemaking. It sent Wabash a letter. There was no notice, no opportunity for comment, no statement of basis, no administrative record, no publication in the Federal Register—none of the elements of rulemaking under the APA.

Id. at 453-454 (citations omitted, citing in part Brock)

The FBSA Regulations as they exist require blowers. If the USCG desired a situation where BRP shall not use them and any result to the contrary is preempted, the FBSA is clear the USCG had to pass a Regulation mandating that. Even if we assume that intention where no competent evidence of it exists, no differently than in Wabash Valley the USCG is held to its own Regulations and cannot change them by a letter.

That USCG had the authority to issue the letter is of no weight and does not distinguish Wabash Valley for the limited reason it is cited here. First, the FDA in Wyeth was within its authority to issue its Order but a bare Order is not law to create preemption. Second, the USCG has no more ability

to change the existing FBSA Regulations by issuing an exemption than the REA in Wabash Valley had to change its Regulation by letter. The USCG may have utilized its exemption discretion but (1) excusing BRP from compliance with blowers is not the same as a Regulation prohibiting them and (2) even if it was the USCG's intention by that letter to create preemption, it remains that "in order to preempt state authority" the USCG was required "to establish (a) rule with the force of law" because it is only a conflict of law that gives rise to preemption. Id.

3. BRP'S LETTER EXEMPTION IS NOT LAW

The APA applies to all agencies requiring public notice of rulemaking, hearings, and passage with publication in the CFR:

> *Failure* to publish in the Federal Register is indication that the statement in question was *not* meant to be a regulation, since the Administrative Procedure Act requires regulations to be so published. The converse, however, is not true: *Publication* in the Federal Register does *not* suggest that the matter published *was* meant to be a regulation, since the APA requires general statements of policy to be published as well. *See* 5 U.S.C. § 552(a)(1)(D). The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents "having general applicability *and legal effect,*" 44 U.S.C. § 1510 (1982) and which the governing regulations provide shall contain only "each Federal *regulation* of general applicability and current or future effect."

Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-538 (DC. Cir.

1986) (all italics in original, underline added).[13] Division One attempts to distinguish Brock, minimizing it as "entirely unrelated" because of its subject matter. (Opinion, p. 9) The case's subject does not distinguish Justice Rehnquist's explanation in Brock of what is required for action to result in Regulation much less the APA for the proposition "Regulations" are only those matters subject to formal rule making process, published in the CFR.

The letter not being a Regulation is fatal. The FBSA is clear only conflict with Regulations is preempted.

> [A] State may not establish... a law or regulation establishing a recreational vessel... or other safety standard... that is not identical to a Regulation prescribed under section 4302 of this title.

46 USC 4306. (underline added). Congress did not create preemption upon conflict with mere action, letters, nor even exemptions.

The USCG had authority to write the letter exemption but that does not make it a Regulation. Not only does the letter not comply with the APA, the USCG did not comply with the further requirement all Regulations be vetted by the NBSAC before it may be consider for Regulation. Sprietsma

4. OTHER ISSUES

BRP argued as an "alternate basis" for dismissal an issue regarding a settlement agreement between Cheri and BRP's co-defendant the Longs.

---

[13] Division One asserts Brock is "the primary case upon which" Cheri relies. p. 9. That is untrue. Brock is one case, used as illustration of a proposition she needs no authority on because it is axiomatic: The USCG's letter is not a Regulation.

Division One did not consider it because: (1) it did not reach it and (2) there was an "incomplete record" created when BRP objected and the Trial Court granted BRP's motion to not consider Cheri's evidence the agreement BRP moved on was not the parties' agreement; it was an earlier one.

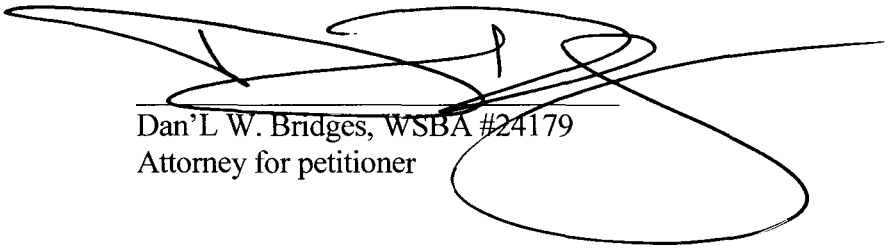
It is unfair for Division One to call it "State Farm's settlement" and reference supposedly "troubling" issues arising from it when Division One concedes it has an incomplete record on it.

At footnote 9 Division One said it "need not address the alternate theories of express preemption or field preemption." Yet, the opinion did and it is undisputed neither lay. There need be no remand on those issues.

As relief, Cheri asks this Court to reverse Division One's decision and remand for further proceedings to the Trial Court regarding the settlement agreement, or failing that, to Division One for the same consideration. Cheri had a pending motion to the Court of Appeals to supplement the record addressing the settlement agreement Division One did not rule on as it did not consider the issue given its holding on preemption.

DATED this 19th day of January, 2016

McGAUGHEY BRIDGES DUNLAP, PLLC



Dan'L W. Bridges, WSBA #24179
Attorney for petitioner

2015 WL 9274912
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 1.

Cheri ROLLINS, individually and as guardian ad litem of Blake Rollins, a minor, Appellant,
v.
BOMBARDIER RECREATIONAL PRODUCTS, INC., a foreign corporation, Respondent,
Dennis Long and Lynette Long, husband and wife; Wildfun Powersports Rentals, LLC., Wildfun Watersports, Inc., Defendants.

No. 73635–3–I.
|
Dec. 21, 2015.

Synopsis

Background: Consumer injured when personal watercraft she tried to start exploded filed product liability action against manufacturer. The Superior Court, Pierce County, Garold E. Johnson, J., dismissed claim. Consumer appealed.

[Holding:] The Court of Appeals, Lau, J., held that state law product liability claim, alleging that manufacturer was negligent for failing to include an engine ventilation system in its design, was impliedly preempted by direct conflict with Coast Guard decision to exempt personal watercraft from ventilation system safety requirement.

Affirmed.

West Headnotes (9)

[1] **States**

Federal preemption of state law can be either expressed or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Cases that cite this headnote

[2] **States**

Express preemption occurs when Congress explicitly defines the extent to which it intends to supersede state law.

Cases that cite this headnote

[3] **States**

Absent explicit preemptive language, implied preemption can occur in two ways: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Cases that cite this headnote

[4] **States**

There is a strong presumption against preemption, and state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.

Cases that cite this headnote

[5] **States**

Injured consumer's state law product liability claim against manufacturer of personal watercraft, alleging that manufacturer was negligent for failing to include an engine ventilation system in its design, was impliedly preempted by direct conflict with Coast Guard decision, pursuant to its Congressional authority under Federal Boat Safety Act (FBSA), to exempt personal watercraft from ventilation system safety requirement; regulations and

exemptions created a framework of safety standards intended to encourage uniformity among the states and protect manufacturers from widely varying local requirements, and grant of exemption was the product of rigorous evaluation procedure. 46 U.S.C.A. § 4302(a)(1)–(2).

Cases that cite this headnote

[6] **States**

A federal agency acting within the scope of its congressionally delegated authority is afforded the same preemptive power over state law as Congress.

Cases that cite this headnote

[7] **States**

Coast Guard regulations are to be given pre-emptive effect over conflicting state laws.

Cases that cite this headnote

[8] **Appeal and Error**

Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.

Cases that cite this headnote

[9] **States**

It is the purpose of Congress that is the ultimate touchstone of pre-emption analysis.

Cases that cite this headnote

Appeal from Pierce County Superior Court; Honorable Garold E. Johnson, J.

Attorneys and Law Firms

Shellie McGaughey, Dan'l Wayne Bridges, McGaughey Bridges Dunlap PLLC, Seattle, WA, for Appellant.

Thomas Raymond Merrick, Attorney at Law, Philip Randolph Meade, Merrick Hofstedt & Lindsey PS, Seattle, WA, R. Bryan Martin Jr., Attorney at Law, Los Angeles, CA, for Respondent.

PUBLISHED OPINION

LAU, J.

***1** ¶ 1 Cheri Rollins suffered serious injuries when the personal watercraft (jet ski) she tried to start exploded. She appeals the trial court's summary judgment dismissal of her product liability claim against Bombardier Recreational Products (Bombardier). She contends Bombardier negligently designed the model of personal watercraft when it failed to include an engine ventilation system. The trial court dismissed her product liability claim on summary judgment, reasoning that, as a matter of law, the Federal Boat Safety Act (FBSA) preempted her state product liability claim. Because her claim directly conflicts with the Coast Guard's explicit decision, pursuant to Congressional authority, to exempt personal watercraft from the ventilation system requirement, it defeats the purpose of the FBSA and is therefore preempted. We affirm the order of dismissal.

FACTS

¶ 2 The main facts are undisputed. On August 1, 2009, Cheri Rollins tried to start a personal watercraft (jet ski) when it exploded.[1] The jet ski was a 1999 Sea–Doo XP Ltd. manufactured by Bombardier and owned by Rollins' parents, Dennis and Lynette Long. The explosion occurred due to accumulated gas vapor in the jet ski's engine compartment. When Rollins engaged the ignition switch, an electrical arc ignited the vapor. Bombardier does not equip these jet skis with a powered ventilation system. Such a system may have prevented the explosion by eliminating the accumulated vapor.

¶ 3 In August 2011, Rollins sued the Longs alleging their failure to properly maintain the jet ski negligently

caused her injuries. In April 2012, the Longs filed a third party complaint against Bombardier. The complaint alleged violations of Washington's Product Liability Act (WPLA) and Washington's Consumer Protection Act (CPA). Rollins amended her complaint to assert the same WPLA design-defect claim against Bombardier. The parties agree that the defect underlying Rollins' claim is Bombardier's alleged failure to Include a powered ventilation system—a "blower" device—on the jet ski.

¶ 4 In June 2013, Bombardier moved for summary judgment dismissal, arguing that federal law preempted Rollins' product liability claim. In September 2013, Rollins and the Longs entered into a Settlement Agreement, entitled "Settlement Agreement, Release, and Assignment." Clerk's Papers (CP) at 2594–99. The Agreement provided that the Longs' insurer, State Farm, paid Rollins $1.2 million. As consideration, Rollins assigned her personal injury claim against Bombardier to the Longs and State Farm. After executing the Agreement, Rollins non-suited her claims, with prejudice, against the Longs. In October 2013, Rollins notified Bombardier that State Farm controlled her claims. In November 2013, Bombardier filed a motion to dismiss "pursuant to CR 12, 17, and 56 ." CP at 2548–66. Bombardier argued that Rollins' lawsuit was an improper claim for indemnification brought by State Farm. Because the Agreement settled Rollins' claims against the Longs and granted State Farm ownership of her remaining claims, the lawsuit had transformed into an attempt by State Farm to use "[Rollins] as a vessel through which it seeks indemnification from Bombardier." CP at 2555. Bombardier also argued that State Farm was not the party in interest.

*2 ¶ 5 The trial court issued two orders addressing Bombardier's two motions-the June 12 motion for summary judgment and the November 21 motion to dismiss. In December 2013, the trial court granted Bombardier's summary judgment motion and dismissed Rollins' product liability claim, reasoning that the claim is preempted by federal law. In January 2014, the trial court issued an order ruling that the settlement agreement between the Longs and Rollins was an "indemnification agreement ... collusive in effect." CP at 2791. But the court concluded that Bombardier's November 21 motion to dismiss was rendered moot when it dismissed Rollins' claim on summary judgment. Rollins appeals the trial court's order granting Bombardier's June 12 motion for summary judgment.

ANALYSIS

Standard of Review

¶ 6 We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 794–95, 64 P.3d 22 (2003). Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Michak*, 148 Wash.2d at 794–95, 64 P.3d 22. The parties agree on the material facts. The sole issue is whether federal law preempts Rollins' product liability claim.

Preemption

¶ 7 Bombardier contends a federal regulation exempting Bombardier from including powered ventilation systems on its jet skis preempts Rollins' state law claim under the WPLA. Rollins alleges Bombardier's jet ski was defectively designed because it lacked a powered ventilation system.

[1] [2] [3] [4] ¶ 8 Federal preemption doctrine derives from the supremacy clause, which provides that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. art. VI. Federal preemption of state law can be "either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. Nat'l Solid Waste Mgmt. Assoc.*, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). Express preemption occurs when Congress explicitly defines the extent to which it intends to supersede state law. *See Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 517,112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). Absent explicit preemptive language, implied preemption can occur in two ways: "field preemption, where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' and conflict pre-emption, where 'compliance with both federal and state regulations is a physical impossibility,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Gade*, 505 U.S. at 98. "There is a strong presumption against preemption and 'state laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.' " *Stevedoring Servs. of Am. Inc. v. Eggert*, 129 Wash.2d 17, 24, 914 P.2d 737 (1996)

(quoting *Washington State Physicians Ins. Exch. & Assn. v. Fisons Corp.*, 122 Wash.2d 299, 327, 858 P.2d 1054 (1993)).

*3 [5] ¶ 9 We conclude that federal law impliedly preempts Rollins' state product liability claim because it directly conflicts with federal safety standards promulgated under the FBSA. It therefore "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (quoting *Freiohtliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995)).

Implied Conflict Preemption

¶ 10 In the FBSA, Congress explicitly provided that federal regulations of recreational watercraft preempt conflicting state laws. The FBSA "was enacted 'to improve boating safety,' to authorize 'the establishment of national construction and performance standards for boats and associated equipment,' and to encourage greater 'uniformity of boating laws and regulations as among the several States and the Federal Government.' " *Sprietsma*, 537 U.S. at 57 (quoting Pub.L. 92–75, § 2, 85 Stat. 213–14). The Senate Report underlying the FBSA explains, "[t]he need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level." S.Rep. No. 92–248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1335. The same report explainspreemption of conflicting state law is necessary to "assure[ ] that manufacture for the domestic trade will not involve compliance with widely varying local requirements." S.Rep. No. 92–248, 1971 U.S.C.C.A.N. at 1341.

¶ 11 In accordance with this purpose, section 4302 of the FBSA delegates to the Secretary of Transportation authority to "[establish] minimum safety standards for recreational vessels and associated equipment," including "requiring the installation, carrying, or use of associated equipment (including ... *ventilation systems* ...)." 46 U.S.C. § 4302(a)(1)-(2). The official notes of section 4302 emphasize that this delegation of authority grants the Secretary broad discretion to establish uniform safety standards:

> In lieu of establishing specific statutory safety requirements, subsection (a) provides *flexible regulatory authority to establish uniform standards* for the design, construction, materials, and performance of the boats themselves and all associated equipment. It also provides for the display of seals and other devices for certifying or evidencing compliance with applicable safety regulations or standards.

46 U.S.C. § 4302, historical and revision notes (emphasis added). Consistent with this flexible regulatory authority, the FBSA also grants the Secretary the discretionary power to *exempt* certain vessels from those same regulations: "If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter." 46 U.S.C. § 4305. Finally, section 4306 of the FBSA —titled "Federal preemption"—expressly provides that the regulatory scheme promulgated under the FBSA preempts inconsistent state law:

> *4 Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce 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.

46 U.S.C. § 4306 (emphasis added).

[6] [7] ¶ 12 The Secretary of Transportation has delegated all regulatory authority under the FBSA to the Coast Guard. *See Sprietsma*, 537 U.S. at 57 (citing 49 C.F.R. § 1.46(n)(1) (1997)). It is a well-settled principle of preemption doctrine that "a federal agency acting within the scope of its congressionally delegated authority" is afforded the same preemptive power over state law as Congress. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S.Ct. 1890,

90 L.Ed.2d 36 (1986). Accordingly, "Coast Guard regulations are to be given pre-emptive effect over conflicting state laws." *U.S. v. Locke*, 529 U.S. 89, 109–10, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). One regulation promulgated by the Coast Guard requires boats to be equipped with a ventilation system:

> (a) Each compartment in a boat that has a permanently installed gasoline engine with a cranking motor must:
>
> (1) Be open to the atmosphere, or
>
> (2) Be ventilated by an exhaust blower system.

33 C.F.R. § 183.610. Since 1988, however, the Coast Guard has granted an official exemption to Bombardier for personal watercraft due to their unique design. The Coast Guard's Grant of Exemption number CGB 88–001, entitled "In the matter of the petition of BOMBARDIER CORPORATION for an exemption from [33 C.F.R. § 183.610]," considers several different regulatory requirements as they relate to personal watercraft. CP at 677–80. Regarding ventilation, the Coast Guard concluded an exemption would not adversely affect boating safety:

> The present ventilation regulations in Subpart K of Part 183 [33 C.F.R. § 183.610] were intended to apply to conventional types of boats powered by inboard or sterndrive engines or equipped with generators. These engines may emit gasoline fuel vapors. The ventilation regulations are intended to remove such vapors; however, the fuel system on the "Sea–Doo" boat is not designed in the same way as a fuel system on a conventional inboard or sterndrive. The fuel system is sealed to prevent leakage when the boat is oriented in any position. *As a result, compliance with the requirements of Section 183.610 is unnecessary to achieve an acceptable level of safety.*
>
> In consideration of the foregoing, I find that to grant this exemption would not adversely affect boating safety. Therefore, pursuant to the authority contained in 46 U.S.C. 4305 and 49 CFR 1.46(n)(1), which authority has been delegated to me by the Commandant, and exemption from the requirements of [33 C.F.R. § 183.610] is hereby granted to the Bombardier Corporation ....

***5** CP at 679 (emphasis added). In light of this exemption, the Coast Guard required Bombardier to affix labels to its personal watercraft models alerting consumers to the exemption:

> Each "Sea–Doo" boat, in lieu of a certification label, shall have permanently affixed to it, in a location clearly visible to the operator when boarding the boat or getting the boat underway, a label which contains the following information:
>
> (b) The words:
>
> "THIS BOAT IS NOT REQUIRED TO COMPLY WITH THE FOLLOWING U.S. COAST GUARD SAFETY STANDARDS IN EFFECT ON (insert date of certification or the words 'THE DATE OF CERTIFICATION'):
>
> • Display of Capacity Information
>
> • Safe Loading
>
> • Flotation
>
> • Fuel System
>
> • *Powered Ventilation*
>
> AS AUTHORIZED BY U.S. COAST GUARD GRANT OF EXEMPTION (CGB 88–001)."

CP at 680 (emphasis added). The record includes a photograph of this label affixed to a jet ski identical to the one involved in the accident underlying Rollins' lawsuit. The Coast Guard has exempted nearly all personal watercraft manufacturers, including Bombardier, from complying with the ventilation requirement under 33 C.F.R. § 183.610(a)(1)-(2).

¶ 13 Federal courts have found conflict preemption when a common law claim imposes a requirement that is inconsistent with federal safety standards. For instance, in *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 299 (7th Cir.1997), the court explained that allowing the plaintiff's design defect claim to continue would defeat the federal government's goal of maintaining uniform safety standards across the country:

> The Safety Act, in order that it might achieve its primary purpose of reducing traffic injuries and fatalities, also had the objective of establishing uniform national safety standards and adequate enforcement of those standards, as the legislative history indicates. We agree that when a state requirement is not identical to the federal standard it would obviously impede the objective of uniform national standards ....

> If Gracia's common law claim was not preempted, then manufacturers would be placed in a position where they could be subject to varying standards from state to state, which could not all be complied with simultaneously. For instance, one state's common law could require stringent windshield retention, while another state's could require that windshields not be permanently affixed. If this were the case, then the manufacturer would be subject to liability if the windshield were ejected in an accident in one state, but in another state would be liable if a windshield remained intact and a trapped victim were unable to escape from the vehicle.

Gracia, 112 F.3d at 298.

¶ 14 The same reasoning applies here. In *Becker v. U.S. Marine Co.,* 88 Wash.App. 103, 943 P.2d 700 (1997), we stated that "[a] tort claim defeats the purposes of the [FBSA] and is therefore preempted only when the duty asserted conflicts with the Coast Guard's explicit decision either to adopt a particular standard or to leave the feature or structure unregulated." *Becker,* 88 Wash.App. at 111, 943 P.2d 700. Because Rollins' claim directly conflicts with an exemption granted by the Coast Guard acting within the scope of its congressionally delegated authority, it is preempted. The FBSA grants authority to the Secretary of Transportation to promulgate boat safety regulations and exempt individual manufacturers or boat models from those same regulations. Together, these regulations and exemptions create a framework of safety standards intended to encourage uniformity among the states and protect manufacturers from "widely varying local requirements." S.Rep. No. 92–248, 1971 U.S.C .C.A.N. at 134; *see also Sprietsma,* 537 U.S. at 57. With these goals in mind, the act provides that standards promulgated under the act preempt conflicting state laws.

***6** ¶ 15 Pursuant to this regulatory authority, the Coast Guard granted Bombardier an official exemption from the ventilation requirement for its Sea–Doo model jet skis. The parties agree that the thrust of Rollins' design defect claim is that the jet ski lacked a ventilation system. Because her claim effectively "impos[es] a requirement' that is inconsistent with the federal safety standard, it creates an obstacle to the FBSA's purpose and is therefore preempted. 46 U.S.C. § 4306 ("[A] State or political subdivision of a State may not ... *impos [e] a requirement* ... that is not identical to a regulation prescribed under section 4302 of this title." (emphasis added)); see *Gade,* 505 U .S. at 98 ("conflict preemption [occurs] where ... state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "). Like in *Gracia,* if Rollins' "common law claim was not preempted, then manufacturers would be placed in a position where they could be subject to varying standards from state to state," thereby negating the Coast Guard's authority to grant exemptions under 46 U.S.C. § 4306 and impeding the purposes underlying the FBSA. *Gracia,* 112 F.3d at 298. [2]

The Coast Guard's Exemption Letter

¶ 16 Rollins argues her claim is not preempted because the Coast Guard's Grant of Exemption is not a "regulation." Rollins asserts that the FBSA preempts state laws only when those laws are "not identical to a *regulation* prescribed under section 4302 of this title." 46 U.S.C. § 4306 (emphasis added). Because the Coast Guard's Grant of Exemption is "a mere letter," and not a "regulation," it has no preemptive authority under the FBSA. Br. of Appellant at 1. The key difference, according to Rollins, is that the content of the Coast Guard's Grant of Exemption was never published in either the Code of Federal Regulations or the Federal Register. To support this argument, Rollins cites *Brock v. Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533 (D.C.Cir.1986):

> Failure to publish in the Federal Register is indication that the statement in question was not meant to be a regulation, since the Administrative Procedure Act requires regulations to be so published.... The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents "having general applicability and legal effect."

Brock, 796 F.2d at 538–39 (quoting 44 U.S.C. § 1510 (1982)). In other words, Rollins argues her claim is not preempted because there is no "law" or "regulation" preempting the claim.

[8] **[9]** ¶ 17 We are not persuaded by Rollins' attempt to cast the exemption letter as a "mere letter" lacking any preemptive effect. Rollins' argument elevates form over substance. She fails to cite any authority stating that only published regulations have preemptive force. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post–Intelligencer,* 60 Wash.2d 122, 126, 372 P.2d 193 (1962). Indeed, preemption does not typically depend on whether a regulation is published. Rather, it is the "purpose

of Congress" that is "the ultimate touchstone of pre-emption analysis ." *Cipollone*, 505 U.S. at 517. Accordingly, federal courts have acknowledged that "federal agency action taken pursuant to statutorily granted authority short of formal, notice and comment rulemaking may also have preemptive effect over state law." *Fellner v. Tri–Union Seafoods, LLC*, 539 F.3d 237, 244 (3d Cir.2008); *see also Colacicco v. Apotex Inc.*, 521 F.3d 253, 271 (3d Cir.2008) ("Although preemption is commonly thought of in terms of statutes and regulations, a federal agency's action taken pursuant to statutorily granted authority may also have preemptive effect over state law."). The FBSA evidences Congress' clear intent to grant the Secretary of Transportation (and, by extension, the Coast Guard) broad regulatory authority to establish uniform safety standards that supersede conflicting state requirements. In *Gracia*, 112 F.3d at 291, the court explained that federal action can have preemptive force even if it involves no regulation. In *Gracia,* the National Highway Transportation Safety Administration (NHTSA) established windshield retention requirements and exemptions for certain vehicles pursuant to its authority under the National Traffic and Motor Vehicle Safety Act (NTMVSA). *Gracia*, 112 F.3d at 297. The court stated that this framework amounted to a federal standard with preemptive force:

> *7 [H]ere there is a specific federal standard addressing windshield retention for the truck at issue, in which the NHTSA determined that this type of vehicle should be exempt from the affixing requirement. The Supreme Court has held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) ... Therefore, the existence of the exclusionary language in the federal safety standard mandates that we interpret it as representing a conscious decision by the NHTSA. An examination of the legislative history further bolsters that it was the intent of the NHTSA to exclude trucks such as the one at issue in this case from having to meet any windshield retention requirements.

Gracia, 112 F.3d 296–97. In *Gracia,* it was irrelevant whether or not the exemptions at issue had been published. [3] Instead, the court considered whether those exemptions demonstrated a "conscious decision" by the agency to develop a federal safety standard. *Gracia*, 112 F.3d at 297.

¶ 18 We acknowledged the same principle in *Becker.* The plaintiff in *Becker* filed a product liability claim against a boat manufacturer alleging the manufacturer negligently caused injury by failing to include certain safety features such as handrails on one of its boat models. *Becker*, 88 Wash.App. at 104–05, 943 P.2d 700. The Coast Guard had never promulgated any regulation or exemption related to handrails. *Becker*, 88 Wash.App. at 110, 943 P.2d 700. But despite any formal law or regulation, we stated that preemption may nevertheless exist if there was sufficient evidence that the Coast Guard had considered and rejected regulations addressing handrails: "[t]he issue in this case, therefore, is a factual one: has the Coast Guard explicitly considered and rejected regulation in matters of handrails and bow seating design?" *Becker*, 88 Wash.App. at 111, 943 P.2d 700. This key inquiry would have been unnecessary if, as Rollins contends, a federal agency's action must be a formally published law or regulation to have preemptive effect. Instead, we considered whether the Coast Guard had made an "explicit decision to either to adopt a particular standard or to leave the feature or structure unregulated." *Becker*, 88 Wash.App. at 111, 943 P.2d 700. We ultimately held the plaintiff's tort claim was not preempted "[b]ecause the Coast Guard has not formally considered, evaluated, and rejected regulation of bow seating design, including handrails ..." *Becker*, 88 Wash.App. at 112, 943 P.2d 700.

¶ 19 Here, unlike in *Becker,* the Coast Guard's exemption letter provides strong evidence of "explicit decision either to adopt a particular standard or to leave the feature or structure unregulated." *Becker*, 88 Wash.App. at 111, 943 P.2d 700. Despite Rollins' assertion that the Coast Guard's Grant of Exemption is a "mere letter," the record shows the Coast Guard grants such exemptions through formal exemption procedures only after conducting a rigorous evaluation process. Scott Evans, retired Captain and former Chief of Office of Boating Safety of the U.S. Coast Guard, explained the exemption process in a declaration submitted to the trial court. The exemption procedure is also summarized in the Coast Guard's 1999 Federal Register.

*8 ¶ 20 To obtain an exemption, a manufacturer such as Bombardier must first send a petition to the Coast Guard's Product Assurance Division. The petition must describe the boat or vessel for which the exemption is being sought and include detailed design information and specifications. The petition must also provide data and argument explaining why the vessel should receive an exemption from a specific Coast Guard regulation and why the exemption would not

adversely affect boating safety. After receiving the petition, engineers in the Product Assurance Division critically and independently review the product designs in comparison with federal standards relevant to the specific exemption request. The engineers work closely with the Division Chief throughout the review process, and the Division Chief reports to the Chief of the Office of Boating Safety regarding the status of the exemption request on at least a weekly basis. The Product Assurance Division also consult closely with outside organizations, such as the American Boating and Yacht Council, Society of Automotive Engineers, National Fire Protection Association, and Underwriters' Laboratories.

¶ 21 During this extensive review process, the Coast Guard works closely with manufacturers to ensure that relevant designs met or exceeded federal requirements. Under the FBSA, the Coast Guard may only grant an exemption if it determines that the exemption will not adversely affect boat safety. Once the Product Assurance Division determines that the exemption would not adversely affect boat safety, the exemption request would be vetted through the Chief of the Officer of Boating Safety. Once the exemption is granted, it "constitute[s] official Coast Guard regulatory action done pursuant to ... Congressional authority." CP at 1755; *see* 46 U.S.C. § 4305. This exemption process has remained the same since 1988. In 1999, the Coast Guard proposed changing the exemption process. The Coast Guard published a description of the exemption process in the Federal Register and sought public comments on certain aspects of the process.[4] But the Coast Guard ultimately left the same procedure in place.

¶ 22 Under these circumstances, the Coast Guard's Grant of Exemption preempts Rollins' claim. Unlike in *Becker* and *Sprietsma,* where the record failed to establish that the Coast Guard had explicitly considered and rejected the regulation at issue,[5] the Coast Guard's Grant of Exemption here shows an unambiguous decision to exempt personal watercraft from the general ventilation requirement under 33 C.F.R. § 183.610. Further, the preemptive power of the FBSA does not derive solely from individual regulations published in the C.F.R., as Rollins contends. The statute grants the Coast Guard flexible authority to create a uniform standard through a framework of regulations and exemptions.[6] Because the Coast Guard's power to grant exemptions flows from a federal statute that expressly delegates authority to develop boat safety standards that supersede conflicting state requirements, the exemption has preemptive force.

*9 ¶ 23 The authority Rollins cites is inapposite. She concedes that *Brock*—the primary case upon which she relies—has nothing to do with preemption doctrine. In *Brock,* the court addressed whether the Secretary of Labor's enforcement policy promulgated under the Federal Mine Safety and Health Act was a "binding norm" or simply a statement of general policy. *Brock,* 796 F.2d at 536. The court concluded that the enforcement policy did not constitute a "binding, substantive regulation" because the "language of the guidelines is replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit." *Brock,* 796 F.2d at 538. In dicta, the court explained that the enforcement policy was not a binding regulation even though It was published in the Federal Register: "Publication in the Federal Register does not suggest that the matter published was meant to be a regulation." *Brock,* 796 F.2d at 539. The court stated that typically a regulation must be published in the Code of Federal Regulations to have legal effect. *Brock,* 796 F.2d at 539.

¶ 24 The legal question in *Brock* is entirely unrelated to the issue here. The *Brock* court analyzed the difference between regulations and general statements of policy, not whether either of those agency actions have preemptive force. As discussed above, both federal and Washington courts have acknowledged that an agency action may preempt state law even if there is no formal, published regulation. *See Fellner,* 539 F.3d at 244; *see also Becker,* 88 Wash.App. at 111, 943 P.2d 700.[7]

¶ 25 Rollins also relies on *Wabash Valley Power Ass'n. Inc. v. Rural Electrification Admin.,* 903 F.2d 445 (7th Cir.1990). The *Wabash* court concluded that the Rural Electrification Administration (REA) could not preempt state law with a letter, stating that instead it "must establish rules with the force of law ." *Wabash.* 903 F.2d at 453–54. There are several key differences between the letter at issue in *Wabash* and the Coast Guard's Grant of Exemption at issue here. First, in the letter, the REA sought to exercise control over Wabash's electricity rates. *Wabash,* 903 F.2d at 450. The REA failed to show it had any legal authority to do so: "[n]either REA's letter to Wabash nor its brief in this court cites any provision of the statute allowing it to regulate the rates charged by its borrowers. Unless the REA has this authority, it is hard to see how it can preempt state law ...." *Wabash.* 903 F.2d at 453. Second, the court criticized the REA's letter as an "informal procedure" lacking legal force. *Wabash.* 903 F.2d at 454. Here, in contrast, the Coast Guard unquestionably possesses the authority to grant exemptions from boat safety

regulations. 45 U.S.C. § 4306. As discussed above, the Grant of Exemption letter is the product of a rigorous evaluation procedure distinct from the informal letter at issue in *Wabash.*

The Savinas Clause

***10** ¶ 26 Rollins also claims that the saving clause in the FBSA saves her state law claim from preemption. The saving clause provides that "[c]ompliance 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." 46 U.S.C. § 4311. In *Sprietsma,* the court concluded the FBSA did not preempt a state product liability claim in part because of the saving clause:

> [T]he "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes commonlaw actions."
>
> The contrast between its general reference to "liability at common law" and the more specific and detailed description of what is pre-empted by § 10 ... indicates that § 10 was drafted to pre-empt performance standards and equipment requirements imposed by statute or regulation.
>
> Indeed, compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving "liability at common law or under State law." In context, this phrase surely refers to private damage remedies. We thus agree. that petitioner's common-law tort claims are not expressly pre-empted by the FBSA.

Sprietsma, 537 U.S. at 6364. At the same time, however, the court recognized that the FBSA would preempt a state common law claim despite the saving clause if that claim directly conflicted with regulations. *Sprietsma,* 537 U.S. at 65 ("Of course, if a state common-law claim *directly conflicted with a federal regulation promulgated under the [FBSA],* or if it were impossible to comply with any such regulation without incurring liability under state common law, pre-emption would occur." (Emphasis added)).

¶ 27 Indeed, both federal and Washington courts have recognized that saving clauses like the one in section 4311 protect only those tort claims outside the scope of federal regulation. In *Geier v. American Honda Motor Co., Inc.,* 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), the court explained that saving clauses do not broadly protect tort claims, but rather prevent manufacturers from using compliance with federal regulation as a general defense to tort liability:

> Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words [in the clause] sound as if they simply bar a special kind of defense, namely, a defense that compliance with federal standard automatically exempts a defendant from state law .... It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does out interpretation conflict with the purpose of the saving provision, say, by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions ....
>
> ***11** Moreover, this Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."

Geier, 529 U.S. at 869–70 (quoting *United States v. Locke,* 529 U.S. 89, 106–07, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)). Indeed, the Senate report for the FBSA confirms that the purpose of the saving clause is to prevent defendants from using compliance with federal regulations as a broad defense to tort claims. *See Becker,* 88 Wash.App. at 108, 943 P.2d 700 ("According to the same Senate report, the purpose of the savings clause is 'to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.' " (quoting S. Rep. 92–248 § 40 (1971), 1971 U.S.C.C.A.N. at 1352)). With this understanding of the saving clause, we held that "[a] tort claim defeats the purposes of the [FBSA] and is therefore preempted only when the duty asserted conflicts with the Coast Guard's explicit decision either to adopt a particular standard or to leave the feature or structure unregulated." *Becker,* 88 Wash.App. at 111, 943 P.2d 700.

¶ 28 Unlike this case, the tort claim in *Sprietsma* was saved from preemption because it targeted an area that the Coast Guard had not regulated. The plaintiff in *Sprietsma* filed a product liability claim when his wife died after being struck by the propeller of a boat manufactured by Mercury

Marine. *Sprietsma.* 537 U.S. at 54. The plaintiff alleged the boat was not equipped with a propeller guard. *Sprietsma.* 537 U.S. at 55. Although the Coast Guard had considered promulgating a standard for propeller guards, it ultimately did not impose any propeller guard regulation due to "the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation.' " *Sprietsma,* 537 U.S. at 67. Therefore, "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." *Sprietsma.* 537 U.S. at 67.

¶ 29 Here, in contrast, the Coast Guard has promulgated a uniform standard for exhaust ventilation. 33 C.F.R. § 183.610 establishes a general requirement for ventilation systems, and the Coast Guard has granted personal watercraft an exemption to this requirement due to their unique design. Preemption did not foreclose the tort claim in *Sprietsma* because the Coast Guard never conveyed an "authoritative message" to either regulate boat propellers or that boat propellers were unnecessary. *Sprietsma.* 537 U.S. at 67. Because the Coast Guard had imposed no regulation *at all,* the tort claim could proceed. Rollins' claim, however, directly conflicts with "the Coast Guard's explicit decision ... to adopt a particular standard" regarding ventilation systems. *Becker,* 88 Wash.App. at 111, 943 P.2d 700. Thus, her claim "defeats the purposes of the [FBSA] and is therefore preempted." *Becker,* 88 Wash.App. at 111, 943 P.2d 700.

***12** ¶ 30 Rollins nevertheless argues her claim is not preempted because the regulation at issue presented Bombardier with a choice to use ventilation systems or not. In *Williamson v. Mazda Motor of Am. Inc.,* 562 U.S. 323, 131 S.Ct. 1131, 179 L.Ed.2d 75 (2011), the court analyzed a regulation under the National Traffic and Motor Vehicle Safety Act which allowed manufacturers a choice as to what type of seat belt-either lap belts or lap-and-shoulder belts-to install in rear middle seats. *Williamson.* 562 U.S. at 326–27. The plaintiff's tort claim alleged that Mazda should have installed lap-andshoulder belts rather than just lap belts. *Williamson.* 562 U.S. at 327. The court held that when a regulation offers a manufacturer a choice, that regulation does not preempt state law claims based on a manufacturer's choice if providing that choice is not central to federal regulatory objectives. *Williamson.* 562 U.S. at 336.

¶ 31 *Williamson* is inapposite for several reasons. First, Rollins' reliance on *Williamson* is a recasting of her previous argument that because the exemption does not prohibit ventilation systems Bombardier could nevertheless include a ventilation system without violating the Coast Guard's regulatory scheme. However, as discussed above, imposing additional requirements via tort liability defeats the Coast Guard's statutory authority to grant exemptions and creates an obstacle to federal regulatory objectives. *See Gracia,* 112 F.3d at 298 ("If Gracia's common law claim was not preempted, then manufacturers would be placed in a position where they could be subject to varying standards from state to state, which could not all be complied with simultaneously."); *see also Becker,* 88 Wash.App. at 111, 943 P.2d 700 ("A tort claim defeats the purposes of the [FBSA] and is therefore preempted only when the duty asserted conflicts with the Coast Guard's explicit decision either to adopt a particular standard or to leave the feature or structure unregulated.").

¶ 32 Second, the Bombardier's exemption does not provide the same "choice" available to manufacturers in *Williamson.* In 1999, the Coast Guard published an explanation of the exemption process in the Federal Register. The Coast Guard stated that once a boat model is subject to an exemption, the manufacturer cannot change the design of that model without petitioning for an amendment to the exemption:

> If the manufacturer changes the design or construction of a boat subject to the provisions of an exemption ... the manufacturer must petition the Coast Guard for an amendment to the provisions of the grant of exemption.

CP at 1748 (64 Fed.Reg. 201 (October 19, 1999)). Therefore, once Bombardier obtained the exemption for its Sea–Doo model, it could not alter the model without petitioning for an amendment to the exemption.

¶ 33 Further, the Coast Guard's ventilation regulation does grant manufacturers a choice, but Bombardier's Grant of Exemption exempts it from having to make that choice. The Coast Guard requires that every boat with a gasoline crank motor achieve ventilation by either (1) exposing the engine compartment to the open air or (2) equipping the model with an exhaust blower system. Manufacturers have the choice of which ventilation method to use. Bombardier's Grant of Exemption, however, allows it to avoid making this choice in the first place. Rollins' theory under *Williamson* would potentially allow a tort suit against a manufacturer who, for instance, chose to use an "open air" model rather than an exhaust blower model. It does not allow Rollins to sue a manufacturer who is exempt from the regulation altogether.

CONCLUSION[8]

*13 ¶ 34 Because Rollins' product liability claim directly conflicts with explicit, uniform safety standards promulgated by the Coast Guard acting within the scope of its congressionally delegated authority, it is preempted.

¶ 35 We affirm the order dismissing Rollins' product liability claim on summary judgment.[9]

WE CONCUR: SCHINDLER and APPELWICK, JJ.

All Citations

--- P.3d ----, 2015 WL 9274912

Footnotes

1 We use the terms jet ski and personal watercraft interchangeably.

2 For similar reasons, the Coast Guard's exemption cannot be viewed as a "minimum standard" upon which a state may place more stringent requirements. Rollins argues that the exemption does not conflict with her product liability claim because the exemption does not prohibit ventilation systems; it merely does not require them. Therefore, a manufacturer could include a ventilation system without violating any federal regulation. But, as explained in *Gracia* and *Becker,* exposing a manufacturer in compliance with federal standards to state common law liability defeats the purpose underlying those standards.

3 The exemptions at issue in *Gracia* had, in fact, been published in the Code of Federal Regulations. However, as Bombardier notes, this is simply due to a key difference between the FBSA and the NTMVSA. The latter requires exemptions to be published while the former does not. *Compare* 49 U.S.C. § 30113, § 30114 *with* 46 U.S.C. § 4305.

4 "On May 19, 1998, the National Transportation Safety Board (NTSB) issued a report that recommended the Coast Guard eliminate the existing process of exempting personal watercraft from the regulations in 33 CFR Parts 181 and 183 and develop safety standards specific to personal watercraft." CP at 1748. Examples of alternate types of regulations were suggested and public comments solicited: "(1) requiring that PWC manufacturers meet prescribed industry design standards ..., or (2) developing manufacturing regulations that address accidents associated with the specific design of the PWC." CP at 1748.

5 *See Sprietsma,* 537 U.S. at 67 ("The Coast Guard did not take the further step of deciding that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe .... *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.*" (emphasis added)).

6 Since 1972, the Coast Guard has granted exemptions from the regulations to certain other non-conventional boats including personal watercraft, air boats, hovercraft, submarines, drift boats, race boats, and mini bass boats.

7 We also note that accepting Rollins' argument under *Brock* - that the Coast Guard's "letter" is not a "regulation"-leads to an absurd result. If Rollins is correct that *Brock* controls, the Coast Guard's Grant of Exemption not only lacks preemptive force, it lacks any legal authority *at all. See Brock,* 796 F.2d at 539 (Regulations must be published in the Code of Federal Regulations to have "legal effect."). If that is the case, then Bombardier and other manufacturers have been designing and selling personal watercraft without ventilation systems in violation of 33 C.F.R. § 183.610 since 1988.

8 Given the trial court's findings, we are troubled by the alternative claims of impropriety alleged by Bombardier premised on State Farm's settlement conduct. But we decline to address those assertions here based on an incomplete record.

9 Because we conclude that Rollins' claim is barred by conflict preemption, we need not address the alternative theories of express preemption or field preemption.

WASHINGTON STATE COURT OF APPEALS

DIVISION ONE

CHERI ROLLINS, an individual, Petitioner, vs. BOMBARDIER RECREATIONAL PRODUCTS, INC., a foreign corporation, Respondent.	NO. 73635-3-I CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury of the laws of the State of Washington that on January 20, 2016 he caused to be filed with the Court of Appeals the original of petitioner's, petition for review to the Supreme Court with filing fee and this certificate and delivered the same to counsel for respondent via the parties' email delivery agreement.

Dated this 20th day of January, 2016, at Seattle, Washington.

Dan'L W. Bridges

ORIGINAL

McGAUGHEY BRIDGES DUNLAP, PLLC
3131 WESTERN AVE, SUITE 410
SEATTLE, WA 98121
(425) 462 - 4000
FACSIMILE (425) 637 - 9638