

**NEWSLETTERS****Rethinking Preemption In The Defense Of Aerosol Cans (And Other DOT-Regulated Containers)**November 1, 2013 | [Indianapolis](#)

Billions of self-pressurized aerosol cans are made and sold in the United States every year, and they contain and dispense thousands of different kinds of products — an almost infinite variety of different personal hygiene products, paints, solvents, lubricants, pharmaceuticals, confections, cleaning supplies, and novelty items. They are ubiquitous in modern society. But when aerosol can accidents happen, the consequences may be severe. Lawsuits, of course, soon follow.

The Dow Chemical Company (“Dow”) makes and sells a line of home improvement and home repair products bearing the trademarked name “GREAT STUFF™.” GREAT STUFF is a polyurethane-based insulating foam sealant sold in steel plate, self-pressurized aerosol cans.

Recently, a California plaintiff alleged that when she was cleaning out a garage, she discarded a long-expired 16 oz. aerosol can of Dow’s “GREAT STUFF Big Gap Filler.” She alleged that it spontaneously exploded, propelling its bottom plate into her gloved right hand with such force that it allegedly broke bones and caused permanent nerve damage. Plaintiff sued Dow, alleging all the traditional product liability and other tort theories.

Aerosol cans are comprehensively regulated by two primary federal statutory and regulatory regimes. First is the federal Hazardous Materials Transportation Act (“HMTA”) and the Department of Transportation’s (“DOT”) implementing regulations under that Act. Second is the Federal Hazardous Substances Act (“FHSA”) and the Consumer Products Safety Commission’s (“CPSC”) implementing regulations under that Act. Both the HMTA and FHSA contain express preemption clauses, but they differ markedly in scope and application.

---

™Trademark of The Dow Chemical Company or its affiliates.

The FHSA and the CPSC’s regulations are primarily directed to the labeling of consumer products, and its express preemption clause bars state law warning duties that are not “identical to the labeling requirements [under the Act].” 15 U.S.C. § 1261 Note (b)(1)(A).

The HMTA and the DOT’s regulations cover a much broader scope, however, regulating the movement in commerce of a wide variety of hazardous substances, including compressed and flammable gases (such as the propellants in aerosol cans), and the design, manufacturing, and testing of different kinds of aerosol cans and myriad other product containers. The HMTA’s complex and multipart preemption provision, in pertinent part, bars any state requirement “that is not substantively the

**RELATED PRACTICE AREAS**

Toxic Substances and Other Torts

same” as an HMTA or DOT requirement relating to “the packing, repacking, handling, labeling, marking, and placarding of hazardous material” and/or “the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.” 49 U.S.C. § 5125(b)(1)(B) & (E). The DOT has adopted by regulation exactly this same preemption provision. 49 C.F.R. § 107.202(a)(2) & (5).

Soon after the United States Supreme Court’s splintered express preemption decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), many end-use product manufacturers using DOT-regulated product containers argued that the HMTA expressly preempted tort law claims that their product containers were defectively designed or manufactured. But the courts uniformly rejected that argument. See, e.g., *Lyll v. Leslie’s Poolmart*, 984 F. Supp. 587 (E.D. Mich. 1997).

Despite this, Barnes & Thornburg LLP and in-house litigation counsel for Dow concluded that a 2011 Third Circuit HMTA preemption decision regarding the off-loading of bulk sulfuric acid from a rail tank car, *Roth v. Norfalco LLC*, 651 F.3d 367 (3d Cir. 2011), a 2012 DOT administrative rule-making decision regarding a fatality caused by an exploding steel compressed gas cylinder, *Common Law Tort Claims Concerning Design and Marking of DOT Specification 39 Compressed Gas Cylinders*, 77 Fed. Reg. 39567-01, 2012 WL 2521268 (July 3, 2012), *aff’d*, *In re Amtrol Holdings, Inc.*, \_\_\_ Fed. App’x \_\_\_, 2013 WL 4055530 (3rd Cir. Aug. 13, 2013), and a 2012 United States Supreme Court field preemption decision, *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012), combined together to make these prior adverse authorities obsolete.

Granting Dow’s summary judgment motion, the Court’s Order began by stating that the federal preemption arguments were moot because plaintiff’s claims failed for state law reasons. But the Court nevertheless did decide the preemption issues and held that plaintiff failed to present any evidence of Dow’s noncompliance with the HMTA or the FHSA, it rejected plaintiff’s anti-preemption arguments, and it entered summary judgment for Dow accordingly.

This appears to be the very first time HMTA express preemption has ever been accepted as a defense in a consumer product personal injury action alleging design and manufacturing defects in a DOT-regulated product container.

This case is *Garnelle Maxwell-Miller v. Dow Chem. Co.*, Case No. 37-2010-00058419-CU-PL-NC, Superior Court of the State of California, County of San Diego (Sept. 10, 2013).

For more information about this topic and the issues in this article, please contact Dean T. Barnhard in our Indianapolis office at (317) 231-7501 or [dean.barnhard@btlaw.com](mailto:dean.barnhard@btlaw.com).

Visit us online at [www.btlaw.com](http://www.btlaw.com).

©2013 Barnes & Thornburg LLP. All Rights Reserved. This page, and all

*information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg.*

*This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*