OSH ACT HAZARD COMMUNICATION STANDARD PREEMPTION OF STATE RIGHT TO KNOW LAWS UNDER *NEW JERSEY CHAMBER OF COMMERCE V. HUGHEY*, 868 F.2D 621 (3d CIR. 1989)

Under the Supremacy Clause,[1] a state law that conflicts with a federal statute or regulation is void.[2] With the expansion of the federal bureaucracy,[3] courts are adjudicating increasing numbers[4] of disputes between federal and state agencies which regulate similar areas of law. Preemption disputes frequently arise in the area of labor law, where federal agencies have largely supplanted the states' traditional regulatory function.[5] Cases involving the federal Occupational Safety and

1. U.S. CONST. art. 6, cl. 11.

2. The Supreme Court considers federal agency rules to have "no less preemptive effect than federal statutes." Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

3. Addressing Congress in 1976, President Ford stated:

> Federal programs and bureaucracies have grown geometrically. In the last fifteen years 236 departments, agencies, bureaus and commissions have been created while only 21 have been eliminated. Today we have more than a thousand different Federal programs [and] more than 80 regulatory agencies [whose] primary purpose is to regulate some aspect of our lives.

H.R. Doc. No. 495, 94th Cong., 122 CONG. REC. 13784 (daily ed. May 13, 1976) (statement of Pres. Ford).

4. There are two kinds of preemption. First, preemption is express when an agency occupies an entire field or states its intention to preempt a specific class of laws. Second, implied preemption occurs when compliance with both laws is impossible or when the effect of a state law is adverse to the purposes of federal law. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (state law is preempted to the extent state and federal laws conflict even if federal law does not occupy the field); *Fidelity Federal*, 458 U.S. at 153 (preemption is a question of congressional intent); Maryland v. Louisiana, 451 U.S. 725, 751 (1981) (subject matter of dispute preempted by a federal statute).

5. Preemption case law has arisen with respect to the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1982), the Occupational Safety and Health Act, 29 U,S.C. §§ 651-78 (1982 & Supp. IV 1986), the Railway Labor Act, 45 U.S.C. §§ 151-63 (1982), the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982) and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-461 (1988).

Health Act of 1970 (OSH Act)[6] provide a good example of the complexities presented by labor law preemption.[7] Even within narrowly defined areas of law, courts approach these issues inconsistently, proffering multiple and sometimes contradictory standards and methodologies to resolve alleged conflicts in the law.[8] In *New Jersey Chamber of Commerce v. Hughey*,[9] the Third Circuit held that the OSH Act preempts part of the New Jersey Worker and Community Right to Know Act (Right to Know Act)[10] requiring disclosure of hazardous substances in the work place. This holding established a new, two-step method of preemption analysis in OSH Act cases.

In *Hughey*,[11] representatives of the chemical and fragrance industries brought suit in federal district court against various New Jersey officials[12] seeking declaratory judgment and injunctive relief to prevent enforcement of the Right to Know Act.[13] The plaintiffs argued that

6. 29 U.S.C. §§ 651-78 (1982 & Supp. IV 1986).

7. According to one writer on OSH Act cases, "the issue of federal preemption has seldom been one with bright lines and clear legal precedent." Tyson, *The Preemptive Effect of the OSHA Hazard Communication Standard on State and Community Right to Know Laws*, 62 NOTRE DAME L. REV. 1010, 1023 (1987). Tyson concludes, the outcomes "often [turn] more upon the facts of the case and the philosophy of the court than upon the application of precise legal principles." *Id.*

8. The courts have established an array of standards in preemption disputes involving the National Labor Relations Act (NLRA). *Compare* United Steel Workers v. Meierhenry, 608 F. Supp. 201, 205 (D.S.D. 1985) (holding that when state law conflicts with NLRA, "importance of state law is of no materiality") *with* Vane v. Nocella, 303 Md. 362, 494 A.2d 181 (1985) (balancing state and federal interests).

9. 868 F.2d 621 (3d Cir. 1989).

10. N.J. STAT. ANN. §§ 34:5A-1 to 5A-31 (West 1984). *See infra* note 13 (describing contents). The Governor of New Jersey signed into law the New Jersey Worker and Community Right to Know Act in August of 1983. At that time, many other states had enacted or were considering similar legislation to remedy what one House report called OSHA's "miserly use of its delegated powers to deal with disease and death-dealing toxic substances." House Comm. on Government Operations, Failure to Meet Commitments Made in the Occupational Safety and Health Act, H.R. REP. No. 710, 95th Cong., 1st Sess. 13 (1977).

11. 600 F. Supp. 606 (D.N.J. 1985).

12. *Id.* at 609. These officials included the Commissioner of Environmental Protection, the Commissioner of Health, and the Acting Commissioner of Labor. In addition, the court allowed twenty-nine labor unions, environmental groups and citizens' groups to intervene on New Jersey's behalf. *Id.*

13. N.J. STAT. ANN. § 34.5A-1 to 5A-31. The Right to Know Act requires that New Jersey employers prepare and submit to the State Department of Health and local fire and police departments environmental and workplace surveys listing all hazardous substances in the plant. N.J. STAT. ANN. § 34:5A-7 (West 1984). The public may view these surveys upon request. § 34:5A-9. Employers additionally must ensure that all

the OSH Act's Hazard Communication Standard[14] expressly preempted[15] the Right to Know Act.[16] The defendants countered that the OSH Act is limited to employee health and safety issues,[17] whereas the Right to Know Act addresses broader concerns of community health and safety and is therefore exempt from preemption.[18] The District Court for the District of New Jersey granted plaintiffs' motion for partial summary judgment, holding that the OSH Act's preemption lan-

containers and chemical pipelines are properly labeled. § 34:5A-14. Whereas § 14(a) requires labeling of "environmental hazardous substances" and "workplace hazardous substances" by chemical name, § 14(b) requires labeling of all chemical containers, hazardous or otherwise, by listing the five most prevalent substances. The Act provides for exceptions to the labeling rules to protect trade secrets. *Id.* Finally, the Right to Know Act requires employers to warn employees of potential health risks and teach them how to properly handle hazardous substances. § 34:5A-13.

14. 29 C.F.R. § 1910.1200 (1988). The Hazard Communication Standard requires employers to (1) label containers, but not pipelines, containing hazardous substances, (2) train and educate workers regarding hazardous substances, and (3) issue a Material Safety Data Sheet (MSDS) for each hazardous substance in the workplace. Originally limited to employers in the manufacturing sector, the Standard was later extended to all of industry. 868 F.2d at 625.

15. *See* 29 C.F.R. § 1910.1200 (1988). The 1987 changes included the spelling out of procedures employers must follow in disclosing hazards, as well as reworded preemption language. One author feels that these changes broaden the Standard's preemptive scope, in addition to extending its coverage. Noting that the list of procedures includes some required of employers under New Jersey law, the commentator concludes that OSHA intended to overrule the recently-decided *Hughey II*. Note, *The Preemptive Effect of the Emergency Planning And Community Right-to-Know Act and OSHA's Hazard Communication Standard*, 67 WASH. U.L.Q. 1153, 1174-76 (1989). This may read too much into the articulation of what is already known (i.e. what constitutes hazard communication); the only substantive change concerned new industries subject to the standard. The author also fails to appreciate the agency's conscious retention of its prior preemption language, albeit in different form. *Compare* 29 C.F.R. § 1910.1200(a)(2) ("no state or political subdivision of a state may adopt . . . any requirement relating to the issue addressed by this Federal standard") *with* 29 C.F.R. § 1910.1200(a)(2) (1984) ("[t]his standard is intended . . . to preempt any state law pertaining to this subject."). *See* New Jersey Chamber of Commerce v. Hughey (Hughey II), 868 F.2d 621, 625 (2d Cir. 1989) (reading this change to show OSHA's intent to make clear that the standard applies to local units of government).

16. 600 F. Supp. at 616-17. Plaintiffs maintained further that the Right to Know Act's disclosure provisions constitute a deprivation of trade secrets without due process. Citing Ruckelshaus v. Monsanto, 476 U.S. 986 (1984), the court held this claim to be without merit. 600 F. Supp. at 622-28. The Third Circuit subsequently agreed. 774 F.2d 587, 598 (3d Cir. 1985).

17. *See infra* note 32 and accompanying text (reviewing the OSH Act's history and purpose).

18. 600 F. Supp. at 618.

guage[19] and the Hazard Communication Standard expressly preempted[20] the Right to Know Act[21] in its entirety.[22] On appeal (*Hughey I*), the Third Circuit reversed in part,[23] affirmed in part[24] and remanded the case to the district court for further findings.[25]

On remand,[26] the district court considered whether New Jersey's labeling requirements "in fact" contravened the OSH Act's purpose by presenting an increased risk of harm.[27] The court found the threat

19. *See infra* notes 34-35 and accompanying text (discussing OSH Act's preemptive language).

20. 600 F.2d at 618. Because Congress included language of preemption in the Standard itself, "the question is one of statutory interpretation, not implied preemption." *Id.* The district court here mistakenly read express and implied preemption to be mutually exclusive analyses. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977) (applying express and implied preemption analysis); *see infra* notes 42-49 and accompanying text (applying both express and implied analyses).

21. As further support for its holding, *Hughey I* noted that New Jersey chose not to seek approval for its regulatory scheme pursuant to § 18(b) of the OSH Act. 600 F.2d at 618. *See* 29 U.S.C. § 667(b) (allowing any state to submit a plan to take over development and enforcement of workplace health and safety standards "relating to" an existing OSHA standard). The Third Circuit repeated this theme in *Hughey I*, stating, "the role of the states is circumscribed by § 18(b)." United Steelworkers of America v. Auchter, 763 F.2d 728, 733 (3d Cir. 1985). *Cf. infra* note 22 (questioning this reasoning).

22. The court used architectural and botanical allusions to show that the Right to Know Act is inseparable, describing its otherwise acceptable, "non-workplace regulatory plan" as "superimposed upon a regulatory foundation" covered by the OSHA standard, and finding the plans "inextricably intertwined." 600 F. Supp. at 622. *Hughey I*'s presumption of inseparability is nowhere explained, but the court apparently feared that states were appending trivial, non-workplace rules to their right-to-know laws in order to defeat "unwanted federal legislation." *Id.* at 619 (quoting Perez v. Campbell, 402 U.S. 637, 651-2 (1971)).

23. 774 F.2d 587, 595-96 (3d Cir. 1985). The court held the Hazard Communication Standard expressly preempted those sections on chemical surveys and container labeling whose "primary purpose" was employee protection from workplace hazards. *Id.*

24. *Id. Hughey I* let other survey and labeling sections stand, to the extent that they addressed environmental and community protection in addition to occupational safety. *Id.* at 596. The court further found the various sections of the Act to be severable under New Jersey law. *Id.*

25. The court remanded to resolve the issue of implied preemption, not reached in *Hughey I*. *Id. See supra* note 4 (explaining implied preemption).

26. *See* New Jersey Chamber of Commerce v. Hughey, Nos. 88-5283, 88-5332 (D.N.J. Feb. 5, 1988).

27. *Hughey II*, 868 F.2d at 628. The court weighed conflicting expert testimony on the likelihood that a dual federal and state labeling system would confuse, and hence endanger workers handling chemicals. *Id.* at 629-30.

minimal, and therefore the Standard did not impliedly preempt the Right to Know Act.[28] On appeal (*Hughey II*),[29] the Third Circuit affirmed the lower court's implied preemption holding,[30] and ruled that the first appeal foreclosed rehearing on the issue of express preemption.[31]

Congress enacted the OSH Act to combat an alarming incidence of job-related injuries to workers.[32] To this end, Congress vested the Occupational Safety and Health Administration (OSHA) with broad powers to regulate work-place conditions.[33] Section 18 of the OSH Act preempts state law by allowing state courts or agencies jurisdiction over "any occupational safety or health issue with respect to which no standard is in effect."[34] Each standard, then, defines its own scope of

28. *Id.* at 630. The court ruled that thorough safety training, required by the OSH Act, would minimize the risk of workers' confusion. *Id.*

29. 868 F.2d 621 (3rd Cir. 1989).

30. *Id.* at 631. In accepting the lower court's factual findings, the Third Circuit applied a "clearly erroneous" standard of review. *Id.* at 629. The court also disagreed with the plaintiffs' legal argument that modifications to OSHA's labeling and training programs, needed under a dual labeling system, created an "impermissible intrusion" into the federal program. *Id.* at 630. The court noted that OSHA framed its standards in flexible terms. *Id.* Lastly, the court rejected the argument that states may not take actions OSHA declined to take, restating *Hughey I's* holding that Congress did not intend for OSHA to occupy the field of occupational safety. *Id. See infra* notes 39-40 (discussing intended role for states in occupational safety).

31. *Id.* at 626-28. In Justice Becker's view, *Hughey I* "evince[d] a clear holding," despite its failure to specify the preempted sections of the New Jersey Act. *Id.* at 627. He next proceeded to interpret the opinion's admittedly "somewhat opaque" language, creating (in part) his own "binding precedent." *Id.* Judge Becker held that the prior decision struck down § 14(a) as it applied to substances that are hazardous in the work-place but are environmentally safe. However, other hazardous substances were subject to the labeling requirement. *Id.* at 628. The Standard preempted none of § 14(b), requiring the labeling of all substance containers by chemical composition. *Id.* at 627-28.

32. According to its statement of purpose, the OSH Act seeks to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651 (1982 & Supp. IV 1986). Congressional hearings at the time revealed that on-the-job accidents were killing 14,500 and disabling 2.2 million workers per year. Moreover, the Public Health Service estimated that industry introduced a new, potentially toxic chemical into the workplace every twenty minutes. S. REP. NO. 1282, 91st Cong., 2d Sess. 1-5 (1970).

33. The Secretary of Labor may promulgate standards "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §§ 652(8), 655 (1982 & Supp. IV 1986). In one court's words, Congress gave OSHA "almost unlimited discretion to devise means to achieve the congressionally mandated goal." United Steelworkers of America, AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1230 (D.C. Cir.), *cert. denied,* 453 U.S. 913 (1980).

34. 29 U.S.C. § 667(a). A state wishing to avoid preemption may submit a plan to

preemption.[35] The Hazard Communication Standard,[36] however, more explicitly states its intent to preempt "any legal requirements of a state, or political subdivision of a state, pertaining to the subject."[37] Predictably, the courts have easily struck down state regulatory schemes that regulate hazard communication for the benefit of workers.[38] Nevertheless, the OSH Act contemplates and even encourages states to regulate workplace safety in certain instances.[39] Responsibility for occupational safety regulation is clearly shared between state and federal agencies.[40] The difficult question arises where a state regu-

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OSHA to regulate any area with respect to which an OSHA standard is in place. 29 U.S.C. § 667(b),(c) (1982 & Supp. 1986). As an incentive, the agency will pay for up to ninety percent of the cost of developing the plan, and up to half the enforcement costs. 29 U.S.C. § 672(f),(g) (1982 & Supp. 1986). Some courts have read these sections to preempt state law, concluding that state regulations touching on workplace safety issues are void because the state chose not to submit a plan. *See supra* note 21 (discussing this analysis). Such reasoning is defective because it creates a presumption that the state intended to regulate aspects of occupational safety "relating to" an OSHA standard.

35. The OSH Act complicates the determination of preemptive scope, though, by failing to define an "issue" under § 18. *See* Note, *The Preemptive Effect of OSHA's Hazard Communication Standard Outside the Manufacturing Sector*, 85 B.Y.U. L. REV. 815, 817 (1985).

36. *See supra* note 14 (describing the Standard). The Hazard Communication Standard was promulgated pursuant to § 655(b)(7) of the OSH Act, authorizing the Secretary of Labor to develop standards "prescrib[ing] the use of labels or other appropriate forms of warning" to protect employees from occupational hazards. 29 U.S.C. § 655(b)(7) (1982 & Supp. IV 1986).

37. 29 C.F.R. § 1910.1200(a)(2) (1988). The Standard also repeats OSH Act's preemption language in the affirmative, stating that § 18 prohibits a state from "adopt[ing] or enforc[ing], through any court or agency, any requirement relating to the issue addressed by this standard, except pursuant to a federally-approved state plan." *Id.* Nearly identical language appears in OSHA Instruction STP 2-1.113, Office of State Programs, D(4) (April 9, 1984).

38. *See, e.g.*, Ohio Mfrs. Ass'n v. City of Akron, 801 F.2d 824 (6th Cir. 1986), *appeal dismissed*, 108 S. Ct. 44 (1987); United Steelworkers of America v. Auchter, 763 F.2d 728, 735 (3d Cir. 1985). *See infra* notes 87-92 and accompanying text (discussing *Auchter*); *infra* note 99 (discussing *Akron*).

39. *See* 29 U.S.C. § 651(b)(11) (encouraging "the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws"); § 667(a) (preserving the right of states to regulate in areas not covered by an OSHA standard); § 653(b)(4) (preserving state common law and statutory rights of action for injured workers); § 672 (providing grants to states to formulate and administer plans).

40. *See, e.g.*, American Federation of Labor v. Marshall, 570 F.2d 1030, 1035 (D.C. Cir. 1978) (the OSH Act creates a "dynamic federal-state partnership in occupational health and safety matters"); Shimp v. New Jersey Bell Telephone Company, 145 N.J. Super. 516, 368 A.2d 408, 410 (1976) ("OSHA in no way preempted the field of occupational safety").

lates hazard communication to ends other than, or in addition to, worker safety.[41]

Although the Supreme Court has not addressed whether the Hazard Communication Standard preempts state law,[42] several decisions address federal law pre-emption under similar circumstances. In *Jones v. Rath Packing Co.*,[43] the Court compared federal[44] and state rules[45] governing weight labeling of flour packages.[46] The Court applied an express preemption analysis and upheld the California requirement under the federal rule's preemption language.[47] The Court, however, found the practical effect of the state rule inimical to the congressional goal of preventing consumer confusion.[48] The state rule was therefore impliedly preempted, though the Court failed to describe the facts that supported this finding.[49]

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41. *See infra* notes 71-74, 94-98 and accompanying text (discussing cases on state regulatory efforts beyond worker safety).

42. The Court has entertained challenges to particular OSH Act regulations and standards. *See, e.g.*, Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980) (upholding regulation protecting employees from employer discrimination for refusal to do a task employee reasonably believes to be dangerous); American Textile Mfrs. Institute v. Donovan, 452 U.S. 490 (1981) (upholding standard limiting occupational exposure to cotton dust).

43. 430 U.S. 519 (1977).

44. 15 U.S.C. §§ 1451-61 (1988) (Fair Packaging and Labeling Act); 21 U.S.C. §§ 301-92 (1988) (Federal Food, Drug and Cosmetic Act).

45. CAL. BUS. & PROF. CODE § 12211 (West Supp. 1977).

46. The Court also passed on labeling rules affecting wholesale meat packers, holding that because the Federal Meat Inspection Act, 21 U.S.C. §§ 601-95 (1988), specifically allows for reasonable loss of weight in distribution and the California law does not, the latter is expressly preempted. 430 U.S. at 529, 532.

47. 430 U.S. at 538. The FDCA "supersedes" state requirements which are "less stringent than or require information different from" their Federal counterparts. 15 U.S.C. § 1461. Because it does not allow for weight loss due to loss of moisture, the California act is more stringent than the Federal rule. 430 U.S. at 541.

48. 430 U.S. at 534. The purpose of the FDCA was to "facilitate value comparisons among similar products." 15 U.S.C. § 1461. The Court reasoned that California packers distributing within and outside of the state would overpack containers to compensate for weight loss in shipment, whereas California packers who exported their entire product would not. As a result, some consumers of California flour in other states would be precluded from making accurate weight comparisons. 430 U.S. at 544.

49. Justice Rehnquist, dissenting, objected to the means by which the Court concluded that the California rule would cause overpacking and consumer confusion. Rehnquist charged that the majority's reasoning rested on "unwarranted speculations that hardly rise to that clear demonstration of conflict that must exist before the mere existence of a federal law may be said to preempt state law operating in the same field." *Id.* at 544 (Rehnquist, J., dissenting).

Using a similar two-step analysis in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*,[50] the Court upheld a state law arguably touching on safety aspects of nuclear power generation, a field entirely preempted by federal agency law.[51] The disputed California provisions[52] required utilities to demonstrate adequate storage capacity for nuclear waste before the state licensed any new reactor.[53] Against industry allegations of unlawful intent, the Court accepted California's position that these safeguards served economic, rather than safety, purposes.[54] By citing the legislature's published statement of intention, the majority avoided a search for "true motives."[55] Considering whether the state law was impliedly preempted, the Court held that the California law would not frustrate the Atomic Energy Act's goal of promoting the peaceful use of nuclear energy.[56]

In *Allis-Chalmers v. Lueck*,[57] the Court relied solely on implied pre-

50. 461 U.S. 190 (1983).

51. *Id.* at 209. The Atomic Energy Act provides that state or local agencies may regulate nuclear powerplants "for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k) (1982). The Court read this to give the Federal Government "complete control of the safety and 'nuclear' aspects of energy generation." 461 U.S. at 211.

52. CAL. PUB. RES. CODE §§ 25000-25986 (West 1977 & Supp. 1983).

53. California utility companies argued that sections of the Atomic Energy Act, 42 U.S.C. §§ 2018, 2021(k), expressly preempted the state law, because the latter regulated plant construction and evinced a safety purpose. 461 U.S. at 204. In the Court's view, the case raised the "difficult proposition" of how the California law was to be "construed and classified." *Id.* at 212.

54. *Id.* at 216. The states may decide what their generating requirements are and how to fulfill them, but they may not impose a moratorium on nuclear power plant construction based on safety concerns. *Id.* In this instance, the Court accepted the state's argument that its law was economic in nature, as demonstrated by a legislative committee document stating that the waste disposal problem is one of costs and not safety. *Id.* at 216.

55. 461 U.S. at 216. Conceding that the factors surrounding the legislature's decision to enact the waste law are "subject to varying interpretation," the Court refused to divine California's true reason, declaring that "inquiry into legislative motive is often an unsatisfactory venture." *Id.* There are, however, limits to accepting official legislative statements of purpose. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979) (questioning state's purported conservation motive in a law banning the export of natural minnows while not limiting the number sold instate); Perez v. Campbell, 402 U.S. 637 (1971) (rejecting state's safety motive for a law revoking the driver's license of judgment debtors from traffic accidents who subsequently declare bankruptcy).

56. *Id.* at 222. Congress disfavored nuclear electrification "at all costs," authorizing states "to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Id.* at 223.

57. 471 U.S. 202 (1985).

emption to resolve a conflict between a Wisconsin tort claim[58] and section 301 of the Labor Management Relations Act.[59] The Court considered Congress' wish to create a unified labor relations system with sole jurisdiction over labor contract disputes.[60] Finding that the claim did not involve a "nonnegotiable state-law right," the Court held that a tort action "derive[d] from" a contract obtained through a collective bargaining agreement is impliedly preempted.[61]

With *Mackey v. Lanier Collections Agency & Service, Inc.*,[62] the Supreme Court recently resolved a preemption dispute, arising under the Employee Retirement Income Security Act of 1974 (ERISA), that involved preemption language similar to that found in the OSH Act.[63] In *Mackey*, a collection agency sought to garnish funds of a vacation plan subject to ERISA for debts incurred by certain plan participants.[64] Writing for the majority, Justice White affirmed the Georgia Supreme Court's ruling that ERISA preempted a Georgia garnishment

58. The plaintiff, an employee, alleged that his employer handled his disability insurance claim in bad faith, a tort under Wisconsin law. *Id.* at 207. The insurance policy in question was the fruit of a LMRA-collective-bargaining agreement. *Id.* at 205.

59. 471 U.S. at 210. Because the LMRA allows, but does not explicitly require, plaintiffs to sue in federal court on breach of collective bargaining agreements, the Court found it necessary to determine whether Congress intended federal courts to hear all such contractual disputes under federal law, over and above state law interpretations. *Id.* at 209. *See* 29 U.S.C. § 185 (1988).

60. 471 U.S. at 212. In the interests of "interpretive uniformity and predictability," the Court stated that federal common law must govern in disputes requiring the interpretation of labor contracts. *Id.* The Court concluded that preemption was called for in the present case because "only that result preserves the central role of arbitration in our 'system of industrial self-government.'" *Id.* at 219. By comparison, the OSH Act posits uniformity as a desirable, but secondary, goal to that of ensuring worker health and safety. *See infra* note 92 and accompanying text (safety over uniformity in the Third Circuit).

61. 471 U.S. at 214, 220. The holding excluded suits "tangentially involving a provision of a collective-bargaining agreement." *Id.* at 212. In so ruling, the Court employed a standard preempting any state law claim whose resolution is "substantially dependent" on an analysis of contractual terms. *Id.* at 221.

62. 108 S. Ct. 2182 (1988).

63. Section 514(a) of ERISA provides as follows:

> . . . the provisions of [ERISA] shall supercede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan . . .

29 U.S.C. § 1144(a) (emphasis supplied). *Cf.* OSH Act section on preemption, *supra* note 34 and accompanying text. For a general discussion of ERISA preemption, see Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984).

64. *Mackey*, 108 S. Ct. at 2184.

statute[65] that specifically barred garnishment of funds in an ERISA benefit plan.[66] With respect to Georgia's garnishment statute of *general* application,[67] however, the Court found that Congressional intent and the plain language of ERISA indicated that the vacation funds would be amenable to garnishment in connection with a state court judgement.[68] Preemption, therefore, depended on a simple semantic difference between the various state statutes.[69]

State and federal courts initially interpreted the OSH Act as broadly preempting state regulatory efforts.[70] In *Five Migrant Workers v. Hoffman*[71] migrant farm workers sought to compel New Jersey to enforce a state law providing for preoccupancy inspections of migrant labor camps.[72] Prior to this action, the state legislature had elected to discontinue its plan, with the view that OSHA inspection standards obvi-

65. GA. CODE ANN. § 18-4-22.1 (1982).

66. *Mackey*, 108 S. Ct. at 2185. The Court relied on Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97, (1983) and its progeny, which read ERISA's "relating to" language as synonymous with making "reference to." *Id.* In *Mackey*, Georgia's statute directly and unambiguously stated its application to ERISA plans. The Court also noted that legislative "good intentions" could not diminish the broad preemptive scope of § 514(a). *Id.*

67. GA. CODE ANN. § 18-4-20 *et seq.* (1982 & Supp. 1987).

68. *Mackey*, 108 S. Ct. at 2191. Unlike the preempted statute, Georgia's general statute "does not single out or specifically mention ERISA plans of any kind." *Id.* at 2186. Equally significant to the Court, ERISA expressly provided in § 206(d)(1) that "pension" benefits could never be garnished under state law. By contrast, Congress said nothing about garnishing "welfare" benefits of the type involved in *Mackey*. *Id.* at 2188-89.

69. The overinclusive statute survived as applied to § 514(a) of ERISA, while the narrow statute fell. The Court's actions in the second part of the opinion seem to undercut its depiction of ERISA's "broad preemptive scope" in the first part. *Id.* at 2185. *Mackey's* significance may rest in the Court's literalistic reading of "relating to," as requiring direct reference to the federal law in the body of the statute being examined.

70. *See, e.g.*, Stanislawski v Industrial Comm'n., 99 Ill. 2d 36, 457 N.E.2d 399 (1983). In *Stanislawski*, the court dismissed a survivor's action for damages under Illinois statutes adopting OSHA standards as that state's own and creating rights of action for injured employees against employers who violated Illinois' standards. The court held that state rules merely duplicating Federal standards are preempted unless the state submits to OSHA a plan which is subsequently approved. *Id.* at 40, 457 N.E.2d at 401. Although technically correct in holding that no action may proceed under a void law, the court failed to consider that the OSH Act leaves unaffected any state remedies for violation of an occupational law that the OSH Act included. *But cf. Berardi, infra* notes 76-81 (upholding a similar law making building owners liable to construction workers for injuries resulting from safety violations).

71. 136 N.J. Super. 242, 345 A.2d 378 (1975).

72. *Id.* at 245, 345 A.2d at 380. From 1972 through 1975 the New Jersey Depart-

ated state regulation.[73] The state district court dismissed the case, finding the OSH Act was "so broad and sweeping as to encompass the entire gamut of migrant worker protection in the field of inspection [of] housing quarters."[74]

By the early 1980s, some courts began to set limits on OSH Act preemption.[75] In *Berardi v. Getty Refining and Marketing Co.*,[76] a construction worker sued a building owner for personal injuries[77] under a New York law requiring owners to provide safety equipment at construction sites.[78] Noting that the OSH Act's scope of preemption of state "related" law had yet to be "clearly delineated," the court refused to extend the OSH Act to owners and contractors despite their functional similarity to employers in the construction context.[79] The court reasoned that because the OSH Act preserves state common law remedies[80] and the New York law is remedial in nature, the state law was not preempted. Finally, the court justified its result by noting that the state law complements the OSH Act's policy of promoting safe

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ment of Labor inspected camps both before and after occupancy under an OSHA-approved plan.

73. *Id.* The New Jersey Department of Labor defended its inaction by indicating that the federal program preempted its plan. *Id.*

74. *Id.* at 246, 345 A.2d at 381. The court found that the state and federal standards were "substantially similar," despite the fact that the latter only provided for post-occupancy camp inspection. *Id.* at 245, 345 A.2d at 380. This comparison was inessential to the outcome, however, as the court based its holding primarily on its reading of the OSH Act. Indeed, the court opined that preemption cannot "turn upon a comparison of the respective regulations." *Id.* at 247, 345 A.2d at 381.

75. *See, e.g.*, Harrington v. Dept. of Labor and Industry, 163 N.J.Super. 595, 395 A.2d 533 (1978) (upholding toilet and drinking water regulations for migrants under a New Jersey law related to those rejected in *Hoffman*). In dictum, *Harrington* narrowed the preemptive scope of OSHA's migrant housing standard, stating that the "situation" was such that "state regulation in the same field would [not] be impermissible interference." *Id.* at 536.

76. 107 Misc.2d 451, 435 N.Y.S.2d 212 (1980).

77. The plaintiff fell while repairing the defendant's water tower, sustaining serious injuries. *Id.* at 452, 435 N.Y.S.2d at 214.

78. The New York law imposed a duty on owners, contractors and their agents, in construction, demolition or repairs to provide workers safety devices or adequate protection. Breach of this duty rendered culpable parties liable for civil damages. N.Y. LAB. LAW §§ 240, 241 subd. 6 (McKinney 1986).

79. *Id.* at 453, 435 N.Y.S.2d at 214-15. Neither owners nor contractors are mentioned anywhere in the OSH Act. Ironically, the employer in *Berardi* was held ninety-five percent liable under common law contribution for its role in the accident. *Id.* at 461, 435 N.Y.S.2d at 219.

80. 29 U.S.C. § 653(b)(4) (1982 & Supp. IV 1986).

working conditions.[81]

Two years after *Berardi*, but before OSHA issued its Hazard Communication Standard, a federal court upheld a West Virginia right-to-know act[82] against an industry challenge. In *West Virginia Mfrs. Assn. v. State of West Virginia*[83] the plaintiffs argued that either a "related" standard already existed, or that OSHA's choice not to issue a notice and posting standard indicated that the agency found none necessary.[84] Limiting its analysis to express preemption, the court found that the allegedly related standard regulated the "level of exposure" rather than hazard communication,[85] and that an absence of standards alone has no preemptive force.[86]

A federal court addressed the Hazard Communication Standard for the first time in *United Steelworkers of America v. Auchter*,[87] an action brought by labor representatives.[88] As in *West Virginia*, the Third Circuit in *Auchter* confined its discussion to express preemption[89] and held that the standard "applies to the exclusion of state disclosure laws which have not been approved" pursuant to section 18(b).[90] Neverthe-

81. 107 Misc.2d at 461, 435 N.Y.S.2d at 219. A state law that supports a federal policy goal is not an independent justification for its constitutionality, but rather a defense to an implied preemption challenge. The court may have used this policy argument as a "tie-breaker" in a close case of express preemption.

82. W. VA. CODE § 21-3-18 (1985 & Supp. 1989).

83. 542 F. Supp. 1247 (S.D.W.V. 1982).

84. *Id.* at 1253-54.

85. *Id.* at 1254.

86. *Id.*

87. 763 F.2d. 728 (3d Cir. 1985).

88. The Steelworkers, with eight states that intervened or filed *amicus curiae*, challenged the new standard and sought a ruling as to its preemptive effect on state safety regulations. In the plaintiffs' view, OSHA wrongly limited the standard to the manufacturing field, failed to adopt a certain list of hazardous chemicals compiled by the National Institute for Occupational Health and Safety (NIOSH) and included an overly broad trade secret exemption. *Id.* at 736. The court upheld the standard but ruled that the issue of its application beyond the manufacturing sector was ripe for review. *Id.* at 738-39. The court also found substantial evidence supporting the Secretary of Labor's choice not to use the NIOSH list, but struck down the trade secret provision as overbroad. *Id.* at 739-42.

89. By not conducting an implied preemption analysis, the court seems to have limited its holding to state rules substantially similar to the Hazard Communication Standard.

90. 763 F.2d at 735. The court observed that intervenor states had not, and probably would not, seek OSHA approval in the future for their plans, as "section 18 contemplates that if they do so, they take on the fiscal burdens of enforcement now borne by the United States." *Id.* at 734. This ignores the reason the states went to court in the

less, *Auchter* raised, in dictum, policy questions central to implied preemption analysis. The court suggested that the Secretary of Labor's wish to limit the burden of multiple state laws on industry might conflict with the OSH Act's paramount safety principle.[91] According to the Third Circuit, Congress meant to elevate worker safety over strictly commercial considerations.[92]

Soon after *Hughey I*, a federal district court upheld most of the Pennsylvania Worker and Community Right-to-Know Act[93] in *Mfrs. Ass'n of Tri-County v. Knepper.*[94] In *Knepper*, labeling requirements for chemical suppliers withstood an express preemption, challenge because the court did not consider the "primary purpose" of the labeling requirements to be identification of hazards to employees.[95] In its analysis for implied preemption the court simply noted that because the plaintiffs did not allege that dual labeling systems would confuse workers the law was not impliedly preempted.[96] The federal standard,

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first place, which was to challenge the federal standard. Also, the court's assessment of the economic distribution is not entirely accurate because the OSH Act provides state grants of up to half the cost of enforcing approved regulations. *See supra* note 34 (explaining state grant provision).

91. *Id.* at 734. In the court's view, such a result would be "arguably at odds with [the] congressional intention that the OSH Act provide a federal floor for safety in the workplace." *Id.*

92. *Id.* The burden of state laws on industry "does not appear to have been a significant congressional concern." Rather, "Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not." *Id.* This reading of legislative history comports with the Supreme Court's finding that the OSH Act's "fundamental objective [is] to prevent occupational deaths and serious injuries," to which end regulations are "to be liberally construed to effectuate the [aforementioned] congressional purpose." Whirlpool Corp. v. Marshall, 445 U.S. 1, 12-14 (1980).

93. PA. STAT. ANN. tit. 35, §§ 7301-7320 (Purdon Supp. 1989). The court found Pennsylvania's hazard disclosure law to be "substantially similar although not identical" to its New Jersey counterpart. Mfrs. Ass'n of Tri-County v. Knepper, 801 F.2d 130, 134 (3d Cir. 1986).

94. 623 F. Supp. 1066 (M.D. Pa. 1985), *aff'd in part, rev'd in part, remanded*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987).

95. *Id.* at 139. The court observed that the rule "addresses broader concerns than workplace safety" because labeling by suppliers "will facilitate employer compliance" with sections of the act addressed to environmental and community health concerns. *Id.*

96. *Id.* at 139-40. The court in *Hughey* remanded at this point for a factual determination on the standards' compatibility. 774 F.2d at 596. *Knepper* took a hands-off approach, and seemed to modify the *Hughey* test by ruling that the court need not undertake implied preemption analyses where the plaintiff fails to plead that the stated standard will impair a federal goal. 801 F.2d at 139-40.

however, expressly preempted, the state requirements insofar as they required employers to label containers, because exemptions for employers without employees indicated an overt safety purpose.[97] The court applied *Hughey's* two-part test to other portions of the law, achieving similar results.[98]

The implied preemption analysis alluded to in *Auchter*, along with a new express preemption standard, arrived with the first appellate decision in *Chamber of Commerce v. Hughey*.[99] With *Hughey*, the Third Circuit applied this analysis to resolve whether the State of New Jersey impermissibly regulated hazard communication to workers or properly regulated environmental, health and welfare issues under its police power. The *Hughey* court looked beyond definitions,[100] scrutinizing the state's Right to Know Act to distinguish repugnant from acceptable portions. Legislative intent[101] was the basis for *Hughey's* express preemption analysis, establishing a "primary purpose" test.[102] The court held that New Jersey's "workplace hazardous substance" rules could be separated into permissible parts, enacted to protect workers and nonworkers alike, and impermissible parts, addressed to workers

97. *Id.* at 140.

98. 801 F.2d at 136, 141. The court upheld rules requiring suppliers to disseminate material safety data sheets and to undertake hazardous substance surveys. *Id.* Respecting the latter rule, the court found relevant to its express preemption analysis New Jersey's separate workplace hazard and environmental hazard survey rules, as opposed to Pennsylvania's single survey requirement. *Id. See infra* note 110 and accompanying text (discussing this discrepancy). The court also rejected rules providing for hazard education and posting of hazardous substance surveys. *Id.* at 138, 142.

99. *See infra* notes 101-05 and accompanying text (discussing of *Hughey I's* two-part test). The Sixth Circuit followed *Hughey I's* general approach in Ohio Mfrs. Ass'n v. City of Akron, 801 F.2d 824 (6th Cir. 1986), but with important qualifications. *City of Akron* cited *Hughey I* for the proposition that state right-to-know statutes are preempted in the manufacturing field. *Id.* at 828. In contrast to *Hughey I*, the court limited its discussion to express preemption for rules touching on occupational safety, and declined to engage in a "primary purpose" analysis, giving preemptive effect to the secondary congressional goal of uniformity in the law. The court indicated that "OSHA could legitimately determine that uniformity would aid in [compliance] with [its] standard." *Id.* at 834.

100. The OSH Act's problematic, undefined terms include "relating to," "pertaining to" and "issue." *See supra* notes 21, 35, 37 and accompanying text (citing and discussing terms).

101. The inquiry into motive will vary according to the degree of deference a court shows toward legislative determinations. *See supra* note 55 discussing differing approaches to this question.

102. 774 F.2d at 595. *See infra* notes 110-11 and accompanying text (discussing "primary purpose" inquiry).

alone.[103] Under this test, "environmental hazardous substance" rules were facially neutral and survived scrutiny.[104] The court next applied the implied preemption analysis to acceptable sections, remanding to determine whether their practical effect inhibited the OSH Act's primary goal of fostering occupational safety.[105] On remand, the district court concluded that these portions would not confuse or endanger employees.

The *Hughey* court resolved a difficult preemption problem, namely over-lapping regulations with allegedly differing purposes, in a manner consistent with the policy and analysis of recent Supreme Court rulings. In view of *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*,[106] the court correctly deferred to New Jersey's determination of purpose for its express preemption analysis. *Hughey* also followed longstanding doctrine, restated in *Allis-Chalmers v. Lueck*,[107] that congressional intent defines the scope of implied preemption involving federal law.[108] Lastly, *Hughey's* two-step test closely resembles the approach taken by the Supreme Court in *Jones v. Rath Packing Co.*[109]

Hughey requires federal courts in the Third Circuit to study both express and implied preemption in disputes involving the Hazard Communication Standard. *Hughey's* "primary purpose" inquiry is subject to the charge that states may avoid preemption through fortuitous draftsmanship, as seen in *Knepper*.[110] The two-step test remedies this

103. *Id.* at 596.

104. *Id.* at 593.

105. *Id.* at 596.

106. 461 U.S. 190 (1983). *See supra* notes 50-56 and accompanying text (discussing *Pacific Gas*).

107. 471 U.S. 202 (1985). *See supra* notes 57-61 and accompanying text (discussing *Lueck*).

108. *See supra* notes 4, 92 and accompanying text (discussing deference to Congress). Courts may reach opposite results, particularly given that legislation may have more than one purpose. The court may try to reconcile competing goals, as in *City of Akron*, 801 F.2d 824, or focus on the predominant one, as in *Hughey*. *See supra* note 99 (discussing *City of Akron*).

109. 430 U.S. 519 (1977). *See supra* notes 43-49 and accompanying text (discussing *Rath*).

110. In a sense, *Hughey* reduces express preemption to a game of competing definitions to avoid preemption. *See supra* note 96 comparing substantively similar provisions in *Hughey* and *Knepper* treated differently by the respective courts. The term "primary purpose" is also sufficiently vague. A court may interpret this as fifty-one

criticism, through implied preemption analysis.[111] Moreover, the test motivates states to avoid preemption in this context to increase worker safety, a goal consonant with federal policy.[112] Because preemption analyses are generally case-by-case,[113] and dependent on regulation determinations,[114] the holding in *Hughey* has a limited impact.[115] By the same token, prior OSH Act preemption cases had little bearing on *Hughey's* outcome, even if they evinced an overall bias towards preemption.[116] In light of this background, and despite the Hazard Communication Standard's wording which may have a broad interpretation of preemptive effect,[117] the *Hughey* court ruled correctly and left behind a fair test, sufficiently flexible to settle complicated preemption issues under the OSH Act.

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percent of a state's purpose, something more than this, or something less, in the case where numerous purposes exist, with one relatively greater than the rest.

111. *But see supra* note 99 (limiting analysis to express preemption where charging party does not allege conflict with congressional purpose).

112. The New Jersey rules are broader than the Hazard Communication Standard, requiring, for instance, the labeling of pipelines within the factory. *See supra* notes 13 and 14 (listing provisions of the state law and federal standard).

113. "The full scope of the preemptive effect of federal labor-contract law remains to be fleshed out on a cases-by-case basis." *Lueck*, 471 U.S. at 220. As the hazard communication cases discussed in this comment show, each preemption analysis is shaped by the language of the laws in controversy.

114. In *Hughey I*, the court rejected plaintiffs' comparison of preemption cases involving the Employee Retirement Income Savings Act (ERISA) to OSH Act cases, calling ERISA's preemption language "much more explicit than the language of the OSH Act." 774 F.2d. at 593. The ERISA provisions in controversy state that they "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," as compared to the more passive OSH Act language which grants states jurisdiction over areas where there no OSHA standard exists. 29 U.S.C. §§ 1001-1461 (1988).

115. This saves *Hughey* from the criticism that its "window" for escaping preemption will lead to unfavorable results in other areas, such as where a state might wish to engage in actions incidentally impeding the flow of interstate commerce.

116. *Hughey I* demonstrably overstated the case when it concluded that the OSH Act's preemption language in section 18(a) "has been consistently interpreted by OSHA and the courts to bar the exercise of state jurisdiction over issues addressed by an OSHA standard." 600 F. Supp. at 618. A number of cases in varying contexts tell otherwise. *See supra* notes 70-98 and accompanying texts (citing and discussing cases prior to *Hughey I* in which state laws survived OSH Act attack).

117. *See supra* notes 33-35 and accompanying text (discussing the preemptive language of the OSH Act and the Hazard Communication Standard).

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