Tips for Representing Consumers and Investors in the Supreme Court

DAVID C. FREDERICK AND BRENDAN J. CRIMMINS

The authors are members of the Washington, D.C., law firm of Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C. Although one or both of us served as counsel for parties in many of the cases discussed in this article, the views expressed here are our own and do not necessarily reflect the opinions of any of our current or former clients, or our law firm.

Commentators have vigorously debated the accuracy of labeling the Roberts Court as "pro-business." In many respects, that label is accurate, but in some important cases involving consumer rights, the Court has not bent reflexively toward pro-business positions. For many years, we have represented consumers and investors—among other types of clients—in cases before the Supreme Court. We have seen a number of recurring themes in Supreme Court cases pitting individual plaintiffs against business interests. Those themes can be illustrated through a discussion of recent Supreme Court cases involving preemption of state tort law, as well as Supreme Court cases involving securities fraud and breach of fiduciary duty.

Our primary aim in this article is to focus on some of the strategic themes and tactics from cases in which consumers and investors have prevailed in the Supreme Court. But we first note a fundamental point about Supreme Court advocacy: the importance of first principles. We are not breaking new ground in remarking that counsel representing any client—plaintiff or defendant—in the Supreme Court must focus on first principles. What do we mean by "first principles"? We mean that, when the case presents a question involving the meaning of a federal statute—as most Supreme Court cases do—counsel must focus intensively on the text and structure of the statute and employ all of the traditional tools of statutory interpretation, including a careful examination of the common-law background against which Congress enacted the law. Circuit precedent, so much a part of advocacy in the lower courts, matters little, if at all, once a case reaches the Supreme Court. With that overarching point in mind (and we will return to it), we turn to the lessons that can be learned from preemption cases.

Preemption Disputes in Consumer Cases

Businesses operating in regulated industries frequently contend that federal law bars consumers from relying on state law to recover for harms caused by the companies' products. That defense is known as preemption, and it is perhaps the most common constitutional claim in civil litigation. Under the Supremacy Clause, "the Laws of the United States" are "the supreme Law of the Land," notwithstanding anything "in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted the Supremacy Clause to mean that federal law preempts contrary state law. Preemption comes in multiple flavors. Congress sometimes says expressly in a federal statute that certain types of state laws are preempted. In other cases, courts will read into statutes and regulations an

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implication that state law is preempted, such as when it is impossible for a person to comply with both state and federal law. In civil cases, preemption often arises when the defendant argues that a state statute, regulation, or common-law rule on which the plaintiff relies to support its case is preempted by federal law.

The Supreme Court has considered a number of these preemption cases in recent years. The Court has been increasingly receptive to preemption claims, even as it has sought to limit the federal government's powers vis-à-vis the states in other areas (such as the Commerce and Spending Clauses). Cases in which injured consumers have prevailed in opposing preemption exhibit a number of common attributes.

The first common feature of these cases is the importance of the common-law background against which Congress legislates. Counsel for successful consumer litigants have demonstrated a history of state regulation of the product in question and of state tort law providing remedies for those harmed by the product. In *Wyeth v. Levine,* 555 U.S. 555, 575 (2009), for example, musician Diana Levine had to undergo the amputation of her arm after receiving an injection of Wyeth's anti-nausea drug Phenergan. A Vermont court awarded damages under state tort law for Wyeth's failure to provide proper instructions for the safe use of the drug. Wyeth argued that state law was preempted because the Food and Drug Administration (FDA) had approved the drug's

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label. In the Supreme Court, we demonstrated that state common law had long provided remedies for patients injured by dangerous drugs, both before and after Congress created the FDA. Respondent's Brief at 1, 3–4, 6. The Supreme Court relied on that history in rejecting Wyeth's preemption argument, explaining that the absence of any statutory language expressly preempting state tort law, combined with Congress's "certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."

The Supreme Court similarly cited a history of state regulation in *Bates v. Dow Agrosciences,* 544 U.S. 431 (2005). The Texas peanut farmers in that case alleged that Dow's pesticide Strongarm had severely damaged their crops. They sought compensation under a Texas consumer protection law. Dow contended that a federal pesticide-safety statute administered by the Environmental Protection Agency preempted the farmers' claims. We argued to the Supreme Court that, "from the earliest uses of agricultural chemicals, farmers commonly pursued claims for compensation under common law and state statutes for injuries caused by pesticides." Petitioners' Brief at 4. The Supreme Court referred to that history at multiple points in its opinion ruling for the peanut farmers. *Bates* 431, 440–41, 449, 451–52. The Court's opinion explained that, if Congress had intended to end the "long history of tort litigation against manufacturers of poisonous substances" such as Dow, it "would have expressed that intent more clearly" in the statute. *Id.* at 449.

Altria v. Good, 555 U.S. 70 (2008), provides another illustration. In that case, consumers of "light" cigarettes manufactured by Altria's subsidiary Philip Morris argued that the company had violated a Maine consumer protection statute by fraudulently marketing "light" cigarettes as less harmful than regular cigarettes. Altria claimed that the lawsuit was preempted by a federal cigarette-labeling statute and by Federal Trade Commission (FTC) policy regarding cigarette advertising. As in *Levine* and *Bates*, we argued successfully on behalf of the consumers that "[p]rotecting the public against fraudulent business practices ha[d] long been a core focus of state consumer-protection law." Respondents' Brief at 30. In rejecting the preemption defense, the Supreme Court cited the traditional role of state law in regulating advertising, as well as the FTC's long reliance on cooperative state regulation. *Altria*, 77, 79 n.6.

Federal Agencies and Preemption

The second common feature of cases in which the Supreme Court has rejected preemption challenges to consumer suits involves the role of the federal agency charged with administering the federal law on which the defendant relies for its preemption defense. The federal government, represented by the solicitor general, regularly participates as an amicus curiae in preemption cases between private parties. Whether the solicitor general supports or opposes preemption in a particular case depends on a variety of factors, including the party affiliation of the incumbent presidential administration.

The solicitor general's views matter in preemption cases. To be sure, the Supreme Court does not blindly defer to a federal agency's ultimate conclusion as to whether state law is preempted in a particular case. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 613 n.3 (2011). But the Court has said that an agency's views on preemption "should make a difference," at least when those views reflect the agency's considered and consistent judgment on the issue. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 335–36 (2011). Some justices have indicated that they would go further and in appropriate cases would "pay particular attention" or even "give special weight" to an agency's position on preemption. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2481 (2013) (Breyer, J., dissenting, joined by Kagan, J.).

Because the federal government's views will likely play a role in the outcome of a preemption case in the Supreme Court, counsel litigating such a case would be wise to engage with the government promptly after the Supreme Court grants review. The solicitor general will formulate the United States' position in the Supreme Court, with input from interested agencies and components of the federal government. Accordingly, counsel should seek to meet with officials in the general counsel's office at the agency that administers the law at issue, and then with lawyers in the solicitor general's office. Counsel should work to explain to those officials both why their client's position is correct as a matter of congressional intent and why the federal government's interests would be served by a ruling in their client's favor.

Levine, *Bates*, and *Altria* illustrate the solicitor general's role in the Supreme Court's preemption cases. In *Altria*, the acting solicitor general opposed Altria's implied preemption defense, articulating the FTC's position that the consumers' lawsuit in that case posed no obstacle to any FTC policy. The Supreme Court relied on that advocacy in ruling in favor of the consumers. 555 U.S. at 87.

In *Levine* and *Bates*, by contrast, the solicitor general advocated in favor of preemption. To blunt the impact of that advocacy, we devoted significant portions of our briefs to demonstrating that the solicitor general's pro-preemption advocacy conflicted with past positions articulated by the relevant federal agencies. Respondent's Brief at 55–56, *Levine*; Petitioners' Brief at 28 and Petitioners' Reply Brief at 4, 9 n.6, 15 n.12, *Bates*. In *Levine*, the Supreme Court gave "no weight" to the government's pro-preemption position because the FDA had provided no "reasoned explanation" for changing its position on the role of state tort law. 555 U.S. at 577, 581. In *Bates*, the Court explained that the

government's preemption argument was "particularly dubious given that just five years ago the United States advocated the [anti-preemption] interpretation we adopt today." 544 U.S. at 449.

Other helpful strategies for combating a pro-preemption government amicus brief include soliciting an anti-preemption amicus brief from former officials of the relevant agency, as well as demonstrating that the agency lacks the authorities and resources to be the exclusive guarantor of consumer safety. Both strategies proved useful in *Levine*. In that case, two former FDA commissioners filed an amicus brief explaining that the agency had traditionally viewed state law as a complementary form of protection for patients, and the Court favorably cited that brief in its opinion. 555 U.S. at 579 n.12. The *Levine* Court also relied on several published reports documenting limits on the FDA's resources and capacity to serve as the sole regulator of drug safety. *Id.* at 578 & n.11. In *Altria*, the Court observed that the FTC had "long depended on cooperative state regulation to achieve its mission because, although one of the smallest administrative agencies, it is charged with policing an enormous amount of activity." 555 U.S. at 79 n.6.

The Supreme Court has held that state law claims based on duties that are substantively the same as duties imposed by federal law are not preempted.

The third common feature of preemption cases is the importance of focusing on the specific state law duties at issue and whether those duties can be considered parallel to the applicable federal law requirements. The Supreme Court has held in a number of cases that state law claims based on duties that are substantively the same as duties imposed by federal law are not preempted. That has been true even when state law provides for remedies not available under federal law and even when federal law would bar the state from imposing duties that exceed the requirements of federal law.

In *Bates*, for example, the federal statute expressly preempted state pesticide labeling requirements "in addition to or different from" federal requirements. 7 U.S.C. § 136v(b). We argued that even if that provision applied to the farmers' claims, many of those claims were not barred because the claims "paralleled" the federal statutory prohibition on selling misbranded pesticides. Petitioners' Brief at 29, 38. The Supreme Court adopted the "parallel requirements" argument. It explained that the federal statute does not preempt common-law labeling duties that are equivalent to the federal statute's misbranding standard. *Bates* 544 U.S. at 447–49. The Court emphasized the importance of carefully considering the substance of the state law duty to determine whether it truly is parallel to the federal standard: Although state law "need not explicitly incorporate" the federal standard or use "*identical* language," the state and federal duty must be "*genuinely* equivalent." *Id.* at 447, 454. The Court remanded the case to the court of appeals for a claim-by-claim analysis.

Counsel litigating preemption questions should be alert to opportunities to make a "parallel requirements" argument not only in the Supreme Court but also in the lower courts. Indeed, the Supreme Court has refused to consider "parallel requirements" arguments that were not first presented in the lower courts. In *Bartlett*, the Court held that it was impossible for the drug company in that case to comply with both state and federal law, meaning that the patient's state law claim was preempted. But the Court went out of its way to leave open whether the same result would apply to "claims that parallel the federal misbranding statute." *Bartlett* at 2477 n.4. It observed that such a claim was not presented at trial in that case. *Id.* Similarly, in *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008), the Court acknowledged that the express-preemption statute in that case "does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements." at. Although the patient there argued that the case raised parallel claims, the Court noted that the argument had not been made in the court of appeals and therefore declined to address it. *Id.*

Investor Rights Cases

Recurring themes also can be discerned in cases in which investors have prevailed in the Supreme Court against securities issuers and investment fiduciaries. One common theme is the adoption by lower courts of rules of law that are designed to shield businesses from the costs of private securities-fraud litigation but that lack a foundation in statutory law or Supreme Court precedent. For example, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1194–97 (2013), the Court addressed a rule some lower courts had adopted requiring investors to prove materiality to obtain certification of a class action under Rule 23 of the Federal Rules of Civil Procedure. Rejecting that rule, the Court explained that the relevant provision of Rule

23 requires a showing that common questions predominate over questions affecting only individual class members. So long as the question of materiality is common to the class, proof of materiality goes to the merits of the claim, not the availability of class certification. Objecting to that conclusion, the issuer of the securities, Amgen, argued that "policy considerations" required a different result because orders granting class certification impose undo settlement pressure on defendants. The Supreme Court observed, however, that Congress had taken other steps to address perceived abuses in securities fraud litigation, through the enactment of the Private Securities Litigation Reform Act of 1995 and the Securities Litigation Uniform Standards Act of 1998. The *Amgen* Court explained that it had "no warrant to encumber securities-fraud litigation by adopting an atextual requirement of precertification proof of materiality that Congress, despite its extensive involvement in the securities field, has not sanctioned." *Id.* at 1202.

Two other recent securities fraud cases in which the Supreme Court ruled for investors without dissent provide additional illustrations of this point. In *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011), the Court unanimously rejected a rule adopted by some lower courts that a securities fraud claim could not be based on a pharmaceutical company's failure to disclose reports of side effects associated with one of its drugs unless the number of reports was statistically significant. And, in *Merck & Co. v. Reynolds*, 559 U.S. 633, 651 (2010), the justices declined to endorse an interpretation of the statute of limitations for securities fraud suits that arose from a "court-created" doctrine but that had no foundation "in the text" of the statute.

This theme can also be seen in cases construing other federal statutes intended to protect investors, such as two unanimous decisions involving the scope of fiduciary duties owed to mutual fund investors and pension plan participants. Both cases involved the same basic problem: the defendant fiduciaries had caused investors and plan participants to pay mutual fund fees that far exceeded the fees offered by other, materially identical funds. In the first case, *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), the lower courts ruled that the plan participants' lawsuit was untimely because any breach of fiduciary duty occurred only when the fiduciaries originally selected the over-priced funds for the plan. In the Supreme Court, the fiduciaries declined to defend the court of appeals' reasoning, and the Supreme Court unanimously reversed, relying on traditional principles of trust law to conclude that plan fiduciaries have a continuing duty to monitor investments and remove imprudent ones. *Id.* at 1828–29 (2015). In the second case, *Jones v. Harris Associates*, 559 U.S. 335 (2010), the Supreme Court unanimously overturned a lower court decision that functionally had stripped the fiduciary duty of mutual fund advisers under the Investment Company Act of any substantive meaning. Again, in an unsuccessful effort to preserve its victory in the lower courts, the defendant had abandoned the lower courts' rationale once the case got to the Supreme Court. 559 U.S. 335, 343–44 (2010).

Conclusions

The discussion of these cases reinforces for practitioners the importance of focusing on first principles when litigating before the Supreme Court and in positioning a case for Supreme Court review in the lower courts. In the investor cases, courts of appeals had adopted rules of law that limited the rights of investors, relying in many instances on a view that the limits were necessary to protect businesses from the risks of civil liability. Attention to first principles and careful statutory interpretation revealed that the courts of appeals had substituted their own policy judgments for those of Congress, and as a result, the Supreme Court overturned the rules those courts had developed.

Another significant insight from these cases is that, contrary to the prevailing view in some quarters, investors and consumers can and do prevail in litigation before the Roberts Court. Some in the progressive legal community hold the view that litigation in the Supreme Court should be avoided at all costs, lest an unfavorable rule of law be adopted nationwide. We believe that a more nuanced perspective is appropriate. When investors have a strong case, they should seek Supreme Court review, as the investors did in *Tibble* and *Jones v. Harris*.

The investor rights cases we have discussed also illustrate two of the themes we discussed in connection with preemption cases—the significance of the common-law background against which Congress legislates and the role of the solicitor general as an amicus curiae. In *Tibble* and *Jones v. Harris*, the investors' briefs focused heavily on common-law trust principles to give meaning to the statutory fiduciary duties at issue. The Supreme Court's opinions in those cases relied on the same common-law authorities the investors had emphasized in their briefing. *Tibble*, 135 S. Ct. at 1828; *Jones*, 559 U.S. at 346–47. With respect to the solicitor general's role, the Court's opinions in *Tibble*, *Amgen*, and *Matrixx* each relied in significant part on arguments made by the solicitor general in support of the investors' positions. *Tibble*, 135 S. Ct. at 1829; *Amgen*, 133 S. Ct. at 1199, 1202; *Matrixx*, 563 U.S. at 40, 42, 44 n.10.

Representing consumers, investors, and other private plaintiffs in the Supreme Court remains a special challenge for a lawyer. Advocates facing this opportunity must reorient their thinking away from circuit precedent and toward first principles. Remembering the themes and tactics we have identified will, we hope, put advocates well on their way to a successful representation for their clients. ■