NFJE Symposium Maps Boundary between Federal and State Law

By Michelle Parrini

The National Foundation for Judicial Excellence, a nonprofit organization that, in part, provides meaningful educational programs to the judiciary, held its fifth annual symposium July 10–11, 2009, at The Drake Hotel in Chicago. The 2009 symposium, titled "Mapping the Legal Frontier: The Uncertain Boundary Between Federal and State Law," was attended by 118 state court appellate judges from 35 states. By all accounts, this year's program, chaired by Matthew Y. Biscan, a member of Clisham Satriana & Biscan LLC, in Denver, was once again greatly successful. In the words of one participant, "The faculty was superb—and very balanced in presenting both sides of each issue. The major themes… were and are of continuing importance to state appellate judges."

David A. Dana, professor of law and associate dean for research, Northwestern University School of Law.

The symposium sought to explore three critical areas in the "the ongoing doctrinal debate about federal preemption." David A. Dana, Federal Preemption of Common-Law Tort Claims at 5 (July 2009), http://www.nfje.net/Resources.aspx0. First, the symposium explored "how courts should reconcile the idea that states deserve a sphere of autonomy and respect and the idea, and indeed clear constitutional principle, that federal law is supreme." *Id.* at 10. Second, it examined how the Federal Arbitration Act (FAA) "applies in state court," when it preempts state laws and "unsettled issues." Christopher R. Drahozal, The Federal Arbitration Act and Its Impact on State Arbitration Laws at 251 (July 2009), http://www.nfje.net/Resources.aspx0. Third, the symposium considered the discretion of states "in authorizing and limiting punitive damages awards" and the extent to which courts have determined that due process limits this discretion. Christy Jones, The Historical Rationale for Punitive Damages, Its Evolution, and Current Application at 275 (July 2009), http://www.nfje.net/Resources.aspx0. These topics are important not only due to the confusion they create, the frequency with which they arise in courts, nor simply because preemption is a strong affirmative defense; preemption in particular is a paramount constitutional principle that implicates our beliefs about democracy and, as noted by all symposium speakers, affects individual citizens, businesses and learned intermediaries, as well as legislators and political actors.

The symposium opened Friday evening with the presentation, "Court Funding: From Crisis to Stability," by Robert N. Baldwin, executive vice president and general counsel of the National Center for State Courts. Mr. Baldwin discussed the projected impact of fiscal year 2010 state budget shortfalls on state court budgets and services, court responses and strategies that administrators could consider to meet budgetary challenges.

David A. Dana, professor of law and associate dean for research, Northwestern University School of Law, delivered Saturday morning's first session, "Developments in Federal Preemption Law in the Federal and State Courts." Discussing recent major preemption cases, which differed in conclusions and deference to the states and federal agencies, he characterized our current federal preemption doctrinal categories, as evident in these decisions, as "perhaps unavoidably vague," partly due to the "large issues involved." *See* Dana at 7–10. He noted that some have faulted institutions, such as Congress, for not ensuring clarity in legislation, but pointed out that it's hard to anticipate legislation's consequences, partly because it's often written quickly. Further, difficulties in ensuring clarity arise from the political process: ambiguity in legislation can reflect different interests, all of which become imbedded in a law. He also mentioned that the Supreme Court "hasn't spoken clearly on preemption," especially on implied preemption's legitimacy—nor explained "what the presumption against preemption means" or clarified who bears the burden of proof. Further, Court justices disagree about whether legislative intent is important. *Id.* at 10.

Brian Wolfman, plaintiffs' attorney and co-director of the Georgetown University Law Center's Institute for Public Representation, and Lawrence S. Ebner, defense attorney and partner with McKenna Long & Aldridge LLP in Washington, D.C.

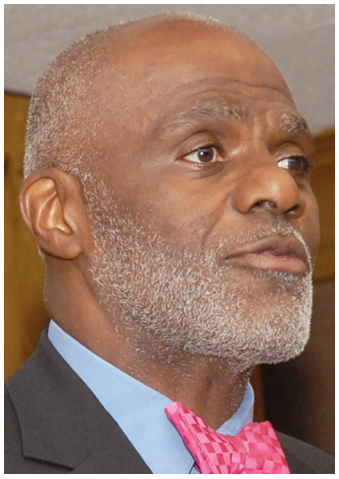
In concluding, Mr. Dana identified questions about broad issues that he thought resonated beyond the cases but underpinned recent preemption decisions. First, how do we view democracies and the democratic process? For instance, do we view federal agencies as

closer to the people than the courts, and therefore, defer to them because the president is elected? Or, do we defer to the states, for instance, when following California's example, 16 other states—one-third of the country—also adopted expansive auto rules, because this reflects democracy? Second, "how much can we trust juries, and how crazy is state tort law?" he asked. Mentioning Justice Alito's *Wyeth v. Levine* dissent, 555 U.S. ___ (2009), No. 06-1249, which "hinted" that he distrusted juries, Mr. Dana posited that faith in or distrust of state tort systems and juries are the "subtext" that underpins preemption decisions: if someone has faith in the tort system and juries, that person is less concerned about preemption than someone who does not. *Id.* at 12.

Following Mr. Dana, Brian Wolfman, a notable plaintiffs' attorney and co-director of Georgetown University Law Center's Institute for Public Representation in Washington, D.C., and Lawrence S. Ebner, an eminent defense attorney and partner with McKenna Long & Aldridge LLP in Washington, D.C., participated in a point-counterpoint, "The Role of State and Federal Courts in Federal Preemption Cases—A Spirited Discussion Between Adversaries at the Bar."

Christopher R. Drahozal, the John M. Rounds Professor of Law, University of Kansas School of Law.

Mr. Wolfman reasoned that the theoretical, doctrinal premise asserted to support preempting state law tort claims is flawed—that state positive law, or regulation, and state tort law have the same effect. Brian Wolfman, Understanding Tort Preemption Claims at 229–30 (July 2009), http://www.nfje.net/Resources.aspx0. "Tort law has a non-regulatory component—a compensatory component—which is virtually never a component of regulation," Mr. Wolfman said. Tort law's ability to compensate is one way that it and positive law are "indisputably" not "the same," he said, although he characterized the Supreme Court's view on the equivalency of state tort law with state positive law as "schizophrenic." *Id.* at 230–37. Further, Mr. Wolfman remarked that federal agencies have powers to move quickly, while tort law's regulatory effect is "incremental." Addressing one of the arguments lobbed against state tort systems, Mr. Wolfman noted that no empirical evidence exists that it "stifles innovation," and in fact, *Wyeth v. Levine* amici medical briefs presented empirical evidence to the contrary. He argued that in certain situations, given our legal culture, civil liability is necessary: it provides compensation when appropriate and extra incentive to sellers and manufacturers to act responsibly in providing information to regulatory agencies so that they can do their jobs. "Even socially beneficial products can create harm, but we keep them on the market," he said. Given the current political reality, non-universal health insurance and non-universal accident insurance and "a regulatory system meant to balance risks and benefits in a highly imperfect system motivated by profit," staffed by underfunded federal agencies, Mr. Wolfman contended that preemption is not in the best interest of the public or federal agencies. Given the reality, he asked, "why wouldn't we want to preserve state common law torts?" *Id.* at 241–46.



Hon. Alan C. Page, Associate Justice of the Minnesota Supreme Court.

Mr. Ebner countered with the industry's view. With the caveat that he disagreed, he began by mentioning that the industry believes that state courts understand preemption less well than federal and will not find for it. He tested these ideas, finding that while at the trial court it may be "tougher to win in state than federal court," preemption can frequently prevail in the highest state courts. After reviewing 42 preemption cases in state supreme courts (2005–2009), he discovered that 18 courts found in favor of preemption, while 24 found against. Mr. Ebner identified issues that continue to divide the Supreme Court and thus create difficulty for state courts. For instance, he agreed with Mr. Dana that applying the "presumption against preemption" challenges state appellate courts.

He argued that it is fundamentally unfair to be held liable under state law for products approved by the federal government. Regardless of the important functions that state tort law serves, he said that under the Supremacy Clause, state law includes state common law, citing several cases. He said that the vast majority of manufacturers would not market harmful products knowingly and that failure to "self-regulate" is "economic suicide."

Illustrating Mr. Dana's point that sometimes preemption debates reveal concerns about the capabilities of juries, Mr. Ebner pointed out that a jury sees a plaintiff only after injury and is unconcerned with risk-benefit balancing. He quoted the part of Justice Alito's *Wyeth v. Levine* dissent that made that point. Additionally, he reasoned that, even assuming Mr. Wolfman was correct that federal agencies required more funds to do their jobs, the proper solution is to raise it with Congress: pressure from 50 states on a manufacturer makes tort law in effect a federal regulatory agency. Quot-

Christy D. Jones, a partner with Butler Snow O'Mara Stevens & Cannada PLLC, in Jackson, Mississippi.

ing the *Riegel v. Medtronic* decision authored by Justice Scalia, 552 U.S. ___ (2008), No. 06-179, Mr. Ebner proposed that the Court had "put Congress on notice": when a statute expressly preempts state requirements, it includes state common law causes of actions.

The luncheon symposium keynote was delivered by the Hon. Alan C. Page, Associate Justice of the Minnesota Supreme Court, who spoke on his concern about judicial independence and an impartial judiciary in the wake of the Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which allows judges to talk about their political opinions and solicit campaign contributions. He mentioned a recent *USA Today* poll in which 90 percent of the respondents viewed judges as incapable of impartiality, which, given circumstances, he found unsurprising. In addition, Justice Page shared three beliefs: "where the law ends tyranny begins," "where the law fails is when impartiality fails," and humans tend to "dance with the one that brung you."

Then NFJE Board of Directors President William R. Sampson, of Shook Hardy & Bacon LLP, in Kansas City, Missouri.

Praising the Arizona judicial system, he advocated for a system of merit selection coupled with retention elections and judicial evaluations, which he thought will reduce the amount of money flowing into the elections. Given that the country was at the time embarking on the confirmation process for Justice Sonya Sotomayer to the U.S. Supreme Court, Justice Page offered a few observations. Namely, he remarked that the process "doesn't enhance public trust and enhance confidence in the judiciary or address this partisanship that further erodes the appearance of neutrality." One symposium participant said, "Good choice of speaker, given the recent *Caperton* [*v. Massey*] decision [556 U.S. ___ (2009), No. 08-22]."

After the keynote, Christopher R. Drahozal, the John M. Rounds Professor of Law, University of Kansas School of Law, spoke on "The Federal Arbitration Act and Its Impact on State Arbitration Law." He remarked that litigation increasingly arises from arbitration clauses. In discussing the key Court holding, *Southland Corp. v. Keating*, 465 U.S. 1 (1984), Mr. Drahozal said that although controversial, *Southland* appears to have settled that the Federal Arbitration Act (FAA) preempts conflicting state laws, but how it applies in different settings remains uncertain. For the most part, the FAA applies to "the full reach of Congress' Commerce Powers in domestic arbitration arenas." *See* Drahozal at 251–53. In general, the Supreme Court has determined that under the FAA's Section 2, with a few exceptions, states can apply general contract defenses to challenge and negate arbitration agreements. Mr. Drahozal offered a four-part test to analyze preemption and discussed its application in state courts. *Id.* at 253–58, 264, 265. The analysis involves asking four questions: (1) does the state law apply to contracts generally, *id.* at 253–54; (2) have parties expressly contracted to apply the state law, *id.* at 254; (3) does the state law invalidate the parties' arbitration agreement, *id.* at 255; and (4) do one of these alternative preemption theories apply: *Keystone, Inc., v. Triad Sys. Corp.*, 971 P.2d 1240, 1244 (Mont. 1998); Revised Uniform Arbitration Act; Anti-FAA; Pro-Contract; or FAA Exclusivity, *id.* at 255–56. He noted that it's unclear when the FAA preempts state court procedures. *Id.* at 259. As for unsettled issues, Mr. Drahozal mentioned that the courts are split on and he wished that the Supreme Court would decide whether the FAA preempts using unconscionability to invalidate arbitration agreements. *Id.* at 257. Finally, Mr. Drahozal described pending legislation, including the Arbitration Fairness Act (2009), which would render "predispute arbitration agreements unenforceable." *Id.* at 262–63.

The final speaker of the day was Christy D. Jones, a partner with Butler Snow O'Mara Stevens & Cannada PLLC, in Jackson, Mississippi. She discussed "The Historical Rationale for Punitive Damages: Evolution and Current Application." Ms. Jones framed the discussion with these questions: "We must consider why punitive damages are awarded and why the [Supreme] Court has decided that due process requires that such awards be limited." *Mathias v. Accor Ecomony Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). First, she traced the evolving purpose of punitive damages, describing their purpose today as "retribution and deterring harmful conduct," (quoting *Exxon Shipping v. Baker*, 128.S. Ct. 2605, 2621 (2008). *See* Jones at 271–73. Second, she traced the evolving analytical framework imposed by courts to ensure punitive damages comport with due process and described the three rationales for due process controls as articulated by Judge Posner in *Mathias*: proportionality, reasonable notice and punishment based on the wrong rather than the wrongdoer's status. *Id.* at 273–77. In short, Ms. Jones argued that unpredictably large jury punitive damages awards punish not the actual wrongdoers, but stockholders, company employees and "communities where employees live and work." *Id.* at 278. She suggested that we have not actually settled who we intend to punish through punitive damages, nor has the current Supreme Court settled what is exorbitant.

Program Chair and member of the NFJE Board of Directors Matthew Y. Biscan, of Clisham Satriana & Biscan LLC, in Denver.

The symposium concluded with a panel, moderated by DRI Secretary-Treasurer Kimberly D. Baker, on which all speakers sat, graciously taking and responding to lively questions from the floor.