



JCCP4574 *In re Byetta Cases* (and similar incretin-mimetic products)

September 15, 2015 Request For Further Briefing

At the oral argument on September 11, 2015, discussion was had on whether or not the issue presented by the motion (motions in the case of the MDL) was a question of fact or question of law. This Court would appreciate further briefing on the subject. While counsel are allowed to reformulate the question presented, this Court would suggest the issues to be briefed are:

Is the determination of whether or not federal “impossibility” conflict preemption under *Wyeth v. Levine* (2009) 555 U.S. 555 applies to a given case a question of law for the court or a question of fact for a jury (assuming one or more relevant facts are disputed)? If it is a question of law, does the Court have the power to resolve disputed facts antecedent to resolving the question of law? If it does, may it do so in the context of a summary judgment motion or does the factual question need to be reached via a ruling at trial (e.g. a ruling in a bifurcated trial of the affirmative defense of federal preemption)

The citations which follow are not intended to be exhaustive, and some of them appear to deal with “field preemption” situations rather than “conflict preemption” so careful reading of the cases is encouraged. Further, the reference – by analogy – to the process by which courts decide whether or not to apply the common-law tort of strict liability for engaging in ultrahazardous activity to a given kind of endeavor is not intended to be the only analogous circumstance in which fact-finding might precede the resolution of a “question of law” by the Court. Feel free to cite other examples (pro or con).

Since the motion for summary judgment before the JCCP court is traditionally the type of motion practice where the existence of a triable issue of material fact is sufficient to defeat the motion, it is understandable that the briefing (particularly by plaintiffs) set up the arguments in this posture. Further, it bears noting that the Supreme Court in *Wyeth v. Levine* used the term “clear evidence” when it set up the federal conflict preemption defense based on impossibility; this implies that factual showings (pro and contra) are relevant to the analysis. Then again, the preemption ruling by the trial court which was affirmed by the U.S. Supreme Court was a ruling made by the judge himself pursuant to post-verdict motion practice which included judicial fact-finding based on the record made during the trial. Preemption, as such, appears not to have been a question submitted to the jury in *Levine*. If the ultimate question is truly one which is reserved to the Court as a “question of law,” then it may follow that a court is nevertheless allowed to engage in whatever predicate fact-finding is necessary to resolve the question of law.

Please also brief the separate question of whether or not it is proper for the Court to do this kind of fact-finding when the motion before the Court is styled as a motion for summary judgment; perhaps the judicial fact-finding (if consigned to the judge and not the jury) needed to resolve a predicate question regarding preemption is better conducted as part of a bifurcated trial limited to the affirmative defense of federal preemption rather than as part of a summary judgment ruling.

Consider the following cases as the start of your research and briefing.

- Federal preemption is question of law for the court. *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089; *Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1372
- Does the reasoning in *City of Auburn v. Qwest Corp.* (9th Cir. 2001) 260 F.3d 1160, 1172 (cited by plaintiffs during oral argument), *overruled on other grounds by Sprint Telephone PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, 577-79, actually shed any light on this question. It is a discussion of ripeness, not a determination that there was a triable issue of material fact preventing a ruling on a preemption defense.
- Does the reasoning in *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910 (cited during oral argument) actually shed any light on this question?
- The Court is authorized to resolve the disputed facts needed to decide, as a question of law, whether or not a given activity is subject to strict liability for conducting ultrahazardous activity. Restatement of Torts § 520, comment l; *Luthringer v. Moore* (1948) 31 Cal.2d 489, 496; *Langan v. Valicopters, Inc.* (Wash. 1977) 88 Wn.2d 855, 567 P.2d 218; *Plourde v. Hartford Electric Lighting Co.* (Super. Ct. Conn. 1974) 31 Conn.Supp. 192, 326 A.2d 848.

Submit concurrent opening briefs not to exceed ten (10) pages of text and without any declarations, exhibits or requests for judicial notice by September 28, 2015. Submit concurrent responding briefs not to exceed five (5) pages of text and without any declarations, exhibits or requests for judicial notice by October 8, 2015. The case will be deemed re-submitted when the briefs are filed on October 8, 2015.