PRODUCTS LIABILITY

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I. Products Liability

Products liability deals with incentives for manufacturers, suppliers, and retailers to provide safety for consumers.

This outline is intended to provide information concerning products liability law in Iowa. The presentation at the seminar will touch on the topics identified in this outline; however, the presenter also intends to discuss recent cases handled by his firm to give the audience examples of issues presented in recent products liability cases.

This presentation has been submitted for Federal CLE approval, and thus attention and time will be spent discussing important issues facing litigation of products liability cases in Federal vs. State Courts in Iowa. This includes issues such as Daubert and federal preemption.

II. Identifying the Case

Wright v. Brooke Group, Ltd., 652 N.W.2d 159 (2002)
Restatement of the Law, Third, Torts: Products Liability, § 1
Restatement of the Law, Third, Torts: Products Liability, § 2

§ 1 Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

§ 2 Categories of Product Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

(a) contains a **manufacturing defect** when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the

product;

(b) is **defective in design** when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) is defective because of **inadequate instructions or warnings** when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

A. Manufacturing Defect

A product is defective when, at the time of sale or distribution, it contains a manufacturing defect. A product:

(a) contains a **manufacturing defect** when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

Restatement of the Law, Third, Torts: Products Liability, § 2 (comment a):

> The rule for manufacturing defects stated in Subsection (a) imposes liability whether or not the manufacturer's quality control efforts satisfy standards of reasonableness. Strict liability without fault in this context is generally believed to foster several objectives. On the premise that tort law serves the instrumental function of creating safety incentives, imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility.
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> Several important fairness concerns are also believed to support manufacturers' liability for manufacturing defects even if the plaintiff is unable to show that the manufacturer's quality control fails to meet risk-utility norms. In many cases manufacturing defects are in fact caused by manufacturer negligence but plaintiffs have difficulty proving it. Strict liability therefore performs a function similar to the concept of res ipsa loquitur, allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof. Products that malfunction due to manufacturing defects disappoint reasonable expectations of product performance. Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity. Finally, many believe that consumers who benefit from products without

suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects.

Restatement of the Law, Third, Torts: Products Liability, § 2 (comment c):

> Manufacturing defects. As stated in Subsection (a), a manufacturing defect is a departure from a product unit's design specifications. More distinctly than any other type of defect, manufacturing defects disappoint consumer expectations. Common examples of manufacturing defects are products that are physically flawed, damaged, or incorrectly assembled. In actions against the manufacturer, under prevailing rules concerning allocation of burdens of proof the plaintiff ordinarily bears the burden of establishing that such a defect existed in the product when it left the hands of the manufacturer.

B. Design Defect

A product is defective when, at the time of sale or distribution is defective in design. A product:

(b) is **defective in design** when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Restatement of the Law, Third, Torts: Products Liability, § 2 (comment a):

> In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing," is necessary. Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers.
>
> Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence. The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe -- for example, automobiles designed with maximum speeds of 20

miles per hour -- any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.

Restatement of the Law, Third, Torts: Products Liability, § 2 (comment d):

Design defects: general considerations. Whereas a manufacturing defect consists of a product unit's failure to meet the manufacturer's design specifications, a product asserted to have a defective design meets the manufacturer's design specifications but raises the question whether the specifications themselves create unreasonable risks. Answering that question requires reference to a standard outside the specifications. Subsection (b) adopts a reasonableness ("risk-utility balancing") test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe. (This is the primary, but not the exclusive, test for defective design. See Comment b.) Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution. See Comment f.

Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. The policy reasons that support use of a reasonable-person perspective in connection with the general negligence standard also support its use in the products liability context.

C. Instructions or Warnings Defect

A product is defective when, at the time of sale or distribution, it is defective because of inadequate instructions or warnings. A product:

(c) is defective because of **inadequate instructions or warnings** when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Restatement of the Law, Third, Torts: Products Liability, § 2 (comment i):

Inadequate instructions or warnings. Commercial product sellers must provide reasonable instructions and warnings about risks of injury posed by products. Instructions inform persons how to use and consume products safely. Warnings alert

users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.

Under prevailing rules concerning allocation of burdens of proof, plaintiff must prove that adequate instructions or warnings were not provided. Subsection (c) adopts a reasonableness test for judging the adequacy of product instructions and warnings. It thus parallels Subsection (b), which adopts a similar standard for judging the safety of product designs. Although the liability standard is formulated in essentially identical terms in Subsections (b) and (c), the defectiveness concept is more difficult to apply in the warnings context.

In evaluating the adequacy of product warnings and instructions, courts must be sensitive to many factors. It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. For example, educated or experienced product users and consumers may benefit from inclusion of more information about the full spectrum of product risks, whereas less-educated or unskilled users may benefit from more concise warnings and instructions stressing only the most crucial risks and safe-handling practices.

In some contexts, products intended for special categories of users, such as children, may require more vivid and unambiguous warnings. In some cases, excessive detail may detract from the ability of typical users and consumers to focus on the important aspects of the warnings, whereas in others reasonably full disclosure will be necessary to enable informed, efficient choices by product users. Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate. No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.

III. Preserving the Evidence

A. State Jury Instruction

Iowa Model Jury Instruction 100.22 Spoliation of Evidence. (Name of party asserting the conclusion) claims that (name of party) has intentionally [altered] [destroyed] [failed to produce] evidence consisting of (describe evidence). You may, but are not required to, conclude that such evidence would be unfavorable to (name of party).

Before you can reach this conclusion, (name of party asserting the conclusion) must prove all of the following:

1. The evidence exists or previously existed.

2. The evidence is or was within the possession or control of (name of party).

3. (Name of party)'s interests would call for production of the evidence if favorable to that party.

4. (Name of party) has intentionally [altered] [destroyed] or [failed to produce] the evidence without satisfactory explanation.

For you to reach this conclusion, more than the mere [alteration] [destruction] [non-production] of the evidence must be shown. It is not sufficient to show that a third person [altered] [destroyed] [is withholding] the evidence without the authorization or consent of (name of party).

Lynch v. Saddler, 656 N.W.2d 104 (Iowa 2003)

> Lynch complains that before the trial began, city employees destroyed parts of the helicopter from the first crash and replaced the lower forward fairings on the city's three other active Model 269A helicopters, including the helicopter in which Lynch ultimately crashed. Lynch argues that if the court had instructed on the spoliation issue, the jury would have found gross negligence. He argues the trial court's failure to give a spoliation instruction constituted error. The city contends Lynch did not preserve error on this issue.
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> Evidence of spoliation may allow an inference that "a party who destroys a document with knowledge that it is relevant to litigation is likely to have been threatened by the document." Phillips v. Covenant Clinic, 625 N.W.2d 714, 718 (Iowa 2001) (citing Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994)). Such inference may only be drawn when the destruction of relevant evidence was intentional, as opposed to merely negligent or the evidence was destroyed as the result of routine procedure. Id. 625 N.W.2d at 719. In the case before us, Lynch is not entitled to a spoliation instruction unless he can show both intentional destruction and control of the evidence. *Id.* "A spoliation inference should be utilized prudently and sparingly." Id. 625 N.W.2d at 720 (citing Crosser v. Iowa Dep't of Pub. Safety, 240 N.W.2d 682, 685 (Iowa 1976)).
>
> The facts before us show it is not clear whether the city employees intentionally destroyed the evidence with knowledge it was relevant to this litigation. The destroyed evidence itself was from the first helicopter crash, not the crash which is the subject of this appeal. The evidence was destroyed only after the National Transportation Safety Board and Federal Aviation Administration had investigated the crash and filed reports regarding the cause of the first crash. There is no evidence the city had knowledge that a second wreck was to come. Similarly, there is no evidence the city employees replaced the air filter housings in the three other helicopters out of concern that the old equipment would be used against them to prove liability for the crash. The parts were replaced months after the first crash and it appears a repair station work order was filled out for each helicopter that had replacements. Because Lynch cannot prove intentional

destruction or alteration of the helicopter parts, a spoliation instruction is not warranted under the circumstances.

B. Federal Preservation of Evidence

Stevenson v. Union Pac. R.R. Co., 354 F.3d 739 (8th Cir. 2004)

"The Court has the discretion to impose sanctions for the spoliation of evidence under its inherent disciplinary power. In order to impose a sanction for the spoliation of evidence, this Court must make two findings: (1) "a finding of intentional destruction indicating a desire to suppress the truth, and (2) "a finding of prejudice to the opposing party."

Morris v. Union Pac. R.R., 373 F.3d 896 (8th Cir. 2004)

"The ultimate focus for imposing sanctions for spoliation of evidence is the intentional destruction of evidence indicating a desire to suppress the truth, not necessarily the prospect of litigation."

Dillon v. Nissan Motor Co., 986 F.2d 263 (8th Cir. 1993) - Remedies

"A court may assess attorneys' fees when a party has acted in bad faith, vexatiously, wantonly, or wantonly, or for oppressive reasons…The Court has also held that dismissal may be ordered as a sanction upon a finding of bad faith, willfulness, or fault."

Example: Fire/Explosion Litigation (cause and origin analysis)

NFPA 921 – The Guide for Fire and Explosion Investigations

Section 16.3.1 states:

Every attempt should be made to protect and preserve the fire scene as intact and undisturbed as possible, with the structural contents, fixtures, and furnishings remaining in their pre-fire locations.

IV. Building the Case

A. Safety Codes – Negligence Per Se

Iowa Model Jury Instruction 700.10 Safety Code - Negligence Per Se.
(Name of Safety Code) requires (Substance of Safety Code).

A violation of this law is negligence.

Authority

Clausen v. R. W. Gilbert Construction Co., Inc., 309 N.W.2d 462 (Iowa 1981)
Koll v. Manatt's Transportation Co., 253 N.W.2d 265 (Iowa 1977)
Wagner v. Northeast Farm Service Company, 177 N.W.2d 1 (Iowa 1970)

Comment

Note: This is limited to safety codes that have the force of law either by statute, regulation or ordinance.

B. Safety Code/Custom – Evidence of Negligence

Iowa Model Jury Instruction 700.11 Safety Code/Custom - Evidence Of Negligence. You have received evidence of [substance of particular custom involved] [applicable safety code provisions]. Conformity with [a custom] [the provisions of a safety code] is evidence that (name of party) was not negligent and [non-conformity] [violations of its provision] is evidence that (name of party) was negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.

Authority

Custom - Langner v. Caviness, 238 Iowa 774, 28 N.W.2d 421 (1947)
Manual On Uniform Traffic Control Devices - Gipson v. State, 419 N.W.2d 369 (Iowa 1988)
Safety Code - Porter v. Iowa Power and Light Company, 217 N.W.2d 221 (Iowa 1974)

1. What is the import of the Alcala decision?

IN THE COURT OF APPEALS OF IOWA
No. 14-1058
Filed September 23, 2015

BRENDA J. ALCALA, Plaintiff-Appellee, vs. MARRIOTT INTERNATIONAL, INC., COURTYARD MANAGEMENT CORPORATION d/b/a QUAD CITIES COURTYARD BY MARRIOTT, Defendants-Appellants, MARRIOTT BUSINESS SERVICES, and HPTCY CORPORATION, Defendants.

Holding: We find the district court erred by submitting this instruction to the jury because it was not supported by substantial evidence. In its objection to the instruction, Marriott stated substantial evidence did not exist to support submitting the instruction to the jury due to the dispute on whether the standards were even applicable to the circumstance in this case. Marriott noted the instruction gave "undue emphasis to something that everybody agrees isn't even applicable or a legal standard in this jurisdiction." We find, given the conflict between the two experts,

and the failure by Alcala to submit the text of the standards into evidence, there was not substantial evidence to submit this question to the jury.

C. Example – Machine Guarding Choices

Generic Performance Standards or Principles

Principle 1. Eliminate the hazard from, or engineer it out of, the product, machine, material, method, facility, workplace, etc.,

Principle 2. Control the hazard by enclosing or otherwise guarding it at its source or isolating it from the user,

Principle 3. Warn, train or otherwise educate the user in respect to the hazard,

Principle 4. Guard or enclose the user by providing personal protective gear,

Principle 5. Do not permit the guard or safeguarding means to be a hazard itself (derives from the preceding four principles),

Principle 6. Take into account reasonably foreseeable human error, failure or oversight or, in other words, the HUMAN factor,

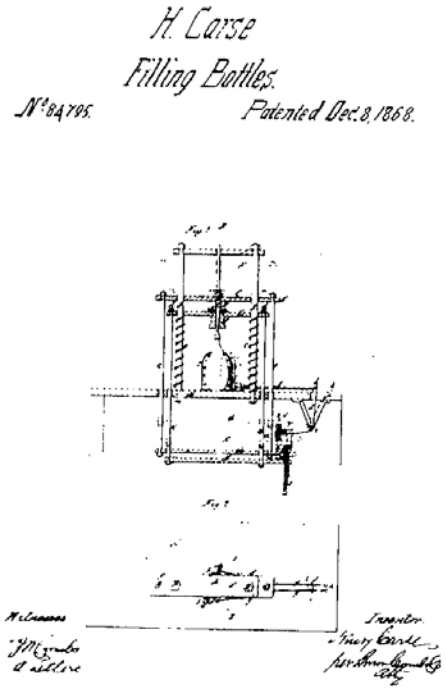
Principle 7. Safety should be built into a product, facility, workplace, job, etc., rather than delegated to an employee, employer or ultimate consumer,

Principle 8. Maintenance and maintainability safety, as well as operating safety, should be considered in product design and construction.

MACHINE GUARDING

A Historical Perspective

Verne L. Roberts



The illustration shows an interlocking type guard which mechanically ties the operation of the machine to the presence of the guard. Patent No. 84,795 (1868).

D. Expert Testimony

Iowa R. Evid. 5.702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 5.703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Iowa R. Evid. 5.704

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Iowa R. Evid. 5.705

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Iowa Case Law – Common Citations

"There is no requirement that the expert be able to express an opinion with absolute certainty. A lack of absolute certainty goes to the weight of the expert's testimony, not to its admissibility." Johnson v. Knoxville Cmty. Sch. Dist., 570 N.W.2d 633, 637 (Iowa 1997)

In the context of cause of death determinations, in order to be considered by the trier of fact "'it is only necessary that the witness entertain a "reasonable degree of medical certainty" for his conclusions.'" State v. Webb, 309 N.W.2d 404, 413 (Iowa 1981)

"In evaluating expert support for causation, we do not require magic words, and the evidence on causation need not be conclusive but must only show reasonable probability." Asher v. Ob-Gyn Specialists, P.C., 846 N.W.2d 492 (Iowa 2014)

Iowa – Are we shifting towards Daubert?

In nearly every products liability case handled by the presenter's firm in Iowa since 2010, defense counsel has filed a motion to exclude some testimony under the federal Daubert standard. This is likely due to the Supreme Court's decision in Ranes v. Adams Laboratories, 778 N.W.2d 677 (Iowa 2010), where the Court held that Daubert analysis applies in toxic tort cases. See Junk v. Obrecht, 839 N.W.2d 675 (Iowa Ct. App. 2013)(toxic tort case)

V. A Few Common Defenses

A. Iowa Code § 614.1(2A) – Statute of Repose

Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

2A. With respect to products.

a. Those founded on the death of a person or injuries to the person or property brought against the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of a product based upon an alleged defect in the design, inspection, testing, manufacturing, formulation, marketing, packaging, warning, labeling of the product, or any other alleged defect or failure of whatever nature or kind, based on the theories of strict liability in tort, negligence, or breach of an implied warranty **shall not be commenced more than fifteen years after the product was first purchased, leased, bailed, or installed for use or consumption unless expressly warranted for a longer period of time by the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product**. This subsection shall not affect the time during which a person found liable may seek and obtain contribution or indemnity from another person whose actual fault caused a product to be defective. This subsection shall not apply if the manufacturer, assembler, designer, supplier of specifications, seller, lessor, or distributor of the product intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm.

See Estate of Ryan v. Heritage Trails Assoc., 745 N.W.2d 724 (Iowa 2008)(holding common liability doctrine still applied to contribution or indemnity claims brought pursuant to Iowa Code 614.1(2A) and Iowa Code 668.6

B. Iowa Code Chapter 668 - Comparative Fault

Iowa Code § 668.1 Fault defined.

1. As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, **misuse of a product** for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009)(holding that principles of comparative fault and joint and several liability apply in enhanced injury cases)

C. "Learned Intermediary/Sophisticated User/Bulk Supplier

1. What is the difference?

Learned Intermediary - This defense argues that the defendant should not be liable for the plaintiff's injuries even though the defendant failed to adequately warn plaintiff about the product's dangers because someone else in the supply

chain had knowledge of the information to warn and was responsible for warning.

Sophisticated User - This defense argues that the defendant should not be liable for the plaintiff's injuries even though the defendant failed to adequately warn plaintiff about the product's dangers because the Plaintiff knew enough about the product to foresee the danger.

Bulk Supplier Doctrine – This defense argues that it is not practical to require manufacturers to warn every potential user of the risks associated with their products that are sold in bulk.

2. Case Law & Authority

West v. Broderick & Bascom Rope Co., 197 N.W.2d 202 (Iowa 1972)

Restat 3d of Torts: Products Liability, § 6 – Liability of Commercial Seller or Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices

3. What is the proper analysis for the District Court?

Duty? Breach?

Example Argument from a New York Case:

I. THE BULK SUPPLIER AFFIRMATIVE DEFENSE DOES NOT APPLY TO THE FACTS OF THIS CASE BECAUSE THERE IS NO EVIDENCE THAT PROVIDING ADEQUATE WARNINGS DIRECTLY TO END USERS WAS UNREASONABLE. .....

A. Comment "n" to the Restatement (Second) of Torts and case law require evidence that directly warning the end user was unreasonable before applying bulk supplier analysis. .....

B. The Supply Chain Defendants failed to produce a single shred of evidence supporting a claim that directly warning the end user was unreasonable. .....

C. The affirmative defense of "bulk supplier" cannot be resolved in favor of Defendants, as a matter of law, given the lack of evidence that warning the end user was unreasonable. .....

D. Other Courts addressing this issue have held that Defendant Wholesalers failed to meet their burden in proving,

D. Federal Preemption

Preemption is the idea that the Supremacy clause allows the federal government to overwhelm the states by saying, "we hereby overhaul the entire laws of the states in this field." The federal government does this because of T.J. Hooper, which held that compliance with safety standards is simply evidence of reasonable practice.

Issues arise when federal regulations, rules, standards don't take over the entire field. In these cases, the Court try to figure out the congressional intent.

It appears that the Supreme Court is taking a case by case approach to preemption. The focus should really be on whether or not Congress intended to totally overhaul the entire laws of the states.

Generally, preemption is disfavored by the Courts. In the interest of avoiding unintended encroachment on the authority of the States, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.