



# RISK REGULATION SEMINARS

FALL 2008

## PENN PROGRAM ON REGULATION

*In cooperation with* The Fels Institute of Government • Initiative for Global Environmental Leadership • Program on Law, the Environment and the Economy • Wharton Risk Management and Decision Processes Center

## PRESENTS . . .

Tuesday, November 18, 2008

4:30 – 6:00 pm, Room G 50, Jon Huntsman Hall, The Wharton School

## The Preemption War: When Federal Bureaucracies Trump Local Juries

**THOMAS O. MCGARITY**

*Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law  
The University of Texas at Austin School of Law*

Over the past several decades, federal agencies and the courts have engaged in an ongoing “war” over federal preemption of state liability claims. In a case currently before the Supreme Court, the Justices will soon decide whether state common law failure-to-warn claims are preempted by the Food, Drug and Cosmetics Act, a position advanced by the Food and Drug Administration (FDA). This case represents a major skirmish in the ongoing “preemption war” that has been waged since the Supreme Court’s landmark *Cipollone* decision in 1992, in which the Court held that the word “requirement” in a federal cigarette labeling law’s express preemption clause included the duties imposed by state common law.

In this seminar, Professor McGarity describes the preemption war and analyzes the relevant issues in the context of federal regulation of pharmaceutical products. He argues that during the George W. Administration, the FDA has dramatically departed from its traditional hands-off policy with regard to federal preemption of state common law claims in the context of pharmaceuticals approved by that agency. No substantive change in the relevant statute, regulations, or case law has prompted the agency’s aggressive new stance on preemption. Rather, he argues that the FDA’s new stance is primarily motivated by the outgoing Administration’s decision to bypass Congress in its eagerness to implement a long-standing “tort reform” agenda.

Professor McGarity also argues that the Bush Administration has not limited its aggressive efforts to preempt state tort law to FDA regulation. The National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the Federal Railroad Commission have adopted similar stances under their statutes, all of which contain express preemption clauses. As Professor McGarity argues in greater detail in his forthcoming book, “The Preemption War: When Federal Bureaucracies Trump Local Juries,” he believes the outcome of this war is critical to the ability of the common law to provide corrective justice to injured plaintiffs and protective justice for those of us who have not yet been injured but are at risk from products and activities that are otherwise subject to federal regulation.

Thomas O. McGarity holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas School of Law. He has taught Environmental Law, Administrative Law and Torts at UT Law school since 1980. Prior to that he taught at the University of Kansas School of Law.

After clerking for Judge William E. Doyle of the Federal Court of Appeals for the Tenth Circuit in Denver, Colorado, Professor McGarity served as an attorney-advisor in the Office of General Counsel of the Environmental Protection Agency in Washington, D.C.

Professor McGarity has written widely in the areas of Environmental Law and Administrative Law. A new book *Bending Science: How Special Interests Corrupt Public Health Research* (co-authored with his University of Texas colleague Wendy Wagner) was published in May 2008 by Harvard University Press. The Yale University Press will be publishing his most recent book, *The Preemption War: When Federal Bureaucracies Trump Local Juries* in October 2008.

Professor McGarity is immediate past president and a member of the Board of Directors of the Center for Progressive Reform, a nonprofit organization consisting of scholars who are committed to developing and sharing knowledge and information, with the ultimate aim of preserving the fundamental value of the life and health of human beings and the natural environment.

For more information, please visit our seminar website: <https://www.law.upenn.edu/academics/institutes/regulation/seminars.html>  
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