

*Highlights of Mayer Brown LLP's  
Federal Preemption Practice*

Mayer Brown LLP has been at the forefront of the preemption struggle, and has extensive experience litigating federal preemption and federal preclusion cases. We have represented either the party arguing for preemption or an amicus supporting preemption in every major preemption case heard by the Supreme Court in the last ten years, and also regularly handle preemption issues in other federal and state courts. We have successfully litigated preemption cases involving a wide variety of industries—including (among others) telecommunications, transportation, medical devices, pharmaceuticals, and banking—under statutes as varied as the Telecommunications Act, the Federal Arbitration Act, the Clean Air Act, the Food, Drug and Cosmetic Act, the National Traffic and Motor Vehicle Safety Act, the Federal Aviation Administration Authorization Act, the ICC Termination Act, and the Federal Insecticide, Fungicide, and Rodenticide Act.

The following list describes some of the many preemption cases handled by Mayer Brown during the past decade. For more information about Mayer Brown's preemption practice, please contact Andrew Tauber (202-263-3324, [atauber@mayerbrown.com](mailto:atauber@mayerbrown.com)) or David Gossett (202-263-3384, [dgossett@mayerbrown.com](mailto:dgossett@mayerbrown.com)) in our Washington, DC office.

**Supreme Court Cases**

***AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S.) (pending).** This is one of dozens of cases in which we represent AT&T Mobility in defending its arbitration provision against attack in state and federal court. In this case, the Ninth Circuit held that the arbitration provision is unconscionable under California law because it requires that arbitration be conducted on an individual basis, thereby precluding class actions. We petitioned for certiorari, which was granted in June 2010. We are now briefing the case on the merits, and are asking the Supreme Court to hold that the Federal Arbitration Act preempts California's state-law policy barring provisions that require individual arbitration.

***Bruesewitz v. Wyeth, Inc.*, No. 09-152 (U.S.) (pending).** The Court granted certiorari to address whether Section 22(b)(1) of the National Childhood Vaccine Injury Act of 1986—which expressly preempts certain design defect claims against vaccine manufacturers “if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warning”—preempts all vaccine design defect claims, regardless whether the vaccine's side effects were unavoidable. We have been retained by the Chamber of Commerce to file an amicus brief supporting respondents.

***Nickels v. Grand Trunk Western R.R.*, 130 S. Ct. 1136 (2010) (mem.).** Having argued and won the issue in the Sixth Circuit, Mayer Brown persuaded the Supreme Court not to disturb the lower court's determination that the plaintiff's claim under the Federal Employers' Liability Act was precluded by the Federal Railroad Safety Act.

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***Wyeth v. Levine, 129 S. Ct. 1187 (2009).*** After submitting an amicus brief on behalf of PLAC and the U.S. Chamber of Commerce that helped convince the Supreme Court to grant review in a case presenting the question of whether FDA approval of a prescription drug label impliedly preempts state law tort claims challenging the adequacy of that label, Mayer Brown submitted an amicus brief on behalf of the Chamber at the merits stage arguing that FDA approval of a drug label does in fact preempt such claims.

***Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008).*** Mayer Brown served as co-counsel to the defendant cigarette manufacturer in a case presenting the question of whether the Federal Cigarette Labeling and Advertising Act preempts, either expressly or impliedly, state-law fraud claims that challenge, as allegedly false, advertisements that describe certain cigarettes as “light” and containing “lowered tar and nicotine.” Unfortunately, the Court rejected our arguments by a vote of 5-4.

***Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).*** As co-counsel to Medtronic, Mayer Brown helped persuade the Supreme Court that the Medical Device Amendments to the Food, Drug, and Cosmetic Act expressly preempt state-law tort claims challenging the design, manufacture, and labeling of a medical device that was granted pre-market approval by the FDA.

***Preston v. Ferrer, 128 S. Ct. 978 (2008).*** We authored an amicus brief on behalf of CTIA–The Wireless Association that helped persuade the Supreme Court that the Federal Arbitration Act preempts state laws that would require parties to an arbitration agreement to submit their dispute to administrative proceedings before commencing arbitration.

***Rowe v. New Hampshire Motor Transport Ass’n, 128 S. Ct. 989 (2008).*** Mayer Brown submitted an amicus brief on behalf of the American Trucking Associations and the U.S. Chamber of Commerce which helped convince the Supreme Court that the Federal Aviation Administration Authorization Act of 1994 preempted two provisions of a state law regulating the shipment of tobacco to state residents.

***Warner-Lambert Co. LLC v. Kent, 128 S. Ct. 1168 (2007) (Mem.).*** We filed an amicus brief on behalf of the U.S. Chamber of Commerce in support of petitioners in a case presenting the question whether a state-law claim that depends on proof of fraud on the FDA is impliedly preempted by the Food, Drug, and Cosmetic Act.

***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006).*** Mayer Brown filed an amicus brief on behalf of the U.S. Chamber of Commerce that helped convince the Court that the Securities Litigation Uniform Standards Act of 1998 preempts so-called “holder suits,” which are brought by persons who claim that they were fraudulently induced to hold (rather than purchase or sell) securities.

***BASF Corp. v. Peterson, 544 U.S. 1012 (2005) (Mem.).*** The Supreme Court granted certiorari and vacated a state court decision on the basis of Mayer Brown’s briefs, which argued that the plaintiffs’ claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.

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***Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).** On behalf of the Product Liability Advisory Council, Mayer Brown submitted an amicus brief in which it argued that the plaintiffs' state-law claims for crop damage were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act. Unfortunately, the Court rejected our arguments.

***Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004).** As counsel to co-petitioner Western States Petroleum Association, Mayer Brown's briefing played a significant role in convincing the Supreme Court to accept the case and then find that the Clean Air Act preempted a local government's rule prohibiting operators of vehicle fleets from purchasing new diesel-fueled vehicles.

***Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).** The Supreme Court granted Mayer Brown's petition for a writ of certiorari and agreed with our contention that a California statute, which required insurance companies to provide certain information regarding policies issued abroad, was preempted because it interfered with the federal government's exclusive responsibility for foreign policy.

***Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).** On behalf of Mercury Marine, Mayer Brown argued that the plaintiff's common law tort claims were preempted by the Federal Boat Safety Act and the Coast Guard's decision not to promulgate regulations addressing the alleged tortious conduct. Unfortunately, the Court rejected our arguments.

***Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).** The Supreme Court accepted the argument put forth by Mayer Brown and its co-counsel on behalf of Phillip Morris that cigarette advertising regulations adopted by the State of Massachusetts were preempted under the Federal Cigarette Labeling and Advertising Act and in violation of the First Amendment.

***Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001).** As counsel for a medical device manufacturer, Mayer Brown persuaded the Supreme Court that the Food, Drug, and Cosmetic Act impliedly preempts state-law tort claims alleging fraud on the FDA.

***Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000).** On behalf of the Product Liability Advisory Council, Mayer Brown filed an amicus brief in which it made the argument, adopted by the Court, that a Department of Transportation regulation promulgated pursuant to the National Traffic and Motor Vehicle Safety Act impliedly preempted the plaintiff's state-law product-liability action.

***Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000).** On behalf of the Product Liability Advisory Council, we filed an amicus brief which helped persuade the Supreme Court that the Federal Railroad Safety Act and regulations issued thereunder preempt state-law tort claims challenging the adequacy of federally funded warning devices installed at railroad crossings.

***United States v. Locke*, 529 U.S. 89 (2000).** Mayer Brown, on behalf of the U.S. Chamber of Commerce and the Product Liability Advisory Council as amici curiae, helped convince the Supreme Court that state tanker regulations were preempted by federal regulations promulgated pursuant to the Ports and Waterways Safety Act.

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***Unum Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999).** We filed an amicus brief on behalf of the Business Roundtable that helped convince the Supreme Court to reverse in part a lower court's interpretation of the preemptive reach of the Employee Retirement Income Security Act.

### **Cases in Other Federal and State Courts**

***Mitaro v. Medtronic, Inc.*, 900 N.Y.S.2d 899 (N.Y. App. Div. 2010).** We represent Medtronic, Inc. in this products liability case involving an FDA-approved medical device. We won dismissal in the trial court of the majority of the plaintiffs' claims on preemption grounds, and then successfully preserved that victory when the plaintiffs appealed the trial court's decision to the New York appellate division.

***Lee v. Am. Honda Motor Co.*, No. BC383426 (Los Angeles Super. Ct.) (pending).** In opposing class certification of a claim asking, among other things, for an injunction ordering an automobile recall for a purported transmission shifting defect, we argued that the federal Motor Vehicle Safety Act preempts common-law auto recall claims.

***Dobbs v. Wyeth Pharmaceuticals*, \_\_\_ F.3d \_\_\_, 2010 WL 2179290 (10th Cir. 2010); *Miller v. SmithKline Beecham Corp.*, 2010 WL 2180615 (10th Cir. 2010); *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387 (7th Cir. 2010).** We represent the Product Liability Advisory Council, Inc. (PLAC) and the U.S. Chamber of Commerce as amici in these three cases, each of which addressed the question whether, in light of *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the FDA's extensive regulation and review of the warnings associated with prescription SSRI depression medications preempts state-law products liability claims based on the allegation that those FDA-approved warnings were inadequate.

***Gonzalez v. Arizona*, Nos. 08-17094, 08-17115 (9th Cir.) (pending).** On behalf of five members of Congress, we submitted an amicus brief arguing that Arizona's Proposition 200, which requires voter registration applicants to provide documentary proof of citizenship, is preempted by the National Voter Registration Act.

***Ilaraza v. Medtronic, Inc.*, 2009 WL 5245630 (E.D.N.Y. Dec. 28, 2009).** Mayer Brown, lead counsel to the defendant manufacturer in a case involving an FDA-approved medical device, secured dismissal of a state-law negligence-per-se claim on the ground that it was expressly preempted under the Food, Drug, and Cosmetic Act.

***Movsesian v. Victoria Verischerung AG*, 578 F.3d 1052 (9th Cir. 2009), petition for rehearing en banc pending.** Successfully arguing that the federal government's plenary authority in foreign relations preempts a California statute purporting to revive and extend the time to bring such claims, Mayer Brown won dismissal of a class action against insurers who had allegedly issued life insurance policies to victims of the massacre of Armenians in the Ottoman Empire during the early twentieth century. In finding the statute preempted, the court relied on *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), which also was handled by Mayer Brown.

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***Cooper v. CSX Transportation, Inc., decided sub nom. Nickels v. Grand Trunk Western R.R., Inc., 560 F.3d 426 (6th Cir. 2009).*** In the first federal appellate case presenting the issue, Mayer Brown persuaded the court that tort claims brought under the Federal Employers' Liability Act alleging the supposedly negligent selection of railroad ballast are precluded under the Federal Railroad Safety Act by Federal Railroad Administration track-safety regulations.

***In re Medtronic Sprint Fidelis Lead Prods. Liab. State Court Litig., 2009 WL 3417867 (Minn. D. Ct. Oct. 20, 2009).*** As lead counsel to the defendant manufacturer in a large consolidated state-court proceeding, Mayer Brown won dismissal with prejudice of state-law fraud and product-liability claims relating to an FDA-approved medical device on the ground that such claims are either expressly or impliedly preempted under the Food, Drug, and Cosmetic Act. We are currently defending our victory in the Minnesota appellate courts. We also represent the client in related one-off state-court litigations across the country and internationally. We have secured voluntary or court-ordered dismissal or summary judgment in some of those cases, from New York to Puerto Rico to California, while others remain pending.

***Cobra Fixations CIE LTÉE-Cobra Anchors Co. Ltd. v. Bulldog Hardware, No. 09-CV-436 (M.D.N.C. 2009).*** Obtaining dismissal on behalf of the defendant manufacturer, Mayer Brown successfully argued that the United States patent laws preempted claims brought under the North Carolina Unfair and Deceptive Trade Practices Act.

***In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig., 592 F. Supp. 2d 1147 (D. Minn. 2009), reconsideration denied 2009 WL 294353 (D. Minn. Feb. 5 2009), appeal docketed No. 09-2290 (8th Cir.).*** As lead counsel to the defendant manufacturer in a large multidistrict litigation, Mayer Brown won dismissal with prejudice of state-law fraud and product liability claims relating to an FDA-approved medical device on the ground that such claims are either expressly or impliedly preempted under the Food, Drug, and Cosmetic Act. We are currently defending our victory in the Eighth Circuit.

***Paduano v. Am. Honda Motor Co., 169 Cal. App. 4th 1453 (2009).*** We persuaded the California Court of Appeal that federal law preempted the plaintiff's principal claim, which alleged that the EPA mileage estimates reproduced in Honda's advertising were misleading because they allegedly could not be achieved through normal driving.

***In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d 29 (D.D.C. 2008).*** Representing defendant railroad BNSF, we helped persuade the court that the plaintiffs' state-law indirect purchaser claims are preempted by the ICC Termination Act.

***Ill. Bell Tel. Co. v. Box, 548 F.3d 607 (7th Cir. 2008).*** We won and then defended on appeal summary judgment in favor of Illinois Bell, successfully arguing that the Telecommunications Act of 1996 and FCC regulatory determinations made pursuant thereto preempt a state-imposed requirement to unbundle certain network services.

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***Williamson v. Mazda Motor of Am., Inc.*, 167 Cal. App. 4th 905 (2008).** Mayer Brown authored an amicus brief on behalf of the Alliance of Automobile Manufacturers that helped convince the court that the plaintiffs' state-law tort claims were preempted by a Federal Motor Vehicle Safety Standard promulgated by the National Highway Traffic Safety Administration pursuant to the National Traffic and Motor Vehicle Safety Act.

***Roland v. General Motors Corp.*, 881 N.E.2d 722 (Ind. Ct. App. 2008).** Our amicus brief on behalf of the Alliance of Automobile Manufacturers helped convince the court that a federal safety standard issued under the National Traffic and Motor Vehicle Safety Act preempted plaintiffs' state-law tort claims.

***Colacicco v. Apotex Inc.*, 521 F.3d 253 (3d Cir. 2008), vacated, 129 S. Ct. 1578 (2009).** On behalf of the Product Liability Advisory Council, Mayer Brown filed an amicus brief that helped persuade the court that the FDA's approval of a drug label impliedly preempted a state-law failure-to-warn claim.

***Carden v. General Motors Corp.*, 509 F.3d 227 (5th Cir. 2007).** We authored an amicus brief on behalf of the Alliance of Automobile Manufacturers that helped convince the court that state-law product liability claims alleging a defective passenger restraint system were preempted by a federal regulation issued pursuant to the National Traffic and Motor Vehicle Safety Act.

***Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 2007 WL 2439499 (C.D. Cal. Apr. 30, 2007), appeal pending, No. 07-55804 (9th Cir.).** On behalf of its clients BNSF and the Association of American Railroads, Mayer Brown persuaded the trial court that local regulations promulgated by the district were preempted by the ICC Termination Act. The decision has been appealed, and Mayer Brown is currently defending its trial court victory in the Ninth Circuit.

***Vaughn v. Kelly*, 2007 WL 804694 (N.D. Ill. March 13, 2007).** Defending musician R. Kelly in a copyright dispute, Mayer Brown persuaded the court that the plaintiff's unjust enrichment claim was preempted by the federal Copyright Act.

***Ill. Bell Tel. Co. v. O'Connell-Diaz*, 2006 WL 2796488 (N.D. Ill. Sept. 28, 2006).** Mayer Brown won partial summary judgment on behalf of AT&T, successfully arguing that the Telecommunications Act of 1996 and FCC regulations promulgated thereunder preempt state-imposed requirements to unbundle certain services.

***Mpower Commc'ns Corp. v. Ill. Bell Tel. Co.*, 457 F.3d 625 (7th Cir. 2006).** Mayer Brown represented Illinois Bell and persuaded the court that an Illinois Commerce Commission tariff proceeding was not preempted by the federal Telecommunications Act.

***Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638 (2d Cir. 2005).** On behalf of the Association of American Railroads, Mayer Brown authored an amicus brief which helped persuade the Second Circuit that the ICC Termination Act preempted a state law requiring preconstruction permits for land development. Mayer Brown was subsequently retained to represent Green Mountain Railroad Corporation in its successful opposition to the State's petition for a writ of certiorari.

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***City of Creede, CO—Petition for Declaratory Order, STB Fin. Dkt. No. 34376, 2005 WL 1024483 (May 3, 2005).*** On behalf of the Association of American Railroads, Mayer Brown authored an amicus brief that helped persuade the STB that the ICC Termination Act preempted the application of municipal zoning laws to a railroad's right of way.

***Pac. Bell Tel. Co. v. P.U.C. of Cal., 2005 WL 818375 (N.D. Cal. Apr. 5, 2005).*** As counsel to SBC Communications, Mayer Brown convinced the court that a public utility commission decision requiring the unbundling of certain network elements was preempted by federal law.

***CSX Transportation, Inc.—Petition for Declaratory Order, STB Fin. Dkt. No. 34662, 2005 WL 584026 (Mar. 14, 2005).*** On behalf of the Association of American Railroads, Mayer Brown authored an amicus brief that helped persuade the STB that the ICC Termination Act preempted a District of Columbia law regulating the transportation of hazardous materials by rail through the city.

***Mich. Bell Tel. Co. v. Lark, 373 F. Supp. 2d 694 (E.D. Mich. 2005).*** We persuaded the court that a state order requiring that Michigan Bell follow certain procedures in connection with the unbundling of network elements was inconsistent with and thus preempted by federal law.

***Ill. Bell Tel. Co. v. Ill. Commerce Comm'n, 816 N.E.2d 379 (Ill. App. Ct. 2004).*** On behalf of Illinois Bell, Mayer Brown convinced the court that a tariff imposed by the state as part of an alternative regulation plan was preempted by federal law.

***Horn v. Thoratec Corp. 376 F.3d 163 (3d Cir. 2004).*** Mayer Brown, as co-counsel, persuaded the court that the Medical Device Amendments to the Food, Drug and Cosmetic Act preempted the plaintiff's state-law tort claims against the manufacturer of a Class III medical device that had received premarket approval from the FDA.

***Antunes v. Nissan N. Am., Inc., No. CV 2003-004187 (Ariz. Super. Ct. June 14, 2004).*** In its dismissal of this product liability case, the court adopted Mayer Brown's argument that the plaintiff's claim was preempted by the National Traffic and Motor Vehicle Safety Act.

***Ill. Bell Tel. Co. v. Ill. Commerce Comm'n, 797 N.E.2d 716 (Ill. App. Ct. 2003).*** On behalf of Illinois Bell, Mayer Brown persuaded the court that a state-imposed tariff was unlawful because it subverted the federally-mandated negotiation procedure.

***Wis. Bell, Inc. v. Bie, 340 F.3d 441 (7th Cir. 2003).*** As counsel to the SBC, Mayer Brown successfully argued that an order issued by the Wisconsin Public Services Commission, which directed the SBC to permit access to elements of its network, was preempted by the Telecommunications Act of 1996.

***Consolidation Coal Sales Co. v. Conrail, 6 S.T.B. 237, 2002 WL 1046015 (May 23, 2002).*** Mayer Brown represented Conrail and convinced the Surface Transportation Board that the Interstate Commerce Act preempted a state-law breach of contract claim.

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***Wenzel v. Citicorp. Mortgage Inc., No. 01 CH 18067 (Ill Cir. Ct. 2002); Etter v. Citibank, F.S.B., No. 02 CH 2193 (Ill Cir. Ct. 2002).*** Representing CitiMortgage and Citibank in a set of consolidated class actions, Mayer Brown won dismissal of state-law claims challenging document preparation fees on the ground that they were preempted by the National Bank Act and the Home Owners' Loan Act.

***Conboy v. United Airlines, Inc., No. 00 CH 11742 (Cook Cty. Cir. Ct. Oct. 26, 2001).*** Mayer Brown won dismissal of this class action after convincing the court that the plaintiffs' contract claims were preempted by the Airline Deregulation Act.

***Cont'l Airlines, Inc. v. United Air Lines, Inc., 120 F. Supp. 2d 556 (E.D. Va. 2000).*** On behalf of United Air Lines, Mayer Brown persuaded the court to dismiss state-law antitrust and conspiracy claims as preempted by the Airline Deregulation Act.

***MorEquity, Inc. v. Naeem, 118 F. Supp. 2d 885 (N.D. Ill. 2000).*** Mayer Brown won dismissal of state statutory claims against a state-chartered, federally-insured bank on the ground that they were preempted by the Depository Institutions Deregulation and Monetary Control Act.