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Cover Page Footnote
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NOTES

THE FEDERAL BOAT SAFETY ACT OF 1971 AND PROPELLER STRIKE INJURIES: AN UNEXPECTED EXERCISE IN FEDERAL PREEMPTION

Amy P. Chiang*

INTRODUCTION

June 6, 1993 was a beautiful day to spend on the water. Kathryn Lewis was doing just that—boating with her boyfriend and his family on Strom Thurmond Lake in Georgia.1 The boat was outfitted with a Brunswick outboard motor.2 Although the motor did not have a propeller guard,3 no one gave it second thought. Everyone took turns riding on an inner tube that was pulled behind the boat. During Kathryn's boyfriend's turn to ride on the inner tube, the driver made a sudden sharp turn.4 In an instant, Kathryn fell or was tossed off the left side of the boat.5 She tumbled into the water and onto the motor's propeller blades.6 The blades repeatedly struck Kathryn's head and body as her boyfriend's family watched in horror.7 She died immediately.8

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1. See Lewis v. Brunswick Corp., 107 F.3d 1494, 1497 (11th Cir.), cert. granted, 118 S. Ct. 439 (1997), cert. dismissed, 118 S. Ct. 1793 (1998). This fact pattern is loosely based on the Lewis case; details have been added.
3. See Lewis, 107 F.3d at 1497. A propeller guard is a device that covers the blades of a propeller motor to prevent contact between the blades and other objects, including people. See also infra note 80 (describing types of guards that are available on the market today). Its purpose in this context is to protect people from propeller strike injuries caused by coming into contact with the blades.
4. See id.
5. See id.
6. See id.
7. See id.
8. See id.
Unfortunately, tragic stories like Kathryn's are not uncommon.\(^9\) Both the number of recreational boaters and reported deaths and accidents relating to recreational boating are rising steadily in the United States.\(^{10}\) In 1997, the United States Coast Guard ("Coast Guard") reported 8047 accidents and 4555 injuries related to recreational boating.\(^{11}\) These figures represented a record number of accidents and injuries reported,\(^{12}\) and resulted in over $29 million in property damage.\(^{13}\) Similarly, the number of victims of motor or propeller accidents is also increasing.\(^{14}\) In 1997, the Coast Guard reported 123 motor or propeller related accidents and 126 injuries,\(^{15}\) up from 119 motor or propeller related accidents and 114 injuries reported in 1996.\(^{16}\)

This growing accident rate has resulted in several lawsuits challenging the safety of outboard motors that are not equipped with propeller guards.\(^{17}\) An unexpected outcome of these civil suits against motor manufacturers is a heated debate over federal preemption of these state law based claims.\(^{18}\) In the archetypal case, the exposed propeller of an outboard motor injures or kills the plaintiff in a tragic boating accident.\(^{19}\) The plaintiff, or the plaintiff's estate or survivors,
sues the motor manufacturer based on a state common law tort claim for failure to outfit the outboard motor with a propeller guard, generally basing these suits on theories of negligence and product liability. Inevitably, the defendant-companies move for summary judgment on the ground that the Federal Boat Safety Act of 1971 ("FBSA") preempts state common law claims regarding propeller guards. The defendant typically argues that the plaintiff's claim is preempted by the FBSA's requirement that state and federal boating safety laws be identical in light of the Coast Guard's policy decision not to mandate propeller guards.

Twelve courts have addressed whether federal preemption is a valid defense to these plaintiffs' common law claims. All but two courts upheld the defense and ruled that the plaintiff's claims were preempted. Those courts finding preemption ("majority") have done so on the ground that Congress's intent to preempt state law via the FBSA, coupled with the Coast Guard's recommendation not to regulate propeller guards, is tantamount to preempting the states from regulating otherwise. Courts that did not find preemption ("minority") generally focused on a narrower reading of the statute in conjunction with a strong presumption against preemption and in

20. See Lewis v. Brunswick Corp., 107 F.3d 1494, 1497 (11th Cir.), cert. granted, 118 S. Ct. 439 (1997), cert. dismissed, 118 S. Ct. 1793 (1998). After the accident, Kathryn's parents filed suit in Georgia State court against the motor manufacturer, Brunswick Corporation ("Brunswick"), to recover damages for their daughter's death. See id. Kathryn's parents alleged that Brunswick's engine was defectively designed for lack of a propeller guard and that Brunswick's failure to install a guard constituted negligence. See id.

21. See Propeller Guard Report, supra note 17, at 4-5 (negligence); Elliot v. Brunswick Corp., 903 F.2d 1505, 1505 (11th Cir. 1990) (product liability).


24. See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 248 (Tex. 1994) ("[Defendant] contends that [Plaintiff's] claims are expressly preempted by the combination of § 4306 and the Coast Guard's decision not to mandate propeller guards through regulation, as evidenced by a Coast Guard report." (footnote omitted)).


26. See infra part III.

27. See infra part III.A.
favor of states' rights. In recognition of this controversy, the
Supreme Court granted certiorari to Lewis v. Brunswick Corp. in
1997. This highly anticipated decision never came to fruition,
however, as the parties agreed to dismiss the case before the Court
rendered judgment. Thus, the issue of the FBSA's preemption of
state common law claims remains unresolved.

This Note considers whether the FBSA preempts state common law
tort claims for liability based on a failure to install propeller guards. It
concludes that although the FBSA does not expressly preempt such
claims, it does so implicitly. Part I discusses the historical backdrop
and legislative history of the Federal Boat Safety Act of 1971. This
part also examines the report on the feasibility and effectiveness of
requiring propeller guards and the Coast Guard's subsequent decision
not to mandate propeller guards. Part II outlines the doctrine of
federal preemption and its basic principles and characteristics. Part
III sets forth the division among the courts over whether the FBSA
preempts state common law propeller guard claims. Part IV applies
preemption analysis and finds that while defendant-companies do not
have an express preemption defense to these state tort claims, they do
have an implied preemption defense. This Note concludes that courts
should henceforth rule that the FBSA implicitly preempts any state
common law tort claim for liability based on the absence of an
outboard motor propeller guard.

I. BACKGROUND

This part discusses the FBSA and the circumstances and intent
behind its enactment, as well as the study assessing the feasibility of
requiring propeller guards on the outboard motors of recreational
boats.

   Legislative History

The Federal Boat Safety Act of 1971 authorizes the Coast Guard
to promulgate "regulations establishing minimum safety standards for
recreational vessels and associated equipment...." The FBSA's
original purpose was to create a uniform national boating safety
program to promote the overall participation and enjoyment of
recreational boating, and to simultaneously shield from injury the

28. See infra part III.B.
30. See Lewis, 118 S. Ct. at 1793.
31. This may not be the case for long, however, as a more recent decision in 1999
   may soon raise this issue with the Court again. See Ard v. Jensen, 996 S.W.2d 594
   (Mo. Ct. App. 1999).
33. Id. § 4302(a)(1); see infra note 70.
growing number of people attracted to recreational boating.\textsuperscript{34} When the FBSA was initially proposed, recreational boating was increasing at an astronomical rate.\textsuperscript{35} Unfortunately, this growth came at a price.\textsuperscript{36} Nearly 7000 persons lost their lives in boating accidents between 1966-1970.\textsuperscript{37} Sources predicted that the number of boat owners would rise rapidly,\textsuperscript{38} and that the number of boat related fatalities would increase. Existing law seemed inadequate to handle this explosion of casualties.\textsuperscript{39} In Congress's view, the annual fatality rate was alarming enough to warrant requiring recreational boating manufacturers to adhere to higher safety standards—on par with the dangers associated with use of their products.\textsuperscript{40} According to Congress, new and uniform federal regulation "could substantially reduce the level of fatalities ... resulting from boating mishaps."\textsuperscript{41} Thus, Congress enacted the FBSA.\textsuperscript{42}


\textsuperscript{35} See S. Rep. No. 92-248, at 6-7 (1971), reprinted in 1971 U.S.C.C.A.N. 1333, 1333-34 (estimating that "the number of recreational boats in the United States [was] increasing at the rate of about 4,000 per week and that by 1975 over 50 million persons [would] be engaged in [boating]," and that "[o]ver 40 million Americans [were] engaged in recreational boating each year in approximately 9,000,000 boats").

\textsuperscript{36} See id., reprinted in 1971 U.S.C.C.A.N. 1333, 1333-34 (stating that this "development has also brought with it accidents, deaths and injuries").


\textsuperscript{40} See id. at 13, reprinted in 1971 U.S.C.C.A.N. 1333, 1335; see also H.R. Rep. No. 92-324, at 2 (1971) (stating that the number of deaths related to recreational boating was "distressing, either in absolute terms or relative to other modes of transportation").


\textsuperscript{42} See id. at 6, reprinted in 1971 U.S.C.C.A.N. 1333, 1333 (stating that the FBSA "largely incorporates the substance of the Federal Boating Act of 1958, which would be repealed, and thereby essentially provides a single comprehensive Act dealing with the subject of safety for boats used principally for other than commercial use"); H.R.
Congress believed that requiring manufacturers to provide safer boats and equipment could improve boating safety. New and uniform manufacturing and equipment standards at the federal level would also limit any interference with interstate commerce. Additionally, Congress wanted to increase the role of the states in boating safety by providing a federal grant in aid incentive payment program to states that had instituted, or intended to institute, certain approved state boating safety programs. State involvement in boating safety was necessary because approximately half of all deaths and more than one-third of all accidents occurred in waters solely under state jurisdiction.

As enacted, the FBSA was a broad statute that sought to regulate recreational boating. Rather than set forth specific standards, the FBSA authorized the Coast Guard to consider and prescribe standards and regulations for recreational vessels. The FBSA focused primarily on establishing uniform safety standards for the manufacture and performance of recreational boating vessels and their related equipment.

B. Preemption and Preservation of Common Law Claims

Particularly relevant to these common law claims involving propeller strike injuries are two FBSA provisions: the federal preemption clause ("preemption clause") and the saving to suitors clause ("savings clause").

Rep. 92-324, at 2-3 (1971) ("It is time that recreational boats be built in accordance with standards prescribed by one Federal agency—in this case the Coast Guard—so that the public can enjoy recreational boating with greater safety.").

44. See id. at 14, reprinted in 1971 U.S.C.C.A.N. 1333, 1335. A uniform standard facilitates interstate commerce because it is easier for a product to comply with one safety standard than with 50 different standards.
48. See id. at 159, reprinted in 1983 U.S.C.C.A.N. 924, 971. The FBSA actually granted this right to the Secretary of Transportation, who delegated this responsibility to the Coast Guard. See Lewis v. Brunswick Corp., 107 F.3d 1494, 1498 (11th Cir.), cert. granted, 118 S. Ct. 439 (1997), cert. dismissed, 118 S. Ct. 1793 (1998); see also 46 U.S.C. § 4303 (1994) (authorizing the Secretary to delegate its duties under the FBSA to "a person, private or public agency, or organization").
The preemption clause provides that "a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing" safety standards or imposing requirements for recreational vessels or associated equipment "that is not identical to a regulation prescribed under [the FBSA]." The preemption clause essentially requires state laws or regulations to match the federal regulations prescribed under the FBSA, and allows for the federal preemption of state standards for boat and equipment safety. The clause comports with the established tradition of preemption in maritime safety by addressing the need for uniform regulations for recreational boats operating in interstate commerce. The clause also ensures that the FBSA would not require manufacturers of such boats and equipment to abide by widely varying local laws.

The preemption clause, however, cannot preempt state laws or regulations regarding safe boat operation and use that are properly within the scope of state or local concern. Congress realized that certain locations may have unusual situations that warrant a departure from the uniform federal standard. As such, the preemption clause allows states to impose additional requirements for "carrying or using marine safety articles... when necessary to meet uniquely hazardous local conditions or circumstances." This right is limited, however, and is still ultimately subject to the need for uniformity.

51. 46 U.S.C. § 4306. The preemption clause provides in full:
Federal preemption
Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Id.
52. See, e.g., Ryan v. Brunswick Corp., 531 N.W.2d 793, 795 (Mich. Ct. App. 1995) ("Section 4302 authorizes the Secretary of Transportation to prescribe regulations requiring the installation of certain equipment on recreational vessels and prohibiting the installation of equipment that does not conform with federal safety standards.").
59. See id., reprinted in 1971 U.S.C.C.A.N. 1333, 1341 ("A right of disapproval, however, is reserved to the Secretary to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity.").
The FBSA also contains a savings clause that preserves particular common law claims from federal preemption. The inclusion of the savings clause indicates that Congress anticipated and acquiesced to common law claims implicating the FBSA. The clause provides that compliance with the FBSA does not preclude liability at common law, and preserves those claims that are compatible with the FBSA's federal regulatory scheme. Congress intended to ensure that defendant manufacturers could not use mere compliance with the minimum standards established under the FBSA as a defense in product liability suits. Thus, Congress had no intention of completely shielding the boating industry from state tort liability.

The preemption clause and the savings clause pull in opposite directions, creating a tension in statutory interpretation. On the one hand, the preemption clause grants the federal government the power to override state law when regulating under the FBSA. On the other hand, the savings clause suggests that this power is not absolute, and that the states retain some ability to regulate boating safety. Therefore, the challenge lies in interpreting the two clauses in a way that gives effect to both.

C. The Report of the Propeller Guard Subcommittee

Under the FBSA, the Secretary of Transportation ("Secretary") has the power to promulgate the statute's safety standards and regulations. Before prescribing a regulation, the Secretary must first consult with the National Boating Safety Advisory Council ("NBSAC") regarding the necessity of the regulation and the extent to which regulation will increase recreational boating safety.

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60. The savings clause is codified at 46 U.S.C. § 4311(g) (1994) and provides in full: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."


63. See Lewis, 107 F.3d at 1504 (deciding which product liability claims may be brought "without upsetting the overall scheme Congress intended").


66. See id.

67. See supra text accompanying notes 51-59.

68. See supra text accompanying notes 60-65.

69. See Becker, 943 P.2d at 703.

70. See 46 U.S.C. § 4302 (1994). The Secretary then delegated his powers and duties under the FBSA to the Secretary of the Coast Guard pursuant to 46 U.S.C. § 4303(a). See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 248 n.3 (Tex. 1994); supra note 48.

71. See Moore, 889 S.W.2d at 248 (citing 46 U.S.C. § 4302(c)(4)).
regulation will compel substantial future alteration of a vessel or piece of associated equipment, the Secretary and the NBSAC must initially determine that such regulation is necessary to avert a significant risk of physical harm to the public.\footnote{\textsuperscript{72}}

Pursuant to these provisions, the Secretary of the Coast Guard—to whom the Secretary’s power was delegated— instructed the NBSAC to appoint a Propeller Guard Subcommittee (“Subcommittee”) in 1988 to review and assess data concerning propeller accidents.\footnote{\textsuperscript{73}} The NBSAC charged the Subcommittee with examining the possibility of mandating propeller guards to avoid propeller related injuries.\footnote{\textsuperscript{74}} The Subcommittee’s results and conclusions are set forth in the Report of the Propeller Guard Subcommittee.\footnote{\textsuperscript{75}} The report concluded: (1) propeller guards can only slightly increase boating safety, especially because propellers themselves are so rarely the “sole” cause of injury in an underwater impact;\footnote{\textsuperscript{76}} (2) the drawbacks of using propeller guards outweigh any protection they may provide in a propeller strike;\footnote{\textsuperscript{77}} (3) efforts to improve recreational boating safety should focus on boater education, rather than superficial solutions such as a propeller guard requirement, because the initial cause of these accidents is often operator error;\footnote{\textsuperscript{78}} and (4) recreational boaters should not be lulled into a false sense of security by “thinking there is a ‘safe’ device which would eliminate or significantly reduce such injuries or fatalities.”\footnote{\textsuperscript{79}}

The report documented many problems with the use of propeller guards to prevent propeller strike accidents. For example, studies showed that some current designs for propeller guards create new hazards such as catching and trapping limbs against the rotating propeller blades.\footnote{\textsuperscript{80}}

\footnote{\textsuperscript{72}} See id. at 248 (citing 46 U.S.C. § 4302(c)(3)).
\footnote{\textsuperscript{73}} See Propeller Guard Report, supra note 17, at 1.
\footnote{\textsuperscript{74}} See id. app. A. Specifically, the NBSAC’s charge was to consider: (a) available propeller accident data and possible ways of covering propellers to prevent propeller accidents; (b) arguments for and against using such methods to prevent propeller strikes; and (c) several other factors such as how often such accidents occurred, whether the number of such accidents was increasing or decreasing, and whether there should be federal regulation. See id.
\footnote{\textsuperscript{75}} See id. at 20-24.
\footnote{\textsuperscript{76}} See id. at 23. Most injuries and fatalities from underwater accidents result from an impact with any part of the propulsion unit, rather than with the propeller blade. See id.
\footnote{\textsuperscript{77}} See id. (concluding that the use of propeller guards “can create new hazards of equal or greater importance”).
\footnote{\textsuperscript{78}} See id. Ignorant or careless operators are often a cause of boating accidents because they fail to understand the “abilities and limitations of their equipment” and “the consequences of careless or negligent operation” of their boats. Id. For example, a boat operator can reduce the chance of an underwater propeller accident by operating a boat in a manner that would prevent passengers from falling overboard. See id. at 10-11.
\footnote{\textsuperscript{79}} Id. at 24. The report also concluded that there is no propeller safety device currently available that can significantly reduce injuries, nor will one be available in the foreseeable future. See id.
propeller.\textsuperscript{80} The additional bulk of a propeller guard also adds an impact hazard by increasing the surface area with which a submerged victim can come into contact.\textsuperscript{81} Propeller guards also adversely affect boat operation. The addition of a propeller guard poses serious steering and handling problems, increases drag,\textsuperscript{82} and dramatically reduces power and fuel efficiency.\textsuperscript{83} Although propeller guards have been used successfully in some situations, they are still unfit for general use. For example, amusement parks have used guards on bumper boats for years.\textsuperscript{84} These boats, however, operate at a maximum speed of two miles per hour where a guard would not affect a boat's performance.\textsuperscript{85} Recreational boats, on the other hand, generally travel at much higher speeds where a guard is more likely to adversely effect a boat's operation.\textsuperscript{86} Rescue boats have also had some success with mask type guards. Although the wide-spaced bars on these guards minimize drag when racing to the rescue scene, they do not prevent body appendages from becoming trapped against the propeller.\textsuperscript{87}

Additionally, evidence that the incidence of propeller caused deaths were relatively infrequent suggested that the installation of guards, even if successful, would do little to improve overall boating safety.\textsuperscript{88} In fact, the number of people affected was minimal compared to the overall number of boating accidents reported per year.\textsuperscript{89} One study

\begin{itemize}
\item \textsuperscript{80} See id. at 20-21. The report considered the three types of guards then available: the ring, screen, and tunnel/tube. See id. at 12-15 (describing each type of guard in further detail). Each type of guard has its own particular drawback. See id. For example:
\begin{quote}
In the case of the ring type guard, a new hazard is created, in that an arm, leg, etc., may be caught by the bars or ring and held against the rotating propeller. Operators of a "guard-equipped boat" can be expected to have a false sense of security when approaching persons in the water at slow speeds, with a very real risk of impacting and/or entrapping a body appendage.
\end{quote}
\textit{Id.} at 20-21 (internal quotations omitted).

\item \textsuperscript{81} See id. at 20-21. The added bulk of the propeller guard increases significantly the "underwater profile" of a boat, thereby increasing the odds of underwater contact. \textit{Id.} at 20. Although propellers can cut and penetrate the body, guards increase the "hazard of blunt trauma injuries, which are often more severe." \textit{Id.} at 18-19. For example, "a skull impact at 10 mph or more in the water would be generally fatal." \textit{Id.} at 17.

\item \textsuperscript{82} Drag is defined as either "motion effected with slowness or difficulty" or "something that retards motion or action." Merriam Webster's Collegiate Dictionary 350 (10th ed. 1997).

\item \textsuperscript{83} See \textit{Propeller Guard Report, supra} note 17, at 16-17. In one experiment, the added drag caused by the propeller guard reduced boat speed from 37 mph to 27 mph, requiring a 100% increase in horsepower to regain the initial speed. See id. at 17.

\item \textsuperscript{84} See id. at 15.

\item \textsuperscript{85} See id.

\item \textsuperscript{86} Normal operating speed is 10 mph or more, and is generally between 13-35 mph. See id. at 19-21 (discussing the adverse effects of propeller guards at speeds higher than 10 mph).

\item \textsuperscript{87} See id. at 15.

\item \textsuperscript{88} See id. at 23.

\item \textsuperscript{89} See id.
\end{itemize}
found that the number of boating deaths involving propellers, approximately thirty to forty-nine per year, equaled one-third to one-half of the number of deaths associated with being struck by lightning.\textsuperscript{90}

Ultimately, the Subcommittee recommended that the "Coast Guard take no regulatory action [requiring] propeller guards."\textsuperscript{91} The NBSAC approved the Subcommittee report, and the Coast Guard adopted all of the Subcommittee's recommendations.\textsuperscript{92} The Coast Guard's official position was that current propeller guard accident data did not warrant mandating propeller guards on motorboats.\textsuperscript{93} The Coast Guard also noted the prohibitive costs of retrofitting millions of boats and the lack of a universal guard that could fit all boats as other reasons in support of its conclusion.\textsuperscript{94} Finally, the Coast Guard agreed to continue its efforts in monitoring propeller accident data and improvements in the propeller guard industry.\textsuperscript{95}

The FBSA, therefore, does not require recreational boaters to install propeller guards. It will not do so until the benefits of such a requirement demonstrably outweigh its drawbacks. Plaintiffs, however, continue to bring state tort claims based on a failure to install a propeller guard. In view of this conflict, the next part sets forth the basic principles of federal preemption of state common law claims, and discusses in detail the different types of preemption.

II. THE DOCTRINE OF FEDERAL PREEMPTION

The defense commonly employed in claims based on propeller strike injuries is that the FBSA, combined with the Coast Guard's decision not to mandate propeller guards, precludes the plaintiff's state law based claims. This part outlines the basic principles of the doctrine of preemption and examines the two types of preemption, expressed and implied.

A. Background and Basic Principles

The doctrine of preemption is rooted in the Supremacy Clause of

\textsuperscript{90} The study was conducted in 1981, and covered the period from 1976 to 1981. \textit{See id.} app. E, at 1-2 (letter from Robert K. Taylor, P.E., Managing Engineer, Failure Analysis Associates, to Captain James E. Getz, Chairman, Propeller Guard Subcommittee, NBSAC (Aug. 2, 1989)).

\textsuperscript{91} \textit{See id.} at 24.

\textsuperscript{92} \textit{See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 249 (Tex. 1994)} (citing Letter from Robert T. Nelson, Rear Admiral U.S. Coast Guard, Chief, Office of Navigation and Waterway Servs., to Mr. A. Newell Garden, Chairman (Feb. 1, 1990)).

\textsuperscript{93} \textit{See id.}

\textsuperscript{94} \textit{See id.} There are an infinite number of types of boats and motors on the water that differ in design, function, size, and type. \textit{See Propeller Guard Report, supra} note 17, at 22. Thus, manufacturing a guard to fit all boats is nearly impossible. \textit{See id.}

\textsuperscript{95} \textit{See Moore}, 889 S.W.2d at 249.
the United States Constitution. The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land," and essentially grants Congress the power to preempt state law. The power to preempt state law extends to both positive enactments and common law. Despite this extensive grant of power, courts seldom find that Congress exercises this power to its fullest extent. When addressing issues arising under the Supremacy Clause, courts presume that federal law does not supersede state police powers unless Congress clearly intended it to do so. The "ultimate touchstone" of preemption is therefore Congressional intent.

When considering a claim of preemption, courts weigh three principles: federalism, predictability, and ease of administration. The first and most important principle is federalism, which requires balancing the federal government's interest in regulation against the state government's desire to regulate its own interests and maintain its


97. U.S. Const. art. VI. The Supremacy Clause provides in full: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id.


99. See shields v. Outboard Marine Corp., 776 F. Supp. 1579, 1581 (M.D. Ga. 1991) ("The preemption doctrine applies not only to state laws and regulations, but common law rules and jury awards of damages as well, since they also act as regulations and can frustrate congressional objectives.").


101. See id. at 568-69.


103. See Stabile, supra note 102, at 8-14.

104. See id. at 9.
Under the Tenth Amendment, those powers not delegated to the federal government, also known as the police powers, are reserved to the States. The Tenth Amendment thereby checks Congress's power to override state law. Courts must balance the Tenth Amendment against the Supremacy Clause's grant of federal power to uphold state sovereignty in accordance with principles of federalism.

The second principle courts weigh is predictability. Predictability refers to the ease with which those subject to a law can interpret that law. Predictability allows those subject to a law to determine more easily which law governs and to adjust their behavior accordingly. Although ease of interpretation is always a concern, this is especially important within the federal preemption context because preemption inherently involves interpreting the substance of two laws—one federal and one state—and the interaction between them. A predictable preemption analysis that determines which standard governs simplifies the process for those subject to the conflicting standards and improves compliance. A wholesale predictability analysis is not advised, however, because it can lead to an inflexible system of regulation that is less adaptable to the various situations that inevitably arise. Thus, courts try to strike a balance between predictability and flexibility to reach the best result.

The third and final principle in preemption analysis is ease of administration. Ease of administration focuses on the judicial
system and its ability to operate effectively and efficiently. This principle relates to developing a sufficiently simple method of preemption analysis that lower courts can easily follow. Complex rules for preemption analysis that are difficult to apply correctly and consistently yield uncertain and varying results. This, in turn leads to increased litigation, which is both expensive and time consuming. Thus, courts consider ease of administration when applying preemption analysis to avoid this unnecessary drain on the judicial system's resources. Thus, preemption analysis begins with the Supremacy Clause, and continues with the principles of federalism, predictability, and efficiency. Together, they drive preemption analysis and help to determine the most just and beneficial outcome.

B. Types of Preemption

There are two types of federal preemption: express preemption and implied preemption. Whether preemption is found to be express or implied, the final result is the same—the relevant state law is rendered inoperable.

1. Express Preemption

Express preemption occurs when Congress drafts a statute that includes language explicitly stating that the federal statute preempts state law. An express preemption inquiry focuses on whether the

118. See id. at 14.
119. See id.
120. See id.
121. See id.
122. See id.

Congressional intent to preempt state law may be revealed in several ways:
(1) 'express preemption,' in which Congress defines explicitly the extent to which its enactments preempt state law; (2) 'field preemption,' in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred; and (3) 'conflict preemption,' in which state law is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Lewis, 107 F.3d at 1500 (citations omitted).
124. See supra part II.A.
125. See Klein, supra note 98, at 107 ("Congress (or an administrative agency to which it has delegated the power) . . . specifically declare[s], in a statute or regulation, an intention to foreclose state law in a particular area."); Grey, supra note 100, at 566.
language of the preemption provision demonstrates a congressional intent to preempt state law.\textsuperscript{126} The most common indicator of express preemption is the presence of a preemption clause in a federal statute\textsuperscript{127} because such a clause clearly demonstrates a congressional intent to preempt.\textsuperscript{128}

A preemption clause also defines the scope and extent of the federal statute's preemption.\textsuperscript{129} Once a statute is found to contain an express preemption clause, courts use statutory construction to identify the scope of the preemption to determine the domain preempted.\textsuperscript{130} Courts do not interpret the preemption provision "in a contextual vacuum," instead they also consider the presumption against preemption and the congressional purpose behind the statute.\textsuperscript{131} This analysis often implicates four factors: (1) the statute's plain language, or what it says on its face;\textsuperscript{132} (2) the presumption against preemption;\textsuperscript{133} (3) the congressional purpose in enacting the

\textsuperscript{126} Express preemption clauses are not uncommon in federal statutes. For example, the Employee Retirement Income Security Act ("ERISA") features a preemption clause, which provides that federal law "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Klein, \textit{supra} note 98, at 107 n.11 (quoting 29 U.S.C. § 1144(a) (1988)). The National Traffic and Motor Vehicle Safety Act of 1966 provided that "no State... shall have any authority either to establish, or to continue in effect... any safety standard... not identical to the Federal standard." 15 U.S.C. § 1392(d) (repealed 1994). The Medical Devices Amendments provide that "no State or political subdivision of a State may establish or continue in effect... any requirement... which is different from, or in addition to, any requirement applicable under this chapter to the device... under this chapter." 21 U.S.C. § 360k (1994).

\textsuperscript{127} Cf. Stabile, \textit{supra} note 102, at 7 ("In express preemption situations, such intent is sought primarily in the language of the preemption provision.").

\textsuperscript{128} See Medtronic, Inc. v. Lohr, 518 U.S. 470, 471 (1996) (stating that "the Court need not go beyond [the statute's] pre-emptive language to determine whether Congress intended the [statute] to pre-empt at least some state law"); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (finding "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation" where a statute contains an express preemption provision (internal quotations omitted)).

\textsuperscript{129} See Cipollone, 505 U.S. at 517.

\textsuperscript{130} See Medtronic, 518 U.S. at 471 (applying statutory interpretation to determine "the domain expressly pre-empted" (quoting Cipollone, 505 U.S. at 517) (internal quotations omitted)); Grey, \textit{supra} note 100, at 566, 568-69.

\textsuperscript{131} Medtronic, 518 U.S. at 485. Justice Scalia disagreed with the plurality's application of the principles of interpretation in deciphering an express preemption clause in Cipollone. See 505 U.S. at 544-45 (Scalia, J., concurring in part and dissenting in part). In Scalia's opinion, once express preemption has been established by the presence of a preemption clause, the statute should be interpreted according to the ordinary or apparent meaning on its face, without applying additional principles or considerations. See \textit{id}.

\textsuperscript{132} See Medtronic, 518 U.S. at 486-89; Cipollone, 505 U.S. at 517-18; Grey, \textit{supra} note 100, at 566.

\textsuperscript{133} See Medtronic, 518 U.S. at 485, 487 (declaring that this presumption not only applied to the existence of a preemption clause, but also to the scope of the clause).
and (4) the regulatory context of the statute.

The presence of a savings clause, along with a preemption clause, adds another dimension to the preemption analysis. Savings clauses are statutory provisions that "limit the reach of an express preemption clause, exempting state law claims ... [without negating] the effect of the preemption clause." Congress generally includes a savings clause when it anticipates common law claims in the area that the statute regulates. Presumably, Congress includes a savings clause to ensure that those claims that it wished to preserve are not inadvertently preempted in the future.

2. Implied Preemption

If a statute does not contain a preemption provision, or if the provision is ambiguous, then courts will consider whether the state law is preempted by implication. An implied preemption analysis looks to the substantive provisions of the federal statute for evidence of congressional intent to preempt. There are two types of implied preemption: field preemption and conflict preemption.

Field preemption exists when the wording of a federal statute or its legislative history evinces Congress's intent to exclusively occupy a given regulatory field. Accordingly, a field preemption inquiry

134. See id. at 486, 490 (examining the statute's general purpose and legislative history to determine its scope); Cipollone, 505 U.S. at 518; Grey, supra note 100, at 566 (searching for the congressional purpose as demonstrated in the statute's legislative history).

135. See Cipollone, 505 U.S. at 513-15, 519; Grey, supra note 100, at 566.


137. Id. For example, the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (repealed 1994), contained a savings clause: "Compliance with any Federal motor vehicle standard ... does not exempt any person from any liability under common law." Id. § 1397(k). The FBSA contains a similar savings clause. See supra part I.B.


139. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 489 (1996); Grey, supra note 100, at 566. The Court has implied that Congress's inclusion of an express preemption clause precludes the existence of implied preemption. See Cipollone, 505 U.S. at 517. But this suggestion has not necessarily been followed. See, e.g., Freightliner Corp. v. Myrick, 514 U.S. 280, 287-89 (1995) (stating that the Cipollone inference is not "a categorical rule precluding the coexistence of express and implied preemption").

140. See Stabile, supra note 102, at 7-8.

141. Scholars have sometimes referred to "field preemption" by other names, such as "implied field preemption," Grey, supra note 100, at 566, and "occupation of the field," Klein, supra note 98, at 107. Substantively, however, there is no difference.

142. "Conflict preemption" is also commonly known by other names, such as "conflicts preemption," Grey, supra note 100, at 566, and "actual conflict," Klein, supra note 98, at 108. Again, there is no difference substantively.

143. See Grey, supra note 100, at 566 (defining field preemption as when a system of federal regulation is so comprehensive as to displace all state regulation); Klein, supra note 98, at 107 (defining field preemption as when "federal law 'touch[es]' a
focuses on the federal statute’s language, legislative history, and overall statutory scheme.\textsuperscript{144} Examples of Congress’s exercise of field preemption include nuclear safety regulation\textsuperscript{145} and sedition.\textsuperscript{146}

Conflict preemption can arise in two ways: when compliance with both state and federal law is impossible,\textsuperscript{147} or when state law frustrates a federal objective.\textsuperscript{148} Under a conflict preemption analysis, there is no longer a presumption against preemption because federal law always trumps state law in a direct conflict under the Supremacy Clause.\textsuperscript{149} The test for the first prong of conflict preemption, the “dual compliance” test, simply asks whether one can physically comply with both the federal law and the state law, even though each contains a different standard.\textsuperscript{150} The second prong, the “frustration-of-objectives” test, considers (1) the overall purpose and objective of the federal law and (2) the impact of the state law’s effect on the execution of the federal objective.\textsuperscript{151} This prong of conflict preemption focuses on interpreting both standards—federal and state—and considers how they interact with one another.

The doctrine of preemption and its basic tenets are well established in the judicial system. At first glance, federal preemption appears straightforward and uncomplicated. As part III demonstrates, however, courts often interpret the doctrine of preemption and its application in conflicting ways, which results in incongruous outcomes. It takes a closer look at this phenomenon within the context of the FBSA and state common law tort claims in propeller injury cases.


\textsuperscript{145} See id. (concluding after studying “the statutory scheme and legislative history of the Atomic Energy Act” that “the Federal Government . . . occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States” (internal quotations omitted)).

\textsuperscript{146} See Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956) (finding a congressional intent to occupy the field of sedition because the relevant federal acts “evince[d] a congressional plan which [made] it reasonable to determine that no room has been left for the States to supplement it”).

\textsuperscript{147} See Grey, supra note 100, at 566-67.

\textsuperscript{148} See id. at 567; Klein, supra note 98, at 108 (describing this prong of conflict preemption as where “the state’s common law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law’”) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

\textsuperscript{149} See supra part II.A.

\textsuperscript{150} See Klein, supra note 98, at 108 (including state common law within the term “law”).

\textsuperscript{151} See id.
III. DIVISION IN THE COURTS: FEDERAL PREEMPTION OF PROPELLER GUARD CLAIMS

In the typical propeller accident case, the plaintiff sues the motor manufacturer under a common law negligence or products liability theory for failing to install guards around the offending propeller.152 The defendant-manufacturers raise a defense based on the FBSA's preemption provision and the Coast Guard's decision not to mandate propeller guards on recreational boating vehicles.153 In all but two of the eleven courts to decide a propeller guard case, plaintiff's claims were found to be preempted.154 Of the courts finding preemption, most held that the plaintiffs' claims were expressly preempted,155 while the remaining three courts held that the plaintiff's claims were implicitly preempted.156 Only two courts denied any preemption, either express or implied, of the plaintiff's claims.157 This part describes how these courts reached their conclusions.

A. The Majority View: The FBSA Preempts Common Law Propeller Guard Claims

Nine courts have addressed the question of preemption of state propeller guard claims and ruled in favor of preemption.158 Seven courts concluded that the plaintiffs' claims were expressly preempted,159 while three courts held that the plaintiffs' claims were implicitly preempted.160

1. Express Preemption of Propeller Guard Claims

Eight courts applied an express preemption analysis; seven of those courts found that the FBSA expressly preempted the plaintiffs' state common law tort claims based on a failure to install propeller

152. See supra text accompanying notes 19-21.
154. See infra part III.A. Of the twelve courts that have decided propeller guard cases, only eleven applied preemption analyses. See supra note 25. The latter are the cases discussed herein.
155. See infra part III.A.1.
156. See infra part III.A.2.
157. See infra part III.B.
159. See infra part III.A.1.
160. See infra part III.A.2.
guards. Express preemption exists where Congress drafts a statute that includes language explicitly defining the areas in which the federal statute preempts state law. In their analyses, these courts, in accordance with the principles of preemption analysis, considered congressional intent and presumed initially that there was no preemption. Still, these courts found that the FBSA's inclusion of a preemption clause sufficiently showed the "reliable indicium of congressional intent" necessary to preempt the propeller guard claims.

The courts next analyzed whether a decision not to regulate propeller guards constituted a federal law or regulation. If the decision amounted to a federal law or regulation, then no state law or regulation could differ under the FBSA. These courts held that the Coast Guard's recommendation not to mandate propeller guards had "the same preemptive force as a decision to regulate," because the decision yielded the same result as the enactment of a regulation preventing the states from requiring propeller guards. This resulted in a deliberate absence of federal regulation of propeller guards. As such, manufacturers could freely choose whether or not to install propeller guards on their motors. Therefore, any state law or regulation mandating the use of propeller guards would not mirror the Coast Guard's regulatory position and would conflict with federal law, which is prohibited by the FBSA.

161. See Lewis, 107 F.3d at 1501; Carstensen, 49 F.3d at 433; Moss, 915 F. Supp. at 186; Shield, 822 F. Supp. at 84; Davis, 854 F. Supp. at 1580; Mowery, 773 F. Supp. at 1017; Farner, 607 N.E.2d at 567; Ryan, 531 N.W.2d at 797. Lewis applied an express-preemption analysis, but failed to find a case for express preemption. See 107 F.3d at 1501.

162. See supra part II.B.1.

163. See Lewis, 107 F.3d at 1500; Davis, 854 F. Supp. at 1579; Farner, 607 N.E.2d at 565; Ryan, 531 N.W.2d at 795; supra part II.B.1.

164. The FBSA's preemption clause, in short, forbids the establishment, continuance, or enforcement of any state law or regulation different from federal regulation with respect to recreational boating safety. See 46 U.S.C. § 4306 (1994). For the full text of the FBSA preemption clause, see supra note 51.

165. Carstensen, 49 F.3d at 432 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992)).


167. Carstensen, 49 F.3d at 431; accord Moss v. Outboard Marine Corp., 915 F. Supp. 183, 186 (E.D. Cal. 1996); Ryan, 531 N.W.2d at 795.

168. See Ryan, 531 N.W.2d at 796.

169. See id.


171. See Carstensen, 49 F.3d at 431; Moss, 915 F. Supp. at 186; see also Davis v. Brunswick Corp., 854 F. Supp. 1574, 1580 (N.D. Ga. 1993), on reconsideration in part (Mar. 17, 1994) (finding a "general conflict ... between uniform federal regulation of boat safety as envisioned by the [FBSA] and state common law damages actions"); Ryan, 531 N.W.2d at 796 (stating that "any award of damages to plaintiff would be based on a determination that Michigan law requires the installation and use of
These courts also considered whether the language, state "law or regulation," in the FBSA’s preemption clause\textsuperscript{172} encompassed state common law.\textsuperscript{173} If the language encompassed state common law, then the FBSA preempts such claims.\textsuperscript{174} These courts found that the FBSA term state “law or regulation” included common law claims even if the preemption clause did not on its face refer to common law actions.\textsuperscript{175} First, the FBSA’s use of such broad language allowed for the interpretation that common law claims are implicitly included.\textsuperscript{176} Second, the courts found no reason to distinguish between positive enactments and common law because the final effect of either was the same—a form of state regulation.\textsuperscript{177} Under this analysis, allowing a jury to assess damages for failure to install a propeller guard would effectively create a state requirement to install guards.\textsuperscript{178} Jury awards on a state tort law claim essentially fine defendants for noncompliance with a jury imposed state standard.\textsuperscript{179} Thus, the enforcement of such awards rises to a form of state regulation because the standard is state based and state created.\textsuperscript{180} The FBSA’s preemption clause explicitly forbids such state interference.\textsuperscript{181} Furthermore, permitting such an outcome would allow a jury to create standards that even state legislatures could not create.\textsuperscript{182}

In some of these cases, plaintiffs argued that the FBSA’s savings clause\textsuperscript{183} preserved their right to sue.\textsuperscript{184} The courts rejected this

\textsuperscript{174} See Moss, 915 F. Supp. at 186.
\textsuperscript{175} See Carstensen, 49 F.3d at 431-32; Moss, 915 F. Supp. at 186; Farner, 607 N.E.2d at 567.
\textsuperscript{176} See Carstensen, 49 F.3d at 431-32; Moss, 915 F. Supp. at 186; Farner, 607 N.E.2d at 567 (stating that the “use of the word ‘law’ in Section 4306 further evidences Congress’ intent that no common-law tort action be maintained based on the lack of a propeller guard” and that “[s]tate law clearly embraces the common law”).
\textsuperscript{178} See Carstensen, 49 F.3d at 432; Moss, 915 F. Supp. at 186; Davis, 854 F. Supp. at 1580.
\textsuperscript{179} See Moss, 915 F. Supp. at 186. A jury award in a common law claim results in an “obligation to pay compensation.” Id. (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521 (1992)).
\textsuperscript{180} See id. Jury awards can be “a potent method of governing conduct and controlling policy.” Id. (quoting Cipollone, 505 U.S. at 521).
\textsuperscript{181} See Davis, 854 F. Supp. at 1580.
\textsuperscript{182} See id. (finding that this outcome “would allow a jury to perform a function from which the fifty states’ legislative bodies are precluded”); Mowery v. Mercury Marine, Div. of Brunswick Corp., 773 F. Supp. 1012, 1017 (N.D. Ohio 1991).
\textsuperscript{183} For the full text of the savings clause, see supra note 60 and accompanying text.
\textsuperscript{184} See Carstensen v. Brunswick Corp., 49 F.3d 430, 432 (8th Cir. 1995); Moss, 915
argument because interpreting the savings clause as such would thwart the FBSA’s goal of establishing uniform boating safety requirements.\textsuperscript{185} Instead, the courts reasoned that the clause should be read as saving only those common law claims that are not expressly preempted.\textsuperscript{186} In response, some plaintiffs argued that this interpretation of the savings clause rendered it superfluous.\textsuperscript{187} The courts disagreed, stating that the savings clause’s purpose was not to preserve all common law claims, but to prevent the preemption of claims in which the defense is based solely on compliance with the federal law.\textsuperscript{188} In other words, the clause was meant to prevent a manufacturer from relying on its compliance with the minimum safety standards set forth in the FBSA as a defense to state common law claims of defective design.\textsuperscript{189} Therefore, the savings clause is inapplicable in the absence of an affirmative requirement to install propeller guards.\textsuperscript{190}

Of the majority, only the Eleventh Circuit, in Lewis v. Brunswick Corp., considered and failed to find express preemption.\textsuperscript{191} In Lewis, the Eleventh Circuit construed the FBSA’s preemption clause narrowly because the FBSA related to safety, an area generally reserved for state regulation through its police powers.\textsuperscript{192} It recognized that the FBSA’s use of the terms “law and regulation [in its preemption clause] evidence[d] an intent to include common law claims.”\textsuperscript{193} But, the savings clause prevented a conclusion of complete preemption of all common law claims because the savings clause definitely saved at least some common law claims from preemption.\textsuperscript{194} The Eleventh Circuit did not elaborate on its reasoning, but presumably the presence of the savings clause itself was sufficient to preclude a finding of express preemption.\textsuperscript{195}

\textsuperscript{185} See Carstensen, 49 F.3d at 432; Moss, 915 F. Supp. at 187 (stating that the clause should not be read to save common law rights inconsistent with the FBSA); Farner v. Brunswick Corp., 607 N.E.2d 562, 567 (Ill. App. Ct. 1992).
\textsuperscript{186} See Carstensen, 49 F.3d at 432; Moss, 915 F. Supp. at 187.
\textsuperscript{187} See, e.g., Carstensen, 49 F.3d at 432 (discussing the potential effects of the FBSA’s savings clause on the preemption analysis).
\textsuperscript{188} See, e.g., id. (stating that interpreting the savings clause to save “only those common law claims that are not expressly preempted” does not “render the savings clause superfluous”).
\textsuperscript{189} See id. at 432-33; Mowery, 773 F. Supp. at 1017; Farner, 607 N.E.2d at 567.
\textsuperscript{190} See Moss, 915 F. Supp. at 186; Mowery, 773 F. Supp. at 1017; Farner, 607 N.E.2d at 567.
\textsuperscript{191} See 107 F.3d 1494, 1501 (11th Cir.), cert. granted, 118 S. Ct. 439 (1997), cert. dismissed, 118 S. Ct. 1793 (1998). However, the Lewis court found a case for implied preemption. See id. at 1505; supra part II.B.2.
\textsuperscript{192} See Lewis, 107 F.3d at 1501.
\textsuperscript{193} Id. (internal quotations omitted).
\textsuperscript{194} See id.
\textsuperscript{195} See id.
Most courts that considered the federal preemption of state common law claims mandating propeller guards found that the FBSA’s preemption clause, coupled with the Coast Guard’s decision not to require guards, expressly preempted the plaintiff’s tort based claims. These decisions focused on the inclusion of a preemption clause in the FBSA, the preemption clause’s use of broad language (i.e., the phrase “state law or regulation”) and the regulatory effect of jury awards. In each of these cases finding express preemption, the courts held that the FBSA’s savings clause failed to preserve the plaintiff’s propeller guard claims.

2. The Implied Preemption of Propeller Guard Claims

Three courts have held that the FBSA implicitly preempts common law claims for failure to install propeller guards. Only one court considered and found field preemption, but all three applied the conflict prong of the implied preemption analysis and found that the plaintiffs’ claims frustrated the FBSA’s regulatory scheme.

The only case to find field preemption was Shields v. Outboard Marine Corp. Its brief field preemption analysis stated that the Coast Guard’s decision not to regulate propeller guard use implied that the area should remain free of regulation. Consequently, the court reasoned that the FBSA prohibits states from enacting regulations in this area, even if they do so under their police powers. Because jury awards in this case would amount to a state regulation inconsistent with other regulations, such claims are prohibited.

Under conflict preemption, on the other hand, the applicable test was whether the plaintiff’s claims frustrated the objectives of the FBSA’s regulatory scheme. Both Lewis and Davis v. Brunswick

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197. See Shields, 776 F. Supp. at 1581. Lewis and Davis did not apply the other prong of implied preemption analysis, nor did their decisions indicate why.

198. See Lewis, 107 F.3d at 1494; Davis, 854 F. Supp. at 1574; supra notes 147-51. In fact, there is substantial evidence that Congress encouraged state involvement in regulating recreational boating safety. See supra part I.A.B.

199. 776 F. Supp. at 1581.

200. See id. (stating that the decision “implied a decision that this area is best left unregulated, which has as much preemptive effect as a decision to regulate”).

201. See id.

202. See id.

203. See Lewis, 107 F.3d at 1502; Davis, 854 F. Supp. at 1581 (examining “whether
Corp. noted that the presumption against preemption did not apply under a conflict preemption analysis because under the Supremacy Clause federal law prevails over state law whenever a conflict arises. In their analyses, each court took its own approach and emphasized different elements.

The Lewis court’s finding of implied preemption relied heavily on Congress’s designation of the Coast Guard as the exclusive regulatory authority under the FBSA. Because the Coast Guard had the exclusive authority to promulgate safety standards, “an absence of federal regulation under the FBSA mean[t] that no regulation, state or federal, [was] appropriate.” The court found this reasoning especially persuasive in light of the Coast Guard’s affirmative decision, made after conducting a thorough study, to refrain from mandating propeller guards. According to the court, Congress’s intent to create a uniform system of regulation and the Coast Guard’s decision not to require propeller guards mandated an absence of both federal and state propeller guard regulation. Lewis found that claims based on the failure to install a safety device that the Coast Guard had decided not to require would conflict with the FBSA’s goals of regulatory uniformity. In the court’s view, the Lewis’ product liability claims for damages in effect sought the imposition of a propeller guard requirement. Such a requirement would conflict with the FBSA’s grant of exclusive regulatory authority over boating safety to the federal government. Thus, the plaintiff’s claims were implicitly preempted.

In contrast, the Davis court focused on the FBSA’s purpose of providing “uniform standards without the imposition of excessive special requirements by individual states.” The court reasoned that the FBSA’s intent, coupled with the Coast Guard’s decision not to regulate, meant that Congress intended for flexibility in FBSA
regulation. Under the federal standard established by the Coast Guard, manufacturers had the option, but not the obligation, to outfit motors with propeller guards. As the Davis court saw it, allowing a jury to find a design defect for failure to install a propeller guard would effectively remove the choice conferred by the federal standard. Thus, allowing such claims would frustrate the uniform regulation that Congress desired in passing the FBSA, and the plaintiff's claims were implicitly preempted.

Alternatively, the court in Shields focused on the effect of the savings clause. Shields concluded that allowing these claims would thwart the overall purpose of the FBSA—standardizing boat manufacturing regulations. According to the court, awarding these claims would "set a precedent for allowing other juries nationwide to decide questions of boat safety, which would result in a patchwork of regulations clearly inconsistent with the purpose of the Act." Moreover, the court reasoned that the savings clause did not save the plaintiff's claims because the savings clause demonstrated that Congress did not intend to monopolize the area of recreational boat safety regulation. Rather, the savings clause was intended to preserve common law claims "based on state statutes and regulations ... identical to those in the [FBSA] and [that] do not conflict with its objectives." Thus, the savings clause would not have saved these claims because doing so would conflict with the Coast Guard's decision not to require propeller guards and with the FBSA's requirement of uniformity in boating regulation.

The Shields court also considered whether the section of the FBSA exempting differing state regulation for uniquely hazardous local conditions applied. But the court quickly dismissed this possibility because of insufficient evidence to establish the existence of a uniquely hazardous local condition. The plaintiff's argument that the defendant's motor was defectively designed for lack of a propeller guard could have been made in any location, and thus the exemption was inapplicable.

215. See id.
216. See id.
217. See id.
219. See id. at 1581.
220. Id.
221. See id. at 1582.
222. Id.
223. See id.
224. See id.; supra text accompanying notes 56-59; see also infra note 311 (discussing one locale where this exception may be applicable).
226. See id.; infra note 311 for a discussion of when such a situation may arise.
In sum, three courts found that the FBSA implicitly preempted the plaintiff’s claims. While *Shields* was the sole case to find evidence of field preemption, all three courts found a sufficient base for conflict preemption. *Lewis* focused on the similarity between the effect of a jury award for damages and that of a positive enactment,227 *Davis* focused on the FBSA’s emphasis on uniformity,228 and *Shields* emphasized the effect of the savings clause.229 Despite these differences, all three held that allowing the plaintiff’s claims would frustrate the overall objective of the FBSA.

B. The Minority View: The FBSA Does Not Preempt Propeller Guard Claims

Of those courts facing the question of the FBSA’s preemption of propeller guard claims, only two have held that the FBSA neither expressly nor implicitly preempted these common law claims.230

1. No Express Preemption of Propeller Guard Claims

Defendants in both *Ard v. Jensen* and *Moore v. Brunswick Bowling & Billiards Corp.* claimed that the FBSA’s preemption clause, along with the Coast Guard’s decision not to require propeller guards, expressly preempted the plaintiffs’ claims. Neither court, however, found a valid case of express preemption.231 *Ard* held that the combination of the FBSA’s preemption and savings clauses preserved the plaintiff’s claims.232 The court’s express preemption analysis focused on the scope of the savings clause and whether it preserved the plaintiff’s claims.233 The court first concluded that Congress intended to protect boat manufacturers from complying with differing federal and state regulations.234 However, the court thought it unlikely that Congress would permit manufacturers to build boats and boating equipment so dangerous that juries would impose liability for introducing them into the stream of commerce.235

The defendants made three arguments in favor of preemption

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229. See *Shields*, 776 F. Supp. at 1581-82.
232. See *Ard*, 996 S.W.2d at 596-601.
233. See id. at 598-601.
234. See id. at 598-99.
235. See id.
regarding the effect of the savings clause. First, defendants claimed that the savings clause did not preserve the plaintiff's claims because such an interpretation would neutralize the effect of the preemption clause. Second, defendants argued that savings clauses in general should not be interpreted so that common law claims could frustrate a federal regulatory scheme. Finally, defendants contended that the savings clause's purpose was to preserve claims relating to defectively installed equipment.

The Ard court dismissed each of these defenses. First, the court found that allowing the savings clause to preserve the plaintiff's claims would not nullify the preemption clause. Instead, the court's interpretation would save only common law claims, while still permitting the preemption clause to preempt those positive enactments of state regulatory agencies that differ from federal standards. According to the court, Congress intended for the common law to establish minimum standards of behavior for boating manufacturers and for the FBSA to impose any higher standards. The court also declined to include common law claims within the term "state laws or regulation" because of the presence of the savings clause and the presumption against preemption.

Second, the court dismissed the defendants' contention that this interpretation of the savings clause undermined the FBSA's regulatory scheme. Defendants contended that a general savings clause could not save common law claims, that if successful, would be absolutely inconsistent with the FBSA. The court responded that even though uniformity was one of the FBSA's goals, Congress did not want manufacturers to avoid liability by claiming compliance with the FBSA. Allowing these claims would not obstruct the FBSA's goal of uniformity because Congress intended only to determine whether or not to require propeller guards, and not "whether a manufacturer could be held liable for a defective design or unreasonable danger because of a lack of propeller guard."

From the court's view, the defendants' attempt to use the Coast Guard's

236. See id. at 599-600. Plaintiff, Ard, sued several defendants, including the driver of the boat, Jensen, the boat manufacturer, Glaston, Inc., and the motor manufacturer, Brunswick Corp. See id. at 596.

237. See id. at 599.

238. See id. at 599-600.

239. See id. at 600.

240. See id. at 599.

241. See id.

242. See id.

243. See id.

244. See id. at 599-600.

245. See id.

246. See id. at 600.

247. Id. (stating that Congress "specifically announced it wanted to allow those claims").
decision not to require propeller guards as a preemption defense was equivalent to the defense of meeting minimum standards to preclude liability, which the savings clause forbade.248

Third, the court also dismissed the defendants’ argument that the savings clause saved only claims based on defectively designed products that had actually been installed, as opposed to a claim based on not installing a product.249 The court advocated reading the statute according to its ordinary meaning.250 In doing so, the court noted that both the statute and its legislative history lacked any distinction between design and installation, and that the FBSA’s broad language cut against such a finding of preemption.251

Finally, the Ard court dismissed the defendants’ attempt to persuade the court with other cases that had found preemption under similar circumstances.252 Emphasizing that “preemption is the exception rather than the rule,” the court implied that those other cases were wrongly decided because those decisions, unlike the Ard court’s decisions, failed to follow the general presumption against preemption required in preemption analysis.253

In Moore, the defendant argued that the FBSA’s preemption clause, along with the Coast Guard’s recommendation not to require propeller guards, expressly preempted the plaintiff’s claims.254 The defendant reasoned that the language “law or regulation” in the preemption clause extended to the plaintiff’s claims because jury awards effectively require “defendant companies to install propeller guards upon threat of liability.”255 According to the defendant, the effect of such an award was tantamount to state regulation, and would result in a prohibited conflict between state and federal policy under the preemption clause.256

The court rejected each of the defendant’s arguments. First, the court considered whether the term “law” in the FBSA referred to both common and statutory law.257 Acknowledging that the term has been held to include common law in other cases and the potential regulatory effect of jury awards, the Moore court nonetheless declined to follow the majority view.258 According to the court, the guiding

248. See id.; supra text accompanying note 246.
249. See Ard, 996 S.W.2d at 600 (citing Mowery v. Mercury Marine, Division of Brunswick Corp., 773 F. Supp. 1012, 1017 (N.D. Ohio 1991)).
250. See id.
251. See id.
252. See id. at 600-01.
253. Id.
255. Id. at 249.
256. See id.
257. See id.
258. See id. at 249-50.
presumption against preemption and the term's location in a preemption provision required a narrower construction of the phrase "state law" than would be required in a non-preemption context. The court also stated that the effect of jury awards was indirect, and thus not equivalent to positive enactments. As a result, the court refused to liberally interpret "law or regulation" to include any common law claims, and consequently the plaintiff's claims as well.

The court provided additional reasons for narrowly construing the term "law or regulation." First, had Congress wished the preemption clause to include common law claims, it would have drafted it accordingly as it has in the past. Second, the existence of a savings clause evidenced Congress's ability to "explicitly refer to common law when it so desired," as well as indicating the absence of congressional intent to preempt all state common law claims under the FBSA. The defendant argued that the savings clause merely saved those claims based on "state regulations and statutes... identical to federal ones." But the court rejected this interpretation because such claims would be preserved regardless of the savings clause, and thus this interpretation would "render the savings clause redundant." Finally, and perhaps most importantly, the court noted its strong interest in preserving state citizens' redress for recreational boating injuries sustained on the state's waterways, especially because the FBSA failed to provide any other remedies for the plaintiffs.

2. No Implied Preemption of Propeller Guard Claims

Only Moore considered whether plaintiff's propeller guard claims

259. See id. at 249 ("[T]he presumption against pre-emption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context..." (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 522 (1992))).
260. See id. at 249-50. According to the Moore court, "Congress may reasonably determine in a given case that the incidental regulatory pressure of state common-law actions is acceptable when direct state regulatory authority is not." Id. at 250 (quoting Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 186 (1988) (internal quotations and citations omitted)).
261. See id.
262. See id.
263. See id.; see, e.g., Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(d), 1715z-18(e) (1994) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. § 301(b) (1994) (preempting rights "under the common law or statutes of any State").
264. Moore, 889 S.W.2d at 250.
265. Id.
266. Id. (noting that even if the preemption clause "applie[d] to common-law actions, it would not bar an action establishing a standard 'identical' to a federal standard").
267. See id. at 251.
were implicitly preempted.\textsuperscript{268} \textit{Ard} concluded that an implied preemption analysis was unnecessary because the FBSA's express preemption clause precluded such.\textsuperscript{269} \textit{Moore} ultimately did not find implied preemption.\textsuperscript{270}

The \textit{Moore} defendant contended that a jury award for the plaintiff's claim would result in conflict preemption because such an award would undermine the FBSA's goal of uniformity.\textsuperscript{271} Specifically, the defendant claimed that a jury award would have resulted in a requirement to install propeller guards, which would differ from the Coast Guard's decision not to mandate guards.\textsuperscript{272} According to the defendant, a decision not to regulate can "have the same preemptive effect as a decision to regulate."\textsuperscript{273}

Despite this possibility of conflict, the court did not believe that it warranted a finding of preemption.\textsuperscript{274} According to the court, it was possible that the Coast Guard did not mean to preclude state liability through its decision not to mandate guards.\textsuperscript{275} First, the court postulated that the difference between the regulatory effect of damage awards and that of positive enactments is that in the former situation, a manufacturer may still choose to not install a guard and risk liability.\textsuperscript{276} Second, the court believed that the savings clause reflected Congress's readiness to accept tension between uniform federal regulations and awards for tort liability at the state level.\textsuperscript{277} Lastly, the court recognized that, although its holding conflicted with the holdings of four other courts that had considered the same issue, the reasoning of those courts was unpersuasive in light of the Supreme Court's "apparent turn to stricter preemption analysis."\textsuperscript{278}

Thus, the minority holds that the FBSA and the Coast Guard's

\textsuperscript{268} See id. at 251-52.
\textsuperscript{269} See \textit{Ard v. Jensen}, 996 S.W.2d 594, 601 n.11 (Mo. Ct. App. 1999). In \textit{Ard}, the court stated that the "inference that an express pre-emption clause forecloses implied pre-emption" applies. See id. (quoting \textit{Freightliner Corp. v. Myrick}, 514 U.S. 280, 288-89 (1995)) (discussing the \textit{Cipollone} inference that where there is an express preemption clause entirely forecloses any possibility of implied preemption); \textit{supra} note 139.
\textsuperscript{270} See \textit{Moore}, 889 S.W.2d at 251-52.
\textsuperscript{271} See id. at 251; \textit{supra} text accompanying notes 147-51.
\textsuperscript{272} See \textit{Moore}, 889 S.W.2d at 251.
\textsuperscript{273} Id.
\textsuperscript{274} See id. ("We recognize this potential for conflict, but do not think it justifies a holding of preemption.").
\textsuperscript{275} See id.
\textsuperscript{276} See id.
\textsuperscript{277} See id. at 252.
\textsuperscript{278} Id. at 252. The "apparent turn to stricter preemption analysis" refers to the \textit{Cipollone} inference, discussed \textit{supra} notes 138 and 269, that implied preemption cannot exist where there is an express preemption clause. See id. at 252 n.10. Therefore, the court was not persuaded by the defendant's argument, which the court viewed as similar to an implied preemption argument. See id. Thus, it seems that the \textit{Moore} court applied the implied preemption analysis merely for the sake of discussion.
decision not to require propeller guards neither expressly nor implicitly preempt the plaintiff’s claim of failure to install a propeller guard. Ard based its conclusion primarily on a narrow interpretation of the effect of the FBSA’s savings clause, and emphasized the presumption against preemption. Moore focused on a narrow interpretation of the FBSA’s preemption clause and emphasized a strong state interest in protecting its citizens’ right to compensation for injury. Part IV argues, contrary to this minority view, that while the FBSA does not expressly preempt, it does implicitly preempt plaintiffs’ common law tort claims requiring propeller guards.

IV. THE FBSA AND THE COAST GUARD’S DECISION IMPLICITLY PREEMPT STATE COMMON LAW PROPELLER GUARD CLAIMS

Under the doctrine of federal preemption, federal laws may either expressly or implicitly preempt state common law claims.279 This part argues that although the FBSA fails to expressly preempt state common law claims for liability based on a failure to install propeller guards, it implicitly preempts such claims.

A. Express Preemption Analysis

For the FBSA to expressly preempt state common law propeller guard claims, it must include statutory language explicitly expressing congressional intent to preempt.280 If such language is present, express preemption is presumed and courts turn to statutory construction to determine whether the statute’s preemptive scope extends to the claims at issue.281 Because federal preemption inherently raises the danger of federal encroachment upon state sovereignty, its analysis requires an overall presumption against preemption.282 The ultimate touchstone of preemption is therefore congressional intent.283

Congress’s intent for the FBSA to preempt at least some state law is readily apparent. The FBSA contains an express preemption clause entitled “Federal preemption,” providing clear and manifest proof of congressional intent for the FBSA to preempt “state laws and regulations.”284 The preemption clause’s language and text also support an inference of preemption.285 Finally, the FBSA’s legislative

279. See supra part II.B.
280. See supra part II.B.1.
281. See supra part II.B.1.
282. See supra part II.B.1.
283. See supra note 102.
285. The plain language of the FBSA’s preemption provision is also similar to those confronted in other express preemption cases. See, e.g., The Federal Boat Safety
history emphasizes federal and state regulatory uniformity, specifically emphasizing that state “laws or regulations” should be identical to federal regulations.\textsuperscript{286}

A definitive intent to preempt, however, still leaves open the question of the preemption clause’s scope, which is determined via statutory construction.\textsuperscript{287} Congress’s intent here depends on whether the term “state law or regulation” encompasses positive enactments and state common law, the effect of the Coast Guard’s decision not to mandate propeller guards, and the effect of the FBSA’s savings clause. A close analysis demonstrates that Congress’s intent to preempt state common law regulation regarding the installation of propeller guards is far from clear. Therefore, there is no express preemption.

Congress’s use of the term “state law or regulation” is vague and fails to support a finding of express preemption. While the term “law and regulation” clearly encompasses positive enactments, its application to state common law is ambiguous.\textsuperscript{288} One view is that Congress’s failure to use language explicitly referring to common law in the FBSA’s language demonstrates that common law claims are not included.\textsuperscript{289} This argument asserts that Congress specifically refers to common law in statutory provisions when it intends its inclusion.\textsuperscript{290} The contrary view is that courts have found the term “state law,” even without further clarification, is broad enough to include both common law and positive enactments.\textsuperscript{291} Nothing in the FBSA or its legislative history suggests which view governs in this context. The proper interpretation of the term “law and regulation” is ambiguous, and thus

\begin{itemize}
  \item Act of 1971, 46 U.S.C. § 4306 (1994) (“[A] State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation . . . that is not identical to a regulation prescribed under [this Act].”); Medtronic, Inc. v. Lohr, 518 U.S. 470, 481 (1996) (“[N]o State or political subdivision of a State may establish or continue in effect . . . any requirement . . . which is different from, or in addition to, any requirement applicable under this [federal law].” (citing the Medical Device Amendments of 1976, 21 U.S.C. § 360k(a) (1994)); Freightliner Corp. v. Myrick, 514 U.S. 280, 284 (1995) (“[N]o State . . . shall have any authority either to establish, or to continue in effect, . . . any safety standard . . . which is not identical to the Federal standard.” (citing the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(d) (repealed 1994)).
  \item See supra part I.A.
  \item See supra note 130.
  \item See supra notes 172-76 and accompanying text.
  \item See supra text accompanying notes 262-64.
  \item See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 250 (Tex. 1994); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 487 (1996) (stating that “if Congress intended to preclude all common-law causes of action,” it would have used a word such as “remedy,” which clearly included common law claims, rather than “requirement”).
  \item See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 522 (1992) (Stevens, J., plurality opinion) (stating that the phrase “state law” has included common law ever since Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)).
\end{itemize}
so is the scope of the FBSA’s preemption clause. Because all ambiguity must be resolved against preemption\textsuperscript{292} one must conclude that the FBSA’s preemption clause fails to encompass state common law. As such, the preemption clause does not reach state common law claims, and the FBSA does not preempt such claims.

The Coast Guard’s decision not to mandate propeller guards further complicates the scope and effect of the FBSA’s preemption provision\textsuperscript{293}. For the preemption provision to apply to these propeller guard claims, the Coast Guard’s decision must be tantamount to federal regulation\textsuperscript{294}. If one views a decision not to mandate propeller guards as an affirmative decision to leave the area unregulated, then the decision constitutes regulation\textsuperscript{295}. Accordingly, under this view any award for damages based on a state jury imposed legal standard would constitute a state regulation “not identical” to federal non-regulation, and hence would indicate preemption\textsuperscript{296}. Alternatively, one can argue that the Coast Guard’s decision signified an intent to refrain from federal regulation to leave the field open for state regulation\textsuperscript{297}. Under this view, a state jury imposed legal standard, and consequently plaintiffs’ claims, would not be preempted\textsuperscript{298}. Again, while either interpretation is plausible, the narrower interpretation should prevail because of the presumption against preemption\textsuperscript{299}. Thus, the Coast Guard’s decision does not have the force of regulation causing a conflict with any jury award based on propeller guard claims.

Finally, the inclusion of a savings clause in the FBSA also cuts against a finding of express preemption. The inclusion of the savings clause\textsuperscript{300} indicates a congressional intent to save at least some state

\textsuperscript{292} See Lewis v. Brunswick Corp., 107 F.3d 1494, 1501 (11th Cir.), \textit{cert. granted}, 118 S. Ct. 439 (1997), \textit{cert. dismissed}, 118 S. Ct. 1793 (1998) (stating that doubts must be resolved” in favor of the narrower interpretation of the preemption clause\textsuperscript{3}); Grey, \textit{supra} note 100, at 565 (arguing that courts should be wary of finding preemption where there is statutory ambiguity).

\textsuperscript{293} See \textit{supra} part I.C.


\textsuperscript{295} See \textit{supra} notes 166-71 and accompanying text.

\textsuperscript{296} See \textit{supra} notes 166-71 and accompanying text.

\textsuperscript{297} \textit{Cf} Freightliner Corp. v. Myrick, 514 U.S. 280, 284 (1995) (stating that the federal statute expressly permitted states to regulate until differing federal regulations were enacted).

\textsuperscript{298} \textit{See id.} at 282 (failing to find plaintiff’s claims either expressly or implicitly preempted).

\textsuperscript{299} The better argument here is the former. Treating the Coast Guard’s decision as if it intended to leave the issue to state regulation disregards the conclusions and recommendations outlined in its propeller guard report. \textit{See supra} part I.C. In deciding whether to mandate propeller guards on boats, the Coast Guard considered the Subcommittee’s extensive study on the feasibility of such a requirement. \textit{See supra} part I.B. Only upon discovering several significant drawbacks to using propeller guards as they existed at the time of the report, did the Coast Guard decline to require guards. \textit{See supra} part I.C.

\textsuperscript{300} \textit{See 46 U.S.C. § 4311(g)} (1994); \textit{supra} notes 60-65 and accompanying text.
common law claims from preemption. Arguably, the mere presence of the clause is sufficient to preclude express preemption because it automatically creates ambiguity over which claims are saved. Express preemption requires a much clearer standard.

Regardless, the savings clause specifically states that only those claims that are “based on state statutes and regulations . . . identical to those in the [FBSA] and [which] do not conflict with its objectives” are preserved. The FBSA is silent on the use of propeller guards because it neither mandates nor precludes propeller guard use, and the Coast Guard only subsequently decided not to mandate them. Whether these two elements amount to federal regulation is unclear. Consequently, there is no federal standard with which to be “identical.” Without a federal standard, the application of the savings clause to propeller guard claims is ambiguous, which is unacceptable to a finding of express preemption.

The FBSA therefore fails to expressly preempt plaintiffs’ common law propeller guard claims. Both the scope of the preemption clause and the effect of the Coast Guard’s decision not to regulate propeller guard use are too ambiguous to establish express preemption. The inclusion of the savings clause in the FBSA only strengthens this conclusion.

B. Implied Preemption Analysis

The absence of express preemption does not preclude a finding of implied preemption. Although the FBSA fails to support a case for field preemption, it supports a case for conflict preemption.

A field preemption analysis asks whether Congress intended for the FBSA to dominate the field of recreational boating safety, specifically propeller guard use, to the exclusion of state involvement. This inquiry revolves around the FBSA’s overall statutory scheme and legislative history. Congress’s intent to dominate recreational boat and equipment safety regulations is evident. The FBSA’s right to

301. See supra notes 136-38 and accompanying text.
302. The Ard court’s interpretation of the clause was especially unpersuasive. See Ard v. Jensen, 996 S.W.2d 594, 596 (Mo. Ct. App. 1999). Ard greatly oversimplified its preemption analysis by blithely stating that the savings clause should be read for its ordinary meaning. See id. The court did so without support and without addressing the other equally plausible interpretations. The result is a decision that seems nothing more than a statement of opinion, which bears little resemblance to legal analysis.
304. See Grey, supra note 100, at 566; supra part II.B.2. But see supra notes 139, 269.
305. See supra note 143 for a general definition of field preemption.
preempt state law is grounded in the federal government’s legacies of federal preemption in maritime safety matters and of maintaining uniformity within the stream of interstate commerce.\textsuperscript{308} The FBSA’s legislative history, however, stops short of establishing a case for field preemption. Though Congress clearly desired that the Coast Guard set uniform regulations,\textsuperscript{309} it also encouraged state involvement in developing regulation.\textsuperscript{310} For example, the FBSA allows states to pass additional regulations that vary from federal regulations where local conditions warrant it.\textsuperscript{311} Under the FBSA, states may regulate safe boat operation and use where it is “appropriately within the purview of state or local concern.”\textsuperscript{312} Although \textit{Shields} found a case for field preemption, it did so incorrectly because its cursory field preemption analysis failed to properly acknowledge this element of state involvement.\textsuperscript{313} Therefore, the overall evidence falls short of establishing a clear case of field preemption.

The evidence more clearly supports a finding of conflict preemption. The test under a conflict preemption analysis is whether compliance with both standards—the one created by the Coast Guard’s decision not to require guards and the one created by allowing recovery on these common law claims—is possible, or whether permitting relief for these state law based claims would frustrate the FBSA’s purpose or regulatory scheme.\textsuperscript{314} There is no presumption against preemption in a conflict preemption inquiry because the Supremacy Clause dictates that federal law prevails over state law in a direct conflict, no matter what the state interest.\textsuperscript{315}


\textsuperscript{310} See id. at 6, reprinted in 1971 U.S.C.C.A.N. 1333, 1341. (“The [FBSA] is also intended to encourage greater state participation in boating safety efforts . . . .”).

\textsuperscript{311} See id. at 20. Florida is one locality that could have more success with this argument, at least legislatively. Florida’s waterways serve as home to many manatees, an arguably endangered species. See Rob Chepak, \textit{Boat Propeller Guards Proposed to Protect Manatees}, The Tampa Tribune, Jan. 7, 1997, at 4. Propeller blades often cut manatees, which are characteristically heavy-set and slow moving. See id. Proponents of the legislation argue that guard requirements could reduce these casualties and injuries. See Neil Santaniello, \textit{Bill Calls for Study of Propeller Guards}, The Sun-Sentinel, Apr. 21, 1997, at 6B. In 1996, 24 manatees died from propeller cuts. See id. (“Many of Florida’s endangered manatees bear grotesque evidence of their encounters with motorboats—gashes left across their backs by whirling propellers.”); see also Deborah Sharp, \textit{Next Collision of Manatees, Boats Might be in Court}, USA Today, June 11, 1999, at 17A (noting that “it’s rare to spot any [manatees in Florida] that do not bear scars left by boat propellers”). Manatee deaths caused by boat collisions reached an all time high of 66 in 1998, compared to 21 in 1978. See id.


\textsuperscript{314} See supra notes 148-52 and accompanying text.

\textsuperscript{315} See supra note 149 and accompanying text. \textit{Lewis} and \textit{Davis} correctly applied this principle in their conflict preemption analyses. See \textit{Lewis v. Brunswick Corp.}, 107 F.3d 1494, 1502 (11th Cir.), \textit{cert. granted}, 118 S. Ct. 439 (1997), \textit{cert. dismissed}, 118 S.
The first prong of the conflict preemption test does not preempt these common law claims because compliance with both federal and state standards is possible. Compliance with the federal standard is automatic because the FBSA is silent as to the necessity of propeller guard use. Manufacturers may install or not install guards without liability. Because the federal standard is silent, compliance under the state standard is automatic as well, no matter what the standard. Thus, even if jury awards for these claims are allowed, manufacturers may still choose whether to install guards albeit at the risk of liability. Because compliance with both standards is possible, no preemption exists under this prong of conflict preemption.

The second prong of a conflict preemption analysis raises a preemption concern because allowing recovery on these common law claims could frustrate the FBSA's greater objectives. An analysis of the FBSA's purposes and regulatory scheme, and the effect on the aforementioned scheme of allowing state common law claims reveals that the latter interferes with the execution of the former. Thus, the FBSA preempts these common law claims under this prong of conflict preemption.

The purpose of the FBSA, as set forth in its legislative history, is to create uniform safety standards for manufacturers engaged in recreational boating. This emphasis on uniformity resonates throughout the FBSA. The FBSA's preemption clause requires that state and federal law be identical. In addition, the Coast Guard affirmatively decided against requiring propeller guards. This could be viewed as a decision to leave the area open for state regulation, or as an unenforceable decision resulting in an absence of regulation of propeller guards. Although it may be tempting to so interpret the

\[ \text{Ct. 1793 (1998); Davis v. Brunswick Corp., 854 F. Supp. 1574, 1581 (N.D. Ga. 1993), on reconsideration in part (Mar. 17, 1994); supra text accompanying notes 204-05.} \\
\text{Shields, however, failed to acknowledge this principle, calling into question its conflict preemption analysis.} \\
\text{316. The Coast Guard did not prohibit the use of propeller guards; it merely stated that guards were not required. See supra part I.C.} \\
\text{317. See id.} \\
\text{318. See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246, 251 (Tex. 1994).} \\
\text{319. See Klein, supra note 98, at 108.} \\
\text{320. See id.} \\
\text{321. See supra part I.A.} \\
\text{322. See supra part I.A., I.B.} \\
\text{323. See supra part I.B.} \\
\text{324. See supra part I.C.} \\
\text{325. This is essentially what the plaintiffs in Lewis argued, relying on a Supreme Court case where the plaintiff's state common law tort claims were preserved. See Lewis v. Brunswick Corp., 107 F.3d 1494, 1502-03 (11th Cir.) (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 282 (1995)), cert. granted, 118 S. Ct. 439 (1997), cert. dismissed, 118 S. Ct. 1793 (1998). In Freightliner, the Supreme Court failed to find the plaintiff's claims expressly or implicitly preempted despite evidence of a federal intent} \]
Coast Guard’s decision, it oversimplifies the issue and fails to bestow proper respect upon the Coast Guard’s finding.\textsuperscript{326}

The Coast Guard’s decision to refrain from mandating propeller guards was thoroughly researched and affirmatively made.\textsuperscript{327} Consequently, the Coast Guard’s decision not to require guards should be viewed as a form of federal regulation rather than a mere absence of regulation.\textsuperscript{328} Adopting the Subcommittee’s study, the Coast Guard concluded that propeller guards should not be required because propellers posed more of a risk with guards than without them.\textsuperscript{329} As the Coast Guard noted, mandating propeller guards could increase rather than reduce overall accidents and injuries.\textsuperscript{330} Equating the Coast Guard’s decision with an absence of regulation disregards the Subcommittee’s study and the Coast Guard’s expertise in boating safety. To allow juries of lay people to override these conclusions is both illogical and misguided.

Additionally, the effect of a jury award can be tantamount to a regulation requiring propeller guards.\textsuperscript{331} Many courts have accepted the regulatory effect of jury awards as equivalent to regulation.\textsuperscript{332} Other courts, however, have held that jury awards do not amount to regulation because manufacturers retain the choice whether to comply under common law, even if it is at the risk of liability and high damage
awards. Because there is no statutory requirement, the offending party is liable only if a successful claim is brought against it. This view, however, inaccurately characterizes a situation where the risk of liability is so great, especially as precedent for finding liability builds, that manufacturers feel compelled to install guards. Thus, jury awards are more properly recognized as a form of regulation, and as such, effectively result in a mandate to install propeller guards, a result clearly unauthorized under the FBSA.

Finally, the argument that the FBSA cannot preempt these claims because Congress would never have intended to leave propeller strike victims without redress is suspect. In these cases there are usually two potential defendants—the motor manufacturer and the boat operator. Propeller strike accidents are more often caused by "[o]perator inexperience, incompetence, negligence, and alcoholic [sic] intake," rather than a lack of a propeller guard per se. Preempting claims against motor manufacturers will neither leave plaintiffs without redress nor obstruct justice, because plaintiffs can still seek relief against boat operators. Despite this fact, there has been a surprising paucity of cases against boat operators, implying that plaintiffs are suing to reach the "deep pockets" of the motor manufacturers, rather than for redress or justice. The theory is even more persuasive considering that requiring propeller guards could bring even more dangers to recreational boating. Although propeller related accidents are tragic for the victims and parties involved, the proper remedy under current federal law lies not in civil suits against motor manufacturers, but in focusing on what is often the true culprit in these tragedies: boat operator ignorance or negligence.

Furthermore, the Moore decision, which found no implied preemption, was fatally flawed because it incorrectly applied the implied conflict preemption analysis. Despite recognizing a "potential for conflict, [the Moore court did] not think it justifie[d] a

334. See Carstensen, 49 F.3d at 432; Moss, 915 F. Supp. at 186; Davis, 854 F. Supp. at 1580.
335. See Moore, 889 S.W.2d at 251; see also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."); Grey, supra note 100, at 562 (recognizing that allowing "this preemption defense is of critical importance to accident victims, because, if the defense is upheld, they may be left without recourse to a damages remedy"). A similar argument was made in Silkwood, where the plaintiff would not have had a remedy had her claims been preempted. See Silkwood, 464 U.S. at 251. In Silkwood, the only potential defendant was the nuclear energy company; thus if the plaintiff were prevented from suing the company, she would have been without redress. See id.
337. See supra part I.C.
338. See Moore, 889 S.W.2d at 249-50.
holding of preemption." The Moore court incorrectly presumed that the conflict had to justify preemption. The Supremacy Clause dictates that federal law reigns supreme and overrides state law in a conflict no matter what the state interest. Courts have no such choice in these conflicts. In essence, the Moore court erroneously chose to override the doctrine of preemption, a choice that exceeded its Constitutional power.

In sum, the majority's application of the preemption doctrine and its interpretation of the FBSA incorrectly led to a finding of express preemption. Despite the preemption clause, express preemption is unfounded because the clause's scope is ambiguous. Rather, the majority courts that found a case for implied preemption were correct. Congress's intent to preempt state common law claims for failure to install propeller guards is evidenced both by its decision to include a preemption clause in the FBSA and its legislative history promoting uniformity in the laws governing recreational boating. Allowing state common law claims for failure to install propeller guards would subvert the FBSA's overall regulatory scheme. Although the minority view raises some valid concerns regarding states' rights, its erroneous application of implied preemption analysis discredits its outcome.

CONCLUSION

The FBSA, together with the Coast Guard's decision not to mandate propeller guards in recreational boats, implicitly preempts state common law tort claims requiring propeller guards. A court faced with a plaintiff suing a defendant-manufacturer for failure to use a propeller guard should henceforth rule in favor of preempting the plaintiff's claims pursuant to the doctrine of implied preemption. Admittedly, this outcome may at times restrict a state's right to regulate and protect its citizens, but this is an inevitable consequence of our system of dual sovereignty. In recognition of this potential for discord, the founding fathers included within the Constitution the Supremacy Clause, which provides that federal law reign supreme over state law when the two conflict. Thus, Congress's decision to regulate recreational boating and the Coast Guard's refusal to mandate propeller guards requires the federal preemption of plaintiffs' state based tort claims. The principles of preemption and federalism demand this result, however tragic for the victims of recreational boating accidents and their families.

339. Id. at 251.
340. See supra notes 96-99 and accompanying text.