

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

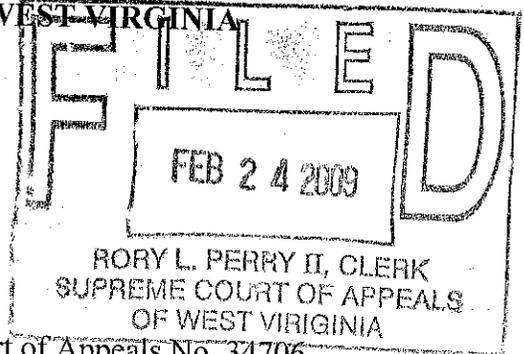
RONALD LEE HARRISON and
BRENDA G. HARRISON,

Plaintiffs-Appellees,

v.

SKYLINE CORPORATION, and
GEORGIA-PACIFIC CORP.,

Defendants-Appellants.



Supreme Court of Appeals No. 34706

THE WEST VIRGINIA HOUSING INSTITUTE'S BRIEF OF *AMICUS CURIAE*

THE WEST VIRGINIA HOUSING INSTITUTE
By Counsel,

A handwritten signature in black ink, appearing to read "Johnnie E. Brown".

Johnnie E. Brown, (WVSB # 4620)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301-2726
(304) 344-0100

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INTRODUCTION

The underlying matter arises from the Order entered by the Circuit Court of Jackson County which answered the following certified questions as follows:

1. Does the preemption provision found at 42 U.S.C. Section 5403(d) preempt and bar Plaintiffs' common law negligence claim based upon formaldehyde exposure when the Plaintiffs do not claim, and cannot establish, that the Defendants failed to comply with the formaldehyde standards established in 24 CFR §§ 3280.308 and 3280.309?

ANSWER: No.

2. May the Plaintiffs present evidence of ambient air testing for the presence of formaldehyde in support of their common law negligence claim when HUD specifically considered and rejected the ambient air standard that Plaintiffs want to present to a Court and jury as the standard of care?

ANSWER: Yes.

3. Does the "savings clause" of 42 U.S.C. Section 5409(c) preclude the Court from granting the Defendants' motions for summary judgment when despite the legislative history which establishes that it was HUD's intention that federal standards preempt state and local formaldehyde standards in accordance with 42 U.S.C. Section 5403(d)?

ANSWER: Yes.

The West Virginia Housing Institute believes that the Court's rulings were contrary to the express statements of the United States Code which governs the building of manufactured housing. The Department of Housing and Urban Development specifically rejected ambient air testing as the standard of care in evaluating formaldehyde exposures in manufactured housing.

Despite this express rejection, the Court intends to adopt the ambient air quality as the standard of care for Plaintiffs' common law negligence claim.

To allow the Circuit Court of Roane County, West Virginia, to ignore federal law and impose an expressly rejected standard, would impose an untenable standard of care upon the manufactured housing industry. To allow a consumer to use the ambient air quality testing as the standard of care would create a multitude of standards within the Circuit Courts of West Virginia and multiple standards within each circuit since ambient air quality testing is dependent upon the individual location of a manufactured home once it has been installed. Natural occurring conditions, such as temperature and humidity, impact ambient air quality testing and provide uncertainty from location to location even within the Circuit Courts of West Virginia.

To allow such a standard would greatly impact the ability of manufactured housing manufacturers to build a house that may or may not be subject to different standards of care depending upon its locale.

The manufactured housing industry has been governed by the Department of Housing and Urban Development with building standards since 1974. This has provided uniformity, and the ability of the manufactured housing industry to build homes which are safe and affordable in accordance with the standards promulgated by the United States government. To allow a Circuit Court to impose an unclear and ever changing standard would significantly harm the ability of the manufactured housing industry to provide affordable housing to the citizens of West Virginia.

ARGUMENT

I. THE PREEMPTION DOCTRINE ORIGINATES FROM THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

It is important to begin this *Amicus Curiae* brief by pointing out that the preemption doctrine originates from the Supremacy Clause of the United States Constitution. The Supremacy Clause of the United States Constitution is implanted in Article VI Clause 2 and provides that:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.”

See U.S. Const. art. VI. cl. 2. As such, the Supremacy Clause of the United States Constitution invalidates state laws that interfere with, or are contrary to, federal law. The Supreme Court of the United States stated that “the critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law.” Louisiana Pub. Serv. Comm’n v. Fed. Communications Comm’n, 476 U.S. 355 (1986).

The United States Supreme Court landmarked the Supremacy Clause and the preemption doctrine in McCulloch v. Maryland, 17 U.S. 316 (1819). In McCulloch, Congress passed an act to incorporate the Bank of the United States. The bank opened a branch in Baltimore, Maryland. Maryland then passed an act to impose a tax on all banks or branches thereof in the State of Maryland. The Bank of America refused to pay the tax and a lawsuit was filed against it. Chief Justice Marshall provided the opinion of the United States Supreme Court which determined that that Maryland may not tax the bank. In reaching this decision, the Court found that the Supremacy Clause dictates that state laws must comply with the Constitution and that they yield where there is a conflict. The Court noted that the “power to tax is the power to destroy” and

that allowing the states to levy taxes against the government would oppose the federal supremacy which originated in the text of the Constitution. See McCulloch, *supra*.

The McCulloch decision established precedent with regard to national supremacy and the preemption doctrine. Despite the existence of this doctrine, however, preemption is disfavored in the absence of convincing evidence warranting its application. Hartley Marine Corp. v. Mierke 474 S.E.2d 599, 603 (W.Va. 1996), *cert denied sub nom. Hartley Marine Corp. v. Paige*, 519 U.S. 1108 (U.S. 1997). As a result, there is a strong presumption that Congress does not intend to preempt traditional state regulation. FMC Corp. v. Holliday, 498 U.S. 52 (1990). “This presumption, however, can be rebutted by a clear declaration of legislative intent to preempt state law.” Hartley, 474 S.E.2d at 603. The West Virginia Supreme Court stated that “in analyzing the question of preemption, the focus is on congressional intent.” Id. This intent may be manifested by express language in a federal statute or implicit in the structure and purpose of the statute. Id.

Preemption can be either express or implied. To establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by state law. Hartley, 474 S.E.2d at 604 (quoting Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm’n, 489 U.S. 493 (1989)). There are two types of implied preemption: field preemption and conflict preemption. In the absence of explicit statutory language signaling an intent to preempt, such intent is inferred where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. Id. In turn, this Honorable Court must focus on the congressional intent behind the

federal regulations regarding formaldehyde emissions to determine whether Congress has expressly or implicitly preempted state law.

A. Congress Expressly Preempted State Regulation of Formaldehyde Standards

The first certified question to this Honorable Court is whether the preemption provision in the Manufactured Home Construction and Safety Standards, specifically found in 42 U.S.C. § 5403(d), bars Plaintiffs claims concerning those standards established in 24 C.F.R. §§ 3280.308-309, regarding formaldehyde emissions. The West Virginia Supreme Court has already declared that “in analyzing the question of preemption, the focus is on congressional intent.” *Hartley*, 474 S.E.2d at 603. This intent may be manifested by express language in a federal statute or implicit in the structure and purpose of the statute. *Id.*

Found in 42 U.S.C. § 5403, and designated as the Manufactured Home Construction and Safety Standards, that Congress’s express language preempted standards contrary to the federal standards. 42 U.S.C. § 5403(d) specifically provides that:

Supremacy of Federal standards

“Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, **no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.** Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate State or local requirements or standards do not affect the uniformity and comprehensiveness of the standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this chapter[.]” (Emphasis added.)

See 42 U.S.C. § 5403(d). This express language makes it clear that any contrary authority established by a state or political subdivision regarding any federal construction or safety standards will be preempted.

In examine the history of this federal statute, congressional intent becomes apparent when these standards were established with regards to federal supremacy. In Senate Report 93-693, it was explicitly proclaimed that "This Chapter would require the Secretary of HUD to establish Federal mobile home construction and safety standards which would supersede State standards not identical to the Federal standards." See S. Rep. 93-693, 93rd Cong., 2nd Session (1974). As such, 24 C.F.R. § 3280.307 states that "this standard covers all equipment and installations in the design, construction, transportation, fire safety, plumbing, heat-producing and electrical systems of manufactured homes which are designed to be used as dwelling units. This standard seeks to the maximum extent possible to establish performance requirements. In certain instances, however, the use of specific requirements is necessary." The relevant standards at issue in the present case are 24 C.F.R. §§ 3280.308-9.¹

As aforementioned, to establish a case of express preemption requires proof that Congress, through specific language, preempted the specific field covered by state law. Hartley, 474 S.E.2d at 604 (quoting Northwest Cent. Pipeline Corp. v. Kansas Corp. Comm'n, 489 U.S. 493 (1989)). It is clear that Congress expressly stated that "no State or political subdivision can establish any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the federal manufactured home construction and safety standard, 42 U.S.C. § 5403(d). Congress, with the oversight of the Department of Department of Housing and Urban Development, promulgated the regulations regarding formaldehyde emissions to establish a safety standard be used in the manufactured home industry. In doing so, Congress explicitly adopted the "product standard" test over the "ambient standard" test after balancing the interests of both, and then finding that the "product

¹ These two standards regulate formaldehyde emission standards for the components installed during the construction of manufactured homes and the precise warnings to be given when the manufactured home is purchased.

standard” maximized safety, reliability, was more effective and cost efficient in the detection of formaldehyde emissions. Congress’s express intent was to leave no room for contrary law that would establish a less significant safety standard than the maximum safety standard intended by the regulations regarding formaldehyde emissions. Therefore, it is apparent that the preemption provision found at 42 U.S.C. § 5403(d) expressly preempts and bars the Circuit Court below from imposing a common law negligence claim based upon formaldehyde exposure, or any evidence supporting the same. When the Plaintiffs do not claim, and cannot establish, that the Defendants failed to comply with the formaldehyde standards established under the federal regulations, the Circuit Court can not abrogate the express intent of the United States Congress.

B. Congress Impliedly Preempted State Regulation of Formaldehyde Standards

Even if this Honorable Court does not find that the formaldehyde standards are expressly preempted, they are impliedly preempted. The United States Supreme Court has recognized that the presence of an express preemption provision does not, by itself, foreclose an implied preemption analysis. Geier v. American Honda Motor Co., 529 U.S. 861 (2000)(citing Freightliner Corp. v. Myrick, 514 U.S. 280 (1996)). Again, implied preemption exists when the state law regulates conduct in a field Congress intended the federal government to occupy exclusively or where the state law at issue conflicts with federal law. See Hartley, *supra*. It is clear from the language of the federal supremacy standard established in 42 U.S.C. § 5403(d) that Congress did not intend for the federal government to occupy the field of construction safety of manufactured homes exclusively.² However, there is a conflict between the Circuit Court’s ruling and the federal law.

² 42 U.S.C. § 5403 states that “Subject to section 5404 of this title, there is reserved to each State the right to establish standards for the stabilizing and support systems of manufactured homes sited within that State, and for the foundations on which manufactured homes sited within that State are installed, and the right to enforce compliance

Conflict preemption exists in either of two situations: (1) where it is impossible to comply with both state and federal law, or (2) where the state law stands as an obstacle to the accomplishment and execution of congressional objectives. See Hartley, *supra*. It would be practicably impossible to conduct both the ambient (home installed on site) and product standards (prior to construction) for the detection of formaldehyde emission in manufactured homes. Furthermore, the process would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the standards promulgated by Congress regarding formaldehyde emissions.

The Manufactured Home Procedural and Enforcement Regulations specify that the test for determining whether a state action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the standards promulgated by Congress is “whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.” 24 C.F.R. §3282.11(d). In the instance case, the Circuit Court has allowed the Plaintiffs to assert claims of formaldehyde emissions in their home based upon ambient air testing. The Circuit Court’s ruling would not only permit the Plaintiffs to base their claim on this type of testing but would also allow this type of evidence to be presented at trial. The allowance of such compromises the federal superintendence of the manufactured home industry as established by the federal specific regulations for product standards, and explicit rejection of ambient air tests.

with such standards, except that such standards shall be consistent with the purposes of this chapter and shall be consistent with the design of the manufacturer.

i. Congress Has Expressly Rejected The Circuit Court Use of Ambient Air Testing To The Standard of Case.

The Manufactured Home Construction and Safety Standards, regarding formaldehyde emission requirements, serve as the sole standard in the regulation of materials containing such emissions before installation into manufactured homes. The Department of Housing and Urban Development, in promulgating the regulations regarding formaldehyde emissions, extensively balanced the interests between the "product standard" and "ambient standard" tests that could be used in the manufactured home industry. After extensive review and research of both tests, the Department of Housing and Urban Development made the following conclusion:

"The Department has decided to adopt product standards. The Clayton study cited above establishes that a product standard can be effective and that product test values reasonably correlate to formaldehyde levels in homes. Products can be tested easily under standardized conditions, which will avoid the problem of compensating for variations in home temperature and humidity levels. Also, a product standard has the advantage of allowing for early detection of a potential formaldehyde problem. Unlike the violation of an ambient standard, which can be established only after a manufactured home has been completely assembled, violation of a wood product standard can be discovered before the wood is shipped by its supplier or installed in a home. Therefore, based on its effectiveness, the availability of reliable test methods, and the potential to prevent formaldehyde problems before the homes are sold, the Department has concluded that a product standard is appropriate. The standards will cover particleboard and plywood, two of the major emitters of formaldehyde in manufactured homes. HUD's objective in implementing these standards is to reduce the level of formaldehyde within the home environment. **It is HUD's intention that these standards preempt State and local formaldehyde standards in accordance with the Act (42 U.S.C. 5403(d))."**

See Manufactured Home Construction and Safety Standard 49 FR 31996-01 (1984)(emphasis added).

The aforesaid regulation regarding formaldehyde emissions is the maximum standard in the industry rather than the minimum standard. Why is this the maximum standard? In promulgating this regulation, the Department of Housing and Urban Development found that

under the products standard, components of the manufactured homes (i.e. particleboard and plywood) could be tested easily under standardized conditions, avoiding the problem of variations in home temperature and humidity levels like under the ambient standard test. The product standard was found to detect potential formaldehyde problems earlier than the ambient testing because unlike the ambient standard, which can be established only after a manufactured home has been completely assembled, product standard tests and failures thereof can be discovered before the wood is shipped by its supplier or installed in a home. All in all, the Department of Housing and Urban Development found the product standard to be the most reliable and effective method while at the same time preventing potential formaldehyde problems before manufactured homes were ever sold to consumers.

As such, the “product standard” test is clearly the maximum regulation in the manufactured housing industry. The Circuit Court’s ruling to allow a homeowner to base a claim on the ambient standard type of testing and also to allow them to present ambient testing results at trial is completely contrary to the Congress’s superintendence of the federal standard. The federal superintendence of the manufactured housing industry becomes unfastened because the Circuit Court’s embracing of the ambient standard test disturbs the federal Manufactured Home Construction and Safety Standards. Claims of formaldehyde emissions in their home based upon ambient air testing stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the standards promulgated by Congress regarding formaldehyde emissions. Thus, it is apparent that the preemption provision found at 42 U.S.C. § 5403(d) impliedly preempts and bars common law negligence claim based upon formaldehyde exposure, or evidence supporting the same, when the Plaintiffs do not claim, and cannot establish, that the

Defendants failed to comply with the formaldehyde standards established under the federal regulations.

C. The Savings Clause Applicable in This Case Does Not Bar the Preemption Analysis

The third certified question to this Honorable Court is whether the “savings clause” of 42 U.S.C. § 5409(c) precludes the Court from granting the Defendants motions for summary judgment. The Circuit Court found that answer to be in the affirmative. However, the Circuit Court’s ruling is in direct contradiction with the binding precedent established by the United States Supreme Court.

The savings clause found in the Manufactured Home Construction and Safety Standards of 42 U.S.C. § 5409(c) states that:

“Compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law.”

See 42 U.S.C. § 5409(c). The United States Supreme Court, in Geier v. American Honda Motor Co., found that a similar savings clause did not remove a common law tort action from the scope of the express preemption clause. Geir, 529 U.S. 861 (2000). The Supreme Court then asked whether the savings clause forecloses or limits the operation of ordinary preemption principles insofar as those principles instruct the Court to read statutes as preempting state laws that “actually conflict” with the statute or federal standards promulgated thereunder. Id. at 869.

The Supreme Court noted that it previously considered the preemptive effect of a saving clause, and the language appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. Id. (citing Freightliner Corp. v. Myrick, 514 U.S. 280 (1995))(declining to address

whether the saving clause prevents a manufacturer from “using a federal safety standard to immunize it self from state common-law liability”). The Supreme Court stated that it has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” *Id.* at 870. The Court found that the saving clause foresees-it does not foreclose-the possibility that a federal safety standard will preempt a state common law tort action with which it conflicts. Thus, the Supreme Court held that the saving clause (like the express preemption provision) does **not** bar the ordinary working of conflict preemption principles. *Id.* at 869.

In the case at hand, nothing in the language of the savings clause found in 42 U.S.C. § 5409(c) suggests an intent to save the common law negligence claim brought by the Plaintiffs which in fact conflicts with federal regulations. Just like in *Geier*, the savings provision here still makes clear that the express preemption provision does not of its own force preempt common law tort actions, and thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a regulation intended to provide a floor. *Id.* at 870. To the contrary, the Department of Housing and Urban Development’s promulgation of the federal regulations regarding formaldehyde emissions did not seek to establish a minimum safety standard. The Department carefully adopted the “products standard” which is the maximum safety standard for the detection of formaldehyde emissions in the manufactured home industry. From this, it is apparent that the Circuit Court’s ruling is in direct conflict with the federal regulation regarding formaldehyde emissions. The Supreme Court held in *Geier* that a saving clause (like the express preemption provision) does **not** bar the ordinary working of conflict preemption principles. 529 U.S. at 869. Therefore, under the principles of implied preemption, the savings clause does not

preclude the Circuit Court from granting the Defendants motions for summary judgment, as this ruling would conflict with federal supremacy and binding precedent.

II. PUBLIC POLICY FAVORS THE PREEMPTION OF STATE TORT SUITS IN CONFLICT WITH FEDERAL REGULATIONS

It is clear that Plaintiffs are bringing a common law negligence claim based upon formaldehyde exposure in their manufactured home. As previously mentioned herein, the preemption doctrine implanted in the Supremacy Clause of the United States Constitution preempts those common law suits that conflict with federal regulations. As such, it is important to understand the underlying policy considerations that establish such precedent.

The preemption provision found in 42 U.S.C. § 5403(d) reflects a desire to subject the manufactured housing industry to a single, uniform set of federal safety standards. The language itself states that “no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home **which is not identical** to the Federal manufactured home construction and safety standard.” *See* 42 U.S.C. § 5403(d). This provision is intended to result in uniformity of manufactured home construction and safety standards so that the public as well as the manufactured housing industry will be guided by one set of criteria rather than by a multiplicity of diverse standards. As such, this provision was intended to preempt all state and local standards, even those that might stand in harmony with federal law, to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standards would otherwise create.

Take for example the effects on the industry if there were a multiplicity of diverse standards among the states, especially among the different counties in West Virginia. If state courts could differentiate between standards for the detection of formaldehyde emissions in homes, contrary to the federal regulations, this would impose a substantial burden on the already struggling factory-built housing industry as varying standards placed upon dealers, manufacturers, suppliers, lenders, community owners, and contractors regarding formaldehyde emissions would be extremely costly. In turn, the manufactured housing industry would be required to conduct formaldehyde emission tests that have been found to be ineffective, unreliable and that could potentially not prevent formaldehyde problems before these homes are sold to consumers.

More particularly, the "ambient standard" test attempted to be utilized by the Plaintiffs did not compensate for variations in home temperature, humidity, ventilation and lifestyles of the consumers. The uncertainty that lies within the ambient standard test would be strengthened if manufactured home dealers were required to improvise this standard. The dealers and manufacturers would first have to wait until the home was complete because the ambient standard can only be established after a manufactured home has been completely assembled. They would then have to come out to each home sold to consumers in varying counties in West Virginia, adjust the test to meet the certain temperature and humidity in that area, to only receive unreliable results due to temperature, humidity, ventilation and the lifestyles of the consumers. On the other hand, the product standard can be discovered before the wood is shipped by its supplier or installed in a home, and is not influenced by temperature, humidity, ventilation or lifestyle. Thus, the product standard minimizes the burden and cost on the manufactured home

industry, increases the reliability in detection of adverse health effects on consumers, while still maintaining affordable, quality built housing for the citizens of West Virginia.

Furthermore, the preemption provision by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts. The Supreme Court in Grier v. American Honda Motor Co. touched home on this point in criticizing broad effects given to saving clauses:

“Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. Insofar as petitioners' argument would permit common-law actions that “actually conflict” with federal regulations, **it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect.** To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to “destroy itself.”

529 U.S. at 871-2. (emphasis added). To this, allowing the Circuit Court's ruling to stand in conflict with the federal government will produce more than just incidental effect on the manufacturing housing industry; and thus, reversal of the Circuit Court's rulings is required.

CONCLUSION

This case is about federal supremacy. The Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law. It is clear that Congress's express intent was to leave no room for contrary law that would establish a less significant safety standard than the maximum safety standard intended by the regulations regarding formaldehyde emissions. Plaintiffs' claims of formaldehyde emissions in their home

based upon ambient air testing stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the standards promulgated by Congress regarding formaldehyde emissions. Furthermore, the savings clause found in the Manufactured Home Construction and Safety Standards does not bar the ordinary working of conflict preemption principles; and as such, the Circuit Court's ruling should be given no effect. Therefore, this Honorable Court should answer Certified Question (I) affirmatively and Certified Questions (II) and (III) negatively, upholding the United States Constitution and sweeping aside any contradiction with the federal manufactured housing industries rules and regulations.

THE WEST VIRGINIA HOUSING INSTITUTE
By Counsel,



Johnnie E. Brown, (WVSB # 4620)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, West Virginia 25301-2726
(304) 344-0100

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CERTIFICATE OF SERVICE

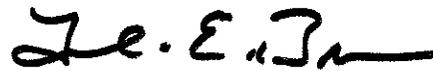
I, Johnnie E. Brown, counsel for the West Virginia Housing Institute do hereby certify that service of the *"The West Virginia Housing Institute's Motion for Leave to File Brief Amicus Curiae In Support of the Appellants"* was made upon the following by mailing, postage prepaid by United States Regular Mail, of true and exact copies, on this 24th day of February, 2009, to the following:

Thomas N. Whittier, Esq.
HEDGES, JONES, WHITTIER & HEDGES
P.O. Box 7
Spencer, WV 25276

Frank Venezia, Esq.
VENEZIA & ELSWICK LAW OFFICE
2442 Kanawha Blvd., East
Charleston, WV 25311

M. David Griffith, Esq.
Robinson & McElwee PLLC
P.O. Box 1791
Charleston, WV 25326

John R. Teare, Jr., Esq.
BOWLES RICE McDAVID GRAFF &
LOVE LLP
P.O. Box 1386
Charleston, WV 25325-1386



Johnnie E. Brown, Esq. (WVSB#4620)

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC
JamesMark Building
901 Quarrier Street
Charleston, WV 25301-2726
(304) 344-0100