

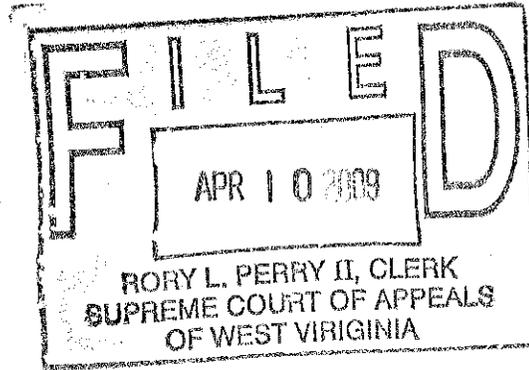
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

34706
No. ~~082094~~

RONALD LEE HARRISON and
BRENDA G. HARRISON,
Plaintiffs below and
Respondents,

v.

SKYLINE CORPORATION,
Defendant below and
Petitioner.



REPLY BRIEF OF PETITIONER

**From the Circuit Court of
Jackson County, West Virginia
Civil Action No. 05-C-50
Judge Thomas C. Evans, III**

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I. PLAINTIFFS' "COUNTER-STATEMENT OF RELEVANT FACTS" CONTAINS STATEMENTS OF "FACT" WHICH ARE NEITHER RELEVANT NOR FACT.

In their Brief at page 2, Plaintiffs represent to this Court that they began experiencing health problems within first year and reference paragraph 20 of their Complaint to indicate where that fact may be found in the record. Paragraph 20 provides, in its entirety:

Plaintiffs thereafter caused the hot water tank and the pertinent fittings to be replaced and repaired the floor underneath the tank and the lower portion of the wall board around the tank.

A thorough review of the Plaintiffs' Complaint establishes that there is no allegation that the Plaintiffs began to suffer health problems within the first year of home ownership. In fact, such an allegation might well have led to the Plaintiffs' claims being dismissed as untimely, and is contrary to the facts developed in several years of discovery and motions.

None of the Plaintiffs' pleadings, including responses to motions for summary judgment including statute of limitation issues, suggest in any fashion that the Plaintiffs suffered health problems after moving into their home. Rather, they uniformly report that they lived in the home from December 1995 until December 2001. Complaint ¶17. They discovered a moldy odor and mold in the Fall of 2001, Complaint ¶ 21, and moved out of their home in December 2003 to protect their health, Complaint ¶18 after receiving a toxicology report related to the mold which also showed formaldehyde levels in the home. In fact, at page 3 of their response to the Petition for Certified Question, filed with this Court on November 10, 2008, the Plaintiffs represented: "After only six years of living in the home Ronald and Brenda Harrison began to experience various health problems and noted a burning of eyes and burning in their throats."

The Trial Court's Findings of Fact are devoid of any finding of an early onset of health problems. See, e.g. Finding of Fact No. 12, Order entered October 10, 2007. Moreover while the timing of making such an important allegation for the first time presents an interesting issue, it is not relevant to the purely legal questions certified to this Court regarding the scope of the statutory preemption provision and whether formaldehyde testing done contrary to federal standards is admissible at trial.

Also at page 2, Plaintiffs suggest that Skyline failed in a duty to provide legally required formaldehyde warning notices. HUD regulations require precise warnings which must be given when a manufactured home is sold. 24 C.F.R. § 3280.309. The warnings, referred to as an "Important Health Notice," must be prominently displayed in the kitchen of the home and included in the homeowner's manual. *Id.* There is no evidence of record that the required notices were not in the home when it was shipped from Skyline to the Dealer.

The relevant regulation, 24 C.F.R. §3282.207(d), provides that no dealer may interfere with the distribution of the homeowner manual and that the dealer shall take any appropriate steps to assure that the purchaser receives a consumer manual from the manufacturer. 24 C.F.R. §3280.309(c) prohibits the removal of the "Important Health Notice" by any party until the entire sales transaction has been completed.

The duty to provide notices and other documentation is imposed on the retail Dealer because Manufacturers like Skyline do not sell directly to consumers. Skyline ships homes to Dealers, such as Bob's Mobile Home Sales, who sell the home, deliver the partially constructed units and complete the construction and installation of the home on the consumer's property. Skyline does not directly participate in the delivery of documents, warranties and

warnings during the sales transaction and generally has no direct contact with the ultimate consumer except for warranty service. To the extent that Plaintiffs suggest that Skyline is responsible for failing to provide the Plaintiffs with a copy of the legally required "important Health Notice," that duty imposed on the Dealer. Plaintiff settled their claims with the Dealer and the Dealer has been dismissed from this civil action.

At page 3 of their brief, Plaintiffs represent that Bill White was an Inspector with HUD¹ when he inspected their home. Surely the Plaintiffs are aware that Bill White was not so employed at the time because Plaintiffs hired Mr. White and his private inspection service. The affiliation of Mr. White with Interstate Inspection Services is noted in Finding of Fact No 13 in the Trial Court's Order denying Skyline's Motion for Summary Judgment which was entered October 10, 2007.

II. THE FEDERAL REGULATORY SCHEME DOES NOT ALLOW SKYLINE ANY DISCRETIONARY AUTHORITY REGARDING THE PLYWOOD AND PARTICLEBOARD PANELS WHICH IT USES TO CONSTRUCT HOMES.

The federal regulations require a specific notice to be stamped on each plywood/particle board panel which is to be installed in manufactured homes and meets federal manufactured housing standards. "Each plywood and particleboard panel to be which is bonded or coated with a resin system containing formaldehyde, other than an exclusively phenol-formaldehyde resin system, shall be stamped or labeled so as to identify the product manufacturer, date of production and/or lot number, and the testing laboratory certifying

¹ United States Department of Housing and Urban Development.

compliance with this section.” 24 CFR §3280.308(c). There is no provision for stamping the formaldehyde testing results, only the conforming compliance label.

Based upon the regulatory environment, when purchasing wood products to be used in the construction of a manufactured home, Skyline has two choices, purchase materials which are marked as compliant or purchase materials which are not marked as compliant. There are no degrees of compliance, only compliant and non-compliant. But the second option of buying and using unlabeled materials is illusory only because Skyline is required by federal regulation to use only properly labeled complaint materials. *Id.*

By contrast, the materials used by homeowners and their contractors,² home builders and modular housing builders are not subject to the same regulation. There is no known rule, regulation, statute or standard which prohibits other builders from using plywood or particleboard decking which does not meet manufactured housing standards in other residential construction.

III. PLAINTIFFS' LEGAL ANALYSIS OF FEDERAL AND WEST VIRGINIA PREEMPTION CASES IS FAULTY IN THAT IT RELIES ON CASES DECIDED UNDER VASTLY DIFFERENT PREEMPTION STATUTES.

Plaintiffs reliance on *Davis* is misplaced as the preemption statutes in that case are fundamentally different from this case. This preemption language at issue in the *Davis* case is found in 30 U.S.C. § 955 which states:

(a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision

² As noted earlier, the homeowners engaged in certain construction activities and hired contractors to build onto their home.

of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.

(b) The provisions of any State law or regulation in effect upon the operative date of this chapter, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this chapter or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this chapter. The provisions of any State law or regulation in effect December 30, 1969, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this chapter or in any order issued or any mandatory health or safety standard, shall not be held to be in conflict with this chapter.

Davis v. Eagle Coal & Dock Co., 220 W. Va. 18, 23-24, 640 S.E.2d 81, 86-87 (2006)(emphasis added). The *Davis* Court noted that Congress had clearly expressed its intent **not to preempt** all state law or to occupy the entire field, therefore federal preemption was not appropriate in that case.

Hartley Marine Corp. v. Mierke, 196 W. Va. 669, 474 S.E.2d 599 (1996), is also not persuasive because it applies a fundamentally different preemption analysis. The Parties in *Hartley Marine* stipulated the absence of any language indicating that state law was to be preempted by federal law. *Id.* at 674, 474 S.E.2d at 604. Justice Workman noted that a direct conflict between state and federal statutes, or if the subject demands uniformity of regulation, the state statute must fall. *Id.* at 676, 424 S.E.2d at 606.

Because there was no direct conflict the *Hartley Marine* Court was required to consider both field preemption and conflict preemption to determine whether Congress intended for the federal government to have exclusive control of the inland navigable waterways system.

The Court found that it was possible to comply with both the state and federal tax laws and further found, using the *Complete Auto*³ four-part test, that the West Virginia tax was constitutional because, *inter alia*, it was fairly related to the Appellant's presence in the State and the services provided by the State. The pending case, by contrast, has an express preemption clause and involves issues regarding testing procedures rejected by the federal government.

Likewise, Plaintiffs' reliance on *Wyeth v. Levine* is misplaced, again because the issues are not similar. In *Wyeth*, the Defendant raised the defense of preemption of pharmaceutical warning/packaging materials based upon FDA approval of the warning. The regulation relied upon, however, specifically permitted warnings to be revised on a temporary basis while revised warnings were under administrative review. In fact, the FDA regulations affirmatively required the drug manufacturer to update its safety warnings. *See, e.g.*, 21 CFR §201.80(e) (requiring a manufacturer to revise its label "to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug"); §314.80(b) (placing responsibility for postmarketing surveillance on the manufacturer); 73 Fed. Reg. 49605 ("Manufacturers continue to have a responsibility under Federal law . . . to maintain their labeling and update the labeling with new safety information"). *Wyeth* slip at p. 14.

HUD does not similarly permit manufacturers of formaldehyde containing wood products to use a different method of testing pending approval, nor does it permit a different warning pending approval.

³ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

IV. SKYLINE DOES NOT SUGGEST THAT THE HUD CODE PREEMPTS ALL CLAIMS IN ALL CASES, RATHER IT SUGGESTS ONLY THAT CERTAIN ASPECTS OF CONSTRUCTION, HEALTH AND SAFETY ISSUES ARE SUFFICIENTLY CONTROLLED BY THE FEDERAL GOVERNMENT TO WARRANT PREEMPTION.

While it is true that the manufactured housing industry is a heavily regulated industry, Skyline does not take the position that the regulation of the industry as a whole is so pervasive to infer that Congress intended to prevent the States from any regulation or oversight over the industry,⁴ nor does it claim that it is a general conflict in regulations that prevents it from complying with both state and federal standards. In fact, the federal regulatory scheme specifically includes the states in the enforcement of the HUD code and regulations. The West Virginia Manufactured Construction and Safety Standards Board is West Virginia's State Administrative Agency responsible for enforcement in West Virginia, but such enforcement must comply with, and be identical to, federal standards. *See* West Virginia Code §21-9-5.

Rather Skyline suggests, however, that certain very discrete areas of industry activity are subject to preemptive regulation, otherwise there would be no reason to include an express preemption provision in both the statute and the controlling regulations. Formaldehyde regulation is one of those discrete areas of preemptive regulation. A review of the mandatory testing protocols makes it clear that certain tests shall be conducted by specified means and there is no "alternative" method acceptable:

⁴ West Virginia Code §21-9-5 provides: "The board is hereby designated as the state administrative agency for the administration and enforcement of the federal standards and is charged with the adoption, administration and enforcement of manufactured home construction and safety standards. **The standards to be adopted shall be identical to the federal standards.** The board shall discharge such duties consistent with the rules and regulations promulgated by HUD." (Emphasis added). *See also* West Virginia Code §21-9-4(a)(6): "The board shall have the power to . . . Conduct hearings and presentations of views consistent with its rules and the federal standards."

24 CFR §3280.406 *Air chamber test method for certification and qualification of formaldehyde emission levels.*

(a) Preconditioning. Preconditioning of plywood or particleboard panels for air chamber tests **shall** be initiated as soon as practicable but not in excess of 30 days after the plywood or particleboard is produced or surface-finished, whichever is later, using randomly selected panels.

(1) If preconditioning is to be initiated more than two days after the plywood or particleboard is produced or surface-finished, whichever is later, the panels **must be** dead-stacked or air-tight wrapped until preconditioning is initiated.

(2) Panels selected for testing in the air chamber **shall not** be taken from the top or bottom of the stack.

(b) Testing. Testing **must be conducted in accordance with the Standard Test Method for Determining Formaldehyde Levels from Wood Products Under Defined Test Conditions Using a Large Chamber, ASTM E 1333-96**, with the following exceptions:

(1) The chamber **shall** be operated indoors.

(2) Plywood and particleboard panels **shall** be individually tested in accordance with the following loading ratios:

(i) Plywood--0.29 Ft²/Ft³, and

(ii) Particleboard--0.13 Ft²/Ft³.

(3) Temperature to be maintained inside the chamber **shall be** 77° plus or minus 2 °F.

(4) The test concentration (C) **shall be** standardized to a level (CO) at a temperature (tO) of 77 °F and 50% relative humidity (HO) by the following formula: $C = CO \times [1 + Ax (H - HO)] \times e^{-R(1/t - 1/tO)}$ where:

C = Test formaldehyde concentration

CO = Standardized formaldehyde concentration

e = Natural log base

R = Coefficient of temperature (9799)

t = Actual test condition temperature (° K)

tO = Standardized temperature (° K)

A = Coefficient of humidity (0.0175)

H = Actual relative humidity (%)

HO = Standardized relative humidity (%)

The standardized level (CO) is the concentration used to determine compliance with § 3280.308(a).

(5) The air chamber **shall be** inspected and recalibrated at least annually to insure its proper operation under test conditions.

Id. (emphasis added). 24 CFR §3280.308(a) *Formaldehyde emission controls for certain wood products*⁵ provides:

(a) Formaldehyde emission levels. All plywood and particleboard materials bonded with a resin system or coated with a surface finish containing formaldehyde shall not exceed the following formaldehyde emission levels when installed in manufactured homes:

(1) Plywood materials shall not emit formaldehyde in excess of 0.2 parts per million (ppm) as measured by the air chamber test method specified in § 3280.406.

(2) Particleboard materials shall not emit formaldehyde in excess of 0.3 ppm as measured by the air chamber test specified in § 3280.406.

In addition, 24 CFR §3280.308 has provisions relating to specific requirements for additional testing, inspections and monitoring to maintain certification.

These specific provisions may be compared to other HUD Code requirements such as 24 CFR §3280.307 *Resistance to elements and use* where the manufacturer has discretion in how it chooses to meet the HUD Code standard:

Subpart D--Body and Frame Construction Requirements

(a) Exterior coverings shall be of moisture and weather resistive materials attached with corrosion resistant fasteners to resist wind, snow and rain. Metal coverings and exposed metal structural members shall be of corrosion resistant materials or shall be protected to resist corrosion. All joints between portions of the exterior covering shall be designed, and assembled to protect against the infiltration of air and water, except for any designed ventilation of wall or roof cavity.

(b) Joints between dissimilar materials and joints between exterior coverings and frames of openings shall be protected with a compatible sealant suitable to resist infiltration of air or water.

(c) Where adjoining materials or assemblies of materials are of such nature that separation can occur due to expansion,

⁵ The only other nationally recognized standard which addresses formaldehyde emissions in wood products in residential construction is American National Standards Institute ("ANSI") A208.1, approved February 8, 1999. ANSI A208.1 requires the same testing protocol required by HUD.

contraction, wind loads or other loads induced by erection or transportation, sealants shall be of a type that maintains protection against infiltration or penetration by air, moisture or vermin.

(d) Exterior surfaces shall be sealed to resist the entrance of rodents.

and 24 CFR 3280.305 Structural design requirements

Subpart D--Body and Frame Construction Requirements

(a) General. Each manufactured home shall be designed and constructed as a completely integrated structure capable of sustaining the design load requirements of this standard, and shall be capable of transmitting these loads to stabilizing devices without exceeding the allowable stresses or deflections. Roof framing shall be securely fastened to wall framing, walls to floor structure, and floor structure to chassis to secure and maintain continuity between the floor and chassis, so as to resist wind overturning, uplift, and sliding as imposed by design loads in this part. Uncompressed finished flooring greater than 1/8 inch in thickness shall not extend beneath load-bearing walls that are fastened to the floor structure.

By these examples, Skyline suggests that while the HUD Code does not have preemptive effect throughout, there are portions of the Code, particularly the formaldehyde regulations in this case, where the HUD way is the only way, thereby precluding the State of West Virginia, and these Plaintiffs, from imposing any different or contrary construction or safety standard upon Skyline.

V. HUD HAS THE LAWFUL AUTHORITY TO PREEMPT CERTAIN CLAIMS PURSUANT TO THE NATIONAL MANUFACTURED HOUSING CONSTRUCTION AND SAFETY STANDARDS ACT.

Curiously, Plaintiff argues at page 23 of its Brief that HUD lacks the lawful authority to deem state law claim preempted. Plaintiffs have failed to consider, however, that the authority for preemption in this case does not depend entirely on agency action and interpretation, but is based upon Acts of Congress endorsed by the President of the United States.

See 42 USC §5403(d) *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.** 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 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.

In addition, Congress legislated mandatory standards to guide HUD in the exercise of its administrative responsibilities:

See 42 USC §5403(e) *Considerations in establishing and interpreting standards and regulations*

The consensus committee, in recommending standards, regulations, and interpretations, and the Secretary, in establishing standards or regulations or issuing interpretations under this section, shall—

- (1) consider relevant available manufactured home construction and safety data, including the results of the research, development, testing, and evaluation activities conducted pursuant to this chapter, and those activities conducted by private organizations and other governmental agencies to determine how to best protect the public;
- (2) consult with such State or interstate agencies (including legislative committees) as he deems appropriate;
- (3) consider whether any such proposed standard is reasonable for the particular type of manufactured home or for the geographic region for which it is prescribed;

- (4) consider the probable effect of such standard on the cost of the manufactured home to the public; and
- (5) consider the extent to which any such standard will contribute to carrying out the purposes of this chapter.

Finally, Congress specifically authorized HUD to promulgate regulations. See 42 USC §5424. Pursuant to that authority HUD promulgated the regulations at issue in this case. Notably, the preemption language used in the regulations are nearly identical to the authorizing statute and, in addition, specifically precludes the State from imposing any requirement in addition to the HUD Code approval label as a condition of entry into or sale in the State.

24 CFR §3282.11 *Preemption and reciprocity*

(a) No State manufactured home standard regarding manufactured home construction and safety which covers aspects of the manufactured home governed by the Federal standards shall be established or continue in effect with respect to manufactured homes subject to the Federal standards and these regulations unless it is identical to the Federal standards.

(b) No State may require, as a condition of entry into or sale in the State, a manufactured home certified (by the application of the label required by § 3282.362(c)(2)(i)) as in conformance with the Federal standards to be subject to State inspection to determine compliance with any standard covering any aspect of the manufactured home covered by the Federal standards. Nor may any State require that a State label be placed on the manufactured home certifying conformance to the Federal standard or an identical standard. Certain actions that States are permitted to take are set out in § 3282.303.

Based upon the Plaintiffs' admission at page 13 of their brief that the formaldehyde levels discovered through testing did not exceed HUD permitted levels and their admission that they have no evidence that the appropriate federal formaldehyde standards were violated in any way, by Skyline or otherwise, Plaintiffs' formaldehyde claims are barred by operation of law.

In addition, the reciprocity provision quoted above provides additional support for the proposition that the State of West Virginia, by statute, regulation or jury verdict, may not impose additional requirements for manufactured homes when the federal standards have been satisfied. State control over manufactured housing is specifically limited to 24 CFR §3282.303, which provides:

Sec. 3282.303 State plan--suggested provisions.

The following are not required to be included in the State plan, but they are urged as necessary to provide full consumer protection and assurances of manufactured home safety:

- (a) Provision for monitoring of dealers' lots within the State for transit damage, seal tampering, and dealer performance generally,
- (b) Provision of approvals of all alterations made to certified manufactured homes by dealer in the State. Under this program, the State would assure that alterations did not result in the failure of the manufactured home to comply with the standards.
- (c) Provision for monitoring of the installation of manufactured homes set up in the State to assure that the homes are properly installed and, where necessary, tied down,
- (d) Provision for inspection of used manufactured homes and requirements under State authority that used manufactured homes meet a minimal level of safety and durability at the time of sale, and,
- (e) Provision for regulation of manufactured home transportation over the road to the extent that such regulation is not preempted by Federal authority.

VI. PLAINTIFF HAS FAILED TO ADDRESS THE REASONING AND IMPACT OF THE CASES CITED BY SKYLINE WHICH HAVE FOUND PREEMPTION TO BE APPROPRIATE.

New Mexico v. Department of Housing and Urban Development, (Docket No. 84-2347, 10th. Cir. 1/7/1987) is the only Federal Court of Appeals case which evaluates the substantive effect of the HUD formaldehyde rules. The State of New Mexico claimed that the standard adopted was arbitrary and capricious because HUD did not give adequate reasons for: (1) selecting a target ambient air level of 0.4 ppm; (2) failing to take into account the effect of

geographic location in adopting the product standards; and (3) rejecting alternative methods to reduce formaldehyde in manufactured homes. *Id.* at slip op. p. 2. The Court of Appeals considered and rejected each of the arguments, and upheld the formaldehyde regulations.

Prior to the effective date of the federal formaldehyde regulations, the State of Wisconsin adopted its own formaldehyde regulations which included an ambient air standard. The Wisconsin Court of Appeals noted that HUD had not established formaldehyde standards at the time the state regulations went into effect, but then concluded that HUD's adoption of the formaldehyde regulations at issue in this case nullified Wisconsin's standards after the effective date of the HUD standard.

We conclude that HUD and Wisconsin have adopted standards regarding construction or safety applicable to "the same aspect of performance" of manufactured homes, within the meaning of 42 U.S.C. sec. 5403(d). Because the state and the federal standards are not identical, 42 U.S.C. sec. 5403(d) nullifies the state standard unless, as DILHR argues, HUD has no authority to adopt its formaldehyde regulations.

DILHR's argument hinges on 42 U.S.C. sec. 5403(a), which requires that federal manufactured home standards "meet the highest standards of protection, taking into account existing State and local laws relating to manufactured home safety and construction." DILHR argues that the federal standard does not "meet the highest standards of protection." DILHR describes the Wisconsin standard as one which protects consumers by directly prohibiting formaldehyde concentrations as actually measured inside the home. DILHR characterizes the HUD standard as an attempt to protect consumers from the same harmful exposure by regulating the emissions of some but not all formaldehyde-emitting building products.

The requirement in 42 U.S.C. sec. 5403(a) is two-fold: that each manufactured home standard "shall be reasonable and shall meet the highest standards of protection...." This dual requirement must be read with 42 U.S.C. sec. 5403(f), which directs HUD to consider, among other things, the probable effect of the standard on the cost of the manufactured home to the public. HUD

concluded that its product standards will result in a .4 ppm indoor level-the same as state standards-and that HUD's level, "given economic considerations, is reasonable." 49 Fed.Reg. at 31999, col. 2. HUD's conclusion as to the reasonableness is uncontested. We conclude that DILHR has failed to show that HUD's standards were adopted without congressional authority.

Liberty Homes, Inc. v. Department of Industry, Labor and Human Relations, 125 Wis.2d 492, 516-517, 374 N.W.2d 142, 154 - 155 (Wis. App. 1985).

In *Georgia Manufactured Housing Ass'n., Inc. v. Spalding County, Ga.*, 148 F.3d 1304 (11th Cir. 1998) the Court of Appeals addressed the scope of federal preemption in the manufactured housing industry, noting:

By defining the scope of the federal superintendence of the mobile home industry, *Scurlock*⁶ establishes that the construction and safety standards preempted by the Act are those standards that protect consumers from various potential hazards associated with manufactured housing. In contrast, a zoning requirement related to aesthetics is not preempted because the goals and effects of such a standard have nothing to do with consumer protection, but instead seek to control the aesthetic quality of a municipality's neighborhoods.

Clearly federal formaldehyde emission regulations are designed to protect consumers from a potential hazard associated with manufactured housing and, at least in the Eleventh Circuit, preempt any standard to the contrary.

Recently, in *Guidroz v. Champion Enterprises*, 2007 U.S. Dist. LEXIS 77611 (W.D.La. January 26, 2007), the federal court noted:

the American Homeownership and Economic Opportunity Act of 2000 amended 42 U.S.C.A. § 5403(d) to include a paragraph stating that: "Federal preemption under this subsection shall be broadly and liberally construed to ensure that disparate State or

⁶ *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988)

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.

Mizner v. North River Homes, Inc., 913 S.W.2d. 23 (Mo. App. 1995), simply cannot be explained away or distinguished, rather it stands out as an aberration among the other cases decided across the country.

Conclusion

In this case, there can be no dispute that the Plaintiffs seek to impose standards and duties upon Skyline which are contrary to and in addition to the specific and preemptive federal formaldehyde standards. Plaintiffs seek to negate the carefully considered and balanced product standard established for formaldehyde emissions. More importantly, Plaintiffs seek to impose liability based upon a test specifically rejected by federal authorities. The hallmark of preemption analysis is the intent of Congress. Congress could not have intended that the savings clause would operate in a way to defeat years of study, testing and deliberation specific to the very issues to be decided in this case.

HUD's regulations provide the only acceptable safety standard for the detection of formaldehyde emissions in the manufactured home industry. Federal regulators concluded that their standards would result in a targeted safe value for formaldehyde vapors inside manufactured homes. Plaintiffs' own testing, using the rejected methodology, confirms that the ambient air in the Plaintiffs' home is substantially below the target value of 0.4 ppm.

For all the aforementioned reasons, Skyline urges this Court to hold: (1) that the federal formaldehyde standards are preemptive of any contrary standard, including any standard

which might be imposed by a jury; (2) that ambient air testing cannot be admitted as evidence due to the federal rejection of ambient air testing; and (3) that the savings clause is not an impediment to preemption and summary judgment.

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RONALD LEE HARRISON and
BRENDA G. HARRISON,
Respondents/Plaintiffs below,

v.

Petition No. 082094

From the Circuit Court of
Jackson County, West Virginia
Civil Action No. 05-C-50

SKYLINE CORPORATION, and
GEORGIA-PACIFIC CORPORATION,
Petitioners/Defendants below.

County: **Jackson**

Judge: **The Honorable Thomas C. Evans, III**

Circuit No: **05-C-50**

CERTIFICATE OF SERVICE

I, John R. Teare Jr., of Bowles Rice McDavid Graff & Love LLP counsel for Skyline Corporation do hereby certify that service of the "Reply Brief of Petitioner" was made upon the following by mailing, postage prepaid by United States Regular Mail, of true and exact copies, on this 10th day of April, 2009, to the following:

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