

**THE EXPANDING WAISTLINE OF THE EXECUTIVE BRANCH:
FEDERAL PREEMPTION OF THE FOREIGN AFFAIRS POWERS**

PERSPECTIVE

By Brian Kabateck and Evan Zucker

On Oct. 4, 2010 the U.S. Supreme Court denied review of the *Thomas Weiss v. Assicurazioni Generali* case, which has led to disturbing new questions about the extent of federal preemption.

The plaintiff, Dr. Thomas Weiss, is the beneficiary of several modest life insurance policies purchased by his father, Pavel Weiss, whose wife, three young children, and siblings were murdered in the Holocaust.

For decades, political motives have blocked all efforts to get payment on life insurance policies rightfully payable to victims of the Holocaust. The economic fallout for many Eastern European countries after World War II was devastating. As a result, agreements to handle reparations at an international level have created a unique climate. Countries that were enemies 65 years ago have become allies and avid trading partners over time. However, individuals like Weiss, can get lost in the court system and their claims overlooked for broader policy concerns.

Most attorneys are familiar with federal preemption based on congressional legislation. Preemption generally arises from the Supremacy Clause of the U.S. Constitution, which provides that "the laws of the United States...shall be the supreme Law of the Land." Under this doctrine, if there is an actual conflict, either explicit, implied, or in application of a federal and a state law, the court will apply federal law and disregard the state law. Similarly, the executive branch led by the president has almost plenary authority over issues related to foreign affairs. So it makes sense that executive agreements with foreign nations and treaties that have the general force of law will pre-empt state laws when there is an actual conflict. After all, as the face of the country, the president must be able to speak with a common voice for all 50 states on matters of foreign affairs.

However, the outer limits of the executive branch's power to pre-empt state laws and the breadth of that authority can be troubling. When the president enters into a treaty with a foreign government, few would argue the proposition that a state should have the power to produce enforceable laws in contravention of that treaty. On the other hand, in the absence of a treaty or an executive agreement, should the president's implied dormant foreign affairs power create a situation where states are limited in their lawmaking ability? Even more troubling is the question of whether implied executive authority, or dormant authority, pre-empts long-standing state common laws, such as breach of contract or tort claims.

In *Weiss*, the New York District Court concluded that Weiss could not pursue a claim against an Italian insurance company based on an insurance contract for simple breach of contract. The executive branch expressed an opinion that pursuing breach of contract claims in U.S. courts for Holocaust era insurance claims would undermine foreign relations. However, this opinion was not expressed directly by the president himself. Instead, it was contained in an

opinion letter from the Department of Justice in response to a request by the court to the U.S. State Department. After receiving a ruling that his state breach of contract claim was pre-empted by an opinion letter issued by a department of the executive branch, Weiss appealed the ruling first to the 2nd U.S. Circuit Court of Appeals (*In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113 (2nd Cir. 2010)). He was unsuccessful based on the prior Supreme Court ruling in *American Insurance Association v. Garamendi*. 539 U.S. 396 (2003) Then he appealed to the U.S. Supreme Court, which denied the request to evaluate the case.

The most expansive portion of this doctrine of law is not that executive authority has the ability to pre-empt state laws, but that no treaty, federal law, or executive agreement is necessary for executive authority to compel that result. *American Insurance Association* and *Weiss* constitute a line of cases that represent an expansion of that executive authority.

After World War II, the London Debt Agreement limited individual claims for reparations resulting from the Holocaust and included claims based on insurance contracts. However, in 1996, the treaty reunifying East and West Germany lifted the London Debt Agreement's moratorium of insurance claims by individual claimants stemming from the Holocaust. In response, European insurance companies, the state of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners created the International Commission on Holocaust Era Insurance Claims (ICHEIC). The president then agreed that when a German company is sued in American courts for a Holocaust era insurance claim, the government would submit a statement that it would be in the interest of U.S. foreign policy for the ICHEIC to be the exclusive forum for that kind of claim. Similar agreements were also entered into with Austria and France. Notably, no such agreement was entered into between the U.S. and Italy.

The agreement with Germany, Austria and France did not explicitly pre-empt any state laws or claims. Instead, it merely obligated the U.S. to submit an opinion letter to courts that the U.S. has a policy interest in the ICHEIC being the exclusive forum for Holocaust era insurance claims. Nevertheless, Weiss' state contract claim was ruled pre-empted by this presidential authority. The Supreme Court in *Garamendi* said that the pre-emptive effect of U.S. foreign policy was based on evidence of a clear conflict between the policies of the U.S., as set by the president, and state law. *Weiss*, expanding on the language in *Garamendi*, held that the existence of executive agreements was not necessary for preemption. Instead, executive agreements were a product of the president's foreign policy. Foreign policy itself has legal pre-emptive power over state laws.

In addition to being concerned about the rights and remedies available to Weiss, the plaintiffs and amici curiae who submitted briefs in connection with the petition for review were troubled with the proposition that a policy declaration from the president alone could pre-empt the application of state common law. An executive agreement or a treaty has concrete definitive language that can be referred to and interpreted. The foreign policy of the president, however, can be ill-defined and subject to speculation. The 2nd Circuit in *Weiss* was particularly careful on this point. That court requested from two different presidential administrations a statement regarding the executive's foreign policy position on the case. In response to these requests, they received letters on behalf of Secretary of State Condoleezza Rice and Secretary of State Hillary Clinton, which supported the court's holding. However, the holding in *Weiss* does not require this level of diligence by the court or the parties. The opportunity for a court or a party to substitute its own conjecture in place of receiving a definitive statement from the government is a real possibility after *Weiss*.

The pre-emptive effect of foreign executive policy has been expanded in two ways by these cases. First, it is the foreign policy of the president himself, not executive agreements or treaties, that have pre-emptive power. Second, the court has opened the door to the possibility of an application akin to that of the dormant commerce clause. Relying on just the executive's foreign policy, the courts now have the latitude they need to pre-empt state law if it encroaches on an area traditionally controlled by foreign policy. The dormant commerce clause is premised on the idea that the commerce clause reserves for Congress some degree of exclusive power to control interstate commerce, and even where Congress has not legislated, individual states are limited in their ability to legislate over such matters. Similarly, the executive branch is given some degree of exclusive power to control foreign relations and even where there is no definitive statement of foreign policy, states may now be limited in their ability to legislate over such matters.

By declining to grant review in *Weiss*, an important case interpreting the holding of *Garamendi*, the Supreme Court does not appear concerned with this expansion of power. In the past, President Barack Obama has taken a narrow view of federal preemption. He has indicated that any statement of preemption by executive agencies should be deliberate and only undertaken after careful consideration of the authority for that preemption. Perhaps this executive mandate provides the necessary counterbalance to prevent the *Garamendi* and *Weiss* rulings from giving courts free reign to expand preemption doctrine further than necessary. In the meantime, *Weiss* cannot collect on the insurance policies rightfully owed to him on behalf of his family.