

What Judge Gorsuch as Associate Supreme Court Justice Could Mean for Product Liability Practitioners

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On Jan. 31, President Trump nominated Judge Neil Gorsuch to fill Justice Antonin Scalia's vacant seat on the U.S. Supreme Court. Gorsuch has served on the U.S. Court of Appeals for the Tenth Circuit since 2006 and was appointed by President George W. Bush. Product liability litigators and commentators have been looking at what Justice Gorsuch could mean for our work, specifically diving into Gorsuch's opinions on federal preemption and the admissibility of expert testimony. Here's a sampling.

Express Preemption

An attorney and blog contributor, James M. Beck does a deep dive into Gorsuch's background relating to express preemption. Beck begins by observing that Gorsuch is the author of *Caplinger v. Medtronic, Inc.*, one of the friendliest preemption decisions finding express preemption for medical device manufacturers under the Medical Device Amendments (MDA). In *Caplinger*, Gorsuch reviewed the Supreme Court's line of MDA preemption decisions; pointing out particular holdings that appear at odds with the language of the statute and, at times, the other decisions. Beck sees this as hope that Gorsuch may do away with certain exemptions to express preemption in MDA cases.

Importantly, at the end of his analysis in *Caplinger*, Gorsuch states that Congress had to strike a balance in deciding where to draw the line on MDA preemption and that "it is not for this court to revise it by beating a new path around preemption nowhere authorized in the text." This statement not only reflects Gorsuch's well-known textualist tendencies, but also informs the reader that when Gorsuch is faced with a federal statute with broad preemption language, he will almost certainly find broad express preemption. This is good news for product liability litigators hoping express preemption will be a valuable tool in future cases.

Expert Testimony

In an article published by Law 360, attorney Eric Wolff reviewed Gorsuch's record on the admissibility of expert testimony under the *Daubert* standard and concluded that it is "reasonable to expect that Gorsuch will be on the side of a robust gatekeeping role for district court judges, and that he will press for meaningful engagement and review of expert testimony issues." Through Gorsuch's opinions, Wolff demonstrates that Gorsuch is reluctant to accept expert speculation, regardless of the

expert's qualification, and wants district courts to engage with a purported expert's theories in undertaking the *Daubert* analysis. From these opinions, it seems that Gorsuch will be a voice for product liability litigators often fighting to keep out speculative and unsound testimony from plaintiffs' experts.

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