



For Release:
September 11, 2007

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CPR Report:

***Bush Administration Using ‘Agency Preemption’ of
State Law to Undercut Consumer Health and Safety***

Washington, DC ---- Working through the federal regulatory structure, the Bush administration has engaged in an aggressive and unprecedented campaign not simply to weaken federal consumer, health and safety protections, but to weaken state protections, as well. That is the chief conclusion of a report, released today by the Center for Progressive Reform, focused on the Administration’s use of “agency preemption” of state tort laws in ways calculated to allow industry to evade accountability for harm its products and practices may cause consumers. On Wednesday, September 12, the Senate Judiciary Committee will hold a hearing on the topic, at 11:00 a.m. in the Dirksen 226, at which report co-author David Vladeck will testify.

The report’s principal authors are Member Scholars of the Center for Progressive Reform: William Funk, Professor of Law at Lewis & Clark Law School in Portland, Oregon; Sidney Shapiro, Professor at the Wake Forest University School of Law; and David Vladeck, Professor of Law at the Georgetown University Law Center. The report is available online at www.progressivereform.org/articles/Truth_Torts_704.pdf.

“The Bush administration’s use of agency preemption is an unprecedented arrogation of power, in service of corporate interests and at the expense of Americans’ health and safety,” said Professor Vladeck. “State tort laws play a vital role in protecting consumers. The Administration’s not fooling anyone. The agenda here is to shield wealthy corporations from accountability for the harm their products and practices can cause.”

The report cites examples from several agencies of the Administration’s efforts to protect industry from tort actions – lawsuits brought by citizens alleging that they have been harmed by industry’s products or practices. The Administration’s approach “substantially exceeds anything even suggested by prior administrations,” the authors write. “Prior to the Bush administration, agencies by and large took one of two positions. They either opposed preemption of state tort remedies or stayed on the sidelines and did not take a position.”

The authors write, “The successful preemption of state tort law would deprive consumers and patients of their rights to recover damages if they are injured by a product or service and to hold those responsible accountable to their victims and society at large. Moreover, people will be at greater risk of being injured or killed because tort law currently complements and augments the protective function of federal safety regulation. For example, the tort system has

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provided crucial protections in areas of vehicle safety largely neglected by NHTSA, including the safety of volatile fuel-tank systems.”

According to the report, the Administration has pursued its preemption agenda along two paths. First, agencies have intervened in state tort cases on behalf of industry, asserting that federal regulations supersede state law. Second, agencies have simply asserted, lacking adequate basis in statute, that their regulations will preempt state tort laws.

Examples include:

- In the summer of 2005, the National Highway Traffic Safety Administration (NHTSA) announced the preemption of state tort law in proposed rulemaking preambles addressing the placement of seatbelts and roof-crush resistance. Bill Walsh, a senior official at NHTSA who worked on the roof-crush rule before retiring from the agency in 2004, told the *L.A. Times* that such preemption of tort law was “different from how we normally operated . . . in issuing regulations.” Moreover, the preemption language in the rule’s preamble, he stated, “was dropped in from out of the blue.” Sens. Arlen Specter and Patrick Leahy expressed dismay in a letter to the agency, noting that it lacked congressional authority to make such a preemption determination
- FDA also recently declared preemption of tort liability in a rulemaking preamble concerning the content and form of drug labeling. Moreover, the agency did not give the public any opportunity to comment on its preemption decision. FDA included its preemption language *only* in the preamble of the *final* version of its drug-labeling rule, which was issued five years after publication of the proposed version. Furthermore, FDA explicitly took the opposite position in the proposed rule, stating that “this proposed rule does not preempt State law.” The National Conference of State Legislatures wrote FDA that “[i]t is unacceptable that FDA would not permit the states to be heard on language that has a direct impact on state civil justice systems nationwide.” Since then, FDA has issued four rules and one proposed rule with language asserting preemption of tort actions in the preambles of the rules.

The Consumer Product Safety Commission (CPSC) recently declared preemption of tort liability in the preamble to its long-awaited mattress-flammability rule. Like NHTSA and FDA, CPSC failed to cite any instances from its 33-year history in which tort liability interfered with the implementation of its statutory mandate, and this rule’s preamble is the first time the agency has declared preemption of tort law in the rulemaking process. CPSC, like FDA, did not assert its intent to preempt tort law at the proposal and public comment stage of the rulemaking process. Thomas H. Moore, a CPSC Commissioner who dissented from the assertion of preemption of tort law in the preamble, questioned why the agency denied the public a meaningful opportunity to respond to the agency’s preemption assertion, objecting to the “twelfth hour” release of the preemption language, “buried in the tabs of the briefing package on our web site, [that] did not give it the public exposure it deserved.”

The report also describes several cases in which the Administration has filed amicus briefs in state tort litigation, backing industry arguments that specific federal regulations preempt state tort laws. “The Food and Drug Administration (FDA) has led the Administration’s efforts to convince courts in amicus briefs that state tort law is preempted,” the authors write. The report cites preemption cases in which the Administration has sided with the drug industry against consumers and the chemical industry against farmers.

“It’s bad enough that the Administration has weakened federal safeguards,” Professor Vladeck said. “Now they’re trying to prevent the states from protecting their own citizens within their own borders. The added irony is that this attack on state power comes from an administration that in other contexts sings the anthem of states rights.”

The authors call on Congress to monitoring and investigating instances of agency preemption, and making its intent with respect to preemption of tort law clear in future legislation.

The Center for Progressive Reform is a nonprofit research and educational organization whose network of scholars across the nation are dedicated to protecting health, safety, and the environment through analysis and commentary. For more information, contact Matthew Freeman at 301-762-8980 or at mfreeman@progressivereform.org. Visit CPR on the web at www.progressivereform.org. The Center for Progressive Reform is grateful to the Pound Civil Justice Institute for its generous support of this project, and to the Beldon Fund and the Deer Creek Foundation for their generous support of CPR’s work in general.