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New CPR Report Spotlights Dangers of Regulatory Preemption at Consumer Product Safety Commission

Congress, Courts, President Have Role to Play Repairing Fabric of Product Safety Law

Washington, DC ---- A new report from the Center for Progressive Reform argues that recent efforts by the Bush Administration and industry allies to “preempt” state tort laws via Consumer Product Safety Commission (CPSC) regulations are an attempt “to make the agency an irrelevant artifact of a bygone consumer-protective era.” The report calls on Congress, the courts and President-elect Obama to take action to reinvigorate consumer product safety laws.

“In recent years,” said report co-author Nina Mendelson, a CPR Member Scholar and law professor at the University of Michigan, “we’ve seen defense lawyers for industry try to persuade courts that CPSC regulations preempt citizens’ right to sue industry to recover damages for the harm their products cause. The effort is unsupported by the relevant laws, and runs counter to congressional intent when it passed the laws. But the defense lawyers have persisted, and have begun to make inroads. If they succeed in this effort, CPSC – already a weakened and overloaded agency – will end up as a protector of manufacturers of faulty products, rather than a protector of consumers.”

The report, *The Truth About Torts: Regulatory Preemption at the Consumer Product Safety Commission*, notes that the push for preemption is dangerous for several reasons:

- CPSC is a weak agency, lacking the power and resources to enforce strong – or even weak – safety standards. Tort law fills the gaps created by weak enforcement, forcing manufacturers to work constantly to develop safer products.
- CPSC suffers from “agency capture” – working increasingly to protect industry, rather than consumers. Tort laws rely on neutral decisionmakers: judges and juries.
- CPSC cannot repair harm done to consumers. Only tort laws allow individual consumers to recover damages.
- CPSC needs tort cases to help it gather information about unsafe products. Courts have much more authority than CPSC to compel manufacturers to furnish information about specific unsafe products. CPSC needs that information to regulate intelligently.

The report notes that both the text and history of the laws establishing CPSC and granting it its authority demonstrate that Congress did not intend for CPSC regulations to preempt

citizens' right to sue for damages caused by defective products. Nevertheless, CPSC has recently sought to assert that a rule about mattress flammability preempted state tort laws under which fire victims might sue, even though the courts have repeatedly held that the relevant statute does not permit preemption.

The report warns that:

Having virtually eviscerated CPSC's standard-setting powers, slashed the agency's resources, and captured the highest levels of the CPSC decisionmaking process, the product manufacturing industry needs only one more thing to make the agency an irrelevant artifact of a bygone consumer-protective era: regulatory preemption of state common law. At that point, industry will have the best of both worlds – minimal regulation at the front end of the production process, and no liability for injuries at the back end. All three branches of government must take positive steps to ensure that product manufacturers are accountable for injuries caused by their goods.

The report calls on each branch of government to take action to protect consumers from faulty products:

- The Executive Branch: CPSC should acknowledge that it lacks the power to preempt tort law and refrain from attempting to do so in future rulemakings. Moreover, CPSC should consult with state officials prior to making any claims that its regulations preempt state statutes or regulations.
- Congress: The recently adopted Consumer Product Safety Improvement Act is a first step toward limiting preemption claims made by CPSC, but its exclusive focus on the agency misses a key player in the preemption debate – the courts. Congress should consider additional legislation clearly stating that courts should only uphold preemption if there is a *direct conflict* between state and federal law – for example, when action to avoid liability under state tort law would subject a manufacturer to liability under other product safety laws.
- The Judiciary: The courts should constrain CPSC's attempts to preempt state common law. As evidenced by the savings clause in the Consumer Product Safety Act, Congress designed CPSC and delegated powers to the agency in a manner intended to complement the various functions of the existing tort system.

Read the report: www.progressivereform.org/articles/Truth_About_Torts_CPSC_807.pdf.

The Center for Progressive Reform is a nonprofit research and educational organization whose network of scholars across the nation is dedicated to protecting health, safety, and the environment through analysis and commentary. For more information, contact Matthew Freeman at 202.747.0698 ex. 2 or at mfreeman@progressivereform.org. Visit CPR on the web at www.progressivereform.org.

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