

Federal Government Increasingly Uses Pre-Emption to Bypass State Laws

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Consumer and state government groups are becoming alarmed at a surge of regulations and bills designed to protect industry, while usurping stronger state regulations and consumers' rights in state courts through pre-emption clauses and laws.

In the last seven months, three federal agencies -- the Food and Drug Administration, the Consumer Product Safety Commission and the National Highway Traffic Safety Administration -- have either promulgated or passed regulations that explicitly overturn tougher state standards and shield manufacturers from lawsuits from victims seeking legal redress:

- On August, the NHTSA issued its first upgrade of the roof crush rule in 32 years. (*Safety Record*, V2 I4) The proposed rulemaking would increase the force that vehicles are required to withstand from 1.5 to 2.5 times their unloaded vehicle weight and replace the 22,240 Newton maximum force limit for passenger cars. The agency estimated that nearly three-quarters of the vehicles on the market already meet the proposed new standard and the standard would only prevent 13-44 fatalities, and about 500-800 non-fatal injuries.
- On January 6, the FDA finalized a drug-labeling rule, which, stated in its preamble, would prevent a consumer from suing a drug manufacturer over any drug the federal agency approves.
- On February 16, the CPSC issued a final rule on mattress flammability, limiting the fire intensity of a burning mattress for the first 30 minutes after ignition. The regulation purports to create more escape time, and estimates that it would prevent 270 deaths and 1,330 injuries a year. The new rule also immunizes manufacturers from claims in state courts, if their mattresses meet the new federal regulation.

More recently, Republicans in the Senate and the U.S. House of Representatives have been filing bills that would protect the food industry, durable goods and chemical manufacturers, the video rental industry and the financial services sector, wiping out consumer protections in the areas of food safety, identity theft, predatory lending, privacy, telecommunications and exposure to toxic chemicals.

U.S.P.I.R.G., which has been tracking such legislation, lists 15 such bills that are in various stages of the legislative process.

For example, this month, the House Passed the National Uniformity for Food Act, which pre-empts about 200 state food safety regulations. The bill gives the Food and Drug Administration the right to set food safety standards. States that wish to retain their strict standards would have to appeal to the FDA, which has 180 days to rule on them. As

Washington Post columnist Harold Meyerson points out, the FDA does not have the money to review those statutes.

Five House and Senate bills related to notification when individuals' private electronic information is stolen would weaken the standard under which online companies would be required to notify consumers of a security breach. All five bills also contain language pre-empting any state notification laws.

Two bills now pending in the House financial services committee and the House subcommittee on Housing and Community Opportunity pre-empt any state anti-predatory lending laws or any state attempts to regulate mortgage-lending.

"I'm getting a bill a week," says Susan Frederick, senior committee director for the National Conference of State Legislatures, including some which attempt to pre-empt states' Good Samaritan laws, and statutes of repose, which set time limits on the filing of lawsuits against durable goods manufacturers.

Joanne Doroshov, executive director of the Center for Justice & Democracy says that the strategy has been evolving over the last year or so. The federal government started by defending industry in the courts, by filing amicus briefs on behalf of corporate defendants in product liability cases. More recently, federal agencies charged with protecting the public have used a battering ram against states' ability to regulate in broad areas involving the health and safety of its citizens.

"I don't think some of this is constitutional," she said.

The NCSL could not take position on the CPSC mattress rule, Frederick said, because it was issued without warning, and because the commission is an independent agency and is not required to consult with other stakeholders before issuing a rule.

But the states' lobbying group has strongly opposed the NHTSA and FDA rulemakings because they tread on state sovereignty and because neither agency analyzed the impact of pre-emption on state budgets, as they are required to do under a federal executive order. In the case of the FDA, the NCSL was informed at the eleventh hour that the drug-labeling rule could have some effect on the states. The group raised its objections, but "it was a done deal and out the door," Frederick said. "We had no impact on the way that rule came out."

"There's going to be additional costs to the states," Frederick added. "And we can only imagine what that they will be if people can't recoup injury and loss costs. The most logical place to look is state and local government services. It's an unfunded mandate and self-governance is being eroded."

Some experts believe that a court challenge to some of these pre-emption clauses is inevitable. In the meantime, consumer and state government groups are working on a

strategy to counter the wholesale effort to enact weak national standards that endanger consumers.

Some of the nation's largest newspapers, such as the *New York Times*, the *Washington Post* and the *L.A. Times*, and popular syndicated columnist Molly Ivins have begun writing about the trend. But most of the activity is going on under the radar of the average consumer, says Alison Cassady, senior research director for U.S.P.I.R.G.

"It's a hard story to tell," she says. "It doesn't have the same resonance as hot button issues like abortion or immigration, but this problem threatens states' ability to protect their citizens and we are trying really hard to get the message out."