'Silent Tort Reform' Is Overriding States' Powers

By Stephen Labaton
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Legal Beat

SUPPORTERS and detractors call it the "silent tort reform" movement, and it has quietly and quickly been gaining ground.

Across Washington, federal agencies that supervise everything from auto safety to medicine labeling have waged a powerful counterattack against active state prosecutors and trial lawyers. In the last three decades, the state courts and legislatures have been vital avenues for critics of Washington deregulation. Federal policy makers, having caught onto the game, are now striking back.

Using a variety of largely unheralded regulations, officials appointed by President Bush have moved in recent months to neuter the states. At the urging of industry groups, the federal agencies have inserted clauses in new rules that block trial lawyers and state attorneys general from applying both higher standards in state laws and those in state court precedents.

The efforts by the federal regulators may wind up doing more than Congress to change state tort laws.

Last month, for instance, the bedding industry persuaded the Consumer Product Safety Commission to adopt a rule over the objections of safety groups that would limit the ability of consumers to win damages under state laws for mattresses that catch fire. The move was the first instance in the agency's 33-year history of the commission's voting to limit the ability of consumers to bring cases in state courts.

In January, the Food and Drug Administration approved a drug label rule that pre-empts state laws. The rule will make it easier for pharmaceutical makers to prevail in consumer lawsuits that could have been brought under state laws more favorable to victims.

Pending before the National Highway Traffic Safety Administration are proposals announced last year by the agency that would pre-empt state laws on the safety standards for car roofs and seat positions. A third rule proposed by the traffic safety agency would preclude states from adopting more stringent fuel emission standards for light trucks and sport utility vehicles.

This week, the Office of Thrift Supervision, a unit of the Treasury Department, successfully challenged a law recently adopted in Montgomery County, Md., a suburb of Washington, that was intended to reduce discriminatory lending practices.

Congress has occasionally encouraged the effort. On Wednesday the House of Representatives, at the urging of the White House and the food industry, adopted a food safety measure that would prevent the states from imposing higher standards than those set by the F.D.A. The bill, which faces an uncertain future in the Senate, was strongly opposed by the states. They say it would undermine scores of stringent state laws and regulations.

The moves in recent months magnify the more limited action taken earlier in the Bush administration to pre-empt the states in consumer cases. The Comptroller of the Currency, another unit of the Treasury Department, has repeatedly moved at the urging of large banks to block enforcement of tougher lending laws in New York, California and elsewhere.

The trend alarms consumer and victims' rights groups and some legal scholars. They say it is not only unfair to victims and gives short shrift to thoughtful state lawmakers and judges, but it also eliminates an important check on inept federal regulators.

"It's very troubling," said Professor Thomas O. McGarity, an expert on regulation and tort law at the University of Texas School of Law. "There is a certain hubris on the part of the regulatory agencies to make the assumption that they are doing their jobs perfectly and should not be second-guessed, especially in light of repeated history of agencies being misled by industries."

State prosecutors and state lawmakers have also lodged objections. Attorneys general in 16 states, including New York, California and Massachusetts, recently sent a letter to the National Highway Traffic Safety Administration about the effort to preempt roof safety rules.

"The state common law court system serves as a vital check on government-imposed safety standards," the state prosecutors said. They said the proposal "is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use."

Administration officials, industry representatives and their scholarly supporters disagree. They say that overzealous state regulators and vexatious lawsuits require a federal response that sets uniform national standards.

"What has been happening is largely reactive and responsive to industry demands that arise because the industries are confronting similar problems—private liability lawsuits and state attorneys general," said Michael S. Greve, the John G. Searle scholar at the American Enterprise Institute and director of the research organization's Federalism Project. "What Professor McGarity thinks as insufficiently demanding standards, too many people think of as outrageously demanding. Many people think that too high standards imposed by the states hamper research and innovation."

"I just don't see how enforcement by Eliot Spitzer or trial lawyers in Beaumont, Tex., will yield better results," he added.

The new regulations are likely to face court scrutiny in the coming years. But the regulatory agencies have engineered the new rules in a way that they hope will make them less vulnerable to immediate challenge. By putting the pre-emption language in the preambles of the new rules, the agencies make it difficult for some consumer and lawyer groups to challenge them.

The official White House view has been that the federal government knows better than the states.

"The Supreme Court has frequently recognized that federal agencies, rather than courts, are often in the best position to make this determination about what best protects public safety," said Alex Conant, a spokesman at the Office of Management and Budget, part of the White House. "State courts and juries often lack the information, expertise and staff that the federal agencies rely upon in performing their scientific, risk-based calculations."

Mr. Conant said that "having a single federal standard can be the best way to guarantee safety and protect consumers."

Officials said that the White House had not formally orchestrated the efforts by the agencies, some of which are supposed to be independent from the executive branch. Still, others said that the administration's message had been loud and clear, and that no formal directive would be necessary.

"If somebody at the White House had said, Stop it, then it would stop," Mr. Greve said.