U.S. rules shield industries from lawsuits

By Myron Levin and Alan C. Miller
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Near sunrise in summer 2001, Patrick Parker of Childress, Texas, swerved to avoid a deer.

His pickup rolled over, and the roof of the Ford F-250 crumpled. Parker's neck broke and, at 37, he was paralyzed from the chest down. He sued, and Ford settled for an undisclosed amount.

"You can imagine what happens when you're belted in and the roof comes down even with the door," Parker said. "Your options are death or quadriplegia."

Parker's case and hundreds like it are behind a beefed-up roof-safety standard proposed in August by the National Highway Traffic Safety Administration (NHTSA). But safety regulators also tucked into the rule something vehicle makers have long coveted: protection from future roof-crush lawsuits.

The surprise move seeking legal protection for automakers is one in a series of recent steps by federal agencies to shield leading industries from state regulations and civil lawsuits on grounds they conflict with federal authority.

Some efforts are facing court challenges. But through arcane regulatory actions and legal opinions, the Bush administration is providing industry with an unprecedented degree of protection at the expense of an individual's right to sue and a state's right to regulate.

In related moves by the administration:

• The NHTSA, a branch of the Department of Transportation, is backing auto-industry efforts to stop California and other states from regulating tailpipe emissions they link to global warming. The agency last summer declared such a rule would be a back-door attempt by states to encroach on federal authority to set mileage standards and should be pre-empted.

• The Justice Department helped industry groups overturn a Southern California pollution-control rule that would have required cleaner-running buses, garbage trucks and other fleet vehicles.

• The U.S. Office of the Comptroller of the Currency has sided with national banks to fend off enforcement of consumer-protection laws passed by California, New York and other states. The agency argued it has sole authority to regulate national banks.

• The Food and Drug Administration (FDA) last month issued a legal opinion asserting that FDA-approved labels should give pharmaceutical companies broad immunity from most lawsuits.

Administration officials said the initiatives have not been coordinated centrally.

"Under the Constitution, federal laws take priority over inconsistent state laws," said Scott Milburn, spokesman for the White House Office of Management and Budget. "Decisions about ... whether particular rules should pre-empt state laws are made agency by agency and rule by rule."

The pre-emption initiatives represent a separate approach to the administration's successful legislative push that restricted class-action lawsuits and banned certain claims against industries including gun makers and vaccine producers.

By embedding similar protections for businesses in regulatory changes, the administration has advanced President Bush's repeated pledge to rein in what he calls junk lawsuits.

On Thursday, for example, when the Consumer Product Safety Commission adopted a rule to curb mattress fires, it asked courts for the first time to bar lawsuits against manufacturers that comply with the new rule.

Rep. Jan Schakowsky, D-Ill., in a letter to the commission, called the move "part of an unfortunate and troublesome pattern ... to undermine consumer rights."

Ties to industry

Besides trying to bar lawsuits over vehicle-roof failures, the NHTSA has sought broad legal protection in two other rules on grounds that lawsuits could undermine its safety goals. One rule related to rear seat belts and the other to visibility requirements for trucks.

No similar exemption clauses have been attached to any other highway-safety-agency rule changes for 35 years.

Industry executives, lobbyists and lawyers have shuttled through the NHTSA and other agencies over the years, but auto-industry ties have grown more conspicuous under the Bush administration.

Before becoming White House chief of staff, Andrew Card served as a General Motors vice president and as chief executive of the top auto-industry trade group.

The NHTSA's acting head, Jacqueline Glassman, was a senior attorney for DaimlerChrysler until 2002 when she became the agency's chief counsel.

Jeffrey Rosen, who became general counsel at the transportation department in 2003, was a senior partner at Kirkland & Ellis, a law firm that has defended GM in numerous product-liability suits and represents the Alliance of Automobile Manufacturers.

Rosen denied using his position to benefit automakers.

"We have issued a number of major rules in the two years that I have been here," he said. "Some of them are supported by industry; some are opposed."

Michael Greve, a resident scholar at the conservative American Enterprise Institute, has written that the pre-emption agenda is crucial to protect the economy from "trial lawyers, ambitious state attorneys general and parochial state legislatures."

But critics say the pre-emption push contradicts conservative ideals of a limited federal government and states' rights, principles espoused by Bush.

"This is the most aggressive federal government in the history of the United States," said California Attorney General Bill Lockyer, a Democrat.

Roofs vs. rollovers

The NHTSA's push to pre-empt personal-injury litigation is based on the agency claim that automakers, fearful of lawsuits, might make roofs too heavy and vehicles, therefore, more prone to roll over.

John Womack, a former acting chief counsel at NHTSA, said equating roof strength with weight is a "very debatable proposition." Other options are to use high-strength steel or widen the stance of vehicles to compensate for heavier roofs, he said.

Groups ranging from Public Citizen, a consumer watchdog, to the National Conference of State Legislatures have condemned the provision and questioned the NHTSA's authority to protect automakers.

Some critics also claimed that costs of caring for seriously injured victims would shift from industry to taxpayer-funded programs such as Medicaid.

A bipartisan group of 26 state attorneys general said in a December letter to the NHTSA that the lawsuit ban, if accepted by the courts, would shift significant costs to the states and conflict with consumer rights.

"Such an extreme step is unwarranted in the absence of express congressional intent," they wrote.

For people like Patrick Parker, the prospect of manufacturer immunity is an especially bitter pill.

The paralyzed Texas man, who had worked as a technician for a local utility, said he at least gained some financial security through litigation by extracting a settlement from Ford. Otherwise, he said, he and his wife "would have been living from hand to mouth."

Surprise move

The immunity clause was unexpected, even to some people in the industry.

"Whether this was some conspiracy, or whether it was a pleasant surprise, I really don't know," said Barry Felrice, director of regulatory affairs with DaimlerChrysler in Washington, D.C.

Spokesmen for GM and Ford said their companies didn't lobby for the lawsuit ban but support it.

Bill Walsh, a senior executive at the NHTSA who worked on the rule before retiring in 2004, said the immunity language "was dropped in from out of the blue." Pre-empting lawsuits, he said, was "different from how we normally operated ... in issuing regulations."

Rosen, transportation's general counsel, said this is not the first time the NHTSA has tried to override state liability laws.

During the 1990s, the agency joined automakers in arguing they should not be sued for not installing air bags at a time the NHTSA allowed either air bags or automatic seat belts. In 2000, the Supreme Court agreed such suits were pre-empted but said compliance with a standard ordinarily "does not immunize a manufacturer."

Card and Glassman declined to discuss how the roof-crush lawsuit pre-emption originated.

The Bush administration also helped two industry groups overturn a regulation requiring purchase of cleaner-running fleet vehicles such as buses and garbage trucks in Southern California.

The Engine Manufacturers Association and Western States Petroleum Association claimed the rule by the South Coast Air Quality Management District was pre-empted by federal law. Their challenge was rejected in federal district court and by a federal appeals court.

When the case went to the Supreme Court, however, the Justice Department filed a brief siding with the industry. The high court agreed the local rules were pre-empted.

In the past, Lockyer said, when industries challenged state regulations, "The federal government abstained from those lawsuits."

Now, he said, there's "a policy of rubber-stamping whatever business wants, and that's too bad."

Debt disclosure

The idea behind the California consumer-protection law was simple: Tell credit-card holders on monthly bills how long it would take to retire their debt if they paid just the minimum amount.

But major banks issuing most of the nation's credit cards didn't like it. In a 2002 court challenge, they attacked the state's credit-disclosure law — with help from a powerful ally.

The U.S. Office of the Comptroller of the Currency (OCC) joined with the American Banking Association, Citibank and other plaintiffs, arguing in a friend-of-the-court brief that the law interfered with federal authority to regulate national banks and with powers granted banks by their federal charters.

A federal judge blocked the law from taking effect, and the state lost a subsequent appeal.

Intervention by the Comptroller of the Currency "definitely tipped the balance," said Gail Hillebrand, a lawyer for Consumers Union, which had backed the state's position.

Turf battles over banking regulation have occurred in the past, but the OCC has become more aggressive in pushing pre-emption under Bush.

OCC officials say they have zero tolerance for abusive practices and bristle at complaints they might be chasing off state watchdogs to the detriment of consumers.

The banks "have an enormous body of consumer compliance laws and regulations that we apply to them at the federal level," said Julie Williams, the agency's senior deputy comptroller and chief counsel.

But Arthur Wilmarth, a George Washington University law professor specializing in banking law, said, "The OCC hasn't been, shall we say, a very zealous enforcer on the consumer side. ... States have been far more vigorous."

Los Angeles Times researcher Janet Lundblad contributed to this report.