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Does rage against federal pre-emption hurt public safety?

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There are a narrow range of products—the cars we drive, the medicines we take, the equipment workers rely upon—that are subject to rigorous federal oversight.

In these areas, Congress, federal agencies, and the courts have found that random liability lawsuits, claiming that a product could somehow be made "safer" or "stronger" or include even more fine print disclaimers, disrupt the agency's delicate balancing of risks and benefits. Judges call this "preemption."

Preemption helps ensure that that lawsuits do not undermine regulators charged with protecting public health and safety. Nevertheless, preemption is under major assault by wealthy personal injury lawyers and some politicians.

Eliminating preemption would increase the number of lucrative lawsuits against industries that are closely regulated by the government. But if anti-preemption personal injury lawyers have their way, the American public will be the true losers, including loss of life. Here is why.

In the 1980s, the National Highway Transportation Safety Administration (NHTSA) decided not to require airbags. NHTSA found the airbag technology of the time posed an unacceptable risk of hurting or killing people, particularly "out-of-position" passengers such as small women and young children.

NHTSA was also concerned that mandating airbags just as seatbelt usage was slowly gaining public acceptance could lead passengers to abandon seatbelts entirely. Wisely, the U.S. Supreme Court rejected lawsuits that would have effectively reversed NHTSA's carefully-reasoned decision. That's preemption working to protect public safety.

Today, enterprising plaintiffs' lawyers have new theories to sue auto manufacturers. They would like to claim vehicles should exceed strengthened roof crash standards, even when NHTSA found that would render many vehicles more prone to rollovers.

Plaintiffs' lawyers would also assert that manufacturers should wedge four seatbelts in the back of a car, even as NHTSA cautions that cramped seating discourages the use of seatbelts by everyone.

Anti-preemption proponents often contend that federal regulations provide only "minimum standards." This is very misleading. It focuses on only part of a product. "Strengthening" one aspect of a "minimum' design may create new risks and decrease a product's overall safety.

Including an additional warning may detract from warnings of more significant risks or discourage use of a good product, especially a pharmaceutical.

For example, anti-preemption lawsuits claim that anti-depressant medicines should carry a stronger warning about the link between the drugs and suicide in adults, despite the FDA repeatedly finding insufficient scientific evidence to support such claims.

When such warnings were required with respect to the risks for children, prescriptions declined. Child suicide rates spiked, reversing a decade of progress.

Government safety standards recognize the need to balance the risks and benefits of a product, as well the need to warn about larger risks as contrasted with smaller ones. Independent government experts spend years looking into specific aspects of products and services.

Regulators consider complex scientific, technical, and public policy issues. Their goal is to provide the most good for the greatest number of people.

Without preemption, a lay judge and jury, even with the best intentions, may, through hindsight, undo these well-reasoned decisions. Their focus is on one highly sympathetic injured person in a courtroom and a battle of experts. The thousands of people who benefited from the product or service are not in the courtroom. They are totally absent from the jury's view.

Further scrutiny about whether a particular federal regulation is sound is a matter for Congress or agencies themselves. They look at the larger picture, not through the tunnel vision of a lawsuit. Litigation may compel a company to make a change based on the roulette wheel of lawsuits, not the public's interest. The result: the public is placed at greater risk.

Unfortunately, Congress and the President seem poised to take the lawsuit industry's bait on broad abolishment of preemption.

Recently, President Obama issued a little-noticed Executive Memorandum instructing federal agencies to identify, review, and potentially reverse, their views in favor of preemption dating as far back as the Clinton Administration.

The Obama memo comes on the heals of a Congressional hearing on legislation that would overturn a sound U.S. Supreme Court ruling that experts at the FDA, not individual judges and lay juries, should decide whether medical devices are safe, effective, and available for potentially life-saving treatments.

These are the first steps toward the personal injury bar's collective goal of eliminating all preemption so that its members can have free reign to sue. Federal agencies, Congress, and the courts should not let personal injury lawyers preempt the health and safety of the American public.

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