CENTER FOR JUSTICE & DEMOCRACY
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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY
****NEWS****

Dear Friend,

Most Americans would agree that corporations that disregard their responsibilities as corporate citizens should not be rewarded for their behavior. Yet that is exactly what might happen. It seems that those seeking to immunize reckless corporations from lawsuits will stop at nothing to accomplish their goals.

Whether enacting tort restrictions, trying to preempt state liabilities laws, as this issues of *Impact* discusses, or electing anti-consumer judges, corporate America is trying to change the entire landscape of the civil justice system.

At a time when corporate misconduct is at an all time high and the government does little about it, eroding the last line of defense - the civil justice system - seems ludicrous. It would be especially tragic given the growing dominance of corporate America in our lives.

The Center for Justice & Democracy remains committed to fighting to protect this fundamental aspect of American democracy

We know that you share these goals with us. Let us know how we can help you!

Joanne Doroshow
Executive Director

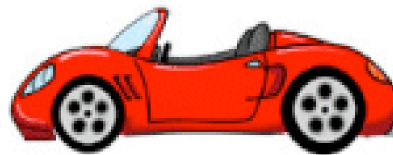
IN THIS ISSUE: FEDERAL AGENCIES

Suppressing Legal Rights, Agency Style

On August 19, 2005, the National Highway Transportation Safety Administration (NHTSA) announced a new standard for vehicle roof strength to be adopted in 2006. Included in the "roof-crush" rule is a provision that bars injured consumers from suing automakers in state court if their vehides' roofs meet minimum federal safety standards.

As a result, accident victims hurt in a rollover or similar crash could not file product liability suits against manufacturers as long as they meet NHTSA's standards, regardless of how weak or obsolete such standards may be.

To put this in perspective, rollover accidents cause 24,000 injuries and kill 10,000 people annually, accounting for one-third of all people killed in auto crashes. NHTSA estimates the new regulation would save only 13 to 44 lives a year. Moreover, most automakers already meet the proposed standard.



NHTSA's bar against lawsuits would apply even if a car company knows of safety problems with its products and refuses to take actions to make them reasonably safe. Why is a federal agency shielding the auto industry from legal accountability, particularly an agency whose stated mission is to "save lives, prevent injuries, reduce vehicle-related crashes"?

The answer lies in one of the most radical regulatory developments to take place in this country since President Reagan took office 25 years ago, when corporate lobbyists and their political allies started making tremendous strides weakening regulations and safety standards meant to protect Americans from harm.

The Bush administration is now quietly attempting to place regulatory agencies, established to protect the public from corporate abuses, into positions of power never before imagined, allowing them to simply wipe out or render mean-

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The Revolving Door

Federal agencies have been captured by the very industries they are supposed to regulate, led by a revolving door of industry figureheads. Such was the finding of the Revolving Door Working Group - a broad-based coalition of organizations ranging from Public Citizen and Common Cause to Farm Aid and Public Employees for Environmental Responsibility - in its October 2005 report, *A Matter of Trust*.

According to the study, the appointment of corporate executives and business lobbyists to key posts in federal agencies "tends to create a pro-business bias in policy formulation and regulatory enforcement….[A] corporate executive or lobbyist joining the government might not only tend to favor a previous private-sector employer but might also be ideologically inclined to shape policy to benefit business in general, as opposed to the broader public interest."

Among those cited by the Working Group:

Jacqueline Glassman, a former DaimlerChrysler attorney before being tapped as chief counsel and later Deputy Administrator of the National Highway Traffic Safety Administration (NHTSA). While at

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ingless the legal rights of consumers hurt by the very dangerous products and practices that the agencies themselves were created to safeguard against and have failed to prevent.

A New Kind of "Tort Reform"

Civil lawsuits brought by average Americans and the subsequent jury verdicts have forced corporations to change their practices and take public safety more seriously. The advent of so-called "tort reform" laws that eliminate citizes' rights to access the courts, however, has enabled companies to ignore their responsibilities to the public.

> **"When agencies become captured by the very industries they are supposed to regulate, they are less likely to step in and investigate and fix problems.."**

Today's regulatory agencies, controlled by industry, have been advancing these corporate goals with a new strategy that works in conjunction with "tort reform" laws to wipe out any consumer recourse. It is a stealth effort by the federal government to do exactly what the tobacco, insurance, pharmaceutical, chemical, oil and auto companies have been trying to accomplish for the last three decades - eliminate the rights of injured people to sue and collect compensation from those who cause them harm.

NHTSA is not the only agency spearheading these efforts. The Food and Drug Administration has included a new policy in its long-awaited drug-labeling rule that would prevent injured consumers from bringing state product liability suits against drug makers whose medication labels have been approved by the FDA.

The FDA's justification? That it knows best when it comes to regulating drugs and therefore courts (specifically juries) should not be allowed to second-guess the agency by hearing injured consumers' tort claims. The FDA has made similar arguments in past "friends of the court" or *amicus* briefs filed on behalf on drug companies being sued by patients.

This is particularly troubling in light of numerous recent examples where the FDA either didn't know or chose not to investigate issues of safety with prescription drugs. Such was the case with its handling of selective serotonin reuptake inhibitors (SSRIs) like Paxil and Zoloft, dietary herbs like ephedra and, most recently, the painkiller Vioxx. It is unclear whether the new FDA policy would affect the 7,000 state and federal Vioxx-related lawsuits currently pending in courts across the country.

Fortunately, judges have not adopted the "federal agencies know best" argument put forth in FDA and other agency briefs. In one case last July, a federal judge in Minnesota rejected Pfizer's FDA-supported preemption arguments in their entirety, writing that "federal labeling laws are minimum standards; they do not necessarily shield manufacturers from state law liability…state-law protections reinforce and enhance" federal efforts to protect the public.

It seems that, for now, federal judges continue to honor the traditional assumption that health and safety matters should be regulated by states and that tort law remains a valuable means of redress for injured consumers.

Why It Matters

When agencies become captured by the very industries they are supposed to regulate, they are less likely to step in and investigate and fix problems. The burden then rests with the people, through the use of the civil justice system, to address corporate wrongdoing.

For example, NHTSA only began to investigate the Ford Explorer/Firestone Tire situation several years ago in response to a wave of public concern following media reports about rollover crashes based, in part, on information uncovered in litigation. As Northwestern University law school professor Steven Lubet wrote in the Chicago Tribune in 2000, "[H]ow did the story finally come out, with Ford and Firestone in deep denial and the NHTSA overwhelmed and short-staffed? The answer is that a group of personal-injury lawyers began filing lawsuits - and eventually succeeded in bringing the problem tires to public attention."

Litigation also unearths important health- and safety-related information, exposing hidden dangers to the general public. If not for civil lawsuits, consumers would not know about hundreds of rollovers where vehicle roofs caved in. Evidence gathered during these cases includes internal company memos showing that Ford's own engineers recommended safety changes to the Explorer but management chose to successively weaken the vehicle's roof throughout the late 1990s. Other trial documents have revealed that Ford's Volvo subsidiary knew strengthening an SUV's roof would save lives in a rollover.

If NHTSA's new "roof-crush" standard takes effect, these kinds of lawsuits would most likely end, removing the last consumer protection mechanism standing in the way of unsafe vehicles reaching the marketplace or the public's learning about them.

And aside from its impact on public health and safety, overriding state liability laws has fundamental implications for American democracy because if used too casually, it greatly disturbs the balance of power between the federal and state systems. State tort laws, intended to safeguard citi-

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The Revolving Door continued . . .

DaimlerChrysler, Glassman helped defend the company against charges by California officials that it resold defective cars to consumers without their knowledge. At NHTSA she played a key role in the decision to block disclosure of "early warning" information such as detailed model-specific crash data.

John Henshaw, who oversaw environment, safety and health for Astaris LLC, a joint venture of chemical producers FMC and Solutia Inc. (a spinoff of Monsanto), and worked at Solutia and Monsanto before becoming head of the Occupational Safety and Health Administration (OSHA). While at OSHA, Henshaw not only reduced the number of staffers devoted to developing new safety standards but also sharply curtailed the agency's rule-making powers, asking instead that companies voluntarily comply with safety standards. Henshaw resigned from his post in December 2004.

Linda Fisher, a former executive at pesticide producer Monsanto who had also practiced law at Latham & Watkins, a firm known for fighting tougher regulatory standards on behalf of powerful industry clients, before being named to fill the second-ranking position, Deputy Administrator, at the Environmental Protection Agency (EPA). She left the EPA in 2003, later taking a job at DuPont.

David Lauriski, who spent 30 years in the mining industry advocating looser coal dust standards before being appointed the Labor Department's Assistant Secretary of Mine Safety and Health. During his tenure, Lauriski attempted to institute new coal regulations that put miners at greater risk of black-lung disease. He left the agency in 2004 and took a position at a mine-industry consulting company.

Recent newspaper investigations have also exposed an unprecedented industry-to-agency revolving door under Bush. As reported in May 23, 2004's *Denver Post*, more than 100 high-level agency officials have regulated industries they once represented as lobbyists, lawyers or company advocates. "In at least 20 cases, those former advocates have helped their agencies write, shape or push for policy shifts that benefit their former industries," according to the *Post*.

Likewise, an analysis by *New York Newsday* in October 2004 uncovered excessive business influence over federal agency policymaking. The paper found that "[n]early half - 47 percent - of the Bush administration's 400 top-level Senate-confirmed appointees to cabinet departments came from corporations, law and lobbying firms, or business consulting" allowing representatives of the same companies that face regulation to hold key regulatory jobs.

A report issued by Representative George Miller (D-Ca.) in February 2003 reached similar conclusions. The study, *A Sweetheart Deal: How Republicans have Turned the Government Over to Special Interests,* catalogued 43 private sector lobbyists and corporate officers who attained high-level appointments in the Bush administration.

"This Valentine's Day report documents how President Bush has put the special interest fox in charge of the public interest henhouse," said Miller in a press release. "The result is that critical laws and policies concerning clean air, pension security, health care, defense contracting, workplace safety, and other areas are now administered with an eye toward the special interests, not the public interest."

Reform in this area is desperately needed. Among the Working Group's suggestions: make the Office of Government Ethics responsible for standardizing and enforcing ethics procedures throughout the executive branch; strengthen federal conflict-of-interest rules to allow the disqualification of potential appointees whose employment background would make it difficult for them to comply with the rule requiring impartiality on the part of federal employees; and compel recusal for appointees on all matters directly involving their former employers and clients during the 24-month period prior to taking office.

Some of these proposals are currently part of ethics legislation spearheaded by Senator Russ Feingold (D-Wis.) and Representative Marty Meehan (D-Mass.).

Unless significant changes are made, federal agencies will continue promulgating regulatory policies that unduly benefit the corporate sector at the expense of the public.

NOTEWORTHY U.S. SUPREME COURT CASES ON AGENCY POWER

New York v. Federal Energy Regulatory Commission, 535 U.S. 1 (2002).
A federal agency may preempt state law only when it is acting within the scope of congressionally-delegated authority.

Whitman v. American Trucking Association, 531 U.S. 457 (2001). Federal agencies cannot exceed the limits of rule-making authority conferred by Congress.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
Agency regulations may be challenged by citizen groups only if: 1) they have suffered concrete injury; 2) a causal connection exists between the harm and the conduct complained of; and 3) it is likely that the injury will be redressed if the group wins in court.

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984).
An agency's interpretation of a statute is upheld where the agency's action is consistent with the statute's unambiguous meaning or Congress has explicitly left a gap for the agency to fill.

Suppressing Legal Rights, Agency Style continued . . .

zens' welfare, have always been regulated by the individual states.

Thus it comes as no surprise that state officials are outraged by the FDA's new preemption policy. In a January 13, 2006 letter to Health and Human Services Secretary Michael Leavitt, the National Conference of State Legislatures called the proposal a "thinly-veiled attempt on the part of the FDA to confer upon itself authority it does not have by statute" and an "abuse of agency process."

Similarly, NHTSA's unprecedented power grab - which is also part of the agency's recently proposed rules involving seat belts in back seats and new child safety seats - has not gone unchallenged.

In late December 2005, 26 state attorneys general urged the government to drop the lawsuit preemption provision, arguing that it would infringe on states' rights and shift injured motorists' medical costs to states.

"State governments and the federal government will have to cover millions of dollars in health care costs which they will pass along to taxpayers, costs that, by all rights, should be the responsibility of manufacturers," the attorneys general wrote.

That same month, the National Conference of State Legislatures weighed in on the issue, sending a letter to NHTSA that it opposed the proposal "in the strongest terms possible," citing worries about the litigation provision.

The policy has prompted similar concerns in Congress. Senators Arlen Specter (R-Pa.), chairman of the Senate Judiciary Committee, and Patrick Leahy (D-Vt.), the ranking Democrat, have questioned NHTSA about the preemption language. "We are interested to learn how NHTSA concluded that preemption of state law was the intent of Congress," the senators wrote in a letter dated November 17, 2005.

Public interest advocates also oppose this rule, stating that the new standards are weak and, when coupled with preemption, allow manufacturers to place dangerous vehicles on the market with no accountability.

"This is a new doctrine, coming straight from the secretary of transportation and the White House," said Clarence Ditlow, executive director of the Center for Auto Safety. "I can't tell you how bad this is for consumers." According to Ditlow, "The primary purpose of this rule is to set a weak standard and to allow manufacturers to use it as a preemptive shield against product liability lawsuits."

The Rollover Safety Coalition, whose members include USAction, Public Citizen and CJ&D, echoed these sentiments in a November 2005 letter to Congress. "On the basis of vaguely formulated suppositions, NHTSA's August 2005 assertion of preemption would, by agency fiat, preempt civil justice laws in all 50 states. This would constitute an unprecedented incursion upon the states, upon Congress, and upon the constitutional rights of ordinary citizens, who will remain uncompensated for the needless deaths and injuries that occur due to the foreseeable negligence of manufacturers."

The prospect of legal liability is often the only thing that provides potential wrongdoers with the economic incentive to make their products and practices safer. If federal regulatory agencies are allowed to weaken the civil justice system, we will live in a world where using prescription drugs, driving your car and making calls on your cell phone require blind-faith in corporate decision-making. This is a proven risk to Americans' health and safety and one that we all must guard against.

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