

FEDERAL PREEMPTION OF TORT LAW:

NO RECOURSE FOR THE INJURED; IMMUNITY FOR THE WRONGDOER

Providing a tort remedy is one of the most basic and traditional of state functions. For most of our nation's existence, this was a non-controversial precept.

However, beginning with the George W. Bush administration,¹ recent Republican-led Houses of Congress² and to varying degrees the Roberts Supreme Court,³ the concept of federally "preempting" state tort remedies has been forced into the political debate. The idea behind "federal preemption" in this context is not to replace state remedies with federal remedies. It is to leave harmed victims with no recourse at all and no ability to be compensated, while providing legal immunity to companies that do harm.

Preemption also means that the public must trust the federal government to "get it right" every time. Yet, time and again the public has seen that federal agencies do not always get it right, that regulated products and practices can still present risks, and that people can suffer extreme injuries as a result.

"Federal preemption" has historically arisen largely in the area of regulatory law, or "prescriptive" law, not tort law; even there, the Framers believed preemption should be rare.

- Sometimes Congress decides to exclusively regulate in an area and does not want states to also regulate. The Supremacy Clause in the U.S. Constitution says that in such cases, the federal law is "supreme" and overrides, or "preempts," the state law.⁴
- However, the Framers of the U.S. Constitution also "created a structure to ensure that the states would have an important and concurrent role protecting their residents."⁵ Protection of this state police power is enshrined in the 10th Amendment to the U.S. Constitution.⁶
- "Congress historically has considered preemption of state law a rather drastic step that should be taken only where clearly necessary for a federal statutory program to work"⁷ because if used too casually, it greatly disturbs the balance of power between the federal and state systems.

Preemption of state tort law is completely different from preemption of state regulations; the organized push by Big Business to expand preemption in the tort area, leaving individuals with no recourse at all, is unprecedented in our history.

- A tort remedy is not equivalent to a state regulation. “Tort remedies are primarily invoked to give citizens a remedy for an actual injury, not to prevent some predicted harm.”⁸
- State regulations specifically require or prohibit certain types of conduct, in contrast to tort lawsuits. Even though tort lawsuits can have a deterrent effect, a tort verdict “is not prescriptive” *i.e.*, defendants are not required to change a product or practice in response to a verdict in any particular way or at all.⁹
- In the 1983 Supreme Court case *Silkwood v. Kerr-McGee*, conservative Justice William Rehnquist joined the Court in upholding a \$10.5 million punitive damages award by a local Oklahoma jury for the lethal contamination of a nuclear plant worker, even though the field – nuclear energy – was exclusively regulated by the federal government.¹⁰ The Court stressed the distinction between state regulatory law and state tort law, stating that “[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”¹¹
- Although its rulings have vacillated in the area of preemption of tort remedies, the Roberts Court in *Wyeth v. Levine* upheld the importance of tort remedies against pharmaceutical companies, observing that “Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers.”¹²
- Until very recently, Congress has never attempted to expressly preempt state tort law without providing for an alternative compensation mechanism.¹³

Federal laws and state tort remedies have always co-existed without problem; in fact, state tort lawsuits have supported federal agencies in many important ways.

- Federal agencies “are in many ways ill-equipped to gather information that firms do not want known.”¹⁴ The reasons vary: Agencies are often captured and are controlled by the very industries they are supposed to regulate. They are also typically understaffed and underfunded. In addition, they usually lack subpoena power and sometimes cannot get information from companies that could be discovered in civil lawsuits.
- In the 2009 case, *Wyeth v. Levine*,¹⁵ the Supreme Court ruled that in the case of pharmaceutical regulation by the FDA,
 - “State law offers an additional, and important, layer of consumer protection that complements FDA regulation.”

- “State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly,” noting that such suits “serve a distinct compensatory function that may motivate injured persons to come forward with information.”
- “FDA has limited resources to monitor the 11,000 drugs on the market and manufacturers have superior access to information about their drugs.”
- The recent General Motors ignition switch scandal is another good example.
 - Only because of a civil lawsuit brought by Ken and Beth Melton over the death of their daughter Brooke did the world learn that GM hid information about a massive faulty ignition defect for over a decade.¹⁶ The Meltons’ suit and resulting publicity prompted GM to confirm that the design had been changed and triggered long-delayed action.¹⁷
 - It was only then that NHTSA launched a full investigation into GM’s failure to act on the ignition-switch problem.¹⁸ NHTSA’s Acting Administrator David Friedman faced questions before Congress about the agency’s repeated failures to both detect the defect and compel GM to act.¹⁹

Preemption of tort remedies “shifts the burden of redressing injuries from the responsible party to the victims, to taxpayers, and to society as a whole.”²⁰

- A National Conference of State Legislatures report on NHTSA’s proposed roof-crush rule during the Bush administration found that “preemption of tort suits would cost the states \$60.2 million a year because some persons who would become disabled as a result of rollover accidents would be forced to resort to Medicaid (partially funded by states) because of the lack of tort compensation.”²¹

NOTES

¹ During President George W. Bush’s administration, federal agencies began inserting language into rule “preambles” (thus avoiding any notice or comment), attempting to preempt state tort law in the event a regulated product caused an injury or death. This was unprecedented. Prior to this, no agency took the position that preemption of tort law was necessary in order to carry out its statutory mandates. See, William Funk et al., “The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety,” Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf. On May 20, 2009, the Obama administration ended this practice. White House Office of the Press Secretary, “Memorandum for the Heads of Executive Departments and Agencies, Subject: Preemption,” <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption>.

² In 2012, for example, the U.S. House of Representatives passed H.R. 5, which generally allows state medical malpractice tort laws to survive only when those laws place more restrictions on patient recovery.

³ The Roberts Court has vacillated on finding tort preemption where Congress never intended it. In *Wyeth v. Levine*, 555 U.S. 555 (2009), the Court ruled in a 6-3 decision that Congress did not preempt state tort action based on failure-to-warn claims against drug companies. But in *Pliva v. Mensing*, 131 S.Ct. 2567 (2011), the Court essentially ruled the opposite way when cases are brought against generic drug companies. As noted by former U.S. Senator Patrick Leahy, “The *Mensing* decision creates a troubling inconsistency in the law with respect to

prescription drugs. ...If a consumer takes the brand-name version of drug, she can sue the manufacturer for inadequate warnings. If the pharmacy happens to give her the generic version, she will not be compensated for her injuries.” Office of U.S. Senator Patrick Leahy, “Leahy To Introduce Bill To Protect Consumers Who Take Generic Drugs,” March 26, 2012, <http://www.leahy.senate.gov/press/leahy-to-introduce-bill-to-protect-consumers-who-take-generic-drugs>. The FDA has proposed a rule to reestablish the rights of patients injured by generic drugs. See, <https://www.federalregister.gov/articles/2013/11/13/2013-26799/supplemental-applications-proposing-labeling-changes-for-approved-drugs-and-biological-products>

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⁴ The Supremacy Clause states: “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the laws or constitution of any state to the contrary notwithstanding.” U.S. Const. Art. VI, cl. 2.

⁵ See, William Funk et al., “The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety,” Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf.

⁶ The 10th Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. Amend. X.

⁷ William Funk et al., “The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety,” Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf.

⁸ See, William Funk et al., “The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety,” Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf.

⁹ *Ibid.*

¹⁰ *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

¹¹ *Ibid.*

¹² 555 U.S. 555 (2009).

¹³ See, William Funk et al., “The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety,” Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf.

¹⁴ *Ibid.*

¹⁵ 555 U.S. 555 (2009).

¹⁶ <http://money.cnn.com/2014/06/04/autos/general-motors-melton-crash/>;
<http://www.nytimes.com/2014/04/03/business/gm-chief-opens-testimony-to-senate-panel.html>;
<http://www.nytimes.com/2014/03/29/business/a-florida-engineer-unlocked-the-mystery-of-gms-ignition-flaw.html>;
<http://www.nbcnews.com/storyline/gm-recall/parents-boiling-anger-after-daughters-death-gm-car-n52316>.

¹⁷ <http://bigstory.ap.org/article/10-key-events-gms-ignition-switch-recall-0>.

¹⁸ <http://www.usatoday.com/story/money/cars/2014/02/26/gm-recall-nhtsa-investigation-timeliness/5848297/>;
<http://www.nhtsa.gov/About+NHTSA/NHTSA+Timeliness+Query+on+2014+GM+Recall+of+Ignition+Switches>.

¹⁹ <http://bigstory.ap.org/article/ap-impact-govt-safety-agency-missed-cobalt-clues>;
<http://money.cnn.com/2014/04/01/autos/nhtsa-gm-testimony/index.html>; <http://www.cnn.com/id/101544111>.

²⁰ See, William Funk et al., “The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety,” Center for Progressive Reform (September 2007), http://www.progressivereform.org/articles/Truth_Torts_704.pdf.

²¹ *Ibid.*