

Industries Get Quiet Protection From Lawsuits

Federal Agencies Are Using Arcane Regulations and Legal Opinions to Shield Automakers and Others From Challenges By Consumers and States

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WASHINGTON - Near sunrise on a summer morning in 2001, Patrick Parker of Childress, Texas, swerved to avoid a deer and rolled his pickup truck.

The roof of the Ford F-250 crumpled, and Parker didn't stand a chance. His neck broke and, at 37, he was paralyzed from the chest down. He sued, and Ford Motor Co. 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. But safety regulators tucked into the proposed rule something vehicle makers have long desired: protection from future roof-crush lawsuits like the one Parker filed.

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 regulation and civil lawsuits on the grounds that they conflict with federal authority.

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

In other moves by the administration:

. The highway safety agency, 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 said last summer that any such rule would be a backdoor attempt by states to encroach on federal authority to set mileage standards, and should be preempted.

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

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

. The Food and Drug Administration issued a legal opinion last month asserting that FDA-approved labels should give pharmaceutical firms broad immunity from most types of lawsuits. The agency previously had filed briefs seeking dismissal of various cases against drug companies and medical-device manufacturers.

In a letter to President Bush on Thursday, Rep. Jan Schakowsky (D-Ill.) said, "It appears that there may have been an administration-wide directive for agencies . to limit corporate liability through the rule-making process and without the consent of Congress."

Administration officials said the initiatives had not been centrally coordinated.

"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 preempt state laws are made agency by agency and rule by rule."

Preemption initiatives by regulatory agencies have drawn less public attention than controversial legislative moves supported by the White House. With administration support, Congress has restricted class-action suits and banned certain claims against gun makers and vaccine producers.

By embedding similar protections for businesses in regulatory changes, the administration has advanced 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 recommended for the first time that courts bar suits against manufacturers that comply with the new standard.

Schakowsky called the move "part of an unfortunate and troublesome pattern . to undermine

consumer rights."

In addition to trying to bar suits over vehicle roof failures, the highway safety agency in recent months has sought broad legal protection for manufacturers in two other rules on the 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 jobs in the highway safety agency and other departments over the years, but in the Bush administration, auto industry ties have grown more conspicuous.

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

The acting head of the highway safety agency, Jacqueline Glassman, was a senior attorney for DaimlerChrysler Corp. before she became the agency's chief counsel in 2002.

Jeffrey A. Rosen, who became general counsel at the Transportation Department in 2003, was a senior partner at Kirkland & Ellis, a powerhouse 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 S. Greve, a resident scholar at the conservative American Enterprise Institute, has written that preemption is crucial to protect the economy from "trial lawyers, ambitious state attorneys general and parochial state legislatures."

But critics say the preemption push contradicts the 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 Atty. Gen. Bill Lockyer, a Democrat.

Some say the election calendar is spurring the moves.

"The message has been clear in the last couple of years that if industries are going to get protection, they need to get it now," because no one knows what will happen in the next election, said Jonathan Turley, a George Washington University law professor.

Rollover accidents kill more than 10,000 people in the U.S. each year, and seriously injure an

additional 16,000. Consumer groups say better roofs would have saved thousands of victims over time.

Automakers counter with the "roof dive" theory - that rollover victims fall head-first to the roof as it strikes the ground, injuring themselves whether the roof holds or buckles. Thus, they say, the value of stronger roofs is practically nil.

Brian O'Neill, president of the Insurance Institute for Highway Safety, called this argument "patently nonsense." If it were true, he said, people would be "just as well-off in a rollover in a convertible as a hardtop."

The highway safety agency always has agreed that roof failures can cause death and injury. Its roof-crush proposal estimates that 596 deaths and 807 serious injuries a year are linked to roof collapse.

Its proposed rule would increase the force a roof must withstand in a rollover from its current 1.5 times a vehicle's weight to 2.5 times - at a cost per vehicle of about \$12. It would cover large trucks and SUVs of more than 6,000 pounds for the first time. The agency also is considering requiring stability control systems to reduce rollover risk.

The revised roof rule would create "the strongest ever uniform set of minimum . standards" for automakers in the U.S., Transportation Department spokesman Brian Turmail said.

However, the safety agency is projecting relatively modest benefits from the upgrade: 13 to 44 deaths and 500 to 800 injuries prevented a year. One reason: Nearly 70% of existing vehicles already meet the proposed standard.

Critics call this a token improvement. The stiffest criticism, however, has been reserved for the effort to grant immunity from lawsuits.

The safety agency says its push to preempt personal injury litigation is based on a concern that automakers, fearful of lawsuits, might beef up roofs to such an extent that the vehicles become top-heavy and more prone to roll over.

John G. Womack Jr., a former acting chief counsel at the safety agency, said that equating roof strength with weight was 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.

Diverse groups - including Public Citizen, a consumer watchdog, and the National Conference of State Legislatures - have condemned the provision and questioned the highway safety agency's authority to protect automakers.

Some have complained that if companies could not be held liable for damages, it would remove incentives for automakers to exceed minimum safety standards.

A bipartisan group of 26 state attorneys general said in a December letter to the highway safety

agency that the lawsuit ban, if accepted by the courts, would shift significant costs of caring for seriously injured victims from the industry to taxpayer-funded programs such as Medicaid. It would also conflict with consumer rights, they said.

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

Roof-crush suits have resulted in costly settlements and verdicts against automakers at a time of widespread financial trouble for the U.S. industry.

In 2004, Ford paid \$41 million in a case in which a California appeals court compared the company's use of a fiberglass and metal roof in the 1978 Bronco to "involuntary manslaughter."

The same year, a San Diego jury awarded damages against Ford of \$367 million, later reduced by the judge to \$150 million. In 2003, GM was hit with a \$19.6-million verdict, described as the largest product liability award in Nebraska history. The San Diego and Nebraska cases are being appealed.

For victims like 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."

He criticized the preemption clause, saying it was as if the industry had "this red phone and they just pick it up and it automatically dials NHTSA."

The immunity clause was unexpected, even to some 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.

Spokesmen for GM and Ford said that their companies had not lobbied for the lawsuit ban but that they supported it.

Bill Walsh, a former highway safety agency senior executive who worked on the rule before retiring in 2004, said the immunity language "was dropped in from out of the blue."

Preempting lawsuits, he said, was "different from how we normally operated . in issuing regulations."

Rosen, the Transportation Department's general counsel, said this was not the first time the highway safety agency had tried to override state liability laws.

During the 1990s, the agency joined automakers in arguing that they shouldn't be sued for not

installing air bags at a time when the agency allowed either air bags or automatic seat belts. In 2000, the Supreme Court agreed that such suits were preempted but said that compliance with a standard ordinarily "does not immunize a manufacturer."

Card, the White House chief of staff, and Glassman, the agency's chief counsel, declined to discuss how the roof-crush lawsuit preemption originated. Rosen said he did not want "to get into the specifics of who said what to whom.. As a legal matter, I'm obliged to protect the deliberative process."

The Rev. Lawrence Harris of Pittsgrove, N.J., sees the issue from the vantage point of his wheelchair. Had his claim been preempted after a devastating accident with his family in North Carolina, he might not be preaching on Sundays.

Harris, then 46, was wearing a seat belt but suffered a fractured spine in 1997 when his Ford Econoline van rolled over. Except for minimal movement in his hands, he was paralyzed from the chest down.

With the damage award he won from Ford, Harris installed a roll-in shower and wheelchair lift in his house, hired a caretaker to help him dress each morning, and modified a van so he could continue as pastor of Olivet United Methodist Church.

Without the lawsuit, he said, "I would not be able to do the things I'm able to do." If automakers are immune, Harris said, "where is the check and balance going to be for them?"

Within days of its roof-crush proposal, the highway safety agency again backed the auto industry in challenging California's efforts to cut emissions.

The Alliance of Automobile Manufacturers had gone to court to stop the state Air Resources Board from regulating tailpipe emissions of carbon dioxide and other greenhouse gases, contending the rule was preempted.

Because carbon dioxide emissions drop when less fuel is burned, the industry attacked the rule as a backdoor attempt to regulate fuel economy - under federal law, the exclusive domain of the highway safety agency.

The agency agreed. On Aug. 23, it issued new mileage standards for light trucks, saying that its authority over fuel economy meant that "a state law that seeks to reduce motor vehicle carbon dioxide emissions is . preempted."

Industry lawyers filed papers the next day in U.S. District Court in Fresno informing the judge of the agency's position.

California's global warming rule, which would first apply to 2009 models, is not all that's at stake in the Fresno case. Ten states have copied California's emission rule, and all those rules could be wiped out if the industry wins.

Rosen's former law firm, Kirkland & Ellis, represents the Alliance of Automobile Manufacturers in the suit to block California's global warming rule. The suit was filed in late 2004, a year after Rosen left the firm to join the Transportation Department.

Transportation spokesman Turmail said Rosen did not discuss the matter with the law firm. In considering the safety agency's position on the matter, Rosen acted in the government's interest, Turmail said.

Eleven U.S. senators from both parties and 29 House Democrats from California have urged Transportation Secretary Norman Y. Mineta to reverse the agency's opposition to the emissions standard.

"Rather than attempting to thwart such state efforts, the federal government should encourage states to develop innovative solutions to serious public health and environmental problems," the senators wrote to Mineta in December.

Kirkland & Ellis also represented automakers in another case against California regulators. In 2002, the industry - backed by the Justice Department - challenged a state rule that required production of a certain number of non-polluting vehicles.

Rosen said he did not participate in that case while he was with the law firm. The case was settled when the state agreed to remove language that the industry said amounted to regulating fuel economy.

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

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

When the case went to the U.S. Supreme Court, the Justice Department filed a brief siding with the industry. The high court agreed that the local rules were preempted.

In the past, said California's Atty. Gen. Lockyer, 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."

The idea behind another California law was simple: Tell credit cardholders on monthly bills how long it would take to retire their debt if they paid 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 joined forces with the American Banking Assn., 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 to the banks by their federal charters.

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

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

In recent years, the comptroller's office on many occasions has helped national banks and their subsidiaries fend off investigations or enforcement actions by state officials on preemption grounds.

In 2004, for example, the agency helped to shoot down a California law that would have required customer permission before banks shared their personal information with business affiliates.

Although a U.S. District Court judge upheld the privacy law, an appeals court ruled last year that its major provisions were preempted by federal law.

Last year, the agency went to court on the side of a banking association to block an investigation by New York Atty. Gen. Eliot Spitzer into possible racial bias in the lending practices of several banks.

A federal judge agreed that Spitzer's investigation "impermissibly infringes" on the authority of the comptroller's office. The state is appealing.

Turf battles over banking regulation have occurred in the past, but the Office of the Comptroller of the Currency has become more aggressive in pushing preemption under Bush.

Agency officials say they have zero tolerance for abusive practices and bristle at complaints that 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 L. Williams, the agency's senior deputy comptroller and chief counsel.

But Arthur E. Wilmarth Jr., a George Washington University 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."

Greve, the American Enterprise Institute scholar who has been a mainstay of the conservative brain trust promoting preemption, said well-connected industry law firms were part of a policy network providing legal and political rationale for the effort.

He called them "a merry band of Washington lawyers . who know how to push the buttons" and get things done.