Preemption under TSCA

TSCA reform must preserve states' rights

As advocates for people harmed by toxic chemicals, AAJ strongly supports efforts to reform the Toxic Substances Control Act (TSCA), but in order for reform to effectively protect the American public, it is imperative that Americans' access to state courts is protected.

Some proponents of the recent TSCA reform bill, S.1009, the "Chemical Safety Improvement Act" (S.1009) will argue that TSCA reform must include *total* preemption. These supporters argue that total preemption promotes innovation and provides them certainty in manufacturing across states lines by establishing a uniform federal standard. What these proponents *won't* tell you is that *total* preemption eviscerates State laws—both statutory and common—thereby removing the ability to sue manufacturers when their products cause injury or death.

Just how bad is *total* preemption for Americans? Two legal experts in both tort law and environmental regulations, Professors Thomas O. McGarrity and Wendy E. Wagner from the University of Texas School of Law, recently commented on the total preemption language found in S.1009, opining:

> *"In our decades of research and writing on tort law and environmental regulation, we have never seen a pre-emption provision that intrudes more deeply into the civil litigation system at the state level than the one in this bill. If victims of toxic chemical exposure attempt to recover damages at the state level, their cases would have to be dismissed if the EPA had concluded — rightly or wrongly — that a chemical was safe."*

Proponents of *total* preemption may also argue that their position is bolstered by the fact that current TSCA actually contains preemption. Indeed, the current TSCA law does contain preemption language; however, that language is nowhere near as sweeping as current proposals such as S.1009. Moreover, the current law has not had the practical *effect* of preemption, nor was it intended by the 1976 Congress which enacted the law, as demonstrated by three principal reasons, namely:

1. The preemptive effect of the 1976 TSCA language has never been truly realized because the standard of review for regulating chemicals was so high that the EPA has only been able to ban five of the approximately 80,000 chemicals under its jurisdiction. With such limited federal regulation of chemicals under existing TSCA, the preemptive effect of the 1976 law just has not occurred. .

2. The U.S. Supreme Court's interpretation of how federal statutes preempt state statutory and common law has evolved significantly since 1976. The Court has found preemption of state laws not only when it is impossible to comply with both state and federal law as was the case in 1976, but now, the Court finds preemption when Congress has "occupied the field," or when compliance with a state law could "frustrate the purpose" of a federal law[i]. This has held true in circumstances even when, seemingly, Congress expressly and explicitly attempted to preserve state law.

3. This change in judicial interpretation of federal preemption did not go unnoticed. As the Court's interpretation of federal preemption changed, Congress recognized the need for greater precision in drafting anti-preemption language. Congress took great pains to insure that Title II

of TSCA - the Asbestos Hazard Emergency Response, which was passed in 1986 and amended in 1990, included very strong anti-preemption language.

Thus, while current TSCA may contain preemption language, it has not had the ***effect*** of preemption. It is paramount that any TSCA reform measure specifically protects the ability of states to regulate dangerous chemicals and allow their citizens to seek recourse when dangerous chemicals cause injury or death.

The ability of states to enact chemical safety laws is critical to the protection of public health, especially when it comes to shedding light on new information regarding the dangers of chemical substances. Chemical testing and regulation at the federal level is often limited by federal resources, rapidly changing technologies, and the ever-expanding proliferation and use of chemicals. In response, most states have enacted laws to protect the health of their citizens from dangerous chemical substances, reflecting the idea that states are often in the best position to know what laws are necessary based on the unique needs and health risks assessed at the state and local levels. This complementary role of the states must be preserved to guide our continued understanding of the dangers of chemical substances and aid a strong federal regulatory system.

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[i] *Wyeth v. Levine*, 555 U.S. 555 (2009).