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**THE WALL STREET JOURNAL.**

WSJ.com

MAY 21, 2009

## Shift Toward State Rules on Product Liability

By ALICIA MUNDY and BRENT KENDALL

WASHINGTON -- In a sweeping order Wednesday, President Barack Obama called for a rollback of Bush administration regulations designed to protect companies from product-liability lawsuits in state courts.

The memo didn't name specific industries but it could affect a wide range of consumer products subject to both federal and state regulation.

Companies have long complained about having to deal with 50 different state rulebooks, and the Bush administration aggressively took up the issue. It encouraged federal agencies to issue rules pre-empting state laws and declared that a single federal standard held sway.

In a two-page memo, President Obama reversed that stance. He said federal agencies and departments should claim that state law is pre-empted by federal law only when there is a well-defined legal basis. He ordered agencies to review regulations from the past 10 years to see if the government had improperly asserted federal pre-emption.

Democratic-leaning legal groups, including trial lawyers, cheered the move, while business groups panned it.

"One thing we know is you can't sue your way into an economic recovery," said Bryan Quigley of the U.S. Chamber of Commerce. "Allowing for more lawsuits will not create more jobs, except maybe for plaintiffs lawyers."

During the 2008 election, the tort bar discussed with Democratic candidates its strong desire to roll back Bush-era pre-emption regulations. It further pushed its case in talks with the Obama transition team before Christmas.

The lobby for trial lawyers, the American Association for Justice, said the president's order "overturned actions taken by Bush administration bureaucrats who were influenced by powerful, well-connected corporations." The move will outstrip "laws designed to give Americans basic rights to hold wrongdoers accountable," a statement said.

Mr. Obama's order said state laws play a valuable role in supplementing federal regulation. "State and local governments have frequently protected health, safety and the environment more aggressively than has the national government," he said.

Bush officials have said state consumer-safety laws gave plaintiffs too many opportunities to circumvent prohibitions on product-liability suits. State laws also helped plaintiffs win large punitive damages. The pharmaceutical industry was hit particularly hard by such tort actions.

Jay Lefkowitz, who led the Bush effort and now represents drug companies in private law practice, said Mr. Obama's move would undo efforts to "save consumers money and eliminate a lot of unnecessary lawsuits." He added, "The

silver lining is it's great to have a president with such healthy respect for states' rights."

Beginning in 2005, Bush officials at regulatory agencies, particularly the Food and Drug Administration and the Department of Transportation, began inserting language that pre-empted state-level suits involving federally regulated products. They included prescription drugs, cars, mattresses, motorcycle brakes and railroad cars.

The Supreme Court has already said that some pre-emption efforts went too far. In March, the high court struck down pre-emption involving drugs in a major case, *Wyeth v. Levine*. Diana Levine of Vermont sued the drug maker Wyeth under Vermont state law after improper administration of its antinausea drug phenergan caused her to develop gangrene. She lost an arm. Wyeth claimed that pre-emption language inserted in an FDA regulation protected the company. The FDA supported Wyeth in a friend-of-the-court brief.

In the court's ruling, Justice John Paul Stevens criticized the FDA's attempts at pre-emption and wrote that its position was "inherently suspect," because the agency failed to follow normal procedures for regulatory changes.

The White House order will have major consequences for businesses, consumers and state regulators. The policy changes outlined in Mr. Obama's memo not only could make it easier for consumers to sue, but could also free the hands of state regulators who believe that a lack of federal regulation in banking and other industries helped contribute to the current financial crisis.

"This directive is a very positive sign that the federal government will get out of the way and let state attorneys general defend their citizens from predatory lending, dangerous products, and environmental hazards," said Jerry Brown, California's attorney general.

Lawsuits against medical-device makers are still pre-empted under a longstanding federal law on devices, but Democrats in Congress, supported by the tort bar, are pushing legislation that would allow such suits.

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Printed in The Wall Street Journal, page A3

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