

2010 Annual Mtg  
SCMPR Co-sponsored

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 9-10, 2010**

**RECOMMENDATION**

RESOLVED, That the American Bar Association urges Congress to address foreseeable preemption issues clearly and explicitly when it enacts a statute that has the potential to displace, supplement, or otherwise affect state tort law by:

- (1) clearly and explicitly stating when it intends to preempt state tort law; and,
- (2) clearly and explicitly setting forth the extent of the preemption of state tort law it intends, and the extent to which, through a savings clause or other means, it intends not to preempt state tort law or related common law duties.

FURTHER RESOLVED, That the American Bar Association urges Congress, when making any decision on whether to preempt state tort law, to take into account the historic responsibility States have exercised over the health and safety of their populace and to balance the competing concerns relating to preemption.

FURTHER RESOLVED, That the American Bar Association supports the principles and requirements of Executive Order 13132 on Federalism regarding federal agency actions that may have preemptive effect on state tort law.

FURTHER RESOLVED, That the American Bar Association urges the President to further require that each Federal agency subject to Executive Order 13132:

- (1) State in any proposed rulemaking whether it intends or believes the rulemaking to have the effect of preempting state tort law;
- (2) Explain the scope of the anticipated preemptive effect on state tort law and why such preemptive effect is appropriate or legally required; and
- (3) Provide
  - (a) factual support in the record for any assertions that state tort law has in the past interfered or is currently interfering with the operation of federal laws or regulations, or

(b) reasoning to support any predictions or concerns that state tort law would in the future interfere with the operation of federal laws or regulations.

FURTHER RESOLVED, That the American Bar Association urges the President to improve agency compliance with Executive Order 13132 by requiring inclusion of an entity independent of the agency regulatory office with sufficient autonomy, authority, and resources to conduct an effective review in the rule-making process before a preemptive rule is adopted.

FURTHER RESOLVED, That the American Bar Association urges independent regulatory agencies, which are not covered by Executive Order 13132, to comply voluntarily with that order regarding federal actions that may have preemptive effect on state tort law and follow the procedures set out in the fourth and fifth RESOLVED clauses above.

**REPORT**  
(REVISED)

## **Introduction**

The American Bar Association (ABA) has a longstanding commitment to certain core principles such as working for just laws and a fair legal process, assuring meaningful access to justice for all persons, and preserving the independence of the legal profession and the judiciary. A task force is occasionally created to address a particular issue as a short-term assignment. In this instance, the Task Force on Federal Agency Preemption of State Tort Law was commissioned to review the ABA's policies concerning federal preemption in the field of tort law, including products liability law, and to make such recommendations to the House of Delegates regarding preemption that it deems appropriate.<sup>1</sup>

### *ABA Policies Relating to Preemption*

House of Delegates policies have consistently recognized the states' traditional role in regulating tort law. In 1981, the House of Delegates opposed legislation such as a pending bill that would impose a Model Products Liability proposal as federal law. A 1983 resolution restated the ABA's opposition to broad federal codification of product-liability laws. However, that resolution supported federal legislation that: 1) addresses tort claims related to occupational diseases (e.g., from asbestos) with long latency periods that threaten the solvency of a significant number of manufacturers and impose excessive burdens on the judicial system, and 2) allocates product liability risks between the federal government and its contractors and provides indemnity against those risks. A 1988 resolution recommended that Congress address foreseeable preemption issues clearly and explicitly when it enacts statutes affecting regulated conduct. It also recommended that each federal agency (1) establish procedures to timely consider the need to preempt state law or regulations that harm federally protected interests, and clearly and explicitly address preemption issues in regulatory decision-making, (2) engage, when practicable, in informal dialogue with state authorities in an effort to avoid any foreseeable conflict with state laws or regulations, and (3) provide affected states and interests with notice and an opportunity for appropriate participation in the proceedings when proposing to act through adjudication or rulemaking to preempt a state law or regulation. A 1995 resolution reaffirmed the continued right of the states and territories to regulate product liability law and opposed federal legislation abolishing strict seller liability.

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<sup>1</sup> The Task Force had its genesis in a letter to Congress supporting the Medical Device Safety Act (S. 3398 and H.R. 6381), sent by then-ABA President H. Thomas Wells Jr. Because some ABA members suggested that a review of ABA Preemption policies was in order, President Wells appointed the Task Force, and President Carolyn Lamm renewed the Task Force's mandate. After reviewing those policies, the Task Force determined that no change in the policies was required and decided to focus on procedural approaches to preemption that might lessen confusion and uncertainty about when federal law preempts state law.

*Our Federalism*

“Preemption” is the displacing effect of a federal law or regulation on state law. The concept and its proper operation are fundamental in our system of federalism.

The law primarily governing our communities is state law, including state constitutions, common law, statutory law and administrative law. The primacy of state law flows from the historical fact that the original states, as sovereign entities, pre-existed the federal union. Upon adoption of the Constitution, the federal government, within the spheres of its delegated authority, was given superiority over state law. At the same time, respect for state authority, as a matter of comity, is part of the federal equation, giving due recognition to the Framers’ solution to creating a union of previously sovereign states in which they “split the atom of sovereignty” between the federal and state governments. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

This relationship is expressed in two Constitutional provisions--the Supremacy Clause (Art. VI, Cl. 2) and the Tenth Amendment. Under the Supremacy Clause, the “Constitution and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...any Thing...to the Contrary notwithstanding.” Under the Tenth Amendment, “The powers not delegated to the United States...are reserved to the States respectively, or to the people.”

A perennial problem in our federal system is that of defining the boundaries between federal law on various subjects and state law dealing with the same general subjects. The boundaries should be maintained as clearly as reasonably possible so that legal rights and responsibilities are as clear as reasonably possible from the viewpoint of our citizens and their activities, including business activities. They are entitled to know, as definitely as practicable, what is “the law” as a whole, including when what constitutes the relevant law is a shared federal-state responsibility.

*Forms of Preemption*

In general concept, the boundary is clear: Within the federal government’s lawful sphere, federal law may “preempt” state law—that is, it may displace the state law that would otherwise govern - depending on the content and purpose of the federal provision. The preemption can be “express” under the terms of a provision in the Constitution. For example, Art. I, Sec. 10 provides that “No State shall...coin money.” The displacement can be express in a federal statute, for example the preemption provision in ERISA or in the Medical Device Amendments of 1976. The displacement may also be partial or limited, by express terms of the statute, as in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (119 Stat. 1895), which authorizes states to supplement the federal regulatory scheme as long as certain conditions are followed.

The preemption can be “implied,” i.e., the federal law must be interpreted to displace some rule of state law. An historical example is the immunity of federal instrumentalities from state taxation, as in *McCulloch v. Maryland*, 17 U.S. 316 (1819). Federal displacement can cover

a “field” that is within federal regulatory competence. An example of field preemption is the “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels ... that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment,” which is regulated by the Ports and Waterways Safety Act of 1972. *See United States v. Locke*, 529 U.S. 89 (2000). More common than field preemption is “implied conflict preemption,” which can be of two types – “direct conflict” preemption and “purposes and objectives” preemption. The former occurs when a regulated person or entity cannot comply with both federal and state law at the same time. The latter occurs when a state law interferes with the full accomplishment of the purposes and objectives of Congress. For instance, in *Gibbons v. Ogden*, 22 U.S. 1 (1824), a New York law limiting which steam boats could travel within the state conflicted with a federal statute licensing steam boats for the coastal trade. Similarly, a state law that bars its agencies from purchasing goods and services from companies that do business with a particular foreign country (Myanmar) may frustrate Congress’ enactment of its own regime of sanctions placed on the country, by prohibiting contracts permitted by the federal act. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).<sup>2</sup>

The various subjects of the Supreme Court decisions and statutes mentioned above suggest the range and pervasiveness of preemption particularly as the federal government has increased its regulatory role over the past century, including the growth of federal instrumentalities, assertion of authority over commerce in all shapes and forms, and enhancement of legally recognized personal rights and relationships. In fact, preemption considerations arise nearly every time Congress adopts a statute, or ratifies a treaty, or empowers a regulatory agency to issue regulations, or when the Executive exercises its regulatory authority under Article II or statutes enacted by Congress.

However, federal authorities, in exercising their powers, often have given inadequate attention to questions of preemption. At times they have given no attention to these questions; at other times they have addressed them in ambiguous or confusing ways, without input from the public or the regulated industries. Agencies, even with unique technical or institutional expertise to recognize how federal objectives implemented through their regulations could be compromised by state law, have sometimes asserted preemption without express authority or public participation through notice and comment when promulgating rules. Moreover, neither Congress nor the federal agencies regularly follow up to examine effects on state law subsequent to a regulatory effort. Even more confusing, federal authority has shifted back and forth over whether preemption applies to the same set of issues.

The proper substantive scope of federal preemption is a broad policy issue. Generally speaking, state law is primarily operative and should be assumed to continue in effect along with federal law in the same field. In some areas, federal and state regulation may complement each other and may further the public interest, while, in other areas, national uniformity may provide a public benefit and needed clarity to those who are regulated. When there is federal preemption, the federal law clearly is the supreme law of the land. The preemption it mandates can be plenary

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<sup>2</sup> Foreign agency preemption is beyond the scope of this Task Force’s engagement.

or it can be partial. When the interaction of federal law and state tort law claims is at issue, a fact-specific inquiry may be necessary to determine whether federal regulation and the specific action or inaction that forms the basis of the tort claim can properly coexist. It is not possible to make a definite description of what subjects and “fields” and federal laws and regulations should be preemptive -- or to what extent preemption should take place when appropriate. Some observers believe that adoption and administration of federal laws and regulations should be systematically accompanied by regular and careful attention to the resulting relationships between the federal provisions and state law. Others question whether such explicitness is always possible or should be expected, given practical constraints and political realities, as well as limits on the ability to foresee potential conflicts. The Task Force agrees, however, that it is desirable to be explicit about the preemptive effect of federal law when such a course is possible.

### **Congressional Preemption**

The Task Force’s study of the issues concerning preemption of state tort law recognizes the critical and usually determinative role played by the Congress. An examination of the case law shows the premium courts put on the clarity and consideration that Congress gives the preemption question. Where such clarity is lacking, courts have come to seemingly inconsistent conclusions about whether state law and state tort lawsuits are preempted. For that reason, the Task Force urges Congress to establish procedures that will appropriately illuminate whether it intends to preempt state law. The Task Force further urges Congress to be mindful and accommodating, in any preemption decision it makes, of the historic responsibility that States have exercised over the health and safety of its populations. These values should be kept in mind when considering the potential benefits that a uniform national approach can sometimes provide, as well as the certainty and clarity preemption can offer to regulated industries regarding their legal obligations, while recognizing the desirability of providing consumers with a “double protection” through state and federal mechanisms.

The Supreme Court has declared that one of two “cornerstones of preemption jurisprudence” is “the purpose of Congress [ , which] is the ultimate touchstone in every preemption case.” *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009), quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In instances where Congress expressly preempts state law, courts properly “focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Congress may also indicate the preemptive scope of its enactment through the express words within the statute or within the statute’s legislative history. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983). Thus, even in those instances where Congress has expressly preempted state law, courts must still examine “the substance and scope of Congress’ displacement of state law” to determine the application of the preemptive effect to the controversy at hand. *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008). Moreover, as the Court recently declared, “[a]bsent other indication, reference to a State’s ‘requirements’ includes its common-law duties.” *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999, 1008 (2008).

Just as Congress has explicitly expressed its intention *to preempt* state law in legislation, it is equally capable of clearly expressing its intention *not to preempt* state law, including tort

claims. Federal legislation frequently includes “savings clauses” that convey Congress’s intent to preserve the authority of state and local governments to enact parallel requirements that may have additional remedies (e.g., consumer protection laws), to adopt additional or more stringent regulations to fit local conditions (e.g., railroad regulation), or to regulate a specific matter upon the approval of a federal agency (e.g., workplace safety).

Preemption may also be implied and not just a function of congressional expression. Discerning when implied preemption applies has been a judicial task fraught with uncertainty. As discussed briefly above, determinations of implied preemption consider: 1) whether Congress “evidences an intent to occupy a given field,” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), 2) whether compliance with both federal and state requirements constitutes “a physical impossibility,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or 3) whether state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The first type of preemption, “field preemption,” rarely affects state common-law claims; the other two forms of implied preemption may have an impact on the continued viability of common-law claims that would impose obligations upon a party that is also required to follow federal regulations or other mandates on the same issue.

Even when legislation expressly addresses preemption and includes a savings clause, the Supreme Court has found that ordinary principles of conflict preemption continue to apply. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000). As Justice Breyer recognized, “one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict” between state and federal law. *Id.* at 884.

In addition, the Supreme Court has recently described “the presumption against preemption” as a second cornerstone of preemption doctrine. *Levine*, 129 S.Ct. at 1194-95. This presumption is based on the “assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.*, quoting *Lohr*, 518 U.S. at 485 (additional quotation omitted). In approaching the interpretational task of determining preemptive effect, the Supreme Court has often applied a “basic presumption against pre-emption,” particularly in fields which the states have traditionally occupied.<sup>3</sup> *See, e.g., Bates*, 544 U.S. at 449. The presumption, along with the tools used to imply preemption, further highlights the importance courts place on a clear expression of congressional intent. A clear indication of intent is also critical to preemption by agency determinations, as the Court has allowed agencies to initiate preemptive effect as long as it is “acting within the scope of its congressionally delegated authority.” *City of New York v. FCC*,

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<sup>3</sup> Some courts have held that this presumption against preemption may be weakened or “disappear” in cases that are outside the realm of public health and safety, *see, e.g., Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), *aff’d*, 550 U.S. 1 (2007), that fall in fields of regulation that have been substantially occupied by federal authority for an extended period of time, such as financial services, *see, e.g., Silvas v. E-Trade Mortgage Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008), or that involve interpretation of a statute that includes an express preemption clause where the words of the statute itself may provide the best evidence of legislative intent of the scope of preemption, *see, e.g., Altria Group, Inc. v. Good*, 129 S. Ct. 538, 556-57 (2008) (Thomas, J., dissenting, joined by Roberts, CJ, and Alito and Scalia, JJ.) (citing cases in which the court has not raised a presumption against preemption).

486 U.S. 57, 63-64 (1988). Moreover, as the Court has recognized, agency positions on the preemptive effect of federal law are “entitled to respect” and are generally accorded “substantial deference.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67-68 (2002).

What is clear from preemption jurisprudence is that Congress has the authority to define the existence, scope, and import of preemption, but has often left those questions unanswered. The courts have plainly struggled to divine congressional intent in those circumstances. To the extent practicable, Congress should consider exercising its authority to guide the courts with the clearest possible expression of its purposes and of the interplay of its enactments and federal regulations promulgated pursuant to congressional authority with those of the states, their regulatory authorities, and state tort systems.

### Federal Agency Preemption

In 1999, President Clinton promulgated Executive Order 13132 on federalism to provide guidance to agencies with respect to their actions that have effects on states.<sup>4</sup> It announced a general policy that agencies should not take actions limiting the policymaking discretion of states unless the national activity was appropriate in light of the presence of a problem of national significance. In addition, it imposed special requirements on agencies with respect to preemption of state laws. It called upon agencies not to construe statutes or authorizations in statutes to preempt state law in the absence of an express preemption provision, “some other clear evidence that the Congress intended preemption of State law,” or “where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.”<sup>5</sup> If preemption was desirable, it was to be restricted to the minimum level necessary to achieve the purposes of the statute. Finally, the Order prohibited agencies from issuing regulations that have the effect of preempting state law unless, to the extent practicable, the agency consults with state and local officials early in the process and in the preamble describes the consultation that took place, the concerns raised by the state and local officials, and the agency’s response.<sup>6</sup> President Bush continued the Order without change.

Despite the Order, some have asserted that executive agencies are not consistently following its directions. For example, when the National Highway Traffic Safety Administration (NHTSA) proposed a rule regarding roof crush-resistance standards, the agency announced its tentative determination that its rule would preempt all conflicting state common-law requirements, yet it stated that the proposed rule did not have sufficient federalism impact to warrant consultation with state and local officials.<sup>7</sup> After this issue was extensively addressed through public comment, NHTSA changed its view with respect to preemption of tort law claims in the final rule.<sup>8</sup> The Food and Drug Administration (FDA), when it adopted a final prescription drug labeling rule with a statement that the rule preempted certain state tort law claims, noted that its proposed rule had not proposed preemption (and consultation with state and local officials required by E.O. 13132 had not taken place).

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<sup>4</sup> See Executive Order 13132, 64 Fed. Reg. 43255 (1999).

<sup>5</sup> See *id.*, at § 4, 64 Fed. Reg. at 43257.

<sup>6</sup> See *id.*, at § 6(c), 64 Fed. Reg. at 43258.

<sup>7</sup> See 70 Fed. Reg. at 49245.

<sup>8</sup> 74 Fed. Reg. 22348, 22380-83 (2009)



Others note that there may be instances in which an agency proposes a rule without expressing a preemptive effect, but later learns through comments received that the continued application of state law in the area at issue would conflict with the rule. In such instances, the Task Force recognizes an agency must retain the flexibility to state a preemptive effect in the final rule.

E.O. 13132, like all modern executive orders directed to agencies, contains a provision declaring that its mandates are not subject to judicial review.<sup>9</sup> Consequently, the only enforcement derives from the President himself or the Office of Management and Budget, which has certain oversight authority under the Order.

Shortly after taking office, on May 20, 2009, President Obama issued a memorandum to the Heads of Executive Departments and Agencies on preemption.<sup>10</sup> In it, he affirmed his commitment to E.O. 13132 and reminded agency heads of the need for a sufficient legal basis to support regulations intended to preempt state law. President Obama then provided three specific instructions. First, he required that agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation. Second, agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in E.O. 13132. Finally, President Obama required agencies to review regulations issued within the past 10 years that contain statements in regulatory preambles or codified provisions intended to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption. If the agency determines that a regulatory statement of preemption or codified regulatory provision cannot be so justified, the agency should initiate appropriate action.<sup>11</sup>

The American Bar Association has taken positions regarding how agencies should address preemption. In 1988, the ABA recommended that:

Each Federal agency establish procedures to ensure timely consideration of the need to preempt state law or regulations that harm Federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency clearly and explicitly address preemption issues in the course of regulatory decision-making; and ...

When a Federal agency foresees the possibility of a conflict between a state law or regulation and Federally protected interests within the Federal agency's area of regulatory responsibility, that agency, when practicable, engage in informal dialogue with state authorities in an effort to avoid such conflict; and

When a Federal agency proposes to act through agency adjudication or

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<sup>9</sup> See *id.*, at §11, 64 Fed. Reg. at 43259.

<sup>10</sup> See 74 Fed. Reg. 24693 (2009).

<sup>11</sup> *Id.*

rulemaking to preempt a state law or regulation, that agency attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

E.O. 13132 is consistent with the ABA resolution. President Obama's memorandum is likewise consistent with the ABA resolution to the extent it advocates that federal agencies give due respect to federalism principles when engaging in rulemaking activities. Given the age of the current ABA resolution and the recent controversies regarding preemption of state tort law, the Task Force believes it is appropriate to restate the ABA's position regarding the procedural requirements that agencies should use before attempting to preempt state law – notably, when practicable, adequate prior consideration and affording prior notice-and-comment on any proposal intended to preempt state law. In certain respects, President Obama's order and memorandum go beyond the ABA resolution, which attempted to be neutral regarding the appropriateness of preemption. The new proposed resolution would retain that position of neutrality.

The Task Force proposes that the President require three particular procedures that we believe are critical before an agency regulation should be able to preempt state law. An executive agency should first state in any proposed rulemaking whether it intends or believes it to have a preemptive effect, second explain the scope of the anticipated preemptive effect and why it is necessary, and third provide factual support in the record for any assertion that state law has interfered or is interfering with the operation of federal law and reasoning to support predictions or concerns that state tort law would interfere with the operation of federal laws or regulations.

The Task Force believes that in order to ensure compliance with E.O. 13132, it is desirable that an entity independent of the agency regulatory office that has sufficient autonomy, authority, and resources conduct a review of the rule-making process before preemption is adopted. The Office of Information and Regulatory Affairs (OIRA) in OMB already reviews all proposed and final executive agency regulations under E.O. 12866, and the Department of Justice's Office of Legal Counsel can issue legal interpretations that are binding on other executive agencies. Such an independent entity might be OIRA, an office in the Department of Justice, or simply an office in the agency proposing the rule if that office has sufficient autonomy, authority, and resources for effective review. The Recommendation urges the President to consider requiring such review.

Because Executive Order 13132 does not apply to independent regulatory agencies and the President has traditionally not directed those agencies to take particular actions, the resolutions aimed at reinforcing the provisions of the order and recommending that the President direct certain actions would not apply to independent regulatory agencies. Those agencies, however, also adopt rules that may have preemptive effect, and the measures recommended for executive branch agencies when they engage in rulemaking intended to have preemptive effect would be equally beneficial if utilized by independent regulatory agencies. Accordingly, the Task Force recommends that independent regulatory agencies voluntarily follow the procedures of Executive Order 13132 as well as the procedures recommended in paragraphs 1(a)-(c) in the preceding resolution -- explaining in the preamble of a proposed rule why preemptive effect is necessary; providing factual support in the record for any assertions that state tort law has

interfered or is interfering with the operation of federal law; and providing the reasoning to support any predictions or concerns that state tort law would in the future interfere with the operation of federal laws or regulations.

The procedures set out in the recommendation are limited to preemption of state tort law. The Executive Orders of Presidents Reagan (E.O. 12512) and Clinton (E.O. 13132), and the August, 1988 ABA policy on preemption, were not so limited, but the task force's mission was only to consider preemption of state tort law. The limitation of this recommendation to tort law is not intended as a statement that the procedures are necessarily so limited, but the propriety of application to other areas of the law was not explored by the task force.

In order to develop its recommendation and report, the Task Force on Federal Agency Preemption of State Tort Laws held numerous meetings and conference calls. It reviewed a large number of resources, many of which are found on its website at the following link: <http://www.abanet.org/dch/committee.cfm?com=BG108100>

On May 29<sup>th</sup>, 2009, the Task Force hosted a meeting attended by two distinguished presenters, Professor David Vladeck and Attorney Bert Rein, who addressed the policy reasons for or against preemption of state tort law by administrative agencies, including when and under what circumstances preemption is desirable.

On October 1, 2009, the Task Force hosted a public forum in Washington, DC with representatives from eight organizations in order to obtain the views of the organizations on federal agency preemption of state laws. The entities represented at the forum were: the Alliance for Justice, the American Association for Justice, the Chamber of Commerce's Institute for Legal Reform, the Defense Research Institute, PhRMA, the Product Liability Advisory Council, Public Citizen and the Public Justice Foundation. A video of the program is found on the website of the Task Force.

The roster of the Task Force members is attached to this report as Appendix "A." The Task Force also benefitted from the active participation of Judge Gregory Mize, currently a Fellow at the National Center for State Courts."

Respectfully submitted,  
Edward F. Sherman  
Chair, Task Force on Federal Agency Preemption of State Tort Laws  
August 2010

**Appendix A**  
**Task Force on Federal Agency Preemption of State Tort Laws**

**Chair:**

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### Executive Summary

#### 1. Summary of the Recommendation:

The recommendation urges Congress to address foreseeable preemption issues clearly and explicitly when it enacts a statute that has the potential to displace, supplement, or otherwise affect state tort law. In making any decision on whether to preempt state tort law, Congress is urged to remain mindful of the historic responsibility that States have exercised over the health and safety of their populace and balance the competing concerns relating to preemption. The recommendation also urges the President to require an agency to follow four specific procedures before it attempts to preempt state tort law. It also recommends that independent regulatory agencies which are not covered by Executive Order 13132 voluntarily comply with that order regarding federal actions that may have preemptive effect. Specific procedures to do this are set forth in the recommendation.

#### 2. Summary of the Issue which the Recommendation Addresses:

The recommendation addresses the issue of federal agency preemption of state tort laws. Preemption is a perennial problem in our federal system. The issue of defining the boundaries between federal law on various subjects and state law dealing with the same general subjects persists to this day. Preemption is pervasive particularly as the federal government has increased its regulatory role over the past century. Given the age of the current ABA resolution addressing federal agency preemption procedures (1988) and the recent controversies regarding agency preemption of state tort laws, the Task Force believes it is appropriate to restate the ABA's position regarding the procedural requirements that agencies should use before attempting to preempt state tort law.

#### 3. An Explanation of how the Proposed Policy Position will Address the Issue:

The proposed policy position would make specific recommendations to Congress and federal agencies regarding procedures for federal agency preemption.

#### 4. A Summary of any Minority Views or Opposition which have been Identified:

The Section of Intellectual Property Law (IP) asked the Task Force to consider edits. It did so and made edits to the recommendation and report with which the IP Section is comfortable. Members of the Council of the Section of Administrative Law and Regulatory Practice Section also asked the Task Force to consider some edits, which the Task Force has made. There are no other minority views or opposition of which we are aware.

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY HOUSE OF DELEGATES**  
**AUGUST 11-12, 2008**

**RECOMMENDATION**

RESOLVED, That the American Bar Association urges federal, state and territorial legislative bodies to adopt legislation establishing pilot programs that enable and encourage medical personnel to report hospital events which, if repeated, could threaten patient safety.

FURTHER RESOLVED, That the elements of such programs should include:

- A. That medical personnel who report include, but are not limited to, doctors, nurses, and other hospital employees with patient care responsibilities, both public and private.
- B. That the events reported are those which are medical in nature and did not result in harm to a patient but which might have resulted in harm;
- C. That the reports be made, to the extent possible within the context of already existing reporting mechanisms within federal or state agencies and accrediting bodies, to an entity or entities designated by the federal, state or territorial legislative bodies, and be provided immediately to hospital administration and to risk management departments; and, with the exception of the identity of any individual or provider, be reported to the public.
- D. That the anonymity of all persons making good faith reports is guaranteed by law;
- E. That any person making a report in good faith shall be immune from civil liability and may not be required to testify in any civil proceedings about the contents of the report;
- F. That a report made in good faith shall not be admissible or discoverable in any legal or administrative proceeding;
- G. That a group of medical experts, such as the Institute of Medicine, shall be consulted to identify the types of hospital events to be reported;