

Administrative agencies sometimes issue regulations that have the effect of overruling state law — and sometimes that is the sole effect of the regulation. This proved quite controversial during the Bush Administration, which used agency rulemaking efforts to cut back on state tort law. The ABA has adopted a new resolution dealing with this issue. The resolution reads:

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.*

[Note: I mistakenly posted a partial version of this resolution initially, due to a glitch on the ABA website.]