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#### Bluebook 21st ed.

Victor E. Schwartz & Christopher E. Appel, Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War, 23 B.U. PUB. INT. L.J. 185 (2014).

#### ALWD 7th ed.

Victor E. Schwartz & Christopher E. Appel, Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War, 23 B.U. Pub. Int. L.J. 185 (2014).

#### APA 7th ed.

Schwartz, V. E., & Appel, C. E. (2014). Government regulation and private litigation: the law should enhance harmony, not war. *Boston University Public Interest Law Journal*, 23(2), 185-218.

#### Chicago 17th ed.

Victor E. Schwartz; Christopher E. Appel, "Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War," *Boston University Public Interest Law Journal* 23, no. 2 (Summer 2014): 185-218

#### McGill Guide 9th ed.

Victor E. Schwartz & Christopher E. Appel, "Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War" (2014) 23:2 BU Pub Int LJ 185.

#### AGLC 4th ed.

Victor E. Schwartz and Christopher E. Appel, 'Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War' (2014) 23(2) *Boston University Public Interest Law Journal* 185

#### MLA 9th ed.

Schwartz, Victor E., and Christopher E. Appel. "Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War." *Boston University Public Interest Law Journal*, vol. 23, no. 2, Summer 2014, pp. 185-218. HeinOnline.

#### OSCOLA 4th ed.

Victor E. Schwartz & Christopher E. Appel, 'Government Regulation and Private Litigation: The Law Should Enhance Harmony, Not War' (2014) 23 BU Pub Int LJ 185  
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## ARTICLES

### GOVERNMENT REGULATION AND PRIVATE LITIGATION: THE LAW SHOULD ENHANCE HARMONY, NOT WAR

VICTOR E. SCHWARTZ\* & CHRISTOPHER E. APPEL\*\*

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Two separate, but important drivers of the creation of law in the United States are the federal regulatory agencies and the litigation system. Federal agencies are empowered to develop regulations in a broad range of areas—anything from food safety<sup>1</sup> to air emissions<sup>2</sup>—and the litigation system is the primary engine for the development of the common law.<sup>3</sup> Sound public policy suggests these drivers work in harmony with each other and not at cross purposes.

Fortunately, the goals of the federal regulatory system and the private litigation system can, and usually do, work together. For example, the Consumer Products Safety Commission generally works to keep people safe from defective products, often before injuries occur.<sup>4</sup> When private litigation is involved, it is typically directed at compensating people hurt by defective products after someone is injured. Both the regulatory system and the tort system may, at times, overstep their bounds in pursuing the goal of protecting society from defective products,<sup>5</sup> but at least both forces move in the same direction.

There are several highly controversial areas, however, where the government regulatory system and the private litigation system may be at odds, or even at war, with each other. The purpose of this Article is to bring those areas to the attention of judges, legislators, and others who formulate public policy, and to suggest that they work toward harmonizing the goals of each system. This Article will discuss four specific areas and provide suggestions for how regulatory and litigation goals can work together.

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<sup>1</sup> See, e.g., FDA Food Safety Modernization Act of 2010, Pub. L. No. 111-353, 124 Stat. 3885 (2011). The Act “aims to ensure the U.S. food supply is safe by shifting the focus of federal regulators from responding to contamination to preventing it.” *Food Fact Sheets and Presentations*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm247546.htm> (last updated May 2, 2014).

<sup>2</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (stating that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide by the Environmental Protection Agency); see also 42 U.S.C. § 7411 (2012).

<sup>3</sup> See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ’S TORTS: CASES AND MATERIALS 1 (12th ed. 2010) (“[T]ort law has been principally a part of the common law, developed by the courts through the opinions of the judges in the cases before them.”).

<sup>4</sup> See 15 U.S.C. §§ 2051–2089 (2012) (providing relevant consumer product safety laws); see also *Regulations*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/en/Regulations-Laws—Standards/Regulations-Mandatory-Standards-Bans/> (last visited May 12, 2014) (providing listing of consumer product safety regulations).

<sup>5</sup> See *infra* Part III.

First, the Article will discuss real and potential conflicts between the government and the litigation system that were labeled by former U.S. Secretary of Labor Robert Reich as “regulation through litigation.”<sup>6</sup> Here, the government, through the democratic political process, has made a decision not to regulate a particular activity.<sup>7</sup> The judgment may, for instance, be based on the absence of need for regulation, the costs and burdens of potential regulation, or the desires of the American public as conveyed to their elected representatives. Regulation through litigation occurs when enterprising plaintiffs’ lawyers suggest to courts, via lawsuits, that the judiciary should regulate an industry through the threat of imposing broad liability against entities in that industry, even though the government has chosen not to regulate.<sup>8</sup> This Article examines whether the clash of goals between government and private litigation is in the public’s interest and concludes it is not.

A second area where the government and private litigation system may be at odds occurs where government regulatory bodies are overly aggressive in pursuing a goal they believe to be in the public’s interest and inadvertently create liability exposure for the regulated entity. An example is where regulators demand that employers turn over employees’ private health records in the name of assuring workplace safety.<sup>9</sup> In doing so, the government agency may have pushed the regulated entity into clutches of tort law and privacy-related lawsuits simply for doing what the government has asked.<sup>10</sup> The government provides no liability shield to the regulated entities, but government action has touched off a war of competing values. This Article suggests such a situation creates fundamental unfairness for those who are regulated.

A third area of potential conflict occurs where a federal regulatory body has created specific rules for safety or made a determination that a product is safe. The war between government regulation and private litigation occurs when the tort litigation system decides it somehow knows more about safety than the expert regulatory agency.<sup>11</sup> As a result, the litigation system may impose more rigid or even contradictory rules on regulated entities.<sup>12</sup> The conflict between

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<sup>6</sup> Robert B. Reich, *Don’t Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22; see also Mark A. Behrens & Rochelle M. Tedesco, *Addressing Regulation Through Litigation: Some Solutions to Government Sponsored Lawsuits*, 3 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, Apr. 2002, at 109, 109; Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215 (2001).

<sup>7</sup> See *infra* Part II.A.

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> See *infra* Part II.A.

<sup>11</sup> See *infra* Part IV.

<sup>12</sup> See *infra* notes 179–84 and accompanying text.

government regulation and the litigation system often occurs under the legal term “preemption”: has the government preempted private lawsuits?<sup>13</sup> The public policy battle, however, is deeper than judicial attempts to discern whether preemption by congressional intent has, in fact, occurred. This Article probes beyond the question of fathoming congressional intent; it will examine whether the government’s regulatory action is undermined by the tort litigation system and, if so, what may be done to neutralize that effect.

Finally, the Article will examine a practice in which government regulatory agencies and private litigants each rebel against the traditional functioning of their respective system. This occurs when private plaintiffs team up with a regulatory agency to circumvent both the regulatory development and review process and the adversarial litigation process.<sup>14</sup> Federal agencies use litigation “settlements” to accelerate rulemaking procedures or even make new substantive law without adhering to required checks on government regulation, such as in the Administrative Procedure Act<sup>15</sup> and Office of Management and Budget oversight.<sup>16</sup> Instead, the government and private litigants, supposed adversaries in litigation, enter into a settlement and act as allies who share an interest in accelerating the development of new regulations and skirting regulatory procedures. Such actions have been labeled “sue and settle.”<sup>17</sup> This Article examines how and whether this conflict within the systems themselves should be resolved.

In each of the four scenarios, the Article concludes that judges offer the principal means by which to harmonize government regulation and private litigation. It is, therefore, imperative that judges understand how these conflicts can develop and what may be done to diffuse them. Just as judges are called upon to serve as “gatekeepers” in disputes among private parties,<sup>18</sup> they must

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<sup>13</sup> See Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TUL. L. REV. 1203, 1207–11 (2010) (discussing preemption cases involving federal safety regulations).

<sup>14</sup> See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Appeals Court Rebuffs Federal Agency’s Attempt at Sue and Settle Regulation*, 22 LEGAL OPINION LETTER (Wash. Legal Found., Washington, D.C.), July 19, 2013, at 1.

<sup>15</sup> See Pub. L. No. 79–404, 60 Stat. 237 (1946).

<sup>16</sup> See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999); Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 18, 2001); Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011); see also *Office of Information and Regulatory Affairs*, WHITE HOUSE OFFICE OF MGMT. AND BUDGET, [http://www.whitehouse.gov/omb/infoereg\\_default](http://www.whitehouse.gov/omb/infoereg_default) (last visited May 13, 2014) (discussing oversight responsibilities).

<sup>17</sup> See, e.g., *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COMMERCE (May 13, 2014, 12:30 PM), <http://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors>.

<sup>18</sup> See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); see also Victor

also act as “peacemakers” when the government regulatory system and the private litigation system work at cross-purposes.

# I. THE CLASH BETWEEN GOVERNMENT REGULATION AND PRIVATE LITIGATION OVER WHETHER TO REGULATE AN ACTIVITY

There has been a continued effort by certain ideological groups, and some members of the plaintiffs’ bar, to have courts use private tort litigation to regulate industry either where the government has chosen not to do so or where more forceful regulation is desired.<sup>19</sup> A court cannot directly “regulate” an activity, but through massive liability exposure, a court can effectively force an industry into settlement, and in that settlement, the industry “agrees” to significant self-regulation. Hence, in the end, *de facto* regulation is accomplished through litigation, and absent government involvement.

In modern times, regulation through litigation began with litigation against the tobacco industry.<sup>20</sup> In response to the federal government’s longstanding decision not to regulate tobacco products, and decades of unsuccessful private litigation against tobacco product manufacturers, a number of state attorneys general joined together with members of the plaintiffs’ bar in the 1990s to sue the tobacco industry.<sup>21</sup> They alleged a novel liability theory, which sought recovery on behalf of a state’s residents, of funds expended through the state’s Medicaid program on tobacco-related diseases.<sup>22</sup> Ultimately, forty-two state attorneys general joined together to bring such litigation and effectively forced the tobacco industry to negotiate a settlement worth over \$200 billion in 1998.<sup>23</sup>

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E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 221–24 (2006) (discussing court’s gatekeeping function).

<sup>19</sup> See Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 VAL. U. L. REV. 369, 379–80 (2012) [hereinafter Schwartz et al., *Tools for Regulating*] (discussing basis of climate change litigation); Victor E. Schwartz, Phil Goldberg, & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 WAKE FOREST L. REV. 923, 938–49 (2009) [hereinafter Schwartz et al., *New Tort Duty*] (discussing legal theories used in attempts at regulation through litigation).

<sup>20</sup> See W. Kip Viscusi & Joni Hersch, *Tobacco Regulation Through Litigation* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 15422, 2009).

<sup>21</sup> See Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smothers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1086–95 (2010) (discussing the “waves” of tobacco litigation leading up to the tobacco Master Settlement Agreement); see also James A. Henderson, Jr. & Aaron D. Twerski, *Reaching Equilibrium in Tobacco Litigation*, 62 S.C. L. REV. 67 (2010).

<sup>22</sup> See Traylor, *supra* note 21, at 1093.

<sup>23</sup> See Susan Beck, *The Lobbying Blitz over Tobacco Fees: Lawyers Went All Out in*

The tobacco litigation has proven to be the pinnacle of regulation through litigation.<sup>24</sup> As part of its Master Settlement Agreement (MSA), the tobacco industry agreed not only to make substantial payments to states, but also agreed to a wide variety of self-regulatory activities, including some that may have waived First Amendment rights to freedom of speech.<sup>25</sup> For instance, the industry was prohibited under the MSA from advertising directly to the youth population, advertising on any outdoor billboards, and advertising on signs and placards in arenas, shopping malls, arcades, or on transit systems.<sup>26</sup> Payments collected under the MSA were also intended to be used to fund mass anti-smoking campaigns; the industry basically agreed to fund efforts to reduce the sale of its products.<sup>27</sup> Interestingly, many of the funds collected were not used for this perceived purpose or in relation to tobacco-related illnesses, but instead to help states balance their general budgets.<sup>28</sup>

Whether tobacco industry regulation through litigation accomplished its goals, other than the large transfer of funds from the industry to states and private attorneys, will be left for history to decide. Today, the government, under the Food and Drug Administration (FDA), does regulate tobacco, and conflicts between the goals of the regulatory system and the private litigation system appear to have been resolved.<sup>29</sup>

The precedent set by the litigation against “Big Tobacco,” however, has fueled other attempts to regulate industry in place of regulatory agencies. For example, litigation has included efforts to regulate guns, lead paint, greenhouse gases, “junk food,” and, most recently, food ingredients. The ongoing question

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*Pursuit of Their Cut of a Historic Settlement. And the Arbitrators Went Along*, LEGAL TIMES, Jan. 6, 2003, at 1 (estimating tobacco settlement at \$246 billion); W. KIP VISCUSI, SMOKE-FILLED ROOMS: A POST-MORTEM ON THE TOBACCO DEAL 41–44 (2002) (stating that most reports value the tobacco Master Settlement Agreement at \$206 billion through 2023, but that the actual value through 2023 is slightly more than \$211 billion).

<sup>24</sup> See Schwartz et al., *New Tort Duty*, *supra* note 19, at 924–27.

<sup>25</sup> See F. A. Sloan, C. A. Mathews & J. G. Trogon, *Impacts of the Master Settlement Agreement on the Tobacco Industry*, 13 TOBACCO CONTROL 356, 356 (2004); *Master Settlement Agreement*, STATE OF CAL. DEP’T OF JUSTICE OFFICE OF THE ATTORNEY GEN., <http://oag.ca.gov/tobacco/msa> (last visited May 13, 2014).

<sup>26</sup> See Traylor, *supra* note 21, at 1096–1101 (discussing the economic and regulatory provisions of the tobacco Master Settlement Agreement).

<sup>27</sup> See *id.*; see also Sloan et al., *supra* note 25, at 358–59.

<sup>28</sup> See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 734 (2011) (“Though the money was intended for health- and smoking-related initiatives, several states announced that they would use it to balance their general budgets.”); Shaila Dewan, *States Look at Tobacco to Balance the Budget*, N.Y. TIMES, Mar. 20, 1999, at A9.

<sup>29</sup> See *Tobacco Products, Product Requirements Marketing & Labeling*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., <http://www.fda.gov/TobaccoProducts/Labeling/default.htm> (last updated Oct 2, 2013); see also B. Ashby Hardesty, Jr., *Joe Camel Versus Uncle Sam: The Constitutionality of Graphic Cigarette Warnings Labels*, 81 FORDHAM L. REV. 2811 (2013).

focuses on the true value of regulation through litigation and whether the clash of goals between government and private litigation is in the public's interest.

### A. Regulation Through Litigation Attempts Targeting Industry

#### 1. Gun Manufacturers

Following the economic success of the tobacco litigation, enterprising plaintiffs' counsel quickly turned their sights on other "unpopular" industries, believing a similar model could be used to effectuate regulation.<sup>30</sup> Among the first targets were gun manufacturers.<sup>31</sup> The theory developed for this pursuit alleged that although guns, like cigarettes, were a lawful product, the marketing and distribution practices and policies of the gun manufacturers facilitated the illegal secondary market for firearms, thereby interfering with the public health of the community.<sup>32</sup> This interference, plaintiffs argued, constituted a "public nuisance" and entitled public and private parties to injunctive relief and damages.<sup>33</sup>

In making such a claim, plaintiffs sought to dramatically expand the traditional boundaries of public nuisance law.<sup>34</sup> Most courts, however, were unwilling to oblige.<sup>35</sup> For example, the Illinois Supreme Court, in a pair of decisions, rejected public nuisance claims brought by both public and private plaintiffs against gun manufacturers.<sup>36</sup> The court specifically found that "there is no authority for the unprecedented expansion of the concept of public rights" asserted in plaintiffs' public nuisance liability theory, and that "there are strong public policy reasons to defer to the legislature in the matter of regulating the

<sup>30</sup> See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 555–57 (2006).

<sup>31</sup> See David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1172 (2000) (stating that although tobacco public-nuisance claims "never [won] in court," they were a "vehicle for settlement" and a model for gun suits).

<sup>32</sup> See Schwartz & Goldberg, *supra* note 30, at 555–57.

<sup>33</sup> See *id.*

<sup>34</sup> As the Illinois Supreme Court stated in dismissing a suit against gun manufacturers, "[p]laintiffs concede that their public nuisance claim, based on the alleged effects of defendants' lawful manufacture and sale of firearms outside the city and the county, would extend public nuisance liability further than it has been applied in the past." *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1118 (Ill. 2004).

<sup>35</sup> See, e.g., *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 115 (Conn. 2001); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d at 1148; *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 203 (App. Div. 2003).

<sup>36</sup> See *Beretta*, 821 N.E.2d at 1112; *Young v. Bryco Arms*, 821 N.E.2d 1078, 1083 (Ill. 2004).



manufacture, distribution, and sale of firearms.”<sup>37</sup> The court further concluded that any change affecting the gun industry’s liability “must be the work of the legislature, brought about by the political process, not the work of the courts.”<sup>38</sup>

Other courts have reached the same conclusion.<sup>39</sup> No court has allowed such an action to proceed to a jury; a result cemented, in part, by Congress’s 2005 enactment of the Protection of Lawful Commerce in Arms Act, which legislatively bars lawsuits against gun makers related to gun crime.<sup>40</sup> Accordingly, the effort to regulate the manufacture of firearms through the imposition of tort liability has failed. Nevertheless, this setback has not deterred plaintiffs’ lawyers, state attorneys general, and other groups from following the tobacco regulation through litigation blueprint in other areas.

## 2. Lead Paint

Around the same time lawsuits were being brought against gun makers to bring about more forceful gun regulation, enterprising plaintiffs’ lawyers and some state attorneys general partnered to sue former makers of lead paint and pigments.<sup>41</sup> The liability theory here, similar to the litigation against gun makers, was that the mere presence of lead paint in homes and buildings constituted a “public nuisance.”<sup>42</sup> Lawsuits sought damages for the cost of abating lead paint in homes and buildings throughout a state, county, or municipality.<sup>43</sup> Thus, the lawsuits sought to push the scope of public nuisance law into new territory—namely the manufacture and sale of products—and remedy a broader range of product-related injuries than available under traditional products liabil-

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<sup>37</sup> *Beretta*, 821 N.E.2d at 1116, 1121.

<sup>38</sup> *Id.* at 1148.

<sup>39</sup> See e.g., *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d at 421; *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d at 540; *Penelas*, 778 So. 2d at 1045; *Ganim*, 780 A.2d at 115; *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d at 1148; *Spitzer*, 761 N.Y.S.2d at 203.

<sup>40</sup> Pub. L. No. 109-92 (2005) (codified at 15 U.S.C. §§ 7901–7903, 18 U.S.C. §§ 922, 924).

<sup>41</sup> See Schwartz et al., *New Tort Duty*, *supra* note 19, at 943–45 (discussing lead paint litigation); see also Carolyn Barta, *Cities Look to Courts in Fight Against Gun-Related Crimes; Both Sides Call Issue of Firearm Suits the ‘Next Tobacco’*, DALLAS MORNING NEWS, June 6, 1999, at 1A.

<sup>42</sup> See Schwartz et al., *New Tort Duty*, *supra* note 19, at 943–45. The lawsuits alleged that the presence of lead paint in older homes, when allowed to chip from poor maintenance, was a health hazard for small children who might eat those paint chips. See, e.g., *State v. Lead Indus. Ass’n*, No. 99-5226, 2001 WL 345830, at \*6 (R.I. Super. Apr. 2, 2001).

<sup>43</sup> See, e.g., *State v. Lead Indus. Ass’n*, 951 A.2d 428 (R.I. 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of Chi. v. Am. Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999); *City of Toledo v. Sherwin-Williams Co.*, No. G-4801-CI-200606040-000 (Ohio Ct. Com. Pl. Dec. 12, 2007).

ity law.<sup>44</sup>

Perhaps the most high profile of the lead paint cases involved a partnership between the Rhode Island Attorney General and the law firm Motley Rice. This lawsuit sought abatement costs, estimated at nearly \$4 billion, for homes and buildings throughout Rhode Island.<sup>45</sup> At the trial court level, the case ended in a verdict for the state,<sup>46</sup> but the Rhode Island Supreme Court reversed that decision and dismissed the lawsuit.<sup>47</sup> In reaching this decision, the state high court explained that “public nuisance law simply does not provide a remedy for this harm”<sup>48</sup> and that “[t]he law of public nuisance never before has been applied to products, however harmful.”<sup>49</sup> The court also stated that although the state General Assembly had recognized that lead paint created a public health hazard, it adopted several statutory schemes to address the problem, none of which authorized the type of action brought by the state on behalf of its residents.<sup>50</sup> Therefore, the court made clear that any change permitting industry-wide liability must come from the legislature, not the courts.

Courts in other states, including the state Supreme Courts of Missouri and New Jersey, have also rejected these lawsuits.<sup>51</sup> Overall, the attempt to impose more forceful regulation on paint and pigment companies in place of the legislature has failed. Still, this setback has not deterred plaintiffs’ lawyers, state attorneys general, and other groups from continuing to follow the tobacco regulation blueprint through litigation blueprint in other areas.

### 3. Greenhouse Gas Emitters

In the early 2000s, as lawsuits were being pursued against the gun and paint industries, some environmentalists, frustrated with the pace at which the federal government was addressing climate change, partnered with plaintiffs’ lawyers and state attorneys general to target emitters of greenhouse gases (GHGs).<sup>52</sup> Even though GHGs are emitted by a myriad of natural sources, including

<sup>44</sup> See Schwartz et al., *New Tort Duty*, *supra* note 19, at 943–45.

<sup>45</sup> See Petition for Writ of Certiorari ¶ 1, *State v. Lead Indus. Ass’n*, No. 99-5226 (R.I. Super. Ct. Mar. 2, 2004); Edward Fitzpatrick, *Paint Maker Seeks Ruling on Judge in Lead Case*, PROVIDENCE J., Aug. 19, 2005, at B1.

<sup>46</sup> See Peter B. Lord, *Three Companies Found Liable in Lead-Paint Nuisance Suit*, PROVIDENCE J., Feb. 23, 2006, at A1.

<sup>47</sup> *Lead Indus. Ass’n*, 951 A.2d at 435–36.

<sup>48</sup> *Id.* at 436.

<sup>49</sup> *Id.* at 456.

<sup>50</sup> *Id.* at 457–58; see also *In re Lead Paint Litig.*, 924 A.2d 484, 487 (N.J. 2007) (providing that tort action “would be directly contrary to legislative pronouncements governing both lead paint abatement programs and products liability claims”).

<sup>51</sup> See *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 112–13 (Mo. 2007); *In re Lead Paint Litig.*, 924 A.2d at 487.

<sup>52</sup> See Schwartz et al., *Tools for Regulating*, *supra* note 19, at 379–80.

human breathing,<sup>53</sup> these groups resolved to hand-pick specific GHG emitters among the nation's largest utility, energy, and automobile companies to name as defendants in litigation.<sup>54</sup> These plaintiffs relied upon another expansive public nuisance theory; that the selected companies engaged in operations or made products that contributed to the build-up of GHGs in the atmosphere, causing the earth to warm, thereby creating the public nuisance of global climate change.<sup>55</sup> The real objective of these lawsuits, as the lawyers bringing these suits acknowledged,<sup>56</sup> was to force companies to lower their GHG emissions under the threat of massive tort liability, and impose emission standards in place of Congress and regulators.

In all, four major climate change tort actions have been brought, and each has ultimately been rejected or withdrawn.<sup>57</sup> Tellingly, courts at every level of the federal judiciary have rejected these claims. For example, the first climate

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<sup>53</sup> See *Overview of Greenhouse Gases*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/ghgemissions/gases/co2.html> (last visited May 14, 2014) ("Carbon dioxide is constantly being exchanged among the atmosphere, ocean, and land surface as it is both produced and absorbed by many microorganisms, plants, and animals.").

<sup>54</sup> See Schwartz et al., *Tools for Regulating*, *supra* note 19, at 382–86 (discussing the four major climate change cases).

<sup>55</sup> See, e.g., *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005) (internal quotation marks omitted) (noting that allegations for common law public nuisance were attributed to global warming which will allegedly cause irreparable harm to citizens and the environment).

<sup>56</sup> See, e.g., Robert Meltz, *Climate Change Litigation: A Growing Phenomenon*, CRS REPORT, RL 32764 (Cong. Research Serv., Washington, D.C.), April 7, 2008, at 1 ("Many proponents of litigation or unilateral state action freely concede that such initiatives are make-do efforts that, while making a small contribution to mitigating climate change, are also aimed at prodding the national government to act."); Daniel A. Farber, *Tort Law in the Era of Climate Change, Katrina, and 9/11: Exploring Liability for Extraordinary Risks*, 43 VAL. U. L. REV. 1075, 1091 (2009) ("Climate change litigation of various kinds is clearly on the rise, and the trend is to hold that potential damage from climate change is a legally cognizable injury."); Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 339 (2005) (quoting Connecticut Attorney General Richard Blumenthal, the lead attorney general in the first joint climate-change action, that the lawsuit was based on a "gut feeling [and] emotion, that CO2 pollution and global warming were problems that needed to be addressed," and they were "brainstorming about what could be done" because action "wasn't coming from the federal government").

<sup>57</sup> See *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013); *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007), *rev'd*, 585 F.3d 855 (5th Cir. 2009), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

change tort case, *American Electric Power Co. (AEP) v. Connecticut*,<sup>58</sup> reached the U.S. Supreme Court. In a unanimous decision, the Court stated that the judiciary is not the appropriate forum to set GHG emission limits on an *ad hoc* case-by-case basis.<sup>59</sup> Here, the Court rejected a lawsuit brought by eight state attorneys general, the City of New York, and several land trusts against private and public energy companies, claiming a federal common law right of action associated with the public nuisance of global climate change.<sup>60</sup> The Court held that the appropriate path for regulating GHG emissions is through the Environmental Protection Agency (EPA) pursuant to congressional authority, and that, through the Clean Air Act, Congress had displaced any federal common law action seeking to limit GHG emissions.<sup>61</sup> The Court went further, though, and issued a broad warning against global climate change litigation, saying the judiciary, given its limited tools, does not have the institutional competence to determine “[t]he appropriate amount of regulation” for sources of GHGs given the impact such a decision would have on America’s energy needs.<sup>62</sup>

Other courts have relied upon both the letter and spirit of the Supreme Court’s decision in *AEP* to reject climate change tort cases.<sup>63</sup> This litigation represents yet another failed effort, at least so far, to regulate select industries through broad and open-ended tort liability exposure.

#### 4. Food Producers

A final example of attempted regulation through litigation involves the food industry. Beginning in the early 2000s, plaintiffs’ lawyers seeking to identify the “next tobacco” teamed up with self-described consumer groups to tackle the epidemic of obesity through targeted lawsuits against purveyors of “junk food.”<sup>64</sup> In one of the early lawsuits, *Pelman v. McDonald’s Corp.*,<sup>65</sup> plaintiffs

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<sup>58</sup> 131 S. Ct. 2527 (2011).

<sup>59</sup> *Id.* at 2539.

<sup>60</sup> *Id.* at 2533–34.

<sup>61</sup> *Id.* at 2538–39. Before the *AEP* decision, the Court, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), held that the Clean Air Act authorized the EPA to regulate emissions of four gases commonly characterized as GHGs, and that EPA arbitrarily abdicated its statutory authority to do so in denying rulemaking. *See id.* at 534.

<sup>62</sup> *Am. Elec. Power Co.*, 131 S. Ct. at 2539.

<sup>63</sup> *See Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 460 (5th Cir. 2013); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 849 (9th Cir. 2012); *see also* Christopher E. Appel, *Time for Climate Change Tort Litigation to Cool Off Permanently*, ENVIRONMENTAL REPORT (Bloomberg BNA) Nov. 20, 2012, at B-1.

<sup>64</sup> *See* Joshua Pennel, *Big Food’s Trip Down Tobacco Road: What Tobacco’s Past Can Indicate About Food’s Future*, 27 BUFF. PUB. INT. L.J. 101 (2009); John J. Zefutue, Jr., *From Butts to Big Macs: Can the Big Tobacco Litigation and Nation-wide Settlement with States’ Attorneys General Serve As a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383 (2004); *see also* Stephanie Strom, *Lawyers From Suits Against Big Tobacco Target Food Makers*, N.Y. TIMES, Aug. 18, 2012.

alleged that McDonalds and other fast food companies were responsible for customer weight gain and health conditions under New York's Consumer Protection Act<sup>66</sup> for creating a "false impression that [their] food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily."<sup>67</sup> The lawsuit was eventually dismissed, but not before causing roughly half of the states to enact legislation banning obesity-related lawsuits.<sup>68</sup>

Neither rejection of the *Pelman* case nor legislatively enacted barriers, however, stopped litigation against food producers. Litigation, for example, was brought under Massachusetts's consumer protection law against soda manufacturers, alleging the companies sold soda to children knowing that it is dangerous to their health and contributes to obesity.<sup>69</sup> Under the threat of litigation that would quickly expand to other states, the soft drink makers agreed to remove regular soda from school vending machines and sell only sports drinks and diet soda.<sup>70</sup> Thus, the litigation was successful in achieving self-regulation by these defendants, even though it is clear that their product is only one of many that may contribute to obesity.

The effectiveness of this litigation and others<sup>71</sup> has fueled a new wave of lawsuits against food producers.<sup>72</sup> A common characteristic of the more recent

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<sup>65</sup> 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (*Pelman I*).

<sup>66</sup> N.Y. GEN. BUS. LAW § 349 (McKinney 2013).

<sup>67</sup> *Pelman v. McDonald's Corp.*, 396 F.3d 508, 510 (2d Cir. 2005) (*Pelman III*). *Pelman* was initially dismissed. *Pelman I*, 237 F. Supp. 2d at 543. An amended complaint was re-filed and dismissed. *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778, at \*15 (S.D.N.Y. Sep. 3, 2003) (*Pelman II*). The U.S. Court of Appeals vacated the court's dismissal and remanded the case. *Pelman III*, 396 F.3d at 508; *see also Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439, 446 (S.D.N.Y. 2005) (*Pelman IV*); *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320, 328 (S.D.N.Y. 2006) (*Pelman V*).

<sup>68</sup> *See, e.g.*, FLA. STAT. § 768.37 (2004); GA. CODE ANN. § 26-2-432 (West 2004); KY. REV. STAT. ANN. § 411.610 (West 2005); LA. REV. STAT. ANN. § 9:2799.6 (2003); MICH. COMP. LAWS ANN. § 600.2974 (West 2004); OHIO REV. CODE ANN. § 2305.36 (West 2004).

<sup>69</sup> *See, e.g.*, Michael Blanding, *Hard on Soft Drinks*, BOSTON GLOBE, Oct. 30, 2005; Caroline E. Mayer, *Lawyers Ready Suit Over Soda*, WASH. POST, Dec. 2, 2005.

<sup>70</sup> *See* Chris Mercer, *Lawsuit Pressure Brings School Soft Drink Deal*, BEVERAGE DAILY, May 4, 2006.

<sup>71</sup> *See, e.g.*, Final Approval Order & Judgment, In re Nutella Mktg. & Sales Prac. Litig., No. 3:11-cv-01086-FLW-DEA (D. N.J. July 31, 2012) (establishing a \$2.5 million fund for customers misled in advertising that Nutella can be part of a healthy breakfast); Laura Northrop, *There's Actually A Settlement In Nutella 'Health Food' Class Action Lawsuit*, CONSUMERIST (Apr. 26, 2012), <http://consumerist.com/2012/04/26/theres-actually-a-settlement-in-nutella-health-food-class-action-lawsuit/> (providing embedded video of advertisement).

<sup>72</sup> *See, e.g.*, Glenn G. Lammi, *Who's Filling the 'Food Court' with Lawsuits: Consumers or Lawyers?*, FORBES (July 22, 2013), [www.forbes.com/sites/wif/2013/07/22/whos-filling-the-food-court-with-lawsuits-consumers-or-lawyers](http://www.forbes.com/sites/wif/2013/07/22/whos-filling-the-food-court-with-lawsuits-consumers-or-lawyers/); *see also* Jessica Dye, *Food Companies Confront Spike in Consumer Fraud Lawsuits*, THOMSON REUTERS NEWS & INSIGHT, June 13, 2013; Vanessa Bloom, *Welcome to Food Court*, RECORDER, Mar. 1, 2013.

cases is to use litigation or the threat of litigation to effectively regulate the ingredients of a food product.<sup>73</sup> For example, recent lawsuits attempt to exploit the absence of federal regulation defining what qualifies as an “all natural” product.<sup>74</sup> Plaintiffs’ lawyers have filed dozens of claims against makers of ice tea, chips, soup, ice cream, canned tomatoes, frozen vegetables, cooking sprays, cocoa, nutrition bars, and cereal on this basis.<sup>75</sup> Many of these lawsuits claim that it is deceptive to advertise a product as “natural” if it may contain genetically modified ingredients.<sup>76</sup> Since genetically modified ingredients are commonplace in processed foods that contain corn, soy, beets, or canola, the number of potential lawsuits could be staggering and lead to *de facto* regulation of food ingredients in place of the FDA and other federal agencies.

It is premature to state whether this latest wave of lawsuits against food producers will be successful or meet the same fate as other regulation through litigation attempts. Indeed, several of the examples discussed previously involving other industries experienced early victories, only to be rejected by courts in the end.<sup>77</sup> The public policy question remains whether it is appropriate and in the public’s interest to address through litigation the potentially harmful

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<sup>73</sup> See Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the ‘Food Court’: An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, BLOOMBERG LAW, August 8, 2013.

<sup>74</sup> An illustration of this effort involves a coalition of plaintiffs’ law firms filing “all natural” lawsuits against Kashi, Ben & Jerry’s, Dreyer’s Grand Ice Cream, and Hain Celestial Group Inc. using the same named representative plaintiff, Skye Astiana, *see* *Astiana v. Hain Celestial Group Inc.*, 905 F. Supp. 2d 1013 (N.D. Cal. 2012); Complaint, *Sethavanish v. Kashi Co.*, 11-cv-2356 (S.D. Cal. Oct. 12, 2011); Complaint, *Astiana v. Dreyer’s Grand Ice Cream Inc.*, No. 3:11-cv-02910 (N.D. Cal., June 14, 2011); Complaint, *Astiana v. Ben & Jerry’s Homemade, Inc.*, No. cv-10-4387 (N.D. Cal., Sept. 29, 2010).

<sup>75</sup> See, e.g., *Splate of Consumer-Fraud Lawsuits Filed Against Kellogg Over ‘Real Fruit’ Claims*, FOOD & BEVERAGE LITIG. UPDATE (Shook, Hardy & Bacon, L.L.P. Kan. City, Mo.), June 21, 2013, at 5, available at <http://www.shb.com/newsletters/FBLU/FBLU488.pdf>; *Suit Over Fruit Content Of General Mills Snacks to Proceed*, CHI. TRIB., May 11, 2012, [http://articles.chicagotribune.com/2012-05-11/business/chi-suit-over-fruit-content-of-general-mills-snacks-to-proceed-20120511\\_1\\_general-mills-fruit-roll-ups-snacks](http://articles.chicagotribune.com/2012-05-11/business/chi-suit-over-fruit-content-of-general-mills-snacks-to-proceed-20120511_1_general-mills-fruit-roll-ups-snacks); Rosie Mestel, *GMO Latest: Goldfish Crackers Lawsuit Over ‘Natural’ Claim*, L.A. TIMES, Nov. 15, 2012, <http://articles.latimes.com/2012/nov/15/news/la-heb-goldfish-crackers-gmo-lawsuit-20121115>; Erin Fuchs, *Kellogg Tries To Shake Fight Over Nutrition Claims*, LAW360, Sept. 20, 2011, <http://www.law360.com/articles/272579/kellogg-tries-to-shake-fight-over-nutrition-claims>.

<sup>76</sup> See, e.g., Mestel, *supra* note 75 (discussing lawsuit seeking upwards of \$5 million against Pepperidge Farm claiming Goldfish crackers containing ingredients derived from genetically engineered soybeans are not “natural”).

<sup>77</sup> See Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 555–61 (2006) (discussing early successes in firearms and lead paint litigation); Schwartz et al., *Tools for Regulating*, *supra* note 19, at 382–86 (discussing early successes in climate change litigation).

effects of food products, such as weight gain and obesity, or regulate the use of certain food ingredients in place of federal regulators.

#### B. *Why Courts Should Continue to Reject Regulation Through Litigation*

The examples given show that regulation through litigation, in most instances, has been a failed social experiment. Courts, in general, have recognized that the practice undercuts the basis of the American democratic system of government.<sup>78</sup> For instance, the practice may effectively circumvent existing regulations that have been carefully put in place, as seen in the lead paint example.<sup>79</sup> Regulation through litigation may also effectively overrule Congress's clear intent not to restrict an activity, as seen in the GHG example,<sup>80</sup> whereby prior to the litigation, Congress consistently rejected proposals that would impose limits on GHG emissions.<sup>81</sup> The American system of government is based on the principle that if the executive or legislative branches fail to act on an important public policy issue, corrective action may be found through the ballot box.<sup>82</sup> The functioning of this system should not be overcome based on the whims of ideological groups, state attorneys general, and plaintiffs' lawyers, especially where these entities could hand-pick the parties or industries responsible for a larger societal concern.

In addition, as the judiciary itself has recognized, courts are not an appropriate mechanism for establishing industry regulations. First, courts are not politically responsive institutions. The civil judicial system is designed to compensate people who have been wrongfully injured by another's conduct;<sup>83</sup> its purpose is not to supplant the administrative and legislative branches of government through regulation.<sup>84</sup> Those branches have the opportunity to see beyond the merits of an individual case, and assess the impact of a rule on society

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<sup>78</sup> See *supra* Part I. Robert Reich, who is often credited with coining the term "regulation through litigation," has stated that these lawsuits are "faux legislation, which sacrifices democracy." Reich, *supra* note 6, at A22.

<sup>79</sup> See *supra* Part I.A.(2).

<sup>80</sup> See *supra* Part I.A.(3).

<sup>81</sup> See Schwartz et al., *Tools for Regulating*, *supra* note 19, at 373–76 (discussing history of climate change initiatives); see also S. Res. 98, 105th Cong. (1997) *supra* Part I.A.(3) (expressing unanimous sense of the Senate that the United States should not be a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change).

<sup>82</sup> See *supra* note 6.

<sup>83</sup> See DAN B. DOBBS, *THE LAW OF TORTS* § 9, at 14 (2000) (characterizing the principal goal of tort law as "righting wrong"); Schwartz et al., *supra* note 3, at 1–2.

<sup>84</sup> See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914 (2008); see also ANDREW P. MORRIS, BRUCE YANDLE & ANDREW DORCHAK, *REGULATION BY LITIGATION* 1 (2009); DANIEL P. KESSLER, Introduction, in *REGULATION VERSUS LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW* 3 (Daniel P. Kessler ed., 2011).

itself.<sup>85</sup> These impacts may be profound and affect the national economy, the health of American citizens, and people's freedom to choose what goods and services they wish to purchase.

For example, as the U.S. Supreme Court explained when rejecting public nuisance claims related to the emission of GHGs, "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."<sup>86</sup> Judges are instead "confined by a record comprising the evidence the parties present," and "may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators" that would facilitate balanced, comprehensive treatment of important public policy issues.<sup>87</sup>

There is no doubt that regulation through litigation has its attractions. For some with strong ideological beliefs, ideas rejected by elective bodies can rise again through the threat of massive liability exposure. But allowing these unelected groups to effectively set federal policy is not in the public's interest. Judges attuned to this truth can promote harmony, not war, between the government regulatory system and private litigation system by continuing to reject regulation through litigation in all its forms.

## II. THE CLASH BETWEEN GOVERNMENT REGULATION AND PRIVATE LITIGATION WHERE FOLLOWING THE LAW CREATES LIABILITY EXPOSURE FOR THE REGULATED ENTITY

When federal and state regulatory agencies act, their attention is focused on the regulatory mission at hand. Discussion regarding potential tort liability exposure may or may not enter that process. For instance, in developing water safety standards, the EPA will focus on protecting the environment, and may not concern itself with the economic burdens or other potential impacts on every entity that must follow a new requirement. Actions by federal and state agencies usually are within the scope of their defined mission, and the impacts of new rules clear, but on occasion, agencies may "push the envelope" with controversial decisions that may be beyond the scope of their authorized mission. In these instances, an unintended adverse scenario may unfold: if the regulated industry complies with the new mandate, it may expose itself to liability under tort or other bodies of law.

This Article considers two examples of this phenomenon at the federal level. One involves the Federal Mine Safety and Health Administration (MSHA) and

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<sup>85</sup> See KESSLER, *supra* note 84, at 3.

<sup>86</sup> *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539–40 (2011).

<sup>87</sup> *Id.* at 2540. The Court additionally recognized that "federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court." *Id.*



the other the Equal Employment Opportunity Commission (EEOC).<sup>88</sup> In both cases, compliance with federal regulations or guidelines threatens to create new tort liability. The regulatory system is thus at war with the private litigation system, and the casualties are the regulated entities.

A. *MSHA Disclosure Requirement May Trigger Privacy-Related Tort Suits*

Under the Federal Mine Safety and Health Act of 1977,<sup>89</sup> the Secretary of Labor is responsible for protecting the health and safety of the nation's miners.<sup>90</sup> MSHA implements this mission and requires mine operators to report all mine related injuries and illnesses suffered by mine employees.<sup>91</sup> If mine operators fail to comply with MSHA's reporting regulations, they are subject to penalty.<sup>92</sup> This policy has existed for years,<sup>93</sup> but in 2010, MSHA decided to "push the envelope" and require mine operators to provide private health records of employees at thirty-nine mines as part of MSHA's regular audit program.<sup>94</sup> This agency demand was not accompanied by any allegations that the mines had failed to comply with their reporting obligations or any factual basis showing insufficient workplace safety practices at the mines.<sup>95</sup>

Both mine workers and mine operators objected to this requirement.<sup>96</sup> Mine workers did not want what might be embarrassing details of their personal health records, including their families' physical and mental illnesses, handed over to the federal government.<sup>97</sup> These records are generally protected by a number of federal laws, including the Health Insurance Portability and Accountability Act, the Family Medical Leave Act, and the Americans with Disa-

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<sup>88</sup> See Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *A Hazardous Precedent: Federal Agency Proposal Targets Workers' Private Health Insurance*, 21 LEGAL OPINION LETTER (Wash. Legal Found., Washington, D.C.), Aug. 3, 2012.

<sup>89</sup> Pub. L. No. 95-164 (codified at 30 U.S.C. §§ 801-966 (2012)).

<sup>90</sup> See 30 U.S.C. § 811; see also *Mine Safety and Health Administration—Protecting Miners' Safety and Health Since 1978*, U.S. DEPT. OF LABOR, <http://www.msha.gov/> (last visited May 14, 2014).

<sup>91</sup> See *MSHA Summary Fatal Accidents with Preventative Recommendations*, U.S. DEPT. OF LABOR, <http://www.msha.gov/fatals/summaries/summaries.asp> (last visited May 14, 2014) (reporting mining death statistics for the first half of 2013).

<sup>92</sup> See 30 U.S.C. § 814(b); see also 30 C.F.R. § 50.41 (2014).

<sup>93</sup> See 30 C.F.R. § 50.41.

<sup>94</sup> See *Big Ridge, Inc. v. Sec'y of Labor*, Nos. LAKE 2011-118-R, LAKE 2011-199-R 2012 WL 2069674, at \*3 (F.M.S.H.R.C. May 24, 2012), *aff'd*, 715 F.3d 631 (7th Cir. 2013).

<sup>95</sup> To the contrary, the mines were selected because "MSHA had determined, based on other data it collected, that these thirty-nine mines' Incidence Rates and Severity Measures were statistically lower than MSHA's calculations indicated they should be. MSHA suspected that the mines might be under-reporting injuries. . . ." *Big Ridge, Inc.*, 715 F.3d at 636 (emphasis added).

<sup>96</sup> See *Big Ridge, Inc.*, 2012 WL 2069674, at \*2.

<sup>97</sup> See *id.* at \*13-15.

bilities Act.<sup>98</sup> Mine workers also did not want records viewed by MSHA officials who might live and work in the same communities as the miners.<sup>99</sup> Mine operators shared these concerns and further objected because the new disclosure requirement threatened to impose unnecessary costs and potentially result in litigation by their employees angered by the release of such private information.<sup>100</sup>

In spite of these objections, MSHA went forward with the disclosure requirement, relying on its general oversight responsibility for mine operations and the reporting of workplace injuries.<sup>101</sup> The mine workers and operators joined together in a lawsuit against MSHA, alleging it exceeded its statutory authority.<sup>102</sup> The case was eventually heard by the United States Court of Appeals for the Seventh Circuit, which upheld MSHA's authority to issue the rule.<sup>103</sup>

In reaching this decision, however, the court recognized the sweeping nature of MSHA's request and the potential to "reveal employees' medical history unrelated to mine work."<sup>104</sup> The court also stated that "[a]ny scheme that puts those records in the hands of strangers, even a government agency, is a serious matter," and that "[t]he extent of the Fourth Amendment's protection in this area is not clear."<sup>105</sup>

In addition, when the case was previously reviewed by the Federal Mine Safety and Health Review Commission, several Commissioners voiced concerns that MSHA did not have privacy protections in place necessary for maintaining miner's personal health records.<sup>106</sup> Commissioner Duffy, for instance, opined that privacy protocols were constitutionally required, and that it was "fatal" to the MSHA rule's validity that protections were "not finalized and made public until the very eve of the hearings in these cases and was still undergoing public explanation and clarification during and after oral argument" before the Commission.<sup>107</sup> Nevertheless, a majority of the Commission con-

<sup>98</sup> See *id.* at \*20.

<sup>99</sup> See Schwartz, et al., *supra* note 88.

<sup>100</sup> See *id.*

<sup>101</sup> See *Big Ridge, Inc.*, 2012 WL 2069674, at \*3.

<sup>102</sup> See *id.*

<sup>103</sup> See *Big Ridge, Inc. v. Federal Mine Safety & Health Review Comm'n*, 715 F.3d 631, 636 (7th Cir. 2013).

<sup>104</sup> *Id.* at 648. As the court explained, "a doctor's slip might contain information about multiple conditions, including conditions unrelated to mine work. . . ." *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Commissioner Young, who supported MSHA's authority to pursue its initiative, said he was "disappointed" that MSHA would not talk with operators about the operators' "reasonable concerns." Schwartz et al., *supra* note 88, at 2. Commissioner Nakamura, who also sided with MSHA, called the initiative "haphazard," and commended the mines for forcing MSHA to "think harder" about the policy and appropriate privacy safeguards. Schwartz et al., *supra* note 88, at 2.

<sup>107</sup> *Big Ridge, Inc.*, 2012 WL 2069674, at \*22 (Commissioner Duffy, dissenting).

cluded that “the tardiness of the protections is insufficient to invalidate the audit initiative”;<sup>108</sup> a decision affirmed by the Seventh Circuit.

As a result of these rulings and compliance with MSHA’s employee health record disclosure requirement, the door may be open to privacy-related tort litigation against the regulated mine operators.<sup>109</sup> For example, a mine operator’s action in disclosing “too much” of an employee’s private health information—information unrelated to mine safety—might be used by enterprising plaintiffs’ lawyers as a basis for a lawsuit. The Seventh Circuit may have appreciated this risk, but did not address the issue directly. Rather, the court suggested that employers could protect employee privacy by “sort[ing] between relevant and irrelevant medical records,” reasoning further that this should not be burdensome for mine operators because they are “usually quite familiar with mine injuries and illnesses.”<sup>110</sup> The court appeared to ignore that an employer’s ferreting through an employee’s personal health records alone might prompt a tort lawsuit, regardless of whether the information is ultimately turned over to MSHA.<sup>111</sup>

In a nutshell, mine operators may face a no-win proposition: either fail to disclose the private employee information and be subject to penalty, or disclose the information and be subject to potential tort liability. While the mine operators might have potential defenses if a privacy-based tort action were brought, including compliance with existing government regulations, the operators, even if successful in that defense, would incur legal costs and possibly adverse publicity merely for complying with the law.

#### B. EEOC’s Guidance Creates a Liability Dilemma

A second illustration of compliance with federal requirements exposing entities to potential tort liability involves guidance issued by the EEOC to restrict employers from conducting criminal background checks on potential employees.<sup>112</sup> While this guidance is not technically a regulation, it has the same practical effect.<sup>113</sup> Courts, corporate counsel, and plaintiffs’ lawyers treat EEOC

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<sup>108</sup> *Id.* at \*15 n.17.

<sup>109</sup> See DOBBS, *supra* note 83, § 117, at 849 (discussing tort liability for invasion of another’s privacy interests); Schwartz et al., *supra* note 3, at 976 (discussing also tort liability for invasion of another’s privacy); see also Schwartz, et al., *supra* note 88.

<sup>110</sup> *Big Ridge, Inc.*, 715 F.3d at 647.

<sup>111</sup> See DOBBS, *supra* note 83, at 854 (discussing privacy related tort action for “unreasonable intrusion” on the solitude or seclusion of others).

<sup>112</sup> See *EEOC Enforcement Guidance*, U.S. EQUAL OPPORTUNITY EMP’T COMM’N (April 25, 2012), [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>113</sup> See Hans A. von Spakovsky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC’s New Employment “Guidelines,”* LEGAL MEMORANDUM (Heritage Found., Washington, D.C.), May 31, 2012, at 3–4; *Banning Background Checks*, WALL ST. J., June 14, 2013, <http://online.wsj.com/article/SB10001424127887324688404578543824103846736.html>.

guidance documents as a standard that American business must meet with respect to federal anti-discrimination employment law.<sup>114</sup>

The premise of this EEOC guidance was an assumption that because certain minority groups are arrested and convicted at a higher rate than whites, employer considerations of criminal backgrounds have a “disparate impact” on minorities, and, therefore, may violate Title 7 of the Civil Rights Act of 1964.<sup>115</sup> An example of this occurred in 2013 when the EEOC accused retailer Dollar General and a United States-based unit of the German carmaker BMW of employment discrimination because the companies used criminal background checks as part of their employment decisions.<sup>116</sup> The predicate for this action was that the use of criminal background checks disproportionately screened out African Americans from employment or resulted in disproportionate employee terminations, and was thus discriminatory.<sup>117</sup>

Regardless of the wisdom of the EEOC’s approach to addressing employment discrimination in this manner, which has been the subject of significant debate,<sup>118</sup> the guidance threatens to create a no-win or Catch-22 scenario for employers.<sup>119</sup> Not following the guidance and conducting criminal background checks could result in an employment discrimination action by the EEOC or a private individual whose employment has been rejected or terminated, while following the guidance and not conducting a criminal background check could result in claims for negligent hiring where someone is injured as a result of an employee’s conduct.<sup>120</sup> In either event, the result is potential liability exposure.

One does not have to rely on tort law hypotheticals either to recognize the potential liability facing companies that follow the EEOC guidance. In 2012, for instance, the Indiana Court of Appeals determined that a motel could be

<sup>114</sup> See *Banning Background Checks*, *supra* note 113.

<sup>115</sup> See *EEOC Enforcement Guidance*, *supra* note 112 (“An employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.”).

<sup>116</sup> See Press Release, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks, U.S. EQUAL OPPORTUNITY EMP’T COMM’N (June 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

<sup>117</sup> See *id.*

<sup>118</sup> See, e.g., von Spakovsky, *supra* note 113 (describing the EEOC guidance as “potentially unlawful and certainly ill-advised”).

<sup>119</sup> See RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (1965) (stating that an employer may be liable for the harm caused by employees “who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others”); Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers’ Liability for Workplace Violence*, 70 Miss. L.J. 505, 507 (2000).

<sup>120</sup> See Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 St. Louis U. L.J. 1001, 1044–45 (“Employers who receive applications from ex-offenders face a dilemma.”); von Spakovsky, *supra* note 113.

successfully sued by the estate of one of its guests who was murdered by a former employee who had kept a copy of the motel's master key.<sup>121</sup> The decedent's estate brought a negligence action against the motel, in part, due to its hiring of the murderer as a general maintenance man.<sup>122</sup> The court noted that the motel had not performed a criminal background check of the former employee and that the culprit had an outstanding warrant for his arrest at the time he committed robbery and murder at the motel.<sup>123</sup> The court went on to reverse and remand a trial jury award of \$41,400 against the motel (based on two percent allocation of fault), finding that award inadequate and against the weight of the evidence.<sup>124</sup> A new trial was thus ordered regarding the allocation of fault to the motel to "carry out the goal of adequately compensating the injured party."<sup>125</sup> Subsequently, the Indiana Supreme Court permitted the new trial.<sup>126</sup>

Such a decision is not an isolated case. Lawsuits based on negligent hiring permeate tort law.<sup>127</sup> These actions would likely become more frequent where employers are limited under federal guidelines in their investigations of the criminal behavior of potential employees. This potential tort liability dilemma is also compounded by some states' recent consideration of laws which would similarly restrict employers' use of criminal background checks.<sup>128</sup>

### C. Solving the Dilemma When Regulation Creates Liability Exposure

The most basic and effective solution to harmonizing government regulatory action with private litigation when regulatory compliance could create tort liability is to give more careful consideration to the development of regulations and guidelines. This may be easier said than done, but it is worth stating because it may very well be the case, as seen in the MSHA disclosure rule exam-

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<sup>121</sup> See *Santelli v. Rahmatullah*, 966 N.E.2d 661 (Ind. Ct. App. 2012), *vacated on other grounds*, 980 N.E.2d 322 (Ind. 2012) (unpublished table decision). The Court of Appeals decision was vacated in an unpublished table decision when the Indiana Supreme Court transferred the case, but the state high court found that the defendant motel could be held liable for negligently hiring an intentional tortfeasor and granted a new trial in a subsequent decision. See *Santelli v. Rahmatullah*, 993 N.E.2d 167 (Ind. 2013).

<sup>122</sup> See *Santelli*, 966 N.E.2d at 664.

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> *Id.* at 674.

<sup>126</sup> See *Santelli v. Rahmatullah*, 993 N.E.2d 167, 175 (Ind. 2013).

<sup>127</sup> See generally Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397 (2012) (discussing potential liability for negligent hiring). Every state recognizes the tort of negligent hiring. See *id.* at 1404 (citing Lex K. Larson, *State-by-State Analysis, Employment Screening* (MB) pt. 1, ch. 11 (2010)).

<sup>128</sup> See, e.g., Opportunity to Compete Act, S. 2586, 2013 Leg., 215th Sess. (N.J. 2013); see also *NJ's Proposed Background Check Restrictions Will Harm Hiring*, PRWEB (June 24, 2013), <http://www.prweb.com/releases/2013/6/prweb10855404.htm>.

ple, that the regulatory body is alerted to the potential for inadvertent tort liability prior to finalizing a requirement or guideline.<sup>129</sup> Consideration of potential tort liability exposure, at least at the federal level, should also be a factor in any regulatory oversight or review process, for example review conducted by the Office of Management and Budget.<sup>130</sup>

In addition, when a federal or state agency has been informed that a potential regulation could create liability exposure, and the regulatory agency wishes to eliminate an unjust tort liability dilemma for regulated entities, that agency should provide a measure of tort immunity. If it is beyond the power of the regulatory body to grant such immunity, legislative action should be undertaken before the regulation is effectuated. A regulated entity can, and presumably would, argue in court that “the government made me do it,” but this is not an absolute defense.<sup>131</sup> Further, even if the regulated entity prevails under this defense, it may still be subject to substantial legal expense and possibly adverse publicity, particularly in litigation involving sensitive issues such as alleged racial discrimination.

In the absence of such “front-end” deliberations prior to issuing a regulation or guidance, the responsibility should rest with judges on the “back-end” to make peace between the regulation and the tort system. Judges can resolve tort liability dilemmas by validating the compliance with regulations defense of regulated entities and finding that permitting tort liability would be inconsistent with the regulatory scheme. This would spare regulated entities wasteful litigation costs and fundamentally unfair allegations in circumstances, such as under the MSHA disclosure requirement, where the regulated entities are trying to protect their employees from the potential overreach by the regulatory agency. Such a ruling by judges would also be consistent with the judiciary’s repeated rejection of “regulation through litigation”; in both scenarios judges are protecting the regulatory system from intrusion by the tort system.<sup>132</sup>

### III. THE CLASH BETWEEN GOVERNMENT REGULATION AND PRIVATE LITIGATION IN THE PURSUIT OF SAFETY

A third area of potential strife between the government regulatory system and private litigation system relates to the safety of the American public. A number of federal agencies have as their primary goal public safety, for example the National Highway Traffic and Safety Administration (NHTSA), which

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<sup>129</sup> See *supra* Part II.A.

<sup>130</sup> See *supra* note 16.

<sup>131</sup> See von Spakovsky, *supra* note 113, at 3 (discussing case law stating that while the “business necessity standard” is a valid defense to a discrimination claim, it does not necessarily apply where the hiring policy has nothing to do with an applicant’s ability to do the job).

<sup>132</sup> See *supra* Part I.

helps assure automobile occupant safety,<sup>133</sup> and the National Institute for Occupational Safety and Health (NIOSH), which is dedicated to workplace health and safety.<sup>134</sup> These agencies are empowered to develop safety regulations which may explicitly or implicitly override the private litigation system.<sup>135</sup> Where this occurs, conflict may arise over which system has the final say in safety matters.

Courts typically decide this issue using a preemption analysis.<sup>136</sup> The analysis considers whether Congress or a regulatory agency acting pursuant to congressional authority intended a law or regulation to bar private actions.<sup>137</sup> Preemption may also be implied by the federal regulatory action itself when there is a clear conflict between the state law, which includes state tort law, and the federal law (conflict preemption),<sup>138</sup> or where, based on the circumstances, state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (obstacle preemption).<sup>139</sup> Congress could also intend to occupy an entire regulatory field (field preemption). For instance, nuclear power production through the Nuclear Regulatory Commission leaves no room for state action over safety protocols.<sup>140</sup>

Preemption analysis often involves a very fact-specific inquiry into the language, scope, and history of a law or regulation.<sup>141</sup> For that reason, outcomes

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<sup>133</sup> See *About NHTSA*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN, <http://www.nhtsa.gov/About> (last visited May 20, 2014) (“NHTSA was established by the Highway Safety Act of 1970 and is dedicated to achieving the highest standards of excellence in motor vehicle and highway safety.”).

<sup>134</sup> See *About NIOSH*, CTRES. FOR DISEASE CONTROL AND PREVENTION, NAT’L INST. FOR OCCUPATIONAL SAFETY AND HEALTH, <http://www.cdc.gov/niosh/> (last updated July 26, 2013) (“The National Institute for Occupational Safety and Health (NIOSH) is the U.S. federal agency that conducts research and makes recommendations to prevent worker injury and illness.”).

<sup>135</sup> See Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law by Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TULANE L. REV. 1203, 1211–23 (2010) (discussing state of preemption law with regard to federal regulatory agency safety determinations).

<sup>136</sup> See *id.* Courts may also determine the availability of private litigation under other legal principles such as a displacement analysis. See *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2538.

<sup>137</sup> See Schwartz & Silverman, *supra* note 135, at 1205–07.

<sup>138</sup> See, e.g., *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

<sup>139</sup> *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000).

<sup>140</sup> See *Pennsylvania v. Nelson*, 350 U.S. 497, 504–06 (1956); see also *About NRC*, U.S. NUCLEAR REGULATORY COMM’N, <http://www.nrc.gov/about-nrc.html> (last updated Apr. 1, 2014).

<sup>141</sup> See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 315–319 (2008) (examining regula-

may vary significantly and be difficult to predict. They may also, at least on the surface, appear inconsistent at times. For example, the United States Supreme Court held that approval by the FDA of medical devices and generic prescription drugs generally preempts state tort litigation, but tort actions are not preempted in the case of FDA-approved brand name drugs.<sup>142</sup> The possibility for inconsistent preemption rulings is also enhanced further by some regulatory agencies taking inconsistent positions on the intended preemptive effect of their regulations.<sup>143</sup>

Preemption is often expressed as an issue of federalism, whereby under the Supremacy Clause of the United States Constitution, conflicting state law must give way to federal law.<sup>144</sup> The underlying public policy battle runs deeper. This section takes a step back from the legal analysis of whether state law has been preempted, to the more fundamental question of how the federal regulatory system and private litigation system should interact regarding safety regulations. To be sure, there are competing views. One view is that when a federal regulatory agency, considered an expert in a subject area, acts to establish a regulation, that regulation provides *the* standard for the imposition of liability.<sup>145</sup> Another view is that safety regulations provide only a *minimum* standard from which the private litigation system may establish greater duties upon the

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tory scheme established by Medical Device Amendments of 1976 to conclude state tort action is preempted with regard to FDA approved medical devices).

<sup>142</sup> Compare *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2569 (2011) (holding state failure to warn action preempted with regard to generic drugs) and *Mut. Pharm. v. Bartlett*, 133 S. Ct. 2466, 2468 (2013) (holding state design defect action preempted with regard to generic drugs), with *Wyeth v. Levine*, 555 U.S. 555, 565–71 (2009) (holding state failure to warn action not preempted with regard to branded drugs).

<sup>143</sup> See, e.g., *Wyeth*, 555 U.S. at 576–79 (discussing FDA’s “dramatic change in position” on preemptive effect of regulation reflected in agency preamble to drug labeling regulation); see also Victor E. Schwartz & Cary Silverman, *Preemption: Department of Labor Reversal and Ruling By Washington Supreme Court Could Impact Respirator Availability*, 40 PROD. SAFETY & LIAB. REP. (Bloomberg BNA) 1274 (2012) (discussing Department of Labor’s preemption “policy about-face with respect to government-approved respirators”).

<sup>144</sup> See U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

<sup>145</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 863 (2000) (“A rule of state tort law imposing a duty to install airbags in cars such as petitioners’ would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed.”); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 99 (1992) (“Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA-regulated health issue is pursuant to approved state plan that displaces the federal standards.”).



regulated entities.<sup>146</sup> Under the latter view, some questions arise regarding the effect of regulatory compliance: if the regulated entity did everything the government required but may still be held liable in a private tort action, is the regulation's efficacy undermined by having two separate systems—one ruled upon by a team of experts, the other by a jury of non-experts—determine separate standards for imposing liability? What if these standards are contradictory or otherwise inconsistent with each other? Who should prevail?

A notable difficulty in making such determinations arises because classifications of “stricter” or “higher” safety standards are not always clear. For example, in the 1980s, private tort actions were brought against automobile manufacturers claiming that all cars should include passenger-side airbags.<sup>147</sup> The expert federal agency, the NHTSA, disagreed with the proposed “higher” safety measure, citing studies that found that the airbag technology of the time posed an unacceptable risk of hurting or killing people, particularly “out-of-position” passengers such as small persons and young children.<sup>148</sup> The NHTSA also cautioned that mandating airbags just as seatbelt usage was slowly gaining public acceptance could lead passengers to abandon seatbelts and rely solely on airbags, a far more dangerous alternative.<sup>149</sup> The NHTSA's judgment essentially was ignored by those bringing claims in the litigation system. Fortunately, the United States Supreme Court rejected the lawsuits, finding the NHTSA's

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<sup>146</sup> See Richard C. Ausness, *The Case for a Strong Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1241–47 (1996) (providing examples of cases in which courts gave little weight to federal safety regulations spanning a variety of areas, such as flammability standards for clothing, pesticide warnings, automobile design, aircraft design, and workplace safety standards).

<sup>147</sup> See Schwartz & Silverman, *supra* note 135, at 1209–11.

<sup>148</sup> See, e.g., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FOURTH REPORT TO CONGRESS: EFFECTIVENESS OF OCCUPANT PROTECTION SYSTEMS AND THEIR USE, ii (May 1999), available at <http://www-nrd.nhtsa.dot.gov/Pubs/808-919.pdf> (“As of September 1, 1998, NHTSA has confirmed 90 crashes where the deployment of the passenger-side air bag resulted in 24 serious injuries, one fatal abdomen injury, and 65 fatal head or neck injuries to infants or children.”); NAT'L CENTER FOR STATISTICS & ANALYSIS, SPECIAL CRASH INVESTIGATIONS, COUNTS OF FRONTAL AIR BAG RELATED FATALITIES AND SERIOUSLY INJURED PERSONS, ii (Oct. 1, 2001), available at <http://www-nrd.nhtsa.dot.gov/Pubs/AB1001.pdf> (finding 119 child fatalities related to airbag technology of the time); Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 65 Fed. Reg. 30680, 30681 (May 12, 2000) (“While air bags are saving an increasing number of people in moderate and high speed crashes, they have occasionally caused fatalities, especially to unrestrained, out-of-position children, in relatively low speed crashes. As of April 1, 2000, NHTSA's Special Crash Investigation (SCI) program had confirmed a total of 158 fatalities induced by the deployment of an air bag. Of that total, 92 were children, 60 were drivers, and 6 were adult passengers. An additional 38 fatalities were under investigation by SCI on that date, but they had not been confirmed as having been induced by air bags.”).

<sup>149</sup> See Schwartz & Silverman, *supra* note 135, at 1209–11

regulations preemptive.<sup>150</sup> The Court's decision likely saved lives and averted a disaster that might have irreparably damaged public acceptance of airbags and possibly delayed for many years the implementation of safer designs. "It was not until the 1990s that technology advances and public education about airbags had reduced the inherent risks to an acceptable level, and NHTSA required manufacturers to install airbags in all vehicles."<sup>151</sup>

In another example, the Occupational Safety and Health Administration (OSHA) established regulations requiring forklifts to include only an operator-controlled horn. Other devices to alert those who might be struck by the vehicle were to be installed only if the employer/customer found a need dependent upon the intended area of use.<sup>152</sup> OSHA based its determination on the ground that in some work environments, such devices may actually endanger workers.<sup>153</sup> Nevertheless, after workplace accidents, private litigation was brought against forklift manufacturers alleging that they should have installed additional audio or visual alarms.<sup>154</sup> Courts rejected the claims on preemption grounds,<sup>155</sup> but the conflict here between the government and litigation systems speaks to the larger public policy issue.

Public safety may be put in jeopardy where decisions by expert federal agencies are ignored, contravened, or otherwise undermined through the private litigation system. Careful study and balancing of safety risks by experts may be supplanted by a civil jury, which despite good intentions of holding regulated entities to a "higher" standard, may do more harm than good. Speculation by laypersons who might base their decision on dueling paid litigation experts could trump the judgment of neutral experts whose focus is on the public's interest.

Ambiguity in safety standards meant to instruct regulated entities of what to do to avoid liability also creates unnecessary risks. Nearly any product can be made safer in some respect, but measuring "safety" is often a complex judgment. A product made safer in one situation may become more dangerous in another. For instance, an enclosed forklift may protect its operator from falling out, but OSHA recommends an open design because the ability to exit quickly in the event of an emergency is deemed more important to the operator's safe-

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<sup>150</sup> See *Geier*, 529 U.S. at 869–74.

<sup>151</sup> See Schwartz & Silverman, *supra* note 135, at 1210.

<sup>152</sup> See 29 C.F.R. § 1910.178(a) (2013) (providing powered industrial truck safety standards).

<sup>153</sup> See Schwartz & Silverman, *supra* note 135, at 1210; see also Ausness, *supra* note 146, at 829–30 (discussing forklift safety litigation).

<sup>154</sup> See, e.g., *Gonzalez v. Ideal Tile Importing Co.*, 877 A.2d 1247, 1249 (N.J. 2005); *Arnoldy v. Forklift*, 927 A.2d 257, 260 (Pa. Super. Ct. 2007); *Kiak v. Crown Equip. Corp.*, No. 3340, 2008 WL 2090791, at \*2 (Pa. Com. Pl. 2008).

<sup>155</sup> See, e.g., *Gonzalez*, 877 A.2d at 1249; *Arnoldy*, 927 A.2d at 260; *Kiak*, 2008 WL 2090791, at \*2.

ty.<sup>156</sup> Allowing a private lawsuit to second-guess such safety decisions injects chaos into the regulatory system and may leave regulated entities unsure of what safety measures to take.

A key to harmonizing the conflict between the government regulatory system and the private litigation system is the recognition of a complete defense for regulatory compliance in appropriate circumstances.<sup>157</sup> For instance, Maryland's highest court has recognized that "where no special circumstances require extra caution, a court may find that conformity to the statutory standard amounts to due care as a matter of law."<sup>158</sup>

Most jurisdictions consider the violation of a safety regulation as evidence that a product is defective as a matter of law. Yet, these jurisdictions do not treat evidence of compliance with government regulations with similar deference.<sup>159</sup> Nevertheless, courts frequently cite compliance with safety regulations as a factor used to justify a directed verdict for a defendant<sup>160</sup> and may find that meeting a government safety standard precludes tort liability.<sup>161</sup> A regulatory compliance defense harmonizes these determinations as well as the competing viewpoints previously discussed regarding how courts should view the effect of federal regulations.

Courts can consider several factors in deciding whether to treat compliance with regulatory standards as a complete defense to liability as opposed to evidence of safe conduct. The American Law Institute (ALI), a highly respected organization comprised of the nation's top echelon of judges, law professors and practitioners, published a Reporter's Study recommending recognition of a regulatory compliance defense where the following criteria are met: (1) where a

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<sup>156</sup> See 29 C.F.R. § 1910.178(a) (2013) (adopting by reference the American National Standards Institute's Powered Industrial Truck for design and construction of forklifts, which recommends against operator enclosures because "rapid and unobstructed ingress or egress for the operator is considered more desirable"); see also AMERICAN NATIONAL STANDARDS INSTITUTE, ANSI B56.1, SAFETY STANDARD FOR POWERED INDUSTRIAL TRUCKS (1969), available at <https://archive.org/details/gov.law.ansi.b56.1.1969>.

<sup>157</sup> See, e.g., *Ausness v. supra* note 146, at 1226; W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1465 (1994); Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147, 2151-52 (2000).

<sup>158</sup> *Beatty v. Trailmaster Prods., Inc.*, 625 A.2d 1005, 1014 (Md. 1993).

<sup>159</sup> See *Schwartz & Silverman, supra* note 135, at 1227.

<sup>160</sup> See, e.g., *Lorenz v. Celotex Corp.*, 896 F.2d 148, 149 (5th Cir. 1990) (finding that compliance with safety regulation is strong and substantial evidence of lack of defect); *Ramirez v. Plough, Inc.*, 863 P.2d 167, 176 (Cal. 1993) (concluding that "the prudent course is to adopt for tort purposes the existing legislative and administrative standard of care"); see also *Dentson v. Eddins & Lee Bus Sales, Inc.*, 491 So. 2d 942, 944 (Ala. 1986) (ruling that a school bus that is not equipped with seatbelts is not defective when the legislature has not required seatbelts).

<sup>161</sup> See *infra* note 163 and accompanying text.

legislature has placed the risk at issue under the authority of a specialized administrative agency; (2) where that agency has established and periodically revises regulatory safety controls; (3) where the manufacturer or other entity complied with the relevant regulatory standards; and (4) where the manufacturer or other entity disclosed to the agency any material information in its possession or of which it has reason to be aware concerning the products' risks and means of controlling them.<sup>162</sup>

The ALI incorporated a similar approach into the Restatement (Third) of Torts: Products Liability. That Restatement says that a product should not be considered defective as a matter of law:

when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established;  
when the specific standard addresses the very issue of product design or warning presented in the case before the court; and  
when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise.<sup>163</sup>

Conversely, the Restatement acknowledges that this defense would not apply "when the deliberative process that led to the safety standard . . . was tainted by the supplying of false information to, or the withholding of necessary and valid information from, the agency that promulgated the standard or certified or approved the product."<sup>164</sup>

In addition, a number of state legislatures have enacted regulatory compliance defenses creating a rebuttable presumption that a product in compliance with federal or state government safety regulations or standards is not defective.<sup>165</sup> This presumption is typically communicated by the court through an

<sup>162</sup> See 2 Enterprise Responsibility for Personal Injury, AM. LAW INST., REPORTER'S STUDY, 96-97 (1991); see also Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual Track System*, 88 GEO. L.J. 2167, 2168-70 (2000).

<sup>163</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 (1998); see also James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 321 (1990) ("Courts recognizing the limits of their institutional capabilities should refuse to second-guess the judgments of agencies who possess not only expertise but also a capacity for knowledge and memory which the courts cannot match."); Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 335 (1985) ("Once that determination has been made by an expert licensing agency, the courts should respect it.").

<sup>164</sup> RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 (1998).

<sup>165</sup> See COLO. REV. STAT. § 13-21-403(1) (West 2013); KAN. STAT. ANN. § 60-3304(a) (West 2005); KY. REV. STAT. ANN. § 411.310(2) (West 2005); MICH. COMP. LAWS § 600.2946(4) (2010); TENN. CODE ANN. § 29-28-104 (West 2012); TEX. CIV. PRAC. & REM. CODE § 82.008 (West 2013); UTAH CODE ANN. § 78B-6-703(2) (West 2012). At least two additional states, Arkansas and Washington, specifically provide by statute that parties may introduce evidence of regulatory compliance to show that a product is not defective or

instruction to the jury.<sup>166</sup> Courts have considered these statutes in cases involving a wide range of products, such as ladders,<sup>167</sup> nail guns,<sup>168</sup> cleaning products,<sup>169</sup> clothing,<sup>170</sup> airplanes,<sup>171</sup> and automobiles.<sup>172</sup>

Some states have also enacted statutes that take awards of punitive damages “off the table” where a product complies with regulatory standards, such as those proscribed by the FDA.<sup>173</sup> These statutes often include safeguards so that the defense will not apply to any manufacturer that withheld or misrepresented

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that its warnings are not inadequate, but do not assign any particular evidentiary weight to compliance with safety standards. *See* ARK. CODE ANN. § 16-116-105(a) (West 2006); WASH. REV. CODE § 7.72.050(1) (West 2007).

<sup>166</sup> *See, e.g.*, COLO. REV. STAT. § 13-21-403(4) (West 2013). Kansas law provides that a claimant may overcome the presumption by showing that “a reasonably prudent product seller could and would have taken additional precautions.” KAN. STAT. ANN. § 60-3304(a) (West 2005). In Texas, a claimant can overcome the standard by establishing that the safety standard or regulation was inadequate to protect the public or the manufacturer withheld or misrepresented information to the agency when it was formulating the applicable standard. TEX. CIV. PRAC. & REM. CODE § 82.008(b) (West 2013).

<sup>167</sup> *See* *States v. R.D. Werner Co.*, 799 P.2d 427, 430–31 (Colo. Ct. App. 1990) (ruling trial court did not err by admitting expert testimony on a ladder’s compliance with federal regulations).

<sup>168</sup> *See* *Slisze v. Stanley-Bostitch*, 979 P.2d 317, 321 (Utah 1999) (ruling OSHA standards regulating design of pneumatic nailer established a rebuttable presumption of non-defectiveness as they provided “a legitimate source for determining the standard of reasonable care”).

<sup>169</sup> *See* *Uptain v. Huntington Lab, Inc.*, 685 P.2d 218, 222 (Colo. Ct. App. 1984) (finding manufacturer of cleaning compound entitled to presumption of nondefectiveness where an expert testified that the product label’s warnings complied with federal and local laws and was approved by the Environmental Protection Agency).

<sup>170</sup> *See* *Alvarado v. J.C. Penney Co.*, 735 F. Supp. 371, 372–74 (D. Kan. 1990) (in a case involving a nightgown and robe that were ignited by a open flame gas heater, ruling that the regulatory compliance provision of the Kansas Products Liability Act did not create a conclusive presumption and thus a constitutional challenge by plaintiffs was moot).

<sup>171</sup> *See* *Champlain Enter., Inc. v. United States*, 957 F. Supp. 26, 28 (N.D.N.Y. 1997) (ruling that regulatory compliance provision of the Kansas Products Liability Act would provide airplane manufacturer with a defense against liability if it established that the aircraft complied with government safety standards unless plaintiff showed that “a reasonably prudent product seller could and would have taken additional precautions”).

<sup>172</sup> *See* *Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1387–88, 1391–93 (D. Kan. 1997) (ruling that automobile manufacturer’s compliance with federal regulatory standards was not dispositive of liability or punitive damages absent clear and convincing evidence that the manufacturer acted with reckless indifference to consumer safety).

<sup>173</sup> *See* ARIZ. REV. STAT. ANN. § 12-701(A) (2003) (drugs); N.J. STAT. ANN. § 2A:58C-5(c) (West 2000) (drugs, devices, food, and food additives); OHIO REV. CODE ANN. § 2307.80(C), (D) (West 2010) (drug, device, or other product); OR. REV. STAT. § 30.927 (2013) (drug); UTAH CODE ANN. § 78B-8-203 (West 2013) (drug). In Michigan, a state that does not recognize punitive damages, state law provides a rebuttable presumption that limits

material information during the approval process relevant to the claimant's injury.<sup>174</sup> Further, approximately two-thirds of state consumer protection statutes provide a type of regulatory compliance defense, exempting conduct that is authorized or permitted by a state or federal government agency.<sup>175</sup>

These laws help assure that compliance with government regulations or standards is appropriately considered by courts. By applying the common law and interpreting a regulatory scheme, judges similarly can give appropriate deference to the safety determinations of agency experts and recognize regulatory compliance as a complete defense. This action by judges leads to harmony between the regulatory system and litigation system.

#### IV. THE CLASH BETWEEN GOVERNMENT REGULATION AND PRIVATE LITIGATION TO CIRCUMVENT REGULATORY LAW AND THE ADVERSARIAL LITIGATION SYSTEM

A final area of conflict between the federal regulatory system and private litigation system arises where actors in each system are essentially at war with the basic functioning of their respective systems. This occurs when a private plaintiff's counsel teams up with a regulatory agency to pursue the common objective of circumventing both the normal regulatory development and review process, and the normal adversarial litigation process.<sup>176</sup> In practice, this phenomenon arises where a plaintiff's counsel sues a regulatory agency to start or advance a rulemaking, and the litigants agree to a "settlement" that sets accelerated time periods for a rulemaking or even adopts new substantive law.<sup>177</sup> Because these settlements are a "judicial act" that carry the same force of law as a regulatory act, they may be used to avoid statutorily required rulemaking procedures and other regulatory safeguards set forth by the Administrative Procedure Act (APA) or Office of Management and Budget (OMB) oversight.<sup>178</sup> Thus, the supposed litigation adversaries each receive exactly what they want in the settlement agreement without compromise or concession: plaintiffs "win" every case (and typically may recover their legal fees from the federal government pursuant to the Equal Access to Justice Act (EAJA) or other fee-shifting stat-

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a drug manufacturer's liability for compensatory damages in product liability actions involving FDA-approved drugs. See MICH. COMP. LAWS § 600.2946(5) (2010).

<sup>174</sup> See, e.g., OR. REV. STAT. § 30.927(2) (West 2013).

<sup>175</sup> See Victor E. Schwartz, Cary Silverman & Christopher E. Appel, "That's Unfair!" Says Who—The Government or Litigant?: *Consumer Protection Claims Involving Regulated Conduct*, 47 WASHBURN L.J. 93, 104–05 (2007).

<sup>176</sup> See *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COMMERCE (May 13, 2014, 12:30 PM), <http://www.uschamber.com/report/sue-and-settle-regulating-behind-closed-doors> [hereinafter *Regulating Behind Closed Doors*]; Schwartz, et al., *supra* note 14, at 1.

<sup>177</sup> See *Regulating Behind Closed Doors*, *supra* note 176; Schwartz, Goldberg & Appel, *supra* note 176.

<sup>178</sup> See *supra* note 16.

utes),<sup>179</sup> and the regulatory agency can more rapidly implement regulations without the requisite oversight.

Such a practice has been referred to pejoratively as “sue and settle.”<sup>180</sup> Reports indicate that the practice has grown significantly in recent years, particularly in the context of environmental regulation.<sup>181</sup> For example, special interest advocacy groups have engaged plaintiff’s counsel to bring at least sixty lawsuits against the Environmental Protection Agency (EPA) between 2009 and 2012.<sup>182</sup> As one report stated, “[t]hese settlements directly resulted in EPA agreeing to publish more than 100 new regulations . . . .”<sup>183</sup>

The ability of regulatory agencies to use “sue and settle” practices to develop new law raises a serious separation of powers concern. In effect, these practices permits the Executive Branch to override rulemaking safeguards adopted by Congress. For instance, Congress enacted the APA in 1946, in part, to assure that those adversely affected by a government regulation had adequate notice of the proposed regulation and an opportunity to comment on its wisdom and impact before the regulation took effect.<sup>184</sup> Similarly, Congress’s purpose in establishing OMB review was to ensure that regulations properly balanced policies and costs to society.<sup>185</sup> These congressionally mandated safeguards may be

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<sup>179</sup> See 5 U.S.C. § 504 (2012); 28 U.S.C. § 2412 (2012); see also David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and the “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583, 588 (2005) (stating that there are over 200 federal laws providing for attorney fee shifting).

<sup>180</sup> See *supra* note 176. Commentators have described “sue and settle” as follows: “In this situation, ‘arrangements’ are made for an entity to institute a legal action to achieve a desired outcome. The ‘government’ makes the decision to settle the case and thereby effects a change in policy—well below the radar of public accountability. If political flack does ensue, the answer is something akin to ‘the devil (i.e., the courts) made me do it.’” Jack W. Thomas & Alex Sienkiewicz, *The Relationship Between Science and Democracy: Public Land Policies, Regulation and Management*, 26 PUB. LAND & RESOURCES L. REV. 39, 63–64 (2005).

<sup>181</sup> See *Regulating Behind Closed Doors*, *supra* note 176, at 14.

<sup>182</sup> See *id.* at 5.

<sup>183</sup> *Id.*

<sup>184</sup> See Attorney General Tom C. Clark, *Attorney General’s Manual on the Administrative Procedure Act* (1947), FLA. STATE UNIV. COLL. OF LAW, <http://www.law.fsu.edu/library/admin/1947i.html> (last visited May 20, 2014) (stating basic purpose of the APA to “require agencies to keep the public currently informed of their organization, procedures and rules” and “provide for public participation in the rule making process”).

<sup>185</sup> See Proclamation No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981) (stating purpose of the Office of Management and Budget to “provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations [through OMB review]”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-205, *FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS* 8 (2009), available at <http://www.gao.gov/new.items/d09205.pdf> (“OMB is responsible for

lost or significantly undermined where private settlement agreements dictate the timing and procedure for developing a regulation.

In addition, these “sue and settle” agreements may permit private plaintiffs’ attorneys representing special interest advocacy groups to effectively set a regulatory agency’s priorities by determining what rulemakings the agency must dedicate its resources.<sup>186</sup> “Sue and settle” agreements may also bind the regulatory agency’s actions and the agenda of future administrations. This can occur regardless of whether an agency’s focus or mission shifts as a result of the democratic election process.

“Sue and settle” agreements are often negotiated behind closed doors, which may have the effect of completely shutting out groups affected by a regulation from providing constructive input for the regulation’s development.<sup>187</sup> This presents a concern not only for regulated entities with a statutory right to notice and comment procedures, but also for other regulatory bodies, such as those at the state level. The concern arises because states may bear primary responsibility for implementing federal programs. For example, at a 2013 congressional hearing examining “sue and settle” practices, Indiana Commissioner of Environmental Management Thomas Easterly estimated that, at least in the case of national environmental laws, states implement approximately 96.5 percent of federal programs and typically supply most of the funding.<sup>188</sup> Commissioner Easterly explained that when agencies are left out of the dialogue for developing new regulations due to “sue and settle” agreements, it “can result in unexpected costs to states and cause difficulties in implementing environmental programs.”<sup>189</sup> He also testified that those federal regulations made without input from state agencies with “boots on the ground” can impact the state agency’s priorities by affecting the state regulatory agency’s funding of programs.<sup>190</sup>

Another major concern regarding “sue and settle” practices arises when a settlement agreement actually creates new substantive law without any open and deliberative process by the regulatory agency.<sup>191</sup> As a result, regulated entities following one set of rules one day must follow different rules the next without warning or opportunity to be heard.

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the coordinated review of agency rulemaking to ensure that regulations are consistent with applicable law, the President’s priorities, and the principles set forth in executive orders, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency.”).

<sup>186</sup> See *Regulating Behind Closed Doors*, *supra* note 176, at 11.

<sup>187</sup> See *id.*

<sup>188</sup> See *Hearing on Sunshine for Regulatory Decrees and Settlements Act: Hearing on H.R. 1493 Before the H. Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 113th Cong., (2013) (statement of Thomas Easterly, Commissioner, Indiana Department of Environmental Management), *available at* 2013 WLNR 13805352.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See Schwartz et al., *supra* note 14.



An example of such a settlement agreement occurred in *Conservation Northwest v. Sherman*.<sup>192</sup> Here, the plaintiff's lawyers represented a coalition of environmental advocacy groups and sued various federal agencies, namely the Bureau of Land Management, Forest Service, and Fish and Wildlife Service ("Agencies"), challenging changes to the Survey and Manage Standard of the Northwest Forest Plan. The Northwest Forest Plan was formed in the 1990s to balance conservation of the Pacific Northwest forests with commercial logging, and the Survey and Manage Standard created a process for assessing the logging impact on about 400 species.<sup>193</sup> The Standard proved costly and complex, however, and in 2007 the Agencies decided to eliminate it.<sup>194</sup> The environmental groups challenged this action in federal district court, alleging it violated procedural requirements of the National Environmental Policy Act (NEPA).<sup>195</sup>

Subsequently, the Agencies entered into a consent decree with the environmental groups "detailing how Survey and Manage would operate going forward."<sup>196</sup> The decree included changes to species classifications and new management requirements for species that had never been part of the Standard.<sup>197</sup> The district court further acknowledged that these provisions were to take effect absent any "public-participation procedures," reasoning that "because the consent decree was a 'judicial act,' procedural requirements that would otherwise govern agency action [were] inapplicable."<sup>198</sup>

A lumber company given standing to intervene in the case appealed this decision, challenging the validity of the decree. The United States Court of Appeals for the Ninth Circuit held that the district court abused its discretion in approving a consent decree that allowed "the Agencies effectively to promulgate a substantial and permanent amendment" to an existing regulation without following statutory rulemaking procedures.<sup>199</sup> The court held that it was "indisputable that the Agencies would have had to go through formal procedures if they had sought to implement the changes to Survey and Manage contained in the consent decree on their own," and that "the public should have been afforded an opportunity to comment on all alternatives that the Agencies were required by law to consider."<sup>200</sup> The court, therefore, concluded that the consent decree did "'nothing short of amend' Survey and Manage" in violation of the law.<sup>201</sup>

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<sup>192</sup> *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1181 (9th Cir. 2013).

<sup>193</sup> *See id.* at 1183–84.

<sup>194</sup> *See id.* at 1184.

<sup>195</sup> *See id.*

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* at 1187.

<sup>198</sup> *Id.* at 1185.

<sup>199</sup> *Id.* at 1188.

<sup>200</sup> *Id.* at 1187–88.

<sup>201</sup> *Id.* at 1187 (quoting *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 556–57 (9th Cir. 2006)).

The Ninth Circuit's ruling is an important judicial limit on one of the most egregious applications of "sue and settle." The decision stops agency rules from being substantively modified by closed-door settlement agreements, at least within the Ninth Circuit. The ruling does not, however, implicate other types of proposed settlements, for example, where accelerated rulemaking deadlines, but not rule changes, are agreed upon that also could limit public participation.

Since the Ninth Circuit's ruling, Congress has considered more comprehensive legislation to appropriately limit federal agency "sue and settle" practices.<sup>202</sup> Proposals have been put forth which would introduce transparency into the process by which consent decrees are entered, giving notice to affected businesses and state entities, and affording them the opportunity to participate in the development of regulations.<sup>203</sup> Other proposals have sought to target "sue and settle" practices by improving transparency and public awareness concerning how much the federal government is paying out to the plaintiff's lawyers and advocacy groups bringing these cases.<sup>204</sup>

Progress is also being made within some federal agencies to curb "sue and settle" practices. In 2013, the EPA began posting Notices of Intent to Sue filed by private plaintiff's against the agency on the EPA website.<sup>205</sup> This is a helpful first step that may provide notice that a potential "sue and settle" action is coming. But it does not cover every potential "sue and settle" action against the EPA or other federal agencies, nor does it provide other members of the public, including the regulated community, the right to intervene in or comment on a suit or settlement.

In the absence of more comprehensive reforms among federal agencies or by Congress, courts will continue to play a vital role in properly curbing "sue and settle" practices. Judges are charged with scrutinizing proposed settlement agreements between regulatory agencies and private plaintiffs, and may, as seen in the Ninth Circuit example, reject these agreements. Even where a proposed settlement agreement does not threaten to amend substantive law and seeks only to accelerate a rulemaking, judges are authorized to exercise discretion with regard to whether such action would effectively limit public participation in the development of a regulation and indirectly contravene required procedures and oversight review. Judges may also reject proposed settlements where it is apparent that the regulatory agency and the plaintiff's counsel be-

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<sup>202</sup> See, e.g., *Sunshine for Regulatory Decrees and Settlement Act of 2013*, H.R. 1493, 113th Cong. 2 (2013); *Achieving Less Excess in Regulation and Requiring Transparency Act of 2014*, H.R. 2804, 113th Cong. (2014); see also *Hearing on Sunshine for Regulatory Decrees and Settlements Act: Hearing on H.R. 1493 Before the H. Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 113th Cong. (2013).

<sup>203</sup> See *Hearing on Sunshine for Regulatory Decrees and Settlements Act at 2*.

<sup>204</sup> See *Judgment Fund Transparency Act of 2013*, H.R. 317, 113th Cong. 2 (2013); *Open Book on Equal Access to Justice Act*, H.R. 2919, 113th Cong. (2013).

<sup>205</sup> See *Notices of Intent to Sue the U.S. Environmental Protection Agency (EPA)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/ogc/noi.html> (last updated Feb. 3, 2014).

trayed the normal adversarial litigation process and act with a common purpose.

#### V. CONCLUSION

This Article has highlighted four areas where government regulation and private litigation may be in conflict with each other or otherwise operate at cross purposes. These include: (1) where private litigation aims to regulate in the absence of government regulation; (2) where the presence of government regulation and regulatory compliance threatens to create private litigation; (3) where the presence of government regulation and private litigation conflict over standards for imposing liability; and (4) where government regulators and private litigants act to circumvent the regulatory process and adversarial litigation process. In each scenario, harmony between the two systems is attainable. Although legislators, regulatory agencies, and other makers of public policy play an important role in providing harmony, it is predominately judges who must properly align the goals of each system. As the Article has shown, only judges can curb "regulation through litigation," interpret a regulatory scheme to limit potential tort liability for regulatory compliance, recognize regulatory compliance defenses to protect expert federal agency safety determinations, and reject abusive "sue and settle" agreements. Only judges can act as peacemakers and assure that two critical drivers in the creation of law, government regulation and private litigation, move in the same direction.