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For Immediate Release April 12, 2007

Paper Assesses Preemption Doctrine's Role in Civil Justice Reform

How can businesses be protected from increasingly burdensome state tort law while, at the same time, showing proper deference to the strictures of federalism? With business and industry increasingly faced with litigious lawyers and the uncertainty created by differences in state laws, greater observance of, and deference to, federal standardization is clearly required, argues attorney James W. Wooten in the Washington Legal Foundation's most recent WORKING PAPER., ***Federal Preemption: Another Form of State Tort Reform?***

Mr. Wootton, who is a partner in the Washington, D.C. office of the law firm Mayer, Brown, Rowe & Maw LLP, authored the paper *pro bono* for WLF. He is the former President of the U.S. Chamber Institute for Legal Reform.

According to Mr. Wooten "redoubled vigilance in judicial enforcement of implied preemption doctrine," — which renders state law "without effect" where an area is reserved to the federal government or where state law conflicts with federal law — is an effective antidote to the crippling effects and high economic costs of the imposition of both federal regulation and common law tort requirements on private enterprise. Taking the reader through a nuanced and reasoned argument, Wooten does acknowledge that gains on the legal reform front have been made at the state level. He cites, in particular, those states, such as Michigan, where less activist judges have rendered legislative reform strategies practicable and "viable" and legislatures have been able to implement restrictions on mass-injury class action suits.

Nevertheless, according to Mr. Wooten, the uneven nature of state tort law still calls for increased deference to uniform federal standards, because manufacturers are producing for, and selling to, a national market. As he notes, "The wide differences n state laws, as well as the frequent changes in those laws, make it practically impossible for manufacturers of products sold throughout the United States to determine the standards of conduct to which they will be held." The author cites the common scenario of a plaintiff's claim that the health or safety features of a given product, while consistent with federal standards, were inadequate according to the state's common law tort requirements. In this manner, states' authority and federal standards become proxies in the standoff between the plaintiffs' bar and private industry or, as Mr. Wooten states: "...the preemption battle is part of the larger chess game between the plaintiffs' bar and the business community over the shape of our civil justice system."

Uniform national standards for products and services, while clearly envisioned by our Founders when they wrote the U.S. Constitution's Commerce Clause is of, perhaps, even greater relevance today as the United States attempts to compete in the global marketplace. Notes the author, "The Founders understood the value of uniform national standards in making the United States one nation that could compete in the world economy."

While Mr. Wooten does not suggest that implied preemption is the cure-all for the "liability monster" of mass-injury suits and carefully notes that the Supreme Court has found limits in the preemption doctrine, specifically in the recent *Bates* v. *Dow Agrosciences*, he concludes that "legal reformers...should encourage more action that is within the authority already granted to federal agencies by Congress and be vigilant in preventing congress from repealing gains from agencies recent assertions of preemption."

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Copies of this educational paper, WLF WORKING PAPER, Number 147 (April 2007), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.