The Daily Dish

Federal-state Issues in Business Regulation

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AAF has spent a little time in the baby-formula trenches (see here, here, or here), not surprisingly focused on the nature of the baby-formula market, the federal programs (e.g., the Special Supplemental Nutrition Program for Women, Infants, and Children, or WIC) that impact it, and the quality of Food and Drug Administration regulation. Standard stuff. But Eakinomics was a bit surprised by *The Wall Street Journal* editorial focusing on "hundreds of lawsuits against [two baby-formula companies] for failing to warn that their products allegedly increase the risk of necrotizing enterocolitis, a life-threatening intestinal disease afflicting premature and low-birth-weight babies." How could AAF have missed this?

It turns out that these are state, not federal, suits. The first began in St. Louis County, Missouri. Now, it is hard enough for one small think tank to defend private markets and advocate for good federal policy (let's just say that the Spartans had better odds at the battle of Thermopylae). But it is an entirely different matter to keep up with what developments occur on a state-by-state basis.

This reality was driven home when Eakinomics stumbled across this *Reuters* coverage of an Illinois suit against the pharmaceutical company GSK, which "won the latest trial over claims that discontinued heartburn drug Zantac caused cancer, as a jury on Monday found that the drug was not responsible for an Illinois woman's illness." Now, GSK does not have an exclusive exposure to Zantac lawsuits. It turns out that there are a lot of such lawsuits:

> Zantac was sold at different times by GSK, Pfizer, Sanofi, and Boehringer Ingelheim. First approved by U.S. regulators in 1983, it became the world's best-selling medicine in 1988 and one of the first to top $1 billion in annual sales. The companies collectively are facing thousands of lawsuits against them in courts across the United States.

"Thousands" is putting it mildly. "The majority of those are in Delaware state court, where a judge in June allowed more than 70,000 cases to go forward after rejecting the defendants' bid to keep key plaintiffs' expert witnesses out of court on the grounds that their scientific methods were not reliable." Seventy-thousand cases! This, despite the fact that a federal judge (in Florida) has already dismissed such claims as unfounded.

There are (at least) two interesting aspects to this episode. The first is Delaware. What the heck is it thinking? An overwhelming majority of firms choose to make Delaware their corporate home, with one reason being the state's reputation for a fair, knowledgeable, and predictable judicial system. Ignoring the federal judicial history and permitting these suits would seem to jeopardize the state's comparative advantage as a corporate home. (Similar arguments are made in Why Public Companies Are Leaving Delaware for Nevada, which was written, unsurprisingly, by Nevadans.)

The second issue is the status of federal-state statutory, regulatory, and judicial rule for businesses. From a pure economics perspective (which, I grant you, may not be the only perspective), if there is a nationally traded

commodity such as antacid or baby formula, it would make sense for there to be a single set of market rules – presumably from the federal government. The whole “let us states band together and dump the British” history, in contrast, puts the emphasis on the individual states. An enormous amount of effort is devoted to balancing the rights and interests of the different levels of government.

That doesn’t mean they are continuously in the right balance. It does seem possible that these lawsuits, the imposition of state financial laws on federally chartered banks, the state laws dictating health insurance mandates on federally created Employee Retirement Income Security Act (ERISA) plans, and other recent developments are flagging a general need to get things back in balance.