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PREEMPTION

MOTOR VEHICLES

Two Supreme Court cases this term involving implied preemption in motor vehicle product liability cases have potentially far-reaching impact on the preemption defense in glazing cases, and other litigation in which a Federal Motor Vehicle Safety standard expressly provides manufacturers with design options for compliance, attorneys Malcolm E. Wheeler and Nicholas J. Wittner say in this BNA Insight. The authors analyze the recent rulings in *Williamson v. Mazda Motor of America Inc.* and *Priester v. Ford Motor Co.*, as well as the top court's seminal 2000 preemption decision in *Geier v. American Honda Motor Co.*, and offer their insights into the future of the preemption defense, as shaped by the Supreme Court and President Obama's 2009 memorandum on preemption.

A Look Through Tinted Glass: What Does the Future Hold for Preemption in Motor Vehicle Litigation?

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The U.S. Supreme Court this term issued two important implied preemption decisions in automobile product liability cases: *Williamson v. Mazda Motor of America Inc.*¹ and *Priester v. Ford Motor Co.*² Wil-

liamson overturned an entire line of cases finding preemption in "lack of rear seat shoulder belt" cases. In *Priester* the Court vacated and remanded a decision in which the Supreme Court of South Carolina had found preemption in a "lack of laminated glazing" case. There is a substantial split of authority on the preemption de-

¹ ___ U.S. ___, 131 S. Ct. 1131 (2011).

² 697 S.E.2d 567 (S.C. 2010), vacated and remanded, 131 S. Ct. 1570 (2011) (U.S.).

fense in the glazing cases in lower courts, and the effect of the Court's decision on them is still to be determined.

This article revisits the *Geier v. American Honda Motor Co.*³ “no airbag” case, which is the touchstone Supreme Court decision finding preemption in automobile product liability litigation. The article then analyzes the two new decisions and discusses their likely impact on the preemption defense in glazing cases and other litigation in which, as in *Geier* and *Williamson*, a Federal Motor Vehicle Safety Standard expressly gives manufacturers design options for compliance. Lastly, the article explores how the future of the preemption defense may be shaped not only by the Court's new decisions, but also by President Obama's 2009 memorandum on preemption⁴ and the American Bar Association's 2010 resolution on preemption.⁵

I. Preemption Law

Article VI of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”⁶ This Supremacy Clause invalidates state statutes, regulations, and common-law claims that interfere with or are contrary to federal statutes or regulations.

Federal preemption of state law can occur in three situations: (1) Where Congress explicitly preempts state law (express preemption); (2) where preemption is implied because Congress has occupied the entire field (implied field preemption); and, (3) where preemption is implied because there is an actual conflict between federal law and state law (implied conflict preemption). Implied conflict preemption occurs when “compliance with both federal and state regulations is a physical impossibility” or state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Preemption turns on the facts and circumstances surrounding a particular regulatory scheme. In some cases preemption may be limited or precluded by a judicial presumption that Congress did not intend to displace state law. That presumption is particularly strong in matters involving public health and safety. In 2008, in *Altria Group Inc. v. Good*,⁷ the Supreme Court for the first time broadly suggested that the presumption against preemption applies in *all* preemption analyses, regardless of whether the issue is express preemption or either form of implied preemption.⁸

³ 529 U.S. 861 (2000).

⁴ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Preemption, 74 Fed. Reg. 24693 24693-94 (May 20, 2009).

⁵ ABA Resolution 117 Revised Approved by the House of Delegates at Annual Meeting 2010, available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/dailyjournal.authcheckdam.pdf>.

⁶ U.S. CONST. art. VI, cl. 2.

⁷ *Altria Group Inc. v. Good*, 129 S. Ct. 538 (2008).

⁸ *Altria Group Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (citing *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Justice Stevens, speaking for a 5-4 majority, stated at the outset that the presumption applies “[w]hen addressing questions of express or implied pre-emption.” *Id.* Because he did not distinguish between field and conflict implied preemption, and because *Altria* argued conflict preemption, Justice Stevens's intent seems clear, even though precedent did not support him.

II. Preemption and the National Traffic and Motor Vehicle Safety Act of 1966

The National Traffic and Motor Vehicle Safety Act of 1966⁹ (the “Safety Act”) includes an express preemption provision that, as originally enacted, stated:

Whenever a federal motor vehicle standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of any motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.¹⁰

The Safety Act also contains a saving clause. As originally enacted it stated, “Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law.”¹¹

The early cases analyzing whether and, if so, to what extent the Safety Act preempts state law focused primarily on the extent to which the Safety Act and federal motor vehicle safety standards (“FMVSS's”) promulgated by the National Highway Traffic Safety Administration (“NHTSA”)¹² preempted state regulatory frameworks. Those cases found no preemption, but recognized that federal law would supersede state regulations if an actual conflict existed.

Early decisions addressing the preemptive effect of FMVSS on state tort-law claims relied heavily on the saving clause and uniformly concluded that the particular FMVSS being considered by the court did not preempt state tort law claims.¹³ When plaintiffs began filing lawsuits alleging that cars manufactured and sold without airbags were defective, however, a different picture emerged. In 1986, in *Vanover v. Ford Motor Co.*,¹⁴ a federal district court held a plaintiff's no-airbag

In dissenting, Justice Thomas, joined by Chief Justice Roberts, Justice Scalia, and Justice Alito, criticized the majority for relying on the presumption and focusing on discerning congressional intent in legislative history, rather than on interpreting the statutory language. *Altria Group Inc.*, 129 S. Ct. at 557 (citing *Riegel v. Medtronic Inc.*, 128 S. Ct. 999 (2008)).

⁹ 80 Stat. 718, 15 U.S.C. §§ 1381 *et seq.*, recodified as amended, 49 U.S.C. §§ 30101 *et seq.*

¹⁰ 15 U.S.C. § 1392(d). This provision was recodified without substantive change in 1994. 49 U.S.C. § 30103(b)(1).

¹¹ 15 U.S.C. § 1397(k). This provision was recodified without substantive change in 1994. 49 U.S.C. § 30103(e).

¹² Congress initially conferred on the Secretary of Commerce the power to administer the Safety Act, but subsequently transferred those powers to the Secretary of Transportation. See 49 U.S.C. § 1655(a)(6)(A). The Secretary of Transportation delegated these powers initially to the National Highway Safety Bureau, 49 C.F.R. pt. 1, 35 Fed. Reg. 4955 (March 21, 1970), and later to NHTSA. See 49 C.F.R. § 1.4 (2006). NHTSA is the agency currently responsible for enforcement of FMVSS's. While *Geier* refers to the “Department of Transportation,” this article refers to the agency responsible for enforcement of the Safety Act and FMVSS as “NHTSA,” regardless of timeframe.

¹³ See, e.g., *Gen. Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985).

¹⁴ 632 F. Supp. 1095 (E.D. Mo. 1986).

claim expressly preempted by the Safety Act's preemption provision because the state-law claim applied to the same aspect of motor vehicle performance addressed by, and was not identical to, the applicable federal standard, FMVSS 208.¹⁵ FMVSS 208 specified the different types of restraint-system options (for example, airbags, passive seatbelts, and manual seatbelts) that a manufacturer could use to comply with the regulation's performance requirements,¹⁶ and the plaintiff's claim would have impermissibly subjected the manufacturer to liability for choosing one of those options, rather than another.¹⁷

In the same year, in *Cox v. Baltimore County*,¹⁸ another federal district court reached the same conclusion. Later that year, in *Baird v. General Motors Corp.*,¹⁹ still another federal district court ruled that the Safety Act's saving clause made the preemption provision inapplicable to common-law claims, but that the plaintiff's no-airbag claim frustrated the optional-compliance scheme of FMVSS 208 and was therefore impliedly preempted.²⁰

The First Circuit in *Wood v. General Motors Corp.*²¹ was the first appellate court to address the issue, and it held a no-airbag claim impliedly preempted. One year later, so did the Eleventh Circuit in *Taylor v. General Motors Corp.*²² During the decade following *Wood* and *Taylor*, the Third,²³ Ninth,²⁴ and Tenth²⁵ Circuits and numerous state courts²⁶ likewise held no-airbag claims preempted by the Safety Act.²⁷ During the same period, however, several state appellate courts declined to find either express or implied preemption and permitted no-airbag claims.²⁸

¹⁵ *Id.* at 1096-97.

¹⁶ 49 C.F.R. § 571.208 (1979).

¹⁷ 632 F. Supp. at 1096-97.

¹⁸ *Cox v. Baltimore County*, 646 F. Supp. 761, 763-64 (D. Md. 1986) (holding no-airbag claim expressly preempted and stating that the saving clause was intended to preserve only claims not addressing aspects of automobile safety governed by an FMVSS).

¹⁹ 654 F. Supp. 28, 29-33 (N.D. Ohio 1986).

²⁰ *Id.*

²¹ 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1781 (1990). The Solicitor General filed a brief in support of preemption in *Wood*. Brief for United States as *Amicus Curiae* in *Wood v. Gen. Motors Corp.*, O.T.1989, No. 89-46, pp. 7, 11-16. The *Geier* Court took note of it. *Geier*, 529 at 882.

²² 875 F.2d 816, 825-26 (11th Cir. 1989).

²³ *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121-25 (3rd Cir. 1990) (implied preemption).

²⁴ *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-15 (9th Cir. 1997) (express preemption).

²⁵ *Kitts v. Gen. Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert denied*, 494 U.S. 1781 (1990); *Richart v. Ford Motor Co.*, 875 F.2d 787 (10th Cir. 1989) (consolidated with *Kitts v. Gen. Motors Corp.*); *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (10th Cir. 1996).

²⁶ See, e.g., *Schwartz v. Volvo N. Am. Corp.*, 554 So. 2d 927, 929-31 (Ala. 1989) (concurring opinion) (holding no-airbag claim preempted based on rationale of *Baird* and *Wood*).

²⁷ See *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-15 (9th Cir. 1997) (express preemption).

²⁸ See *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347-48 (N.H. 1995); *Wilson v. Pleasant*, 660 N.E.2d 327, 330-39 (Ind. 1995); *Monroe v. Galati*, 938 P.2d 1114, 1116-20 (Ariz. 1997); *Minton v. Honda of Am. Mfg., Inc.*, 684 N.E.2d 648, 655-61 (Ohio 1997); *Drattel v. Toyota Motor Corp.*, 699 N.E. 2d 376, 379-86 (N.Y. 1998).

III. *Geier v. Honda*

Geier arose from an automobile crash in 1992 in which Alexis Geier collided with a tree while driving a 1987 Honda Accord. She and her parents sued Honda entities, in the U.S. District Court for the District of Columbia, seeking to recover under District of Columbia tort law on the theory that the Accord was defectively designed because it did not have a driver-side airbag.²⁹

Honda moved for summary judgment, arguing that the no-airbag claim was preempted by FMVSS 208.³⁰ The applicable version of the regulation permitted manufacturers to choose from among various types of restraint systems, including airbag systems, to achieve compliance.³¹ It did not require airbags in all vehicles or in any specific vehicle line.³² The vehicle had a driver's manual three-point lap-and-shoulder seatbelt that Alexis Geier had been wearing when the collision occurred.

Honda asserted that the no-airbag claim either was expressly preempted by the Safety Act's preemption provision as a common-law state standard that differed from and addressed the same aspect of motor vehicle safety as FMVSS 208 or was impliedly preempted because a verdict in favor of the Geier family would conflict with the optional compliance framework of FMVSS 208. The Geiers argued that the preemption provision applied only to state statutes and regulations and that the saving clause preserved common-law claims.³³

The trial court granted summary judgment for Honda, reasoning that the no-airbag claim sought to establish a *de facto* safety standard that differed from FMVSS 208 by requiring airbags and was, accordingly, expressly preempted.³⁴ The Court of Appeals for the District of Columbia affirmed, but on the basis of implied preemption.³⁵

In light of the split of authority between, on the one hand, several federal courts of appeals, all of which had held no-airbag claims preempted, and, on the other hand, the state courts that had held no-airbag claims not preempted, the Supreme Court granted *certiorari* to resolve the conflict.³⁶ Justice Breyer wrote for the majority in the 5-4 decision.

The Court used a straightforward, three-question framework to decide whether FMVSS 208 preempted the no-airbag claim:

- (1) Does the Safety Act's preemption provision expressly preempt no-airbag tort claims? The Court said it did not.³⁷
- (2) Do ordinary preemption principles apply to the Safety Act? The Court said they do.³⁸

²⁹ 529 U.S. at 865.

³⁰ *Id.* at 864-65.

³¹ See 49 C.F.R. § 571.208 (1984); 49 Fed. Reg. 28962, 29008-010 (July 17, 1984).

³² *Id.*

³³ *Id.*; see *Geier*, 166 F.3d 1236, 1238 (D.D.C. 1999).

³⁴ *Geier*, 529 U.S. at 865; see *Geier*, 166 F.3d at 1238.

³⁵ See *Geier*, 166 F.3d at 1240-41 (discussing concerns with finding of express preemption, but avoiding question due to clear presence of implied preemption).

³⁶ See *Geier*, 529 U.S. at 866.

³⁷ 529 U.S. at 867.

³⁸ *Id.*

- (3) Do no-airbag tort claims actually conflict with FMVSS 208 and, thus, with the Safety Act itself? The Court ruled that they did.³⁹

The Court first addressed express preemption. The Court acknowledged that tort judgments might be considered a form of “safety standard” to which the express preemption provision, standing alone, could be interpreted to apply,⁴⁰ but the Court noted that the Safety Act included the saving clause as well as the preemption provision.⁴¹ Considering the preemption provision and saving clause together, the Court said, precluded an interpretation of the preemption provision to apply to state tort-law claims.⁴² The Court opined that inclusion of common-law claims would result in the preemption of all non-identical state standards created by tort jurisprudence that affected the same aspect as an FMVSS, even where that FMVSS “merely established a minimum standard.”⁴³

The Court next turned to implied conflict preemption. Analyzing the language of the saving clause and case law interpreting other saving clauses, the Court held that neither the existence of the preemption provision nor the presence of the saving clause “foreclosed the possibility that a federal safety standard will preempt a state common-law tort action with which it conflicts.”⁴⁴

The Court rejected any suggestion that application of implied conflict preemption under the Safety Act should be subject to a special burden.⁴⁵ Rather, the Court said, the presence of the preemption provision and saving clause together within the Safety Act reflected a “neutral policy, not a specially favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles.”⁴⁶ This pronouncement appeared to establish that no presumption exists against a finding of implied conflict preemption under the Safety Act, especially because the Court never even mentioned any “presumption.”

The Court next analyzed whether a no-airbag state tort-law claim actually conflicted with FMVSS 208 and gave rise to preemption. The majority rejected the dissent’s characterization of FMVSS 208 as “a minimum airbag standard” and recognized that NHTSA had “deliberately provided the manufacturer with a range of choices among different passive restraint devices.”⁴⁷ The Court noted that this optional compliance frame-

work was intended to further the safety objectives of FMVSS 208 by permitting the introduction of different systems over time, thereby lowering costs, overcoming technical safety problems, and encouraging technological development.⁴⁸

After a thorough review of the extensive regulatory and judicial history of FMVSS 208, the Court analyzed the factors that NHTSA considered in promulgating the applicable version of FMVSS 208. First, while an airbag could address some of the risks posed by an occupant’s failure to use an available seat belt, it could not address all such risks.⁴⁹ Second, airbags and other passive restraint systems posed their own unique disadvantages and safety risks.⁵⁰ Third, the Court analyzed both the increased costs that an airbag mandate would impose and the related risk of public resistance.⁵¹

The Court explained that because of these considerations NHTSA had “deliberately sought variety—a mix of several different passive restraint systems.”⁵² The means for achieving the desired variety was the establishment of a minimum performance requirement and “allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement.”⁵³

The Court noted that NHTSA had rejected a proposed standard that would mandate the use of airbags in all vehicles due to “safety concerns (perceived or real)” associated with their use and that the agency believed that permitting a mix of devices would both facilitate the development of data on comparative effectiveness and allow industry to overcome safety concerns and high production costs.⁵⁴ The crux of the Court’s finding is that FMVSS 208 was deliberately intended to provide to manufacturers various expressly authorized options for complying with its requirements.⁵⁵ In essence, FMVSS 208 reflected NHTSA’s policy judgment that safety would best be promoted “if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.”⁵⁶

Turning to the Geiers’ no-airbag claim, the Court reasoned that the claim depended on the existence of a duty—*i.e.*, a rule of state tort law—requiring automobile manufacturers to install airbags when the Geier vehicle was manufactured.⁵⁷ Such a duty would have applied to manufacturers of all similar cars.⁵⁸ By mandating the use of airbags in all vehicles, this state-law duty would have frustrated NHTSA’s objectives and presented an obstacle to the mix of devices deliberately sought by

³⁹ *Id.*

⁴⁰ The Court had previously ruled that the word “requirements” in other preemption provisions encompassed common-law actions. See *Medtronic Inc. v. Lohr*, 518 U.S. 470, 503-04 (1996); *Cipollone*, 505 U.S. at 521.

⁴¹ 529 U.S. at 867.

⁴² 529 U.S. at 867-68.

⁴³ *Id.*

⁴⁴ 529 U.S. at 869-70. The majority’s careful analysis of the language of the savings clause is particularly important in light of Justice Thomas’s contention in *Williamson*, without any supporting text and analysis, that the savings clause precludes preemption of any common-law claim. See n. 92 *infra*. In short, Justice Thomas, who generally argues that the presence or absence of preemption should turn solely on exegesis of the applicable statutory or regulatory text, failed to note the significant difference between the language of the limited saving clause in the Safety Act and the broader language of more traditional saving clauses.

⁴⁵ *Id.* at 870-74.

⁴⁶ *Id.* at 870-71.

⁴⁷ *Id.* at 874-75.

⁴⁸ *Id.* at 875.

⁴⁹ *Id.* at 877.

⁵⁰ *Id.*

⁵¹ *Id.* at 878.

⁵² *Id.*

⁵³ *Id.* (citing 49 Fed. Reg. at 28990, 28996).

⁵⁴ *Id.* at 879 (citing 49 Fed. Reg. at 28990, 29001-002).

⁵⁵ *Id.* at 878, 881 (“FMVSS 208 embodies the Secretary’s policy judgment that safety would be best promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.” (Quotation omitted)).

⁵⁶ *Id.* at 881.

⁵⁷ *Id.*

⁵⁸ *Id.*

FMVSS 208.⁵⁹ For that reason the Court held the no-airbag claim preempted.⁶⁰

Geier established a framework for analyzing the preemptive effect of FMVSS's on state tort-law claims. It established that state tort-law claims are not subject to express preemption under the Safety Act, but the Safety Act's saving clause does not insulate common-law claims from preemption; rather, traditional principles of implied conflict preemption apply, and preemption is neither favored nor disfavored under the Safety Act.⁶¹

Geier further instructed that the state of technology, comparative costs of alternatives, and real or perceived safety concerns are all legitimate agency considerations when formulating an FMVSS. When NHTSA determines that its legitimate concerns about safety, technological advancement, and cost can best be promoted by permitting manufacturers to choose from among expressly approved design options, its deliberate establishment and maintenance of such an optional compliance framework is a means-related objective worthy of preemptive protection. When NHTSA deliberately encourages specific optional methods of compliance with an FMVSS to serve the purposes of the Safety Act, a state tort-law claim that seeks to prevent exercise of one or more of the expressly approved option cannot stand.⁶²

Geier also underscored the importance of the agency's contemporaneous comments about its objectives.⁶³ In addition, the Court placed weight on the brief filed by the Solicitor General on behalf of NHTSA and the Department of Transportation ("DOT"), which stated that "a tort suit such as this one would 'stand' as an obstacle to the accomplishment and execution' of those objectives."⁶⁴ The Court stressed that when the subject matter is technical and the history and background complex, "the agency's own views should make a difference."⁶⁵ Also, "[w]e have no reason to suspect that the Solicitor General's representation of DOT's views reflects anything other than 'the agency's fair and considered judgment on the matter.'"⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 869-74 (Safety Act reflects a "neutral policy" toward the application of preemption).

⁶² *See id.* at 874-82.

⁶³ *Id.* at 874.

⁶⁴ *Id.* at 882.

⁶⁵ *Id.*

⁶⁶ 529 U.S. at 885. The Court, in explicitly rejecting the dissent's view, stated that there is no prerequisite of a formal statement of preemptive intent by the agency when it promulgates its rule. According to the Court, "conflict preemption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of preemptive intent. *Geier* at 885.

Geier was a 5-4 decision with a strong dissent written by Justice Stevens and joined by Justices Souter, Thomas, and Ginsburg. The dissent's view was that the saving clause "arguably denies the Secretary [of DOT] to promulgate standards that would preempt common-law remedies." 529 U.S. at 900. Justice Stevens also wrote that there is a strong presumption against preemption. Moreover, he rejected the Solicitor General's position, on behalf of NHTSA, that common-law tort suits would indeed frustrate the purpose of FMVSS 208. *Id.* at 904.

IV. Preemption Under the Safety Act After *Geier*

A. Supreme Court Cases

In the 11 years between *Geier* and *Williamson*, the Supreme Court decided more than three dozen preemption cases that were not automotive cases.⁶⁷ Preemption in auto litigation in the lower courts mostly involved FMVSS 208 and FMVSS 205.

B. FMVSS 208 Cases

After *Geier*, but before *Williamson*, several courts ruled that FMVSS 208 preempted more than no-airbag claims. Considering the preemptive effect of FMVSS 208 in the wake of *Geier*, they consistently found preemption of state tort-law claims that sought to preclude or compel selection of *any* design option expressly authorized by the applicable version of FMVSS 208.⁶⁸ That is what the California Court of Appeal did in *Williamson*⁶⁹ when it ruled that FMVSS 208 preempted rear-seat "lap only" seatbelt claims. The Eleventh Circuit reached the same conclusion in *Griffith v. General Motors Corp.*⁷⁰ when it held preempted a defect claim that was based on the manufacturer's decision to install a "lap-only" seatbelt in a rear center seating position as

⁶⁷ One of them, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), relied substantially on *Geier*. In *Wyeth*, a failure to warn pharmaceutical case, Justice Stevens, writing for the Court, embraced *Geier* as good law, but concluded that *Wyeth* had failed to adduce evidence that a common-law tort suit would frustrate the purpose of the Food and Drug Administration's drug labeling regulation under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. section 301.129. *See* 129 S. Ct. at 1204. Justice Stevens rejected the Solicitor General's position, giving it no deference because, according to him, the government's position was a departure from its prior position. *Id.* at 129 S. Ct. at 1201-02. Moreover, Justice Stevens dismissed the preamble to the rulemaking for the Food and Drug Administration's regulation at issue, which included a broad preemption provision to exclude tort claims, because the preemption provision had not been included in the regulation during the rulemaking process. *Id.*

Justice Breyer concurred in the result in *Wyeth* but wrote separately that there may be occasions where the Food and Drug Administration's regulations may preempt tort suits. *Id.* at 129 S. Ct. at 1204. Justice Breyer's comments reflect an inclination to defer to an agency's interpretation of its regulations, as he did in *Geier* and as he would do in *Williamson*. Justice Thomas concurred in the judgment only. In a departure from *Myrick v. Freightliner*, where he had written for the Court, Justice Thomas stated, "I have become increasingly skeptical of this Court's 'purposes and objectives' pre-emption jurisprudence." 129 S. Ct. at 1205. He added that "implied preemption provisions that wander far from the statutory text are inconsistent with the Constitution . . ." *Id.* Chief Justice Roberts and Justices Alito and Scalia dissented, stating, "This case illustrates that tragic facts make bad law." 129 S. Ct. at 1217.

⁶⁸ The cases distinguished between claims challenging a manufacturer's right to choose an expressly authorized type of safety system and challenges to a manufacturer's specific implementation of one of those systems. *See, e.g., King v. Ford Motor Co.*, 209 F.3d 886, 891-93 (6th Cir. 2000) (distinguishing preempted claims that manufacturer should have chosen different type of restraint system approved by FMVSS 208 from permitted claims that chosen type of approved restraint system should have been designed differently).

⁶⁹ 84 Cal. Rptr. 3d 545, 550-56 (Cal. App. 4th 2008).

⁷⁰ 303 F.3d 1276 (11th Cir. 2002), *cert. denied*, 538 U.S. 1023 (2003).

permitted by FMVSS 208. So did the Fifth Circuit in *Carden v. General Motors Corp.*,⁷¹ noting that “FMVSS 208’s extensive rulemaking history indicates that child safety concerns also played a role in the decision not to require lap/shoulder belts in rear seating positions.”⁷²

Thus, there was a unanimous line of cases holding that FMVSS 208 preempted “lap-only” seatbelt cases when the Supreme Court issued its decision in *Williamson*. We now turn to that decision.

In 2002, Thanh Williamson was a passenger in a 1993 Mazda minivan that had three rows of seats. The second row had a bench seat for only two passengers. That design enabled passengers in the third row to enter and exit through the walkway between the rear passenger door and the second-row bench seat. The seat next to the window had a lap-and-shoulder seatbelt, but the seat next to the aisle had only a lap belt. FMVSS 208 required the former, but gave manufacturers the option to install either a lap belt or a lap-and-shoulder belt for the seat next to the aisle.

Another vehicle crashed head-on into the minivan. The other occupants in the minivan were wearing lap-and-shoulder belts and survived the collision. Thanh Williamson, who was in the seat next to the aisle and was wearing the lap-only seatbelt for that seat, died. Her husband and estate sued Mazda, alleging that Mazda should have equipped the minivan with a lap-and-shoulder belt for that seat. Mazda moved to dismiss the case based on implied preemption under *Geier*, and the trial court granted the motion. The California Court of Appeal affirmed.⁷³ The plaintiffs filed a petition for review in the California Supreme Court, which denied the petition. The plaintiffs then sought review by the United States Supreme Court.

The Supreme Court invited the Solicitor General to express the views of the United States as to whether the Court should grant the plaintiffs’ petition for a writ of certiorari. Then-Solicitor General Elena Kagan submitted an *amicus curiae* brief advising the Court to grant review.⁷⁴ (After her appointment to the Supreme Court, Justice Kagan recused herself from the case.)

The brief for the United States acknowledged that there was no conflict among the lower courts that had addressed the issue, but asserted that they all had adopted an erroneous reading of *Geier*. The brief stated:

First, the question presented is significant and recurring. The lower courts repeatedly have over-read a decision of this Court to hold that a federal regulation preempts state law, even though the federal agency that promulgated and administers that regulation disagrees. . . . Second, the lower courts are currently in conflict on how to apply the reasoning of *Geier* to claims of preemption generally.⁷⁵

The Solicitor General maintained that the position of the United States had remained the same as it had been in the *amicus* briefs the government had filed in *Wood*, *Myrick*, and *Geier*, and that, accordingly, its position

⁷¹ 509 F.3d 227, 230-31 (5th Cir. 2007), cert. denied, 553 U.S. 1094 (2008).

⁷² *Id.* at 232 & n.2.

⁷³ 84 Cal. Rptr. 3d 545, 550-56 (Cal. App. 4th 2008).

⁷⁴ Brief for the United States as *Amicus Curiae*, No. 08-1314, *Williamson v. Mazda Motor of Am.*

⁷⁵ *Id.* at 17.

was entitled to deference from the Court. The brief distinguished *Williamson* from *Geier* on the ground that NHTSA, in the portion of FMVSS 208 in issue in *Williamson*, “was not seeking to promote safety by encouraging a variety of design. . . .” Unlike in *Geier*, the regulation was simply a “minimum standard,” and the reasons why NHTSA did not mandate lap-and-shoulder belt seatbelts “pertained to its assessment at the time of technological difficulties, costs, and benefits of such a requirement.”⁷⁶ The significant considerations underpinning NHTSA’s passive restraint rule were, according to the Solicitor General, missing in *Williamson*.⁷⁷

Lastly, referring to the FMVSS 205 “lack of laminated glass” cases, the Solicitor General noted: “The analytical framework presented by this case—how to apply *Geier*’s reasoning to FMVSS provisions that do not affirmatively seek to foster a diversity of options—has already produced conflicts in the lower courts, even though not in the precise circumstances here.”⁷⁸ A list of preemption cases under FMVSS 205 then followed.⁷⁹

When the Supreme Court granted review, the Solicitor General filed an *amicus curiae* merits brief supporting the plaintiffs. It was one of many *amicus* briefs for each side. Some of the briefs supporting the plaintiffs asked the Court to overturn *Geier*.

The Court did not do so. Justice Breyer, writing for the Court, instead applied the *Geier* framework by asking the same questions he had asked in writing for the majority in *Geier*: First, does the preemption provision expressly preempt plaintiffs’ claim? No, just as in *Geier*. Second, does it foreclose implied preemption? Again, No, just as in *Geier*. And “[w]e consequently turn our attention to *Geier*’s third subsidiary question, whether, in fact, the state court tort action conflicts with the federal regulation.”⁸⁰ The Court unanimously held that it did not.

Before he explained the reasons for these answers, Justice Breyer wrote, “At the heart of *Geier* lies our determination that giving auto manufacturers a choice among different kinds of passive restraints was a significant objective of the federal regulation. We reached this conclusion on the basis of our examination of the regulation including its history, the promulgating agency’s contemporaneous explanation of its objectives, and the agency’s current views of the regulations preemptive effect.”⁸¹ He then recounted the regulatory history of FMVSS 208’s passive-restraint options, NHTSA’s contemporaneous explanations of its purposes and objectives, and the Solicitor General’s brief, on behalf of the DOT and NHTSA, stating that a no-airbag tort

⁷⁶ *Id.* at 14. According to the Solicitor General, that “stands in sharp contrast to the agency’s reasoning with respect to airbags and other passive restraints, discussed in *Geier*. There, the agency affirmatively wished to provide for and encourage several options for passive restraints. . . . That purpose of promoting safety by fostering a variety of passive-restraint devices would have been frustrated by a state common-law duty to install airbags in all vehicles.” *Id.*

⁷⁷ *Id.* at 9.

⁷⁸ *Id.* at 20.

⁷⁹ The Solicitor General identified the appellate cases that we discuss in the FMVSS 205 preemption section. The Solicitor General’s brief on the merits in support of the petitioners did not discuss the FMVSS 205 cases, nor did the Supreme Court in its *Williamson* decision.

⁸⁰ 131 S. Ct. 1131 (2011).

⁸¹ *Id.* at 1136.

suit would frustrate the purposes of FMVSS 208. He explained that taken together these factors had “convinced us that manufacturer choice was an important regulatory objective. And since that tort suit stood as an obstacle to the accomplishment of that objective, we found the tort suit pre-empted.”⁸²

In contrast, Justice Breyer explained, in *Williamson* the primary reason why NHTSA did not require rear-seat lap-and-shoulder seatbelts in the aisle-adjacent seat of minivans in the 1993 model year was that they would not be cost-effective. The agency had changed its reasoning that before 1989 had underlain its decision not to require rear-seat lap-and-shoulder belts. The agency no longer had a significant safety concern about installing lap-and-shoulder belts or an interest in assuring a mix of devices.⁸³ The Court acknowledged that “an agency could base a decision to pre-empt on its cost-effectiveness judgment, [but] we are satisfied here that the rule-making record at issue here discloses no such pre-emptive intent.”⁸⁴

The Court then noted that “the Solicitor General tells us that DOT’s regulation does not pre-empt this tort suit. As in *Geier*, ‘the agency’s own views should make a difference.’”⁸⁵ That was so because DOT’s views in the briefs filed in prior FMVSS 208 preemption cases were not inconsistent.

Summing up, Justice Breyer ended where he had begun: “In *Geier*, the regulation’s history, the agency’s contemporaneous explanation, and its consistently held interpreted views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives. Here, these same considerations indicate the contrary.”⁸⁶

Simply put, the Court found that the mere presence of expressly approved design options in the applicable FMVSS without something more is not enough for implied preemption. Instead, there must be what we shorthandedly call “options-plus,” with the “plus” meaning the kinds of factors identified in *Geier*, including deliberate agency reasons for wanting manufacturers to be allowed to choose from among the specified alternative designs.

The brief opinion adds no new factor to be considered and breaks no new ground. It is noteworthy, however, for what it does not say: It does not mention any presumption against preemption, even though the Solicitor General, relying on *Wyeth*, had referred to an “assumption” that state law does not impose an obstacle to the frustration of a federal purpose, but explained that this assumption may be countered with a showing that “state policy may produce a result inconsistent, . . . as in *Geier*, with the objective of an implementing regulation.”⁸⁷

Justice Thomas filed a concurring opinion. It disdains implied preemption in words even more striking than his words in *Wyeth*. He wrote: “I have rejected purposes and objectives pre-emption as inconsistent with the Constitution because it turns entirely on extratex-

tual ‘judicial suppositions’”⁸⁸ Moreover, “[p]urposes and objectives pre-emption—which by design roams beyond statutory or regulatory text—is thus wholly illegitimate.”⁸⁹ “The dispositive difference between this case and *Geier*—indeed the only difference—is the majority’s ‘psychoanalysis’ of the regulators.”⁹⁰ “The Supremacy Clause commands that ‘the [l]aws of the United States,’ not the unenacted hopes and dreams of the Department of Transportation,’ shall be the supreme Law of the Land.”⁹¹

Most significantly, he stated that “the savings clause simply means what it says: FMVSS 208 does not preempt state common-law actions.”⁹² That assertion, however, ignores that the majority in *Geier* carefully explained why the language of the Safety Act’s saving clause, unlike the different language of more encompassing saving clauses in other federal statutes, does not completely preclude preemption of common-law claims. Moreover, if Justice Thomas were correct in suggesting that the saving clause means that no common-law claim can be impliedly preempted, manufacturers required by an FMVSS to apply specific warning labels, and only the specified warning labels, could be subject to common-law tort suits alleging that different warning labels should have been used in direct contravention of the FMVSS mandate. A recent preemption case involves just such an allegation, and the United States District Court for the Eastern District of Washington ruled that the inadequate warning claim was preempted.⁹³

C. FMVSS 205 Cases

In *O’Hara v. General Motors Corp.*,⁹⁴ Michelle O’Hara was driving a 2004 Chevrolet Tahoe, and her 9-year-old daughter was in the passenger seat. As Michelle attempted to merge into traffic, the Tahoe struck a guardrail. The Tahoe started to roll over, the tempered glass in the side window shattered, and the daughter’s arm went through the window and was crushed. The O’Haras sued General Motors, alleging that glass-plastic glazing, not tempered glass, should have been used and would have prevented the partial ejection of the girl’s arm. General Motors moved for summary judgment, arguing that FMVSS 205 preempted the claim. The district court granted the motion.⁹⁵

FMVSS 205 allowed, and still allows, manufacturers to use tempered glass, laminated glass, or glass-plastic glazing in side windows.⁹⁶ FMVSS 205 itself does not specify the options, but it incorporates by reference American National Standards Institute (“ANSI”) Standard Z26.1-1996, which lists several types of glazing materials that may be used for the side windows. The list includes tempered, laminated, and glass-plastic glazing among the choices. In FMVSS 205, NHTSA stated: “The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure

⁸⁸ *Williamson*, 131 S. Ct. at 1142.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1143.

⁹¹ *Id.* (citations omitted.)

⁹² *Id.* at 1142.

⁹³ See *Morris v. Mitsubishi Motors N. Am. Inc.*, No. 2:08-cv-00396 (E.D. Wash. Mar. 23, 2011).

⁹⁴ 2006 WL 1094427 (N.D. Tex. Apr. 25, 2006).

⁹⁵ *Id.*

⁹⁶ 49 C.F.R. Section 571.205 (S5.1).

⁸² *Id.* at 1137.

⁸³ *Id.* at 1138.

⁸⁴ *Id.* at 1139.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1140.

⁸⁷ *Williamson*, Brief of the United States as *Amicus Curiae* Supporting Petitioners at 11.

a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions.”⁹⁷

During the 1990’s, NHTSA considered proposing to require advanced glazing—i.e., glazing other than tempered glass—for side windows to address the potential for occupant ejection, but ultimately filed a notice of withdrawal in 2002⁹⁸ because of the possible safety risks⁹⁹ of advanced glazing and because of the agency’s planned comprehensive rulemaking for rollover-injury mitigation.¹⁰⁰

The district court in *O’Hara*, applying *Geier*’s implied preemption analysis, examined the regulatory text and history of FMVSS 205 and wrote:

In other words, the NHTSA considered removing the tempered glass option, and it deliberately chose to preserve that option because banning the use of tempered glass might increase risk of injuries resulting from impact to glazing surfaces for belted occupants while decreasing risk of ejection for unbelted occupants. After detailed investigation, the NHTSA determined that the best course, to further FMVSS 205’s purposes, was to preserve the option to use tempered glass and the advanced glazing.¹⁰¹

Accordingly, the district court decided that a tort suit under Texas common law would stand as an obstacle to the purposes and objectives of Congress and was impliedly preempted.¹⁰²

In 2007 the U.S. District Court for the Middle District of Florida agreed in *Martinez v. Ford Motor Co.*¹⁰³ The plaintiff there claimed that laminated glass, not tempered glass, should have been installed in side windows. Ford moved for summary judgment, and the court concluded that FMVSS 205 impliedly preempted the claim. Also in 2007 the U.S. District Court for the District of Montana agreed in *Erickson v. Ford Motor Co.*¹⁰⁴

Then a split of authority developed, beginning with the Fifth Circuit’s reversal of the district court in *O’Hara*.¹⁰⁵ It is the only federal court of appeals that has decided whether “no laminated glazing” claims are preempted. We now discuss *O’Hara* in detail because of its prominent role in creating a conflict among the courts.¹⁰⁶

The court began its analysis using the *Geier* framework: “To determine the federal policy expressed in FMVSS 205, this court looks to the text of the regulation, the history of NHTSA regulation in this area, and NHTSA . . . statements construing FMVSS 205.”¹⁰⁷ Citing *Geier*, the court noted that “it is not necessary for an agency to provide a ‘specific expression of agency

intent to preempt, made after notice and comment rule-making.”¹⁰⁸

The court noted that “the text of the regulation incorporates the ANSI standards for glazing materials and provides minimal restrictions on the placement of different types of glass.”¹⁰⁹ The court decided that the text and legislative history of FMVSS 205 differed “significantly” from those of FMVSS 208.¹¹⁰ The court viewed FMVSS 205 as a “minimum standard,” rather than an “options” standard, but did not explain why.¹¹¹ Although FMVSS 205 had an extensive regulatory history of safety research and testing,¹¹² the court summarily stated:

The text of FMVSS 208 strongly supports the conclusion that it expresses a federal policy which would be frustrated by lawsuits seeking to establish common law rules to the contrary. All of these factors’ detailed implementation timelines, full vehicles testing procedures, and “options” language are conspicuously absent from FMVSS 205.¹¹³

The *O’Hara* court recognized that FMVSS 205 incorporated ANSI standard Z26.1, but it viewed that standard as only a “materials standard” that established a “safety ‘floor’” to ensure that automotive glazing meets certain basic requirements.¹¹⁴ The court then turned to the next part of its analysis to see if “NHTSA’s statements interpreting FMVSS 205 . . . clearly articulated a glazing materials policy which would be frustrated by the *O’Haras*’ suit.”¹¹⁵

The court acknowledged that “Federal agency statements interpreting specific agency regulations are given substantial deference,”¹¹⁶ but it accorded little weight to NHTSA’s conclusions about the safety risks of advanced glazing when the agency decided not to mandate such glazing.¹¹⁷ The court expressed its regret

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 760.

¹¹¹ *Id.* at 763.

¹¹² Three decades before Congress passed the Safety Act, private and industry researchers working under the procedures of the American Standards Association promulgated specifications and tests designed to improve the safety of glass and glazing used in motor vehicle applications. See *Tentative American Standard Safety Code for Safety Glass for Glazing Motor Vehicles Operating on Land Highways* (published by American Engineering and Industrial Standards and approved by the American Standards Association (“ASA”) on Dec. 30, 1935) (superseded by American Standard Z26.1-1938, approved Mar. 7, 1938). ANSI research into glazing safety has continued in the intervening 70 years, and the current version of Z26.1 incorporated into FMVSS 205 reflects the benefit of that research.

¹¹³ *Id.* at 759-62.

¹¹⁴ *Id.* at 760-62.

¹¹⁵ (*Id.* at 760).

¹¹⁶ (*Id.* at 760.)

¹¹⁷ *Id.* at 761-62. NHTSA’s research indicated that advanced glazing increases the risk of neck injury. See 67 Fed. Reg. 41365-41367 (June 18, 2002) (withdrawing Advance Notices of Proposed Rulemaking pertaining to advanced glazing requirements) (“Notice of Withdrawal”); *Ejection Mitigation Using Advanced Glazing*, NHTSA Final Report, Docket No. 96-1782-22 (Aug. 2001) (“Final Report”), at viii, x, 34-36 (Section 6.0), and 54. The *O’Hara* court twice characterizes this finding as a “slightly increased risk of minor neck injuries,” citing to the Notice of Withdrawal both times. *O’Hara*, 508 F.3d at 757 and 761 (emphasis added). However, the Notice of Withdrawal

⁹⁷ 49 C.F.R. Section 571-205 at S2.

⁹⁸ 67 Fed. Reg. 41365-41367 (June 18, 2002).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 488 F. Supp. 2d 1194 (M.D. Fla 2007).

¹⁰⁴ 2007 WL 2302121 (D. Mont. Apr. 7, 2007).

¹⁰⁵ *O’Hara v. Gen. Motors Corp.*, 508 F.3d 753 (2007).

¹⁰⁶ Two weeks after deciding *O’Hara*, the Fifth Circuit issued its opinion in *Carden*, finding that FMVSS 208 preempted the plaintiff’s “lap-only” seatbelt claim. The court used the *Geier* framework in both cases, but with these differing results.

¹⁰⁷ *Id.*

that, unlike in cases where regulatory agencies had filed *amicus curiae* briefs, “we do not have the benefit of NHTSA’s opinion here.”¹¹⁸ The court’s review of the agency’s statements could find “no commentary indicating that NHTSA intended to ‘preserve the option’ of using tempered glass in side windows or that preserving the option would serve the safety goals of FMVSS 205.”¹¹⁹ The court ended by observing that the agency’s commentary “is short (only eight pages in the *Federal Register*) and does not discuss NHTSA’s rollover protection policies.”¹²⁰

After concluding that FMVSS 205 was merely a minimum standard that did not deliberately give manufacturers options to serve the agency’s safety goals, and that NHTSA’s commentary and reports did not support the defendant’s contention that the plaintiffs’ purported safety enhancements would frustrate NHTSA’s safety goals, the *O’Hara* court devoted a substantial part of its opinion to NHTSA’s decision to withdraw a proposed requirement of advanced glazing. According to the court, nothing in NHTSA’s notice of withdrawal undermined the court’s conclusion.¹²¹

The accentuated focus on the notice of withdrawal steered the *O’Hara* court away from *Geier* and into the waters of *Sprietsma v. Mercury Marine*.¹²² That detour into *Sprietsma* muddled the court’s analysis of whether NHTSA had chosen to mandate the options in FMVSS 205 for specific reasons and whether a tort suit would stand as an obstacle to the purpose of mandating those choices. Moreover, *Sprietsma* is, at bottom, inapposite.

In *Sprietsma*, a federal agency proposed a regulation, but then withdrew the proposal, so no regulation actually existed when the plaintiff’s injury occurred. In contrast, FMVSS 205 remained fully in force both before and after NHTSA issued its notice of withdrawal of a proposed new regulation and when the plaintiff’s injury occurred, and at all times FMVSS 205 specifically authorized the use of tempered glass by incorporating ANSI standard Z26.1.

Sprietsma arose from a boating accident in which a person fell overboard and suffered a fatal injury upon being struck by the propeller blades of an outboard engine. A survivor of the decedent sued the boat manufacturer, alleging that the engine should have been equipped with a propeller guard. The manufacturer claimed preemption under the Federal Boat Safety Act of 1971 (“FBSA”),¹²³ by virtue of the Coast Guard’s earlier decision after considerable study not to promulgate a regulation requiring propeller guards.¹²⁴ The case went to the Supreme Court after the Illinois Supreme

neither quantifies the increased risk posed by advanced glazing nor evaluates the severity of such potential neck injuries. See Notice of Withdrawal at 41366-67. NHTSA acknowledges that it is unable to assess actual neck injury levels because no accepted injury criteria exist for the two elevated neck force measurements observed in its testing. Final Report at 36. Compare note 53.

¹¹⁸ *Id.* at 763 n.6.

¹¹⁹ *Id.* at 761.

¹²⁰ *Id.*

¹²¹ *Id.* at 763.

¹²² 537 U.S. 51 (2002). See *O’Hara*, 508 F.3d at 762 (“We find the parallels between NHTSA’s Withdrawal of Rulemaking [regarding advanced glazing] and the Coast Guard’s statements in *Sprietsma* to be compelling.”).

¹²³ 46 U.S.C. §§ 4301-4311.

¹²⁴ *Sprietsma*, 537 U.S. at 54.

Court, relying on *Geier*, ruled that the tort claims were impliedly preempted.

At the time the Supreme Court was considering the matter, no federal regulation regarding the use of propeller guards had been issued.¹²⁵

After dispatching the manufacturer’s claim of express preemption, the Court turned its attention to the claim of implied conflict preemption based on the decision not to mandate propeller blades. The Court noted that the decision to “take no regulatory action” left the law applicable to propeller guards exactly as it had been before the study—*i.e.*, no federal law relating to it.¹²⁶ The Court stated that the decision not to regulate a particular aspect of boating safety was “fully consistent with an intent to preserve state regulatory authority” regarding that aspect.¹²⁷ Contrasting the “no regulation” situation, the Court stated, “Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act, . . . pre-emption would occur.”¹²⁸

The U.S. District Court for the Western District of Arkansas followed the Fifth Circuit’s *O’Hara* opinion in two decisions, but without significant analysis.¹²⁹ The Texas Court of Appeals also followed the Fifth Circuit’s *O’Hara* opinion in *MCI Sales v. Hinton*.¹³⁰ That case, which involved the ejection of an occupant in an intercity bus, focused mostly on preemption of a “failure to install seat belts” claim, although a short part of it addressed the laminated glass preemption issue.

The Supreme Court of Appeals of West Virginia, however, disagreed with the Fifth Circuit. In *Morgan v. Ford Motor Co.*¹³¹ the plaintiff, a passenger in a 1999 Ford Expedition, sustained a severe arm injury when an Expedition rolled over, the tempered glass shattered, and her arm was partially ejected. She claimed that Ford should have installed laminated glass instead of tempered glass and that laminated glass would have prevented her injury. The circuit court held that FMVSS 205 impliedly preempted the claim,¹³² and the West Virginia Supreme Court reluctantly affirmed the decision.

The supreme court noted that “our law has a bias against preemption.”¹³³ After reviewing *Geier*, *Wyeth*, and *O’Hara*, the court lamented: “We discern that we are stuck between a rock and a jurisprudential hard place. On the one hand, the U.S. Supreme Court’s recent decision in *Wyeth v. Levine* suggests that *Geier* has a limited interpretation—that conflict preemption may only be inferred when there is an extensive contemporaneous history, and detailed agency explanations, showing a federal scheme that would be obstructed by the plaintiff’s tort claim. On the other hand, several state and federal trial courts across the country have ruled that any interpretation of the preemptive effect of

¹²⁵ *Id.*

¹²⁶ See *id.* at 65.

¹²⁷ *Id.*

¹²⁸ *Id.* at 65.

¹²⁹ *Spruell v. Ford Motor Co.*, 2008 WL 906648 (W.D. Ark. Apr. 1, 2008); *Burns v. Ford Motor Co.*, 2008 WL 222711 (W.D. Ark. Jan. 24, 2008).

¹³⁰ 272 S.W.3d 17 (Tex.App.-Waco, 2008), *affd.*, 329 S.W.3d 475 (2010).

¹³¹ 680 S.E.2d 77 (W.Va. 2009).

¹³² *Id.* at 82.

¹³³ *Id.* at 83.

FMVSS 205 is controlled by Geier's 'purposes and objectives' analysis."¹³⁴

Rejecting *O'Hara* and its diminishment of NHTSA's assessment of the safety risk of advanced glazing, and deciding that *Geier* controlled, the court explained that to do otherwise would allow "each of 55 counties . . . theoretically, one by one, to eliminate all of the options offered under FMVSS 205."¹³⁵ This would "eviscerate" the regulation and "leave manufacturers with no options for glazing materials in side windows."¹³⁶ The court concluded: "Our decision must be controlled by *Geier*, because the NHTSA made a public policy decision to not mandate advanced glazing in side windows because of safety concerns that advanced glazing has a slightly increased risk of neck injuries."¹³⁷

The court was not at all comfortable with its decision. It believed, "as Justice Thomas noted in *Levine*—that *Geier* is flawed because it requires courts to look beyond the properly-enacted federal statute or law and divine an agency's intent from extraneous materials to determine the preemptive effect of a regulation."¹³⁸ But "*Geier* is, until altered or explicated by the United States Supreme Court, the guiding law of the land."¹³⁹

In *Raley v. Hyundai Motor Co.*¹⁴⁰ the U.S. District Court for the Western District of Oklahoma followed the Fifth Circuit's decision in *O'Hara* without any discussion of *Morgan*, *Martinez*, or *Erickson*. Three months later, the Tennessee Court of Appeals in *Lake v. Landsmen*¹⁴¹ surveyed all of the appellate cases—*Geier*, *Wyeth*, *Spietsma*, *O'Hara*, and *Morgan*—decided that *Geier* controlled, and ruled that FMVSS 205 impliedly preempted the plaintiff's claim that laminated glass should have been used in a shuttle bus. The court stated: "Respectfully, we disagree with the decision in *O'Hara* and find *Spietsma* to be distinguishable from the situation before us. From our review of FMVSS 205 and its history, we cannot agree with the *O'Hara* court that FMVSS 205 is only a minimum standard and that there is no federal policy which would be frustrated."¹⁴²

Next came *Priester*. During the early morning hours of August 17, 2002, Preston Cromer was driving a 1997 Ford F-150 pick-up truck at excessive speed. James Priester was in the rear seat, unbelted. Both Cromer and Priester had been at Showgirls(z), a strip club that allegedly served them alcohol. They were underage and apparently drunk when they were in the pick-up. Cromer drove off of the road, the pick-up rolled over, and Priester was ejected during the rollover and died at the scene.¹⁴³ Priester's mother sued Ford, alleging that Ford had used "inappropriate glazing materials" that shattered on impact. Ford moved for summary judgment. The trial court granted the motion, finding that FMVSS 205 impliedly preempted the claim. The trial court rejected the Fifth Circuit's reasoning and result in

O'Hara, and the South Carolina Supreme Court affirmed.¹⁴⁴

The supreme court summarized in one paragraph the regulatory background of FMVSS 205, focusing on the NHTSA research reports during the 1990s, especially NHTSA's final report and the subsequent notice of withdrawal, with the findings that advanced glazing increased the risk of neck and back injuries for belted occupants in rollover accidents. In the next two paragraphs, the court succinctly outlined the *Geier* requirements for implied preemption, and in the rest of its five-page opinion disagreed with *O'Hara* and aligned itself with *Morgan* and *Lake*. The court concluded, "In our view, the purpose of this regulation is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard."¹⁴⁵ A tort lawsuit "would stand as an obstacle to achieving the purposes and objectives" of FMVSS 205 and is preempted.¹⁴⁶

The plaintiff sought review in the United States Supreme Court four days after the oral argument in *Williamson*. On February 28, 2011, five days after deciding *Williamson*, the Court granted certiorari, vacated the opinion, and remanded to the South Carolina Supreme Court for further consideration in light of *Williamson*.¹⁴⁷

Also after oral argument in *Williamson*, but before the decision,¹⁴⁸ the Texas Supreme Court affirmed the Texas Court of Appeals in *MCI Sales and Service Inc. v. Hinton*.¹⁴⁹ The Texas Supreme Court took judicial notice of the Solicitor General's brief as *amicus curiae* in *Williamson*, and then undertook a lengthy review of the regulatory history of FMVSS 205, followed by an analysis of *Geier* and the pre-*Williamson* FMVSS 208 and 205 cases. The court ruled that FMVSS 205 did not preempt the plaintiff's claim that the motorcoach in which the plaintiff had been injured should have had laminated glass windows. The Supreme Court's *Williamson* opinion does not refer to *Hinton* or any other FMVSS 205 case, and the Court's order vacating the *Priester* judgment refers only to the Court's own *Williamson* decision.

What does the Court's order in *Priester* mean? If the Court concludes that a lower court's decision conflicts with the Court's new decision in another case, the Court can grant certiorari and summarily reverse. The Court did not do that in *Priester*. However, a "grant certiorari, vacate, and remand" order does indicate "that, in light of 'intervening developments,' there was a 'reasonable probability' that the [lower court] would reject a legal premise on which it relied and which may affect the outcome of the litigation."¹⁵⁰

The Supreme Court may have concluded that the South Carolina court's review of the regulatory history was too abbreviated compared with the Court's own exhaustive analysis of FMVSS 208's lengthy passive re-

¹³⁴ *Id.* at 94.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ 2010 WL 199971 (W.D. Okla).

¹⁴¹ 2010 WL 891867 (Tenn. Ct. App.).

¹⁴² 2010 WL 891867 at *7.

¹⁴³ *Priester v. Ford*, 697 S.E.2d 567, 568 (S.C. 2010).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 571.

¹⁴⁶ *Id.*

¹⁴⁷ 2011 WL 67695 (U.S.S.C.).

¹⁴⁸ The South Carolina Supreme Court had decided *Priester* on August 6, 2010, shortly before briefing in the *Williamson* case had closed. The Texas Supreme Court delivered its opinion in *Hinton* on December 17, 2010, and the United States Supreme Court decided *Williamson* on February 23, 2011.

¹⁴⁹ 329 S.W.3d 475 (Tex. 2010).

¹⁵⁰ *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001).

straint rulemaking in *Geier*, and to a lesser extent in *Williamson*, where the regulatory history was not nearly as complex. The one-paragraph synopsis of FMVSS 205 by the South Carolina Supreme Court also was quite sparse compared with the detail in the *O'Hara* and *Hinton* decisions.¹⁵¹ Moreover, the South Carolina court's treatment of *O'Hara* in an even shorter paragraph may have left the impression that the court's legal analysis lacked adequate depth, although the court's succinct opinion did address each appellate case and rested on *Lake* and *Morgan*, the latter of which did include a detailed analysis of the regulation, *O'Hara*, and United States Supreme Court precedents. On the other hand, the *Morgan* court reluctantly found preemption and all but invited the Supreme Court to resolve the issue. In any event, however one interprets the Supreme Court's action in *Priester*, the reality is that the Court did not reverse, but rather vacated and remanded.

On remand, the South Carolina Supreme Court now has available the *Williamson* opinion; two United States District Court opinions, *Erickson* and *Martinez*, with *Erickson* relying in part on the district court opinion in *O'Hara*; one intermediate state appellate case, *Lake*; and one state supreme court case, *Morgan*, with all but *Williamson* finding preemption. On the other hand, there are the United States Court of Appeals decision in *O'Hara*, and the three cases that followed it: *Spruell*, *Burns*, and, most recently, the *Hinton* decision by the Texas Supreme Court. Of course, the *Geier* framework must be applied because we see *Geier* as unaltered by *Williamson*.

V. Executive Order 13132 and the Obama Memorandum

As we look to the future, we also consider the "Memorandum for the Heads of Executive Departments and Agencies" ("Memorandum") issued by President Obama on May 21, 2009.¹⁵² The Memorandum includes three directives to regulatory agencies "to ensure that executive departments and agencies include statements of preemption in regulations only when such statements have a sufficient legal basis." Two are proscriptions to the heads of departments and agencies telling them not to do the following:

1. "include in regulatory preambles statements that the department or agency intends to preempt State

¹⁵¹ The South Carolina Supreme Court decided *Priester* before the Texas Supreme Court issued its opinion in *Hinton*, but the *Priester* court did consider and reject the lower court's decision in *Hinton*, which found no preemption. *Priester*, 697 S.E.2d. at 431-32.

¹⁵² President Obama issued the order because, "notwithstanding Executive Order 13132 of August 4, 1999 (Federalism), executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles." President Clinton had signed Executive Order 13132, which took effect on November 2, 1999. An October 28, 1999, Memorandum by John T. Spoitila, Administrator of the Office of Information and Regulatory Affairs, which had primary responsibility for implementing the Order, issued a Memorandum entitled, "Guidance for Implementing E.O. 13132. It explains that, among other requirements, agencies must "restrict regulatory preemption of State law to the minimum level necessary to achieve the objectives of the applicable Federal statute"

law through the regulation except where preemption provisions are also included in the codified regulation.

2. "include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132."¹⁵³

In addition, the Memorandum requires agencies to review all regulations issued during the previous 10 years to determine if preemption statements in preambles or codified regulations are justified and if they cannot be justified, then to "initiate appropriate action, which may include amendment of the relevant regulation."¹⁵⁴ There already are instances in which preemption provisions in major rulemakings were deleted during rulemaking and replaced by final-rule statements that the regulation is not intended to preempt.¹⁵⁵ The Memorandum has not, however, generated any amendment to FMVSS 205, the regulation at issue in *Priester*.

VI. The American Bar Association Resolution

We also note the American Bar Association's 2010 resolution on preemption. It asks Congress "to address foreseeable preemption issues clearly and explicitly when it enacts a statute that has the potential to displace, supplement, or otherwise affect state law by . . . setting forth the extent of the preemption of state tort law it intends, and the extent to which, through a saving clause or other means, it intends not to preempt state tort law or related common law duties."¹⁵⁶ The Resolution "urges the President to ensure agency compliance with Executive Order 13132" The ultimate intent, of course, is to induce congressional and agency provisions or statements that explicitly state whether preemption is intended and, if so, the basis for express and implied preemption.

VII. The Future

Geier is still good law. *Williamson* (and even Justice Stevens in *Wyeth*) made that much clear. In automotive litigation there currently is no express preemption of state tort-law claims, and it appears unlikely that Con-

¹⁵³ See note 153, *supra*.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* The rulemaking on FMVSS 216 had a preemption provision of tort claims involving a rollover roof crush, 70 Fed. Reg. 49223 (August 23, 2005), that was omitted in the final rule, 74 Fed. Reg. Vol. 74, No. 90 22348 (May 12, 2009). Moreover, the final rule explicitly disclaimed preemption: "Therefore although under the principles enunciated in *Geier* it is possible that a rule of State tort law could conflict with a NHTSA safety standard if it created an obstacle to the accomplishment and execution of that standard, we do not currently foresee the likelihood of any such tort requirements and do not have a basis for concluding that any particular levels of stringency would create such a conflict." 74 Fed. Reg. 22348 (May 12, 2009). See also 74 Fed. Reg. 68185 (Dec. 23, 2009) (removing language from NHTSA rulemaking on designated seating positions that state tort law claims would be preempted). Rule 216 is a pure performance standard that provides no expressly mandated design choices for compliance.

¹⁵⁶ American Bar Association Task Force on Federal Agency Preemption of State Tort Laws Report to the House of Delegates, Recommendation. Adopted August 7, 2010.

gress in the near future will amend the Safety Act to provide for any. The last time that Congress amended the Safety Act was in response to the Ford-Firestone tire recall event, and the amendments imposed more stringent requirements under the “Transportation Recall Enhancement Accountability and Documentation Act.” Moreover, the last Congress devoted much of its time to the investigation and hearings into the recent Toyota recalls, with draft legislation that threatened to impose penalties on auto manufacturers that did not comply with the Safety Act’s requirements. Although Congress did not adopt the draft legislation, the aftereffect may linger for years.

Implied preemption of no-airbag claims (or, presumably, other passive-restraint options) is untouched. For preemption in other options cases, preemption is likely to require a regulatory history of what we call “options-plus.” Justice Breyer put it succinctly: “In *Geier*, the regulation’s history, the agency’s contemporaneous explanation, and its consistently held interpreted views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives.”

That paragraph from *Williamson* does not necessarily define the outer bounds of preemption under the Safety Act, but it charts the course for what manufacturers seeking preemption should seek to prove, and it shows why the Memorandum and Resolution may make doing so more difficult in the near term. The ultimate result of the Memorandum and ABA Resolution has been and will likely be to limit language in new legislation or rulemaking that would support preemption. We expect that, at least in the near future, NHTSA regulations are unlikely to have contemporaneous explanations that provide support for implied preemption.

Geier, *Williamson*, and *Myrick* also illustrate the importance of the Solicitor General’s position. In all three cases the Supreme Court provided substantial deference to the agency. In *Williamson*, we believe, it was only because of the Solicitor General’s support of the certiorari petition that the Court granted review of an intermediate state appellate decision with a thin record, despite no conflict among the lower courts and despite the denial of review in *Carden*, which involved the same regulation and virtually the same facts and allegations.

In most of the recent preemption cases involving personal-injury claims under state tort law, the Solicitor General has taken the position that there is no preemption under the applicable federal statutes and regulations.¹⁵⁷ The Solicitor General filed briefs in federal courts of appeals¹⁵⁸ opposing preemption and in one Supreme Court case urged the Court to deny certiorari where the courts of appeals found no preemption (on different grounds).¹⁵⁹ When the Court nevertheless decided to review the case, the Solicitor General filed an *amicus curiae* brief in support of the plaintiffs and successfully sought separate time during oral argument.¹⁶⁰

Impossibility preemption under the Safety Act remains despite Justice Thomas’s position that the saving

clause saves all product liability cases. We see no support for his position in the case law. FMVSS 208 and other rules expressly provide for specific and exclusive warning labels, for example. It is unlikely that a tort suit alleging that a different label should have been used would lie under those circumstances.

The “presumption against preemption” continues to be puzzling. The “presumption” certainly has faded in the automotive product liability preemption cases. The *Geier* Court did not mention it and rejected the notion of a “special burden” on defendants. The *Williamson* Court omitted it entirely from its analysis. In addition, the Court has never explained whether the presumption is merely a bursting-bubble presumption or affects the burden of proof.

Although implied preemption remains unaltered by *Williamson*, its importance in automotive litigation likely will depend on whether in the future NHTSA promulgates regulations that mandate actual design options or, instead, promulgates only performance standards.¹⁶¹ Future implied preemption claims may be crafted when NHTSA provides, for specific safety-related reasons, phase-in periods, and a product liability claim asserts that the manufacturer should have equipped more of its vehicles than it did. If the regulation offers additional credits for earlier compliance percentages, however, the analysis becomes more complex. The precise language of the regulation and the precise details of the regulatory history will tell the tale.

Finally, as to *Priester*, there is more regulatory history to support preemption than there was in *Williamson*. To find preemption again, however, the South Carolina Supreme Court will need to delve into the regulatory history as deeply as the United States Supreme Court did in *Geier*.¹⁶² If the *Priester* court does that, it will find that NHTSA had important safety reasons for providing the option of using tempered glass in side windows, and may well conclude that *Geier* and *Williamson* provide a basis for preemption.

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¹⁵⁷ See, e.g. *Actavis Inc. v. Demahy*, U.S., No. 09-1501; *Pliva Inc. v. Mensing*, U.S., No. 09-993.

¹⁵⁸ See *Morris v. Wyeth Inc.*, No. 09-5509 (6th Cir.); *Smith v. Wyeth*, No. 5460 (6th Cir.); *Wilson v. Pliva Inc.*, No. 09-5466 (6th Cir.).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See, e.g. *Durham v. County of Maui*, 696 F. Supp. 2d (D. Hawaii 2010).

¹⁶² Shortly before this article went to print, the South Carolina Supreme Court requested the parties to file briefs on the effect of *Williamson* on the case.