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Motor Vehicles

Glazing Standard Preempts Ejection Suit, State Top Court Says on SCOTUS Remand

A federal standard on window materials for motor vehicles preempts a state law tort suit asserting Ford Motor Co. should have used a certain type of glass in pickup truck windows, the South Carolina Supreme Court held Nov. 21 in a case the U.S. Supreme Court had sent back to it for reconsideration (*Priester v. Cromer,* S.C., No. 27191, 11/21/12).

The decision represents the latest effort by courts to determine the preemptive effect of different motor vehicle regulations.

The South Carolina Supreme Court's 4–1 ruling on the federal glazing standard reaffirmed its previous decision in the rollover case. There, it found preemption and approved the lower court's grant of summary judgment in favor of Ford Motor Co. (38 PSLR 814, 8/9/10).

But the state top court examined the regulatory history of Federal Motor Vehicle Safety Standard 205 in much greater detail than it had before, following the U.S. Supreme Court's instructions to reconsider the case in light of *Williamson v. Mazda Motor of America Inc.*, 131 S. Ct. 1311 (2011).

Williamson concerned a federal seat belt standard for minivans and emphasized the importance of the agency's record and statements about the standard.

''This appears to be the first decision by a state supreme court or a federal court of appeals after *Williamson*, looking at this question of the preemptive effect of federal motor vehicle safety regulations on state law tort claims focused on the type of glass or glazing used in vehicle windows,'' Gregory Garre, an attorney for Ford, told BNA Nov. 28. He called it ''a welcome development for manufacturers.''

***Williamson*'s Ripples.** In its 8–0 decision in *Williamson,* the U.S. high court saw no preemption and determined that a family's suit over a minivan's seat belts could proceed.

The state supreme court here came to the opposite conclusion from *Williamson,* on a different regulatory record.

The South Carolina justices also weighed in on *Williamson*'s effect on preemption law, particularly on another U.S. Supreme Court case, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

Geier found an air bag standard had preemptive effect because the National Highway Traffic Safety Administration deliberately sought to preserve manufacturer choice about whether to install air bags. The federal agency, the U.S. Supreme Court said, wanted a ''mix'' of devices across the fleet.

''In sum, we believe *Williamson* did not eviscerate *Geier* or relegate it to outlier status,'' Justice John W. Kittredge wrote for the South Carolina Supreme Court. ''Rather, *Williamson* clarified that a deliberate decision to retain manufacturer choice is, in and of itself, insufficient to establish preemption.''

Instead, the court said, under *Williamson*, a defendant must show that an agency wanted ''a variety of means to achieve a 'significant' federal purpose'' in order to establish preemption. That was the case here, the court said.

A successful state law tort suit restricting a manufacturer's choice of glass ''would frustrate two significant federal purposes underlying FMVSS 205—namely Congress' fundamental desire to promote safety and the collateral goal of increasing seatbelt use,'' the majority concluded.

Nicholas Wittner, professor of law at Michigan State University's College of Law, told BNA Nov. 26, ''The court does note that it did not have the benefit of the Solicitor General's view.''

Anticipating that the case may go back to the U.S. Supreme Court, Wittner added, ''Given how much deference the [U.S. Supreme Court] has extended to the Solicitor General in recent preemption cases, I do believe that the Solicitor General's brief will play perhaps the dispositive role, but certainly a very critical role.''

Justice Costa M. Pleicones, who concurred in the South Carolina court's first decision in the case, dissented this time, saying, ''[M]y reconsideration in light of *Williamson* leads me to the opposite conclusion.''

Pleicones said NHTSA's decision to maintain manufacturer choice over glazing materials in side and rear windows did not reflect a significant agency objective.

In an email Nov. 23, Wittner said, ''This case is really significant because a finding of no preemption pretty much would have put an end to preemption under most FMVSS. The door is still open. Ultimately, I expect that the U.S. Supreme Court will decide if it remains that way.''

Ford spokeswoman Kristina Adamski said in a statement, ''Safety is best served by allowing manufacturers a choice of glazing material so that overall protection for both belted and unbelted occupants can be maximized. State law personal injury claims attempting to deny manufacturers that choice plainly conflict with the safety objectives of federal law.''

Underage Drinking. James Lloyd Priester and Preston Cromer, both under 21 years old, went to a strip club the night of Aug. 16–17, 2002, where they were served alcohol, according to the court. Both became intoxi-

cated. After leaving the strip club, the young men got into a 1997 Ford F-150 pickup truck. Cromer was driving and Priester was in the rear seat, not buckled into his seat belt.

Cromer, driving at excessive speed, left the roadway. The truck rolled several times. Priester was ejected through a window of the pickup and suffered fatal injuries.

Priester's mother, Mary Robyn Priester, sued Cromer, the owners of the strip club, and Ford, in the Orangeburg County Circuit Court. She asserted claims for strict liability and breach of warranty, saying Ford should have used laminated glass in its side and rear windows.

The side windows of the Ford at issue were made of tempered glass. Quoting the American National Standards Institute safety code incorporated into FMVSS 205, the South Carolina Supreme Court explained that tempered glass ''immediately breaks into innumerable small pieces, which may be described as granular,'' when broken.

The supreme court also repeated an observation from its previous opinion: ''[I]t can be stated generally that tempered glass is safer for vehicle occupants wearing seat belts, where the risk of ejection is reduced, because it provides less risk of additional injuries. Laminated glass is safer for unbelted passengers, where the risk of ejection is increased, because it is likely to keep a passenger inside the vehicle due to the 'adhering' quality of the glass.''

Ford sought summary judgment, which the trial court granted.

The South Carolina Supreme Court affirmed summary judgment in August 2010. Priester sought a writ of certiorari from the U.S. Supreme Court.

Shortly after issuing its decision in *Williamson*, the U.S. Supreme Court granted certiorari, vacated the state supreme court's decision, and remanded the case for reconsideration in light of *Williamson* (39 PSLR 238, 3/7/11).

The Belted Versus the Unbelted. The South Carolina Supreme Court focused particularly on a 12-year research program by NHTSA on the pros and cons of each type of glazing.

NHTSA concluded it was ''extremely reluctant to pursue a [glazing] requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle.''

NHTSA also gave two reasons for not pursuing advanced glazing: ''the advent of other ejection mitigation systems, such as side air curtains and the need to develop performance standards for them, and the fact that advanced side glazing in some cases appears to increase the risk of neck injury.''

Based on these statements and others, the supreme court concluded that ''[t]he objective of promoting safety was at the core of NHTSA's deliberate decision not to require advanced glazing in side windows.''

The court also disagreed with two pre-*Williamson* cases finding the glazing standard did not preempt tort suits—*O'Hara v. General Motors Corp.*, 508 F. 3d 753 (5th Cir. 2007) (35 PSLR 1138, 12/10/07); and *MCI Sales & Service Inc. v. Hinton*, 329 S.W. 3d 475 (Tex. 2010) (36 PSLR 922, 9/29/08).

O'Hara ''too casually dismisses the additional risk of neck injury that advanced glazing imposes upon belted passengers,'' the court said here.

O'Hara and *Hinton* also ''overstate the significance of NHTSA's silence regarding 'preserving the option' of tempered glass in its 2003 amendment of FMVSS 205,'' the court said.

''We disagree this amendment demonstrates the agency intended 205 to be a minimum standard,'' the court said. ''Rather, we believe NHTSA deliberately chose to retain the option of tempered glass by abandoning the proposed rule requiring advanced glazing.''

At least one lower court, the U.S. District Court for the District of Arizona, has considered the preemptive effect of FMVSS 205 since *Williamson*.

In that case, *Bernal v. Daewoo Motor America Inc.*, D. Ariz., No. 2:09-cv-01502, the federal district court threw out the automaker's preemption defense in June 2011 (39 PSLR 630, 6/20/11). The parties eventually reached a settlement and the case was dismissed Sept. 7, 2012.

Attorneys for Priester could not be reached for comment.

Darrell T. Johnson Jr., who practices in Hardeeville, S.C.; James B. Richardson Jr., who practices in Columbia, S.C.; and Leslie A. Brueckner and Matthew W. H. Wessler, of Public Justice in Oakland, Calif., and Washington, D.C., represented Priester.

Curtis L. Ott and Carmelo B. Sammataro of Turner Padget Graham & Laney in Columbia and Gregory G. Garre of Latham & Watkins in Washington represented Ford.

BY MARTINA S. BARASH

The opinion is available at http://op.bna.com/pslr.nsf/r?Open=mbah-92hmm6.

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