From Shield to Sword

The Transformation of Preemption Law

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Potential defense uses and future effects of agency rule changes for the automotive design world.

Over the years, the role of the argument for preemption has evolved immensely. Prior to the United States Supreme Court's decision in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), trial courts had little guidance in how to deal with preemption arguments. Common law in many states, however, provided that, although it was not an absolute defense, a manufacturer could raise the affirmative defense of compliance with federal regulations as a jury issue. In 2000, however, the Supreme Court changed the landscape of preemption law (especially in the realm of automotive design cases) by accepting Honda's argument that federal regulations providing manufacturers with a choice of design options preempted common law tort actions that would require the choice of one particular option.

Since the *Geier* decision, many trial courts across the country have followed suit, including expanding preemption protections to situations where federal regulations do not provide a choice of design options. These decisions have spurred considerable debate among proponents and opponents of preemption as to whether the *Geier* decision itself was correct and whether it should be expanded to situations other than those regulations that provide a choice of design options. In recent years, as illustrated below, manufacturers have become more successful with motions for summary judgment based on preemption, effectively changing the preemption argument from the affirmative defense shield that it once was, to a sword that could successfully be used offensively to gut a plaintiff's claim. This recent success, however, has not been complete; there remains a considerable divide among courts as to whether implied preemption principles apply in such cases.

In response to this continued debate, federal agencies have stepped in and spoken up, often in favor of preemption. For example, in recent years the Food and Drug Administration (FDA) has started intervening in pharmaceutical and medical devices actions in support of manufacturers. *See, e.g., Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (2006) (FDA submitted an amicus brief supporting the defendants' arguments that the plaintiff's failure to warn claims were barred due to implied

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conflict preemption) (currently winding its way to the United States Supreme Court). Further, in numerous other final and proposed rules, federal agencies have begun adopting express preemption clauses that more clearly express their intent to preempt common law tort actions. *See*, *e.g.*, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (FDA Preamble stating that the FDCA "preempts conflicting or contrary state law," including state failure to warn claims); 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (Consumer Product Safety Commission).

The automotive design realm is no different. In August 2006, the National Highway Traffic Safety Administration (NHTSA) published a proposed rule that included an express preemption clause. This proposed rule caused an uproar among the plaintiffs' bar. Although it is unclear if this rule will be finalized, it is certain to raise serious questions for future courts if it is.

This article discusses the potential uses of the preemption argument by defense counsel and the possible future of preemption law. This article focuses upon the progression toward the proposed rule, the potential effect this rule will have on the automotive design world, and the likely challenges to be raised if adopted. For issues outside the scope of this article, but potentially of interest to practitioners and manufacturers, the authors have provided references to additional materials.

A Brief Introduction to Preemption

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." U.S. Const. art. VI, cl. 2 (the "Supremacy Clause"). The Supremacy Clause obligates states to abide by federal law, thereby empowering Congress to preempt state law. *See*, *e.g.*, *Louisiana Pub. Serv. Comm'n v. Fed Commc'n Comm'n*, 476 U.S. 355, 368 (1986). The Supremacy Clause applies to all federal "law," whether constitutional, statutory or regulatory in nature. *See*, *e.g.*, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612–13 (1979). A long line of United States Supreme Court cases has fleshed out the parameters of the preemption doctrine.

Federal preemption of state law can occur in three types of situations: (1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field ("field preemption"); or (3) where preemption is implied because there is actual conflict between federal and state law ("conflict preemption"). *See*, *e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299–300 (1988).

Express preemption is rare and only occurs when a federal statute explicitly provides that the states are without power to regulate in a particular realm. *See*, *e.g.*, *Pac. Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983); 29 U.S.C. §1144(a) (2000). Instead, most cases of preemption can be classified within the latter two categories. Under field preemption, state law is preempted when federal statutes and/or regulations so wholly occupy a particular field that Congress' intent to preempt state law is inferred. *See*, *e.g.*, *English v. Gen. Elec. Co.*, 496 U.S. 72, 79–80 (1990). On the other hand, conflict preemption occurs when a federal statute or regulation is in direct conflict with state law, making compliance with both impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Hines v. Davidowitz*, 312 U.S. 42, 67 (1941); *see also*, *e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

Geier: Stepping Stone or Milestone?

The National and Motor Vehicle Safety Act of 1966 ("the Safety Act") empowers the Department of Transportation to enact safety standards (Federal Motor Vehicle Safety Standards) regulating almost every facet of automotive design. *See* 49 U.S.C. §30101 *et seq.* (formerly 15 U.S.C. 1381 *et seq.*). Specifically, the Safety Act authorizes the National Highway Traffic Safety Administration (NHTSA) to promulgate the Federal Motor Vehicle Safety Standards (FMVSS). *Id.* at §30111(a).

The Safety Act contains both a preemption clause and a savings clause. The preemption clause provides that a state may establish "a [safety] standard applicable to the same aspect of performance of a motor vehicle… only if the standard is identical to the [federal motor vehicle safety] standard." 49 U.S.C. §30103(b). The savings clause provides that "[c]ompliance with a [federal] motor vehicle safety standard… does not exempt a person from liability at common law." 49 U.S.C. §30103(e).

Ultimately, the tension between these two provisions led to a conflict among critics regarding preemption of state common law claims that sought to impose tort liability on automobile manufacturers who have exercised design options specifically allowed under FMVSS regulations. Advocates of states' rights and the sanctity of tort law argued that all persons should have access to the court system and that a jury should determine whether an automobile was unreasonably designed. Advocates for the automotive manufacturers, though, argued that NHTSA was in the best position to regulate the design of automobiles because such regulation required the balancing of risks and benefits as relates to all occupants and accident scenarios that could only be done by an agency with special expertise in the design of automobiles. This tension was addressed, to some extent, by the United States Supreme Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

In *Geier*, the plaintiff brought suit against Honda, alleging that her 1987 Accord was defective because it was not equipped with an airbag, but had only manual lap and shoulder belts. *Geier*, 529 U.S. at 865. Honda argued that the vehicle met all applicable FMVSS standards, including FMVSS 208, which required manufacturers to equip only 10 percent of their 1987 cars with airbag systems.

In analyzing the preemption issue, the Supreme Court first asked whether the Safety Act's express preemption provision preempted the plaintiff's claims. *Id.* at 867. The Court found that the plaintiff's claims were not expressly preempted because the savings clause left "adequate room for state tort law to operate" in situations in which the "federal law creates only a floor, *i.e.*, a minimum safety standard." *Id.* at 868. The Court went on to find, however, that the savings clause did not bar the ordinary working of preemption principles, because nothing in the savings clause specifically "suggest[ed] an intent to save state-law tort actions that conflict with federal regulations." *Id.* at 869. The Court further held that the savings clause did not "create some kind of 'special burden' beyond that inherent in ordinary pre-emption principles." *Id.* at 870. Inherent in the Court's ruling was a find-

ing that the preemption provision "suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create." *Id.*

In ruling that the plaintiff's common law tort action, which would require an airbag when the federal regulation did not, actually conflicted with FMVSS 208, and thereby was preempted, the Court relied heavily upon the Department of Transportation's (DOT) comments accompanying the promulgation of FMVSS 208. *Id.* at 875. Effectively, the Court found that FMVSS 208 "deliberately provided the manufacturer with a range of choices among different passive restraint devices," rather than simply a single minimum standard. *Id.* The Court further found that the DOT believed that this choice among options would be beneficial to the industry in many ways, including by developing data on comparative effectiveness, allowing the industry time to overcome safety problems and high production costs associated with airbags, facilitating the development of alternative, cheaper and safer passive restraint systems and building public confidence. *Id.* at 878–79.

The Post-*Geier* World

Over the last 17 years, the *Geier* analysis has been applied by many courts and extended to other types of regulations, including those mandating one particular design and those permitting a choice of designs. Below, the authors have compiled a collection of preemption case law that is particularly useful for the defense practitioner; although, the practitioner should be warned that, as discussed above, there are also recent decisions supporting an argument against preemption.

Seatbelts—A Regulatory Scheme with Options

Heinricher v. Volvo Car Corp., 809 N.E.2d 1094, 61 Mass. App. Ct. 313 (2004). The holding in *Geier* was specifically challenged in *Heinricher.* The plaintiff was seated in the rear center seat of a 1990 Volvo sedan, wearing the provided two-point lap belt, when she allegedly sustained serious injuries. *Heinricher*, 809 N.E.2d at 1095, 61 Mass. App. Ct. at 313. She alleged that the Volvo was defective because it lacked a three-point (Type 2) lap-shoulder belt in the rear center seat. *Id.* at 1095, 61 Mass. App. Ct. at 313–14. The trial judge granted Volvo's motion for summary judgment, concluding that the plaintiff's claims were preempted by FMVSS 208, which permitted manufacturers to equip the rear center seat with either two-point (Type 1) lap belt or three-point (Type 2) lap-shoulder belts. *Id.* at 1095, 61 Mass. App. Ct. at 314. On appeal, the Appeal Court of Massachusetts stated that:

> As part of a comprehensive safety scheme, Federal law plainly provided Volvo Car Corporation with the option of installing *either* a two-point lap belt *or* a three-point lap-shoulder harness in the rear center seat of its vehicles. Volvo Car Corporation complied with this safety scheme by availing itself of one of the two designated options. The Heinrichers' action would hold the defendants liable for choosing one Federally approved passenger restraint over another. Their cause of action, if successful, would establish a rule that, to avoid liability in Massachusetts, manufacturers must install three-point lap-should harnesses in the rear center seats of all their vehicles. As such, the passenger restraint options specifically afforded manufacturers by Congress would be foreclosed. This result would conflict with and stand as an obstacle in the implementation of the comprehensive safety scheme promulgated in Standard 208. Accordingly, Heinrichers' state common-law claims are preempted as a matter of law.

Id. at 1098, 61 Mass. App. Ct. at 318–19 (emphasis in original); *see also James v. Mazda Motor Corp.*, 222 F.3d 1323 (11th Cir. 2000) (preempting state law claims alleging that an automobile manufacturer failed to warn consumers of the risks of failing to use the manual lap belt portion of the restraint system); *Wood v. Gen. Motors Corp.*, 865 F.2d 395 (1st Cir. 1988) (injured passenger's state law product liability claims against the manufacturer were impliedly preempted by FMVSS 208); *Gills v. Ford Motor Co.*, 829 F. Supp. 894, 899 (W.D. Ky. 1993) ("If… federal regulations requiring a *choice* of safety features do not impliedly or expressly shield a manufacturer from liability for making the very choice mandated, then [that regulation] has little purpose or any reason for being.") (emphasis in original).

Hernandez-Gomez v. Volkswagen of America, Inc., 32 P.3d 424, 201 Ariz. 141 (2001). In this case, the court preempted the plaintiff's allegation that a 1981 Volkswagen Rabbit was defective due to its failure to include a manual lap belt as part of the safety restraint system. *See generally Hernandez-Gomez*, *supra*. Volkswagen argued that FMVSS 208 permitted manufacturers to choose between three options for safety restraint systems, including an option that did not require a manual lap belt. *Id.* at 426, 201 Ariz. at 143.

Originally, the Arizona Supreme Court rejected Volkswagen's argument, finding that the savings clause contained within the Safety Act "manifests a congressional intent to preserve common-law tort claims" and, therefore, the federal law did not expressly preempt plaintiff's state tort law claims. *Hernandez-Gomez v. Leonardo*, 884 P.2d 183, 191, 180 Ariz. 297, 305 (1994), *vacated Volkswagen v. Hernandez-Gomez*, 514 U.S. 1084 (1995) ("*Hernandez-Gomez I*"). Upon remand by the United States Supreme Court, the Arizona Supreme Court further determined that the Safety Act established only minimum equipment standards and, therefore, did not "occup[y] the entire field." *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 245, 185 Ariz. 509, 516 (1996) ("*Hernandez-Gomez II*"). The court further found that the imposition of common law tort liability would not obstruct Congress' objections and, therefore, there was no implied preemption. *Id.* at 248, 185 Ariz. at 519.

Citing and applying the rationale in *Geier*, the Arizona Court of Appeals later ruled that the "conclusion in *Hernandez-Gomez II* that federal law does not implicitly preempt plaintiff's state law tort action is not compatible with *Geier*." *Hernandez-Gomez v. Volkswagen*, 32 P.3d at 428, 201 Ariz. at 145. Instead, the court held that "FMVSS 208 gave manufacturers an unfettered choice among those options and precluded a common-law action requiring additional safety equipment not otherwise called for by the chosen option.… [Any other determination would] pose an obstacle to alternative choices 'the federal regulation sought.'" *Id.* (quoting *Geier*, 529 U.S. at 881). Based upon this analysis, the court of appeals vacated

the judgment entered against Volkswagen. *Id.* at 430, 201 Ariz. at 147.

Griffith v. General Motors Corp., 303 F.3d 1276 (11th Cir. 2002). In *Griffith*, the plaintiff was injured when the 1990 Chevrolet Silverado in which she was riding was involved in a head-on collision with another vehicle. *Griffith* at 1278. The Silverado's front seat was a bench seat with restraints for all three seating positions. *Id.* The driver's and passenger's positions were equipped with lap and shoulder belts, but the center seating position (where the plaintiff was seated) was only equipped with a lap belt. *Id.*

The plaintiff alleged that the restraint design was defective because the center seating position was not equipped with a shoulder belt and General Motors failed to warn her of the danger associated with this seating position. *Id.* Faced with an argument for preemption by the manufacturer, the plaintiff specifically argued that the *Geier* decision was applicable only to claims "seeking to force manufacturers to select some sort of passive restraint option for their vehicles." *Id.* at 1280. The plaintiff pointed out that, in her case, there was no explicit intent of NHTSA to permit manufacturers to utilize either lap belts or lap/shoulder belts and, therefore, her lawsuit did not frustrate NHTSA's intent. *Id.*

The Eleventh Circuit Court of Appeals disagreed, stating that the Supreme Court in *Geier* did not analyze the preemptive effect of FMVSS 208 as a function of a distinction between passive and manual restraint systems, but rather framed it as an issue of intent. *Id.* The court found that the DOT deliberately designed a regulatory scheme contemplating specific passenger restraint options, none of which could be barred by common law tort actions. *Id.* at 1281. The court specifically stated that "Griffith claims that General Motors' selection of a lap-belt-only design for its Silverado front center seat constitutes a design defect. If successful, her suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted." *Id.* at 1282.

Failure to Warn

Fisher v. Ford Motor Company, 224 F.3d 570, 573 (6th Cir. 2000). In *Fisher*, the Sixth Circuit Court of Appeals applied the *Geier* analysis to the plaintiff's failure to warn claim. The plaintiff, a five-foot-one-inch woman in her seventies, suffered a skull fracture and brain hemorrhage when the driver-side airbag deployed in her 1996 Mercury Sable. *Fisher* at 572. The plaintiff alleged a failure to warn claim based upon the dangers of the deployment of the airbag as related to small-statured persons. *Id.* Ford argued that the plaintiff's claims were preempted because federal regulations mandated a particular warning be placed on a label on the sun visor at the time of the manufacture of the vehicle. Relying upon *Geier*, the court ruled that, although federal regulations did not explicitly prohibit additional warnings, the concerns expressed in the regulation that too many warnings can cause "information overload" impliedly prohibited the inclusion of any further airbag warnings and, therefore, the plaintiff's claims were preempted by the federal regulations. *Id.* at 574.

Glazing

O'Hara v. General Motors Corp., No. 3:05-CV-1134-G, 2006 WL 1094427 (N.D. Tex. April 25, 2006). The *O'Hara* case extended the application of implied conflict preemption to a manufacturer's choice of glazing materials. In this case, a mother who was driving a 2004 Chevrolet Tahoe struck a guardrail, causing the vehicle to roll one-quarter roll, coming to rest on its passenger side. *O'Hara* at *1. During the roll, her 9-year-old daughter, who was seated in the front passenger seat, put her hand out to catch herself from falling toward the window. *Id.* The tempered glass in the window shattered and her hand and arm went through the glass and were crushed. *Id.*

Her parents sued the manufacturer, alleging that the Tahoe was defective because the front passenger window shattered and the manufacturer failed to warn the consumers that the windows may shatter. *Id.* The court granted General Motors' motion for summary judgment, finding that FMVSS 205 permitted manufacturers an option to use tempered glass in the front passenger window and that any state law that required the use of any other type of glass would stand as an obstacle to the accomplishment of the purposes and objectives of FMVSS 205. *Id.* at *5; *see also Martinez v. Ford Motor Co.*, 2007 WL 1599013 at *3 ("Plaintiff's claim that Ford should have designed the vehicle with laminated glass is federally preempted because the option for utilizing tempered glass is specifically preserved under the regulatory scheme of FMVSS 205").

For other examples of courts extending the *Geier* ruling to other scenarios, and a more in-depth history of *Geier*, see *Preemption in Automotive Crashworthiness Cases: Post-Geier v. American Honda Motor Company*, 67 Ala. Law. 119 (March 2006).

The preemption provision "suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create."

Federal Motor Vehicle Safety Standard 216

Although, as seen above, there has been a flurry of rulings finding implied conflict preemption in the automotive realm since the *Geier* decision, there is still significant debate among commentators about the propriety of these rulings. For example, plaintiffs' counsel will often argue that there is a presumption against preemption and that overcoming this presumption places an additional burden on the defense. Defense counsel will often counter, arguing that, although there is a presumption against preemption in the express preemption context, such a presumption does not apply in the implied conflict preemption context. *See, e.g., Pharm. Research and Mfr's of Am. v. Meadows*, 304 F.3d 1197, 1206 (11th Cir. 2002) ("a state statute is generally not entitled to a presumption against implied conflict preemption");

Irving v. Mazda Motor Corp., 136 F.3d 764, 769 (11th Cir. 1998) ("When considering implied preemption, no presumption exists against preemption.").

This debate has put pressure on NHTSA to clarify the extent to which the FMVSS are intended to preempt common law tort actions. In response to this debate, in August 2005, NHTSA issued a Notice of Proposed Rulemaking related to FMVSS 216 (regulating roof strength). 70 Fed. Reg. 49,223 (Aug. 23, 2005). Among other things, this proposed rule includes a section entitled "Civil Justice Reform" that expressly states that the requirements of the proposed FMVSS 216 would preempt state law. *Id.* at 49,246 ("[I]f the proposal were adopted as a final rule, it would preempt all conflicting State common law requirements, including rules of tort law."). NHTSA asserts that this preemption clause is necessary to ensure that automotive manufacturers do not strengthen vehicle roofs to the detriment of other vehicle characteristics (*e.g.*, handling and stability). *Id.* at 49, 245–46.

As one could imagine, there has been considerable debate about this proposed rule, from proponents of the automobile industry and the plaintiffs' bar, as well as from government officials across the country. In reviewing the docket, one instantly finds numerous letters from state governors and attorney generals arguing against the "Civil Justice Reform" provision. Specifically, opponents of the proposed rule often argue that the rule directly conflicts with the authority granted NHTSA to make regulations. Opponents also argue that the provision is in direct conflict with the stated purpose of the FMVSS as only "minimum standards." *See*, *e.g.*, R. Ammons & D. George, *Tort Reform by Regulation: The National Highway Traffic Safety Administration Attempts to Preempt State-Tort Lawsuits with Its Proposed Roof-Strength Regulation*, 58 Admin. L. Rev. 709 (Summer 2006) (for a good overview of the arguments made by opponents of the proposed rule).

The comment period regarding this proposed rule has long been over and many anticipate that NHTSA will act upon the proposed rule in the next few months. If the rule, as worded, becomes final, it will certainly be challenged. Bases for the challenges will likely include NHTSA's authority to promulgate such a regulation based upon its grant of authority within the Safety Act, as well as the constitutionality of the regulation due to perceived attempts to block an individual's access to state courts.

If the rule does go into effect, it will likely change the face of preemption challenges nationwide. Certainly, this proposed rule is a direct response to the Supreme Court's finding of no express preemption in *Geier*, where the Court stated that "[w]e have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances." *Geier* at 868.

While allegations dealing with roof strength may easily be dismissed by courts based on this new express preemption clause, courts may interpret NHTSA's failure to amend all of the FMVSS to include such clauses as an indication that other FMVSS are not intended to preempt common law tort actions, foreclosing even the option of implied conflict preemption in cases dealing with allegations outside the realm of roof strength. The pendulum may also swing in the other direction: the new rule may give courts the ammunition needed to rule that NHTSA has explicitly approved the Supreme Court's ruling in the *Geier* case, permitting courts to dismiss many other types of claims by plaintiffs related to the design and manufacture of automobiles. Only time will tell whether the proposed rule will become final, how the courts will deal with legal challenges to the authority of NHTSA to pass such a rule, or how the courts will interpret NHTSA's intent in finalizing this rule.

If activity in the drug and medical device field is any indication, even the adoption of NHTSA's proposed rule will probably not answer the question. Since the FDA promulgated a similar preemption Preamble in January 2006, the debate among the courts regarding the application of preemption in such cases has been far from quelled. Instead, the courts appear to have had substantial trouble consistently applying the Preamble to seemingly similar case facts. *See* Drug Preemption Scorecard, http://druganddevicelaw.blogspot.com/2007/09/drug-preemption-scorecard.html.

Conclusion

As discussed above, the automobile industry is not the only industry to be affected by the recent trends in preemption. Recent proposed regulations in the banking, telecommunications and drug industries have also focused upon the preemption of common law tort actions. To date, the plaintiffs' bar has been one of the strongest and loudest opponents to these initiatives by the agencies involved. It is up to the defense bar to protect the interests of our clients, both in and out of court. Specifically, the extension of the preemption argument will likely depend on a concerted effort by those of us representing the automobile manufacturers to lay out carefully and clearly the history of preemption to the court, and to be aware of the recent advancements toward preemption made by courts around the country and the NHTSA itself. FD