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PREEMPTION

MOTOR VEHICLES

On remand from the U.S. Supreme Court, *Priester v. Cromer* provides the South Carolina Supreme Court with an excellent opportunity to clarify preemption law as applied to the federal motor vehicle safety standards—an area of law that has so far been murky, say attorneys Charles H. Moellenberg Jr. and Leon F. DeJulius Jr. in this BNA Insight. Whatever the state top court decides, it will likely have ramifications beyond the subject of this case, a safety standard covering window glass glazing, the authors say.

Driving Preemption Forward After *Williamson v. Mazda*

BY CHARLES H. MOELLENBERG JR. AND LEON F. DEJULIUS JR.

The U.S. Supreme Court, after its decision in *Williamson v. Mazda Motor of Am. Inc.*, 131 S. Ct. 1131 (2011), remanded *Priester v. Cromer*, 697 S.E. 2d 567 (S.C. 2010), to the South Carolina Supreme Court. In *Priester*, the South Carolina Supreme Court had held that Federal Motor Vehicle Safety Standard 205 (FVMSS 205), which dictates the different types of window glass glazing that vehicle manufacturers may use, preempted state tort suits. *Priester* provides the South Carolina Supreme Court with an excellent opportunity to clarify preemption law as applied to the federal motor vehicle safety standards—an area of law that has so far been murky.

From *Geier* to *Williamson*

In *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the U.S. Supreme Court held that Federal Motor

Vehicle Safety Standard 208 (FMVSS 208) preempted a state tort suit against Honda for not installing airbags. The Court explained that common law tort suits are not preempted if they ''seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.'' *Id.* at 870. But, because the federal policy behind FMVSS 208 sought to encourage a mix of passive restraints, either airbags or automatic seatbelts, in order to encourage consumer acceptance and further technical development, there was an actual conflict that preempted suits challenging the manufacturer's choice. *Id.* at 886.

Eleven years later, in *Williamson v. Mazda*, 131 S. Ct. 1131 (2011),[1] the Supreme Court held that a different portion of FMVSS 208, which permitted manufacturers to install either lap belts or more protective lap-and-shoulder belts on rear inner seats of minivans, did not preempt a state law tort claim against Mazda for choosing to install the less protective lap belts. In its decision, the Supreme Court reaffirmed *Geier* and held that federal minimum standards could be supplemented through state tort suits. *Id.* at 1139.

One distinction between *Geier* and *Williamson* is that ''choice [was not] a significant regulatory objective'' in *Williamson*, whereas it was in *Geier*. *Williamson*, 131 S. Ct. at 1137. Unlike in *Geier*, the Supreme Court said, the federal regulators in *Williamson* were not concerned about consumer acceptance of lap-and-shoulder belts. *Id.* at 1138. They were convinced that lap-and-shoulder belts would increase safety and not create additional safety risks. *Id.* The regulators in *Williamson* ''had no interest in assuring a mix of devices; and, though [they were] concerned about additional costs, that concern was diminishing.'' *Id.* By contrast, in *Geier*, choice and variety were important regulatory objectives. 529 U.S. at 875-78. Because choice was a ''significant regulatory objective'' in *Geier* but not in *Williamson*, the Supreme Court found preemption in *Geier* and not in *Williamson*. 131 S.Ct. at 1137.

No Objectively Safest Choice

FMVSS 205, the regulation in controversy in *Priester*, requires vehicle manufacturers to use one of seven different glazing materials for their side and rear windows, such as tempered glass or laminated glass. ANSI/SAE Z26.1-1996, *incorporated by reference in* 49 C.F.R. § 57.205, § 3.2(a). Each type ''possesses its own distinctive safety characteristics.'' *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 87 (W.Va. 2009). ''One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. . . . [N]o one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions.'' ANSI/SAE Z26.1-1996 § 2.2. Laminated glass is required only for front windshields. Virtually every vehicle produced between 1965 and 1995, and more than 90 percent of current vehicles, use tempered glazing on their side and rear windows.

Tempered glazing, which is easier to break, creates a higher risk of ejection, primarily for passengers not wearing seatbelts. *See* 67 Fed. Reg. at 41366-67 (noting that advanced glazing improves passenger retention in crashes but that ''the benefits would dramatically decline with increased seat belt use.''). On the other hand, because tempered glass shatters on impact into small pieces, it reduces the risk of neck and other injuries to belted occupants. In contrast, laminated glazing, because it is tough and resists breaking, increases the risk of neck and back injuries. *See Priester,* 697 S.E.2d at 570. In addition, effective use of laminated glazing would require design changes and smaller windows, both reducing driver vision and adding significant costs. *See* 67 Fed. Reg. at 41367. Finally, because it is more difficult to break, laminated glazing makes it harder for passengers or emergency services to break into or out of a car in emergency situations. *See* Gerald M. Dworkin, *Laminated Versus Tempered Glass*, Lifesaving Resources Inc. (2010), http://www.lifesaving.com/general-interest/news/laminated-versus-tempered-glass. (''if someone is in an immersed or submersed vehicle with laminated glass in the doors, it will be nearly impossible to escape from the vehicle if the doors do not open due to the pressure of the water against the doors.'').

Appellate Court Split Over Preemptive Effect of FMVSS 205

Before the Supreme Court's vacation and remand of *Priester*, five appellate courts had already addressed the issue of federal preemption in injury cases arising from tempered window glass:

- *O'Hara v. Gen. Motors Corp.*, 508 F.3d 753 (5th Cir. 2007): In *O'Hara*, the Fifth Circuit held that a Texas tort lawsuit against General Motors for using tempered rather than laminated glazing could proceed. The Court ruled that FMVSS 205 was a minimum safety standard because the National Highway Traffic Safety Administration (NHTSA) did not reject laminated glazing as unsafe. *Id.* at 762.
- *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009): In *Morgan v. Ford*, the West Virginia Supreme Court held that FMVSS 205 preempted a state lawsuit against a car manufacturer for using tempered glass. That court noted that FMVSS 205 was not a minimum safety standard—NHTSA had stated that tempered glazing was safer than the alternatives in some cases, like those involving neck injuries. *Id.* at 94. That court also noted that finding no preemption could create an absurd result—because no material is always safer than the others, ''actions in the courts of each of West Virginia's 55 counties could theoretically, one-by-one, eliminate all of the options offered under FMVSS 205. . . . Regulation by juries could, in a piecemeal fashion, eviscerate the unitary federal regulation and leave manufacturers with no options for glazing materials in vehicle side windows.'' *Id.*[2]
- *Lake v. Memphis Landsmen LLC*, 2010 WL 891867, at *7-*8 (Tenn. Ct. App. 2010): In *Lake v. Memphis*, the Tennessee Court of Appeals agreed with the West Virginia Supreme Court, and held that a common law tort claim was preempted because no type of glazing was strictly safer than another. Therefore, federal policy was to give manufacturers the option of using the glazing that they wanted—a federal policy that con-

[1] The authors wrote an amicus brief urging preemption for that reason in *Williamson*.

[2] The authors wrote an amicus brief urging preemption for that reason in *Morgan*.

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flicted with state tort claims against manufacturers for using or not using a specific type of glazing.

- *Priester v. Cromer*, 697 S.E.2d 567 (S.C. 2010): In *Priester v. Cromer*, now on remand from the U.S. Supreme Court, the South Carolina Supreme Court joined West Virginia and Tennessee in holding that FMVSS 205 preempted state tort suits. The South Carolina Supreme Court focused on the federal policy in favor of choice, which state tort suits would seriously frustrate. *Id.* at 571. As evidence of a federal policy favoring manufacturer choice, the South Carolina court noted that tempered glazing is generally safer for riders wearing seatbelts, and that NHTSA chose to allow tempered glazing because it was ''extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants.'' *Id.* at 569-70 (quoting 67 Fed. Reg. 41365).

- *MCI Sales & Serv. Inc. v. Hinton*, 329 S.W.3d 475, 487-89 (Tex. 2010): In *MCI Sales v. Hinton*, the Texas Supreme Court applied a presumption against preemption to hold that FMVSS 205 did not preempt state law tort suits absent Congress's clear and manifest purpose to do so. The Texas Supreme Court ruled that there was no preemption because FMVSS 205 was a ''minimum standard'' and that the NHTSA ''did not state a positive desire to preserve the use of tempered glass in windows by forbidding contrary state regulation.'' *Id.* at 497-98.

In sum, at present, three appellate courts have held that FMVSS 205 preempts state tort suits while two appellate courts have held that it does not. In revisiting *Priester*, the South Carolina Supreme Court will have the first opportunity to address the issue of FMVSS 205 preemption in light of *Williamson*, the U.S. Supreme Court's most recent FMVSS preemption decision. As such, its decision may become a model for other courts and help clarify the confusing and sometimes contradictory issues surrounding FMVSS 205 and preemption.

FMVSS 205 Conflicts With And Preempts State Tort Suits

The conflict between the purposes of FMVSS 205 and state tort suits arises primarily from two facts. First, unlike the provision of FMVSS 208 discussed in *Williamson*, which was seen as a minimum safety standard, there is no objectively safest choice in FMVSS 205 for window glass. Because every type of glazing has its own safety advantages and disadvantages, ANSI/SAE Z.26.1-1996 § 2.2, the purpose of FMVSS 205 cannot be to set a minimum standard. Instead, it is to encourage a mix of products on the market and promote choice. A state tort suit prohibiting a certain type of glazing may improve safety in some circumstances, but would reduce safety in others. It is therefore not saved under the rule in *Geier* allowing tort suits designed to provide greater safety than a federal minimum standard. *See* 529 U.S. at 870.

Second, as the West Virginia Supreme Court observed in *Morgan*, 680 S.E.2d at 94, because each type of glass is inferior to others in preventing injury in some accidents, different juries in different circumstances could find a manufacturer liable for using every different type of glazing. In that case, manufacturers may not be able to avoid liability by using any type of glazing, an absurd result. At the very least, manufacturers may be required to produce a different type of glazing for each state, a result that would be contrary to the federal regulatory purpose of promoting national uniformity and the free flow of interstate commerce.

Federal regulators were sensitive to the safety tradeoffs. After a decade of rulemaking and research efforts, NHTSA chose not to prohibit tempered glazing, citing ''safety and cost concerns.'' 67 Fed. Reg. at 41367. NHTSA retained the tempered glass option, after careful consideration, in order to balance the competing interests of individuals who might be harmed by tempered glazing with the interests of individuals who might be harmed if the option of tempered glazing were removed. *See* 67 Fed. Reg. at 41367 (''The agency is extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants.''). Thus, unlike in *Williamson*, where NHTSA's primary concern was the cost of requiring lap-and-shoulder belts, and that concern was diminishing, 131 S. Ct. at 1138, NHTSA here has a significant regulatory objective in ensuring that tempered glass remains available, as it is actually safer for motorists who wear seatbelts. *See* 67 Fed. Reg. at 41367.

For this reason, FMVSS 205 more closely resembles the portion of FMVSS 208 that was held to have preemptive effect in *Geier*. First, in *Geier*, NHTSA was concerned about the safety risks of airbags (including lack of public acceptance). 529 U.S. at 877-78. Similarly, in this context, NHTSA is concerned about the safety problems of laminated glazing. *See* 67 Fed. Reg. at 41367. Second, in *Geier* (and in contrast with *Williamson*, where the cost considerations were small and diminishing), NHTSA was concerned about the significant costs of mandating airbags—both the $320 per vehicle average installation cost and the $800 replacement costs. 529 U.S. at 878. Similarly, with FMVSS 205, prohibiting tempered glass windows would reportedly require many cars to be redesigned with smaller windows, at a significant cost both financially and in terms of the danger from reduced visibility. *See* 67 Fed. Reg. at 41367. Finally, in *Geier*, NHTSA did not want to mandate a specific type of passive restraint because it wanted to encourage innovation among manufacturers through a mix of different products. 529 U.S. at 875. Similarly, with FMVSS 205, NHTSA chose to allow tempered glazing in part to encourage the development and use of safer systems to prevent ejection, such as side curtain airbags. 67 Fed. Reg. at 41367.

In fact, the case that preserving tempered glass is a ''significant regulatory objective'' of FMVSS 205 is even stronger than the case that preserving automatic seatbelts was a ''significant regulatory objective'' in *Geier*, where the Supreme Court did find preemption. The regulation at issue in *Geier* only required some form of passive restraint system that met crash protection requirements. *See* 529 U.S. at 878. It did not specifically create an exhaustive list of those passive systems. *Id.* In that sense, *Geier* could have labeled FMVSS 208 a minimum standard since it laid out minimum crash protection requirements and then let manufacturers decide how they wanted to meet them. In contrast, FMVSS 205 explicitly allows tempered glazing. ANSI/SAE Z26.1-1996 § 3, *incorporated by reference in* 49 C.F.R. § 57.205, § 3.2(a). That inclusion reveals NHTSA's spe-

cific intention to ensure the availability of tempered glass.

In deciding to keep tempered glazing available, NHTSA used its expert judgment to promulgate a national standard designed to reduce overall risks across all accident patterns. A single jury will only see the single case in front of it and certainly feel sympathy for the single plaintiff before it. It will likely dwell on the particular circumstances of the plaintiff's accident and create liabilities that reduce the safety of the country's motorists as a whole. Under the Supremacy Clause, it cannot be allowed to undo a federal agency's carefully considered expert decision made in the wider public interest. A suit against a manufacturer for using tempered glazing might reduce car safety and would frustrate NHTSA's purpose of keeping tempered glazing available.

The Risk of Conflicting Standards

The fact that no type of glazing is strictly safer than the others also creates a serious logical dilemma. If a state suit attacking the use of tempered glazing were to proceed, how would a state court respond in the next lawsuit to a plaintiff who sued after being injured due to laminated glazing? The law should not countenance that the tempered glazing plaintiff be allowed his day in court but the laminated one be preempted. Yet if manufacturers face liability regardless of which FMVSS 205 option they take, then a situation arises where state law prohibits what federal law requires—the textbook case of conflict preemption. The most logical way out of this dilemma would be to find that both suits are preempted. Otherwise, states could, by eliminating one option after another, arrive at that textbook case of preemption. *See Morgan*, 680 S.E.2d at 94. And under the Supremacy Clause, states can no more create a conflict with federal laws piecemeal than they can in one fell swoop.

In *Williamson*, there was no such risk of conflicting standards. The lap-and-shoulder belts were safer than the minimally-required lap belts. 131 S. Ct. at 1138. Thus, manufacturers faced no serious risk that they would be sued for using lap-and-shoulder rather than lap belts and then not be able to use either. With window glass, however, manufacturers do face a real risk of being sued for using laminated glass, as laminated glass does pose some significant risks that tempered glass does not—for instance, neck and back injuries, *see Priester*, 697 S.E.2d at 570, reduced visibility, *see* 67 Fed. Reg. at 41367, and trapping riders in their vehicles.[3]

Moreover, even if each state were to keep some glazing options available, there is no guarantee that each state would keep the *same* glazing options. In a case involving a federal minimum standard like *Williamson*, inconsistent standards are less of a problem because a manufacturer could comply with the standards of the most stringent state. In the FMVSS 205 context, however, each state's standards would depend on the vagaries of what accidents happened and what suits are filed. Thus, each state's standards could not only conflict with the federal standards, but also other states' standards, and manufacturers would be left having to use different glazings for cars in each state, a result contrary to the purpose of the federal motor vehicle safety standards in the first place. *See* S. Rep. No. 89-1301, at 12 (1966) (''[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be . . . uniform throughout the country.'').

One goal of the revision to FMVSS 205 that incorporated ANSI/SAE Z.26.1-1996 to allow tempered glazing was ''Streamlining and Clarification.'' 68 Fed. Reg. at 43964. DOT noted that ''[t]he amendments of the past 20 years have resulted in a patchwork of requirements and that a purpose of the revision was 'to simplify FMVSS No. 205, consistent with our regulatory reform efforts.' '' *Id.* Certainly, state tort suits creating a situation where different states—or even different parts of a state, *see Morgan*, 680 S.E.2d at 94—require different types of glazing would hearken back to the ''patchwork'' regulations of old that the newest federal regulations are intended to supplant.

Implication for Preemption Analysis

The U.S. Supreme Court, in the absence of express statutory preemption, has turned its analysis in some cases to whether ''state and federal law conflict [so that] it is impossible for a private party to comply with both state and federal requirements.' '' *E.g.*, *Pliva Inc. v Mensing*, No. 09-993, 2011 WL 2472790, at *8 (June 23, 2011) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). In *Pliva*, the Court reserved judgment on ''whether state and federal law 'directly conflict' in circumstances beyond 'impossibility.' '' *Id*. at n.4.

The analysis of FMVSS 205 demonstrates that direct conflicts do arise, and implied conflict preemption should apply, beyond the narrow boundary of impossibility of current compliance. Because federal law is neutral and ordinary conflict preemption principles apply when considering federal motor vehicle safety standards, *Geier*, 529 U.S. at 870-71, the considered policy judgments of an expert federal agency such as NHTSA should prevail. The shifting political winds within the White House and the Solicitor General's Office should be given little analytical weight. The South Carolina Supreme Court's ultimate decision on preemption in *Priester* will likely have ramifications beyond FMVSS 205.

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[3] It is true that most of the recorded window glazing lawsuits to date have targeted tempered glazing. That trend reflects, however, not the danger of tempered glass, but rather the fact that virtually every vehicle produced by every manufacturer between 1965 and 1995, which accounts for more than 90 percent of current vehicles, use tempered glass in their side windows. If tort suits for using tempered glass were allowed to proceed, manufacturers may start using alternatives such as laminated glass more frequently, and the frequency of laminated glass lawsuits surely will then rise.

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