AIR BAG PREEMPTION: A STATUS REPORT

The U. S. Supreme Court will finally and for all time decide the fate of air bag preemption in the case of Geier v. American Honda Motor Company, in which cert was granted and oral argument held during 1999. The decision is expected between late April and June. Assuming Geier opens the door to no air bag cases where does that take us? What is the current status pending the Geier decision?

BACKGROUND TO GEIER

Geier is Rob Palmer's case which presented the question of whether compliance with 15 U.S.C. §1381-1431 preempts state common law claims that an automobile is defectively designed because it lacks an air bag. 15 U.S.C. §1397(k) expressly saves common law remedies from preemption. In Geier, the *amicus* brief of the state's attorneys general supported a restrictive view of preemption that limited it to precluding states from having different safety standards than the federal government. Regardless of Geier, other case decisions have held:

1. That NHTSA regulations do not preempt manufacturer determinations of threshold collision speed that cause air bags to deploy. Plaintiffs are free to claim that the deployment threshold of a particular vehicle was too high or too low. Perry v. Mercedes Benz of North America, Inc., 957 F.2nd 1257 (5th Cir. 1992).

2. NHTSA regulations do not establish standards for gas temperatures or fabric materials. Plaintiffs are free to assert that a particular system was defectively designed in a manner that allowed it to cause facial burns. Collazo-Santiago v. Toyota Motor Corp., 159 F.3rd 23 (1st Cir. 1998).

Preemption of claims that a vehicle was defective for the absence of an air bag has, to-date, been unanimous in the federal courts. (E.g., Wood v. General Motors Corp., 865 F.2d 395 (1st Cir.

1988); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989).

In fact some federal courts have held that §1392(d) preempts any common law ruling imposing a standard of care greater than the minimum standards set by NHTSA. Harris v. Ford Motor Co., 110 F.3rd 1410, 1413-1415 (9th Cir. 1997).

The Solicitor General's position is that compliance with federal standards does not immunize manufacturers from liability, and that the Safety Act does not expressly preempt tort claims. Yet the solicitor agreed with Honda that in the case of air bags, there was implied preemption because the Secretary of Transportation meant for there to be an option in the types of passive restraints offered. However, the Solicitor General's office took the position that the "savings clause" at 1397(k) was meant to negate the NHTSA regulations being a "substantive defense to liability" rather than directly addressing preemption. "In cases in which tort liability does not conflict with a federal standard, §1397(k) makes clear that compliance with the standard does not immunize a manufacturer from liability." Solicitor general's brief at 21.

This policy was recently affirmed by the U. S. Supreme Court in Medtronic, Inc. v. Lohr, 518 U.S. 470, 495 (1996).