

NOTES

THE DEPLOYMENT OF CAR MANUFACTURERS INTO A SEA OF PRODUCT LIABILITY? RECHARACTERIZING PREEMPTION AS A FEDERAL REGULATORY COMPLIANCE DEFENSE IN AIRBAG LITIGATION

INTRODUCTION

Since their technological development in the late 1960s,¹ automobile supplemental restraint systems,² more commonly known as airbags,³ have been the source of heated debate. Consumer advocates, the federal government and car manufacturers have wrestled with the airbag safety value⁴ and the consumers' willingness to pay for the added feature.⁵ Throughout the 1970s and 1980s, the Big Three⁶ clung to the notion that safety does not sell.⁷ However, as the government campaign for the

1. The first airbag patent was issued in 1923 for a pre-inflated device that was designed to protect delicate freight. William R. Carey, known as the father of the airbag, received the first 10 patents for the modern day airbag. See Anita Lienert, *Airbag Furor Dismays Inventor: "I'm Trying to Save Lives,"* DETROIT FREE PRESS, Nov. 28, 1996, at 1A.

2. Modern day airbag systems are sometimes referred to as supplemental restraint systems or SRS's. Car manufacturers prefer this term to emphasize the importance of using seat belts in conjunction with the airbag component. The industry warns that airbags are a supplement, not an alternative, to seat belts. See, e.g., 49 C.F.R. § 571.208 (1996).

3. An airbag "is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces." Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-35 (1983).

4. Airbags are credited with saving more than 2620 drivers and passengers, primarily in high and moderate speed crashes as of November 1, 1997; however, there are a confirmed total of 87 fatalities caused by airbag deployment. Forty-nine of those fatalities involved children. See NHTSA, *Airbags* (visited Mar. 24, 1998) <<http://www.nhtsa.dot.gov/airbags>>. See Lienert, *supra* note 1, at 1A. See also *infra* note 20, 39 and accompanying text.

5. See Fred Mannering & Clifford Winston, *Automobile Air Bags in the 1990s: Market Failure or Market Efficiency?*, 38 J.L. & ECON. 265 (1995) (concluding that the widespread adoption of airbags and their elevation to a standard feature in all vehicles is a product of an efficient market).

6. Ford Motor Company, General Motors Corporation, and Chrysler Corporation are commonly referred to as the "Big Three" American car manufacturers.

7. See S. REP. NO. 89-1301, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2710 (the conviction that safety does not sell is widely held in the industry). During the 1970s and early 1980s, American car manufacturers faced significant competition from foreign car manufacturers as evidenced by a decline in market share. "The Big Three automakers felt every dollar spent meeting government regulations was a dollar stolen from developing features to make cars more attractive to buyers." James R. Healey & Jayne O'Donnell, *Deadly Air Bags: How a Government Prescription for*

installation of airbags became increasingly public, the demand for better performance and increased safety features escalated.

Despite the escalation in demand, car manufacturers vehemently opposed the installation of airbags into new vehicles because of two considerations. First, car manufacturers feared massive product liability litigation as a result of industry research that exposed the dangerous propensities of airbags.⁸ Second, car manufacturers consistently feared that airbags could severely injure or kill children and small adults.⁹

Despite industry warnings, the government campaign for airbag installation continued. In 1988, the National Highway Traffic and Safety Administration ("NHTSA") passed Safety Standard 208¹⁰ mandating the phase-in of airbags by giving car manufacturers the option of installing one of three passive restraint systems in all cars produced on or after September 1, 1989.¹¹ After this legislative initiative, the courts faced hundreds of product liability suits alleging that car manufacturers negligently designed defective cars by failing to install airbags.¹² In response, car manufacturers successfully raised a preemption defense, arguing that the National Highway and Traffic Safety Act ("Safety Act")¹³ preempts state common law actions for failure to install an airbag.

To date, only four appellate courts have addressed the issue of whether the Safety Act and Safety Standard 208 preempt manufacturers' liability under state common law when the car manufacturer chose to install another federally approved passive restraint system other than airbags.¹⁴ All four

Safety Became a Threat to Children, USA TODAY, July 8, 1996, at 1B. In 1971, Lee Iacocca, Ford's then president, elicited President Nixon's help in relieving the pressure on auto manufacturers to install airbags and other safety devices. Nixon was sympathetic, and as a result, a requirement for automatic passenger restraints including airbags was delayed until 1976. *See id.* *See generally* S. REP. NO. 89-1301, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2710.

8. *See infra* note 39 and accompanying text.

9. *See infra* notes 39, 64, 66 and accompanying text.

10. 49 C.F.R. § 571.208 (1996).

11. *See id.* § 571.208 S4.1.4 - 4.1.4.2.2; *see also infra* notes 47-48 and accompanying text.

12. Although airbags were not required before September 1, 1997, some car manufacturers have installed airbags prior to this time on their own initiative. *See infra* note 56. The first reported decision addressing the failure to install airbags was *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir. 1985). This court, however, did not consider the validity of the airbag theory, but simply affirmed summary judgment in favor of General Motors because the plaintiff failed to raise an issue of material fact. *See id.* at 987.

13. The National Highway and Traffic Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966) (originally codified at 15 U.S.C. §§ 1381-1431 (1988)). The statute was recodified in 1994 so that all transportation laws appeared in one comprehensive title. It was moved from Title 15 to Title 49 in the United States Code. *See* Pub. L. No. 103-272, 108 Stat. 1379 (1994). No substantive changes were made to the law. The Safety Act is now codified at 49 U.S.C. §§ 30101-30162 (Supp. 1995).

14. *See Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989);

courts concluded that the Safety Act impliedly preempts state common law liability.¹⁵ However, in light of two recent Supreme Court opinions, state and federal district courts are split on the issue of whether the "failure to install" should result in the imposition of liability upon car manufactures.¹⁶

The judicial interest in the production of safe and crashworthy¹⁷ automobiles has reached a critical juncture. In 1993, NHTSA ended the phase-in period and amended Safety Standard 208 to require the installation of driver and passenger side airbags in all new cars beginning with the 1998 and 1999 model years.¹⁸ Thus courts will face a new tide of automobile product liability suits by plaintiffs who are injured or killed by an airbag required by federal law.¹⁹ As a result, car manufacturers will once again raise a preemption defense. The preemption defense in cases where a vehicle occupant is injured or killed, however, will focus on the issue of whether compliance with federal standards will bar manufacturer liability.²⁰

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988).

15. See *Pokorny*, 902 F.2d 1116; *Taylor*, 875 F.2d 816; *Kitts*, 875 F.2d 787; *Wood*, 865 F.2d 395. See *infra* notes 92, 97, 102, 109 and accompanying text. For an in-depth criticism of the preemption defense in automobile design defect cases, see Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415 (1996). See also Keith C. Miller, *Deflating the Airbag Pre-emption Controversy*, 37 EMORY L. J. 897 (1988).

16. See *Freightliner v. Myrick*, 115 S. Ct. 1483 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

17. Crashworthiness is a common law development. Crashworthiness is defined as "the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury." *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968). That court concluded that injuries resulting from accidents and those injuries produced in the "second collision" of the passenger with the interior of the car are all foreseeable and thus should be designed against using reasonable care. See *id.*

The "second collision" refers to the impact of the individual against the steering wheel, dashboard, windshield and other interior fixtures of the automobile. A crashworthiness claim is based on the notion that a design defect led to injuries "over and above the damage or injury that probably would have occurred as a result of the impact of the collision absent the defective design." *Id.* at 503. Crashworthiness claims are normally in negligence, breach of warranty, strict liability and misrepresentation. Defective airbag claims and failure to install airbag claims are just two types of claims involving crashworthiness themes. See R. Ben Hogan, III, *The Crashworthiness Doctrine*, 18 AM. J. TRIAL ADVOC. 37, 41-42 (1994). For an in-depth discussion of the fundamental legal principles applied in crashworthiness litigation, see Nicholas J. Wittner, *Crashworthiness Litigation: Principles and Proofs, in Litigating the Complex Motor Vehicle Case* 175 (Neil A. Goldberg et al. eds., 1992).

18. See 49 C.F.R. § 571.208 (1996). See *infra* note 53 and accompanying text.

19. One commentator suggests that the courts will encounter at least three types of product liability claims involving airbags by the year 2000: "(1) claims for injuries sustained where airbags deployed prematurely; (2) claims for injuries sustained in auto accidents where airbags fail to deploy; and (3) claims for injuries allegedly caused solely by airbag components, including fires, burns, lacerations, whiplash, and even death." Cynthia M. Certo, *1993 Changes to Safety Standard 208: Deploying an (Air) Bag Full of Product Liability Claims?*, 67 TEMP. L. REV. 673, 676 (1994).

20. As of October, 1996, there were approximately eight cases filed nationwide against automobile manufacturers relating to children's deaths resulting from deployments of front passenger-side airbags. See Ann T. Darin, *Volvo Faces Airbag Suit in Death of Child*, AUTOMOTIVE NEWS, Oct.

Courts will look to the failure to install cases for guidance on the preemption issues that will permeate the new tide of defective airbag cases. However, the previous appellate court decisions²¹ have failed to answer the crucial question surrounding the next generation of airbag litigation: are a plaintiff's airbag design defect claims preempted by the Safety Act when the airbag conforms to federal standards? Thus far, only the Fifth Circuit has confronted this issue, and it allowed a state liability action to proceed despite manufacturer compliance.²² This decision, however, is not necessarily indicative of how other courts will answer this question.

This Note will examine the controversy surrounding the preemption defense used by car manufacturers in suits based on the failure to install airbags. Using that analysis, this Note will evaluate car manufacturers' defense that compliance with federal standards bars state common law liability in light of federally mandated driver and passenger side airbags. Part I reviews the tumultuous evolution of the National Traffic and Motor Vehicle Safety Act of 1966 and Standard 208. Part II discusses the car manufacturers' increased exposure to product liability in the wake of the new federal law requiring both driver and passenger side airbags and the recent deaths and injuries resulting from airbag systems already in place. Part III analyzes judicial decisions affecting the preemption defense in failure to install airbag cases. Using the precedent set by the courts in failure to install cases, Part IV applies those rationales to the new defective airbag cases where a vehicle occupant is injured or killed by an airbag. Finally, Part V proposes that the courts recharacterize the federal preemption defense as a federal regulatory compliance defense barring manufacturer liability when the airbag complies with the applicable performance standards. The proposed parameters of the federal regulatory compliance defense will follow the government contractor defense that has been recognized by the Supreme Court.

28, 1996, at 16, available in 1996 WL 12807352. The case that is the subject of Ms. Darin's article, *Hisrich v. Volvo Cars of North America, Inc.*, was scheduled to be heard in the summer of 1997 in the U.S. District Court for the Northern District of Ohio in Cleveland. See *id.* In *Hisrich*, Diana Zhang was killed by an airbag in a 7 mph crash. See *id.* The claim alleges that the vehicle's airbag system had inadequate usage and safety instructions, a defective sensor system and a defective design that did not account for low-speed, front-end accidents. See *id.* The defense counters that the collision was of sufficient force to warrant deployment of the airbag, that warnings in the vehicle were not followed and that the child was unbelted in violation of Ohio law. See *id.*

21. See *supra* note 14 and accompanying text.

22. See *Perry v. Mercedes Benz N. Am.*, 957 F.2d 1257 (5th Cir. 1992).

I. HISTORY

A. *The National Traffic and Motor Vehicle Safety Act of 1966*

For the first half of this century, common law dictated automobile safety standards.²³ It was not until 1966 that Congress made its first legislative thrust toward uniform automobile safety standards by passing the Safety Act. The Safety Act granted NHTSA the power to pass safety standards in an effort to “reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.”²⁴ Passage of this landmark legislation “marked a dramatic shift from the historic definition of the automobile safety problem as one of avoiding accidents by modifying driver behavior to that of modifying vehicle design.”²⁵ To accomplish its goal of reducing traffic accident fatalities, the Safety Act authorized the Secretary of Transportation²⁶ to promulgate Federal Motor Vehicle Safety Standards (“FMVSS”) for all

23. Automobile product liability can trace its history to *MacPherson v. Buick Motor Co.* in which Justice Cardozo established a general rule of manufacturer liability: “If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. . . . [t]hen, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.” 111 N.E. 1050, 1053 (N.Y. 1916).

The common theories of strict liability, negligence and warranty continued to develop. In 1968, the Eighth Circuit, in *Larsen v. General Motors Corp.*, significantly expanded the automobile manufacturers duty under common law. 391 F.2d 495 (8th Cir. 1968). This landmark case recognized that a manufacturer is “under no duty to design an accident-proof or fool-proof vehicle.” *Id.* at 502. However, the *Larsen* court noted that although a car manufacturer does not intend for its product to be involved in a collision, it is “clearly foreseeable” and “statistically inevitable” that over the life of the car, “it will be involved in some type of injury-producing accident.” *Id.* Therefore, the court held that a “manufacturer is under a duty to use reasonable care in the design of its vehicle” to minimize injuries caused by the “second collision” of the passenger with the interior part of the car. *Id.* Failure of the manufacturer to fulfill this duty will result in liability under general negligence principles. *See id.*

24. 49 C.F.R. § 571.208 (1996). The Safety Standard 208 states an express scope and purpose:

Scope. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

Purpose. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

Id.

25. *See* Kurt B. Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to Federal Preemption Defense*, 46 BAYLOR L. REV. 141, 142 (1994). *See also* Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 33 (1983).

26. Originally, the Safety Act delegated authority to the Secretary of Commerce. Once Congress created the Department of Transportation, the administration of the Safety Act was transferred to the new department. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(a)(6)(A), 80 Stat. 931 (1966). The Secretary of Transportation’s authority to promulgate safety standards under the Safety Act has been delegated to the Administrator of the National Highway Traffic Safety Administration. 49 C.F.R. § 1.50(a) (1996).

cars sold in the United States.²⁷

B. Standard 208—A Troubled Path to Mandatory Airbags

In enacting the Safety Act's Standard 208, Congress sought to focus the automotive industry on improving the crashworthiness of vehicles through the implementation of safety measures designed to reduce the potentially devastating impact of the "second collision."²⁸ Because of the low number of Americans who used seat belts and the rising death rate due to car accidents, the Department of Transportation believed that passive occupant restraint systems²⁹ were necessary to protect consumers.³⁰

NHTSA has engaged in "regulatory schizophrenia"³¹ over the issuance of safety standards that would require mandatory installation of airbags in all cars. Since the Safety Act's inception in 1966, the federal requirements for passive restraint systems have been "promulgated, revoked, reversed, suspended, extended, amended, reinstated, and generally scrutinized by all three branches of the government."³² A discussion of Standard 208's "complex and convoluted history"³³ provides a foundation for understanding the precarious position of car manufacturers selling automobiles in the United States.³⁴

Originally, Standard 208 simply required the installation of seat belts in all automobiles.³⁵ However, with increased pressure from the government, NHTSA formally proposed a standard requiring passive restraint systems in

27. See 15 U.S.C. § 1393(a) (1966) (repealed 1974). The delegation to the Secretary of Transportation was broad. The Safety Act stated that the safety standards "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." *Id.*

28. See S. REP. NO. 1301, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2710. Congress intended the Safety Standards to address two types of dangers: vehicle defects that caused the accidents and vehicle defects that aggravated injuries to the occupants once the accident occurred. See *Wood v. General Motors Corp.*, 865 F.2d 395, 397 (1st Cir. 1988). The latter, often referred to as "second collision" injuries, was the focus when the National Highway Safety Board issued Federal Motor Vehicle Safety Standard 208 on February 3, 1967. Motor Vehicle Safety Standard No. 208, 32 Fed. Reg. 2415 (1967). Passive restraint systems are designed to reduce these second collision injuries. See *supra* note 17.

29. Passive occupant restraint systems are devices that do not depend for their effectiveness on any action taken by the occupant except that necessary to operate the vehicle. Two types of systems emerged—automatic seat belts and airbags. For a discussion of the differences between active and passive restraint systems, see *Higgs v. General Motors Corp.*, 655 F. Supp. 22, 24 (E.D. Tenn. 1985).

30. See *Motor Vehicle Mfrs.*, 463 U.S. at 34.

31. See *Miller*, *supra* note 15, at 898.

32. See *Certo*, *supra* note 19, at 679.

33. *Motor Vehicle Mfrs.*, 463 U.S. at 34.

34. For a more detailed account of the history of Standard 208, see *Motor Vehicle Mfrs.*, 463 U.S. at 34-40; *Chadwell*, *supra* note 25.

35. See Motor Vehicle Safety Standard No. 208, 32 Fed. Reg. 2415 (1967).

all vehicles manufactured after January 1, 1972.³⁶ This action met with staunch resistance from car manufacturers causing NHTSA to amend the standard to require full passive protection for all front seat occupants of vehicles manufactured after August 15, 1975.³⁷ Just before the new deadline, however, Secretary of Transportation William Coleman suspended the passive restraint requirement because of the expected public resistance to the new systems.³⁸

Government support for airbags continued to be met with strict opposition from car manufacturers. Industry research indicated that unrestrained and out-of-position children and adults could be severely injured or killed by airbags.³⁹ Despite manufacturers' warnings, airbag enthusiasts pushed the government to regulate and require the installation of airbags in all cars. Proponents accused the car manufacturers of stalling on airbag installation, thus creating a general mistrust and contempt for automakers.⁴⁰

Nevertheless, in 1977, Secretary of Transportation Brock Adams issued a new mandatory passive restraint regulation⁴¹ mandating the phasing-in of

36. See *Inflatable Occupant Restraint Systems*, 34 Fed. Reg. 11, 148 (1969). The term passive restraint system, at this time, connoted an inflatable airbag restraint system. See *supra* note 29.

37. See *Occupant Crash Protection* 37 Fed. Reg. 3911-13 (1972). In the interim, vehicles manufactured between August 1973 and August 1975 were to include either passive restraints or lap and shoulder belts coupled with an ignition lock that would prevent the car from starting if the seat belts were not secured. See *Motor Vehicle Mfrs.*, 463 U.S. at 35. Most car manufacturers chose to install the ignition locks which created considerable public disapproval. As a result, Congress was forced to amend the Act. See *id.* at 36. See also *Motor Vehicle and Schoolbus Safety Amendments of 1974*, 15 U.S.C. § 1410(b). The new amendment also required that "any safety standard that could be satisfied by a system other than seat belts" be submitted to Congress where it could be vetoed by concurrent resolution of both houses. See *id.* (citing 15 U.S.C. § 1410(b)(2)). The effective date for mandatory passive restraint systems was extended until August 31, 1976. See *id.* (citing 40 Fed. Reg. 16,217 (1975)).

38. In an effort to "smooth the way for public acceptance of mandatory passive restraints," Secretary of Transportation Coleman proposed a demonstration plan where 500,000 cars would be produced containing passive restraint systems. *Motor Vehicle Mfrs.*, 463 U.S. at 37.

39. See Healey & O'Donnell, *supra* note 7, at 1B. As early as 1969, car manufacturers began warning of the dangerous propensities of airbags. See *id.* At a safety conference in August of that year, General Motors stated, "a small child close to an instrument panel from which an air cushion is deployed may, in our present estimation, be severely injured or even killed." *Id.* In 1974, Volvo published a report, entitled "Possible Effects of Airbag Inflation on a Standing Child," which confirmed the danger of airbags to small children. Baby pigs, weighing 31 to 33 pounds, were used to simulate three to six year old children, and were positioned four to six inches from the passenger airbags without seat belts and were subjected to the equivalent of a 17.5 mph crash. Eight of the 24 pigs were killed by the airbags and 13 were badly injured. See *id.* The warning was repeated in 1979 by the General Accounting Office. Once again, however, the warning was dismissed by NHTSA as faulty because of its reliance on data supplied by the car industry. See *id.*

40. See generally Nader & Page, *supra* note 15.

41. The new standard was known as Modified Standard 208. *Occupant Restraint Systems*, 42 Fed. Reg. 34,289-308 (1977). The Modified Standard was upheld as a rational and nonarbitrary regulation consistent with NHTSA's mandate under the Act. See *Pacific Legal Foundation v. Dep't of*

either airbags or automatic seat belts for all cars beginning with model year 1984.⁴² For the next four years, the car industry geared its efforts toward producing and refining the technology necessary to meet the modified Standard 208.⁴³ By 1981, the car industry had changed its plans, and as a result, NHTSA no longer believed that the passive restraint requirement would produce significant safety benefits.⁴⁴ Accordingly, Secretary of Transportation Lewis abandoned the entire passive restraint standard.⁴⁵

The rescission of the passive restraint system was not well received. In 1983, the Supreme Court determined that NHTSA's rescission was "arbitrary and capricious" and therefore void.⁴⁶ Based on this ruling and the increasing public support for airbags, NHTSA produced a revised set of safety standards in 1988.⁴⁷ Mandating compliance beginning with the 1990 model year, car manufacturers were allowed to phase-in airbags by choosing one of three passive restraint options: a driver's side airbag system and front automatic seat belts, front automatic seat belts or manual front seat belts with a belt warning system.⁴⁸ The standard allowing airbag phase-in became the center of the failure to install controversy. Injured plaintiffs filed claims alleging that the car manufacturers negligently and defectively designed their cars without airbags despite compliance with the options granted by the federal statute.⁴⁹

Transportation, 593 F.2d 1338 (D.C. Cir. 1979).

42. See *Motor Vehicle Mfrs.*, 463 U.S. at 37. The choice of which system to install—airbags or passive seat belts—was left to the manufacturer. See *id.*

43. Once again, however, in April 1981, Secretary of Transportation Andrew Lewis ordered a one-year delay in the application of Modified Standard 208. See *id.* at 38 (citing 46 Fed. Reg. 21,172 (1981)).

44. See *id.* NHTSA's change in conviction resulted from the decision of car manufacturers to install automatic seat belts rather than airbags in their cars. See *id.* In the Agency's view, this eliminated the safety potential of airbags. In 1977, NHTSA based its life-saving and injury-preventing estimates of airbags assuming that airbags would be installed in 60% of all new cars and automatic seat belts in 40%. See *id.* However, car manufacturers chose to install automatic seat belts in 99% of their cars. See *id.* Thus, NHTSA concluded that imposing approximately \$1 billion in costs to implement the passive restraint requirement without more adequate evidence concerning sufficient safety benefits would be unreasonable. See *id.* at 39.

45. See Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 46 Fed. Reg. 21,205 (1981) (to be codified at 49 C.F.R. pt. 571). NHTSA decided to rescind the passive restraint requirement in response to both the changed economic conditions and the difficulties that the car industry faced in the 1980s. See *id.*

46. *Motor Vehicle Mfrs.*, 463 U.S. at 46. NHTSA's action in promulgating occupant crash protection standards could be set aside if found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994). Justice White stated that "for nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost." *Motor Vehicle Mfrs.*, 463 U.S. at 49.

47. See 49 C.F.R. § 571.208 (1996).

48. See *id.*

49. Plaintiffs typically file suit under two theories. First, plaintiffs claim that their cars are

By the late 1980s, airbag systems had gained widespread public support.⁵⁰ Car manufacturers, faced with escalated consumer demand, feared increased liability for failing to install airbags in all cars.⁵¹ Based on government pressure, consumer demand and increased liability exposure, car manufacturers felt obligated to install airbags in all cars sold in the United States, despite the options granted in Standard 208.⁵²

By 1993, NHTSA deleted the options available to car manufacturers under the previous amendment. The revised Standard 208 mandates that all cars beginning with the 1998 model year be equipped with a driver's and passenger's side airbag and manual lap and shoulder belt.⁵³ It is this revised standard, requiring the installation of airbags in all cars, that will be the center of the new tide of defective airbag claims when a vehicle occupant is injured or killed by an airbag. One commentator has stated that removing the phase-in period that allowed manufacturers to choose among three options has put the "regulatory war over airbags to rest."⁵⁴ In reality, however, the war has not ended, but has just entered a new phase.

II. THE CONTROVERSY SURROUNDING FEDERALLY MANDATED AIRBAG INSTALLATION

Nearly twenty-two million cars and light trucks have passenger side airbags. This number will likely increase in response to the 1998 deadline⁵⁵

defectively designed and unreasonably dangerous because of the lack of airbags or other passive restraint systems. Second, plaintiffs claim that automobile manufacturers were negligent in failing to include airbags or other passive restraint systems in the design of the car, and that the lack of the airbags increased the severity of plaintiffs' injuries. See Frank Waters, *Airbag Litigation: Plaintiffs, Start Your Engines*, 13 PEPP. L. REV. 1063 (1986).

50. See Chadwell, *supra* note 25, at 147. Consumers disliked the automatic seat belts that fastened around the driver and front seat passenger. Similarly, the automatic seat belts were unpopular with safety experts because only the shoulder harness and not the lap belt automatically fastened. The airbag appeared to answer the public's complaints. See *id.* at 146-48.

51. In 1977, the automotive manufacturing industry was warned by the general counsel of the Insurance Institute for Highway Safety that continued resistance to installing airbags could result in potential liability. See Nader & Page, *supra* note 15, at n. 113.

52. See *infra* note 56.

53. See 49 C.F.R. § 571.208 (1996).

At least 95% of each manufacturer's passenger cars manufactured on or after September 1, 1996 and before September 1, 1997 must be equipped with an airbag and a manual lap/shoulder belt at both the driver's and right front passenger's seating position. Every passenger car manufactured on or after September 1, 1997 must be so equipped.

At least 80% of each manufacturer's light trucks manufactured on or after September, 1997 and before September 1, 1998 must be equipped with an airbag and a manual lap/shoulder belt.

Every light truck manufactured on or after September 1, 1998 must be equipped with an airbag and a manual lap/shoulder belt at both the driver's and right front passenger's seating positions.

54. See Certo, *supra* note 19, at 680.

55. See *supra* note 53 and accompanying text.

requiring that all new cars and trucks have a dual airbag system.⁵⁶ NHTSA set forth mandatory minimum "performance" standards⁵⁷ for the automatic crash protection systems.⁵⁸ According to the regulation, the performance standards are created according to testing criteria.⁵⁹ A vehicle must meet specified injury criteria measured on a test dummy in a thirty mile per hour barrier crash test.⁶⁰ The standard is based on protecting a 165-pound man of medium height who is not wearing a seatbelt and who is involved in a frontal collision.⁶¹ Therefore, in order to meet minimum federal performance standards, an airbag must deploy with enough force⁶² to protect an adult passenger not wearing a seat belt.⁶³

Because of the manner in which the performance standards are established for properly functioning airbag systems, they tend to discriminate against children,⁶⁴ fetuses,⁶⁵ women⁶⁶ and short adults.⁶⁷ Car manufacturers

56. See Healey & O'Donnell, *supra* note 7, at 1B. Although car manufacturers are not required to provide dual airbag systems until the 1998 model year, the increased popularity of airbags has forced carmakers to install them ahead of the federal deadline to remain competitive. See Michael Clements, *Carmakers Surprised by Customer Demand*, USA TODAY, Sept. 29, 1995, at 4B. For example, Ford Motor Company made driver's and passenger's side airbags standard in 13 of 17 car lines beginning with the 1994 models. See *A Quick Read on the Top Money News of the Day*, USA TODAY, June 2, 1993 at 1B.

57. Performance standards describe the performance characteristics of a product but do not regulate the specific materials or design that a manufacturer must use to meet the performance standard. Specification standards regulate the particular materials and design used in the manufacture of a product. See S. REP. NO. 89-1301, at 5-6 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2713-14.

58. See 49 C.F.R. § 571.208 (1996).

59. See Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 58 Fed. Reg. 46,551 (1993) (codified at 49 C.F.R. § 571.208).

60. See *id.* If a manufacturer chooses to install airbags, the car must meet the protection requirements for frontal, lateral and rollover crashes. In order to meet the federal requirements, an anthropomorphic test dummy must meet or exceed certain "injury criteria" following an impact . . . up to and including 30 mph, into a fixed collision barrier." *Id.*

61. See Matthew L. Wald, *Auto Makers Seek to Reduce the Danger of Airbags' Impact*, N.Y. TIMES, Nov. 2, 1996, at A3.

62. When crash sensors in the front bumper determine that the car is decelerating so fast that it is about to crash, an ignition device sets off a chemical called sodium azide. See Healey & O'Donnell, *supra* note 7, at 1B. Within 1/40 of a second, the sodium azide produces nitrogen gas that expands the airbag in the dash or steering wheel. See *id.* The airbag then rips through its cover at up to 200 mph and fully inflates within 1/50 of a second. See *id.* By 3/20 of a second, the bag is deflated and limp. See *id.*

63. BMW objected to the testing requirements that created the foundation for the minimum federal airbag standard. BMW argued that NHTSA supported this testing method because it regarded the airbag as a primary and not supplemental restraint system. BMW proposed only using a combination testing requirement consisting of a belted dummy and airbag deployment. The agency rejected this proposal stating that it "believes it is important to require occupant crash protection in situations where occupants are not wearing safety belts." Standard No. 208, 58 Fed. Reg. 46,551 (1993) (codified at 49 C.F.R. § 571.208).

64. See *supra* notes 4 and 39.

65. Government officials confirmed the first death of an eight-month-old fetus caused by an airbag when the mother was involved in a low speed crash. See *Report: Death of Fetus Blamed on*

are subject to potential common law liability for deaths and debilitating injuries occurring in recent months despite the airbags' compliance with federal performance standards.⁶⁸

For the last fifteen years, car manufacturers have defended against state common law claims when they installed passive restraint systems other than airbags.⁶⁹ Now with the mandatory dual airbag requirement,⁷⁰ manufacturers will face a new set of defective airbag claims. Controlled by a federal mandate on one side and the potential for state common law claims on the other, car manufacturers are exposed to both federal and state liability. To resolve the issue of whether manufacturer compliance with federal standards will preempt state law tort claims in cases where an airbag injures or kills a vehicle occupant, courts will look to the failure to install cases for guidance.

III. THE PREEMPTION DEFENSE IN FAILURE TO INSTALL CASES

The preemption controversy in airbag cases stems from the conflict between the Safety Act's Preemption Clause⁷¹ and its Savings Clause.⁷² In the Act, Congress intended a federalized approach to regulating automobile safety.⁷³ This intention is evidenced by the Preemption Clause of the Safety Act.⁷⁴ The Preemption Clause prohibits a state or political subdivision thereof from establishing or enforcing safety standards which are not at least as strong as the federal standard.⁷⁵ The conflict centers around the

Car's Air Bag, THE ASSOCIATED PRESS, Oct. 29, 1996, available in 1996 WL 4446513.

66. Of the 19 adults killed by airbag injuries, 16 have been women. See David B. Ottaway, *A Safety Device with a Fatal Flaw*, WASHINGTON POST, Oct. 27, 1996, at A1.

67. See *id.*

68. In addition, car manufacturers face common law liability for injuries such as lacerations, burns and broken bones caused by the deployment of the airbag. See, e.g., *Kampen v. Chrysler Corp.*, Civ. A. No. 96-1676, 1996 WL 599448 (E.D. La. Oct. 17, 1996) (driver side airbag spontaneously deployed causing personal injuries); *Debbs v. Thiokol Corp.*, No. CIV. A. 93-0082, 1993 WL 190872 (E.D. Pa. June 4, 1993); *Stemmons v. Toyota Tsusho Am., Inc.*, 802 F. Supp. 195 (N.D. Ill. 1992).

69. See *infra* note 80 and accompanying text.

70. See *supra* note 53.

71. 49 U.S.C. § 30103(b) (1994). See *infra* note 75.

72. 49 U.S.C. § 30103(e) (1994). See *infra* note 79 and accompanying text. Manufacturers typically make three preemption arguments: (1) a state tort law claim alleging defective or negligent design is expressly preempted under the Preemption Clause if a performance requirement addressed the design and the manufacturer complied; (2) the Safety Act impliedly preempts state tort actions which would punish manufacturers for choosing one of the federally mandated options contained in the Safety Act; or (3) manufacturer compliance with federal standards preempts state tort claims.

73. See Chadwell, *supra* note 25, at 143 ("The Act and its legislative history indicate that Congress did not want a dual state and federal system of administrative regulation.")

74. 49 U.S.C. § 30103(b) (1994) (formerly codified at 15 U.S.C. § 1392(d)).

75. 49 U.S.C. § 30103(b) states:

(b) Preemption -

Preemption Clause's applicability to common law actions. The Preemption Clause does not expressly refer to common law liability.⁷⁶ Some courts have interpreted the Preemption Clause to exclude common law actions from preemption because the clause refers solely to "safety standards" created by a "state or political subdivision of a state."⁷⁷ Other courts have concluded that state common law actions are equivalent to state regulations and are thus preempted.⁷⁸ The Safety Act's Savings Clause, however, directly addresses common law actions by stating: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."⁷⁹ Because the Savings Clause directly addresses common law actions, some courts have found that it saves all state tort suits. Other courts have concluded that it saves only those claims that do not conflict with Standard 208 or do not stand as an obstacle to the full purposes of Congress.

Judicial interpretation of the Preemption Clause and Savings Clause is critical to a common law action for failure to install airbags. A court's position on the preemption issue in the failure to install context will form the foundation for the preemption determination when a defective airbag injures or kills a vehicle occupant.

The question of whether the Safety Act and Standard 208 preempt common law claims for failure to provide airbags has produced substantial divergence among the courts.⁸⁰ The majority of courts have found that the

(1) When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard of this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

76. *See id.*

77. *See infra* note 80.

78. *See infra* notes 92-94, 175 and accompanying text.

79. 49 U.S.C. § 30103(e) (1994) (formerly codified at 15 U.S.C. § 1397(k)).

80. A non-exhaustive list of cases holding that the Safety Act and Standard 208 do not preempt state common law suits include: *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994); *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3d Cir. 1992); *Jordan v. Paccar, Inc.*, 792 F. Supp. 545 (N.D. Ohio 1992); *Swope v. STI Transit Co.*, 796 F. Supp. 160 (E.D. Pa. 1992); *Garrett v. Ford Motor Co.*, 684 F. Supp. 407 (D. Md. 1987); *Hernandez-Gomez v. Leonardo*, 917 P.2d 238 (Ariz. 1996); *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995); *Nelson v. Ford Motor Co.*, 670 N.E.2d 307 (Ohio Ct. App. 1996); *Muntz v. Commonwealth Dep't of Transp.*, 674 A.2d 328 (Pa. Commw. Ct. 1996); *Brewer v. General Motors Corp.*, 926 S.W.2d 774 (Tex. App. 1996).

Safety Act impliedly preempts state common law claims based on the failure to install airbags.⁸¹ However, only one appellate court has considered a defective airbag case. This court held that a state tort claim against a car manufacturer was not preempted even though the airbag conformed with federal standards.⁸² While this decision is important, it is not necessarily indicative of how other courts will dispose of the issue in the future. Thus, in order to resolve the conflict, it is crucial to understand the reasoning behind the preemption analysis of the failure to install cases.⁸³

A. *Wood v. General Motors Corp.—The First Approach to Preemption*

The First Circuit was the first appellate court to address the issue of whether federal safety regulations preempt a state law claim for failure to install airbags. In *Wood v. General Motors Corp.*,⁸⁴ the plaintiff was rendered

A non-exhaustive list of cases holding that the Safety Act and Standard 208 do preempt state common law suits include: *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996) (implied); *Courtney v. Mitsubishi Motors Corp.*, 926 F. Supp. 223 (D. Mass. 1996) (implied); *Waters v. Ford Motor Co.*, No. CIV. A. 95-3891, 1996 WL 114791 (E.D. Pa. Mar. 13, 1996) (implied); *Beeman v. Lovelace*, No. CIV-94-1956-A, 1995 WL 813722 (W.D. Okla. Nov. 2, 1995) (implied); *Johnson, III v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. 1995) (express); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994) (implied); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993) (implied); *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991) (implied); *Cerniak v. Nissan Motor Co.*, No. 88C 4815, 1991 WL 147366 (N.D. Ill. July 26, 1991) (implied); *Guerra v. General Motors Corp.*, CIV. A. No. C86-2102A1-1JTC, 1990 WL 93293 (N.D. Ga. May 14, 1990) (implied); *Weinstein v. Ford Motor Co.*, CIV. A. No. 4:89-2590-15 1990 WL 85497 (D.S.C. Feb. 8, 1990) (implied); *Purdy v. Ford Motor Co.*, No. 89-30314 WEA 1990 WL 96091 (N.D. Fla. Jan. 3, 1990) (implied); *Cox v. Baltimore*, 646 F. Supp. 761 (D. Md. 1986) (express); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986) (express); *Nissan Motor Corp. v. Superior Court of Los Angeles County*, 212 Cal. App. 3d 980 (Ca. Ct. App. 1989) (implied); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994); *Panarites v. Williams*, 216 A.D.2d 874 (N.Y. App. Div. 1995) (express and implied); *Minton v. Honda of America Mfg., Inc.*, No. 14949, 1996 WL 402070 (Ohio Ct. App. July 19, 1996) (implied); *Cellucci v. General Motors Corp.*, 676 A.2d 253 (Pa. Super. Ct. 1996) (implied); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. App. 1993) (implied); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994) (express); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993) (implied).

81. See *supra* note 80. For a critique of decisions holding a plaintiff's failure to install case impliedly preempted, see Miller, *supra* note 14; Ellen L. Theroff, Note, *Preemption of Airbag Litigation: Just a Lot of Hot Air?* 76 VA. L. REV. 577 (1990).

82. See *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992).

83. Supreme Court decisions have made it clear that there are three different ways that a federal law may preempt a state law. First, federal law may expressly preempt state law. Second, federal law may impliedly preempt state law when it occupies an entire field of regulation, in which case the states must leave all regulatory activity in that area to the federal government. Third, federal law may impliedly preempt state law to the extent that the state law actually conflicts with federal law. The conflict can arise when compliance with both state and federal law is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

84. 865 F.2d 395 (1st Cir. 1988).

quadriplegic when the 1976 Chevrolet Blazer in which she was a front seat passenger collided with a tree.⁸⁵ The Blazer was “equipped with seat belts and complied with all applicable federal motor vehicle safety regulations.”⁸⁶ Although Wood was not wearing her seat belt at the time of the accident, she filed suit under state law claiming that General Motors negligently designed the vehicle by failing to “provide reasonably safe and adequate safety devices” such as an airbag system.⁸⁷

On appeal, the First Circuit held that the Safety Act does not contain an express preemption.⁸⁸ The court reasoned that in 1966 Congress did not envision a state action that would create a standard in conflict with a federal safety standard.⁸⁹

After concluding that the Safety Act contained no express statement of preemption, the court embarked on an implied preemption analysis.⁹⁰ The court held that the Safety Act impliedly preempted Wood’s claim because it “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress”⁹¹ in maintaining uniform motor vehicle safety standards throughout the country.⁹² The court reasoned that allowing this

85. *See id.* at 396.

86. *Id.* The Blazer contained lap and shoulder belts, plus a warning system which satisfied the third option under Safety Standard 208. *See* 49 C.F.R. § 571.208, S4.1.2.3 (1996).

87. *Wood*, 865 F.2d at 396. The district court concluded that neither express nor implied preemption existed in the Safety Act and consequently denied General Motor’s motion for summary judgment. *See id.* at 400.

88. *See id.* at 407.

89. *See id.* at 406. A Senate Report discussing the effect of the Safety Act on state law indicated that “State standards are preempted only if they differ from Federal standards.” On the other hand, the Safety Act “need not be interpreted as restricting state common law standards of care.” S. REP. NO. 89-1301, at 12 (1966), *reprinted in* 1996 U.S.C.C.A.N. 2709, 2720. The court interpreted these dichotomous statements as evidence that Congress never considered a state action creating a standard that conflicted with a federal standard. *See Wood*, 865 F.2d at 407. Thus, the First Circuit concluded that if Congress did not consider such a scenario, it could not have intended to expressly preempt it through the Preemption Clause. *See id.* *See* Rudy Fabian, *Federal Preemption: Car-Makers’ Cushions Against Air Bag Claims?*, 27 DUQ. L. REV. 299, 318 (1989). Furthermore, the court found that the Savings Clause was in direct conflict with the Preemption Clause. Thus, the court concluded that the language of the Savings Clause was not intended to preserve “a narrow set of design lawsuits that give rise to a conflicting state standard” in contradiction to the Preemption Clause. *Wood*, 865 F.2d at 407. The court, therefore, rejected the plaintiff’s contention that Congress meant to express approval of the tension that would arise if federal safety standards and state common law design standards were to coexist. *Id.*

90. *See Wood*, 865 F.2d at 407.

91. *Id.* (quoting *Schneidewind v. ANR Pipeline Co.* 485 U.S. 293 (1988)).

92. The court noted that if the federal government did not issue a safety standard on a certain aspect of performance, the states could then set their own standards. *See Wood*, 865 F.2d at 412. However, once a federal standard was in effect, the states were prohibited from establishing nonidentical standards. *See id.* *See* S. REP. NO. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (“The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicles safety standards be not only

claim would be tantamount to creating a state regulation requiring the installation of passive restraints.⁹³ Because such a regulation would be expressly preempted by the Safety Act, the court concluded that Wood's comparable state common law action would thus be impliedly preempted.⁹⁴

After *Wood*, the United States Court of Appeals for the Tenth Circuit addressed a state action against General Motors and the Ford Motor Company concerning the failure to install airbags.⁹⁵ In *Kitts v. General Motors Corp.*, the plaintiffs sued the car manufacturers under New Mexico law, alleging that their cars were negligently and defectively designed because the cars were equipped with seat belts rather than airbags.⁹⁶ Using the implied preemption rationale promulgated in *Wood*, the Tenth Circuit barred the plaintiffs' claims as a violation of the Safety Act's Preemption Clause.⁹⁷

B. Pokorny v. Ford Motor Co.—*The Second Approach To Preemption*

After *Wood* the United States Court of Appeals for the Eleventh Circuit also confronted the preemption issue, but reached the same conclusion using a distinctly different rationale. In *Taylor v. General Motors Corp.*,⁹⁸ personal representatives of the decedents filed suit against the car manufacturer under state law theories of strict liability and negligence for failure to install airbags in the vehicle.⁹⁹ Like the First Circuit,¹⁰⁰ the Eleventh Circuit concluded that

strong and adequately enforced, but that they be uniform throughout the country.”).

93. See *Wood*, 865 F.2d at 402. The court concluded that allowing a common law action for failure to install airbags would effectively circumvent the Preemption Clause's "prohibition of nonidentical state standards covering the same aspect of performance as a federal safety standard." *Id.* The court noted that "by including passive restraints as an option for complying with Standard 208," it is undeniable that passive restraints are within the "aspect of performance" acknowledged by the federal standard. *Id.* at 409.

94. See *id.* at 414.

95. See *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989). *Kitts v. General Motors Corp.* and *Richart v. Ford Motor Co.* were submitted separately to the court. The court consolidated the two cases for purposes of disposition of the preemption issue. See *id.* at 788.

96. See *id.* In *Richart*, the case was submitted under a theory of negligent design and uncrashworthiness due to the lack of airbags. See *id.* In *Kitts*, the plaintiff argued that the car was defective and unreasonably dangerous because the manufacturer failed to install available technology i.e. airbags. See *id.* at 789, n.3.

97. See *id.* at 789. "Because we believe *Wood* directly addresses and correctly resolves the issue before us, we follow the general principles articulated in *Wood* and adopt the implied preemption rule of the First Circuit." *Id.*

98. 875 F.2d 816 (11th Cir. 1989). The implied preemption analysis of *Taylor* was abrogated by *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1522 (11th Cir. 1994) ("*Cipollone's* clear instruction that when there is an express preemption provision we should not consider implied preemption, supersedes the second part of *Taylor*."). See *infra* notes 117, 127 and accompanying text.

99. See *Taylor*, 875 F.2d at 817-18.

100. Although both courts concluded that no express preemption exists, the *Taylor* court rejected

the Safety Act does not contain an unambiguous intention to expressly preempt common law claims.¹⁰¹

Under the implied preemption analysis, the court followed *Wood* and found that the plaintiff's common law claims were impliedly preempted.¹⁰² However, the court reached this conclusion using a different rationale. The court acknowledged the options available to car manufacturers under the Safety Act,¹⁰³ and concluded that allowing plaintiff's common law action would effectively eliminate the element of choice, and thus frustrate the federal regulatory scheme.¹⁰⁴

The United States Court of Appeals for the Third Circuit also addressed the implied preemption issue and adopted the reasoning of the *Taylor* court.¹⁰⁵ In *Pokorny v. Ford Motor Co.*, the plaintiff filed suit on behalf of her deceased husband, alleging that the manufacturer was negligent in failing to install airbags or automatic seat belts and protective netting on the windows.¹⁰⁶ After considering congressional intent, the court held that the plaintiff's common law claim concerning the airbags was not expressly preempted.¹⁰⁷ The court then turned to a cautious analysis of the implied

the specific reasoning used in *Wood*. The *Taylor* court found unpersuasive the claim that "Congress in 1966 did not contemplate the possibility that a state tort action might exist that would effectively create a state design standard conflicting with a federal standard." *Id.* at 825.

101. *See id.* The car manufacturers argued that the language of the Preemption Clause expressly preempts any state regulation, including a common law rule that is not "identical" to the federal regulation. *See id.* at 824. The court rejected that argument stating that the Savings Clause clearly states that compliance with any safety standard "does not exempt any person from liability at common law." 49 U.S.C. § 30103(e) (1994). The court concluded that to accept the manufacturers' narrow interpretation of the Savings Clause as preserving common law liability only for defects not specifically addressed by a safety standard "would render the Savings Clause a mere redundancy." *Wood*, 875 F.2d at 824. The court further noted that Congress did not make explicit reference to state common law actions in the Safety Act's Preemption Clause as it had in many other statutory preemption clauses. *See id.*

102. *See id.* at 827.

103. *See supra* note 47-48 and accompanying text.

104. "A state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option." *Id.* at 827 (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982)). Further, the court noted that removing the options available under the Safety Act would frustrate the federal regulatory scheme. *See id.*

105. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990).

106. *See id.* at 1118.

107. *See id.* at 1121. The court held that the Preemption Clause cannot be considered alone; adequate weight must be given to the Savings Clause. *See id.* The court also looked at congressional intent, "that Congress did not intend all common law actions for design defects . . . to be expressly preempted by federal regulations like Standard 208." *Id.* Further, the court rejected the *Wood* court's narrow construction of the Savings Clause. *See id.* at 1121 at n.6. In addition, the Third Circuit was not persuaded by the *Wood* court's holding that Congress did not foresee design defect lawsuits establishing a conflicting standard to the federal standards, and therefore could not have intended to save common law actions. *See id.*

preemption issue.¹⁰⁸ The Third Circuit concluded that Pokorny's state action for failure to install airbags was impliedly preempted because such a claim effectively eliminated any flexibility provided in the Safety Act.¹⁰⁹ However, the court allowed Pokorny's design defect claim based on Ford's failure to provide window netting because the potential liability for this claim did not directly conflict with the Safety Act.¹¹⁰

C. Cipollone and Freightliner—*The Supreme Court Speaks on Preemption*

Two years after the *Pokorny* decision, the Supreme Court further articulated the relationship between express and implied preemption in *Cipollone v. Liggett Group, Inc.*¹¹¹ In *Cipollone*, the Court concluded that the 1965 Federal Cigarette Labeling and Advertising Act did not preempt state common law damages claims. Further, the Court found that the Public Health Cigarette Smoking Act of 1969 did not preempt plaintiff's express warranty, intentional fraud and misrepresentation or conspiracy claims.¹¹² The Court reasoned that the Preemption Clause¹¹³ in that statute provided a reliable

108. *See id.* at 1121. The court acknowledged the general presumption against preemption and yet recognized that common law liability may create a conflict with federal law. *See id.* at 1122. Against this backdrop, the court stated that an actual conflict must exist with a federal regulation in order to support an implied preemption finding. *See id.* In addition, the court downplayed the significance of Congress' intention to provide uniformity. *See id.* The court noted that uniformity was not the primary objective of the Safety Act and thus found that allowing a broad interpretation of preemption would undercut Congress' primary concern for safety. *See id.*

109. *See id.* at 1123-25. The court recognized that Standard 208 was specifically designed to give automobile manufacturers a choice when installing passive restraint systems. *See id.* Because common law liability would interfere with the federal government's method of regulation, the court determined that an "actual, clear conflict" existed with the federal regulation. *See id.* The court briefly addressed the language of the Savings Clause and determined that it could not "save common law actions that would subvert a federal statutory or regulatory scheme." *Id.* at 1125.

110. *See id.* at 1125-26. According to the court, the potential liability for failure to install window netting presented no direct conflict with Standard 208 because the federal standard was silent on this safety measure. *See id.* at 1126. Therefore, allowing the defective design claim based on failure to install window netting would not eliminate the flexibility nor frustrate the purpose of the federal scheme. *See id.*

111. 505 U.S. 504 (1992).

112. *See id.* at 530-31. A plurality of the Court, however, determined that the 1969 Act did preempt the failure to warn claims involving the manufacturer's advertising or promotion of cigarettes. *See id.* at 531.

113. The Federal Cigarette Labeling and Advertising Act, prior to being amended in 1969, contained the following Preemption Clause in section 5(b): "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Cipollone*, 505 U.S. at 504 (emphasis added).

In 1969, section 5(b) of the Act was amended by the Public Health Cigarette Smoking Act to include broader language: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (1994)

expression of congressional intent concerning state authority. Thus, an implied preemption analysis should not be used to determine whether Congress intended to occupy the field, or whether a state common law suit would create an actual conflict with a congressional purpose.¹¹⁴

The *Cipollone* decision cast doubt on the cases recognizing the implied preemption of failure to install airbag claims.¹¹⁵ Many courts interpreted *Cipollone* as abandoning an implied preemption analysis when an express preemption clause exists.¹¹⁶ The Court of Appeals for the Eleventh Circuit recognized the abrogation of *Taylor's* implied preemption analysis in *Myrick v. Feuhaus*.¹¹⁷ Thus, *Cipollone* led to many inconsistent results.¹¹⁸

In April 1995, the Supreme Court revisited its preemption analysis in *Freightliner v. Myrick*.¹¹⁹ In *Freightliner*, the plaintiffs brought state common law claims against truck manufacturers, alleging that the failure to include antilock brakes constituted a design defect.¹²⁰ After concluding that no express preemption existed under the Safety Act, the Court retreated from *Cipollone's* implication that an express preemption provision foreclosed any possibility of implied preemption, and engaged in an analysis of the implied preemption issue.¹²¹ The Court made clear that *Cipollone* did not establish a

(emphasis added).

114. See 504 U.S. at 517. The Court also noted:

[T]he preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation. . . . Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted.

Id. (internal citations omitted). For a detailed discussion of *Cipollone*, see Chadwell, *supra* note 25, at 167-173.

115. See *supra* notes 91, 97, 102, 109 and accompanying text.

116. The *Cipollone* decision led many courts to a narrow interpretation of the Preemption Clause. Many courts interpreted *Cipollone* as requiring a finding of no preemption or a finding of express preemption. See, e.g., *Johnson v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. 1995); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Hyundai Motor Co. v. Phillip*, 639 So. 2d 1064 (Fla. Dist. Ct. App. 1994); *Loulos v. Dick Smith Ford*, 882 S.W.2d 149 (Mo. Ct. App. 1994); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App. 1993). For a critical analysis of *Cipollone*, see Jeffrey R. Stern, *Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group*, 80 VA. L. REV. 979 (1994).

117. 13 F.3d 1516 (11th Cir. 1994). That court determined that the Preemption Clause and the Savings Clause considered together provided a reliable indicia of congressional intent. See *id.* at 1526. The court noted that the ambiguity between the Savings and Preemption Clause should not lead to the finding that those provisions do not reliably indicate Congress's intent. See *id.*

118. See *infra* note 125.

119. 115 S. Ct. 1483 (1995).

120. See *id.* at 1485.

121. See *id.* at 1488. The Court, however, deemed the petitioner's preemption argument futile and

categorical rule precluding the coexistence of express and implied preemption.¹²² Rather, the Court indicated that the implied preemption analysis remained a viable option of interpretation.¹²³

IV. APPLICATION OF THE FAILURE TO INSTALL PREEMPTION ANALYSIS TO NEW DEFECTIVE AIRBAG CLAIMS

Although *Cipollone* calls for a stricter preemption analysis, its impact on failure to install cases and its influence on defective airbag claims when the manufacturer has complied with federal standards is substantially less decisive in light of *Freightliner*.¹²⁴ An array of cases since *Cipollone* and *Freightliner* have interpreted the preemption issues inconsistently under Standard 208.¹²⁵ Although all four circuit court opinions¹²⁶ predated

affirmed the Eleventh Circuit's finding of no preemption. *See id.* The court believed that the Safety Act was silent regarding antilock braking systems and therefore, "[a] finding of liability against petitioners would undermine no federal objectives or purposes with respect to ABS devices, since none exist." *Id.*

122. *See id.*:

The fact that an express definition of the preemptive reach of a statute "implies"—i.e., supports the reasonable inference—that Congress did not intend to preempt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption. . . . At best, *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

123. *See id.* The Court noted that in *Cipollone*, the Court engaged in a conflict preemption analysis of the Federal Cigarette Labeling and Advertising Act. The Court found "no general inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions." *Cipollone*, 505 U.S. at 518.

124. *See, e.g.,* *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996) (holding that the express preemption clause of the Safety Act did not preclude implied preemption analysis and thus *Kitts* applies in finding implied preemption). After *Cipollone*, several commentators and courts questioned the *Pokorny* rationale supporting its implied preemption holding. For those that interpreted *Cipollone* as foreclosing an implied preemption analysis when an express preemption clause exists, *Pokorny* directed a finding of no preemption.

The *Pokorny* court also found that the Safety Act's Preemption Clause did not expressly preempt plaintiff's common law airbag claim. *See Pokorny*, 902 F.2d at 1121. Under *Cipollone*, the preemption analysis would have ended there. However, *Pokorny's* rationale was salvaged by *Freightliner*, allowing an implied preemption analysis despite a preemption clause. *See Waters v. Ford Motor Co.*, No. CIV. A. 95-3891, 1996 WL 114791, at *3 n.6 (E.D. Pa. Mar. 13, 1996); *see also Certo, supra* note 19.

125. The following courts found preemption: *Waters v. Ford Motor Co.*, No. CIV. A. 95-3891 1996 WL 114791 (E.D. Pa. Mar. 13, 1996); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1995); *Johnson v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. 1995); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div. 1994); *Panarites v. Williams*, 216 A.D.2d 874 (N.Y. App. Div. 1995); *Marrs v. Ford*, 852 S.W.2d 570 (Tex. App. 1993); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994).

The following courts did not find preemption: *Hernandez-Gomez v. Leonardo*, 917 P.2d 238 (Ariz. 1994); *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995); *Loulos v. Dick Smith Ford*, 882 S.W.2d 149 (Mo. Ct. App. 1994); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995); *Muntz v.*

Cipollone and *Freightliner*, their reasoning still offers guidance to courts that face future airbag cases alleging defective design when the airbag injures or kills a vehicle occupant.¹²⁷

A court applying the *Wood* rationale¹²⁸ to a defective airbag case in which a plaintiff is injured by an airbag in conformity with Standard 208 would likely find implied preemption.¹²⁹ The reasoning of *Wood* rests on two key premises, both of which are directly applicable to the new defective airbag cases. First, an award of damages can have the same regulatory effect as a state legislative action.¹³⁰ Second, any state standard that is not identical to the federal regulation runs contrary to congressional intent.¹³¹ Under this second rationale, any state common law action that attempts to impose a more stringent standard than the federal standard is impliedly preempted.¹³² Under *Wood*, allowing a state common law claim would establish a non-identical state standard in conflict with the "full purposes" of Congress.¹³³ Thus, most courts adopting the First Circuit's rationale would conclude that any state common law action involving airbags that comply with Standard 208 is impliedly preempted.

Courts applying *Pokorny* in a defective airbag case would reach the opposite result. The Third Circuit requires an "actual conflict" before a federal regulation will impliedly preempt a state law.¹³⁴ The court based its holding on the elimination of choice granted to manufacturers in selecting from one of three passive restraint systems.¹³⁵ Given that the choice was eliminated from the federal scheme in September 1997,¹³⁶ the *Pokorny*

Commonwealth Dep't of Transp., 674 A.2d 328 (Pa. Commw. Ct. 1996); *Alvarado v. Hyundai Motor Co.*, 908 S.W.2d 243 (Tex. App. 1995).

126. See *supra* note 14.

127. *Pokorny* based its preemption analysis on *Taylor*, and yet the Third Circuit still recognizes *Pokorny*'s implied preemption rationale despite the Supreme Court's recent preemption decisions. See *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (10th Cir. 1996) (reaffirming *Kitt* after both *Cipollone* and *Freightliner*); *Courtney v. Mitsubishi Motors Corp.*, 926 F. Supp. 223, 226 (D. Mass. 1996) ("Whatever *Freightliner* and *Cipollone* may have done to preemption jurisprudence, they do not seem to undercut the precedential force of *Wood*").

128. See *supra* notes 90-94.

129. See *Certo*, *supra* note 19.

130. See *supra* note 93 and accompanying text. For a comparison of state common law damage awards and state regulations, see *Nader & Page*, *supra* note 15.

131. See *supra* notes 91-92 and accompanying text.

132. See *Wood v. General Motors Corp.*, 865 F.2d 395, 414 (1st Cir. 1988) ("[The Preemption Clause] preempts state standards which are either more or less stringent than the federal standard.").

133. See *id.* at 412.

134. See *supra* note 109.

135. See *supra* notes 11, 109 and accompanying text.

136. See *supra* note 53 and accompanying text.

court's rationale could lead to a finding of no preemption.¹³⁷

With the impending mandate of dual airbags, a car manufacturer's preemption argument will focus on compliance with federal safety standards as a complete defense to state common law standards. The Fifth Circuit¹³⁸ is the only appellate court thus far that addressed the issue of whether a manufacturer should be liable for airbags that conform to minimum federal standards.¹³⁹ In *Perry v. Mercedes Benz of North America*, the plaintiff was injured when her driver's side airbag failed to deploy as her car crashed into a ditch.¹⁴⁰ Perry filed suit under Louisiana law alleging that the airbag system was defective because it failed to deploy under the type of impact her vehicle sustained.¹⁴¹

The *Perry* court relied on *Pokorny*¹⁴² and held that the plaintiff's defective design claim was not impliedly preempted.¹⁴³ The court concluded that once a manufacturer installs an airbag system, Standard 208 merely sets forth minimum performance requirements.¹⁴⁴ Thus, common law liability would not eliminate the flexibility of the federal regulatory scheme.¹⁴⁵

V. A PROPOSED FEDERAL REGULATORY COMPLIANCE DEFENSE

The *Perry* court, consistent with most jurisdictions, relied on the traditional rule that compliance with a government safety standard merely evidences due care, but provides no defense to tort liability.¹⁴⁶ Many courts argue that compliance with a federal motor vehicle safety standard

137. See *Certo*, *supra* note 19.

138. See *Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992).

139. It should be noted that this case was decided prior to *Cipollone* and *Freightliner*. As previously discussed, these two decisions arguably have no significant impact on the holding of the *Perry* court. See *supra* notes 124-27 and accompanying text.

140. See *Perry*, 957 F.2d at 1259. Perry was not wearing her seat belt at the time of the collision and she struck the steering wheel or windshield and received facial lacerations and damage to her teeth. See *id.*

141. See *id.* Perry alleged that MBNA designed the airbag system with an unreasonably dangerous "deceleration velocity deployment threshold" that determines the force that must be caused by the car's sudden deceleration to trigger the airbag deployment. *Id.* The airbag in the plaintiff's car was designed to deploy upon a crash against a rigid barrier occurring at 12 mph or more. See *id.* at 1259-60. Perry did not allege that her vehicle did not meet performance requirements. See *id.* at 1261. Rather, she claimed that her vehicle was defectively designed because the likelihood of her injuries outweighed the burden of adopting a safer system, thus rendering her car unreasonably dangerous. See *id.*

142. See *supra* notes 107-10 and accompanying text.

143. See *Perry*, 957 F.2d at 1266.

144. See *id.* at 1265.

145. See *id.*

146. See, e.g., *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 270 (8th Cir. 1993) (allowing defendant to introduce compliance as evidence of due care).

establishes only a minimum requirement and thus does not preempt a finding of design defect.¹⁴⁷ These courts continue to dismiss car manufacturers' compliance argument, giving no weight to the complexity and specificity of the federal safety regulations that govern their products.¹⁴⁸ Instead, these courts allow juries to substitute their own standard for that of NHTSA. In an era of complex mandatory automotive regulation, reliance on the traditional rule is inefficient, inappropriate, and impractical.¹⁴⁹

In the failure to install cases, courts are saddled with interpreting and reconciling the statutory preemption provisions in the Safety Act.¹⁵⁰ It is well-settled in the arena of statutory construction that each clause is to be given effect.¹⁵¹ However, the ambiguity resulting from analyzing the Preemption and Savings Clauses together has created widespread divergence among the courts.¹⁵² The Supreme Court, in *Cipollone* and *Freightliner*, has failed to create a clear rule for preemption analysis.¹⁵³ Moreover, the confusion is exacerbated by Congress' continued silence and failure to specify whether common law tort claims are preempted.¹⁵⁴ Therefore, courts

147. See *Perry*, 957 F.2d at 1265 ("Once the manufacturer chooses an option that includes an airbag, Standard 208 55-56 merely sets forth *minimum* performance requirements for that system.") (emphasis in original). See also *Sours v. General Motors Corp.*, 717 F.2d 1511, 1517 (6th Cir. 1983); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980); *Murphy v. Nissan Motor Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987). But see *Wood*, 865 F.2d 395, 414 ("Although the standards are a minimum in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not minimum in relation to state law."); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76, 77 (D. Conn. 1987) ("Congress has not merely set a minimum standard. It has clearly . . . established a minimum standard and a maximum standard in the choice permitted.").

148. See Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 WM. & MARY L. REV. 903, 965 (1996) (finding that courts often dismiss compliance with intricate regulatory schemes as nothing more than satisfying minimum requirements).

149. See Paul Dueffert, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 218 (1989) ("Against such complex regulatory schemes, the rule that regulatory compliance cannot shield a defendant from liability seems archaic.").

150. See *supra* notes 71-79 and accompanying text.

151. See *Smith v. United States*, 508 U.S. 223, 233, (1993) ("Just as a single word cannot be read in isolation, nor can a single provision of a statute."); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981) ("all parts of a statute, if possible, are to be given effect").

152. See *supra* note 80 and accompanying text.

153. See *supra* notes 124-25 and accompanying text.

154. One commentator argues that this issue has been examined. See Howard J. Newman, *Preemption of "No Airbag" Claims*, N.Y. L.J., July 12, 1996, at 1. Newman argues that Congress has implicitly addressed whether common law tort claims are preempted. He asserts that when Congress amended the Safety Act in 1991 to require airbags prospectively, NHTSA alerted Congress that most courts found "no airbag" claims preempted under the Safety Act. Congress was further informed that if a mandatory airbag rule was adopted, courts may begin to find these claims no longer preempted. Congress responded by stating that the amendments should not be construed to "affect, change or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." *Id.* (citations omitted). Thus, Newman concluded that

must consider alternatives that give full effect to congressional intent,¹⁵⁵ while maintaining a practical and efficient system for car manufacturers.

The Preemption Clause should be recharacterized to provide car manufacturers with a defense to state common law claims if they have complied with federal performance standards.¹⁵⁶ The preemptive reach of Standard 208 does not occupy the entire field.¹⁵⁷ Rather, it provides crashworthiness standards applicable to specific aspects of vehicle or vehicle equipment performance in terms of forces and accelerations as measured in test crashes.¹⁵⁸ Standard 208 does not mandate a particular design, only the performance of that design. Therefore, the Savings Clause should be interpreted as preserving state common law liability for cases in which the car manufacturer fails to comply with federal performance standards,¹⁵⁹ or when no performance standard governs a particular issue.¹⁶⁰

The Supreme Court has acknowledged an analogous regulatory compliance defense, known as the government contractor defense, in *Boyle v. United Technologies Corp.*¹⁶¹ In that case, a wrongful death action was brought against a government contractor who supplied military equipment to the United States allegedly containing a design defect.¹⁶² The Court held that the procurement contract involved a uniquely federal interest, and that a state

Congress intended the courts to continue finding preemption of state law claims. *See id.*

155. *See supra* notes 24, 92 and accompanying text.

156. One commentator has argued that the federal preemption doctrine is analogous to a choice of law principle. A preemption determination would thus direct a court to either apply state or federal standards. *See* Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743 (1992).

157. *See Perry v. Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257, 1264 (5th Cir. 1992) (citing *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987)) ("[W]e [do not] find that Congress has created a 'scheme' of federal regulation [that] is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for [a] tort claim."). *See also* *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 245 (Ariz. 1996) ("[T]he preemptive reach of [the Preemption Clause], defined by Standard 208's limited regulatory scope, is not a comprehensive regulation that occupies the entire field.").

158. *See supra* notes 57-60 and accompanying text.

159. Because the Safety Act mandates only performance standards rather than specific design standards, the Savings Clause would save claims alleging improper design or that the airbags contained design defects causing them not to comply with federal performance standards. Moreover, it would also preserve claims that allege other safety devices in addition to those required under the federal regulation should have been installed. *See* Gregory L. Taddonio, *Revisiting Myrick v. Freightliner: Applying the Brakes on Restrictive Preemption Analysis*, 14 J.L. & COM. 257, 269 (1995).

160. *See supra* note 110 and accompanying text. The Savings Clause would save design defect cases arising out of a manufacturer's failure to install safety devices not governed by Standard 208. *See* *Cellucci v. General Motors Corp.*, 676 A.2d 253, 260 (Pa. Super. Ct. 1996); *Hernandez-Gomez v. Leonardo*, 917 P.2d 238 (Ariz. 1996).

161. 487 U.S. 500 (1988).

162. *See id.*

law holding government contractors liable for design defects could present a significant conflict¹⁶³ with federal policy. Such a conflict would require displacing state law through a government contractor defense.¹⁶⁴ However, the Court found that the defense does not displace state law unless: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."¹⁶⁵

The test set forth by the Supreme Court for the government contractor defense provides a workable set of criteria to find preemption in airbag cases where the airbag performed according to the applicable performance standards.¹⁶⁶ In a possible suit, the car manufacturer would assert that reducing traffic accident injuries through uniform safety standards is a unique federal interest. The car manufacturer would bear the burden of identifying the applicable performance standard, and proving that it complied with the precise specifications set forth by NHTSA. The car manufacturer would also bear the burden of producing necessary evidence regarding the repeated warnings given to NHTSA concerning the dangers of airbags.¹⁶⁷ The manufacturer would then conclude that to allow state common law to impose liability for an airbag meeting federal standards would conflict with federal

163. *See id.* at 507. The Court noted, however, that displacement will occur only in one of two instances: first, where there is a significant conflict between identifiable federal policy or interest and the operation of state law; second, where the application of state law would frustrate specific objectives of federal legislation. *See id.* (citations omitted). The criteria for discerning a significant conflict is similar to the criteria for the general preemption defense. *See supra* note 83 and accompanying text.

164. Some courts apply the government contractor defense to civilian products manufactured for the government. *See, e.g.,* *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993) (applying government contractor defense to nonmilitary ambulance contractors). *But see* Steven B. Loy, *The Government Contractor Defense: Is It a Weapon Only for the Military?* 83 KY. L.J. 505 (1994-95) (asserting that the government contractor defense should not be extended to nonmilitary government contractors). *See generally* Richard Ausness, *Surrogate Immunity: The Government Contract Defense and Products Liability*, 47 OHIO ST. L.J. 985, 1014-19 (1986).

165. *Boyle*, 487 U.S. at 512.

166. For a discussion of the use of the government contractor defence in torts, see Noah, *supra* note 148.

167. The rationale that underpinning the government contractor defense, and arguably a regulatory compliance defense, is that car manufacturers would be compensated for their "government-imposed" exposure to design defect liability in airbag cases. In the early stages of airbag development, the car manufacturers consistently warned the government of the dangerous propensities of airbags to children, women and small adults. *See supra* notes 8, 39 and accompanying text. Yet despite these warnings, the government has mandated airbags in all cars. *See supra* note 53. In other words, the government proceeded with its airbag mandate despite knowledge of the dangers. Like the government contractors who comply with federal specifications with knowledge of the particular dangers inherent in the design, car manufacturers should also be relieved of liability for complying with federal performance standards when the government knew of the dangers inherent in those standards.

policy, thus requiring the preemption of state common law.

Courts should recognize that the strong federal interest in uniform automotive regulation¹⁶⁸ is sufficient to justify recharacterizing the preemption argument as a regulatory compliance defense.¹⁶⁹ The federal government is capable of creating adequate performance standards to achieve both uniformity and traffic safety goals.¹⁷⁰ (Congress formed NHTSA to create such uniform motor vehicle safety standards.)¹⁷¹

Uniformity, while a secondary goal of Congress in enacting the Safety Act, must also be given effect.¹⁷² Car manufacturers produce a product that is crucial to the efficient operation of American society. That product permeates a national market among the fifty states.¹⁷³ To require car manufacturers to comply with both federal standards and varied state common law standards potentially requires different manufacturing for each

168. See *supra* note 92 and accompanying text.

169. See, e.g., *Boyle*, 487 U.S. at 508 ("In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. In others, the conflict is more narrow, and only particular elements of state law are superseded.") (citations omitted). See also *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989) (finding state common law actions impliedly preempted because they defeat congressional desire for uniform standards); *Wood v. General Motors, Corp.*, 865 F.2d 395, 412 (1st Cir. 1988) (same).

170. Congress's primary goal of reducing traffic accidents can still be achieved through uniform federal regulations. Plaintiffs would still have common law remedies for defective airbags that do not meet federal standards (i.e., airbags that fail to deploy, airbags that deploy with inadequate strength or airbags that deploy prematurely).

171. See *supra* notes 26-27 and accompanying text. The purpose of the Safety Act is to force the federal government to shoulder the primary responsibility in setting standards regulating the automobile industry. See *Wood*, 865 F.2d at 397-98 (S. REP. NO. 89-1301, (1966) reprinted in 1966 U.S.C.C.A.N. 2709, 2712): "While the contribution of the several States to automobile safety has been significant, and justifies to the States a *consultative* role in the setting of standards, the primary responsibility for regulating the national automotive industry must fall squarely upon the Federal Government."

172. Congress' express purpose for preserving uniformity is described in a Senate Report. "The centralized mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. REP. NO. 89-1301, at 12 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2720.

A House committee report stated that the "preemption subsection is intended to result in uniformity of standards so that the public as well as the industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. REP. NO. 89-1776, at 17 (1966).

The courts that remain determined to follow *Pokorny* will allow the state claim to proceed because *Pokorny* only gives credence to the Safety Act's primary purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." The *Pokorny* court believed that giving effect to the goal of uniformity would undercut Congress' concern for safety. See *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3d Cir. 1990).

173. See *Miranda v. Fridman*, 647 A.2d 167, 172 (N.J. Super. Ct. App. Div. 1994) ("[Preemption] was the common sense result, prompted by concern over the effect of permitting juries in fifty states to create as many safety standards as there were verdicts, all binding on car makers when nationally marketing a product approved by the national government.").

state.¹⁷⁴ While some commentators insist that common law does not impose a legal duty,¹⁷⁵ car manufacturers are nonetheless forced into a corner: the manufacturer must either comply with the federal and state standards, or face potential tort liability for meeting only the federal requirement.¹⁷⁶ The possibility of contradictory verdicts in different jurisdictions subjects car manufacturers to uncertainty, as automakers will not know which car design is necessary to avoid liability.¹⁷⁷ To subject car manufacturers to an ad hoc system of state standards, when the airbag complies with the complex and intricate federal performance standards, would be both inefficient and impractical.¹⁷⁸ The need for uniform standards in this respect justifies the preemption of common law liability through a regulatory compliance defense.

174. See *Cellucci v. General Motors Corp.*, 676 A.2d 253, 263 (Pa. Super. Ct. 1996) (J. Cirillo, concurring) (stating that allowing a common law action “lays the foundation for a patchwork of differing standards throughout the country, and frustrates the uniformity Congress sought in enacting the federal safety law.”).

175. For a discussion of the differences in effect between state common law damage awards and state regulation, see Nader & Page, *supra* note 15; Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 218-220 (1991). The courts disagree whether judicially imposed state damages impose the same duty on manufacturers as does a state legislated regulation. Compare *Cipollone v. Ligette Group, Inc.*, 505 U.S. 504, 521 (1992) (quoting *San Diego Bldg. Trades Council v. Garmon*, 395 U.S. 236, 247 (1959)) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *Wood*, 865 F.2d at 411 (recognizing that state common law damage awards have a regulatory effect); *Kolbeck v. General Motors, Corp.*, 702 F. Supp. 532, 541 (E.D. Pa. 1988) (“An automobile manufacturer faced with the prospect of choosing the [passive restraint options], or facing potential exposure to compensatory and punitive damages for failing to do so has but one realistic choice.”) (citation omitted); *Cellucci*, 676 A.2d at 258 (stating that common law tort actions seek to impose standards upon and enforce the duty of defendants to comply with specified standards of conduct); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347 (N.H. 1995) (finding that a common law rule sets a standard equivalent to a state regulation and thus is subject to the Supremacy Clause); *with Pokorny v. Ford Motor Corp.*, 902 F.2d 1116, 1121 (3d Cir. 1990) (“Although we recognize that common law damages may have an effect on automobile manufacturers similar to other safety standards established by states through statutory or regulatory process, common law liability and state regulation have important differences.”); *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 248 (Ariz. 1996) (“Standard 208 sets out minimum safety standards that are uniformly applicable to all cars manufactured, whereas tort liability operates to encourage behavior not require it.”); *Ketchum v. Hyundai Motor Co.*, 49 Cal. App. 4th 1672 (Cal. Ct. App. 1996) (distinguishing safety standard and liability under common law).

176. In *Nissan Motor Corp. v. Superior Ct.*, 261 Cal. Rptr. 80, 82 (Cal. Ct. App. 1989), the court held that a failure to install airbag action was preempted, stating:

To hold otherwise would be to allow a potential flood of action against manufacturers that have been following the custom of the industry and acting in compliance with federal regulations. The result would not only work a hardship to manufacturers, but also might so encourage litigation as to hamper the administration of justice.

177. See Nader & Page, *supra* note 15.

178. For discussion of the advantages of uniform federal regulation, see Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1218-19 (1996).

Accepting that reducing traffic accident injuries through uniform performance standards is a unique federal interest, then to allow a state common law action against a car manufacturer when the airbag conforms to federal requirements presents a significant conflict with federal policy. Courts can use the failure to install cases to articulate the significant conflict rationale. The *Perry* court and others that follow the *Pokorny* line of reasoning place undue emphasis on the Safety Act's Savings Clause at the expense of recognizing the "full purposes" of the federal regulation.¹⁷⁹ It is well settled that a savings clause does not preserve common law actions that would undermine a federal statutory or regulatory scheme.¹⁸⁰ The absence of an unregulated passive restraint system, such as the window netting in *Pokorny*, does not subvert the federal scheme, create an actual conflict, or stand as an obstacle to Congress' full purposes¹⁸¹ because the Safety Act is silent.¹⁸² Once the government creates performance standards that regulate a particular safety device, and the device conforms to that standard, a common law action creates an additional state standard that inhibits the purpose of Congress.¹⁸³ The Savings Clause should be construed as saving those state tort claims that address issues not covered under Standard 208, or those claims where the airbag does not comply with the federal standard.¹⁸⁴ The state should not be able to accomplish through the common law what it is prohibited from doing through its state legislature.¹⁸⁵

Many commentators are critical of providing car manufacturers with a regulatory compliance defense. Some argue that to allow such a defense will

179. The courts must look at all the purposes behind the Safety Act and analyze the common law effect on those purposes. Although the express purpose of the Safety Act is to reduce traffic fatalities, Congress has also expressed a desire for uniform safety standards. *See supra* note 172.

180. *See International Paper Co. v. Oullette*, 479 U.S. 481, 494 (1987). *See also* Cellucci, 676 A.2d at 260.

181. *See Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1125-26 (3d Cir. 1990).

182. *See id.* In *Freightliner*, the Court concluded that common law could not conflict with a federal law when no federal standard existed. Thus a "finding of liability . . . would undermine no federal objectives or purposes with respect to [the safety device], since none exists." *Freightliner v. Myrick*, 115 S. Ct. 1483, 1488 (1995). *See also* *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 243 (Ariz. 1996) ("Without a standard, there can be no preemption—express or implied.").

183. *See supra* notes 90-94.

184. *But see* *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989) ("Such a construction . . . would render the savings clause a mere redundancy since the preemption clause itself provides that where a federal standard does not govern the same aspect of performance as the state standard, the state standard is not preempted."). Without the Savings Clause, however, courts would be free to conclude that any common law claim addressing any standard not identical to the federal standard would be expressly preempted. Because of the Savings Clause, four appellate courts have engaged in implied preemption analysis.

185. *See* *Wood v. General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988) (finding "no convincing reason why Congress would want to encourage states to impose an inconsistent safety standard . . . by lawsuits and not by regulation.").

discourage the development of better and safer automotive technology.¹⁸⁶ However, while car manufacturers must satisfy minimum standards under the federal regulation, increased consumer demand for safer cars will provide manufacturers with incentives to develop safer and more technologically advanced safety devices.¹⁸⁷ In fact, it was this demand that pushed car manufacturers to install airbags ahead of NHTSA's deadline.¹⁸⁸

Critics of a regulatory compliance defense put little faith in NHTSA's ability to maintain adequate safety standards. The government pervasively regulates the installation of airbags through a series of complex performance standards.¹⁸⁹ Courts should defer to the expertise of NHTSA to create current safety standards.¹⁹⁰ NHTSA gathers information and opinions from a wide variety of sources. The nature of the information is highly technical, requiring expertise to synthesize all relevant data into the creation of performance standards.¹⁹¹ Lay juries do not have the necessary qualifications to question the performance standards created by NHTSA.¹⁹²

186. See, e.g., Nader & Page, *supra* note 15.

187. Safety Standards "are expected to be performance standards, specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. Manufacturers and parts suppliers will thus be free to compete in developing and selecting devices and structures that can meet or surpass the performance standard." REP. NO. 89-1301, at 5-6 (1966), *reprinted in* 1996 U.S.C.C.A.N. 2709, 2714. Congress intended market forces to encourage car manufacturers to consistently improve automotive safety. See S. REP. NO. 89-1301, at 1, (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709 (" [T]his legislation reflects the faith that the restrained and responsible exercise of Federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and competitive effort to improve the safety of vehicles."). This incentive is not stalled by preempting defective design claims where the airbag has met federal standards.

188. See *supra* notes 52, 56 and accompanying text.

189. See *supra* notes 57-60 and accompanying text.

190. See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 321 (1990) ("Courts recognizing the limits of their institutional capabilities should refuse to second-guess the judgments of agencies who possess not only expertise but also a capacity for knowledge and memory which the courts cannot match.").

191. See 15 U.S.C. § 1392(f) (1982) (repealed 1994). See also James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). Henderson argued that the manufacturers only owed a duty to comply with industry custom and federal regulations with respect to intentional choices made in designing a product. *Id.* He recognized that problems posed from weighing so many "polycentric factors" and posited that consumers could be sufficiently protected through the judgments and regulations of the government. For a brief critique of Henderson's theory, see Nader & Page, *supra* note 15.

192. See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988) ("The appropriate design for military equipment . . . involves not merely engineering analysis but judgment as to the balancing of many technical, military and even social considerations."); *Wood v. General Motors Corp.*, 865 F.2d 395, 410 (1st Cir. 1988) ("If preemption was not found, it would arrogate to a single jury the regulatory power explicitly denied to all 50 states' legislative bodies."). However, there is a danger that juries will deliver sympathetic judgments in favor of injured plaintiffs, thus creating inconsistent results. See Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and*

NHTSA is capable of creating effective standards to increase the safety of the automotive industry. NHTSA has proven its adaptability by proposing and passing regulations that allow airbags to be deactivated and depowered in light of recent fatalities due to airbags.¹⁹³ Regulators are currently formulating a phase-in period for new technology known as smart airbags.¹⁹⁴ In addition, the Safety Act has specific penalty provisions to ensure compliance with the standards and penalize noncompliance.¹⁹⁵

CONCLUSION

The car manufacturer is greatly constricted at present. It is currently required by federal regulation to install airbags. Yet it remains susceptible to common law liability under state tort law when an airbag kills or injures an automobile occupant. Recharacterizing the federal preemption argument as a regulatory compliance defense for the new wave of defective airbag cases

Reciprocal Comity, 61 NOTRE DAME L. REV. 1, 30-31 (1986).

193. On December 30, 1996, NHTSA issued proposed regulations that would allow manufacturers to depower airbags by 20-35% until smart airbags are phased in. *See Federal Agency Issues Airbag Regulations, Speeds Up Comment Period*, WEST LEGAL NEWS, Jan. 2, 1997, available in 1997 WL 709. *See Automakers Split Over Expanding Use of Airbag Switches*, WALL ST. J., June 11, 1996, at C23. On November 17, 1997, the federal government issued regulations that allow certain vehicle owners to have on-off switches installed in their cars or light trucks to temporarily deactivate the airbags. *See* 49 CFR §§ 571 and 595. The regulation exempts motor vehicle dealers and repair businesses from the statutory prohibition against making federally-required safety equipment inoperative. Beginning January 19, 1998, dealers and repair businesses may install retrofit manual on-off switches for airbags of vehicle owners whose request is approved by NHTS. *See* NHTSA, *Airbags* (visited Mar. 24, 1998) <<http://www.nhtsa.dot.gov/airbags>>. This exemption is subject to conditions. *See id.* In addition, vehicle owners must certify that they are a member of one of several specified risk groups or that their vehicle will be driven or occupied by a person who is a member of such a group. For a discussion of risk groups, see NHTSA, *Airbags* (visited Mar. 24, 1998) <<http://www.nhtsa.dot.gov/airbags/rule/section07.html>>.

194. Three types of smart airbags have been identified. *See* Federal Motor Vehicle Standards; Occupant Crash Protection, 61 Fed. Reg. 60206 (1996). A smart airbag senses or responds to differences in crash severity, occupant size or the distance of the occupant from the airbag at the time of a crash. The smart airbag adjusts by suppressing deployment in circumstances in which fatalities might be caused by the airbag. *See id.* It has been estimated that this technology will not be available until the turn of the century because of the need for more testing.

In order to bring the testing requirements into line with increased seat belt usage and further reduce manufacturer liability, the performance standards should be created using a seat belted individual. It is now estimated that 67% of front seat passengers now use seat belts. *See* Wald, *supra* note 61. With the increased seat belt usage, the crash tests which set performance standards using unbelted dummies do not reflect societal changes. Thus, airbag deployment rates are too high and are killing children as a result.

195. Violations of the federal standards can result in civil penalties. *See* 49 U.S.C. § 30165 (1994). Manufacturers may also be enjoined or forced to recall or repurchase vehicles that do not conform to federal standards. *See id.* Some commentators have criticized the preemption of tort actions because it would leave the victim with no avenue to be compensated. *See* Atwell, *supra* note 175, at 229 n.42.

would further the goal of reducing traffic accident fatalities while maintaining uniform federal standards.

Congress created NHTSA to promulgate effective and practical safety standards and to enforce manufacturer compliance. Because the government mandates that all cars beginning with the 1998 model contain dual airbags, courts should not dismiss the manufacturers' compliance argument. Rather, courts should recharacterize the preemption defense as a regulatory compliance defense barring manufacturer liability when they have complied with the specific and complex federal regulations. State common law actions should not undermine the credibility of NHTSA standards and create an ad hoc system of state standards that deploy car manufacturers into a sea of product liability.

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