Articles

Saving Preemption: A Conflict Preemption Quandary Resolved in *Geier v. American Honda Motor Co., Inc.*

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I. Introduction

In the case of *Geier v. American Honda Motor Co.* (*Geier II*),[1] the United States Supreme Court decided that a *no airbag* lawsuit conflicted with the objectives of Federal Motor Vehicle Safety Standard 208[2] ("Standard 208"), and was consequently preempted by the National Traffic and Motor Vehicle Safety Act of 1966[3] ("Safety Act").[4] The case was

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1. Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861 (2000).
2. 49 C.F.R. § 571.208 (2005).
3. *Geier II*, 529 U.S. at 865 (indicating that the court refers to the pre-1994 version of the statute as codified at 15 U.S.C. § 1381 *et seq.*, but recognizing that the current version of the statute is codified at 49 U.S.C. § 30101 *et seq.* (2000)).
4. *Id.* at 867.

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based on a complaint by a driver who contended that an automobile manufacturer, American Honda Motor Company ("American Honda"), was liable for damages arising from the allegedly defective design of the vehicle she was injured in because the company had failed to install airbags.[5] American Honda countered by claiming that its compliance with the Safety Act and Standard 208 preempted the *no airbag* lawsuit.[6]

The Court agreed with the manufacturer, declaring that the lawsuit conflicted with the objectives of Standard 208 and was preempted by the Safety Act.[7] The Court made three major findings in reaching this conclusion. The first finding was that the preemption provision did not expressly preempt the lawsuit. The Court determined that the preemption provision of the Safety Act should be read narrowly to preempt *only* state statutes and regulations, excluding common law tort actions.[8]

Second, ordinary preemption applied. While the Safety Act's saving clause did not expressly *save* Geier's action, the Court concluded, based partially on its inclination not to construe saving clauses broadly, that the clause did not "bar the ordinary working of conflict pre-emption principles."[9] The Court stated that it was Congress' intent to apply ordinary pre-emption principles where an actual conflict with a federal objective existed; without such application, states could impose laws directly conflicting with federal regulatory mandates.[10]

Third, the Court held that Geier's suit was exactly such a case because it actually conflicted with the Safety Act due to its inconsistency with the Department of Transportation's objectives in enacting the standard.[11] To allow Geier's suit to proceed would have imposed a state-created duty compelling car manufacturers to install airbags in their vehicles. Such a result would constitute "an obstacle to the variety and mix of devices that the federal regulation sought."[12]

This Article will first review the facts and holding of *Geier II.* It will then examine the evolution of the doctrine of federal conflict preemption, including the National Motor Vehicle Safety Act, Standard 208, judicial interpretation of this doctrine, the court split, and decisions subsequent to *Geier II* that have used it as precedent. Next, this Article will contend that the Court in *Geier II* properly held that state common law *no airbag* suits were preempted by Standard 208 and implicitly resolved the court

5. *Id.* at 865.

6. Brief for Respondents at 7, Geier v Am. Honda Motor Co. (*Geier II*), 529 U.S. 861 (2000) (No. 98-1811).

7. *Geier II*, 529 U.S. at 874.

8. *Id.* at 868.

9. *Id.* at 869.

10. *Id.* at 871.

11. *Id.* at 867.

12. *Id.* at 881.

split on the preemption doctrine, correctly enforcing the circumstances in which ordinary preemption applies. Finally, this Article will exhibit the precedent *Geier II* has set in enforcing ordinary preemption principles, as discussed in subsequent appellate decisions.

II. Facts and Holding

In 1992, Alexis Geier sustained serious injuries when she drove her 1987 Honda Accord, which lacked passive restraints, into a tree in the District of Columbia.[13] While driving, Ms. Geier, who was wearing her manual shoulder harness and lap belt, rounded a curve and lost control.[14] Ms. Geier, and her parents ("Geier"), sued American Honda seeking $20,500,000 in compensatory and punitive damages.[15] Geier sued under the tort law of the District of Columbia, claiming American Honda negligently and defectively designed the vehicle based on the lack of a driver's side airbag.[16] American Honda filed a motion for summary judgment, asserting that their compliance with the Safety Act and Standard 208 preempted the defective design lawsuit.[17]

The District Court for the District of Columbia granted American Honda's motion for summary judgment.[18] The court noted that Standard 208, which obliged auto manufacturers to install passive restraints in 1987 model vehicles, expressly preempted the petitioners' claims.[19] The court concluded that because the lawsuit sought to create a different safety standard, one requiring airbag installation, it was expressly preempted by the Safety Act.[20] Geier appealed to the United States Court of Appeals for the District of Columbia Circuit.[21]

The Court of Appeals for the District of Columbia affirmed the District Court's grant of summary judgment based on slightly different reasons, holding that a verdict in Geier's favor would present an obstacle to the government's method of achieving the Safety Act's objectives.[22] According to the Court of Appeals, it was not necessary to resolve the issue of express preemption as the Safety Act impliedly preempted Geier's suit.[23] Appellants' claims conflicted with Standard 208 and, based on or-

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13. *Id.* at 865.
14. *Id.*
15. Brief for Respondents, *supra* note 6, at 6.
16. *Geier II*, 529 U.S. at 865.
17. Brief for Petitioners at 12-13, *Geier II*, 529 U.S. 861 (No. 98-1811).
18. Geier v. Am. Honda Motor Co. (*Geier I*), 166 F.3d 1236, 1237 (D.C. Cir. 1999).
19. *Geier II*, 529 U.S. at 865.
20. *Id.*
21. *Geier I*, 166 F.3d at 1236.
22. *Geier II*, 529 U.S. at 865-66.
23. *Geier I*, 166 F.3d at 1243; *Geier II*, 529 U.S. at 866.

dinary preemption principles, the Safety Act preempted the lawsuit.[24] The United States Supreme Court granted certiorari to resolve the differences between state courts that have held against preemption and federal circuit courts that have held for it.[25]

In a 5 to 4 decision, the United States Supreme Court held that petitioners' *no airbag* lawsuit conflicted with the objectives of Standard 208 and was consequently preempted by the Safety Act.[26] Delivered by Justice Stephen G. Breyer, the Court made three determinations in its decision.[27] First, the preemption provision did not expressly preempt the lawsuit.[28] Second, ordinary preemption applied.[29] Finally, the lawsuit actually conflicted with the Safety Act.[30]

The Safety Act contains an express preemption provision which provides that "[w]henever a Federal motor vehicle safety standard . . . is in effect, no State . . . shall have any authority . . . to establish . . . any safety standard applicable to the same aspect of performance of such vehicle . . . which is not identical to the Federal standard."[31] The Court determined that this preemption provision should be read narrowly to preempt only state statutes and regulations, excluding common law tort actions.[32] A broad reading would not be appropriate as it would allow little, if any, common law liability. Further, there was no indication that Congress intended to preempt common law tort actions in addition to state statutes and regulations.[33]

In addition to its preemption provision, the Safety Act also contains a "saving clause," which states that "'compliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"[34] The saving clause indicates that the express preemption clause does not preempt tort actions.[35] Although the saving clause did not expressly save Geier's tort action, the Court concluded that it did not bar the "ordinary working of conflict pre-emption principles."[36] However, the Court has repeatedly refused to give a broad effect to a saving clause where it would disturb an established federal regulatory scheme.[37] The

24. *Geier I*, 166 F.3d at 1243; *Geier II*, 529 U.S. at 866.
25. *Geier II*, 529 U.S. at 866.
26. *Id.* at 886.
27. *Id.* at 864.
28. *Id.* at 867-70.
29. *Id.* at 870-74.
30. *Id.* at 874-86.
31. *Id.* at 867 (quoting 15 U.S.C. § 1392(d) (1988)).
32. *Id.* at 868.
33. *Id.*
34. *Id.* (quoting 15 U.S.C. § 1397(k) (1988)).
35. *Id.*
36. *Id.* at 869.
37. *Id.* at 870 (quoting United States v. Locke, 529 U.S. 89, 106 (2000); citing Am. Tel. &

Court questioned whether Congress would have wanted to apply ordinary preemption principles where an actual conflict with a federal objective is present.[38] In the absence of such application, states could impose laws that would directly conflict with federal regulation.[39]

The Court held that petitioners' lawsuit actually conflicted with Standard 208 and the Safety Act.[40] Although petitioners claimed Standard 208 created a minimum safety standard, the Court stated that the Department of Transportation created Standard 208 not as a minimum, but as a way to introduce car manufacturers to various passive restraint devices that would be gradually integrated into the market.[41] Through this introduction, the costs of passive restraints would be lowered, technological development encouraged, technical safety problems overcome, and widespread consumer acceptance won.[42]

The history of Standard 208 explains why the Department of Transportation promoted these objectives.[43] While the Department of Transportation mandated manual seatbelt installation in all automobiles in 1967,[44] it became obvious that most vehicle occupants would not buckle up, prompting the Department of Transportation to investigate the feasibility of passive restraints.[45] Standard 208 was amended multiple times as the Department of Transportation attempted to deal with the lack of popular acceptance of the passive restraint requirement.[46]

The 1984 version of Standard 208 reflected several significant considerations regarding the effectiveness of seatbelts[47] and the likelihood that passengers would leave their seatbelts unbuckled,[48] the advantages and disadvantages of passive restraints,[49] and the public's resistance to the installation or use of passive restraint safety devices that were available at

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Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 227-28 (1998) and Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)).

38. *Id.* at 871.

39. *Id.*

40. *Id.* at 874.

41. *Id.* at 875.

42. *Id.*

43. *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-38 (1983)).

44. *Id.* (citing 32 Fed. Reg. 2408, 2415) (1969)).

45. *Id.* (citing 34 Fed. Reg. 11148 (1969)).

46. *See id.* at 875-76.

47. *Id.* at 877 (citing 49 Fed. Reg. 28962, 29003 (July 17, 1984) (codified at 49 C.F.R. pt. 571)) and Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983)).

48. *Id.* (citing 49 Fed. Reg. 28962, 28983 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).

49. *Id.* at 877-78 (citing 49 Fed. Reg. 28962, 28986, 28990-93, 29001 (July 17, 1984) (codified at 49 C.F.R. pt. 571) and 65 Fed. Reg. 30680, 30681-82 (May 12, 2000) (codified at 49 C.F.R. pt. 552, 571, 585, 595)).

the time.[50] Most importantly, the Department of Transportation deliberately rejected an "all airbag" standard because real or perceived safety concerns threatened a negative public response more easily overcome with a combination of several different devices.[51]

The 1984 Standard 208 also sought to gradually phase in passive restraints.[52] It required ten percent of manufacturers' car fleets to be equipped with passive restraints in 1987, followed by an increasing percentage in three annual phases, up to one hundred percent after September 1, 1989.[53] In addition to providing time for compliance, this progressive approach would also help establish data on comparative effectiveness, permit manufacturers to overcome safety problems and high production costs, and advance the development of alternative passive restraint systems, ultimately building necessary public confidence.[54]

In *Geier II*, Petitioners claimed that American Honda, as a manufacturer, had an obligation to install an airbag in the 1987 Accord driven by the plaintiff.[55] The Court explained that plaintiff's rationale would impose an airbag installation mandate upon manufacturers of similar cars based on state law.[56] To impose a rule of state tort law compelling a duty to install airbags in cars such as the Honda in question "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."[57] The Court recognized the importance of the Department of Transportation's understanding of its own regulation and deferred to the Department's position that state tort suits would impinge on Standard 208's objectives.[58]

While preemption is generally an issue of congressional intent, courts have traditionally made distinctions between express and implied preemption.[59] *Geier II* was a case of "conflict" preemption and, therefore, hinged on the issue of Congress' "implied" intent.[60] The Court believed that Congress would not have intended such a significant conflict to be

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50. *Id.* (citing 49 Fed. Reg. 28962, 28990, 28987-89, 29001 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
51. *Id.* at 879 (citing 49 Fed. Reg. 28962, 29001 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
52. *Id.* (citing 49 Fed. Reg. 28962, 28999-29000 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
53. *Id.* (citing 49 Fed. Reg. 28962, 28999 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
54. *Id.* (citing 49 Fed. Reg. 28962, 29000-01 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).
55. *Id.* at 881.
56. *Id.*
57. *Id.*
58. *Id.* at 883.
59. *Id.* at 884.
60. *Id.* at 884-85 (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 287 (1995), English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990) and Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 545, 547-48 (1992)).

permitted.[61]

Justice John Paul Stevens, writing for the dissent, argued against preemption "[b]ecause neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt petitioners' cause of action . . . ."[62] Before discussing the issue of preemption, the dissent observed that good faith compliance with Standard 208 would not provide a complete defense for Honda, but "such compliance would be admissible evidence tending to negate charges of negligent and defective design."[63]

Justice Stevens noted that federal statutes are not presumed to preempt state laws, especially those within the scope of historic police powers, unless Congress has a "clear and manifest purpose . . . ."[64] Express preemption clauses are evidence of preemptive intent.[65] Although the Court has interpreted such clauses broadly in prior cases, the dissent distinguished statutes in those cases from the preemption provision of the Safety Act.[66] The former contained preemption clause language that was significantly broader than the provision of the Safety Act and also did not preserve common law remedies through a saving clause.[67] The dissent contended that the express preemption and saving provisions of the Safety Act created a "special burden" which a court must impose on a party who claims conflict preemption.[68]

The dissent asserted three reasons to reject the majority's opinion that common law claims presented liability risks that would have frustrated the Secretary of Transportation's policy decisions in enacting Standard 208.[69] First, that the majority's contention was based on "an unrealistic factual predicate" because, at that time, the risk of common law liability was not great enough to compel manufacturers to install airbags; if there had been a high likelihood of liability, Standard 208 would have been unnecessary.[70] Second, the purposes of the Standard would not actually have been frustrated because even without preemp-

61. *Id.* at 885.

62. *Id.* at 912-13 (Stevens, J., dissenting).

63. *Id.* at 892-93 (Stevens, J., dissenting).

64. *Id.* at 894 (Stevens, J., dissenting) (citing Medtronic, Inc. v. Lohr (*Medtronic II*), 518 U.S. 470, 485 (1996) and Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 116-17 (1992) (Souter, J., dissenting)).

65. *Id.* at 895 (Stevens, J., dissenting) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

66. *Id.* at 896-97 (Stevens, J., dissenting).

67. *Id.* at 897 (Stevens, J., dissenting).

68. *Id.* at 898-99 (Stevens, J., dissenting); *see id.* at 895 (Stevens, J., dissenting) (defining 15 U.S.C. § 1392(d) as the express preemption provision of the Safety Act and defining 15 U.S.C. § 1397(k) as the saving clause).

69. *Id.* at 901 (Stevens, J., dissenting).

70. *Id.* (Stevens, J., dissenting).

tion the manufacturers would have modified their designs to avoid liability in the future.[71] Third, that the majority ignored the definition of standards established under the Safety Act, which indicated an imposition of minimum requirements as opposed to fixed requirements.[72] The possibility that manufacturers might be exposed to potential tort liability would have accelerated the rate of airbag installation, promoting the sole goal expressed in Standard 208 itself, reducing deaths and injuries.[73] Justice Stevens further argued that there is generally a "presumption against preemption" rooted in federalism.[74] He contended that Honda had not overcome this presumption, as Standard 208 contained no "indication of intent to preempt common law no-airbag suits."[75]

III. Background

A. Federal Court Preemption Doctrine

Article VI of the United States Constitution provides that the laws of the United States, "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[76] "From this simple mandate springs the doctrine of preemption . . . ."[77] This clause "gives federal law precedence over conflicting state law."[78] When a state law conflicts with a federal law, the state law is without effect.[79] The United States Supreme Court provides that preemption exists in three situations: (1) where Congress expressly defines the extent of preemption;[80] (2) where preemption may be "inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;'"[81] and (3) where it "actually conflicts" with federal and state requirements.[82] The second and third types are instances of implied

71. *Id.* at 901-02 (Stevens, J., dissenting).

72. *Id.* at 903 (Stevens, J., dissenting) (citing Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 358 (2000) (Breyer, J., concurring) and Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 721 (1985)).

73. *Id.* at 903-04 (Stevens, J., dissenting).

74. *Id.* at 906-07 (Stevens, J., dissenting) (citing Rice v. Santa Fe Elevator Corp., 331 U.S., 218, 230 (1947) and Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

75. *Id.* at 910 (Stevens, J., dissenting).

76. U.S. Const. art. VI, cl. 2.

77. Cipollone v. Liggett Group, Inc. (*Cipollone I*), 593 F. Supp. 1146, 1150 (D. N.J. 1984).

78. Viet D. Dinh, *Regulatory Compliance as a Defense to Products Liability: Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2088 (2000).

79. Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 516 (1992) (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

80. English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990).

81. *Id.* at 79 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

82. *Id.*

preemption.[83]

However, as the States are recognized as autonomous sovereigns, there is a presumption that "Congress does not cavalierly pre-empt state-law causes of action."[84] Generally, there is an assumption that a federal act is not to supersede the States' historic police powers unless it is "the clear and manifest purpose of Congress" to do so.[85] Nevertheless, courts struggle with determining whether "federal law preempts state action"[86] because determining Congress' "manifest purpose" does not traditionally require express statutory text.[87] The United States Supreme Court noted that where express preemption is absent, one may imply preemption.[88]

B. The National Traffic and Motor Vehicle Safety Act of 1966

The first legislative drive toward the development of uniform safety standards regarding automobiles was the enactment of the National Traffic and Motor Vehicle Safety Act of 1966.[89] Congress enacted the Safety Act with the purpose of, "[reducing] traffic accidents and deaths and injuries to persons resulting from traffic accidents . . . ."[90] The Safety Act made the federal government responsible to insure that vehicles "prove crashworthy enough to enable their occupants to survive with minimal injuries."[91]

Section 1381 of the Safety Act authorized the Secretary of Transportation to promulgate Federal Motor Vehicle Safety Standards.[92] The Safety Act provides that a safety standard is a "minimum standard for motor vehicle performance, . . . which is practicable, [and] which meets

83. Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 151 (1994) ("Absent explicit pre-emptive language, [the Supreme Court has] recognized . . . two types of implied pre-emption: field pre-emption . . . and conflict pre-emption . . . ." (citing Pub. Health Trust v. Lake Aircraft, Inc., 992 F.2d 291, 294 (11th Cir. 1993) (alteration in original))).

84. Medtronic, Inc. v. Lohr (*Medtronic II*), 518 U.S. 470, 485 (1996).

85. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); citing Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715-16 (1985) and Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 22 (1987)).

86. *Cipollone I*, 593 F. Supp. at 1150.

87. *Cipollone VI*, 505 U.S. at 545 (Scalia, J., concurring in part and dissenting in part).

88. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

89. Dana P. Babb, Note, *The Deployment of Car Manufacturers Into a Sea of Product Liability? Recharacterizing Preemption as a Federal Regulatory Compliance Defense in Airbag Litigation*, 75 Wash. U. L.Q. 1677, 1681 (1997).

90. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 33 (1983) (quoting 15 U.S.C. § 1381 (1976)) (alteration in original).

91. Chadwell, *supra* note 83, at 142 (quoting S. Rep. No. 1301 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2709, 2712).

92. *Motor Vehicle Mfrs.*, 463 U.S. at 33 (citing 15 U.S.C. § 1392(a) (1976)).

the need for motor vehicle safety . . . ."[93] The Secretary of Transportation has delegated the authority to enact safety standards to the Administrator of the National Highway Traffic Safety Administration ("NHTSA").[94] The express preemption clause of the 1984 Safety Act provided:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle . . . safety standard applicable to the same aspect of performance of such vehicle or item of equipment[,] which is not identical to the Federal standard.[95]

The saving clause in effect in 1984 stated that compliance with a federal safety standard issued "does not exempt any person from any liability under common law."[96]

C. Standard 208

The Department of Transportation first issued Standard 208 in 1967, requiring that seatbelts be installed in all cars.[97] Based on a low use of seatbelts, the Department sought to consider the development of possible passive restraint systems.[98] Two types of passive restraint devices emerged, airbags and automatic seatbelts.[99] In the early 1970's, after an extensive rulemaking proceeding on such systems, the Department of Transportation amended Standard 208 to include passive restraint devices.[100] Vehicles manufactured between 1973 and 1975 were to contain passive restraints or a system involving lap and shoulder belts, in conjunction with an ignition interlock system which prevented a vehicle from starting when the seatbelts were not connected.[101] Based on considerable

93. Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 283-84 (1995) (quoting 15 U.S.C. § 1391(2) (1994)).

94. *Motor Vehicle Mfrs.*, 463 U.S. at 34 n.3 (citing 49 C.F.R. § 1.50(a) (1982)).

95. *Geier II*, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (1988)).

96. *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988)).

97. State Farm Mut. Auto. Ins., Co. v. Dep't of Transp., 680 F.2d 206, 209 (D.C. Cir. 1982) (citing 32 Fed. Reg. 2408, 2415 (1967)).

98. *Id.* at 209-10 (defining passive restraint systems as "protective systems" requiring "no action by vehicle occupants." (citing 34 Fed. Reg. 11, 148 (1969) and 36 Fed. Reg. 8296 (1971)).

99. *Motor Vehicle Mfrs.*, 463 U.S. at 35.

> The automatic seatbelt is a traditional safety belt, which when fastened to the interior of the door remains attached without impeding entry or exit from the vehicle, and deploys automatically without any action on the part of the passenger. The 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.

Id.

100. *Id.* (citing 35 Fed. Reg. 16927 (1970)).

101. *Id.* The ignition interlock system proved undesirable, leading Congress to amend Standard 208 "to prohibit a motor vehicle safety standard from requiring or permitting compliance

resistance from the automotive community, including manufacturers, the NHTSA postponed the effective date of the Standard.[102] In 1976, the Secretary of Transportation, William T. Coleman, Jr., prolonged the alternatives indefinitely and suspended passive restraint requirements.[103] He established that passive restraints were feasible, both economically and technologically, but based his conclusion on the expectation of extensive public resistance to passive restraint systems.[104]

In 1977, Coleman's successor, Brock Adams, issued a new compulsory passive restraint regulation, Modified Standard 208.[105] The modification "mandated the phasing in of passive restraints beginning with large cars in model year 1982 and extending to all cars in model year 1984."[106] In 1981, Secretary Andrew Lewis totally rescinded the passive restraint mandate.[107] The reasoning was based on the manufacturers' intentions to install automatic seatbelts in 99% of cars, the fact that these passive belts were easily detachable, and, once detached, the passive belts would provide no superior protection than the use of manual belts.[108]

The United States Supreme Court reviewed the rescission of Modified Standard 208 in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[109] In *Motor Vehicle Manufacturers*, the Court concluded that the rescission was arbitrary and capricious, and that further consideration was required.[110] It determined that the NHTSA's acquiescence to the manufacturers' decision to adopt automatic belts instead of installing airbags was inappropriate.[111] Subsequently, the NHTSA reviewed the passive restraint matter thoroughly.[112]

On July 17, 1984, NHTSA reinstated Standard 208, directing a phase in of passive restraints beginning with cars manufactured after September 1986.[113] Secretary Elizabeth Dole focused on the traditional three-point

by means of an ignition interlock or a continuous buzzer designed to indicate that safety belts were not in use." *Id.* at 36 (citing Motor Vehicle and Schoolbus Safety Amendments of 1974, 15 U.S.C. § 1410(b) (repealed 1994)).

102. Chadwell, *supra* note 83, at 146. Some experts contended that "further testing and development was necessary before a functional airbag system would be available." *Id.* at 145.

103. *Motor Vehicle Mfrs.*, 463 U.S. at 36 (citing 41 Fed. Reg. 24070 (1976)).

104. *Id.* at 36-37. Instead, Coleman proposed a project involving approximately 500,000 vehicles, containing passive restraints, to introduce the systems to the public, and "smooth the way" for future mandatory installation. *Id.* at 37.

105. *Id.* (citing 42 Fed. Reg. 34289 (1977) and 49 C.F.R. § 571.208 (1978)).

106. *Id.*

107. *Id.* at 38.

108. *Id.* at 38-39.

109. *Id.* at 32.

110. *Id.* at 46, 57.

111. *Id.* at 49-50.

112. Chadwell, *supra* note 83, at 149.

113. *Id.* (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. § 571.208)).

belts.[114] Due to the fact that most vehicles contained three-point belts, compulsory belt use laws would produce more instantaneous safety benefits than passive restraint requirements, which would take time to implement.[115] The NHTSA lacked the power to enact compulsory belt use laws itself, so it decided to instate the phase-in requirement.[116] The phase-in requirement eventually mandated installation of passive restraints in all cars manufactured after September 1, 1989.[117]

D. *No-Airbag* Cases and Preemption of Common Law Claims

The controversy surrounding preemption in airbag cases arises from "conflict between the Safety Act's [p]reemption [c]lause and its [s]aving [c]lause."[118] It is clear that Congress intended to federalize the approach to automobile safety regulation.[119] "The conflict centers around the [p]reemption [c]lause's applicability to common law actions."[120] The clause itself did not mention preemption of common law claims.[121] This omission led to a split amongst courts.[122] Some courts held that the language of the preemption clause did indeed extend to common law actions in addition to actions by state regulatory bodies.[123] Accordingly, a jury is foreclosed from imposing liability as a common law standard which contradicts a federal standard, just as a regulatory agency of a state is preempted from creating a standard dissimilar to Standard 208.[124]

Another area of conflict in airbag litigation was the question of whether common law should be preempted as conflicting with federal law.[125] Conflict preemption arises when a state law conflicts directly with federal law or presents an obstacle to federal law or federal objectives.[126] The majority of courts found that common law claims were impliedly preempted by the Safety Act.[127] Some courts have held *no airbag* claims

114. *Id.* A "three point" belt is one with a shoulder and lap combination which is attached to the vehicle at three points. *Id.* at 149 n.57.

115. *Id.* (citing 49 Fed. Reg. 28962, 28997-98 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).

116. *Id.* (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).

117. *Id.* (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).

118. Babb, *supra* note 89, at 1687.

119. *Id.* (citing Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 143 (1994)).

120. *Id.* at 1687-88.

121. *Id.* at 1688.

122. Chadwell, *supra* note 83, at 156-57.

123. *Id.* (citing Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986) and Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1097 (E.D. Mo. 1986)).

124. *Id.* at 157.

125. *Id.* at 161.

126. *Id.* at 162; *English*, 496 U.S. at 78-79.

127. Cellucci v. Gen. Motors Corp. (*Celluci II*), 706 A.2d 806, 812 n.4 (Pa. 1998) (citations omitted).

expressly preempted.[128] A minority of courts found the Safety Act did not preempt airbag claims whatsoever.[129]

E. *Cipollone*: State Common Law Preemption Precedent

In *Cipollone v. Liggett Group, Inc.* (*Cipollone VI*), the United States Supreme Court determined that only the express language of the 1965 Federal Cigarette and Advertising Act and the 1969 Public Health Cigarette Smoking Act, governed their preemption.[130] In *Cipollone VI,* a lung cancer patient named Rose Cipollone filed an action in the United States District Court for the District of New Jersey against three cigarette companies, the Liggett Group, Inc., Philip Morris, Inc., and Loew's Theatres, Inc., bringing a fourteen count complaint based in part on strict liability and negligence.[131] Cipollone alleged that the defendants produced unsafe and defective products, of which the risk outweighed the utility, and that they did not adequately warn consumers of smoking hazards.[132] Defendant manufacturers asserted a defense that the Federal Cigarette Labeling Act ("FCLA") of 1965, as amended by the Public Health Cigarette Smoking Act of 1969, preempted the plaintiff's claims.[133]

The district court granted a motion to strike, ruling that the FCLA did not preempt the plaintiff's common law actions, but that the FCLA was intended to create a national uniform warning system that would protect manufacturers from being subjected to a variety of state laws.[134] The court provided that an individual is not prevented from claiming that inadequate warnings existed regardless of the existence of federally man-

128. *Id.* (citations omitted).

129. *Id.* (citations omitted).

130. *Cipollone VI*, 505 U.S. at 517.

131. *Cipollone I*, 593 F. Supp. at 1149.

132. *Id.*

133. *Id.*; *Cipollone VI*, 505 U.S. at 510. The express preemption provision, section 5 of the 1965 Act, provides in part:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package. (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 VI, 505 U.S. at 514 (quoting Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1966) (current version at 15 U.S.C. § 1334)). The Public Health Cigarette Smoking Act of 1969 amended the 1965 Act as follows: (1) instead of requiring a warning label that cigarette smoking "may be hazardous," the 1969 Act mandated a stronger statement that smoking "is dangerous," and (2) the 1969 Act altered the preemption provision contained in the 1965 Act to impart, "[n]o 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 Act." *Id.* at 515 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. §§ 1333, 1334(b))).

134. *Id.* at 510 (citing Cipollone v. Liggett Group, Inc. (*Cipollone I*), 593 F. Supp. 1146, 1148, 1153-70 (D. N.J. 1984)).

dated warnings.[135] While the court also recognized that it would be very difficult to prove such a claim, it added that "the difficulty of proof cannot preclude the opportunity to be heard . . ."[136]

The Third Circuit Court of Appeals accepted interlocutory appeal and reversed, rejecting defendant manufacturers' express preemption contention, but accepting their assertion that plaintiff's common law actions would conflict with federal law.[137] Congress' purposes in the FCLA included establishing a balance between public warning of smoking hazards and protection of national economic interests.[138] These purposes would be upset by state common law actions.[139] Therefore, the court held that the FCLA preempted common law damages actions relating to smoking that challenged either cigarette package warnings or the propriety of a party's advertising actions.[140] The court further held that damages claims were preempted where success depended upon a party's duty of providing a consumer warning, in addition to the congressionally mandated warnings on cigarette packages.[141] The Court of Appeals did not identify with specificity which of the plaintiff's claims the FCLA preempted.[142] The United States Supreme Court denied certiorari[143] and returned the case to the District Court for the District of New Jersey for trial.[144]

The district court, in compliance with the mandate by the Court of Appeals, held that Cipollone's "failure-to-warn, express-warranty, fraudulent-misrepresentation, and conspiracy-to-defraud claims" were preempted as they relied on defendant manufacturers' advertising activities after the effective date of the enactment of the FCLA of 1965.[145] It also found that the design defect claims were barred, but were not preempted by federal law.[146] Following a four month trial, a jury awarded $400,000

135. *Cipollone I*, 593 F. Supp. at 1148.

136. *Id.*

137. *Cipollone VI*, 505 U.S. at 511 (citing Cipollone v. Liggett Group, Inc. (*Cipollone II*), 789 F.2d 181 (3d Cir. 1986)).

138. Cipollone v. Liggett Group, Inc. (*Cipollone II*), 789 F.2d 181, 187 (3d Cir. 1986) (citing Banzhaf v. FCC, 405 F.2d 1082, 1090 (D.C. Cir. 1968)).

139. *Id.* (citing Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 156-59 (1982), Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324-25 (1981), and San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959)).

140. *Id.*

141. *Id.*

142. *Cipollone VI*, 505 U.S. at 512.

143. Cipollone v. Liggett Group, Inc. (*Cipollone IV*), 479 U.S. 1043, 1043 (1987).

144. *Cipollone VI*, 505 U.S. at 512.

145. *Id.* (citing Cipollone v. Liggett Group, Inc. (*Cipollone III*), 649 F. Supp. 664, 669, 673-75 (D. N.J. 1986)).

146. *Id.* (citing Cipollone v. Liggett Group, Inc. (*Cipollone III*), 649 F. Supp. 664, 669, 673-75 (D. N.J. 1986)).

of damages to the plaintiff.[147] The jury found that Liggett Group, Inc., had breached a duty to warn as well as express warranties prior to 1966.[148] Attributing 80% of Cipollone's injuries to her own voluntary smoking of cigarettes, a known danger, the jury awarded no damages to her estate.[149] However, damages were awarded to her husband in compensation for losses incurred due to the defendant manufacturers' breach of express warranty.[150] Both parties "appealed, raising a plethora of issues," but mainly based on alleged errors in the district court's charge to the jury and errors in jury findings.[151] Specifically, Cipollone contended that the district court erred in interpreting the Third Circuit's prior decision by holding that the FCLA preempted plaintiff's misrepresentation, intentional tort and fraud claims.[152]

The Third Circuit Court of Appeals partially affirmed the decision, upholding the district court's preemption ruling, and partially reversed and remanded.[153] The court disagreed with Cipollone's contentions and reasserted its prior holding that the FCLA "preempts those state law damage actions relating to smoking and health that challenge . . . the propriety of a party's actions with respect to the advertising and promotion of cigarettes."[154] Cipollone's intentional tort claim was based on allegations that defendant manufacturers "intentionally, wil[l]fully, and wantonly, through their advertising, attempted to neutralize the [federally mandated] warnings that were given regarding the adverse effects of cigarette smoking."[155] This claim specifically challenged the defendants' advertising and promotions actions regarding cigarettes;[156] therefore, the court concluded that the lower court did not err in interpreting the Court of Appeals prior preemption decision.[157] The United States Supreme Court "granted the petition for certiorari to consider the pre-emptive effect of the federal statutes."[158]

147. *Id.* (citing Cipollone v. Liggett Group, Inc. (*Cipollone V*), 893 F.2d 541, 554 (3d Cir. 1990)). Rose Cipollone died in 1984 and her husband filed an amended complaint. After trial, he also died and their son maintained the action. *Id.* at 509.

148. *Id.* at 512 (citing Cipollone v. Liggett Group, Inc. (*Cipollone V*), 893 F.2d 541, 554 (3d Cir. 1990)).

149. *Id.* (citing Cipollone v. Liggett Group, Inc. (*Cipollone V*), 893 F.2d 541, 554 (3d Cir. 1990)).

150. *Id.*

151. Cipollone v. Liggett Group, Inc. (*Cipollone V*), 893 F.2d 541, 546 (3d Cir. 1990).

152. *Id.* at 581.

153. *Id.* at 583.

154. *Id.* at 582 (quoting Cipollone v. Liggett Group, Inc. (*Cipollone II*), 789 F.2d 181, 187 (3d Cir. 1986)).

155. Cipollone v. Liggett Group, Inc. (*Cipollone III*), 649 F. Supp. 664, 673 (D. N.J. 1986).

156. *Cipollone V*, 893 F.2d at 582 (citing Cipollone v. Liggett Group, Inc. (*Cipollone II*), 789 F.2d 181, 187 (3d Cir. 1986)).

157. *Id.*

158. *Cipollone VI*, 505 U.S. at 512.

The United States Supreme Court affirmed in part and reversed in part, holding that the FCLA of 1965 did not preempt common law damages claims and the 1969 Act did not preempt plaintiff's intentional fraud and misrepresentation, express warranty, or conspiracy claims.[159] Justice John Paul Stevens, speaking for the majority, reasoned that the preemption clause of the FCLA provided a reliable expression of congressional intent concerning state authority.[160] Consequently, an implied preemption analysis was unnecessary in determining the Act's preemptive reach.[161] When looking at the provisions of an act, a court must construe them "in light of the presumption against the pre-emption of state police power regulations."[162]

1. The Judgment of the Court

Justice John Paul Stevens announced the judgment of the Court in parts I-IV for a 7 to 2 majority.[163] In part IV of the opinion, Justice Stevens provided that the 1965 Act included a preemption provision in which "Congress spoke precisely and narrowly."[164] The preemption provision language merely prohibited federal and state rulemaking bodies from requiring specific cautionary statements in advertising or on labels.[165] Justice Stevens concluded that the preemption provision of the 1965 Act "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state-law damages actions."[166]

2. Justice Stevens' Plurality Opinion

In part V of the opinion, Justice Stevens, joined by three other members of the Court, provided that the 1969 Act's preemption provision was much broader than the 1965 Act which it amended.[167] This amendment prohibited not merely, "'statements' but rather 'requirements or prohibitions . . . imposed under State law.'"[168] Justice Stevens provided that the 1969 Act extended the reach of the 1965 Act's preemption clause.[169] Although the 1969 Act suggested that Congress' concern was to preempt

159. *Id.* at 530-31.
160. *Id.* at 517.
161. *See id.*
162. *Id.* at 518.
163. *Id.* at 507.
164. *Id.* at 518.
165. *Id.*
166. *Id.* at 519-20.
167. *Id.* at 515.
168. *Id.* (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))).
169. *Id.* at 522-23.

state and local enactments, here, "it is difficult to say that such actions do not impose 'requirements or prohibitions.'"[170]

The preemption provision of the 1969 Act was not to be read as preempting all common law claims.[171] Justice Stevens stated the Court had to narrowly construe the language of the preemption clause and look at each of Cipollone's common law claims with a "presumption against preemption," to determine which actions were indeed preempted.[172] In analyzing each of the plaintiff's claims, the Court considered whether the claim imposed a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion."[173]

Cipollone's failure-to-warn claims against the cigarette manufacturers were preempted insofar as "they rely on a state-law 'requirement or prohibition . . . with respect to . . . advertising or promotion.'"[174] The 1969 Act therefore preempted claims regarding advertising or promotions containing additional or stronger warnings. However, it did not preempt claims that relied on actions unrelated to promotion or advertising. The Court found that Cipollone's breach of express warranty claims were not based on a state-imposed requirement and, therefore, were not preempted by the 1969 Act.[175] "A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the 'requirements' imposed by an express warranty claim are 'not imposed under State law,' but rather imposed *by the warrantor*."[176] Such common law actions for contractual commitments by manufacturers were not considered a "requirement . . . *imposed under State law*" as set forth in the preemption provision of the 1969 Act.[177]

Cipollone maintained two fraudulent misrepresentation claims.[178] The first alleged that the manufacturers, through advertising and promotion, had neutralized the effects of the mandatory warning labels.[179] Justice Stevens stated that the 1969 Act preempted this claim as "it seems quite clear that petitioner's first theory of fraudulent misrepresentation is

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170. *Id.* at 521-22 (citing W. PROSSER, LAW OF TORTS 4 (4th ed. 1971) and BLACK'S LAW DICTIONARY 1489 (6th ed. 1990)).

171. *Id.* at 523.

172. *Id.*

173. *Id.* at 523-24 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))).

174. *Id.* at 524 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))).

175. *Id.* at 526-27.

176. *Id.* at 525 (alteration in original).

177. *Id.* at 526 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))) (alteration in original).

178. *Id.* at 527.

179. *Id.*

inextricably related to petitioner's first failure-to-warn theory, a theory that we have already concluded is largely pre-empted" by the Act.[180] Cipollone's second theory, based on the tobacco companies' alleged "false representation of a material fact" and "concealment of a material fact[,]" was determined not to be preempted by the Act as it was "predicated not on a duty 'based on smoking and health[,]' but rather on a more general obligation – the duty not to deceive."[181]

Finally, Cipollone alleged a conspiracy existed among the cigarette manufacturers "to misrepresent or conceal material facts concerning the health hazards of smoking."[182] Justice Stevens stated this claim was not predicated on a "prohibition 'based on smoking and health[,]'" but on "a duty not to conspire to commit fraud."[183] Accordingly, the 1969 Act did not preempt the claim.[184]

3. *The Blackmun Opinion*

Justice Harry A. Blackmun, joined by Justice David H. Souter and Justice Anthony M. Kennedy, concurred and dissented in part.[185] Justice Blackmun agreed with the Court in its exposition of preemption law, its unwillingness to find preemption of state common law claims as being "pre-empted by federal law in the absence of clear and unambiguous evidence that Congress intended that result," and in its finding that the 1965 Act did not preempt any of Cipollone's common law damages claims.[186] Justice Blackmun dissented, finding the plurality's determination that the 1969 Act preempted "some common-law damages claims [to be] little short of baffling."[187] In his opinion, the substitution of the words "requirement or prohibition" in the 1969 Act for the word "statement" did not clearly evidence a congressional intent to preempt common law damages actions.[188] Instead, the 1969 Act's plain language "simply cannot

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180. *Id.* at 528.

181. *Id.* at 528-29 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))).

182. *Id.* at 530.

183. *Id.* (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))).

184. *Id.*

185. *Id.* at 531 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

186. *Id.* at 531-34 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 516 (1992)).

187. *Id.* at 534 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

188. *Id.* at 534, 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

bear the broad interpretation the plurality would impart to it."[189] The changes to the preemption provision are "generally non-substantive in nature[,]" and show Congress meant to clarify the clause, not to dramatically expand its reach.[190]

4. *The Scalia Opinion*

Justice Antonin Scalia, joined by Justice Clarence Thomas, concurred and dissented in part, reasoning that there was no merit to the majority's newly crafted narrow construction doctrine.[191] Justice Scalia would have found complete preemption of Cipollone's claims.[192] He provided that the Supreme Court's "job is to interpret Congress' decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning."[193] Express preemption cases have applied ordinary statutory construction to determine the scope of the preemption.[194] If ordinary statutory construction principles were applied, Justice Scalia believed Cipollone's failure-to-warn claims would be preempted by the 1965 FCLA and all Cipollone's common law claims preempted by the 1969 Act.[195]

Since the preemption provision of the 1965 Act enjoins only laws requiring statements in cigarette advertising, claims based on voluntary statements by the manufacturers should not be preempted.[196] Justice Scalia provided that promotion and advertising are normal means by which a manufacturer communicates warnings to customers.[197] He stated, "It is implausible that Congress meant to save cigarette companies from being compelled to convey such data to consumers through that means, only to allow them to be compelled to do so through means more onerous still."[198]

F. POST *CIPOLLONE* IMPLIED PREEMPTION CASES

The United States Supreme Court, in *Freightliner Corp. v. Myrick* (*Freightliner II*), revisited federal preemption of common law actions and held that the Safety Act did not preempt state common law claims against

189. *Id.* at 539 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

190. *Id.* at 539-40, 542 (citing S. REP. NO. 91-566, at 12 (1969), *as reprinted in* 1970 U.S.C.C.A.N. 2652, 2663).

191. *Id.* at 544 (Scalia, J., concurring in the judgment in part and dissenting in part).

192. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

193. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

194. *Id.* at 545-46 (Scalia, J., concurring in the judgment in part and dissenting in part).

195. *Id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part).

196. *Id.* at 550 (Scalia, J., concurring in the judgment in part and dissenting in part).

197. *Id.* at 555 (Scalia, J., concurring in the judgment in part and dissenting in part).

198. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

manufacturers of tractor-trailers.[199] *Freightliner II* arose from two actions in the District Court for the Northern District of Georgia in which plaintiffs contended the manufacturer had negligently designed tractor-trailers by omitting antilock brake system ("ABS") installation.[200] The two accidents involved eighteen-wheel tractor-trailers, neither with an ABS installed, that jackknifed when the drivers attempted to brake suddenly.[201] In the first action, a tractor-trailer manufactured by Freightliner hit plaintiff, Ben Myrick, head on, giving him brain damage and permanent paraplegia.[202] The second action dealt with an automobile driver, Grace Lindsay, who died when a tractor-trailer manufactured by Navistar collided with her.[203] The plaintiffs separately filed common law actions against the manufacturers under Georgia tort law.[204] They independently alleged that the vehicles were negligently designed based on the absence of ABS installation.[205] The defendant manufacturers removed the actions to the United States District Court for the Northern District of Georgia based on diversity of citizenship.[206] Freightliner and Navistar moved for summary judgment claiming the Safety Act preempted the plaintiffs' common law actions.[207]

The District Court for the Northern District of Georgia separately granted summary judgment for defendant manufacturers, holding that the Safety Act preempted both plaintiffs' common law actions.[208] In the *Myrick* action, the court granted summary judgment in favor of Freightliner because the Safety Act, and the regulations implemented under it, impliedly preempted the action.[209] Immediately following the *Myrick* decision, a different judge in the district court decided the *Lindsay* action, adopting the reasoning of the first action, finding the cause of action to be similarly preempted.[210]

The Eleventh Circuit Court of Appeals consolidated the two actions and reversed, holding that the plaintiffs' claims were not expressly or impliedly preempted based on a conflict between federal regulation and state law.[211] The court found that they were bound by their decision in

199. *Freightliner II*, 514 U.S. at 282.
200. *Id.* at 282-83.
201. *Id.* at 282.
202. *Id.*
203. *Id.*
204. *Id.* at 283.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* (citing Myrick v. Freuhauf Corp. (*Myrick I*), 795 F. Supp. 1139, 1140, 1143 (N.D. Ga. 1992)).
209. Myrick v. Freuhauf Corp. (*Myrick II*), 13 F.3d 1516, 1518-19 (11th Cir. 1994).
210. *Id.* at 1519.
211. *Id.* at 1519, 1528.

Taylor v. General Motors Corp.,[212] which the court determined remained unchanged by the United States Supreme Court's holding in *Cipollone VI*.[213] Based on *Taylor*, the plaintiffs' common law actions were not preempted by the express language of the Safety Act.[214] In both instances, the plaintiffs' claimed that the manufacturers were strictly liable and negligent in failing to equip a safety device in their manufactured vehicle.[215] Additionally, a safety standard existed under the Safety Act that gave manufacturers the option not to install the device.[216]

The preemption and saving clauses were the same for both cases, thereby binding the Court of Appeals to conclude in favor of express preemption consistent with *Taylor*.[217] The court's decision "primarily involve[d] laying the *Cipollone* [*VI*] decision over the *Taylor* decision[,]" thereby mandating a holding that the Safety Act did not preempt Myrick's and Lindsay's common law claims.[218] Judge James C. Hill dissented, stating that the effect of a common law claim for negligent failure to install ABS would be identical to Georgia enacting a statute providing a manufacturer could not sell any truck lacking ABS.[219] Therefore, he stated, "If the Supremacy Clause means anything, it must mean that federal law prevails in this conflict."[220] The United States Supreme Court granted certiorari.[221]

The United States Supreme Court affirmed the decision of the Eleventh Circuit Court of Appeals, reasoning that no express preemption existed for plaintiffs' claims, but making clear that *Cipollone VI* did not establish "a categorical rule precluding the coexistance of express and implied preemption . . . ."[222] Rather, the Court indicated that the implied

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212. Taylor v. Gen. Motors Corp., 875 F.2d 816 (11th Cir. 1989).

213. *Myrick II*, 13 F.3d at 1521. In *Myrick II*, the court discussed the *Taylor* decision wherein the court held that state common law actions based on a defect addressed by a safety standard created under the Safety Act were not expressly preempted. The court did find that the claims were impliedly preempted, however, as a common law claim. A common law tort claim "based on a failure to install air bags [are] impliedly pre-empted by the Safety Act because they would interfere with and frustrate the methods by which the federal regulations sought to accomplish their goals." The Safety Act safety standard at issue in *Taylor* granted manufacturers an option for manual seat belt or airbag installation. *Id.* at 1520-21 (citing Taylor v. Gen. Motors Corp., 875 F.2d 816, 822-27 (11th Cir. 1989)).

214. *Id.* at 1521.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 1528.

219. *Id.* at 1531 (Hill, J., dissenting).

220. *Id.* (Hill, J., dissenting).

221. Freightliner Corp. v. Myrick (*Freightliner I*), 513 U.S. 922, 115 S. Ct. 306 (1994), *aff'd by* Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280 (1995).

222. *Freightliner II*, 514 U.S. at 286, 288, 290.

preemption analysis remained a viable option.[223] Justice Thomas, writing for the Court, stated that "*Cipollone* [*VI*] supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule."[224] The Court concluded, however, that defendant manufacturers' preemption argument was futile as plaintiffs' common law actions and federal law did not conflict.[225] First, compliance with both state and federal law was not impossible as the Safety Act contained no regulations regarding ABS use.[226] Second, the Court could not conclude that the common law claims conflicted with the objectives of Congress.[227]

In 1996, the United States Supreme Court, in *Medtronic, Inc. v. Lohr* (*Medtronic II*), directed that state common law claims were not preempted by a provision of the Federal Food, Drug and Cosmetic Act ("FDCA").[228] Lora Lohr had a Medtronic pacemaker implanted in 1987.[229] In 1990, the pacemaker failed because of an alleged defect, requiring Ms. Lohr to undergo emergency surgery.[230] In 1993, Ms. Lohr and her husband filed an action against Medtronic in Florida state court alleging both negligence and strict liability.[231] The complaint alleged that Medtronic failed to act reasonably in designing, manufacturing, assembling, and selling the subject pacemaker and that "the device was in a defective condition and unreasonably dangerous to foreseeable users at the time of its sale."[232] Medtronic removed the action to the federal district court and filed a summary judgment motion, arguing that the Medical Device Amendments ("MDA") of the FDCA preempted both of Ms. Lohr's claims.[233] Section 360(k) of the MDA provides that no state may establish a medical device requirement relating to safety or effectiveness of a device which is "different from, or in addition to, any requirement" applicable to the device.[234]

The District Court for the Middle District of Florida initially denied Medtronic's motion for summary judgment.[235] The district court found nothing in the MDA that entirely exempted a manufacturer who "allegedly violated the FDA's regulations."[236] However, in an earlier case, the

223. *Id.* at 288.
224. *Id.* at 282, 289.
225. *Id.* at 289.
226. *Id.*
227. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
228. *Medtronic II*, 518 U.S. at 503.
229. *Id.* at 480.
230. *Id.* at 480-81.
231. *Id.* at 481.
232. *Id.*
233. *Id.*
234. *Id.* at 481-82 (quoting 21 U.S.C. § 360k(a)).
235. Lohr v. Medtronic, Inc. (*Medtronic I*), 56 F.3d 1335, 1341 (11th Cir. 1995).
236. *Medtronic II*, 518 U.S. at 482.

United States Court of Appeals for the Eleventh Circuit had concluded that the same MDA provision required preemption of some common law claims, which prompted the district court to reconsider and dismiss the Lohrs' complaint.[237]

The Lohrs appealed the district court's decision to the Eleventh Circuit Court of Appeals, claiming error in the district court's finding that common law tort actions against the manufacturer of Ms. Lohr's pacemaker were preempted by the MDA.[238] The Court of Appeals, reversing and affirming in part, ruled that the claims based on negligent design were *not* preempted, and the claims based on negligent manufacturing and failure to warn *were* preempted.[239] In reaching this holding, the court decided "common law actions are state requirements within the meaning of [section] 360k(a)."[240] In discussing Food and Drug Administration ("FDA") regulations, the court concluded that a state requirement is preempted if the FDA has established "*specific* requirements applicable to a particular device . . . ."[241] The FDA established that these requirements existed for the failure to warn and negligent manufacturing claims, consequently preempting them.[242] Alternatively, FDA did not establish a requirement regarding negligent design claims; therefore, the court concluded the claims were not preempted.[243] Medtronic petitioned for writ of certiorari with the United States Supreme Court to consider the affirmation of the district court's decision and the Lohrs cross petitioned for review of the judgment upholding the preemption defense.[244] The Court granted both petitions based on the divergent decisions regarding preemption and state common law claims.[245]

The United States Supreme Court reversed the decision of the Eleventh Circuit Court of Appeals, holding that none of Ms. Lohr's state common law claims alleging negligent design and negligent manufacture were preempted.[246] The Court, in an opinion by Justice John Paul Stevens, provided that their task was to interpret the scope of the express preemption provision of section 360(k), similar to its undertaking in *Cipollone VI*.[247] The Court expressed two presumptions concerning preemption.[248]

237. *Id.* at 482-83. (citing Duncan v. Iolab Corp., 12 F.3d 194 (1994), *abrogated by* Goodlin v. Medtronic, Inc., 167 F.3d 1367 (11th Cir. 1999)).

238. *Medtronic I*, 56 F.3d at 1338, 1340-41.

239. *Id.* at 1347-50.

240. *Id.* at 1342.

241. *Id.* at 1344 (quoting 21 C.F.R. § 808.1(d)) (alteration in original).

242. *Medtronic II*, 518 U.S. at 483.

243. *Id.* (citing Lohr v. Medtronic, Inc. (*Medtronic I*), 56 F.3d 1335, 1347-49 (11th Cir. 1995)).

244. *Id.* at 484.

245. *Id.* (citing Medtronic, Inc. v. Lohr, 516 U.S. 1087 (1996)).

246. *Id.* at 503.

247. *Id.* at 474, 484.

First, there is a presumption against preemption of state common law actions.[249] Second, in every preemption case the "ultimate touchstone" is Congress' purpose.[250]

Medtronic claimed that the Eleventh Circuit Court of Appeals erred in deciding against preemption regarding the negligent design claims.[251] Medtronic suggested that all common law actions are requirements which impose "duties 'different from, or in addition to,' . . . federal standards that the FDA has promulgated in response to mandates under the MDA."[252] The Court disagreed with this contention as such an interpretation would mean Congress precluded state courts from allowing consumers protection from defective medical devices.[253] In fact, such a reading of section 360(k) would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that . . . needed more stringent regulation . . . ."[254]

The Court noted that Congress has used the word "requirement" in preempting state actions.[255] By using the word "requirement," there was an apparent presumption that specific duties were imposed on manufacturers by the State.[256] Although the Court found, in *Cipollone VI*, that a statute preempting "requirements" preempted certain common-law claims, that statute is distinguished as preempting a very limited set of claims.[257] Medtronic's interpretation of section 360(k) was not as limiting and would produce "a serious intrusion into state sovereignty[;]" therefore, the Court did not accept such a contention.[258]

An examination of the basic purpose of the MDA supported the Court's rejection of certain preemption claims.[259] The purpose of the MDA is "to provide for the safety and effectiveness of medical devices intended for human use."[260] The legislative history contains nothing that

248. *Id.* at 485 (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992)).

249. *Id.*

250. *Id.* (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

251. *Id.* at 486.

252. *Id.*

253. *Id.* at 487.

254. *Id.*

255. *Id.* at 487-88 (citing Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 521-22 (1992)).

256. *Id.* at 487.

257. *Id.* at 487-88. "The pre-emptive statute in *Cipollone* [*VI*] was targeted at a limited set of state requirements - 'based on smoking and health' . . . involving the 'advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of' the federal statute." *Id.* at 488 (quoting Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 515 (1992)).

258. *Id.* at 488-89.

259. *Id.* at 490.

260. *Id.* at 490 (quoting Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (1976)).

suggested "a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices."[261] Had Congress intended such preemption, there would have been some indication.[262] In the absence of such indication, the Court noted that some common law causes of action could be maintained.[263]

Specifically, the Court evaluated the Lohrs' action regarding three issues.[264] First, it provided that the Court of Appeals held correctly against preemption of the negligent design claims, as the purpose of Congress should prevail.[265] Second, although the Lohrs argued that the "state requirements [were] not pre-empted unless [the state requirements were] 'different from, or in addition to,' the federal requirement, the Court stated that the MDA did not preempt state requirements that are the same as the federal requirements.[266] Finally, the State's rules regarding manufacturing and labeling were not preempted because they did not impose requirements "with respect to a device[.]"[267]

The Lohrs' cross petition claimed common-law duties could never be requirements in reference to section 360(k) and that the MDA did not preempt common law actions.[268] The Court did not resolve this argument because none of the plaintiffs' claims were preempted; such discussion would merely be hypothetical and, due to the specificity of section 360(k), few common law claims would ever be preempted.[269]

Justice David Breyer concurred in part in the judgment, providing that while the MDA would preempt a common law tort suit on some occasions, the Lohrs' claims were not preempted.[270] Insofar as section 360(k) preempted a state requirement in the form of a state rule, statute, or regulation, section 360(k) would preempt a similar requirement embodied as a standard of care imposed by common law tort action.[271] Justice Breyer concluded that the claims at hand, however, were not preempted, as the ambiguous preemption provision of the MDA did not force the federal requirements to preempt state requirements.[272] Justice Breyer further concluded that the ordinary conflict preemption principles

261. *Id.* at 491.
262. *Id.*
263. *Id.*
264. *Id.* at 492.
265. *Id.* at 494.
266. *Id.* at 494-97 (quoting 21 U.S.C. § 360k(a)).
267. *Id.* at 502 (quoting 21 U.S.C. § 360k(a)).
268. *Id.*
269. *Id.* at 502-03. The Court further stated, "[e]ven then, the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis . . . ." *Id.* at 503 (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 287 (1995)).
270. *Id.* at 503-05 (Breyer, J., concurring in part and concurring in judgment).
271. *Id.* at 504-05 (Breyer, J., concurring in part and concurring in judgment).
272. *Id.* at 505-06 (Breyer, J., concurring in part and concurring in judgment).

are consistent with the holding against preemption.[273]

Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas, concurred and dissented in part.[274] Justice O'Connor concluded that state common law actions for damages impose requirements and are consequently preempted where the requirements are in conflict with those of the FDCA.[275] The determination by a majority of the Court in *Cipollone VI* determined that common law damage actions impose requirements.[276] Whether cigarettes or pacemakers, Justice O'Connor agreed that common law damages actions require manufacturers' compliance with common law duties.[277] Justice O'Connor determined that the Court's interpretation was incorrect because, where the express statutory language is clear, deference to an agency's construction is improper.[278] Justice O'Connor concluded that the MDA did not preempt the Lohrs' design claim, but did preempt the claims based on failure to warn and negligent manufacture.[279]

G. The Court Split

1. Decisions Holding Against Preemption

In *Wilson v. Pleasant* (*Wilson II*), the Indiana Supreme Court held that the Safety Act, and its subsequent regulations, did not preempt state common law negligence claims based on a manufacturer's failure to install airbags.[280] *Wilson II* involved a suit by the decedent's estate against Mr. Pleasant, the driver of the automobile that struck the decedent, and General Motors ("GM"), who negligently designed, manufactured and sold a vehicle which lacked an airbag passive restraint system.[281] Mr. Wilson was operating a 1986 Chevrolet manufactured by GM and was not wearing his seat belt when Mr. Pleasant struck him.[282] GM filed a summary judgment motion, asserting that Wilson's common law claims were

273. *Id.* at 507-08 (Breyer, J., concurring in part and concurring in judgment).

274. *Id.* at 509 (O'Connor, J., concurring in part and dissenting in part).

275. *Id.* (O'Connor, J., concurring in part and dissenting in part).

276. *Id.* at 510 (O'Connor, J., concurring in part and dissenting in part) (citing Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 521-22 (1992) (plurality opinion) and Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 548-49 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)).

277. *Id.* (O'Connor, J., concurring in part and dissenting in part).

278. *Id.* at 512 (O'Connor, J., concurring in part and dissenting in part) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

279. *Id.* at 514 (O'Connor, J., concurring in part and dissenting in part).

280. Wilson v. Pleasant (*Wilson II*), 660 N.E.2d 327, 328 (Ind. 1995).

281. *Id.* at 329.

282. *Id.*

preempted by the Safety Act and safety regulations created under it.[283] GM's motion was granted by the trial court, and the court of appeals subsequently affirmed the decision finding "that although the Safety Act did not expressly pre-empt a common law claim such as the one asserted in this case, it impliedly did so."[284] The court of appeals held that the Safety Act impliedly preempted the claims as they conflicted with federal regulation.[285]

The Indiana Supreme Court vacated the court of appeals decision and reversed the trial court's grant of summary judgment, concluding that it was improper to imply preemption of Wilson's claims.[286] Justice Patrick Sullivan, writing for the majority, held that the preemption clause of the Safety Act "entirely forecloses implied pre-emption . . . . And even if we appl[ied] the principles of implied pre-emption analysis as re-stated in [*Freightliner II*] . . . it would be improper to imply pre-emption here."[287] The court agreed with the court of appeals, finding that the Safety Act did not expressly preempt Wilson's state common law claim.[288] In addition, through an examination of the Safety Act's purposes and policies, the court found no basis for applying the implied preemption doctrine.[289] The court held that through the Safety Act's saving clause, "Congress made an explicit statement that the kind of state common law claim made by [Wilson] in this case [was] not pre-empted . . . ."[290] The court also held that the "pre-emption clause entirely forecloses any possibility of implied pre-emption in this case."[291]

Similarly, in *Minton v. Honda of America Manufacturing, Inc.* (*Minton II*), the Ohio Supreme Court held that the Safety Act did not expressly or impliedly preempt state common law tort claims based on an automobile manufacturer's failure to install airbags.[292] In *Minton II*, Mary Ann Minton, executrix of the Estate of Jeffrey L. Minton, sued Honda of America Manufacturing, Inc., Honda R & D Co., Ltd., and Honda Motor Co., Ltd. ("Honda") in the Montgomery County Court of Common Pleas, seeking damages based on negligence and strict product

283. *Id.*

284. *Id.* (citing Wilson v. Pleasant (*Wilson I*), 645 N.E.2d 638, 642 (Ind. Ct. App. 1994)).

285. *Id.* at 330 (citing Wilson v. Pleasant (*Wilson I*), 645 N.E.2d 638, 641 (Ind. Ct. App. 1994)).

286. *Id.* at 339.

287. *Id.* at 328, 339.

288. *Id.* at 330 (citing Wilson v. Pleasant (*Wilson I*), 645 N.E.2d 638, 641 (Ind. Ct. App. 1994)).

289. *Id.* at 339.

290. *Id.* at 336.

291. *Id.*

292. Minton v. Honda of Am. Mfg., Inc. (*Minton II*), 684 N.E.2d 648, 662 (Ohio 1997).

liability.[293] In 1991, Jeffrey Minton was killed while driving a 1990 Honda Accord.[294] Mr. Minton was wearing a "motorized shoulder belt and manual lap belt" when another vehicle hit the Accord practically head on.[295] As executrix of Jeffrey Minton's estate, Mary Ann Minton, brought suit under Ohio's state product liability laws.[296] Minton claimed that the Honda Accord her husband operated was defective in its manufacture and design, specifically, that the shoulder belt was defective.[297] As agreed to by both parties, the design defect strict liability claim was the only issue at trial.[298] Honda submitted a motion in limine seeking the exclusion of testimony and evidence regarding the lack of a driver's side airbag in the Honda Accord.[299] The Montgomery County Court of Common Pleas sustained the motion and excluded any airbag references.[300] Minton appealed the trial court's judgment, claiming it erred in disallowing the introduction of evidence relating to the absence of airbags.[301]

The Ohio Court of Appeals, Second Appellate District, Montgomery County, affirmed the trial court's ruling, as the Safety Act preempted Minton's *no airbag* claim.[302] Minton was precluded from presenting evidence of design alterations made to Honda Accords.[303] The court first noted that the claim was not expressly preempted based upon the language of the Safety Act's preemption clause and federal appeals court precedent.[304] Federal appeals courts had unanimously held that the Safety Act did not expressly preempt common law liability.[305] Additionally, if Congress wanted to preempt such claims, it could have expressly included the phrase "common law" in the federal statute.[306]

However, the court concluded that Minton's claim was impliedly preempted based on federal appeals court precedent and the notion that an award of damages would in effect be the same as a regulation requir-

293. Minton v. Honda of Am. Mfg., Inc. (*Minton I*), No. 14949, 1996 WL 402070, at *1 (Ohio Ct. App. July 19, 1996).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* The motion was premised on Honda's lack of notice concerning the *no airbag* claim, and federal law would preempt the claim. *Id.*

300. *Id.*

301. *Id.* at *2.

302. *Id.* at *7.

303. *Id.* at *1.

304. *Id.* at *5.

305. *Id.* (citing Wood v. Gen. Motors Corp., 865 F.2d 395, 401 (1st Cir. 1988) and Taylor v. Gen. Motors Corp., 875 F.2d 816, 825 (11th Cir. 1989)).

306. *Id.* (citations omitted).

ing airbags.[307] In *no airbag* cases, federal appeals courts had unanimously found implied preemption.[308] The court also agreed with Honda's contentions that a holding against preemption "would create a conflict with the Safety Act . . . by subverting the federal purpose of providing manufacturers with alternative methods of providing passive restraint system[s]."[309] Minton appealed from the verdict and judgment favoring Honda, claiming error in the trial court's failure to allow her introduction of airbag evidence.[310]

The Ohio Supreme Court reversed the court of appeals' judgment holding that a state common law tort claim founded on the manufacturer's failure to install airbags was not preempted, either expressly or impliedly, by the Safety Act.[311] Justice Andrew Douglas, writing for the majority, determined that the plaintiff should have been permitted to present evidence to the trial court showing that their 1990 Honda Accord did not contain airbags while the 1992 Accords did.[312] The court agreed with the court of appeals insofar as Minton's products liability claim was not expressly preempted by the Safety Act.[313] This conclusion complied with federal circuit court decisions.[314] In addition, the court also noted the lack of express mention of common law actions in the preemption clause.[315] Additionally, in examining the Safety Act's history, the court could not construe any intent of Congress to expressly preempt a *no airbag* claim.[316]

Justice Douglas disagreed with Honda's contentions that implied preemption should apply.[317] He contested Honda's arguments, finding that "Congress did not intend for the Safety Act to occupy the entire field of auto safety . . . [and] appellant's claim does not prevent compliance with [S]tandard 208, nor does it thwart the accomplishment of the full purposes of Congress."[318] In holding that Minton's state claim against Honda for its failure to install airbags was not preempted impliedly or expressly, the court reversed and remanded the action to the trial court.[319]

307. *Id.* at *6 to *7.
308. *Id.* at *6.
309. *Id.* at *6 to *7.
310. *Id.* at *1.
311. *Minton II*, 684 N.E.2d at 662 (Ohio 1997).
312. *Id.* at 651-52.
313. *Id.* at 655.
314. *Id.* (citations omitted).
315. *Id.* at 655-56.
316. *Id.* at 657.
317. *Id.* at 660.
318. *Id.* at 661 (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 287 (1995)).
319. *Id.* at 662.

Justice Deborah Cook dissented, claiming the Safety Act impliedly preempted *no airbag* claims in tort.[320] Justice Cook emphasized the United States Supreme Court's statement that preemption exists "where it is impossible for a private party to comply with both state and federal requirements, *or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'*"[321] She disagreed with the majority's implied preemption analysis and, instead, agreed with the First Circuit Court of Appeals decision in *Wood v. General Motors Corp.*, finding that a product liability *no airbag* claim was impliedly preempted.[322] If a common law action were allowed holding a manufacturer liable for the absence of airbags, it would be equal "to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area."[323]

Likewise, in *Drattel v. Toyota Motor Corp.* (*Drattel II*), the New York Court of Appeals determined that the Safety Act of 1966 did not preclude plaintiffs' state common law claims.[324] In *Drattel II*, the plaintiff, Caryn Drattel, sued Toyota Motor Corporation and the distributors of her 1991 Toyota Tercel ("Toyota"), alleging defective design based on the absence of a driver's side air bag.[325] Drattel, who was wearing her seatbelt, received injuries in an automobile collision while driving her Tercel.[326] Drattel alleged that installation of a driver's side airbag would make for a safer alternative design.[327] Toyota moved for partial summary judgment seeking dismissal of the plaintiff's claim based on preemption by the Safety Act and Standard 208.[328]

The trial court granted Toyota's motion for summary judgment.[329] It concluded that the "claims, insofar as they were based on the absence of an air bag, were preempted by [f]ederal law . . . ."[330] The court reasoned that allowing state common law claims would impose a standard not identical to federal regulation because Standard 208 gave manufacturers a

320. *Id.* at 662 (Cook, J., dissenting).

321. *Id.* at 663 (Cook, J., dissenting) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)) (alteration in original).

322. *Id.* at 666 (Cook, J., dissenting) (citing Wood v. Gen. Motors Corp., 865 F.2d 395, 402 (1st Cir. 1988)).

323. *Id.* (Cook, J., dissenting) (quoting Wood v. Gen. Motors Corp., 865 F.2d 395, 402 (1st Cir. 1988)).

324. Drattel v. Toyota Motor Corp. (*Drattel II*), 699 N.E.2d 376, 377 (N.Y. 1998).

325. *Id.* at 377.

326. *Id.*

327. Drattel v. Toyota Motor Corp. (*Drattel I*), 662 N.Y.S.2d 535, 536 (N.Y. App. Div. 1997).

328. *Id.*

329. *Drattel II*, 699 N.E.2d at 377.

330. *Drattel I*, 662 N.Y.S.2d at 536 (citing Panarites v. Williams, 629 N.Y.S.2d 359, 360-61 (N.Y. App. Div. 1995) and Gardner v. Honda Motor Co., 536 N.Y.S.2d 303, 306 (N.Y. App. Div. 1988)).

choice of installing airbags or another passive restraint system.[331] The New York Supreme Court, Appellate Division, Second Department, reversed the trial court, finding that Drattel's suit was not preempted as Congress did not intend the preemption of state common law claims.[332] This determination was based upon legislative history and the purpose and language of the Safety Act.[333]

The New York Court of Appeals affirmed the Appellate Division's decision, finding that the Safety Act did not preclude Drattel's state common law claims.[334] Judge Joseph Bellacosa, writing for the court, found that neither express nor implied preemption applied.[335] The court determined that express preemption did not apply as the preemption provision did not mention common law claims, and the savings clause negated "any lingering notion of express preemption of State common-law claims."[336] Additionally, the court found that the Safety Act's legislative history confirmed that Congress intended to preserve common law claims against manufacturers of defective automobiles.[337] Judge Bellacosa provided that implied preemption analysis was not warranted.[338] The combination of the Safety Act's express preemption clause, the saving clause, as well as legislative history, combined to prove "a reliable indicium of congressional intent" to preserve common law claims.[339] The court stated that implied conflict preemption was not available as recognition of Drattel's common law claims would neither make compliance with federal regulation impossible nor prevent the execution and accomplishment of the Safety Act's congressional objectives.[340]

Judge Howard Levine dissented, reasoning that the implied preemption doctrine should apply to the plaintiff's claims to the extent they were premised on the omission of driver's side airbags.[341] To impose common law liability for a manufacturer's failure to install airbags "would inevitably undermine the regulatory, interest-weighing cost/benefit determination by Congress . . . ."[342] Additionally, Judge Levine argued that the majority's position, relying on the saving clause to overcome implied pre-

331. *Id.*
332. *Drattel II*, 699 N.E.2d at 377-78 (citing Drattel v. Toyota Motor Corp. (*Drattel I*), 662 N.Y.S.2d 535, 535 (N.Y. App. Div. 1997)).
333. *Id.* at 378.
334. *Id.* at 385-86.
335. *Id.* at 377, 381, 383.
336. *Id.* at 381-82.
337. *Id.* at 382 (citing Minton v. Honda of Am. Mfg., Inc. (*Minton II*), 684 N.E.2d 648, 656-57 (Ohio 1997)).
338. *Id.* at 383.
339. *Id.* (citing Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 517 (1992)).
340. *Id.* at 385 (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 287 (1995)).
341. *Id.* at 386 (Levine, J., dissenting).
342. *Id.* at 391 (Levine, J., dissenting).

emption, was inconsistent with United States Supreme Court precedent.[343] Based on this, Judge Levine would have reversed and granted Toyota's motion for partial summary judgment, dismissing the complaint to the extent it relied upon the omission of airbag installation.[344]

2. *Decisions Holding for Preemption*

a. The Ninth Circuit

In *Harris ex rel Harris v. Ford Motor Co.*, the Ninth Circuit Court of Appeals decided that the Safety Act expressly preempted *no airbag* claims.[345] In *Harris*, Jennifer Harris was driving a 1992 Mercury Topaz when she "lost control of the vehicle, smashed into a tree, and was seriously injured."[346] Harris sued Ford in a California trial court, alleging Ford's negligence in defectively designing the vehicle due to the failure to equip the vehicle with a driver's side airbag.[347] The action was subsequently removed to the United States District Court for the Central District of California and Ford filed a motion for partial summary judgment claiming the Safety Act and Standard 208 preempted Harris' claims.[348]

The district court denied Ford's motion for partial summary judgment and certified its order for appeal.[349] Subsequently, Ford petitioned the Ninth Circuit Court of Appeals, which granted leave to file an interlocutory appeal regarding the preemption issue.[350] The Court of Appeals reversed the district court's denial of summary judgment, concluding that section 1392(d), the express preemption clause in the Safety Act, "expressly pre-empt[ed] state law causes of action, including Harris', for failure to install airbags."[351] Section 1392(d) precluded states from creating or continuing in effect standards not identical to federal standards.[352] The court noted, contrary to Harris' contentions, that section 1392(d) contemplated safety standards not solely created by regulators and legislators.[353] The court further noted that analysis from United States Supreme Court decisions applied to Harris' claims, and supported a finding of preemption.[354] Using the Supreme Court's analysis, the court stated

343. *Id.* at 394 (Levine, J., dissenting).
344. *Id.* (Levine, J., dissenting).
345. Harris *ex rel.* Harris v. Ford Motor Co., 110 F.3d 1410, 1416 (9th Cir. 1997).
346. *Id.* at 1411.
347. *Id.*
348. *Id.* at 1411-12.
349. *Id.* at 1412.
350. *Id.*
351. *Id.* at 1415-16.
352. *Id.* at 1413.
353. *Id.*
354. *Id.* at 1413 (discussing Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504 (1992) and Medtronic, Inc. v. Lohr (*Medtronic II*), 518 U.S. 470 (1996)).

that Congress, the Department of Transportation, and the National Highway Transportation and Safety Administration weighed the benefits and burdens of airbags and determined that manufacturers should be given the choice of installing passive restraint systems.[355] Further, the court found that other circuits had found implied preemption of *no airbag* claims.[356]

Additionally, the court did not agree with Harris that section 1397(k), the saving clause, vitiated preemption.[357] The court noted that section 1397(k), which provided that compliance with a standard promulgated under the Safety Act "does not exempt any person from any liability under common law," was not to be construed in isolation.[358] Instead, section 1397(k), which must be read with section 1392(d), "clearly preempt[ed] common law claims . . . ."[359] The court determined that observance of federal standards did not excuse anyone from state imposed liability.[360] The saving clause still imposed liability for a multitude of claims pertaining to automobile safety, including areas where no safety standard existed.[361]

Judge Bruce Van Sickle dissented, reasoning that neither the Safety Act nor Standard 208 preempted state common law tort claims.[362] Judge Van Sickle noted that there was no indication that the Safety Act was designed to achieve uniform national safety standards, especially where doing so would conflict with the purpose of the Act.[363] Instead, he believed that the Safety Act was designed to improve safety by creating minimum safety standards.[364] Judge Van Sickle concluded that the ability of the states to set higher standards, along with the preservation of common law actions, constituted exceptions to national uniformity.[365]Additionally, Judge Van Sickle stated that the majority ignored the saving clause, or convoluted its meaning, thereby supplanting Congress' intentions.[366]

b. The Majority of Courts Have Found *Implied* Preemption

In *Wood*, the First Circuit Court of Appeals did not find express pre-

355. *Id.* at 1414 n.7.
356. *Id.* at 1413 n.4, 1414 n.7 (citations omitted).
357. *Id.* at 1415-16.
358. *Id.* at 1415 (quoting 15 U.S.C. § 1397(k) (repealed 1994)).
359. *Id.*
360. *Id.*
361. *Id.* (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 280 (1995)).
362. *Id.* at 1416 (Van Sickle, J., dissenting).
363. *Id.* (Van Sickle, J., dissenting).
364. *Id.* (Van Sickle, J., dissenting).
365. *Id.* (Van Sickle, J., dissenting).
366. *Id.* at 1418 (Van Sickle, J., dissenting).

emption in a *no airbag* suit, but found that "Congress' purposes, as revealed in the Safety Act and legislative history, plainly *imply* a preemptive intent."[367] In *Wood*, Patricia Wood sued General Motors ("GM") in the United States District Court for the District of Massachusetts alleging negligent design and manufacture as well as breach of express and implied warranties.[368] Wood was injured and rendered quadriplegic when she was involved in a collision while riding as a passenger in a 1976 Chevrolet Blazer.[369] She brought the action under Massachusetts law, asserting that GM was negligent in failing to provide reasonable and adequate safety devices, including airbags.[370] GM filed a motion for summary judgment, arguing that the claim was invalid under Massachusetts' products liability laws and that federal safety regulations preempted it.[371]

The district court denied summary judgment, disagreeing with GM's express and implied preemption arguments.[372] The district court reasoned that the express preemption theory did not apply for the following reasons: (1) the preemption clause appeared to be applicable to state regulation; (2) Congress did not explicitly mention the preemption of defective design claims; (3) the savings clause countered any express legislative intent to preempt such actions; and (4) there is a presumption against preemption.[373] The court also determined that Wood's action was not in conflict with Standard 208 and would not frustrate the goals of the Safety Act.[374] GM moved for interlocutory appeal to the First Circuit Court of Appeals.[375] The court granted the motion, in part, for review of the question "whether federal law preempts a state law product liability claim against a motor vehicle manufacturer based on its installing seat belts, rather than airbags, in a motor vehicle."[376]

The Court of Appeals remanded the action to the district court, holding that federal law preempted Wood's products liability action insofar as it was based on GM's installation of seat belts instead of airbags.[377] Justice Levin H. Campbell, writing for the majority, stated, "[p]reemption is a matter of congressional intent."[378] Justice Campbell noted that there

367. Wood v. Gen. Motors Corp., 865 F.2d 395, 401-02 (1st Cir. 1988).
368. *Id.* at 396.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* at 400.
373. *Id.*
374. *Id.*
375. *Id.* at 397.
376. *Id.*
377. *Id.* at 419.
378. *Id.* at 401.

were two possible methods of analyzing this issue.[379] First, the preemption and savings clauses may be read together, showing Congress intended preemption of contradictory state safety regulations or standards, but not of standards in common law suits or, second, the legislative history of the Safety Act may be examined.[380] The court preferred the second method, and examined the Safety Act in terms of express and implied preemption.[381]

While Congress' lack of inclusion of product liability claims in the preemption provision precluded a finding of express preemption, the court was "convinced that Congress'[ ] purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent."[382] This is due to the notion that, if upheld, such a product liability claim would be an obstacle to the Safety Act's regulatory scheme.[383] A defective design common law action would create a safety standard related to, but not identical to, Standard 208.[384] Allowing such an action, holding an automobile manufacturer liable for the failure to install airbags in automobiles, "would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area."[385]

Judge Bruce Selya dissented, reasoning that he could not discern a clear expression of preemption intent, nor reasons to imply preemption.[386] Judge Selya agreed that preemption is primarily the subject of congressional intent.[387] However, he could not agree with the majority because he believed the savings clause should be read with great breadth and a search of the legislative history failed to reveal an "implicit exception for design defects . . . ."[388]

In *Pokorny v. Ford Motor Co.* (*Pokorny II*), the Third Circuit Court of Appeals stated that, to the extent a common law suit was based on the absence of airbags or automatic belts, it was preempted by Standard 208 and the Safety Act, but was not preempted if based on the absence of a protective window netting as it would then lack an actual conflict with federal regulation.[389] In *Pokorny II*, Anne Duffy Pokorny, as administrator of John Duffy's estate, sued Ford Motor Company in Pennsylvania

379. *Id.*
380. *Id.* at 401-02.
381. *Id.* at 402.
382. *Id.* (alteration in original).
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.* at 419-20 (Selya, J., dissenting).
387. *Id.* at 421 (Selya, J., dissenting).
388. *Id.* at 420, 421 (Selya, J., dissenting).
389. Pokorny v. Ford Motor Co. (*Pokorny II*), 902 F.2d 1116, 1118 (3d Cir. 1990).

state court alleging negligence, breach of implied warranty and strict liability.[390] Mr. Duffy was killed in an automobile collision in which he was not wearing his seatbelt.[391] Ford removed the action to federal court on the basis of diversity between the parties.[392] In the United States District Court for the Eastern District of Pennsylvania, Ford filed a motion for summary judgment, alleging that the Safety Act and Standard 208 expressly and impliedly preempted the claims.[393] Ford contended that the van complied with one of the enumerated passive restraint options of Standard 208.[394] Additionally, Ford argued that an allowance of claims such as Pokorny's "created an actual conflict with the federal regulatory requirements that clearly gave automobile manufacturers the choice to install either manual safety belts *or* passive restraints."[395] Therefore, Ford alleged that the action was impliedly preempted.[396]

The District Court for the Eastern District of Pennsylvania concluded that the action constituted a conflict with the Safety Act and Standard 208, and it consequently granted Ford's summary judgment motion.[397] The court observed that Standard 208 gave automobile manufacturers a choice in passive restraint system installation.[398] To allow a suit like Pokorny's would expose Ford to liability for failure to install a certain passive restraint system, thereby eliminating the flexibility and choice the regulations were designed to offer manufacturers.[399]

Pokorny appealed the district court's grant of summary judgment to the Third Circuit Court of Appeals.[400] The Court of Appeals partially affirmed and partially reversed the district court's decision, determining that Pokorny's claims asserting the absence of airbag or automatic belts were preempted by Standard 208 and the Safety Act.[401] However, the court noted that the portion of Pokorny's claim based on the absence of a protective window netting was not preempted as it did not conflict with federal regulation.[402] In contrast, common law liability stemming from failure to install the airbags and automatic belts would create an actual

390. *Id.* at 1117-18.
391. *Id.* at 1118.
392. *Id.*
393. *Id.*
394. *Id.* at 1119.
395. *Id.* (alteration in original).
396. *Id.*
397. *Id.* at 1118 (citing Pokorny v. Ford Motor Co. (*Pokorny I*), 714 F. Supp. 739, 742 (E.D. Pa. 1989)).
398. *Id.* at 1119.
399. *Id.*
400. *Id.*
401. *Id.* at 1126.
402. *Id.* at 1123.

conflict with federal regulations and statutes.[403] However, the court noted that not all design defects that arise from the absence of certain passive restraints posed an actual conflict with federal regulations and statutes.[404]

The court first examined Ford's assertion of express preemption.[405] The court stated that Ford's argument was unconvincing as it focused on only one clause of the Safety Act, the preemption clause, and did not consider the saving clause.[406] When the court analyzed the preemption and saving clauses together, they concluded that Congress did not intend for regulations such as Standard 208 to expressly preempt all design defect common law actions.[407] Since the judiciary must abide by Congress' designed framework in enacting the Safety Act, Pokorny's action was not expressly preempted.[408]

Alternatively, Ford argued that the Safety Act and Standard 208 impliedly preempted Pokorny's action because common law liability would present an obstacle to the accomplishment of the purposes that Congress and the Department of Transportation articulated.[409] The court provided that a state law must actually present a conflict with federal regulation before it becomes impliedly preempted.[410] In regards to Pokorny's airbag and seat belt claim, the court stated that potential common law liability interfered with federal regulatory methods which were created to achieve the stated goals of the Safety Act.[411] Section 1410(b) of the Motor Vehicle and Schoolbus Safety Amendments of 1974 ("MVSSA") clarified the conflict theory.[412] The MVSSA was enacted to address motorists' concern about the possibility of passive restraint systems becoming mandatory.[413] The court stated that, as exhibited by the MVSSA, Congress desired manual belts to remain as one of the federal restraint system options.[414] The options promulgated by the Department of Transportation in Standard 208 manifested congressional intent as they allowed manufacturers to comply with federal regulations by selecting one of the

403. *Id.* (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).

404. *Id.* at 1118.

405. *Id.* at 1120.

406. *Id.*

407. *Id.* at 1121.

408. *Id.*

409. *Id.* at 1121-22.

410. *Id.* at 1122.

411. *Id.* at 1123 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).

412. *Id.* at 1123 (citing Motor Vehicle and Schoolbus Safety Amendments of 1974, 15 U.S.C. § 1410(b) (1982) (repealed 1994)).

413. *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34-37 (1983)).

414. *Id.* at 1123-24 & nn.8 & 9.

options.[415] Allowing Pokorny's allegations of common law liability for a manufacturer's failure to install automatic belts or airbags "would directly undermine the regulatory framework suggested by Congress . . . in Standard 208."[416]

Finally, Pokorny's action was not preempted because it asserted Ford's liability for its failure to provide window netting.[417] Possible liability for the window netting system was distinguished from the failure to provide automatic belts or airbags since the netting system presented no actual conflict with Standard 208.[418] The court stated that potential liability for the window netting system did not remove the flexibility that was established by the federal regulatory scheme and did not prohibit an option that Congress or the Department of Transportation had granted.[419] Instead, common law liability would encourage manufacturers to install safety devices in addition to those mentioned in Standard 208.[420]

Subsequently, in *Cellucci v. General Motors Corp.* (*Cellucci II*), the Supreme Court of Pennsylvania also held that that the Safety Act impliedly preempted state tort *no airbag* actions, consistent with the majority of case precedent.[421] In *Cellucci II*, Daniel Cellucci sued automobile manufacturer General Motors ("GM") contending he wore his seatbelt during an accident and alleging defective design based on lack of air bag installation.[422] GM filed a motion seeking partial summary judgment claiming that federal law preempted Cellucci's defective vehicle claim based on the absence of airbags.[423]

The trial court denied the motion, and GM appealed to the Pennsylvania Superior Court.[424] The Superior Court reversed the denial of partial summary judgment, holding that Cellucci's *no airbag* claim was impliedly preempted by federal law.[425] The Superior Court first determined that the Safety Act did not expressly preempt the *no airbag* claim because the court found an ambiguity when the preemption clause was read in conjunction with the savings clause.[426] Instead, the court found implied preemption because the allowance of such claims against manufacturers based on the absence of airbags "would create an actual conflict

415. *Id.* at 1124.
416. *Id.*
417. *Id.* at 1125-26.
418. *Id.* at 1126.
419. *Id.* (citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154-56 (1982)).
420. *Id.*
421. *Cellucci II*, 706 A.2d at 811-12 & n.4.
422. *Id.* at 807.
423. *Id.*
424. *Id.*
425. Cellucci v. Gen. Motors Corp. (*Cellucci I*), 676 A.2d 253, 261 (Pa. Super. Ct. 1996).
426. *Id.* at 258.

between the federal and state law . . . ."[427] Cellucci petitioned the Pennsylvania Supreme Court for allowance of appeal and the petition was granted.[428]

The Pennsylvania Supreme Court affirmed the decision of the Superior Court, similarly holding that Cellucci's claims were impliedly preempted, consistent with the majority of courts' rulings on the issue.[429] The court noted that the regulations under the Safety Act gave automobile manufacturers the choice of seat belt promoting schemes.[430] The court reasoned, "Allowing a state common law standard that imposes liability on a manufacturer for choosing a federally-imposed option takes away that federally-imposed option from the manufacturer, which clearly goes against Congress' intent."[431] Therefore, liability in common law arising from a manufacturer's failure to install passive restraint systems, including airbags, actually conflicts with federal law.[432]

H. Post-*Geier* Decisions

One week following the issue of the Court's decision in *Geier II*,[433] the United States District Court for the Northern District of Illinois granted summary judgment in a *no airbag* action.[434] In *Davis v. Nissan Motor Corp. in U.S.A.*, the plaintiff sued Nissan Motor Corporation in U.S.A. ("Nissan"), asserting her deceased husband's vehicle was unreasonably dangerous based on the lack of an installed airbag.[435] Her husband was driving his 1994 Nissan Sentra when he was struck by another vehicle.[436] The injuries sustained by the plaintiff's husband were fatal.[437] Nissan moved for partial summary judgment alleging the plaintiff's *no airbag* claim was preempted by the Safety Act and Standard 208.[438]

The District Court for the Northern District of Illinois granted Nissan's summary judgment motion based on the United States Supreme Court's decision in *Geier II*.[439] The district court first acknowledged the Supreme Court's decision that *no airbag* claims were not expressly pre-

427. *Id.* at 259 (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).
428. *Cellucci II*, 706 A.2d at 807.
429. *Id.* at 811-13 & n.4.
430. *Id.* at 811.
431. *Id.*
432. *Id.*
433. *Geier* II, 529 U.S. at 861.
434. Davis v. Nissan Motor Corp. in U.S.A., No. 99C1186, 2000 WL 1459027, at *1 to *2 (N.D. Ill. June 5, 2000).
435. *Id.* at *1.
436. *Id.*
437. *Id.*
438. *Id.*
439. *Id.* at *1 to *2.

empted by the Safety Act or Standard 208.[440] However, consistent with *Geier II,* the district court held that ordinary preemption principles applied.[441] The district court reasoned that the Court in *Geier II* held *no airbag* claims impliedly preempted as they actually conflicted with Standard 208.[442] To allow such an action "to proceed would have the effect of requiring all manufacturers to install airbags to avoid suits and would eliminate the choices given by the federal standards."[443]

In *Lady v. Neal Glaser Marine, Inc.*, the Fifth Circuit Court of Appeals held that, where there is a significant federal interest, implied preemption precluded an injured plaintiff's state tort actions against a boat manufacturer.[444] Steven Lady sued Neal Glaser Marine, Inc. and Outboard Marine Corporation ("OMC") in Mississippi state court, seeking damages for losses he received in a boating accident.[445] Lady's jet ski collided with a friend's motor boat, Lady was thrown from the jet ski, and sustained injuries from the boat's propeller.[446] Lady sought recovery under Mississippi state tort law, alleging OMC's negligence, gross negligence, breach of warranty, and design defect for failure to install a propeller guard.[447] OMC removed Lady's action to federal court based on diversity.[448] OMC filed a motion for summary judgment claiming that Lady's claims were preempted by federal law, including the Federal Boat Safety Act ("FBSA") and Coast Guard regulations.[449] Subsequently, Lady and OMC agreed to a magistrate judge's authority over the proceedings, including final judgment entry.[450] The magistrate judge concluded that the FBSA as well as the Coast Guard regulations preempted Lady's claims and granted OMC's motion for summary judgment.[451]

Lady appealed the magistrate judge's decision to the Fifth Circuit Court of Appeals, arguing that, despite the express preemption clause of the FBSA and the existence of Coast Guard regulatory decisions, the ac-

440. *Id.* at *1 (citing Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861, 868 (2000)).

441. *Id.* at *2 (citing Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861, 874 (2000)).

442. *Id.* (citing Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861, 886 (2000)).

443. *Id.*

444. Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 615 (5th Cir. 2000), *abrogated by* Spreitsma v. Mercury Marine, 537 U.S. 51, 68 (2002) ("[W]e think it clear that the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies."). *See infra* note 679 for a more detailed discussion of the *Lady* and *Spreitsma* decisions.

445. *Id.* at 600.

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.* at 601.

450. *Id.*

451. *Id.*

tion was not precluded because it was preserved by the saving clause.[452] The Fifth Circuit affirmed the magistrate's opinion, concluding that implied preemption applied and precluded Lady's common law actions against OMC.[453] The court first noted that Lady's claims were not expressly preempted by the express preemption clause in the FBSA.[454] While the preemption clause of the FBSA did not specifically preempt common law actions, the court noted that the United States Supreme Court had interpreted similar clauses to include state common law actions.[455] The court reasoned that, in light of the recent decision in *Geier II*, the presence of a saving clause in the FBSA "precludes a broad reading of the express preemption provision . . . ."[456] Accordingly, the Fifth Circuit was unable to hold Lady's claims expressly preempted.[457]

Additionally, relying in part on the *Geier II* decision, the court concluded that Lady's action was impliedly preempted by the FBSA.[458] A common law rule mandating a propeller guard would disturb the Coast Guard's objectives of the FBSA.[459] The Coast Guard had studied the issue and affirmatively determined against imposing such a requirement.[460] An objective of the FBSA was to maintain national uniformity, which requires state law to be consistent with the Coast Guard's regulation.[461] The court stated that this goal and the regulations of the Coast Guard must be weighed with Congress' intentions as evidenced by the FBSA's saving clause.[462] Lady's claims were in the realm in which the Coast Guard had affirmatively decided that such a requirement was inappropriate, and were thus preempted.[463]

In *Choate v. Champion Home Builders Co.*, the Tenth Circuit Court of Appeals held, partially based on the reasoning in *Geier II*, that the preemption clause of the National Manufactured Housing Construction and Safety Standards Act of 1974 ("MHA") did not preempt a tort action against the manufacturer of a manufactured home.[464] Plaintiffs sued a manufactured home builder in the United States District Court for the Eastern District of Oklahoma, alleging failure to provide a smoke detec-

452. *Id.* at 600, 602.
453. *Id.* at 615.
454. *Id.* at 602.
455. *Id.* at 609 (citations omitted).
456. *Id.* at 610.
457. *Id.* at 611.
458. *Id.* at 615 & n.23.
459. *Id.* at 614.
460. *Id.*
461. *Id.* at 615.
462. *Id.*
463. *Id.*
464. Choate v. Champion Home Builders Co., 222 F.3d 788, 790, 793-94 (10th Cir. 2000).

tor with battery powered backup and failure to warn that smoke detection would be inactive with a power loss.[465] The plaintiffs bought the manufactured home in 1997 and approximately one and a half months later it caught fire, injuring one and killing another.[466] The home was manufactured with a smoke detector that was not outfitted with a battery powered back-up; consequently, it did not function during the fire because the fire had caused a power loss.[467] The fact that the detector lacked battery backup and a warning was undisputed.[468] The defendant filed a motion for summary judgment, asserting that the MHA and the Housing and Urban Development regulations promulgated beneath it preempted the plaintiffs' claims both expressly and impliedly.[469] The plaintiffs responded that the saving clause preserved their common law claim from preemption.[470] The District Court for the Eastern District of Oklahoma granted the manufacturers' motion for summary judgment, holding that "[p]laintiffs' state law claim based on [manufacturers'] failure to install battery powered smoke detectors is preempted by federal law."[471] Plaintiffs appealed, asserting their claim was not impliedly or expressly preempted by the MHA.[472]

The United States Court of Appeals for the Tenth Circuit reversed the district court holding that plaintiffs' claim was not preempted, expressly or impliedly, by the MHA or any regulations promulgated under it.[473] The court first examined the possibility of express preemption.[474] The preemption clause of the MHA provided that a state could not create a manufactured home safety standard different from federal safety standards.[475] The court noted that the United States Supreme Court reasoned that common law rules might be expressly preempted by language such as that in the MHA.[476] The existence of the saving clause in the MHA led to a discussion of the United States Supreme Court's decision in *Geier II*.[477] The court noted that, in *Geier II*, the preemption and sav-

465. *Id.* at 790.

466. *Id.* "'Manufactured' homes are often referred to as 'mobile' homes." *Id.* at 790 n.2.

467. *Id.* at 790.

468. *Id.*

469. *Id.* at 791.

470. *Id.*

471. *Id.* (quoting Choate v. Champion Home Builders, Co., No. 97-564-S, at 10 (E.D. Okla. Aug. 4, 1998)).

472. *Id.*

473. *Id.* at 790.

474. *Id.* at 792.

475. *Id.* (quoting Manufactured Housing Act, 42 U.S.C. § 5403(d) (1992)).

476. *Id.* (citing Medtronic, Inc. v. Lohr (*Medtronic II*, 518 U.S. 470, 481, 502-03 (1996) and Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 521 (1992)).

477. *Id.* at 793.

ing clause provisions were nearly identical to those of the MHA.[478] In *Geier II*, the Supreme Court concluded against express preemption, relying on the saving clause.[479] Given the almost identical preemption and saving clauses in both the Safety Act and MHA, the Tenth Circuit held that "in light of *Geier* [*II*], . . . [plaintiffs'] claim is not expressly preempted."[480]

The Tenth Circuit determined that the existence of an express preemption clause and the presence of a saving clause did not preclude the possibility of implied preemption.[481] The court stated that implied preemption exists where a state law regulates an area Congress intended to be governed exclusively by federal law and where there is an actual conflict between the state and federal law.[482] The home manufacturer did not argue the first situation, field preemption, but instead asserted that a finding of conflict preemption was appropriate as state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[483] The court found that the law presented no such obstacle.[484] The MHA's implementing regulations contain a provision stating that the determination of whether such an obstacle exists can be discovered by questioning "whether the [s]tate rule can be enforced or the action taken without impairing the [f]ederal superintendence of the manufactured home industry as established by the Act."[485] A state standard that required a battery-powered backup would not be contrary to a federal standard that required at least one smoke detector.[486] Additionally, the court stated that allowing claims such as the plaintiffs' was consistent with the MHA's purposes because it was enacted to reduce deaths and injuries, insurance costs, and increase the quality of manufactured homes.[487]

IV. Analysis

In *Geier II*, the United States Supreme Court held, in a 5 to 4 decision, that petitioners' *no airbag* lawsuit conflicted with the objectives of

478. *Id.*
479. *Geier II*, 529 U.S. at 868.
480. *Choate*, 222 F.3d at 793-94.
481. *Id.* at 794 (citing Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861, 869 (2000)).
482. *Id.* at 795 (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).
483. *Id.* (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).
484. *Id.*
485. *Id.* (quoting 24 C.F.R. § 3282.11(d)).
486. *Id.* (noting that "the HUD standard, 24 C.F.R. § 3280.208(d), only requires '*[a]t least* one smoke detector [which is hard wired to the general electrical circuit].'" (alteration in original)).
487. *Id.* at 796 (quoting 42 U.S.C. § 5401(b)(5)).

Standard 208 and was consequently preempted by the Safety Act.[488] Alexis Geier ("Geier") contended that American Honda Motor Co. ("American Honda") was liable for damages arising from its alleged defective design of the 1987 Honda in which she was injured by failing to install airbags or another passive restraint device.[489] American Honda claimed that its compliance with the Safety Act and Standard 208 preempted the *no airbag* lawsuit.[490] The Court declared that the lawsuit conflicted with the objectives of Standard 208 and was preempted by the Safety Act.[491] The Court made three findings in its decision; first, the preemption provision did not expressly preempt the lawsuit; second, ordinary preemption applied; and finally, the lawsuit actually conflicted with the Safety Act.[492] The Court determined the preemption provision of the Safety Act should be read narrowly to preempt only state regulations and statutes, excluding common law tort actions.[493] The Safety Act's saving clause did not expressly save Geier's action and the Court concluded, based partially on its inclination not to construe preemption clauses broadly, that it did "*not* bar the ordinary working of conflict pre-emption principles."[494] The Court stated that it would be Congress' intent to apply ordinary preemption principles where there is "an actual conflict with a federal objective . . . [;]" without such application, states could impose laws "that would conflict directly with federal regulatory mandates . . . ."[495] Finally, the Court concluded that Geier's suit actually conflicted with the Department of Transportation's objectives in enacting the Standard.[496] An imposition of a rule of state tort law compelling a duty to install airbags in cars such as petitioners' "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."[497]

The Court, faced with a split of decisions involving state and circuit courts, properly concluded in favor of implied preemption and preserved the objectives of the Safety Act. The correctness of the Court's holding in *Geier II* can be demonstrated by considering three aspects of the Court's opinion. First, the Court examined the possibility of express preemption and decided the issue in a manner consistent with its prece-

488. *Geier II*, 529 U.S. at 863, 865.
489. *Id.* at 865.
490. Brief for Respondents, *supra* note 6, at 7.
491. *Geier II*, 529 U.S. at 866.
492. *Id.* at 867.
493. *Id.* at 868.
494. *Id.* at 869 (alteration in original).
495. *Id.* at 871.
496. *Id.* at 874.
497. *Id.* at 881.

dent.[498] Second, the Court properly upheld the application of ordinary preemption principles to Geier's actions,[499] resolved an unanswered question from *Cipollone VI*,[500] and further defined the workings of the Safety Act's saving clause.[501] Third, the Court *applied* ordinary preemption by looking beyond the express language of, and examining the intent behind, the Safety Act and Standard 208. Consistent with the doctrine of implied preemption, the Court held that an actual conflict existed between Geier's action and Standard 208.[502] The Court's holding in *Geier II* resolved the split among the various courts, preventing future state and appellate courts from holding against preemption in *no airbag* cases.[503] The Court affirmed the *Freightliner Corp. v. Myrick* (*Freightliner II*) decision by determining that the existence of a preemption clause does not foreclose the workings of ordinary preemption.[504] Subsequent to the Court's decision in *Geier II*, state and appellate courts have relied on *Geier II* to apply ordinary preemption principles when reasoning both for and against the preemption of common law actions.[505]

A. Ordinary Preemption Analysis

1. *The Preemption Clause and Express Preemption*

The United States Supreme Court's holding in *Geier II*, namely that the petitioners' *no airbag* suit was not expressly preempted, was sup-

498. *See Geier II*, 529 U.S. at 867-68 (holding that the Safety Act's savings clause removed the claim from the scope of the express preemption clause).

499. *See id.* at 874.

500. *Id.* at 869 ("We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act.").

501. *Id.* at 869-70.

502. *Id.* at 874-86.

503. *See id.* at 886 (holding that the *no airbag* claim was preempted).

504. *Id.* at 869 (citing *Freightliner II* in support of its holding that the saving clause, like the preemption provision, did "*not* bar the ordinary working of conflict pre-emption principles." (alteration in original)).

505. *E.g.*, *Choate*, 222 F.3d at 793-94 (holding, in light of *Geier II*, that "[g]iven the nearly identical nature of the preemption and saving clause provisions in the National Traffic and Motor Vehicle Safety Act and the Manufactured Housing Act[,]" that common law actions were not expressly preempted, thus, applying ordinary preemption principles and ultimately determining that the common law claim at issue was not impliedly preempted); *Lady*, 228 F.3d at 611-12 (holding that, because the saving clause in the FBSA is similar to the saving clause in the Motor Vehicle Safety Act, the common law tort action at issue was not expressly preempted and, thus, applying ordinary preemption principles and ultimately determining that the claim was not impliedly preempted; however the court's implied preemption holding was abrogated by Spreitsma v. Mercury Marine, 537 U.S. 51, 68 (2002)); *Davis*, 2000 WL 1459027, at *1 to *2 (holding in accordance with *Geier II*).

ported by its established precedent.[506] Although the Court had not, prior to Geier, explicitly decided the preemption issue as it relates to airbags, it had previously discussed factors that courts should weigh when considering preemption.[507] Court precedent dictates that when the term "common law actions" is omitted from an act's preemption clause, that omission must be interpreted to mean that Congress intended such actions to survive preemption. For example, in *Cipollone VI*, the Supreme Court determined that only the express language of certain statutes governed their preemption.[508] The preemption clause at issue provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes . . . ."[509] The Court determined that several common law claims were not expressly preempted by the statutory language in question because the actions did not impose requirements or prohibitions "based on smoking and health"[510] In *Geier II*, the preemption clause of the Safety Act provided, in part, that states shall not "have any authority either to establish, or to continue in effect . . . any motor vehicle . . . safety standard . . . not identical to the Federal standard."[511] Much like "requirements or prohibitions," the term "standards" was not held to include the plaintiff's common law actions.[512] Therefore, consistent with *Cipollone VI*, the Court in *Geier II* concluded that the plaintiff's claims were not expressly preempted.

Similarly, in *Freightliner II*, the Court declined to declare similar state common law actions expressly preempted.[513] In *Freightliner II*, as in *Geier II*, the Court faced the preemption clause of the Safety Act.[514] Like the plaintiff in *Freightliner II*,[515] Geier asserted a negligent and de-

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506. *See Geier II*, 529 U.S. at 867-68 (holding that the Safety Act's saving clause removed the claim from scope of the express preemption clause).

507. Patrick J. Norton, Note, *What Happens When Air Bags Kill: Automobile Manufacturers' Liability for Injuries Caused by Air Bags*, 48 Case W. Res. L. Rev. 659, 667-68 (1998) (discussing Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504 (1994) and Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280 (1995)).

508. *Cipollone VI*, 505 U.S. at 517.

509. *Id.* at 515 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (current version at 15 U.S.C. § 1334(b))).

510. *Id.* at 526, 528-29 (quoting 15 U.S.C. § 1334(b)).

511. *Geier II*, 529 U.S. at 867 (quoting National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b))).

512. *Compare Cipollone VI*, 505 U.S. at 523 ("That the pre-emptive scope of [the Public Health Cigarette Smoking Act's preemption clause] cannot be limited to positive enactments does not mean that that section pre-empts all common-law claims."), *with Geier II*, 529 U.S. at 867-68 (determining Geier's claims were not expressly preempted by the statutory language).

513. *Freightliner II*, 514 U.S. at 286.

514. *Id.* at 286-87.

515. *Id.* at 282.

fective design claim.[516] As in *Geier II*, the Court in *Freightliner II* found plaintiff's negligent design actions were not expressly preempted by the Safety Act's preemption clause.[517] Thus, the Court's holding in *Geier II* was consistent with its previous findings regarding substantially similar issues.

The Court's reasoning in *Medtronic II* also parallels that of the *Geier II* decision.[518] The preemption clause at issue in *Medtronic II* explicitly preempted "requirements," and the Court declined to establish that the term "requirement" explicitly included state common law actions.[519] In *Geier II*, the Safety Act's preemption clause did not mention the preemption of state common law tort actions, but explicitly preempted certain state "standards."[520] The Court in *Geier II* stated that it "need not determine the precise significance of the use of the word 'standard' . . . ."[521] The Court did not thoroughly explore the possibility of an explicit or express preemption finding of state common law actions in either case because a different analysis was more appropriate.[522] The Court's holding in *Geier II* was consistent with its decision in *Medtronic II* when it declined a thorough discussion of a similar preemption clause.

2. *Upholding Ordinary Preemption*

In *Geier II*, the United States Supreme Court upheld the application of ordinary preemption principles.[523] The Court also resolved a previously undetermined question from *Cipollone VI* in a manner that was consistent with precedent.[524] Additionally, the Court further defined the workings of the Safety Act's saving clause.[525]

The decision in *Geier II*, holding that implied preemption principles apply, is consistent with the Court's decision in *Freightliner II*. In *Freightliner II*, the Court determined that the Safety Act did not expressly pre-

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516. *Geier II*, 529 U.S. at 865.
517. *Freightliner II*, 514 U.S. at 286.
518. *Medtronic II*, 518 U.S. at 470.
519. *Id.* at 502-03.
520. *Geier II*, 529 U.S. at 867-68.
521. *Id.* at 867.
522. *Id.* at 867-68 (declining to determine the significance of the word "standard" as opposed to "requirement" when the savings clause resolved the issue); *Medtronic*, 518 U.S. at 501-03 (plurality opinion) (declining to determine whether common law actions were explicitly preempted by the preemption clause and deferring possible evaluation to conflict preemption analysis).
523. *Geier II*, 529 U.S. at 874.
524. *See id.* at 869 ("We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act.").
525. *Id.* at 869-70.

empt plaintiff's claims.[526] Instead, the Court analyzed the possibility that the suit might be impliedly preempted.[527] The Court in *Geier II* also determined that the existence of a preemption clause does not preclude "any possibility of implied [conflict] preemption."[528] The Court in *Geier II* followed the precedent set in *Freightliner II* and conducted an analysis of the implied preemption scope of the Safety Act.[529]

While *Cipollone VI* questioned the application of express or implied preemption, it did not resolve when a court should apply ordinary preemption principles.[530] The Court addressed the scope of express preemption without exploring implied preemption.[531] The Court stated, "the preemptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in [section] 5 of each Act."[532] *Cipollone VI* cast doubt on the application of implied preemption in *no airbag* cases, as "[m]any courts interpreted [*Cipollone VI*] as abandoning an implied preemption analysis when an express preemption clause exists."[533] The *Cipollone VI* decision "led to many inconsistent results."[534] The plaintiff in *Freightliner II* argued that the Court in *Cipollone VI* "held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute."[535] Despite the plaintiff's arguments, the Court in *Freightliner II* held that *Cipollone VI* did not create a categorical rule precluding the existence of implied preemption when an express preemption clause exists.[536]

Consistent with *Freightliner II,* the Court in *Geier II* conducted implied preemption analysis.[537] Whereas *Cipollone VI* led to inconsistent results, *Geier II* resolved the issue by providing that the existence of the Safety Act's preemption clause did not preclude the prospect of implied preemption.[538] The decision to analyze possible implied preemption of

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526. *Freightliner II*, 514 U.S. at 286.

527. *Id.* at 288-90.

528. *Geier II*, 529 U.S. at 869 (quoting Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 288 (1995)) (alteration in original).

529. *Id.* (providing, consistent with *Freightliner II*, that a preemption provision alone does not necessarily preclude implied preemption).

530. *Cipollone VI*, 505 U.S. at 517.

531. *Id.*

532. *Id.*

533. Babb, *supra* note 89, at 1694 (citations omitted).

534. *Id.*

535. *Freightliner II*, 514 U.S. at 287.

536. *Id.* at 288.

537. *Geier II*, 529 U.S. at 869 ("Petitioners concede, as they must in light of [*Freightliner II*], that the pre-emption provision, by itself, does not foreclose . . . 'any possibility of implied [conflict] pre-emption' . . . ." (quoting Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 288 (1995)) (second alteration in original)).

538. *Id.*

Geier's claims even withstood the existence of the saving clause of the Safety Act.[539] The Court in *Geier II* decided to apply ordinary preemption principles notwithstanding Geier's contention that the existence of the saving clause foreclosed the workings of ordinary preemption.[540]

Although the Court in *Freightliner II* considered the statute's preemptive effect, it did not determine the extent to which the saving clause saved state common law actions.[541] The *Geier II* decision further defined the Safety Act's saving clause by concluding that its existence did "*not* bar the ordinary working of conflict pre-emption principles."[542] This conclusion was consistent with the Court's past treatment of saving clauses.[543] *Geier II*'s allowance for the application of ordinary preemption principles was not only consistent with precedent, but also simultaneously resolved uncertainty regarding the appropriateness of implied preemptive analysis in light of express preemptive clauses.

3. No Airbag *Suits Actually Conflict With the Safety Act*

The United States Supreme Court in *Geier II* correctly applied preemption consistent with the doctrine of implied preemption.[544] The Court looked beyond express language,[545] examined the intent behind the enactment of Standard 208,[546] and held that an actual conflict existed.[547] The preemption doctrine stems from the Supremacy Clause of the United States Constitution.[548] Article VI of the Constitution provides that the laws of "the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[549] The Supremacy Clause "gives federal law precedence over conflicting state law."[550] When state law and federal law conflict, the state law is "without effect."[551] Courts assume that a federal

539. *Id.* ("We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles." (alteration in original)).

540. *Id.* at 869.

541. *Freightliner II*, 514 U.S. at 287 n.3.

542. *Geier II*, 529 U.S. at 869 (alteration in original).

543. *Id.* at 870 ("[T]his Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" (quoting United States v. Locke, 529 U.S. 89, 106-07 (2000) (second alteration in original))).

544. *See id.* at 874-86.

545. *See id.* at 884 ("[C]onflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent.") (citing English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990)).

546. *Id.* at 874-84, 886.

547. *Id.* at 874.

548. *Cipollone I*, 593 F. Supp. at 1150.

549. U.S. CONST. art.VI, cl. 2.

550. Dinh, *supra* note 78, at 2088.

551. *Cipollone VI*, 505 U.S. at 516 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

act does not supersede the states' historic police powers, "unless that was the clear and manifest purpose of Congress."[552] The Supreme Court provides three situations in which preemption exists.

> First, Congress can define explicitly the extent to which its enactments preempt state law . . . . Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively . . . . Finally, state law is pre-empted to the extent that it actually conflicts with federal law.[553]

The second and third types of preemption are implied.[554] The third type of preemption, conflict preemption, includes situations where compliance with both federal and state law is impossible, and instances where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[555] In *Geier II*, the Court rested its holding on conflict preemption.[556] The Court determined that Geier's claims actually conflicted with the Safety Act because it found that the rule of law Geier's claim would impose presented an obstacle to the Standard's objectives.[557]

The Court reached its decision in *Geier II* by following established implied preemption doctrine and remaining consistent with past decisions involving conflict preemption.[558] The Court's analysis of conflict preemption also properly considered the history of Standard 208.[559] The Department of Transportation first issued Standard 208 in 1967, providing a

552. *Medtronic II*, 518 U.S. at 485 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

553. *Myrick II*, 13 F.3d at 1519 (quoting English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990)).

554. Chadwell, *supra* note 83, at 151.

555. *Choate*, 222 F.3d at 792 (quoting English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990)).

556. *Geier II*, 529 U.S. at 867.

557. *Id.* at 886.

558. *Id.* at 884 ("The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre-emption. And conflict pre-emption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent. While [p]re-emption fundamentally is a question of congressional intent, this Court traditionally distinguishes between 'express' and 'implied' pre-emptive intent, and treats 'conflict' pre-emption as an instance of the latter. And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere volume and complexity of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area - so-called 'field pre-emption'- the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists." (alteration in original) (internal quotations and citations omitted)).

559. *See id.* at 886 (determining that Standard 208 "sought a gradually developing mix of alternative passive restraint devices for safety-related reasons" and, thus, holding that "the rule of state tort law for which petitioners argue would stand as an 'obstacle' to the accomplishment of that objective.").

requirement that seatbelts be installed in all cars.[560] In the early 1970's, after an extensive rulemaking proceeding on such systems, the Department of Transportation amended Standard 208 to include passive restraint devices.[561] Based on considerable resistance from the automotive community, including manufacturers, the NHTSA postponed the effective date of Standard 208.[562]

In 1976, the Secretary of Transportation "extended the optional alternatives indefinitely and suspended the passive restraint requirement."[563] In 1981, the passive restraint mandate was completely rescinded.[564] In 1984, NHTSA reinstated Standard 208, directing a phase-in of passive restraints, beginning with cars manufactured after September 1986.[565] The NHTSA lacked the power to enact compulsory belt use laws itself, so it opted for a phase-in requirement.[566] The phase-in requirement eventually mandated installation of passive restraints in all cars manufactured after September 1, 1989.[567] *Geier II* maintained these objectives by holding Geier's claims impliedly preempted because an opposite holding would have frustrated the regulatory scheme and discouraged the Department's objective of "a gradually developing mix of alternative passive restraint devices for safety-related reasons."[568]

Further, the Court stated that the analysis conducted in *Freightliner II* was entirely consistent with the Court's determination of implied preemption in *Geier II* because no implied preemption existed in the former. In *Freightliner II*, the plaintiffs brought common law claims against truck manufacturers, asserting a design defect in failure to install antilock brakes.[569] The Court concluded that no express preemption existed, and subsequently conducted an implied preemption analysis.[570] In deciding the claims were not expressly preempted by the Safety Act, the Court stated that "there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and

560. *State Farm*, 680 F.2d at 209 (citing 32 Fed. Reg. 2408, 2415 (1967)).

561. *Motor Vehicle Mfrs.*, 463 U.S. at 35 (citations omitted).

562. Chadwell, *supra* note 83, at 145-146 (citations omitted).

563. *Motor Vehicle Mfrs.*, 463 U.S. at 36.

564. *Id.* at 38.

565. Chadwell, *supra* note 83, at 149 (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).

566. *Id.*

567. *Id.* (citing 49 Fed. Reg. 28962, 28963 (July 17, 1984) (codified at 49 C.F.R. pt. 571)).

568. *See Geier II*, 529 U.S. at 886 ("[Standard] 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an 'obstacle' to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.").

569. *Freightliner II*, 514 U.S. at 283.

570. *Id.* at 286-90.

vehicle stability."[571] Instead, in the absence of regulation, states remained free to "'establish, or to continue in effect,' their own safety standards concerning those 'aspect[s] of performance.'"[572] Therefore, the Court decided that the plaintiff's claims were not impliedly preempted as finding Freightliner liable would not present an obstacle to federal purposes or objectives.[573]

Geier II involved the Safety Act and a defective design claim based on a failure to install airbags.[574] The Court determined in *Geier II* that if the tort claims were allowed, they "would have presented an obstacle to the variety and mix of devices that the federal regulation sought . . . [and] also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed."[575] The uncertainty surrounding Standard 208 did not involve the absence of regulation; rather, Standard 208 was a specific regulation requiring a phase-in of passive restraints, beginning with 1987 model cars.[576] As opposed to *Freightliner II*, where federal objectives were nonexistent,[577] the Court in *Geier II* was faced with a specific regulation and a multitude of federal objectives.[578] Therefore, Court precedent did not preclude the finding of implied preemption where *Geier II* presented a possibility of enacting a common law regulation which would have conflicted with federal law.

B. Resolving the Split of Authority

A variety of courts subsequent to *Cipollone VI* and *Freightliner II* "have interpreted the preemption issues inconsistently under Standard 208."[579] In fact, the Court in *Geier II* "granted certiorari to resolve these differences."[580] Several state courts had held that neither the Safety Act's express preemption nor Standard 208 preempted a *no airbag* claim.[581] In

571. *Id.* at 286.
572. *Id.* (quoting 15 U.S.C. § 1392(d) (1966)) (alteration in original).
573. *Id.* at 287, 289-90.
574. *Geier II*, 529 U.S. at 864-65.
575. *Id.* at 881.
576. *See* Norton, *supra* note 507, at 663.
577. *Freightliner II*, 514 U.S. at 289 ("[T]here is simply no federal standard for a private party to comply with.").
578. *Geier II*, 529 U.S. at 874-75 ("DOT's comments, which accompanied the promulgation of [Standard] 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and [Standard] 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance – all of which would promote [Standard] 208's safety objectives." (citing 49 Fed. Reg. 28962, 28962 (1984) (codified at 49 C.F.R. pt. 571)).
579. Babb, *supra* note 89, at 1695 (citations omitted).
580. *Geier II*, 529 U.S. at 866.
581. *Id.* (citations omitted).

contrast, the federal circuit courts, which had considered the issue, found preemption in *no airbag* cases.[582] The Ninth Circuit concluded in favor of preemption resting on the express preemption clause of the Safety Act.[583] All of the other decisions, however, found "pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to [Standard 208's] objectives, and thus to the Act itself."[584] The United States Supreme Court in *Geier II* invalidated the Ninth Circuit's finding of express preemption in *no airbag* suits.[585] *Geier II* thus established precedent incompatible with various decisions on the state level and reaffirmed the application of ordinary preemption principles set forth in *Cipollone VI*.[586] Finally, *Geier II* resolved the differences in *no airbag* decisions, and set precedent by concluding that *no airbag* claims are impliedly preempted by the Safety Act.[587]

1. The Ninth Circuit

In *Harris*, the Ninth Circuit Court of Appeals determined that the Safety Act expressly preempted claims based on the manufacturer's failure to install an airbag.[588] This holding is inconsistent with and currently superseded by the Court's recent holding in *Geier II*. The Ninth Circuit stated, contrary to Harris' contentions, that the preemption provision of the Safety Act contemplated safety standards not solely created by regulators and legislators.[589] The *Geier II* decision also dealt with the preemption clause of the Safety Act and a claim for failure to install an airbag.[590] However, in *Geier II*, the Court held against an express preemption finding due to the existence of the Safety Act's saving clause.[591] Consequently, the Court determined that the existence of the Safety Act's saving clause precludes a finding of express preemption of *no airbag* claims,[592] contrary to the Ninth Circuit's determination that *no*

582. *Id.*

583. *Id.* (citing Harris *ex rel.* Harris v. Ford Motor Co., 110 F.3d 1410, 1413-15 (9th Cir. 1997)).

584. *Id.* at 868-69.

585. *See id.* at 866 ("We now hold that this kind of 'no airbag' lawsuit conflicts with the objectives of [Standard 208], a standard authorized by the Act, and is therefore, pre-empted by the Act.").

586. *See id.*

587. *See id.*

588. *Harris*, 110 F.3d at 1415.

589. *Id.* at 1413.

590. *Geier II*, 529 U.S. at 865.

591. *Id.* at 868-69.

592. *Id.* at 869-70 (concluding that due to the existence of the savings clause the preemption provision must be narrowly read to preclude expressly preempting common law claims).

airbag claims were expressly preempted by the Safety Act.[593]

2. Implied Preemption Application

Geier II resolved the split among state and federal courts by holding that there is no categorical rule precluding implied preemption when an express preemption clause exists in *no airbag* cases.[594] While *Cipollone VI* led to inconsistent results,[595] *Geier II* established precedent incompatible with various decisions on the state level, reaffirming the application of ordinary preemption principles set forth in *Cipollone VI*.[596] For example, in *Minton v. Honda of America Manufacturing, Inc.* (*Minton II*), the Ohio Supreme Court held that the Safety Act did not expressly or impliedly preempt state common law tort claims based on an automobile manufacturer's failure to install airbags.[597] The court relied on *Cipollone VI* and "concluded that if the federal legislation at issue contains an express preemption clause, there is no need to look beyond the text of that clause to determine the preemptive intent of Congress."[598]

The United States Supreme Court, in *Freightliner II*, reasoned that no express preemption existed for the plaintiff's claims under the Safety Act, but made clear that *Cipollone VI* did not establish "a categorical rule precluding the coexistence of express and implied pre-emption . . . ."[599] Rather, the Court indicated that implied preemption analysis remained a viable option for interpretation.[600] Although the Ohio Supreme Court, in *Minton II*, recognized the *Freightliner II* opinion, the court opted not to follow it.[601] In so holding, the *Minton II* court determined that *Freightliner II* did not overrule *Cipollone VI*, but instead, "sought merely to disapprove of decisions interpreting *Cipollone* [*VI*] to mean that implied preemption can never exist when Congress has included an express preemption clause in the legislation in question."[602]

The *Geier II* decision affirmed the analysis in *Freightliner II*, stating

593. *Harris*, 110 F.3d at 1416 (concluding that the preemption provisions expressly preempted plaintiff's claim).

594. *Geier II*, 529 U.S. at 869.

595. Babb, *supra* note 89, at 1694 (citations omitted).

596. *See Geier II*, 529 U.S. at 869 (referencing *Freightliner II*, but recognizing that the *Freightliner II* Court discussed *Cipollone VI*).

597. *Minton II*, 684 N.E.2d at 652, 662.

598. *Id.* at 658 (citations omitted).

599. *Freightliner II*, 514 U.S. at 283, 287-88.

600. *Id.* at 288.

601. *Minton II*, 684 N.E.2d at 658 (acknowledging that the Supreme Court in *Freightliner II* "noted that an explicit statement limiting Congress' preemptive intent does not always obviate the need to consider the implied preemption[,]" but determining that because the *Freightliner II* Court "did not overrule *Cipollone* [*VI*] . . . an implied preemption analysis is not required . . . ." (citations omitted)).

602. *Id.* at 658 (citing Wilson v. Pleasant (*Wilson II*), 660 N.E.2d 327, 334 (Ind. 1995)).

that the petitioners conceded, "as they must in light of *Freightliner* [*II*] . . . that the pre-emption provision, by itself, does not foreclose . . . 'any possibility of implied [conflict] pre-emption[.]'"[603] The *Geier II* decision, holding that ordinary preemption principles apply to *no airbag* suits,[604] supersedes *Minton* because the *Minton II* court declined to conduct an implied preemption analysis.[605]

Similarly, in *Wilson II*, the Indiana Supreme Court held that the Safety Act and its subsequent regulations did not preempt state common law negligence claims based on a manufacturer's failure to install airbags.[606] The court concluded that it was improper to imply preemption of Wilson's claims.[607] Justice Patrick Sullivan, writing for the majority, reasoned that the preemption clause of the Safety Act, "entirely forecloses implied preemption . . . [a]nd even if we apply the principles of implied pre-emption analysis as re-stated in [*Freightliner II*] . . . it would be improper to imply pre-emption here."[608] The court's finding in *Wilson II* is also superseded by *Geier II* as ordinary preemption principles apply to *no airbag* suits,[609] and *Wilson II* declined to conduct an implied preemption analysis.[610]

In *Drattel II*, the New York Court of Appeals determined that the Safety Act of 1966 did not preclude plaintiffs' state common law claims.[611] The court discussed *Cipollone VI*, and provided that implied preemption analysis was not warranted.[612] The combination of the Safety Act's express preemption clause, the saving clause and the legislative history demonstrated congressional intent to protect common law claims.[613] The court noted that implied conflict preemption was unavailable, as the plaintiff's common law claims would neither make compliance with the federal regulation impossible nor prevent the execution and accomplish-

603. *Geier II*, 529 U.S. at 867, 869 (quoting Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 288 (1995)).

604. *Id.* at 869 (determining that the existence of a preemption provision does not preclude the possibility of implied preemption).

605. *Minton II*, 684 N.E.2d at 658 (determining that an implied preemption analysis was not required).

606. *Wilson II*, 660 N.E.2d at 330, 334.

607. *Id.* at 339.

608. *Id.* at 328, 339.

609. *Geier II*, 529 U.S. at 869 (determining that the existence of a preemption provision does not preclude the possibility of implied preemption).

610. *Wilson II*, 660 N.E.2d at 339 (concluding that the pre-emption clause entirely foreclosed implied pre-emption).

611. *Drattel II*, 699 N.E.2d at 382-83.

612. *Id.* (determining that, when read together, *Cipollone VI* and *Freightliner II*, "do not favor, support or mandate an implied preemption analysis of common-law claims in the present case framework.").

613. *Id.* at 383.

ment of the Safety Act's congressional objectives.[614] *Geier II* affirms the opposite; where a preemption provision exists, the possibility of implied preemption is not foreclosed.[615] The dissent's discussion in *Drattel II* was consistent with the United States Supreme Court's holding in *Geier II*, reasoning that the implied preemption doctrine should apply to the plaintiff's claims to the extent their claims were premised on the omission of driver's side airbags.[616] The dissent argued that imposition of common law liability for a manufacturer's failure to install airbags "would inevitably undermine the regulatory, interest-weighing cost/benefit determination by Congress . . . ."[617]

3. *Implied Preemption of* No Airbag *Claims*

In *Geier II*, the United States Supreme Court granted certiorari to resolve differences in decisions made by state and federal courts regarding preemption in *no airbag* cases.[618] *Geier II* resolved the differences and set precedent establishing that the Safety Act impliedly preempts *no airbag* claims.[619] Contrary to *Geier II*, the Ohio Supreme Court, in *Minton II*, held that *no airbag* claims were not impliedly preempted.[620] The court stated that "Congress did not intend for the Safety Act to occupy the entire field of auto safety . . . [and] appellant's claim does not prevent compliance with [S]tandard 208, nor does it thwart the accomplishment of the full purposes of Congress."[621] *Geier II*, however, established that a conflict with federal law *does* exist as *no airbag* claims present an obstacle to the objectives of Congress.[622]

Similarly, in *Drattel II*, the New York Court of Appeals found that *no airbag* claims were not impliedly preempted.[623] The court stated that implied conflict preemption was not available as permitting Drattel's common law claims would neither make compliance with federal regulation impossible nor prevent the execution and accomplishment of the Safety Act's congressional objectives.[624] The United States Supreme Court, in *Geier II*, rejected this contention and established that a conflict

614. *Id.* at 385.
615. *Geier II*, 529 U.S. at 869.
616. *Drattel II*, 699 N.E.2d at 383 (Levine, J., dissenting).
617. *Id.* at 391 (Levine, J., dissenting).
618. *Geier II*, 529 U.S. at 867.
619. *Id.* at 866 ("We granted certiorari to resolve these differences. We now hold that this kind of 'no airbag' lawsuit conflicts with the objectives of [Standard 208] . . . and is therefore preempted by the [Safety] Act.").
620. *Minton II*, 684 N.E.2d at 662.
621. *Id.* at 661 (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 287 (1995)).
622. *Geier II*, 529 U.S. at 867.
623. *Drattel II*, 699 N.E.2d at 383.
624. *Id.* at 383-85.

with federal law exists because *no airbag* claims pose an obstacle to Congress' objectives.[625]

Over a decade before the *Geier II* decision, the First Circuit reached a similar conclusion to that of *Geier II.* In 1989, the First Circuit conducted the first appellate review of preemption of *no airbag* claims.[626] In *Wood*, the First Circuit Court of Appeals did not find express preemption in a *no airbag* suit, but found that Congress' aims, as demonstrated by the Safety Act and legislative history, "plainly *imply* a preemptive intent."[627] While the lack of mention of products liability claims in the preemption provision precluded a finding of express preemption, the court inferred preemptive intent.[628] The court noted that if such a product liability claim were upheld, it would be an obstacle to the Safety Act's regulatory scheme.[629] A defective design common law action would create a safety standard related, but not identical, to Standard 208.[630] Allowing such an action holding automobile manufacturers liable for the failure to install airbags in automobiles "would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area."[631] This decision is akin to that of *Geier II*, where the United States Supreme Court found implied preemption based on the same reasoning,[632] namely conflict preemption based on the presentation of an obstacle to federal objectives.[633]

Subsequently, the Pennsylvania Supreme Court held, in *Cellucci II*,

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625. *Geier II*, 529 U.S. at 881.

626. Babb, *supra* note 89, at 1689.

627. *Wood,* 865 F.2d at 402 (alteration in original).

628. *Id.* ("At the time [the Safety Act was drafted], the only kind of legal claim which could give rise to the present dilemma – a cause of action based upon alleged automobile design defects – had yet to take its place in the arsenal of the plaintiff's bar. We infer from this, as well as from the total silence of the legislative record concerning the present dilemma, that Congress simply did not anticipate the situation that now confronts us. While Congress intended that federal safety standards would not interfere with ongoing state litigation as then understood, it did not foresee the possibility of litigation that could, in practical effect, impose a new and conflicting state safety standard on national automobile manufacturers... [G]iven Congress' failure to oversee this problem, we are not persuaded that section 1392(d) can be construed to manifest an *express* intention to preempt state design lawsuits having the present effect . . . . While we, therefore, do not find express preemption, we are convinced that Congress' purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent." (footnote omitted) (alteration in original)).

629. *Id.*

630. *Id.*

631. *Id.*

632. *Geier II*, 529 U.S. at 881 ("In effect, petitioner's tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law ... by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems . . . . It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.").

633. *Id.* at 886.

that that the Safety Act impliedly preempted state tort *no airbag* actions.[634] In *Cellucci II*, the Pennsylvania Supreme Court noted that the regulations under the Safety Act gave automobile manufacturers an option of various passive restraint devices.[635] To allow a common law standard imposing "liability on a manufacturer for choosing a federally-imposed option takes away that federally-imposed option from the manufacturer, which clearly goes against Congress' intent."[636] Therefore, liability in common law, arising from a manufacturer's failure to install passive restraint systems, including airbags, actually conflicted with federal law.[637] Similarly, the *Geier II* decision found that *no airbag* claims actually conflicted with federal law and held those claims impliedly preempted.[638]

The United States Supreme Court's decision in *Geier II* also accords with the Third Circuit's holding that *no airbag* claims are impliedly preempted. In *Pokorny II*, the Third Circuit Court of Appeals held that a common law claim based on the absence of airbags or automatic belts was impliedly preempted by Standard 208 and the Safety Act.[639] The court stated that common law liability developing from failure to install airbags and automatic belts would create an actual conflict with federal regulations and statutes.[640] Potential common law liability arising from Pokorny's airbag and seat belt claims interfered with federal regulatory methods created to achieve the stated goals of the Safety Act.[641] The court noted that section 1410(b) of the Motor Vehicle and Schoolbus Safety Amendments of 1974 ("MVSSA") clarified the conflict theory.[642] Congress enacted the MVSSA to address motorists' concern about the possibility of passive restraint safety systems becoming mandatory.[643] The court stated that, as exhibited by the MVSSA, Congress desired manual belts to remain as one of the federal restraint system options.[644] The options promulgated by the Department of Transportation in Standard 208 manifest congressional intent, as they allow manufacturers to be compliant with federal regulations by selecting one of the options.[645] Al-

634. *Cellucci II*, 706 A.2d at 811-12.
635. *Id.* at 811.
636. *Id.*
637. *Id.* at 811-12.
638. *Geier II*, 529 U.S. at 886.
639. *Pokorny II*, 902 F.2d at 1126.
640. *Id.* at 1118.
641. *Id.* at 1123 (citing Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).
642. *Id.* at 1123-24 (footnote omitted) (citations omitted).
643. *Id.* at 1123 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34-37 (1983)).
644. *Id.* at 1123-24 (citing Taylor v. Gen. Motors Corp., 875 F.2d 816, 826-27 (11th Cir. 1989)).
645. *Id.* at 1124.

lowing Pokorny's allegations of common law liability for a manufacturer's failure to install automatic belts or airbags "would directly undermine the regulatory framework suggested by Congress . . . in Standard 208."[646] The *Geier II* decision accords with the Third Circuit's reasoning, as the Supreme Court in *Geier II* similarly held that *no airbag* claims actually conflicted with federal law and were impliedly preempted.[647]

Unlike the Ninth Circuit in *Harris*, the Supreme Court in *Geier II* correctly rejected a holding of *no airbag* claims in light of the Safety Act's saving clause. Further, the Court reaffirmed the principle that there is no categorical rule precluding implied preemption when an express preemption clause exists in *no airbag* cases, resolving the split of decisions among the various courts.[648]

C. Setting Precedent

The *Geier II* decision immediately set precedent in holding *no airbag* claims impliedly preempted. Just one week following the issuance of the United States Supreme Court's decision in *Geier II*, the United States District Court for the Northern District of Illinois granted summary judgment in a *no airbag* action.[649] In *Davis*, the plaintiff sued Nissan Motor Corporation in U.S.A ("Nissan") asserting her deceased husband's vehicle was unreasonably dangerous based on the lack of an installed airbag.[650] The District Court for the Northern District of Illinois granted Nissan's summary judgment motion based on the Court's decision in *Geier II*.[651] The district court recognized the Court's decision that *no airbag* claims were not expressly preempted by the Safety Act or Standard 208.[652] Additionally, the district court stated, consistent with *Geier II*, that ordinary preemption principles apply.[653] The court reasoned that the Court in *Geier II* held an actual conflict with Standard 208 existed, thereby preempting *no airbag* claims.[654] The court in *Davis* applied the precedent *Geier II* established, and both courts agree that allowing such

646. *Id.*
647. *Geier II*, 529 U.S. at 886.
648. *Id.* at 866-69.
649. *Davis*, 2000 WL 1459027, at *1 to *2.
650. *Id.* at *1.
651. *Id.* at *1 to *2.
652. *Id.* at *2.
653. *Id.* ("Plaintiff argues that the presence of an express pre-emption provision in the Act creates an inference that there is no implied pre-emption precluding her from bringing her 'no-air bag' claim. The Supreme Court, however, determined that nothing in the saving clause suggests an intent to save common law actions that actually conflict with federal regulations and, thus, ordinary pre-emption principles apply." (citing Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861, 974 (2000)) (internal citation omitted)).
654. *Id.*

an action "to proceed would have the effect of requiring all manufacturers to install airbags to avoid suits and would eliminate the choices given by the federal standards."[655]

Furthermore, *Geier II* established an ordinary preemption analysis which now provides a basis for courts considering preemption of common law claims by any federal act.[656] The Tenth Circuit followed *Geier II* in its analysis of preemption of common law claims by the National Manufactured Housing Construction and Safety Act of 1974 ("MHA").[657] In *Choate*, the United States Court of Appeals for the Tenth Circuit held that the preemption clause of the MHA did not preempt a tort action against the manufacturer of a manufactured home.[658] By applying the reasoning of *Geier II*, the Tenth Circuit found that no express preemption existed, but that ordinary preemption principles applied.[659] The preemption clause of the MHA provided that a state could not create a manufactured home safety standard different from a federal safety standard.[660]

The Tenth Circuit noted that the word "standard" and the word "requirement" may be similarly interpreted, recognizing that common law rules could be preempted by the express language.[661] The existence of the saving clause, however, led to a discussion of the precedent set in *Geier II*.[662] The preemption and saving clause provisions of the Safety Act were nearly identical to those of the MHA.[663] Given the almost identical preemption and saving clauses in both the Safety Act and MHA, the Tenth Circuit held, "in light of *Geier* [*II*], that [plaintiffs'] claim is not expressly preempted."[664] *Geier II* established that the exact significance of the term "standard" need not be ascertained in light of the existence of the saving clause.[665] *Choate* followed the precedent and found, in the

655. *Id.*

656. *See Geier II*, 529 U.S. at 874-86 (examining the history of Standard 208 and the Department of Transportation's primary goals in determining whether the *no airbag* claim actually conflicted with Standard 208 and indicating that a formal agency statement of pre-emptive intent is not a prerequisite to concluding that a conflict exists).

657. *Choate*, 222 F.3d at 793-94 (holding, based on the similarities between the preemption and savings clauses of the MHA and the Safety Act, that the plaintiffs' claims were not expressly preempted, but, in contrast to the *Geier II* decision, holding that the plaintiffs' claims were not impliedly preempted based on the history of the MHA and the stated purpose of the Act).

658. *Id.* at 797.

659. *Id.* at 793-94.

660. *Id.* at 792 (quoting 42 U.S.C. § 5403(d)).

661. *Id.* (citing Medtronic Inc. v. Lohr (*Medtronic II*), 518 U.S. 470, 481, 502-04, 509 (1996) (plurality opinion) (Breyer, J., concurring in part and concurring in judgment) (O'Connor, J., concurring in part and dissenting in part) and Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 521 (1992)).

662. *Id.* at 793-94.

663. *Id.*

664. *Id.*

665. *Geier II*, 529 U.S. at 867-68.

presence of a preemption clause and saving clause nearly identical to those of the Safety Act, that an express preemption finding would be improper.[666]

Additionally, in accordance with the United States Supreme Court's precedent in *Geier II*, the Tenth Circuit applied ordinary preemption principles.[667] Although the Tenth Circuit found the plaintiff's claims were not preempted, the analysis conducted by the court accords with *Geier II*.[668] In discussing conflict preemption, the court concluded against a finding of implied preemption, as the claims did not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[669]

Similar to the United States Supreme Court's decision in *Geier II*, the Tenth Circuit conducted an analysis to determine the objectives and purposes of Congress in order to decide whether a conflict existed.[670] The Tenth Circuit found no such obstacle.[671] The MHA's implementing regulations contain a provision stating that determination of whether such an obstacle exists can be discovered by questioning, "whether the [s]tate rule can be enforced or the action taken without impairing the [f]ederal superintendence of the manufactured home industry as established by the Act."[672] A rule that required a battery-powered backup would not be contrary to a federal standard that required at least one smoke detector.[673] However, a rule that required an airbag mandate, where Congress and the Department of Transportation intended for manufacturers to have a choice of passive restraint systems, was an obstacle to a federal objective.[674] Therefore, the Tenth Circuit followed the precedent set in *Geier II* and applied ordinary preemption analysis in accordance with the Supreme Court's discussion.[675]

The Fifth Circuit looked, in part, to *Geier II* in evaluating preemption of common law claims by the Federal Boat Safety Act ("FBSA").[676] In *Lady*, the United States Court of Appeals for the Fifth Circuit held

666. *Choate*, 222 F.3d at 793-94.
667. *Id.* at 794-95.
668. *Id.* at 795-97.
669. *Id.* at 796-97 (quoting English v. Gen. Elec. Co. .496 U.S. 72, 79 (1990)).
670. *Id.* at 795-96.
671. *Id.* at 796-97.
672. *Id.* at 795 (quoting 24 C.F.R. § 3282.11(d)).
673. *Id.* at 795-96 (determining that the plaintiffs' claim that state products liability law "pertaining to defective and unreasonably dangerous products require[d] that the hard-wired smoke detector also have either a battery-powered backup or a warning that it would not work if there was a loss of power . . . would not eliminate the chosen federal method of providing smoke detection in manufactured homes. It would simply increase the effectiveness of that method.").
674. *Id.* at 796 (citing Geier v. Am. Honda Motor Co. (*Geier II*), 529 U.S. 861, 875 (2000)).
675. *Id.* at 795-96.
676. *Lady*, 228 F.3d at 598.

that implied preemption precluded an injured plaintiff's state tort actions against a boat manufacturer.[677] The court determined that Lady's claims requiring a propeller guard on a recreational boat "would frustrate the Coast Guard's decision that recreational boats should not be required to be equipped with propeller guards."[678] The Fifth Circuit, like the *Geier II* Court, concluded that frustration of the Coast Guard's decision and an obstacle to congressional objectives of a federal act both amounted to a conflict with federal law.[679]

Through the *Geier II* decision, the United States Supreme Court set precedent mandating a holding of implied preemption of *no airbag* claims. Moreover, *Geier II* established an ordinary preemption analysis which now provides a basis for courts considering preemption of common law claims by any federal act. The Fifth and Tenth Circuits have recog-

677. *Id.* at 600, 615 ("[W]e conclude that, at least in the instant maritime context where the federal interest and presence has traditionally been so significant and there is no presumption against preemption, implied preemption precludes [the] action . . .."), *abrogated by* Spreitsma v. Mercury Marine, 537 U.S. 51, 68 (2002) ("[W]e think it clear that the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies.").

678. *Id.* at 602.

679. *Compare Lady*, 228 F.3d at 602 (discussing the frustration of the Coast Guard regulation), *with Geier II*, 529 U.S. at 886 (stating the tort action was preempted because it posed an obstacle to federal objectives). It should be noted, however, that the *Lady* court relied heavily on Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) in determining that Lady's claims were impliedly preempted. The court stated,

> [U]nlike the situation in *Geier* [*II*], the manufacturer's contention does not rest upon a prescribed safety standard, but rather a decision not to prescribe a standard, in which the Coast Guard, after considering whether to require propeller guards, decided that [t]he U.S. Coast Guard should take no regulatory action to require propeller guards. An agency decision not to regulate does not always, or perhaps even usually, carry a preemptive effect. Yet, a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much pre-emptive force as a decision *to* regulate. This is so where the failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, [s]tates are not permitted to use their police power to enact such a legislation.

Id. at 613 (internal quotations and citations omitted) (alterations in original). Thus, the court determined that,

> where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA's objective of national uniformity mandates that state law not provide a result different than the Coast Guard's.

Id. at 615. The court's holding rested on the conclusion that, "at least in the instant maritime context where the federal interest and presence has traditionally been so significant and there is no presumption against preemption, implied preemption precludes Lady's action against [the manufacturer]." *Id.* Therefore, in contrast to the holding in *Geier II*, the court ultimately found implied preemption based on federal occupation of the field, not solely based on an actual conflict. *Id.*

nized the *Geier II* reasoning in holdings for and against a finding of implied preemption.

V. Conclusion

In *Geier II*, the United States Supreme Court decided that a *no airbag* lawsuit conflicted with the objectives of the Safety Act and Standard 208.[680] An injured driver contended American Honda was liable for damages arising from its alleged defective design of a vehicle based on a failure to install airbags.[681] American Honda asserted its compliance with the Safety Act and that Standard 208 preempted the *no airbag* lawsuit.[682] The Court held that the lawsuit conflicted with the objectives of Standard 208 and was consequently preempted by the Safety Act.[683] The Court made three major findings in its decision; first, the Act's preemption provision did not expressly preempt the lawsuit; second, ordinary preemption applied; and finally, the lawsuit actually conflicted with the Safety Act.[684]

The Court determined the preemption provision of the Safety Act should be read narrowly to preempt "only state statutes and regulations," excluding common law tort actions.[685] However, the Safety Act's saving clause did not expressly *save* Geier's action. The Court concluded, based partially on its inclination not to construe saving clauses broadly, that the clause did not "bar the ordinary working of conflict pre-emption principles."[686] The Court stated that it was Congress' intent to apply ordinary preemption principles where there is "an actual conflict with a federal objective[;]" without such application, states could impose laws "that would conflict directly with federal regulatory mandates."[687] Finally, the Court concluded that Geier's suit actually conflicted with the Department of Transportation's objectives in enacting the standard.[688] An imposition of a rule of state tort law compelling a duty to install airbags in cars such as petitioners' "would have presented an obstacle to the variety and mix of devices that the federal regulation sought."[689]

First, the Court in *Geier II* properly held that state common law *no*

680. *Geier II*, 529 U.S. at 886.
681. *Id.* at 865.
682. Brief for Respondents, *supra* note 6, at 7.
683. *Geier II*, 529 U.S. at 886.
684. *Id.* at 867.
685. *Id.* at 868.
686. *Id.* at 868-69 (alteration in original).
687. *Id.* at 871.
688. *Id.* at 874.
689. *Id.* at 881.

airbag suits were preempted by Standard 208 and the Safety Act.[690] Second, the Court resolved the court split on the preemption doctrine, clarifying the circumstances in which ordinary preemption applies, and reaffirming decisions holding *no airbag* suits impliedly preempted.[691] Finally, *Geier II* has set precedent which enforces ordinary preemption principles, demonstrated by the decisions of courts that have subsequently relied on its law.[692]

Geier v. American Honda Motors Co. is a case of obvious importance to automobile manufacturers. The preemption issues analyzed have significant implications not only for manufacturers faced with *no airbag* suits, but any businesses subject to significant federal regulation. Many federal statutes contain preemption clauses similar to that of the Safety Act. *Geier II* presents a broad question relating to whether the existence of an express preemption clause forecloses the operation of ordinary preemption principles, an argument the Court rejected.

The United States Supreme Court also answered the question that its holding in *Cipollone VI*[693] left unresolved.[694] By holding that the Safety Act preempted *no airbag* suits, the Court followed precedent and reaffirmed ordinary preemption principles. If the Court had held in favor of Geier, manufacturers would have been subjected to an increased range of products liability suits. Courts would have begun to question the language of the preemption provisions of other federal acts, resulting in inconsistent holdings and an onslaught of litigation in areas Congress may have intended to preempt. Instead, in *Geier II*, the Court recognized that the objectives of Congress are of the utmost importance and any claim which presents an obstacle to that goal must not be permitted. *Geier II* offers protection to not only automobile companies but to all types of product manufacturers who may face product liability suits despite compliance with regulations embodying federal objectives in a given area.

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690. *See id.* at 865-86 (examining both express and implied preemption and looking to legislative history and the Department of Transportation's intent in making its determination).

691. *Id.* at 866 ("We granted certiorari to resolve these differences. We now hold that this kind of 'no airbag' lawsuit conflicts with the objectives of [Standard 208], a standard authorized by the Act, and is therefore pre-empted by the Act.").

692. *E.g.*, *Choate*, 222 F.3d at 793-97.

693. *Cipollone VI*, 505 U.S. at 504.

694. *Geier II*, 529 U.S. at 869 ("We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles." (citing Freightliner Corp. v. Myrick (*Freightliner II*), 514 U.S. 280, 287 (1995) which discusses Cipollone v. Liggett Group, Inc. (*Cipollone VI*), 505 U.S. 504, 517-18 (1992) (internal citations omitted) (alteration in original)).