

**American Association for Justice (formerly the Association to Trial Lawyers of America (ATLA®)) *
Association of Trial Lawyers of America® - New Jersey * Consumer Attorneys of California *
Consumers for Auto Reliability and Safety * New York State Trial Lawyers Association *
Pennsylvania Association for Justice * Washington State Trial Lawyers Association**

November 24, 2008

David Kelly
Acting Administrator
National Highway Traffic Safety Administration
1200 New Jersey Avenue, S.E.
Washington, DC 20590

**Re: Petition for Reconsideration; Designated Seating Positions and Seat Belt
Assembly Anchorages (Docket No. NHTSA-2008-0059)**

Dear Mr. Kelly:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA®), Association of Trial Lawyers of America ® New Jersey (ATLA-NJ), Consumer Attorneys of California (CAOC), Consumers for Auto Reliability and Safety (CARS), New York State Trial Lawyers Association (NYSTLA), Pennsylvania Association for Justice (PAAJ), and the Washington State Trial Lawyers Association (WSTLA) (hereinafter, “undersigned groups”), hereby jointly submit a Petition for Reconsideration of the National Highway Traffic Safety Administration’s (NHTSA) final rule regarding designated seating positions and seat belt assembly anchorages. *See* 73 Fed. Reg. 38331.

AAJ, with members in the United States, Canada and abroad, is the world’s largest trial bar. It was established in 1946 to safeguard victims’ rights, strengthen the civil justice system, promote injury prevention, and foster the disclosure of information critical to public health and safety. ATLA-NJ, CAOC, NYSTLA, PAAJ, and WSTLA are all state affiliates of AAJ and represent trial attorneys in their respective states. CARS is a national, award winning, non-profit auto safety and consumer advocacy organization working to save lives, prevent injuries, and protect consumers from auto-related fraud and abuse.

The undersigned groups request that NHTSA reconsider this final rule given the language regarding preemption of state tort law included in the preamble and the rule text, Section 571.3(c). This language directly contradicts Congressional intent. The undersigned groups also believe that NHTSA may not rely upon *Geier v. American Honda Motor Co.*¹ as authority to preempt state tort law claims in any instance other than the specific factual circumstances at issue in that case. Therefore, we request that the agency issue a new final rule that removes this language from both the preamble and the rule text, Section 571.3(c).

¹ 529 U.S. 861 (2000).

I. The Rule's Preemption Language Contradicts Congressional Intent

The undersigned groups urge NHTSA to reconsider this rule, because it includes language in both the preamble and rule text stating that this federal regulation preempts² state common law. This directly contradicts Congressional intent to preserve an injured consumer's right to hold a negligent wrongdoer accountable in court. Both the House and the Senate have reiterated Congress' intent during the debate regarding the agency's forthcoming roof crush resistance rule. Any statements made during that debate clearly apply here.

In 2005, the then-current Chairman and Ranking Member of the Senate Judiciary Committee, Sens. Arlen Specter (R-PA) and Patrick Leahy (D-VT), expressed concern regarding the agency's attempt to preempt state common law with respect to the proposed roof crush rule.³ They stated that Congress did not delegate to the agency the ability to preempt state law and asked the agency to provide some evidence that Congress intended for federal motor vehicle safety regulations to have this type of preemptive effect.

More recently, both Democratic and Republican Senators expressed disapproval of the agency's policy attempting to preempt common law at an oversight hearing. Senator Mark Pryor (D-AR) stated that preemption is not in the public's best interest, is outside the scope of the agency's authority, and would result in "bipartisan opposition in the Senate."⁴ Likewise, Senator Tom Coburn (R-OK) noted that twenty-six (26) attorneys general agree that preemption "would be a major setback to vehicle safety, yet NHTSA has not offered any explanation for why the rights of a vehicle purchaser to seek a common-law remedy for home done to them should be taken away."⁵ In a subsequent letter, Sens. Pryor, Coburn, and Inouye (D-HI) all stated that the inclusion of a provision to preempt state common law in any final rule "would constitute an unprecedented incursion upon the constitutional rights of consumers, who will remain uncompensated for the needless deaths and injuries that occur due to the foreseeable negligence

² Congress may intend that certain federal regulations preempt state law in several ways:

- **Express Preemption:** Congress, at times, passes legislation containing an express preemption provision, as in the National Traffic and Motor Vehicle Safety Act. The express preemption provision at issue here does not preempt state tort law.
- **Field Preemption:** Field preemption, a type of implied preemption, occurs when Congress intended to "occupy the field" of an entire subject matter. This is not at issue here.
- **Conflict Preemption:** Conflict preemption, a type of implied preemption, occurs when the state law at issue makes it impossible to comply with both state and federal law. The *Geier* Court addressed whether conflict preemption extends to state tort law.

³ Letter from Sens. Specter and Leahy to Jacqueline Glassman (Nov. 17, 2005).

⁴ *Oversight Hearing on Passenger Vehicle Roof Strength: Hearings Before the Subcomm. on Consumers Affairs, Insurance, and Automotive Safety of the S. Comm. on Commerce*, 110th Cong. (2008).

⁵ *Id.*

of manufacturers.”⁶ Congressman Henry Waxman (D-CA) filed a similar letter stating that “[t]here is no indication that Congress intended NHTSA to preempt state common law.”⁷

Congressional intent is the touchstone of preemption.⁸ As Congress has repeatedly stated that it never intended to preempt state common law remedies, the agency cannot issue a regulation that directly contradicts its clear intent. Therefore, the agency must remove language seeking to preempt state common law from the preamble and rule text.

II. NHTSA Cannot Rely Upon the *Geier* Case to Ignore Congressional Intent

The only case law that the agency cites as the basis for its authority to preempt state tort law claims is *Geier v. Honda Motor Co.*, 529 U.S. 861 (2000). However, *Geier* is an unusual, fact-driven case which cannot be used to establish preemption of state tort law for all NHTSA motor vehicle safety rules. In *Geier*, the Supreme Court found NHTSA’s passive restraint rule preempted state common law based on a unique set of facts. The Court relied upon two of the unusual factors present in the history of the passive restraint rule, which do not apply to the seating positions rule at issue here: (1) the range and phase-in of compliance options; and (2) the lengthy history behind the rule. The Court explained the need for the “range of choice among different passive restraint devices”⁹ and noted the fact that the safety standard deliberately sought a gradual phase-in of passive restraints in several stages over three years. In contrast, the seating positions rule promotes the agency’s safety objectives without providing for a range and phase-in of various compliance options.

The *Geier* Court also discussed the history behind the creation of these rules and the fact that the Department of Transportation re-drafted the rules several times during this period.¹⁰ In this instance, there was no prolonged history in this rule re-defining the term “designated seating positions.” As NHTSA states in the preamble to the rule, the agency only released its notice of proposed rulemaking in 2005, and there were no prior rules amending the definition of designated seating positions (DSPs) and changing the calculation procedure for determining the number of DSPs in a vehicle. These clear differences between *Geier* and the circumstances at issue here render *Geier* inapplicable.¹¹

⁶ Letter from Sens. Mark Pryor, Tom Coburn, and Daniel Inouye to Secretary Mary Peters Re: Federal Motor Vehicle Safety Standard (FMVSS) No. 216 (June 19, 2008).

⁷ Letter from Cong. Henry Waxman to Secretary Mary Peters Re: Roof Crush Resistance for Motor Vehicles (June 27, 2008).

⁸ *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

⁹ 529 U.S. at 875.

¹⁰ *Id.* at 875-77 (discussing the agency’s findings regarding seatbelts and airbags from 1967 to 1984).

¹¹ The Fifth Circuit Court of Appeals has found that *Geier* is not applicable to all federal motor vehicle safety standards. See *O’Hara v. General Motors Corp.*, No. 06-10498, 2007 WL 4015758 (5th Cir. Nov. 20, 2007) (finding that federal window glazing standards do not preempt state common law). The court distinguished *Geier* based, in large part, on the fact that there is no language in the rule intended to “preserve the option” for manufacturers to use a different type of safety glass, as opposed to the options provided by the safety standard in *Geier*. *Id.* at *6. Similarly, the designated seating positions rule also does not preserve options for compliance which renders it distinguishable from the standard at issue in *Geier*.

Given the narrow *Geier* holding, the Supreme Court’s decision in *Sprietsma v. Mercury Marine*¹² is a more appropriate case to determine whether a rule preempts state tort law. *Sprietsma* interprets a saving clause which is similar to the savings clause included in the National Traffic and Motor Vehicle Safety Act (NTMVSA)¹³ – the Act at issue here. In *Sprietsma* the court found that it is “perfectly rational” to preempt state standards but not common law claims, which “perform an important remedial role in compensating victims.”¹⁴ The Court stated that “compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving ‘liability at common law or under State law’” and that, “in context, this phrase surely refers to private damages remedies.”¹⁵ This same principle should hold true for regulations promulgated pursuant to the NTMVSA, including the designated seating positions rule.

The undersigned groups appreciate the opportunity to submit this Petition for Reconsideration of the agency’s final rule regarding designated seating positions. If you have any questions or comments, please contact Gerie Voss, AAJ’s Director of Regulatory Affairs, at (202) 965-3500 ext. 748.

Sincerely,



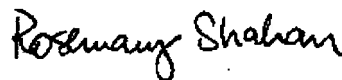
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¹² 537 U.S. 51 (2002).

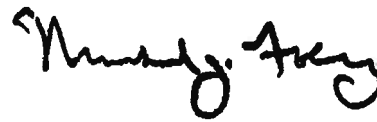
¹³ 49 U.S.C. § 301 *et seq.* The designated seating positions rule is integral to several safety standards, including nos. 110 and 208, included in this Act.

¹⁴ 537 U.S. at 64.

¹⁵ *Id.* (quoting 46 U.S.C. § 4311(g)).



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