



Formerly the Association of Trial Lawyers of America (ATLA®)

November 17, 2008

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building, Ground Floor, Rm. W12-40
Washington, DC 20590-0001

Re: Motorcycle Brake Systems; Docket No. 2008-0150

Dear Sir or Madam:

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America (ATLA®), hereby submits comments in response to the National Highway Traffic Safety Administration's (NHTSA) proposed rule regarding motorcycle brake systems. *See* 73 Fed. Reg. 54020.

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. AAJ's comments pertain to the preemptive effect of the rule, as stated in the preamble. AAJ believes that NHTSA may not rely upon *Geier v. American Honda Motor Co.*¹ as authority to preempt state tort law with respect to claims involving motorcycle brake systems. Courts have found that the *Geier* case is limited to its unique facts and does not apply to the circumstances at issue. Moreover, Congress has reiterated that it has not delegated the right to NHTSA to preempt state tort law claims and that it does not approve of the agency's recent practice of including such preemption language in all safety standards. Therefore, although AAJ believes that preamble language has no substantive effect, the language must be revised to remove any reference to preemption of state tort law.

I. NHTSA's Preamble Language Regarding Conflict Preemption Incorrectly Interprets *Geier*

NHTSA states that this rule expressly preempts state law pursuant to the National Traffic and Motor Vehicle Safety Act's express preemption provision.² NHTSA also claims that in addition to express preemption, this rule can preempt state tort law pursuant to *Geier*. Given that

¹ 529 U.S. 861 (2000).

² 49 U.S.C. §30103(b)(1).

Geier is an unusual case, AAJ believes that NHTSA must remove any language seeking to preempt state common law.

Geier cannot be used to establish preemption³ of state tort law for all NHTSA motor vehicle safety rules. Several courts, including the Fifth Circuit Court of Appeals, already have explored this issue.⁴ For example, the Fifth Circuit found that Federal Motor Vehicle Safety Standard (FMVSS) 205, which sets forth vehicle window glazing standards, does not preempt common law claims against an automobile manufacturer for failing to improve the glass used on its vehicles.⁵

Like NHTSA is attempting to do here, the defendant General Motors also claimed that the federal rule preempts state common law claims pursuant to *Geier*. The Fifth Circuit court disagreed, finding that the Federal Safety Act “preempts state regulations, 49 U.S.C. § 30103(b), but compliance with a motor safety standard prescribed under the Act does not preempt common law suits, 49 U.S.C. § 30103(e).”⁶ The court found that FMVSS 208, at issue in *Geier*, was an anomaly given that it permitted manufacturers to choose between specific options. However, “FMVSS 205 is a materials standard that sets a safety ‘floor’ to ensure that the glazing materials used by manufacturers meet certain basic requirements.”⁷ The court reasoned that such a construction was necessary, because the policy behind the rule was to reduce injuries.⁸ The court also noted that there was no language in the rule that intended to “preserve the option” for manufacturers to use a different type of safety glass, as opposed to the rule at issue in *Geier*.⁹

Like FMVSS 205, this rule sets a safety floor by stating the minimum requirements to ensure the safe manufacture and installation of motorcycle brake systems. This rule is necessary to prevent injuries and deaths associated with faulty brake systems. The rule certainly does not seek to preserve any options for manufacturers as to how to comply with this standard. Accordingly, a federal court likely would agree that the motorcycle brake standard also does not preempt state common law remedies.

³ 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.

⁴ *O’Hara v. General Motors Corp.*, No. 06-10498, 2007 WL 4015758 (5th Cir. Nov. 20, 2007).

⁵ *Id.* at *3.

⁶ *Id.* at *1.

⁷ *Id.* at *5.

⁸ *Id.* at *4-*8.

⁹ *Id.* at *6.

Given the narrow *Geier* holding, the Supreme Court’s decision in *Sprietsma v. Mercury Marine*¹⁰ 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)¹¹ – 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.”¹² 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.”¹³ This same principle should hold true for regulations promulgated pursuant to the NTMVSA. Therefore, AAJ urges NHTSA to eliminate language seeking to preempt state tort law.

II. Congress Does Not Approve of NHTSA’s Attempts to Preempt State Tort Law

At a Senate hearing regarding the agency’s forthcoming rule on roof crush, both Democratic and Republican Senators expressed disapproval of the agency’s policy, since 2005, of including language regarding the preemption of state tort laws in the preambles to proposed and final safety standards.¹⁴ Senator Mark Pryor (D-AR), the Subcommittee Chairman, 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.” 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.” These comments would apply to this motorcycle brake systems standard as well.

Members of both the House and Senate followed up the hearing with letters to the agency regarding its rule and urging the agency to remove the preemption language. The Senate letter stated that the language “would constitute an unprecedented incursion upon the constitutional rights of consumers.”¹⁵ Similarly, the House noted that “[t]here is no indication that Congress intended NHTSA to preempt state common law.”¹⁶ As Congressional intent is the touchstone of preemption, and Congress did not intend to preempt state common law, NHTSA has no basis

¹⁰ 537 U.S. 51 (2002).

¹¹ 49 U.S.C. § 301 *et seq.* The motorcycle brake systems standard was promulgated based on Safety Standard 122, included in this Act.

¹² 537 U.S. at 64.

¹³ *Id.* (quoting 46 U.S.C. § 4311(g)).

¹⁴ *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).

¹⁵ 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).

¹⁶ Letter from Cong. Henry Waxman to Secretary Mary Peters Re: Roof Crush Resistance for Motor Vehicles (June 27, 2008).

to do so in the preamble to its federal regulations.¹⁷ Therefore, AAJ urges the agency to remove any references to the preemption of state common law from the preamble to this rule.

AAJ appreciates the opportunity to submit these comments in response to the agency's proposed rule regarding motorcycle brake systems. If you have any questions or comments, please contact Gerie Voss, AAJ's Director of Regulatory Affairs at (202) 965-3500 ext. 748.

Sincerely,



Les Weisbrod
President
American Association for Justice

/gv

¹⁷ *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).