



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

December 1, 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: Federal Motor Vehicle Standards; Motorcycle Helmets; Docket No. 2008-0157

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 helmets. *See* 73 FR 57297.

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. 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. The preemption language is so broad that it could give motorcycle helmet manufacturers immunity from lawsuits by individuals injured as a result of defective motorcycle helmets.¹ NHTSA has offered no rationale for its sudden decision to claim preemption and such attempts to preempt state tort law are not approved of by Congress. AAJ also believes that NHTSA may not rely on *Geier v. American Honda Motor Co.*² as authority to preempt state tort law with respect to claims involving such products.³ Courts have found that the *Geier* case is limited to its unique facts. It does not apply to the circumstances at issue.

¹ The preemption language would immunize manufacturers of helmets used for other motor vehicles as well.

² 529 U.S. 861 (2000).

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.

I. NHTSA is Attempting to Afford Immunity to Motorcycle Helmet Manufacturers While Undercutting Motorcyclist Safety

NHTSA claims that its regulations can preempt state requirements imposed on motor vehicle manufacturers, including sanctions imposed by state tort law. AAJ believes that NHTSA must remove the proposed language, which appears to preempt *any* defect claim with respect to motorcycle helmets. Preempting state tort law will prohibit individuals injured by defective helmets from holding manufacturers accountable, regardless of the factual circumstances, the inaccuracy of the safety testing, erroneous labeling and the number of people injured or killed. Such preemption language undercuts the objective of Federal Motor Vehicle Safety Standard (FMVSS) No. 18, *Motorcycle Helmets*.⁴ Although the purpose of this standard is to reduce deaths and injuries to motorcyclists and other motor vehicle users resulting from head impacts, the proposed preemption language decreases the safety of motorcycle helmets. NHTSA is removing a powerful incentive for ensuring protective helmets by barring injured motorcyclists from holding negligent motorcycle helmet manufacturers accountable. Preempting state tort law will leave injured individuals and their families with no financial recourse for injuries resulting from dangerous and defectively designed helmets, and manufacturers would have no incentive to redesign or address manufacturing defects.

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

At a Senate hearing regarding the agency's 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.⁵ Senator Tom Coburn (R-OK) questioned the rationale of proposed preemption rules, noting that 26 state attorney generals wrote to NHTSA stating preemption "would be a major setback to vehicle safety, yet NHTSA has not offered any explanation for why the rights of a motorcyclist to seek a state tort remedy for harm done to them should be taken away."

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, who will remain uncompensated for the needless deaths and injuries that occur due to the foreseeable negligence of manufacturers."⁶ Similarly, the House noted that

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- 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 49 CFR § 571.218.

⁵ *Oversight Hearing on Passenger Vehicle Roof Strength: Hearings Before the Subcomm. on Consumer Affairs, Insurance, and Automotive Safety of the S. Comm. on Commerce, 110th Cong. (2008).*

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).

“[t]here is no indication that Congress intended NHTSA to preempt state common law.”⁷ As Congressional intent is the touchstone of preemption, and Congress did not intend to preempt state common law, NHTSA has no basis to do so in the preamble to its federal regulations.⁸ Therefore, AAJ urges the agency to remove any references to the preemption of state common law from the preamble to this rule.

III. 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.⁹ NHTSA also claims that in addition to express preemption, this rule can preempt state tort law pursuant to *Geier*. Given that *Geier* is an unusual case and federal law maintains a presumption against preemption, AAJ believes that NHTSA must remove any language seeking to preempt state common law.

A. *Geier* Does Not Apply to Other Federal Motor Vehicle Safety Rules

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 November 2007, the Fifth Circuit Court of Appeals explored the very same issue in *O’Hara v. General Motors Corp.*¹⁰ In that case, the court found that FMVSS 205, which sets forth vehicle window glazing standards, does not preempt common law claims against automobile manufactures for failing to improve the glass used on its vehicles.¹¹

Like NHTSA is attempting to do here, the defendant General Motors also claimed that the federal rules preempt state common law claims pursuant to *Geier*. The Fifth Circuit 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 tort suits, 49 U.S.C. § 30103(e).”¹² The court found that FMVSS 208, at issue in *Geier*, was an anomaly given that it permitted manufacturers to choose between specific options. Implied conflict preemption in *Geier* was premised on the federal government’s explicit policy against requiring all cars to have airbags, instead opting for a gradual phase-in using a variety of passive protection devices that carmakers could choose from. The standard deliberately provided the manufacturers with a range of choices among the different passive restraint devices. However,

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

⁹ 49 U.S.C. §30103(b)(1).

¹⁰ 508 F.3d 753 (2007).

¹¹ *Id.* at 3.

¹² *Id.* at 1.

FMVSS 205 is a materials standard that sets a safety ‘floor’ to ensure that the glazing materials used by manufacturers meet certain basic requirements.”¹³

The court reasoned that such a construction was necessary, because the policy behind the rule was to reduce injuries.¹⁴ The court also noted that there was no language in the rule that provided detailed implementation time lines, full vehicle testing procedures, nor was there language 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*.¹⁵ Standard 205 did not establish a federal policy which would be frustrated by a state common law rule for advanced glazing.

This rule, similar to FMVSS 205, establishes *minimum performance requirements* for helmets designed for use by motorcyclists and other motor vehicle users. The rule 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 helmet standard also does not preempt state common law remedies.

B. Federal Law Has Maintained a Presumption Against Preemption

Supreme Court decisions generally contain a presumption that state law is not preempted by federal regulations. The *Geier* case is the exception to this rule. Since *Geier*, the Supreme Court has been hesitant to find the existence of conflict preemption. For example, the Supreme Court in *Bates v. Dow Agrosciences LLC* stressed the requirement that a court reviewing a preemption claim must begin its analysis with the “basic presumption against preemption.”¹⁶ The Supreme Court also has held that the finding of conflict preemption requires the existence of a legal conflict.¹⁷ However, in citing *Geier*, NHTSA states, “[We] ha[ve] not outlined such potential State requirements in today’s rulemaking...NHTSA may opine on such conflicts in the future, if warranted.”¹⁸ It is inappropriate to rely on *Geier* for conflict preemption without the existence of a direct conflict on the record, as NHTSA concedes has not been established.

Given the narrow *Geier* holding, the Supreme Court’s decision in *Sprietsma v. Mercury Marine*¹⁹ is a more appropriate case to determine whether a rule preempts state tort law. *Sprietsma* interprets a savings clause which is similar to the savings clause included in the National Traffic and Motor Vehicle Safety Act (NTMVSA)²⁰ – the Act at issue here. In

¹³ *Id.* at 5.

¹⁴ *Id.* at 4-8.

¹⁵ *Id.* at 6.

¹⁶ 544 U.S. 431, 449 (2005). *See id.* at 455 (stating that the Supreme Court is becoming “increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied preemption.”). This reluctance reflects that preemption analysis is not “‘a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,’ but an inquiry into whether the ordinary meanings of state and federal law conflict.” *Id.* at 459 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n.*, 505 U.S. 88, 111 (1992)).

¹⁷ *See, e.g., Medtronic v. Lohr*, 518 U.S. 470, 511 (1996).

¹⁸ 73 FR 57297.

¹⁹ 537 U.S. 51 (2002).

²⁰ 49 U.S.C. § 30103(e).

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.”²¹ 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.”²² 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.

AAJ appreciates the opportunity to submit these comments in response to the agency’s proposed rule regarding motorcycle helmets. 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

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²¹ 537 U.S. at 64.

²² *Id.* (quoting 46 U.S.C. § 4311(g)).