



November 12, 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: Occupant Crash Protection; Docket No. 2008-0149**

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 occupant crash protection. *See* 73 Fed. Reg. 52939.

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. The preemption language is so broad that it could give manufacturers immunity from lawsuits by families with children injured as a result of defective child restraint systems, thereby leaving them without compensation for their injuries. Congress also 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. In addition, NHTSA fails to explain its decision to include this language in the preamble, even though it was not included in the prior version of the rule. 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.<sup>1</sup>

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<sup>1</sup> 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.

## **I. NHTSA Should Not be Providing Immunity to Manufacturers at the Expense of Children's Safety**

NHTSA claims that its regulations can preempt State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law. The proposed preemption language is written so broadly that if NHTSA passes the final rule as written and a court defers to NHTSA's claim that this rule preempts common law claims, consumers will be unable to hold manufacturers accountable for their defective child restraint systems. In fact, the language appears to preempt *any* defect claim with respect to such restraint systems – no matter how glaring the defect, no matter how inaccurate the testing, no matter which component piece of equipment may be found to be defective, and regardless of how many children are injured as a result of the defect. Children and their families should not be left without remedies for injuries caused by a restraint system simply because NHTSA has decided to remove the sunset provision under this proposed rule. Therefore, although AAJ believes that preamble language does not have any substantive effect,<sup>2</sup> AAJ urges NHTSA to eliminate this language.

This language could undercut the very purpose of the rule. Instead of enhancing children's safety in motor vehicle crashes, the proposed preemption language *decreases* the safety of child restraint systems. Barring injured children and their families from holding negligent booster seat manufacturers accountable will severely hamper children's safety since this removes a powerful incentive for ensuring safe equipment. Families would be left with no financial recourse for injuries resulting from dangerous and defectively designed restraint systems, 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 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.<sup>3</sup> 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

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<sup>2</sup> A federal court evaluated the preemption statements included in a regulatory preamble. *Perry v. Novartis*, Civ. Action No. 05-5330, 2006 U.S. Dist. LEXIS 75319 (E.D. Pa. Oct. 16, 2006). The court explained that preamble language is "not a binding portion of the regulations, but is instead an advisory opinion." *Id.* at \*13 (citing 21 C.F.R. § 10.85(d)(1) (identifying as an advisory opinion "[a]ny portion of a Federal Register notice other than the text of a proposed or final regulation, e.g., a notice to manufacturers or a preamble to a proposed or final regulation"))).

<sup>3</sup> *Oversight Hearing on Passenger Vehicle Roof Strength: Hearings Before the Subcomm. on Consumers Affairs, Insurance, and Automotive Safety of the S. Comm. on Commerce*, 110<sup>th</sup> Cong. (2008).

vehicle purchaser to seek a common-law remedy for harm done to them should be taken away.” These comments would apply to this occupant crash rule 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.”<sup>4</sup> Similarly, the House noted that “[t]here is no indication that Congress intended NHTSA to preempt state common law.”<sup>5</sup> 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.<sup>6</sup> Therefore, AAJ urges the agency to remove any references to the preemption of state common law from the preamble to this rule.

## **II. NHTSA Offers No Rationale for Its Decision to Claim Preemption in this Occupant Protection Standard**

NHTSA’s proposed rule merely seeks to remove the sunset of a requirement that a lap belt must be lockable to tightly secure a child restraint system.<sup>7</sup> Yet, in making this limited change, NHTSA decided to add this preemption language in the preamble, which was not included in the preamble to 1999 rule at issue. NHTSA believed the rule did not have federalism implications or preempt State law and, therefore, did not require preparation of a federalism assessment in accordance with Executive Order 12612.<sup>8</sup> Yet, under the successor to this Executive Order, NHTSA now states that virtually the same rule preempts State law under express preemption and conflict preemption.<sup>9</sup>

With NHTSA only removing the sunset provision as its change to the 1999 rule, there is no justifiable reason why NHTSA suddenly would claim that the rule may have preemptive effect and require consultation. It is unclear how this change in the rule could impact the rule’s preemptive effect. Therefore, NHTSA should delete any discussion regarding the rule’s potential preemptive effect.

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<sup>4</sup> 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).

<sup>5</sup> Letter from Cong. Henry Waxman to Secretary Mary Peters Re: Roof Crush Resistance for Motor Vehicles (June 27, 2008).

<sup>6</sup> *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

<sup>7</sup> *Federal Motor Vehicle Safety Standards; Occupant Crash Protection*; Notice of Proposed Rulemaking, 73 Fed. Reg. 52939, 52939 (Sept. 12, 2008).

<sup>8</sup> *Federal Motor Vehicle Safety Standards; Child Restraint Systems; Child Restraint Anchorage Systems; Final Rule*, 64 Fed. Reg. 10786, 10813 (Mar. 5, 1999).

<sup>9</sup> 73 Fed. Reg. at 52941.

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

Sincerely,

A handwritten signature in black ink that reads "Les Weisbrod". The signature is written in a cursive style with a large, prominent initial "L".

Les Weisbrod  
President  
American Association for Justice

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