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Andrew Tauber and Erika Jones,
Mayer Brown LLP

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*Contributed by **Andrew Tauber** and **Erika Jones**. Andrew Tauber and Erika Jones are partners in **Mayer Brown LLP's** Washington, DC office. Tauber, a member of the firm's Supreme Court & Appellate practice, frequently litigates preemption issues on behalf of clients in heavily regulated industries. Jones, former chief counsel for the National Highway Traffic Safety Administration, regularly represents automotive and other manufacturers in regulatory and judicial proceedings.*

Part 2: A Regulatory Basis for the Implied Preemption of State-Law Design-Defect Claims

As discussed in **Part 1** of this article, the National Highway Traffic Safety Administration (NHTSA) has issued an Advance Notice of Proposed Rulemaking (ANPR) announcing the agency's consideration of a policy that would encourage diversity in autonomous-vehicle design. If adopted, that policy will foster the development and deployment of autonomous vehicles by helping insulate manufacturers from state-law design-defects claims.

The key to understanding the significance of NHTSA's ANPR is *Geier v. American Honda Motor Co.*, **529 U.S. 861** (2000), the Supreme Court's seminal decision on preemption of common-law design-defect claims in the automotive context. In *Geier*, the plaintiff was injured in a collision despite wearing shoulder and lap belts. The plaintiff asserted state-law design-defect claims, contending that the car she was driving should have been equipped with airbags. The Supreme Court affirmed the dismissal of the plaintiff's claims, holding that they were preempted by federal law notwithstanding the savings clause codified at **49 U.S.C. § 30103(e)**.

When the car driven by the plaintiff was manufactured in 1987, a federal motor vehicle safety standard, FMVSS 208, required that cars be equipped with passive restraints, but did not specify the type of passive restraint to be used. Thus, FMVSS 208 gave manufacturers unfettered discretion to choose between airbags, automatic seatbelts, and other passive-restraint technologies that satisfied the performance standard embodied in the regulation.

The Court began its analysis by rejecting the contention that **49 U.S.C. § 30103(b)(1)** expressly preempted the plaintiff's claims. The Court held that although FMVSS 208 established a federal safety standard applicable to passive restraints, although a tort duty could constitute a state-law "standard," although FMVSS 208 allowed manufacturers to decide which type of passive restraint to install, and although a state-law requirement to install airbags in particular was not "identical to the standard prescribed" by FMVSS 208, a state-law tort duty to install airbags was not expressly preempted by **§ 30103(b)(1)**. This was so, the Court explained, because **49 U.S.C. § 30103(e)** specifically saved common-law claims from preemption. If **§ 30103(b)(1)** were interpreted to preempt tort duties, then **§ 30103(e)** would rendered be a nullity.

That, however, was not the end of the Court's preemption analysis. The Court explained that the savings clause codified in **§ 30103(e)** "does *not* bar the ordinary working of conflict pre-emption principles.'" *Geier*, **529 U.S. at 869**. Thus, although the plaintiff's design-defect claims were not expressly preempted, they nonetheless would be impliedly preempted if they were "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, **530 U.S. at 372**.

Upon examining the history of FMVSS 208, the Court concluded that allowing private plaintiffs to use state tort law to compel the installation of air bags would indeed have thwarted Congress's goals as articulated by NHTSA when exercising its congressionally delegated authority "to prescribe motor vehicle safety standards." **49 U.S.C. § 30101**. The Court found that FMVSS 208 reflected the agency's determination "that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Geier*, **529 U.S. at 881**. The preamble published in the Federal Register upon adoption of FMVSS 208 stated NHTSA's belief that technological diversity would not only "promote public acceptance" of passive restraints, but "would help develop data on comparative

effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems." *Id.* at 879. Against this backdrop, the Court found that a state-law tort action that would "require[] manufacturers … to install airbags rather than other passive restraint systems" would "present[] an obstacle to the variety and mix of devices" that NHTSA sought. *Id.* at 881. Accordingly, the Court held that the plaintiff's design-defect claims were impliedly preempted.

As a subsequent case makes clear, the result in *Geier* depends on the fact that NHTSA did not merely tolerate, but instead affirmatively desired technological diversity. In *Williamson v. Mazda Motor of America, Inc.*, **562 U.S. 323** (2011), the Court had to decide whether a later version of FMVSS 208, which explicitly allowed automobile manufacturers to equip inner rear seats with either lap or lap-and-shoulder belts, preempted a state-law tort duty to install lap-and-shoulder belts in particular. The Court held that the later version of FMVSS 208 did not preempt common-law claims predicated on such a duty.

At first blush, *Williamson* seems inconsistent with *Geier*. The federal motor vehicle safety standard at issue in *Williamson*, like the earlier version at issue in *Geier*, gave manufacturers a choice with respect to the equipment that they chose to install; and, the tort claims asserted in *Williamson*, like the tort claims asserted in *Geier*, would have restricted that choice as a matter of state law. Despite these similarities, the Court held that the claims asserted in *Geier* were an obstacle to the achievement of congressional and regulatory objectives and thus preempted whereas the claims asserted in *Williamson* were not. According to the Court, the critical difference between the two cases was that in *Geier* NHTSA, acting on behalf of Congress, had given manufacturers discretion with respect to the choice of passive-restraint systems "in order to further significant regulatory objectives," whereas in *Williamson* giving manufacturers the discretion to install either lap or lap-and-shoulder belts was meant primarily to benefit manufacturers financially rather than to advance independent federal goals. *Williamson*, 562 U.S. at 335–36. Because "manufacturer choice" as to passive-restraint technology "was an important means for achieving [NHTSA's] basic objectives," *Geier* held that any state-law tort duty that eliminated that freedom of choice conflicted with, and was therefore impliedly preempted by, federal law. *Id.* at 331. By contrast, because NHTSA "had no interest in assuring a mix of [rear-seat safety-belt] devices," the claims asserted in *Williamson* did not stand as an obstacle to the achievement of federal objectives even though they too would "restrict the manufacturer's choice" of equipment. *Id.* at 333, 336. In other words, the seemingly inconsistent results in *Geier* and *Williamson* are explained by the extent to which "manufacturer choice was an important regulatory objective" in its own right intended to further a federal policy goal. *Id.* at 332.

Because NHTSA's October 2018 ANPR regarding a pilot program to study autonomous vehicles characterizes technological diversity as a way to achieve the agency's regulatory objectives, it—like the regulatory history considered in *Geier*—provides a foundation upon which manufacturers of autonomous vehicles will be able to build an implied-preemption defense to design-defect claims. In the ANPR, NHTSA declares its belief that

> in order to anticipate, identify and address potential safety concerns and realize the full promise of [autonomous vehicles], it is vital that the developers of vehicles with high and full driving automation have broad opportunities to gain practical, real world experience, in locations of their choosing, ***with different approaches to, and combinations of, hardware and software*** in order to learn which approaches and combinations offer the greatest levels of safety and reliability.

83 Fed. Reg. at 50875 (emphasis added). Leaving no doubt that technological diversity is a central component of the agency's regulatory strategy, NHTSA makes clear that it "seeks to facilitate research and data gathering involving these new and developing technologies ***in their various iterations and configurations***." *Id*. at 50876 (emphasis added). Furthermore, in articulating NHTSA's tentative view that "[o]n-the-road testing and evaluation" of autonomous vehicles "in locations of [manufacturers'] choosing" is "critical to the successful development and integration of these vehicles into the roads and highways throughout the country," the ANPR signals a possible federal intent that manufacturers be allowed to deploy autonomous vehicles with different designs everywhere without regard to potential state-law restrictions. *Id.* 50875.

The ANPR is clear evidence that permitting manufacturers to deploy autonomous vehicles equipped with varying technologies is meant to benefit NHTSA itself. The agency observes that "to establish [regulatory] standards that ensure safety without jeopardizing innovation, NHTSA must conduct significant research, as well as leverage research conducted

by outside entities, including industry and universities." **83 Fed. Reg. at 50876**. According to the ANPR, NHTSA expects the contemplated study "to generate the data needed to assist in developing methods of validating the safety performance of vehicles with high and full driving automation." *Id.* at 50876–77. The ANPR explains that encouraging the deployment of different automated systems will "enable [NHTSA] to learn from the testing and development of the emerging advanced vehicle safety technologies" and thereby "allow NHTSA to determine how to appropriately evaluate and regulate [autonomous] vehicles." *Id.* at 50873, 50880. Accordingly, to the extent the ANPR seeks comments on the parameters of the contemplated study, it does so to "facilitate the Agency's … learning from the testing and deployment" of autonomous vehicles. *Id.* at 50880.

Having made clear that NHTSA seeks diversity in autonomous-vehicle design "in order to further significant regulatory objectives" (*Williamson*, **562 U.S. at 335**–36), the ANPR establishes the factual predicate for implied preemption under *Geier* and *Williamson*.