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Federal Preemption: Car-Makers’ Cushion Against Air Bag Claims?

I. BACKGROUND

Despite the fact that our federal system of government is premised on the idea that the federal government and the individual state governments have largely separate and non-overlapping spheres of responsibility, over the years there have been numerous situations where the laws of the states and the laws of the federal government have come into conflict. The supremacy clause of the constitution provides that in such situations, the laws of the individual states must yield. This is the gravamen of the doctrine of federal preemption. It is often not clear whether such a conflict between state and federal law has actually occurred, and the determination of whether or not such a conflict has arisen is often a difficult one to make. The issue of federal preemption has been at the heart of a number of different cases in a number of different contexts.

1. In the landmark case of Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), in which the United States Supreme Court first addressed this problem, a steamboat operator, possessing the right to exclusive navigation of state waters, granted by New York, obtained an injunction to prevent another operator, who was licensed under an act of Congress, from navigating between New York and New Jersey. The Supreme Court dissolved the injunction, holding that the federally granted license prevailed over the state granted license. Id.

2. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

One area in which the issue of federal preemption of state law has been hotly contested in the last three years involves personal injury suits brought by injured automobile drivers and passengers against automobile manufacturers who did not install air bags in their cars. The typical case has been brought as either a negligence action, alleging that the manufacturer had not satisfied the duty of care, or as a products liability action, alleging that the car was defective due to the failure to install air bags. Preemption has been raised as a defense by manufacturers, claiming that a federal statute and federal regulations exist which govern "occupant crash protection," and which do not absolutely require air bags. The argument has continued that, by complying with the federal statute and regulations, via alternative safety measures, the manufacturers have an absolute defense to a state common law action.


8. See PROSSER & KEETON, supra note 6, at § 98.


11. Id. at § 571.208(S4).

12. Id.

In 1967 the Department of Transportation adopted Federal Motor Vehicle Safety Standard 208 requiring the installation of seat belts in automobiles. In 1970 this Safety Standard was amended to include a set of injury criteria that had to be met by some form of passive restraint system, including but not limited to airbags, for all
This defense has, in all the air bag cases decided in federal district court to date, in 1989, been procedurally raised as the basis for a motion for summary judgment. In this context, it matters little whether the claim is framed in negligence or as strict products liability. If it is the former, the standard at issue pertains to the conduct of the manufacturer. If it is the latter, the standard relates to the condition of the automobile. In either case, however, the issue is whether that standard is conclusively established by federal law.

In most of the district court air bag cases the defendants' preemption defenses have further been refined into two discrete, alternative bases of preemption. The first of these is express preemption, which occurs when the pertinent statute expressly declares that its provisions are to preempt state law. The second mode of preemption, implied preemption, is invoked where Congress has not definitively spoken to the preemption issue in the

occupant positions of all cars manufactured after July 1974. The federal regulations and statutes in effect in 1975, at the time that Mr. Cox's Pinto was manufactured by Ford, specifically authorized manufacturers to use three-point seat belts to meet the then existing injury criteria. Airbags were not decreed. Ford contends that this provision, [15 U.S.C. § 1392(d)] in conjunction with Safety Standard 208, constitutes an express preemption of the states' ability to impose any sort of airbag requirement.

Id. (emphasis added).

15. See supra note 6.
16. See supra note 8.
17. See supra notes 9-13 and accompanying text.
So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action—and the validation of congressionally authorized state or local action—flow directly from the substantive source of the congressional action coupled with the supremacy clause of article VI; such cases may pose complex questions of statutory construction but raise no controversial issues of power.

Id. (footnote omitted).


20. See Scurlock v. City of Lynn Haven, 858 F.2d 1521 (11th Cir. 1988). "In addition, preemptive intent may be inferred when Congress legislates comprehensively, thus occupying an entire field of regulation, or when state law actually conflicts with federal law and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 1523.

In pressing their implied preemption arguments in this appeal, each side relies extensively on the legislative history of the Act. As is often the case with legislative history, both sides have succeeded in gleaning passages that bolster their contrary positions.
statute, but where other factors indicate that preemption was, nonetheless, intended. These factors include considerations of whether concurrent state law regulation would frustrate the purpose of the federal legislation, whether there is a situation which demands "exclusive federal regulation in order to achieve uniformity vital to national interests" and whether simultaneous compliance with both state and federal regulations is an impossibility.

The federal statute which gives rise to the air bag preemption defense is the National Traffic and Motor Vehicle Safety Act of 1966 (hereinafter the "Act"). This statute directs the Secretary of Transportation to promulgate motor vehicle safety standards. The regulation pertinent to air bags is contained in the regulations of the National Highway Traffic Safety Administration, Department of Transportation. While this particular rule has been amended no less than twenty-five times in the last fifteen years, the provisions relating to the manufacturers' claim that they have complied with the rule regarding air bags have effectively remained unchanged. This regulation allows three options in order for the manufacturer to be in compliance: 1) a complete passive protection system, either automatic seat belts or air bags, which protect the occupants from frontal as well as angular impact; 2) a combination air bag and seat belt system to protect against frontal and angular impacts respectively; or 3) a lap and shoulder belt with warning system. The manufacturers have consistently chosen the third option.

Although we find the legislative history to the Act informative, no materials have come to our attention that we deem wholly dispositive of the issue before us. Even more important, we find the language of the statute itself a sufficiently clear expression of congressional intent without resort the Act's legislative history.

Id. at 186.
22. See infra notes 55-89 and accompanying text.
27. Id. at § 1392(a).
32. Id. at § 571.208(S4.1.2.2).
33. Id. at § 571.208(S4.1.2.3).
The controversy surrounding the preemption defense can be traced to two provisions of the Act. The first is entitled SUPREMACY OF FEDERAL STANDARDS: ALLOWABLE HIGHER STANDARDS FOR VEHICLES USED BY FEDERAL OR STATE GOVERNMENTS (hereinafter the "Preemption Clause"), which states:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a state shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard. Nothing in this section shall be construed as preventing any state from enforcing any safety standard which is identical to a Federal safety standard.

Both the title and the language of this subsection would seem to put to rest any controversy involving preemption, appearing to make congressional intent to preempt state law in the area of automobile safety equipment quite clear. However, Congress, in what appears to have been a deliberate attempt to confuse the issue, also included a "savings clause" in the Act, entitled CONTINUATION OF COMMON LAW LIABILITY, which seems equally clear that Congress intended no such preemption of state common law. The savings clause provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Thus, there exists a situation where the defendants have argued that the preemption clause acts to expressly preempt the common law claim, and plaintiffs have cited the savings clause to show that their common law claim is preserved. The manufacturers have argued, in

36. Id.
39. Id.
41. See, e.g., Cox v. Baltimore County, 646 F. Supp. 761 (D. Md. 1986). "Plaintiffs point to the savings clause of 15 U.S.C. Section 1397(c) as expressly preserving from pre-
the alternative, that, even if the common law claim is not expressly preempted, the Act and regulations impliedly preempt it.\textsuperscript{42}

To date, there have been twelve federal district court cases decided which involve the preemption defense to air bag claims,\textsuperscript{43} only one of which has been reviewed by a federal court of appeals.\textsuperscript{44} The holdings of these cases on the express and implied preemption issues have been as inconsistent as the provisions of the Act.\textsuperscript{45}

After having read these thirteen opinions, as well as the legislative history of the Act,\textsuperscript{46} one can appreciate why the courts have come to such widely varying conclusions. The statutory language is obviously unclear on the preemption issue,\textsuperscript{47} making a determination as to express preemption very difficult.\textsuperscript{48} The legislative history is just as misleading in its indicia of implied preemption. Nonetheless, it is possible, through careful analysis, to arrive at what must be the correct interpretation of congressional intent.

First of all, it must be recognized that this is not a situation where Congress has utterly failed to consider the preemption issue, a situation where an analysis of implied preemption would be appropriate.\textsuperscript{49} Congressional cognizance of the issue is demonstrated

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\textsuperscript{43} See supra note 4.

\textsuperscript{44} Wood v. General Motors Corp., No. 87-1750, slip op. (1st Cir. Dec. 28, 1988).

\textsuperscript{45} Three of the courts have held that plaintiffs' claims were not barred by either express or implied preemption. Four of the courts found that there was express preemption. Five of the courts found evidence of implied preemption, including three courts which had previously held that express preemption was absent. See infra note 49 and accompanying text.


\textsuperscript{47} See supra notes 35-41 and accompanying text.

\textsuperscript{48} "The application of the preemption doctrine to a particular case is often a matter of statutory construction and may well require a judicial determination of the legislative intent behind a specific federal statute." Bellmore v. Mobile Oil Corp., 783 F.2d 300, 303 (2d Cir. 1986).

\textsuperscript{49} Id.

Congressional purpose to preempt state law can be either express or implied. \textit{Absent express preemptive language}, Congressional intent to occupy a given field may be found from either a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the
by the two, albeit conflicting, provisions in the Act. It does not make sense to search for indicia of implied congressional intent to preempt, when Congress has expressly spoken on the subject. Despite the inherent reasonableness of this conclusion, three of the district courts have held that the Act does not expressly preempt the plaintiffs' air bag claims, but nevertheless have held that implied preemption barred plaintiffs' state common law claims. It is puzzling that a court could conclude that Congress implied that preemption was intended even though it had expressly said that it was not.

For this reason, the answer regarding the question of express preemption must lie in statutory interpretation, and not in an investigation of implied preemption. This process of statutory interpretation reveals that Congress did not intend to preempt a state common law air bag claim. While eight of the twelve district courts reached this conclusion, the reasoning underlying the conclusion of six of these courts is defective in that each of these courts went on to address the defendant's alternative defense of implied preemption. In doing so, each court tacitly found that there was an absence of express preemption in the Act. On the other hand, careful statutory interpretation discloses that there is an affirmative rejection of such preemption embodied in the Act. Such "reverse preemption" obviates the need for and, if implied preemption is found, refutes the results of an implied preemption analysis.

character of obligations imposed by it may reveal the same purpose.'

Id. (footnotes omitted) (emphasis added).


51. See supra note 48.


II. IMPLIED PREEMPTION

Notwithstanding the fact that express preemption theory must ultimately be found to control the disposition of common law air bag claims, it is easy to see how a court might erroneously decide a case based on the abundant indicia of congressional intent to impliedly preempt such claims. Therefore, the following analysis of implied preemption is undertaken with the caveat that it would only be appropriate to consider implied preemption when the express preemptive intent of Congress cannot be gleaned, which is not the case with the Motor Vehicle Safety Act.

One of the primary considerations in an implied preemption analysis is "[w]hether, under the circumstances of a particular case, state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." It is therefore necessary to ascertain the purpose and objectives of the Act. If the purpose of the Act is simply to provide the strictest safety standards possible, then state common law tort liability would clearly not be in conflict with the federal purpose. Undeniably, the imposition of such liability, based on a standard determined anew with each and every jury, would put tremendous pressure on the car manufacturers to put every safety device possible on every car. This would, presumably, in turn advance the congressional purpose of promoting safer cars. This reading of statutory purpose is supported by the first section of the Act, entitled CONGRESSIONAL DECLARATION OF PURPOSE, which provides: "Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."

The foregoing view was vigorously adopted in Richert v. Ford Motor Company. In rejecting the defendant's contention that uniformity was a major goal of the Act, which would be frustrated by the imposition of state tort liability, the court, citing a Second Circuit opinion, said that "the reduction of traffic accidents, rather than uniformity, was the overriding concern of Congress."

On the other hand, if there were one or more ancillary purposes

55. See supra note 49 and accompanying text.
58. Id.
60. Chrysler Corp. v Tofany, 419 F.2d 499, 510 (2d Cir. 1969).
motivating Congress when it passed the Act, it would appear more reasonable to disallow concurrent state activity in the regulation of occupant crash protection. One such goal, made obvious by the very structure of Standard 208,\textsuperscript{62} is to provide the manufacturers with some flexibility in achieving occupant crash protection. This reasoning was espoused by the court in \textit{Baird v. General Motors Corporation},\textsuperscript{63} which concluded that implied preemption was intended, and is supported by the fact that the regulations provide three alternative means of compliance.\textsuperscript{64}

Support for the notion that one of the goals of the Act is to provide the manufacturers with some leeway and some input into the methods for reducing highway carnage is found in the language of the Act itself. First is the definition of "Motor vehicle safety standards," which "means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, \textit{which is practicable}, which meets the need for motor vehicle safety and which provides objective criteria."\textsuperscript{65} The fact that one of the goals was to make the standards "practicable" suggests that the manufacturers, who are in a better position to assess practicability than is a governmental agency, should be afforded some discretion in the method used to achieve the desired level of safety.

The need for feasible standards is also echoed elsewhere in the statute. For example, section 1392(a) of the Act provides that "each federal motor safety standard shall be practicable . . ."\textsuperscript{66} In addition, the Secretary of Transportation is instructed to "consider whether any such proposed standard is reasonable, practicable and appropriate . . . and consider the extent to which such standards will contribute to carrying out the purposes of this chapter."\textsuperscript{67}

The legislative history of the Act buttresses this argument. The section of the Senate Report entitled "Purpose and Need"\textsuperscript{68} states: "This legislation reflects the faith that the restrained and responsible exercise of federal authority can channel the creative energies and vast technology of the automobile industry into a vigorous and

\begin{itemize}
\item \textsuperscript{62} 49 C.F.R. § 571.208 (1987).
\item \textsuperscript{63} 654 F. Supp. 28, 32 (N.D. Ohio 1986).
\item \textsuperscript{64} See 49 C.F.R. § 571.208 (1987).
\item \textsuperscript{66} \textit{Id.} at § 1392(a).
\item \textsuperscript{67} \textit{Id.} at § 1392(f)(3) and (4).
\item \textsuperscript{68} S. REP. NO. 1301, 89th Cong., 2d Sess. 4, \textit{reprinted in} 1966 U.S. CODE CONG. & ADMIN. NEWS 2709.
\end{itemize}
competitive effort to improve the safety of vehicles." This passage makes clear that a secondary purpose of the Act is to encourage the car-makers to become involved in the process of improving automobile safety. Later in the same section, the report proclaims that "[i]t is the committee's judgment that the enactment of this legislation can further industry efforts to produce motor vehicles which are, in the first instance, not unduly accident prone." It is also obvious that if flexibility is accepted as a major purpose of the Act, as the foregoing excerpts suggest that it should, then liability imposed on the basis of state common law does stand as an obstacle to the achievement of that objective.

The preamble to the final rulemaking for the Occupant Crash Protection regulations suggests a second ancillary purpose to be achieved by the Act. That goal is to promote public acceptance of whatever safety equipment is installed in cars. This again indicates that the manufacturers should be given some leeway in the area of installing safety equipment, since they, with their sophisticated public relations and advertising capabilities, can best advance public acceptance. The imposition of state tort liability is seemingly inconsistent with this goal.

A final collateral goal of the Act would appear to be the promo-

69. Id.
70. Id. at 2712 (emphasis added).
71. See also Senate Report 1301 at 2713-14:

Unlike the General Services Administration's procurement standards, which are primarily design specifications, both the interim standards and the new and revised standards are expected to be performance standards, specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. Such safe performance standards are thus not intended or likely to stifle innovation in automotive design.


72. However, the same section also proclaims: "The committee intends that safety shall be the overriding consideration in the issuance of standards under this bill." Id.
74. Care must be taken when attempting to infer congressional intent, as opposed to agency intent, from the promulgation of regulations. In discussing the FDA regulations applicable to DPT vaccines, the federal district court for the District of Utah recognized that: [W]e realize that pursuant to her statutory authority, an administrator may promulgate regulations, and may make statements on her own authority. However, the federal government does not always speak with one voice and it is the intent of Congress that determines the scope of the preempted field. In such situations, the pronouncements of Congress must control over contrary statements by administrators. Patten v. Lederle Laboratories, 655 F. Supp. 745, 750 (D. Utah 1987).
tion of a uniform set of safety standards. Both the Senate Report on the Act and the House Report indicate that Congress had uniformity of standards in mind when the Act was passed. It is obvious that "[t]his purpose would be entirely frustrated by permitting individual states to adopt tort rules which would permit liability to be imposed upon manufacturers because of the absence of air bags." 

The discussion to this point has implicitly assumed that a congressional purpose to achieve a reduction in highway deaths and injuries, which would appear to allow state tort law to function concurrently, and the potential subsidiary purposes, which would be frustrated by such common law intervention, are themselves at odds. However, this apparent clash in purposes is not necessarily present. It is possible that Congress felt that the best way to achieve the primary goal of improved automobile safety is through the achievement of the secondary goals of flexibility for the manufacturers, public acceptance of the safety measures and uniformity of standards. If this were the case, then tort liability, which interferes with the accomplishment of the secondary goals, would indirectly be interfering with the primary goal and would be impliedly preempted. It would therefore appear that the congressional approach to the problem of improving highway safety demands that the statute impliedly preempt state common law liability awards.

In addition to addressing the purpose of the Act, an additional

76. See supra notes 59-61 and accompanying text.
79. "Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as the industry will be guided by one set of criteria rather than a multiplicity of divers standards." Id. at 17. See also Senate Report 1301 at 2720, wherein the report provides: "that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." Id.
81. See supra notes 57-61 and accompanying text.
82. See supra notes 62-80 and accompanying text.
83. See supra notes 57-58 and accompanying text.
84. See supra notes 62-71 and accompanying text.
85. See supra notes 73-75 and accompanying text.
86. See supra notes 76-80 and accompanying text.
87. See International Paper Co. v. Ouellette, 107 S. Ct. 805, 813 (1987)(quoting Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 477 (1984)), wherein the Court stated: "A law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." Id.
basis for analyzing whether Congress has intended to impliedly preempt state common law claims is to search the legislative history for clues as to the respective roles of the federal government and the states as envisioned by Congress. The Senate Report states that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." This language implies that there is room for state regulation and that state tort law has a place in the regulatory scheme. However, the Report makes clear that the states' role is to be merely "consultive." The fact that the states' role is to be limited to being consultive rejects the argument that the states can have an active role, via the imposition of tort liability, in the setting of those standards. Consequently, it would again appear that implied preemption was intended.

III. EXPRESS PREEMPTION

Despite the fact that an implied preemption investigation would undoubtedly lead one to conclude that Congress must have intended that the Act and accompanying regulations preempt state tort law relating to occupant crash protection, statutory interpretation of the Act shows that Congress expressly rejected such preemption. As stated above, the preemption clause prohibits the states from establishing motor vehicle safety standards pertaining to any aspect of performance governed by federal law, which are different than the federal standard. This provision would appear to preempt a common law air bag claim. At the same time, the savings clause states that compliance with a federal motor vehicle safety standard does not exempt any person from common law liability, a reverse preemption provision. In order to reach a conclusion as to congressional intent, these two seemingly contradictory subsections must be reconciled. This can be accomplished either through a narrow reading of the savings clause, which dictates that the air bag claims must be preempted, or through a narrow reading

89. Id. at 2715. "The committee is mindful of the contribution which the States have made toward the development of vehicle safety standards over the years and expects this contribution to continue in a consultive role." Id.
90. See supra notes 55-89 and accompanying text.
92. Id.
93. Id. at § 1397(c).
94. Id.
Federal Preemption

of the preemption clause, which mandates the opposite result. For the reasons discussed below, the second construction must be the correct one.

A narrow reading of the savings clause was explicitly adopted by only one of the twelve district courts.\(^9\) What is intended by the term “narrow reading” is “that compliance with the federal standards does not protect an automobile manufacturer from liability for design or manufacturing defects in connection with matters not covered by the federal standards.”\(^9\) This interpretation is espoused and more fully explained in a recent law review article.\(^7\)

The author, Professor Wilton, explains that there are two types of federal preemption. The first, which he calls “type 1,” occurs when Congress “occupies the field” so that the states are prevented from regulating in that area at all.\(^8\) The second, termed “type 2” preemption, occurs when Congress has not “occupied the field,” choosing to regulate only certain aspects of the subject matter, but where a purported state regulation directly conflicts with the limited federal regulation.\(^0\) He then posits that the savings clause preserves “type 2” preemption but defeats “type 1” preemption.\(^1\)

All of this really boils down to a narrow reading of the scope of the savings clause.

Dubbing the foregoing construction a “conflict analysis,”\(^2\) Professor Wilton illustrates its application with an example involving federal regulation of headlight brightness.\(^3\) He explains that a state common law claim that a car’s headlights were not bright enough would be preempted because the savings clause, as narrowly construed, would not act to preserve that common law claim.\(^4\) On the other hand, a common law claim that the tail lights were not bright enough would not be preempted because this claim would be based on an aspect of performance not directly addressed by the federal regulations. Therefore, such a claim would

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96. Id. at 784 (emphasis added).
98. Id. at 12.
99. “Purported” because the ultimate validity of the regulation is the question in issue.
100. Wilton, supra note 97, at 12-13.
101. Id. at 22.
102. Id.
103. Id.
104. Id.
be preserved by the savings clause.105

The foregoing argument is based on the reasoning that to read the savings clause more broadly would "result in its frustrating, indeed defeating, the purpose of the Safety Act of establishing uniform standards."106 While this rationale does make some sense, in as much as uniformity does appear to be at least a secondary purpose of the Act,107 it has one fatal flaw: the words of the savings clause do not say what Professor Wilton claims they say.108 The savings clause says that "compliance with any Federal . . . standard . . . does not exempt any person from any liability under common law."109 It does not say that compliance with a federal standard does not exempt any person from common law liability arising from a federally non-regulated aspect of performance. Professor Wilton even acknowledges that the plain language of the savings clause does not support his analysis. "If the savings clause were read in literal and simplistic fashion to relieve state common law from normal rules of preemption, the state common law could frustrate the purposes of the federal regulatory scheme and effectively nullify the federal law."110 It is doubtful that his elaborate, policy-driven interpretation is preferable to a "literal and simplistic"111 reading.

Professor Wilton alludes to the following comment in the Senate Report on the Act112 to buttress his interpretation: "[c]ompliance with . . . [federal safety] standards would thus not necessarily shield any person from product liability at common law."113 He interprets this to mean that compliance with federal standards only shields a defendant if the state common law claim arose from an aspect of performance directly addressed by the federal regulations, and not otherwise.114 His argument is that if the savings clause was an absolute savings clause, the word "necessarily" would have been omitted.115 However, there is another, more per-
suasive explanation for the limitation expressed by the "not necessarily" language. This interpretation requires reading that sentence in the context of the entire section of the Senate Report, entitled "Effect on State Law," in which it is contained.116

The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards not only be strong and adequately enforced, but that they be uniform throughout the country. At the same time, the committee believes that the States should be free to adopt standards identical to the Federal standards. . .so that the States may play a significant role in the safety field by applying and enforcing standards over the life of the car. Accordingly, State standards are preempted only if they differ from Federal standards applicable to the particular aspect of the vehicle or item of vehicle equipment (sec. 104).

The States are also permitted to set more stringent requirements for purposes of their own procurement. Moreover, the federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would not necessarily shield any person from product liability at common law.117

The repeated references in this section to identical state and federal standards provides the clue to interpreting the "not necessarily" language. This sentence is better read to mean that compliance with a federal standard only shields a defendant from common law liability if the federal standard is identical to the state standard, and not otherwise. Indeed, the quoted passage says exactly this.118 This is a logical interpretation since compliance with a federal standard would necessarily result in compliance with an identical state standard, and therefore constitute an absolute defense to a tort claim. Consequently, it would seem that a construction of the "not necessarily" language based on the identical nature of the state and federal standards is more persuasive than a construction based on a "conflict analysis."119 Moreover, because a "plain meaning" construction of the savings clause does not support a narrow reading of that provision,120 and because the only non-policy basis for that reading to be found in the legislative history is inadequate to overcome a literal reading,121 this clause can-

117. Id. (emphasis added).
118. "State standards are preempted only if they differ from Federal standards applicable to the particular aspect of the vehicle or item of vehicle equipment" Id.
119. See supra notes 97-115 and accompanying text.
120. See supra notes 108-111 and accompanying text.
121. See supra notes 112-115 and accompanying text.
not realistically be interpreted to apply only to state common law liability arising from an alleged defect not directly covered by the federal regulations.

The other option for harmonizing the two provisions of the Act is to read the preemption clause narrowly. Such a reading would exclude state common law damage awards from the purview of the term "safety standard" as used in that clause. This construction was adopted by five of the district courts, and seems to have been the main battleground in most of the cases. While there are very strong reasons for generally rejecting an interpretation that the imposition of common law liability does not constitute the setting of "standards," it is, nonetheless, impossible in the case of this particular statute to conclude that Congress intended anything else.

The rationale adopted by the court in Richart v. Ford Motor Company epitomizes the argument that imposition of common law liability does not amount to regulation or the setting of standards. The court repeatedly asserted that it did "not accept the premise that a state damage award 'compels' a manufacturer to install passive restraints. . ." The argument goes that:

[N]on-compliance with the federal safety standards constitutes a violation subject to civil penalties and injunctive relief. . . . An award of tort damages does not invoke this panoply of sanctions and prohibitions; rather, such an award is aimed at compensating a victim for tortious conduct. The manufacturer need not alter its future conduct but may instead choose to compensate the victim.

The foregoing reasoning adopted by the Richart court is faulty for a number of reasons. First, it ignores the fact that a damage award is typically many times greater than a fine and that, to the extent that regulatory impact is proportional to the amount of money involved, the damage award clearly regulates the manufacturer's conduct. Secondly, with respect to the Richart court's

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125. Id. at 1468.
126. Id. at 1469 (citing Wood v. General Motors Corp., 673 F. Supp. 1108, 1113 (D. Mass. 1987)).
127. "The underpinning of this argument is that a return of a large monetary award in
reasoning:

The same could be said, however, for traditional [written] state regulations which conflict with federal regulations. The manufacturer could always follow the federal standard and pay the fine for violating the state one. The preemption question is properly whether the manufacturer can comply with both state and federal standards, not whether he can comply with one and pay the price for resulting non-compliance with the other.128

Finally, the Richart approach presumes that the manufacturer has the option of complying with both the state standard and the federal standard. Imagine, however, the following scenario. As a result of several state tort damage awards on air bag claims in New Mexico, a manufacturer switches to a complete air bag system in its cars. Subsequently, a passenger in one of these cars, who is not wearing his lap belt, is injured in a collision in Massachusetts, despite the proper deployment of the air bag.129 The injured party now sues for damages, claiming that, by failing to install a 3-point belt system, the manufacturer had not complied with Massachusetts common law standards. The manufacturer is thus placed in a position where, by complying with the standards of one state, he is liable for non-compliance with the standards of another state. The manufacturer does not have the option of complying with “state law” because “state law” involves a potential multiplicity of standards.130

128. Wilton, supra note 97, at 19.
129. Such an occurrence is not merely fanciful. In the preamble to the promulgation of an amendment to 49 C.F.R. § 571.208 the Department of Transportation stated: “Airbags are not designed to provide protection at barrier equivalent impact speeds less than approximately 12 mph. In addition, to provide protection comparable to that of a 3-point belt, they must be used in conjunction with a lap belt.” 49 Fed. Reg. § 29001 (1984).
130. In Hughes v. Ford Motor Co., 677 F. Supp. 76 (D. Conn. 1987), the court reasoned that:

The manufacturer would, if plaintiffs were correct, be faced with a Hobson’s choice. If, as here, the choice was for the ignition interlock, [an alternative to air bags under Federal Motor Vehicle Safety Standard 208, see note 12 supra.] the claim would be that the lack of an airbag was a defect. If the choice was an airbag, the lack of ignition interlock would be claimed to be a defect. There is an even greater quandary. Having made the choice and faced with the claim of a defect in the absence of whichever device was not selected, here the airbag, the vagaries of jury standards of safety could result in a different result in each suit brought. The law, as argued by plaintiffs, would thus leave to a manufacturer no choice, contrary to Congress’ policy. Manufacturers would be obligated to install both devices at the expense of the consumer with no suggestion that dual installations produce any greater safety. Id. at 77-78 (footnote omitted).
There is a line of cases in federal court which specifically hold that the imposition of common law liability can be a powerful regulatory tool. The leading case in this area, *San Diego Building Trades Council v. Garmon*, was cited by four of the air bag courts. The United States Supreme Court in *Garmon* held that:

> The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary efforts to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

While, as a general rule, the *Garmon* approach is undoubtedly correct, and the view taken by the *Richart* court is unrealistic, in the case of the Motor Vehicle Safety Act the opposite conclusion is mandated. For reasons to which none of the courts who narrowly construed the preemption clause alluded, it appears that Congress did not intend to include common law liability in its conception of "setting of standards." This conclusion in turn allows the preemption clause and the savings clause to be reconciled.

Such an interpretation is based on the recognition that other provisions of the Act are in pari materia with the preemption clause and give some insight into the meaning of the term "standard" as used therein. The Act is replete with examples of the use of the word "standard" which indicate that Congress, when using that term, contemplated a written, legislatively, or administratively established norm. The Act states that "[t]he Secretary may by order amend or revoke any Federal motor vehicle safety standard. . ."; that "[t]he Secretary shall issue initial Federal motor vehicle safety standards. . .", that "the Secretary shall publish proposed Federal motor vehicle safety standards . . ."; and that

132. 359 U.S. 236 (1959)
135. *See* supra note 9.
137. "Of the same matter; on the same subject; as, laws pari materia must be construed with reference to each other." BLACK'S LAW DICTIONARY 1004 (5th Ed. 1979).
139. *Id.* at § 1392(h) (emphasis added).
140. *Id.* at § 1392(i)(1)(A) (emphasis added).
"the Secretary shall promulgate Federal motor vehicle safety standards. . . ."\textsuperscript{141}

The legislative history offers further examples which support this construction. For example, the legislative history alludes to the "standards produced by the committees of the Society of Automotive Engineers"\textsuperscript{142} and "interim standards, which will be promulgated. . . ."\textsuperscript{143} It also provides that "[t]he Secretary is directed to issue new and revised standards."\textsuperscript{144} In a section of the Senate Report on the Act entitled "Procedures on the Promulgation of Safety Standards,"\textsuperscript{145} the Senate committee further states: "The Secretary is directed to consult with . . . such other state and interstate agencies, including legislative committees . . . to encourage them to adopt standards which are identical to the federal ones (sec. 104)."\textsuperscript{146} Clearly, the Senate committee envisioned "standards" as emanating from legislative or administrative bodies rather than from the courts.

A final point to lend support to this construction can be found in the section of the Senate Report entitled "Effect on State Law,"\textsuperscript{147} which recites that "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care."\textsuperscript{148} The phrase "State common law standards of care" should be read as a single term, in contradistinction to the term "standard" which appears six prior times in that section.\textsuperscript{149} Thus, the term "standard," as used in the preemption clause, would be exclusive of "State common law standards of care." This interpretation allows the savings clause to preserve all state common law air bag claims, with the narrow exception of those where the manufacturer complied with identical federal and written state standards. As such, it is a "reverse preemption" provision with respect to state common law. As stated above, this conclusion renders moot an implied preemption analysis.

\textsuperscript{141} Id. at § 1392(i)(1)(B) (emphasis added).
\textsuperscript{142} S. REP. No. 1301, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2711 (emphasis added).
\textsuperscript{143} Id. at 2713 (emphasis added).
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 2715-16.
\textsuperscript{146} Id. at 2715 (emphasis added).
\textsuperscript{147} See supra notes 116-117.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
IV. WOOD V. GENERAL MOTORS CORPORATION

To date, only one of the twelve air bag cases decided in a United States District Court has been reviewed on appeal, that being Wood v. General Motors Corporation.\textsuperscript{150} This was a products liability action in which the trial court,\textsuperscript{151} after finding no express preemption in the Act,\textsuperscript{152} went on to look for indicia of implied preemption, only to find such indicia absent.\textsuperscript{153} Consequently, the defendant manufacturer's motion for summary judgment was denied.

On appeal, the United States Court of Appeals for the First Circuit conducted a thorough analysis of the Act and concluded that while express preemption was absent,\textsuperscript{154} implied preemption should be a bar to the plaintiff's common law claim.\textsuperscript{155} It therefore remanded the case to the district court for a disposition consistent with its opinion.\textsuperscript{156}

The analysis conducted by the court of appeals is superior to all of the district court analyses inasmuch as it embodies a genuine attempt to understand Congress' motivation in enacting the Motor Vehicle Safety Act, in light of the conditions prevailing in 1966. The court held that the type of lawsuit involved in this case, a tort action alleging defective design, was not known in the days preceding the passage of the Act.\textsuperscript{157} The court opined that because such a cause of action was unknown, Congress was not envisioning this type of suit when it composed either the "preemption clause"\textsuperscript{158} or the "savings clause."\textsuperscript{159} Because the preemption clause was not drafted with this type of action in mind, the court held that it did not apply to a negligent design suit, and consequently, that express preemption of this type of action could not possibly have been intended.\textsuperscript{160}

Similarly, the court rejected the plaintiff's contention, as adopted by the trial court, that the "savings clause" preserved the

\textsuperscript{150} No. 87-1750, slip op. (1st Cir. Dec. 28, 1988) [hereinafter No. 87-1750].
\textsuperscript{152} Id. at 1113-14.
\textsuperscript{153} Id. at 1114-18.
\textsuperscript{154} Wood v. General Motors Corp., No. 87-1750 at 33.
\textsuperscript{155} Id. at 48.
\textsuperscript{156} Id. at 68.
\textsuperscript{157} Id. at 18, 24-30.
\textsuperscript{158} Id. at 19.
\textsuperscript{159} Id.
\textsuperscript{160} See supra note 158 and accompanying text.
common law action.\textsuperscript{161} Again, the rationale was that if Congress was not cognizant of that cause of action, it could not have written the "savings clause" to preserve it.\textsuperscript{162}

The court buttressed its argument that Congress did not anticipate the problem presented by this suit by suggesting that even if Congress had been able to foresee defective design lawsuits, it could not have envisioned a situation where such a suit would have an effect which potentially overlapped the standard-setting function embodied in the Act.\textsuperscript{163} This is because defective design suits would, in most cases, have the effect of imposing design standards, while the Act and accompanying regulation contemplate performance standards.\textsuperscript{164}

After concluding that neither the "preemption clause" nor the "savings clause" applied to the action at hand, the court noted that the Act does not contain an explicit statement as to preemption, either pro or con, and that an implied preemption analysis was therefore appropriate.\textsuperscript{165} Having thus arrived at an implied preemption analysis, it was easy for the court to conclude that implied preemption prevailed.\textsuperscript{166} The primary basis for this result is that suits such as the plaintiff's would frustrate the goal of uniformity of standards embodied in the Act and regulations.\textsuperscript{167}

The Achilles' heel of the court's analysis is the conclusion that a cause of action for negligent design was unavailable to plaintiffs at the time that Congress was considering the Act,\textsuperscript{168} and that neither the "preemption clause" nor the "savings clause" applied to that cause of action.\textsuperscript{169} When considering the court's assertion that Congress "did not envisage this peculiar type of lawsuit,"\textsuperscript{170} one inevitably wonders what type of lawsuit Congress was contemplating when it wrote: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any
person from liability under common law." The same question comes to mind with respect to several excerpts from the legislative history cited by the court to support its contention, including "common law standards of care," "rights of parties under common law particularly those relating to warranty, contract and tort liability," "common law remedy," and "common law on product liability."

In answer to this question, the court offers only the following response: "Instead Congress had in mind the then customary 'State common law standards of care' pertaining to the negligent operation or manufacture of vehicles, coupled, no doubt, with warranty claims then customary, none of which had the potential to create the current problem."

Addressing each of these causes of action seriatim, in light of the language of the "savings clause," it appears that none of them are a plausible and exclusive alternative to a negligent design suit as the object of congressional attention. First, to suggest that in the "savings clause" Congress meant that compliance with a federal safety standard would not exempt a person from liability for negligent operation of the vehicle, belies the weakness of the court's argument. Compliance with a safety standard relates to actions of the maker of the car, while negligent operation bears upon behavior of the driver.

Second, the court would have us believe that Congress meant that compliance with a federal safety standard would not exempt a person from liability for negligent manufacture of the vehicle. At least with this suggestion, the party responsible for "compliance" is the same party who is potentially "exempt . . . from liability under common law." However, the "savings clause" could then only have meaning in situations where a manufacturing defect was such as to give rise to potential common law liability, while at the same time rendering the vehicle in compliance with the federal safety standard. This would appear to be such a rare situation that it is impossible to believe that it was the motivation for the "sav-

172. No. 87-1750 at 30-31.
176. Id. at 14, 230 (remarks of Senator Magnuson).
177. No. 87-1750 at 32-33.
ings clause.”

Finally, it is proposed by the court that Congress really had a warranty action in mind when it drafted the “savings clause.” While this is certainly possible, it too has serious problems. By 1966, forty-eight of the states had adopted the Uniform Commercial Code. As a result, by that time, warranty actions pertinent to automobiles were statutory and no longer based on common law; the words of the savings clause, however, make explicit reference to the “common law.” Even assuming that the vestiges of common law warranty were on the minds of members of Congress in 1966, the court’s claim that a warranty action did not have “the potential to create the current problem” is not convincing. “The current problem” refers to a lawsuit which “itself created an overlapping design standard so similar to FMVSS [Federal Motor Vehicle Safety Standard] as to raise the question of the former’s preemption by the latter.”

Contrary to the court’s assertion, a warranty action under the Uniform Commercial Code has precisely this potential. The code imposes an implied warranty of merchantability on goods sold by merchants. This provision requires that for “[g]oods to be merchantable [they] must be such as . . . (c) are fit for the ordinary purposes for which such goods are used . . .” The determination of whether a car is “fit for the ordinary purposes for which such goods are used” is exactly the kind of setting of design standards which can overlap with the federal standards.

In any event, the court appears not to have relied very heavily on warranty actions as an alternative to defective design suits as being in the forefront of congressional consciousness in 1966, since it listed them as a kind of “throw in,” along with the primary alternatives of negligent operation and negligent manufacture. Therefore, even though the court appears to make a strong case for the rarity of design defect cases before 1966, the majority concedes that “[w]e do not mean to suggest that broadened design liability, as reflected by Larsen v. General Motors Corp., was en-

179. See supra note 177 and accompanying text.
180. No. 87-1750 at 32.
182. Id.
183. See supra note 177 and accompanying text.
184. See supra note 157 and accompanying text.
tirely unforeseeable.”\textsuperscript{185} Because the alternatives advanced are so unpersuasive, it would appear that, contrary to the court's conclusion, a negligent design action was part of congressional thinking in 1966.

As to the related argument that Congress never expected design standards potentially arising from common law suits to overlap with the federal performance standards,\textsuperscript{186} the court itself recognized that “although design and performance standards are analytically distinct, in practice the line is not so clear.”\textsuperscript{187} If one rejects the conclusion that the Act in no way addressed actions alleging defective design, the court was no longer justified in even performing an implied preemption analysis, and the result previously suggested\textsuperscript{188} obtains.

V. Conclusion

It is not uncommon for Congress to enact legislation in which its intent vis-a-vis the preemption issue is not clear.\textsuperscript{189} It is, however, difficult to imagine a case where Congress could have affirmatively obfuscated the issue to a greater extent than it did with the Motor Vehicle Safety Act. This discussion has used twelve cases decided in United States District Courts and one United States Court of Appeals opinion as a backdrop. Assuming the validity of the conclusion reached herein, that being that common law air bag claims are not preempted by the Act, nine of those district courts, along with the Court of Appeals for the First Circuit, reached the incorrect result that the plaintiffs' common law claims were barred by federal preemption. This is a frighteningly high percentage of incorrect results. Even the three courts which reached the proper resolution failed to appreciate that the Act contains a reverse preemption provision which should have obviated the need for the implied preemption analysis undertaken by each.

While it is certainly incumbent on any court to perform a thorough analysis of the preemption issue in whatever context it arises, it is equally incumbent on Congress to make its intention on that subject as clear as possible. In this case, where Congress has camouflaged its intent to the point that three fourths of the United

\textsuperscript{185} No. 87-1750 at 26.
\textsuperscript{186} See supra notes 163, 164 and accompanying text.
\textsuperscript{187} No. 87-1750 at 60.
\textsuperscript{188} See supra notes 135-149 and accompanying text.
\textsuperscript{189} See supra note 3 and accompanying text.
States District Courts and the only United States Court of Appeals addressing the issue could not uncover it, Congress clearly has failed.

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