The Truth about Torts:

Regulatory Preemption at the National Highway Traffic Safety Administration

By William Funk, Thomas McGarity, Nina Mendelson, Sidney Shapiro, David Vladeck, and Matthew Shudtz

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About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation and improved public access to information. The Center for Progressive Reform is grateful to the Bauman Foundation, the Beldon Fund, and the Deer Creek Foundation for their generous support of its work in general.

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Executive Summary

Following the Supreme Court's influential decision in *Geier v. American Honda*,[1] the National Highway Traffic Safety Administration (NHTSA) has claimed that a number of new federal safety standards preempt state tort law. Meanwhile, auto manufacturers have attempted to convince state courts to dismiss lawsuits filed by injured motorists, claiming that the suits are impliedly preempted by existing safety standards. If federal courts start accepting these arguments on a broad scale, consumers will be deprived of the important protections provided by state common law.

The Center for Progressive Reform's report, *The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety*, published in September 2007, presents an overview of the preemption movement that has taken root in federal regulatory agencies. It recounts how the Food and Drug Administration, National Highway Traffic Safety Administration, and Consumer Product Safety Commission have led a government-wide initiative to claim that new regulatory standards preempt state tort law, regardless of the background law. That paper provides background information on the constitutional underpinnings of the preemption doctrine and a brief history of the Supreme Court's preemption analysis.

This white paper is the first of three papers in which the Center for Progressive Reform will take an in-depth look at why specific agencies' regulatory preemption initiatives create dangerous public policy. It begins with an overview of the statutory framework that governs NHTSA's development of vehicle safety standards. After describing the law on preemption in the automobile-safety context, the paper then outlines current trends in the courts' and NHTSA's analysis of the preemptive effect of vehicle safety standards. Finally, the paper describes the policy considerations that counsel against the preemption of state law through federal vehicle safety regulation. The primary reasons for retaining a complementary tort system include:

- *An underfunded agency:* The tort system is always there to provide consumer protection as a backstop when agency resources dwindle and regulatory staff lack the resources to develop new standards.
- *The slow development of federal regulations:* The tort system provides incentives for manufacturers to continue developing and installing new safety features, even though NHTSA's safety standards are revised at a glacial pace.
- *Agency capture:* The tort system is less susceptible to the influence of business interests than NHTSA, whose top political officials move back and forth from public office to positions at leading auto industry legal posts and lobbying firms.
- *Corrective and protective justice:* The tort system ensures compensation for the injuries and deaths caused by violations of common law tort standards and creates incentives to avoid them in the future.
- *Information production:* The tort system has institutional advantages over the regulatory system for producing certain information that is essential to ensuring a proper level of vehicle safety.

Background

The Law on Safety Standards

Congress enacted the National Traffic and Motor Vehicle Safety Act in 1966 in response to concerns about steadily increasing rates of injury on U.S. roadways and pressures from the growing consumer advocacy movement. The statute granted the Secretary of Transportation the power to set "objective" and "practicable" safety standards that "meet the need for motor vehicle safety."[2] That power has been delegated to NHTSA, which is responsible for setting safety standards after considering (1) "relevant available motor vehicle safety information;" (2) "whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed;" and (3) the extent to which the standard will further the congressional goal of reducing traffic accidents.[3] The legislative history of this seminal statute makes it clear that its primary purpose was, and is, to protect the safety of vehicle occupants.

The National Traffic and Motor Vehicle Safety Act was enacted in 1966 in response to concerns about steadily increasing rates of injury on U.S. roadways.

According to the Vehicle Safety Act, the regulations developed by NHTSA, known as Federal Motor Vehicle Safety Standards (FMVSS), are "*minimum* standard[s] for motor vehicle or motor vehicle equipment performance."[4] Some are defined in terms of performance (e.g., the magnitude and direction of pressure that a roof must be capable of withstanding),[5] while others set more specific design requirements (e.g., the specific components of electronic stability control systems that correct for understeer).[6] Performance-based standards give manufacturers wider latitude in choosing design details, while design standards can be utilized to ensure a minimum level of safety when a particular safety technology is in its infancy. Importantly, Congress intended for all NHTSA standards to be *minimum* standards, an approach that encourages manufacturers to compete on the basis of superior safety.

The Law on Preemption

When Congress gave the Department of Transportation the power to set vehicle safety standards, it expressly stated that the federal standards would have some preemptive effect:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.[7]

However, the breadth of this preemption clause is limited by the statute's savings clause, which reads:

> Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.[8]

The Supreme Court took up the task of interpreting the relationship between these two provisions of the Vehicle Safety Act, and their relationship to state tort law, in *Geier v.*

American Honda.[9] Alexis Geier sued Honda on a defective design theory because her 1987 Honda Accord was equipped only with manual shoulder and lap belts, not airbags or other passive restraints. Honda argued that either the Vehicle Safety Act's express preemption clause or NHTSA's FMVSS 208, which set passenger restraint standards, preempted Geier's lawsuit. The Supreme Court held that while the statute's express preemption provision only preempts state positive law and regulation, the savings clause ensures the continued viability of state common law claims only to the extent that they do not conflict with a particular federal standard. The Court ultimately held that Geier's lawsuit would conflict with FMVSS 208 because the safety standard allowed manufacturers to phase in the use of airbags and Geier's claim "would stand as an 'obstacle' to the accomplishment of that objective."[10]

Geier was a remarkable decision in several respects. First, the Court misjudges Congress' intent with respect to the Vehicle Safety Act's savings clause. By including the savings clause in a statute that establishes a regulatory regime involving *minimum* safety standards, Congress obviously recognized the mutually reinforcing roles of state common law and federal regulations and intended for the savings clause to preserve the availability of state common law in most cases.

Another remarkable aspect of *Geier* is the lesson that automobile manufacturers extracted from the narrowly drawn decision. Although the Court split 5 to 4 and the majority's decision was entirely dependent on the controversial history specific to FMVSS 208, the defense bar has taken it as an open invitation to make preemption claims in every automobile safety lawsuit that implicates a federal safety standard. But properly understood, *Geier* created only a limited universe of cases in which courts should consider preemption claims. Following the Supreme Court's ruling closely, a tort suit that would require a particular safety feature should only be preempted because it is an obstacle to federal policy in cases where the agency has explicitly considered requiring that particular safety feature but rejected it as not maximizing vehicle safety. However, defendant automobile manufacturers now make preemption claims as a matter of routine.

Auto manufacturers have also tried to read into *Geier* an expansion of the Supreme Court's obstacle preemption doctrine. Traditionally the Supreme Court has held that federal law preempts state law when operation of the state law would create an obstacle to achievement of the primary goals of the federal statute. For example, in *Geier*, the Court found that a tort-inspired requirement that all cars be equipped with airbags would stand as an obstacle to "the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car."[11] In other words, the *Geier* decision was based in part on NHTSA's determination that alternative protection systems would improve safety and any common law rule that would limit the alternatives available would create an obstacle to the achievement of increased fleet safety. Nonetheless, in cases following *Geier*, the defense bar has repeatedly made the argument that preemption arises out of a lawsuit's conflict with the "countervailing or moderating goals of the statute" like forestalling industry resistance to new design requirements, rather than conflict with the "primary" goals of promoting vehicle safety.[12]

At issue in the *Griffith* case was whether General Motors defectively designed the restraint system by only installing lap belts in the front center seat position.

The Response to *Geier*

While Congress has been silent on the issue of vehicle safety standard preemption following *Geier*, the courts and NHTSA have not. This section provides an overview of some important court cases and rulemaking trends.

The Courts' Response

Soon after the Supreme Court decided *Geier*, the Eleventh Circuit took on a case in which the preemptive effect of a different aspect of FMVSS 208 was at issue. In *Griffith v. General Motors*, the plaintiff claimed that GM defectively designed the restraint systems in her 1990 Silverado pickup truck by choosing to install only a lap belt in the front center seat position.[13] According to the court, under FMVSS 208, GM "was free to install either a completely automatic restraint system (automatic seat belts with or without air bags) or some form of belt system, either a lap belt for pelvic restraint or a shoulder/lap belt combination system."[14] In response to GM's argument that the defective design claim was preempted by FMVSS 208, the Eleventh Circuit held that "[i]f successful, [the plaintiff's] suit would foreclose an option specifically permitted by FMVSS 208. Therefore, it conflicts with that federal law and is impliedly preempted."[15]

The court's holding that preemption ultimately was rooted in a conflict with the agency's goal of maximizing manufacturers' choices about restraint systems contradicts good legal policy. As Professor Thomas McGarity points out in *The Preemption War*, the Eleventh Circuit's decision appears to substitute a policy of maximizing manufacturer choice for the Vehicle Safety Act's primary goal of improving vehicle safety.[16] This policy not only ignores the congressional concern for preserving the corrective justice function of the common law,[17] it creates a risk of giving NHTSA extensive power to preempt state law beyond what Congress intended simply by claiming "the state law strikes a different balance of statutory objectives than the federal approach."[18]

After *Geier* and *Griffith*, numerous other courts have found that FMVSS 208 preempts design defect claims against manufacturers who properly install restraint systems allowed under the standard.[19] By comparison, in *O'Hara v. General Motors*, the Fifth Circuit found that FMVSS 205, which sets requirements for the glass used in automobile windows, simply sets a minimum safety standard and is not inherently tied to any policy that would be frustrated by common law claims for defective design, manufacture, or marketing.[20] In reaching its conclusion, the *O'Hara* court rejected defense arguments that there was an agency policy that might preempt state common law. The court looked at the text of FMVSS 205, the history of NHTSA regulation in the area, and NHTSA and Department of Transportation statements construing the FMVSS' policy, and found that all of these resources supported the conclusion that FMVSS 205 is a minimum safety standard.[21]

Notably, neither the Fifth Circuit nor the Supreme Court gave any "special weight" to Department of Transportation analysis of the preemptive effect of the policy bound up in the FMVSS. The level of deference courts should give to agency determinations about general

questions of federalism raises questions rooted in administrative law, constitutional law, and public policy.[22] Professor Nina Mendelson enumerates "several factors that, taken together, weigh against *Chevron* deference to administrative interpretations of state law preemption."[23] Institutional competency is the primary issue – empirical analysis suggests that Congress and the courts are better suited to make well-reasoned decisions regarding the proper balance of governmental authority.[24] In addition, there is a potential for arbitrary decisionmaking when Congress gives an agency like NHTSA the power to preempt state law but does not indicate the factors that the agency should consider in assessing the preemptive effect of a regulation.[25]

NHTSA's Response

From NHTSA's perspective, the *Geier* decision and its progeny sent mixed signals about the agency's potential influence in federal courts' preemption decisions. As the Supreme Court made clear in *Geier*, NHTSA's explanation of the various goals and objectives it intends to accomplish through a particular safety standard will be given "substantial deference"[26] and can have a significant impact on federal courts' decisions about the preemptive effect of that safety standard. But, as the *O'Hara* case showed, the agency's impact on eventual preemption rulings is blunted by the fact that, although courts defer to NHTSA on the goals and policies the agency intends to further through a FMVSS, they will not defer to NHTSA on preemption determinations.[27]

To a limited degree, preemption-related provisions of two executive orders address the concerns about administrative competency and the potential for arbitrary decisionmaking by requiring agencies to analyze the preemptive effect of proposed rules in *Federal Register* notices. Executive Order 12988 requires agencies to specify, in clear language, the preemptive effect to be given to a regulation.[28] Executive Order 13132 instructs agencies to construe federal statutes as preempting state law "only where the statute contains an express preemption provision," where "there is some clear evidence that the Congress intended preemption of state law, or where the exercise of state authority conflicts with the exercise of Federal authority under the Federal statute."[29]

An examination of a number of proposed and finalized rulemakings published since the *Geier* decision reveals that NHTSA has taken three different stances on preemption in response to the Executive Order requirements.

For some safety standards, NHTSA provides an extensive discussion of the preemptive effect of the regulation. This discussion is always in support of the agency's claim that the standard preempts state tort suits. The three instances in which NHTSA has claimed that vehicle safety standards preempt state tort law are:

- The 2005 Notice of Proposed Rulemaking regarding roof crush resistance.[30] As part of its comprehensive plan to reduce the risk of injury from vehicle rollovers, NHTSA proposed upgrading the roof crush resistance standard. However, the agency chose to retain the old "static" roof crush test, which does not test rollover-induced roof intrusion nearly as well as the more modern "dynamic" test.

- The 2005 Notice of Proposed Rulemaking regarding rearview mirrors on trucks.[31] In response to a petition for rulemaking filed by a man whose grandson was killed after being struck and run over by a delivery truck, NHTSA has proposed requiring manufacturers to equip all straight trucks weighing between 10,000 and 26,000 pounds with either convex mirrors or rear video systems.
- The 2005 Notice of Proposed Rulemaking amending the definition of "designated seating position" for FMVSS.[32] NHTSA has, for years, recognized the reality that certain seating arrangements (e.g., benches and split seats) often lead to vehicle occupancy beyond the designated capacity of a particular vehicle. The revised definition is meant to ensure that all vehicle occupants are in designated seating positions and, therefore, protected by seat belts or airbags.

In other instances, NHTSA provides a cursory discussion of the preemption issue, providing the same boilerplate language in each case:

> In addition to the express preemption … the Supreme Court has also recognized that State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as an obstacle to the accomplishment and execution of a NHTSA safety standard. When such a conflict is discerned, the Supremacy Clause of the Constitution makes their State requirements unenforceable. See *Geier v. American Honda Motor Co.,* 529 U.S. 861 (2000). NHTSA has not outlined such potential State requirements in today's rulemaking, however, in part because such conflicts can arise in varied contexts, but it is conceivable that such a conflict may become clear through subsequent experience with today's standard and test regime. NHTSA may opine on such conflicts in the future, if warranted.[33]

Finally, there have been instances in which NHTSA has completely ignored the issue of preemption in the rulemaking analysis. The failure to address the preemptive effect of new or revised safety standards is a common problem for rulemakings initiated before 2005. For instance, in both the 2006 update of breaking strength requirements on child restraint webbing and the 2005 final rule on tire pressure monitoring systems, NHTSA simply stated that "the rule will not have sufficient Federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement."[34]

From a process standpoint, the fact that NHTSA rarely consults with the states regarding the local impact of its attempts at federal regulatory preemption is one of the most troubling aspects of the agency's record of compliance with the preemption-related Executive Orders.[35] States are responsible for a percentage of the Medicaid costs that will inevitably arise when crash victims cannot recover damages from automobile manufacturers. The National Conference of State Legislatures published a study in March 2006 that found potential transfer costs to the states of $48 million to $70 million per year if NHTSA's new roof crush resistance standard were to preempt state tort suits.[36]

Sound Public Policy Depends on Complementary Tort and Regulatory Systems

The preemption of state tort suits in the field of automotive safety presents a serious risk to the public. Federal safety standards often do not adequately prevent injuries or protect passengers when collisions occur. This section will explain why NHTSA's standards are not always sufficient and why the tort system is a necessary complement.

The Slow Evolution of Regulation

As best exemplified by the history of airbag requirements, the development of federal safety standards can be a torturously slow process. Informational demands, changes in agency political dynamics, and resource constraints are all factors that delay the implementation of new safety standards. In the meantime, vehicle safety technology continues to improve. Yet implementation of the new technology is not as widespread as it could or should be because NHTSA's safety mandates are so slow to develop.

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The agency has attempted to accelerate the FMVSS review process by adopting a policy of reviewing all safety standards on a seven-year cycle.[37] Additionally, President Bush's first NHTSA Administrator, Dr. Jeffrey Runge, started an initiative to reform NHTSA's rulemaking process so that new vehicle safety standards would be in Final Rule form within two years of the initiation of the rulemaking.[38]

But this aspirational timetable is insufficient given the external pressures that hinder NHTSA's ability to develop new standards. Congress has taken a number of actions that slow NHTSA's work, including mandating the adoption of specific new safety standards, which inevitably draws resources away from existing rulemakings. NHTSA can also be sidetracked by private parties' petitions for new rules, which the agency by statute is required to answer within a reasonable time at risk of resource-draining litigation. Finally, coordination with the White House's Office of Management and Budget can delay the adoption of new safety standards for a number of months, even after the Secretary of Transportation has approved NHTSA's rule. For example, DOT sent the congressionally mandated new rule for tire pressure monitoring systems to OMB on December 18, 2001; OMB sent it back to DOT on February 12, 2002 suggesting a number of significant changes; and the final rule (including analysis of OMB's concerns) was not published until June 5, 2002.[39]

In the end, these pressures, combined with resource constraints and the informational and research demands that attend any rulemaking, have resulted in multi-decade waiting periods for new vehicle safety standards. For example, the proposed new roof crush resistance standard is the first revision of the performance requirement for roof crush since 1973.[40] Yet, the new standard does almost nothing to prompt improvements in vehicle safety: 68 percent of the vehicle fleet already meets the standard.[41] And bringing the remainder of the fleet into compliance with the proposed standard would only prevent between 13 and 44

fatalities annually,[42] a small percentage of the nearly 500 deaths that occur each year as a result of vehicle roofs collapsing during rollover crashes.[43]

Many other NHTSA regulations are similarly outdated. FMVSS 202 – which sets standards for head restraints to prevent whiplash – was written in 1969 and not revisited until 2001.[44] A new standard was not finalized until 2007.[45] The safety standard for seatback strength, which protects vehicle occupants in rear-impact collisions, was originally drafted in 1971, based on a 1963 recommendation by the Society of Automotive Engineers. Though NHTSA initiated some work to revise the standard from 1974 through 1979, that effort was eventually abandoned, and the 1971 standard, which only required seatbacks to withstand 200 to 300 pounds of force, is still in effect. In 1989, a woman who lost the use of her legs as a result of a failed seatback petitioned the agency to change the standard. But even though NHTSA agreed that her proposal "warranted further consideration," it spent the next 12 years researching technical issues.[46]

NHTSA officials seem resigned to the fact that new safety standards are too slow in coming: Dr. Ricardo Martinez, NHTSA Administrator from 1994 through 1999, characterized the agency's rulemaking process as "broken" and Dr. Jeffrey Runge, Administrator from 2001 through 2005, said that NHTSA "cannot stay ahead of technology with regulations."[47]

State tort law provides a necessary complement to NHTSA's slowly developing regulatory work. When minimum safety standards fail to prevent injury – because they allow the use of outdated technology, are simply too lax, or for any other reason – the tort system creates an incentive for auto manufacturers to adopt safer technologies, regardless of the state of NHTSA's safety standards. Adoption of new safety technology in response to tort liability can also prompt improvements in NHTSA standards.

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Agency Capture

NHTSA is an agency where the "revolving door" between top-tier agency political appointments and auto industry executive office suites moves particularly smoothly. Jacqueline Glassman, the acting head of NHTSA at the time NHTSA claimed that the seat belt placement, rearview mirror, and roof crush resistance rules would preempt state tort law, was a senior attorney at DaimlerChrysler until becoming the agency's chief counsel in 2002.[48] After leaving, she went to work in the transportation and legislation practices at Hogan & Hartson.[49] Sue Bailey, who held the position of NHTSA Administrator during the end of the Clinton Administration and who was the face of the agency during the Ford Explorer/Firestone ATX tire ordeal, became a consultant to Ford after she left NHTSA.[50] Many other former agency officials have gone on to work for law firms, consulting groups, and public relations and lobbying firms that represent auto manufacturers, and many are drawn from industries ranks to lead the agency.[51]

The auto industry's organizational and resource advantages also give manufacturers a powerful voice in the early stages of the rulemaking process. The design costs associated

with improved safety standards fall exclusively and immediately on a small cadre of well-endowed corporations that can easily bring their collective resources to bear on an agency beholden to regulated parties for much of the information that new safety standards demand. Conversely, the risks posed by lax regulatory standards are "latent, diffuse, widely dispersed, of low probability, and nonexclusive," all qualities that make it difficult for injured parties and the concerned public to gather and employ the resources necessary to advocate for stronger standards.[52]

The tort system provides a useful solution to the problem of agency capture because the decisionmakers are less susceptible to undue corporate influence. Juries decide cases based on evidence that is presented according to rules designed to put both parties on equal footing, regardless of their available resources. They are "not invested in defending earlier regulatory actions" as are agency officials.[53] The sheer size of the American judiciary system prevents the possibility of manufacturers "capturing" judges, even given the fact that many judges are elected and need campaign donations. Moreover, jury trials and class action litigation counteract the public's "collective action problem"[54] by essentially asking juries to weigh in on the adequacy of a particular NHTSA standard.

An Under-Funded Agency

NHTSA was one of many federal regulatory agencies that suffered immense budget cuts in the early years of the Reagan Administration. Unfortunately, it has been one of the slowest to recover. After taking a 50-percent cut during the Reagan years NHTSA's budget has slowly climbed back upward, although as of 2001 it was still 18 percent below the 1981 levels in inflation-adjusted terms.[55] In terms of the agency's ability to develop or revise safety standards, budget shortfalls have led to a rulemaking staff that has shrunk from 103 to 62 between 1981 and 2007.[56] NHTSA's entire staff, including those responsible for vehicle safety research, consists of a mere 635 full-time employees.[57] Meanwhile, 50 million more vehicles are on U.S. roads today than were in 1981.[58] These facts underscore the importance of state common law that can act as a backstop when NHTSA regulations fail to protect motorists adequately.

Corrective Justice

Eliminating the availability of state tort law simply because an auto manufacturer has complied with NHTSA's minimum safety requirements unnecessarily destroys what legal scholars refer to as the "corrective justice" function of the law. The concept of corrective justice embodies the fundamental principle that, as a society, we should be able to rely on the legal system to correct situations where one person's actions unjustly diminish another person's health, wealth, or happiness.[59] It is a matter of basic justice, which Congress expressly preserved for crash victims by including a savings clause in the Motor Vehicle Safety Act.

Viewing the Vehicle Safety Act in its historical context shows that Congress intended to preserve the corrective justice function of tort law. Congress enacted the statute against a backdrop of steadily rising traffic fatalities[60] and a growing realization that automobile manufacturers were producing products that did not deliver the basic level of safety consumers should expect.[61] The Vehicle Safety Act, like numerous other health and safety statutes enacted in the 1960s and 1970s, was designed to expand consumer protection against irresponsible manufacturers. Accordingly, it left intact the existing protections afforded by state tort law.[62]

Preservation of the corrective justice function of tort law makes even more sense today, based on NHTSA's implementation of the Vehicle Safety Act. NHTSA rules describe what the agency has determined are the minimum requirements for avoiding unreasonable risks after factoring in information about costs and feasibility available to the agency at the time of the rulemaking. But once the standard is in place, it often will not be changed for years. Meanwhile, new technology and new information are constantly becoming available to car manufacturers.

When people are injured despite manufacturer compliance with existing safety standards, the corrective justice function of state tort law ensures that those injured are properly compensated in light of the evolving state of technology and new information available to the manufacturer. It recognizes that manufacturers have a responsibility to employ reasonably available technologies as they become available, not just when they are told to do so by the federal government. Companies should compensate those who are injured as a result of their failure to act responsibly, even if they are not subject to fines for violating any particular regulatory requirements.

Importantly, the corrective justice function of tort law is closely tied to the availability of civil jury trials. As an institution, juries play the essential role in our modern legal system of the democratic counterpart to technocratic decisionmakers. NHTSA standards are based on detailed analyses of crash statistics, engineering data, and economic factors; but what they fail to take adequately into account are the views of a broad cross-section of society regarding the proper standard of care owed to automobile passengers.

Information

Tort law also plays an important role in uncovering and disseminating information about vehicle safety, a task not adequately performed by NHTSA alone. Professor Thomas McGarity describes the informational interactions between regulatory agencies and the courts as "feedback loops … in which each institution draws on information, experience and different incentives of the other." [63] As a result of tort actions, agencies are able to obtain technical data, analyses of the state of the science from the relevant literature, and other information that can inform subsequent regulatory decisions. These data are available during the discovery process of a tort action, but companies are not required to disclose the data to NHTSA. Meanwhile, courts can look to the agencies for analysis of the risks and

benefits of regulated products, as well as regulatory standards that can factor into decisions about whether regulated parties have met their duty of care. McGarity notes that feedback loops "have unquestionably improved the quality of decisionmaking in both institutions."[64]

Preemption of state common law through NHTSA regulation destroys the feedback loop, unwisely limiting the useful information that NHTSA can get from the tort system. Indeed, the feedback loop is so important to vehicle safety regulation that Congress used it as the backbone of recent legislation. In response to the Ford Explorer/Firestone tire problem, Congress in 2000 passed the TREAD Act, which required NHTSA to develop a new system for gathering and analyzing reports of tire, equipment, and motor vehicle defects.[65] Tort claims filed in state courts are a primary source of information for this new system.[66] Simply by virtue of a claim having been filed, the tort system provides signals that defects may exist or existing safety standards may be inadequate. "The availability of damages in state tort lawsuits can give injured citizens the incentive to come forward and share potentially valuable information."[67]

At each successive step in the litigation process, tort suits provide additional opportunities for the development of information that could be useful to NHTSA in regulating vehicle safety. Pre-trial discovery can turn up technical data about vehicle safety features; information about costs, manufacturing practices, and the number of reported problems with a vehicle; and other facts relevant to the regulatory process. The discovery process can also uncover useful information about manufacturers' decisionmaking processes, adding a level of public accountability to corporate decisions about what level of risk should be foisted on consumers given the costs of added safety features or, more disturbingly, the costs saved by removing safety features.[68]

Expert testimony given in discovery or at trial could also be useful to NHTSA staff insofar as the testimony is bolstered by the experts' analysis of the state of the science. Moreover, expert analysis of the specific facts that give rise to tort claims sheds light on how injuries actually happen in the real world.[69] Test dummies and standardized testing procedures give us some idea of how automobiles and people will be affected by the extreme forces of a collision, but this is (necessarily) a controlled environment. Case-by-case analysis of actual collisions creates policy-relevant knowledge of how vehicle safety features respond to real-world collisions and how human behavior can alter the effectiveness of vehicle safety standards.

Finally, jury decisions, whether in favor of injured plaintiffs or manufacturer defendants, provide insight about evolving social norms. This information is useful to NHTSA staff who are required by statute to analyze the costs and benefits of any proposed rulemaking.

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Conclusion

Federal preemption of state law is a question of congressional intent. Congress' inclusion of a savings clause in the original 1966 National Traffic and Motor Vehicle Safety Act and retention of that savings clause as it has updated the statute over the last 40 years manifests a clear intent to restrain the preemptive effect of federal motor vehicle safety standards. All three branches of government should work to preserve the tort system's role in protecting Americans involved in auto collisions.

- NHTSA itself should reorient its thinking about preemption. The agency should focus on the useful role the tort system can play as both a backstop to outdated standards and a source of information and expertise unavailable to the agency. Rather than supporting manufacturer's claims that tort suits create an obstacle to improved safety, NHTSA should recognize the complementary role of the tort system. In addition to abiding by Executive Order 13132's admonition only to construe statutes as preemptive in limited circumstances and to consult with state officials prior to claiming preemption, NHTSA should conduct robust empirical research to determine whether and how state tort law impinges on the agency's ability to prevent injury.
- Congress should amend the Vehicle Safety Act to state clearly that neither the statute nor any FMVSS promulgated under the statute preempts state tort law.
- Courts should resist further attempts by NHTSA to preempt common law through regulatory fiat. Given the agency's shortcomings in implementing the statute and the absence of any indication from Congress that it meant to preempt state torts through the Vehicle Safety Act, courts should be careful not to cut off injured parties' main avenue for obtaining compensation and encouraging the adoption of better safety technology.

The Truth about Torts

This White Paper is the fourth installment of the Center for Progressive Reform's "Truth about Torts" series. Industry advocates continue to perpetuate the myth of a "Lawsuit Crisis" as a way to push legal and regulatory reforms that eliminate accountability for risk-producing corporations. CPR Member Scholars have conducted extensive research on the topic, and in a series of reports on various aspects of the subject, have debunked most of industry's claims about the need for "tort reform."

Previous Installments in the Series:

■ The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety
by William Funk, Sidney Shapiro, David Vladeck and Karen Sokol
<<http://www.progressivereform.org/articles/Truth_Torts_704.pdf>>

After providing a concise description of the constitutional law governing preemption, we examine three agencies' initial efforts to promote regulatory preemption through amicus briefs and administrative rulemaking. The White Paper describes in general terms why preemption is dangerous for consumers of pharmaceuticals, medical devices, automobiles, and other consumer products.

■ The Truth about Torts: Lawyers, Guns, and Money
by Thomas O. McGarity, Douglas A. Kysar, and Karen Sokol
<<http://www.progressivereform.org/articles/Truth_About_Torts_Immunity.pdf>>

In this White Paper, we critique the argument that certain industries deserve blanket immunity from tort suits on the theory that tort liability amounts to "regulation by litigation." The White Paper exposes the lack of content in the idea of "regulation by litigation" and highlights the dangers of granting immunity to the firearms and food industries.

■ The Truth about Torts: An Insurance Crisis, Not a Lawsuit Crisis
by Thomas O. McGarity, Douglas A. Kysar, and Karen Sokol
<<http://www.progressivereform.org/articles/Torts_509.pdf>>

In our first White Paper in the series, we tackled the complex issues of medical malpractice litigation, doctors' malpractice insurance, and healthcare costs. The paper presents the empirical data that prove that litigation is not the driving force behind rising malpractice premiums and healthcare costs, but rather insurers' poor business decisions and consequent need to recoup financial losses.

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End Notes

[1] 529 U.S. 861 (2000).

[2] 49 U.S.C. § 30111(a).

[3] 49 U.S.C. § 30111(b).

[4] 49 U.S.C. § 30102(a)(9) (emphasis added).

[5] 49 C.F.R. § 571.216 (2007).

[6] 49 C.F.R. § 571.126 (2007).

[7] 49 U.S.C. § 30103(b)(1).

[8] 49 U.S.C. § 30103(e).

[9] 529 U.S. 861 (2000).

[10] *Geier v. American Honda*, 529 U.S. 861, 886 (2000).

[11] *Id.* at 881 (quotations omitted, emphasis in original).

[12] *See* Nina A. Mendelson, *A Presumption Against Preemption*, ___ Northwestern U. L. Rev. ___ (p.19 of manuscript) (2008).

[13] *Griffith v. General Motors*, 303 F.3d 1276, 1278 (11th Cir. 2002).

[14] *Id.* at 1279.

[15] *Id.* at 1282.

[16] Thomas O. McGarity, *The Preemption War* 66 (forthcoming from Yale University Press).

[17] *Id.* at 66-67.

[18] Mendelson, *A Presumption Against Preemption, supra* n.12 at p.21 of manuscript.

[19] *Carden v. General Motors*, 509 F.3d 227 (5th Cir. 2007); *Hurley v. Motor Coach Indust.*, 222 F.3d 377 (7th Cir. 2000); *Carrasquilla v. Mazda Motor Corp.*, 166 F.Supp.2d 169 (M.D.Pa. 2001); *Anthony v. Abbott*, 289 F.Supp.2d 667 (D.Vi. 2003); *Heinricher v. Volvo*, 809 N.E.2d 1094 (Mass. App. Ct. 2004).

[20] *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007).

[21] *Id.* at 759.

[22] *See* Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737 (2004).

[23] *Id.* at 799. "*Chevron* deference" is a relatively high level of judicial deference rooted in agencies' technical expertise in the matters that Congress has delegated them the power to regulate.

[24] *Id.* at 779-91.

[25] *Id.* at 791-94.

[26] *O'Hara v. General Motors*, 508 F.3d 753, 760 (5th Cir. 2007).

[27] The *Geier* Court, however, said that it would "place some weight upon" the Transportation Department's preemption analysis because "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier v. American Honda*, 529 U.S. 861, 883 (2000). The Court will likely have more to say about the proper deference federal courts should afford agencies' preemption analyses when it decides *Wyeth v. Levine*, No. 06-1249, in its October 2008 term.

[28] Exec. Order No. 12,988, 61 Fed. Reg. 4727, 4732 (§ 3(b)(2)(A)) (Feb. 7, 1996).

[29] Exec. Order No. 13,132, 64 Fed. Reg. 43255, 43257 (§ 4) (Aug. 10, 1999).

[30] Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Roof Crush Resistance*, 70 Fed. Reg. 49223, 49245-46 (Aug. 23, 2005).

[31] Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Rearview Mirrors*, 70 Fed. Reg. 53753, 53768-69 (Sept. 12, 2005).

[32] Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Designated Seating Positions and Seat Belt Assembly Anchorages*, 70 Fed. Reg. 36094, 36101-02 (June 22, 2005).

[33] *See,* e.g., Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Door Locks and Door Retention Components,* 72 Fed. Reg. 5385, 5397 (Feb. 6, 2007), Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Electronic Stability Control Systems; Controls and Displays*, 72 Fed. Reg. 17236, 17301 (Apr. 6, 2007), Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Head Restraints; Final Rule*, 72 Fed. Reg. 25483, 25512 (May 4, 2007), Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Occupant Protection in Interior Impact; Side Impact Protection; Fuel System Integrity; Electric-Powered Vehicles: Electrolyte Spillage and Electrical Shock Protection; Side Impact Phase-In Reporting Requirements*, 72 Fed. Reg. 51908, 51953 (Sept. 11, 2007).

[34] Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Child Restraint Systems*, 71 Fed. Reg. 32855, 32860-61 (June 7, 2006); Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Tire Pressure Monitoring Systems; Controls and Displays*, 70 Fed. Reg. 18135, 18183 (Apr. 8, 2005).

[35] *See* Hon. Donna D. Stone, State Representative, Delaware and President, National Conference of State Legislatures, Testimony Before the Committee on the Judiciary, U.S. Senate, September 12, 2007, available at http://www.ncsl.org/statefed/preemption.htm (accessed June 3, 2008).

[36] National Conf. State Leg., Ted R. Miller and Eduard Zaloshnja, Roof-Crush Standards: Costs to States of NHTSA Proposed Rule, 2 (March 2006), available at http://www.ncsl.org/print/press/060406RoofCrush.pdf (accessed June 3, 2008).

[37] Testimony of Dr. Jeffrey W. Runge, M.D., before the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection, March 18, 2004, *available at* http://www.nhtsa.dot.gov/nhtsa/announce/testimony/2004-CTCP.htm (accessed June 3, 2008).

[38] *Id.*

[39] *Public Citizen v. Mineta*, 340 F.3d 39, 49-50 (2d Cir. 2003).

[40] See Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Roof Crush Resistance*, 70 Fed. Reg. 49223, 49225 (Aug. 23, 2005).

[41] *Id.* at 49243.

[42] *Id.* at 49242-43.

[43] Dept. of Trans., NHTSA, *Federal Motor Vehicle Safety Standards; Roof Crush Resistance*, 73 Fed. Reg. 5484, 5485 (Jan. 30, 2008) (explaining target population of proposed FMVSS 216 update).

[44] *NHTSA's regulatory challenges*, Det. News, Mar. 3, 2002.

[45] NHTSA, *Federal Motor Vehicle Safety Standards; Head Restraints; Final Rule,* 72 Fed. Reg. 25483 (May 4, 2007).

[46] *Better science can improve dated designs*, Det. News, Mar. 3, 2002.

[47] Jeff Plungis, *Vehicle safety standards outdated*, Det. News, Mar. 3, 2002.

[48] Myron Levin and Alan C. Miller, *U.S. rules shield industry from lawsuits,* L. A. Times, Feb. 19, 2006.

[49] Hogan & Hartson, *Newstand – Hogan & Hartson Adds National Highway Traffic Safety Administration Leader to Firm's Washington Office* (Aug. 7, 2006), at http://www.hhlaw.com/newsstand/detail.aspx?news=644 (accessed June 3, 2008).

[50] SafetyForum, *The Hoar List*, at http://www.safetyforum.com/hoarlist/ (accessed June 3, 2008).

[51] See id.; *NHTSA's revolving door*, Det. News, Mar. 4, 2002.

[52] Clayton P. Gillette & James E. Krier, Risk, Courts, and Agencies, 138 U. Pa. L. Rev. 1027, 1067-68 (1990).

[53] William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1589 (2007).

[54] That is, the problem of low per-capita stakes in a particular standard and high costs of effective participation in the rulemaking process resulting in a lack of wide-scale public participation.

[55] Jeff Plungis, *Money, clout key to fixing NHTSA*, Det. News, Mar. 6, 2002.

[56] Roy Ulrich, *Where have you gone, Otis Chandler?,* L.A. Times, Apr. 24, 2007.

End Notes

[57] U.S. Dept. of Trans., National Highway Traffic Safety Administration, *Budget Estimates: Fiscal Year 2009, 19, available at* http://www.dot.gov/bib2009/budgetestimates/nhtsa.pdf (accessed June 3, 2008).

[58] Jeff Plungis, *Money, clout key to fixing NHTSA*, Det. News, Mar. 6, 2002.

[59] Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348, 2350-51 (1990).

[60] National Academies of Science, *Accidental Death and Disability: The Neglected Disease of Modern Society*, 8 (1966).

[61] See generally, Ralph Nader, Unsafe at Any Speed: The designed-in dangers of the American automobile (1965).

[62] 49 U.S.C. § 30103(e).

[63] Thomas O. McGarity, "The Regulation-Common Law Feedback Loop in Non-Preemptive Regimes," in Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question ___ (William W. Buzbee ed., forthcoming 2008).

[64] Id.

[65] Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, 114 Stat. 1800 (Nov. 1, 2000).

[66] U.S. DEPT. OF TRANS., NHTSA, *Reporting of Information and Documents About Potential Defects*; Retention of Records That Could Indicate Defects, 67 Fed. Reg. 45821, 45834-36 (July 10, 2002).

[67] *Colacicco v. Apotex Inc.*, et al., 521 F.3d 253, 284 (3d Cir. 2008) (Ambro, J., dissenting).

[68] See McGarity, *The Preemption War*, *supra* n.16 at 204-07.

[69] See Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. REG. 137, 162 (1995).

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