

lar bus project supported by AC Transit . . . will serve a largely white ridership. On the other hand, a rail expansion project . . . may benefit minority riders more than white riders by serving areas with high concentrations of minorities, and integrating them more fully into the regional rail system."

The court said that the plaintiffs' "regional-level population statistics fail to explain with any precision the effect the [RTEP] will have on minority transit users." It added that under the plaintiffs' theory "so long as the population of the bus riders contains a greater percentage of minorities than the population of rail riders, any RTEP that emphasizes rail expansion over bus expansion, even where such a plan may confer a far greater benefit upon minorities than whites, would be subject to a legal challenge."

No Intentional Discrimination. The court also said that the plaintiffs' "failure to establish that MTC's challenged conduct has a discriminatory impact prevents any inference of intentional discrimination." It said that the plaintiffs' claim "relies on drawing equivalences, between (1) bus-riders and minorities, and (2) rail-riders and whites, that are not borne out by the data. Plaintiffs' lack of any direct evidence of racial animus leaves us only with circumstantial evidence of a policy-making process that does not support an inference that MTC's conduct is motivated by any racial bias."

Judge J. Clifford Wallace joined the opinion.

Concurring, Judge John T. Noonan noted "the messy mass of facts, factors and guesses" that go into planning regional transportation. He said, however, that the plaintiffs failed to show "any intent to discriminate" or "any disparate impact from the funding planned."

Linda Lye, Altschuler Berzon, San Francisco, argued for the plaintiffs. Kimon Manolius, Hanson Bridgett, San Francisco, argued for MTC.

Full text at <http://pub.bna.com/lw/0915878.pdf>.

Product Liability—Preemption

State Law Seat Belt Claims Not Preempted, High Court Says, Focusing on Agency Goals

A National Highway Traffic Safety Administration seat belt standard that gave automakers a choice between two types of seat belts in certain seating positions does not preempt a state tort suit, the U.S. Supreme Court ruled Feb. 23 (*Williamson v. Mazda Motor of America Inc.*, U.S., No. 08-1314, 2/23/11).

A key factor in finding no preemption was the court's determination that there were no "significant regulatory objectives" behind the agency's determination to allow automakers the choice of what kind of seat belt to install.

The eight participating justices, seven of whom joined in Justice Stephen G. Breyer's majority opinion, determined that the family of Thanh Williamson, who died from injuries she sustained in an accident while wearing a lap-only seat belt, could go forward with claims alleging that Mazda should have installed a lap-and-shoulder belt where she was sitting. The court reversed the decision of a California court of appeal, which found that the 1989 version of Federal Motor Ve-

hicle Safety Standard 208 impliedly preempted the Williamsons' suit.

The high court distinguished the case from a key precedent, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), which involved claims that an auto manufacturer should have installed air bags. The regulation at issue was a portion of the 1984 version of FMVSS 208. In *Geier*, "the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives. Here, these same considerations indicate the contrary," the court said.

Consequently, "even though the state tort suit may restrict the manufacturer's choice," it does not present a conflict with federal law, the court found.

Breyer also authored the majority opinion in *Geier*.

'Misreading' of Geier Corrected. Martin N. Buchanan, an attorney for the Williamsons, told BNA Feb. 23, "The most significant thing about the case is it really corrects a widespread misreading of the *Geier* decision on air bags and . . . reaffirms the importance of state tort law in achieving greater vehicle safety than the federal minimum standards."

Buchanan added that the decision "is likely to have an impact in other areas of the law as well—certainly it will be significant for all types of vehicle-safety lawsuits, but also federally regulated consumer products."

Matthew Wessler, an attorney with Public Justice PC, which submitted an amicus brief supporting the family, told BNA, "Manufacturers had used *Geier* as a talisman: 'Oh, look, there are options here. . . . That lawsuit should be preempted.' This opinion puts that theory pretty much in the ground."

Wessler said Breyer believes courts "have to undertake a very careful, fact-bound analysis" and laid out the framework for doing so.

Mazda issued a statement saying, "We are of course extremely disappointed in the Supreme Court's ruling today. However, it is important to understand that the Court did not determine that Mazda was liable to the plaintiff or that the subject vehicle was defective. Instead, the court's ruling simply means that the plaintiff[s] may continue with their lawsuit." The company added that it would vigorously defend the suit in the trial court.

Role of Standards at Issue. In their briefs filed with the Supreme Court, the parties focused on whether the safety standards at issue set a floor for motor vehicle safety, or a floor and a ceiling. In their merits brief, the Williamsons wrote that the underlying 1966 National Traffic and Motor Vehicle Safety Act "defines a 'safety standard' as a 'minimum standard for motor vehicle or motor vehicle equipment performance.'"

Mazda, meanwhile, in its brief, said, "Most [Federal Motor Vehicle Safety Standards] establish 'performance standards,' . . . and typically merely establish a federal floor. . . . But some FMVSSs establish design standards that mandate the installation of particular safety features, establishing both a floor and a ceiling. . . . And occasionally, NHTSA finds that the Act's purposes are served best by leaving manufacturers free to choose among specified design options."

The court's opinion focused on interpreting *Geier* and comparing the safety standard at issue in *Geier* with the one in the Williamsons' case. The court reiter-

ated two parts of the majority's analysis in *Geier*. First, the *Geier* court held that the Safety Act, despite an express preemption clause directed at state "safety standards," did not preempt a state tort suit, "primarily because the statute also contains a saving clause." Second, the court held that the savings clause did not go further and "foreclose or limit the operation of ordinary preemption principles," particularly the implied preemption of state standards that "actually conflict" with federal statutes or regulations.

The next step of the *Geier* court's analysis was to determine "whether, in fact, the state tort action conflicts with the federal regulations."

Agency Focused on Cost-Effectiveness. "At the heart of *Geier* lies our determination that giving auto manufacturers a choice among different kinds of passive restraint devices was a *significant objective* of the federal regulation," the court said. "We reached this conclusion on the basis of our examination of the regulation, including its history, the promulgating agency's contemporaneous explanation of its objectives, and the agency's current views of the regulation's pre-emptive effect."

But the choice presented to manufacturers in the 1989 seat belt standard, at issue in the *Williamsons* case, was different. NHTSA's "1989 reasons for retaining that choice differed considerably from its 1984 reasons for permitting manufacturers a choice in respect to airbags." The agency's main concern with lap-and-shoulder belts in rear inner seats was cost-effectiveness, the court concluded.

"[T]o infer from the mere existence of such a cost-effectiveness judgment that the federal agency intends to bar States from imposing stricter standards would treat all such federal standards as if they were *maximum* standards, eliminating the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state tort law. We cannot reconcile this consequence with a statutory saving clause that foresees the likelihood of a continued meaningful role for state tort law," the court said.

Concurrences. Justice Sonia M. Sotomayor wrote a concurring opinion "only to emphasize the Court's rejection of an overreading of *Geier* that has developed since that opinion was issued."

Justice Clarence Thomas, who opposes the doctrine of implied preemption, concurred only in the judgment. His analysis focused on a "saving clause" preserving common-law tort actions in the underlying statute. Whereas the majority in *Geier* "interpreted the saving clause as simply cancelling out the statute's express pre-emption clause with respect to common-law tort actions," Thomas said, he read it more broadly. "[T]he saving clause simply means what it says: FMVSS 208 does not pre-empt state common-law actions."

Justice Elena Kagan did not participate in the decision. As Solicitor General, she submitted a brief for the United States in support of the *Williamsons*—which Breyer cited in the court's opinion.

Martin N. Buchanan, Niddrie, Fish & Buchanan, San Diego, argued for the *Williamsons*. Gregory G. Garre, Latham & Watkins, Washington, D.C., argued for Mazda.

By MARTINA S. BARASH

Full text at <http://pub.bna.com/lw/081314.pdf> and 79 U.S.L.W. 4098.

Cases In Brief

Specialty Certification by Bar Not Protected Interest

A Florida lawyer lost her fight over the state bar association's confidential peer review process used to certify attorneys as specialists in a particular field when the U.S. Court of Appeals for the Eleventh Circuit Jan. 19 affirmed the dismissal of her due process claims. Certification as a specialist in a particular legal field is not a constitutionally protected property or liberty interest for purposes of the plaintiff's facial challenge to the secret process on procedural due process grounds, the court said. An otherwise barred attorney may practice in any court in Florida that a certified specialist can practice, and "[t]he failure to convey a badge of distinction is not stigmatizing," the court held. Further, the lawyer's as-applied claim was barred under the *Rooker-Feldman* doctrine, the court held, because the Florida Supreme Court's denial of her petition for review was made based on the 25-page petition itself, as well as 37 separate appendices, which signaled that the denial was most likely connected to the merits of the case, effectively preventing review in federal court. *Zisser v. Florida Bar*, 11th Cir., No. 10-11974, 1/19/11.

Derivative Suit Party Could Move to Oust Counsel

A litigant had "vicarious standing" to seek opposing counsel's disqualification in a derivative action where the nature of the corporate dispute among limited liability companies meant that the attorney was representing interests on both sides of the lawsuit, the California Court of Appeal, Second District, decided Feb. 2. The court said this exception to traditional principles of standing, under which a party usually lacks standing to seek disqualification of a lawyer with whom the party never had an attorney-client or fiduciary relationship, is necessary to give teeth to the ethics rules regarding conflicts of interest and representation of organizations when co-owners of corporate entities are feuding. Without this exception, the court said, a limited liability company would have no way of escaping conflicted concurrent representation by an attorney representing the alleged wrongdoer. *Blue Water Sunset LLC v. Markowitz*, Cal. Ct. App., No. B216392, 2/2/11.

Firm's 'Loss Prevention' Parleys Privileged

Bucking the trend, the U.S. District Court for the Southern District of Ohio Feb. 3 ruled that when a client sues a law firm for malpractice, the attorney-client privilege protects the firm's internal "loss prevention" communications that took place after the possibility of a malpractice claim surfaced—even for documents that were created before the firm withdrew from the representation. While acknowledging that almost all authority on the point holds to the contrary, the court upheld application of the privilege in this situation after it examined the case law closely, evaluated policy considerations, and considered the reasons for recognizing exceptions to the privilege. A law firm's alleged conflict of