No. 98-1811

**IN THE SUPREME COURT OF THE UNITED STATES**

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ALEXIS GEIER, et al.,
*Petitioner*

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
*Respondent*

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# BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Filed November 19, 1999

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RULES

## INTEREST OF THE AMICUS CURIAE

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 21,000. It seeks to advance the cause of the civil justice system in America by ensuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress and state legislatures on select legislation impacting the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.[1]

All parties have granted a blanket consent to the filing of *amicus curiae* briefs, including this brief.

## I. SUMMARY OF ARGUMENT

Disappointed with the Secretary of Transportation's decision to phase-in mandatory installation of passive restraints in automobiles, but not require air bags,

[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioners and Respondents had no part in authoring any portion of this brief. No one other than the DRI made a monetary contribution to the preparation or submission of this brief.

plaintiffs have attempted to mandate immediate installation of a single passive restraint system – the air bag – through litigation.

In numerous cases across the country plaintiffs have attempted to establish a new safety standard under state product liability law that punishes automobile manufacturers for exercising the option permitted under Federal Motor Vehicle Safety Standard 208 to not equip certain cars with air bags. This focus on state tort law has raised serious federalism questions, requiring courts to examine the relationship between state common law and the federal policy for safety standards embodied within the express language of the National Traffic and Motor Vehicle Safety Act ("Safety Act") and its corresponding regulatory scheme. The common law's ability to shape behavior has been central to this study.

While it does so in a case by case fashion, the common law often establishes new causes of action and sets new standards of behavior that transcend the facts and circumstances of the particular case. It does not simply provide individual plaintiffs with remedies for their individual injuries. There has not been a more powerful or influential body of common law than product liability.

Individual product liability decisions have created new standards for safety in a dizzying array of industries, have forced products off the market, raised consumer awareness, and changed the practices of whole industries. In most cases, these discrete judicial opinions are not based on the particular facts of the particular case. Rather, like legislative enactments, they are based on broad public policy concerns. For example, the decisions



that established modern product liability law were not based upon the particular needs of the individual plaintiffs before the court, but the desire to allocate the costs associated with product-related injuries so as to establish incentives for manufacturing safer products.

Due to the reasoning and broad-based influence of product liability decisions, this Court and every Circuit Court of Appeals that has addressed the issue has repeatedly held that state common law decisions have the same force and effect in shaping behavior as positive legislative enactments. As a result, common law decisions addressing product safety create a system of regulation that parallels the authority of federal regulation. Conflict between these equal authorities is inevitable. Where such conflict exists, federal law controls. This is the doctrine of federal preemption, dictated by the Supremacy Clause of the United States Constitution.

Petitioners and *Amicus Curiae,* The Association of Trial Lawyers of America ("ATLA"), as a necessary predicate to their argument against preemption, ignore the common law's basis in public policy and its historical power in changing or shaping industry behavior. They currently argue that the common law does nothing more than render vending-machine justice, doling out compensation in particular cases, without any immediate or prospective impact on manufactures' or consumers' behavior. Such a position is not only contrary to this Court's previous pronouncements and the recognized purpose and history of product liability common law, but is contrary to ATLA and other trial lawyers' historical strategy of using individual common law decisions as a coercive tool to change manufacturers' behavior.

Contrary to ATLA's stated position regarding the common law's impotence, the origins of product liability common law, its history, and ATLA's previous pronouncements all demonstrate that common law decisions can, and in fact do, exert the same coercive effect on external behavior and decision making as legislatively imposed standards. Common law decisions can impose a standard of performance that conflicts with the Safety Act's regulations. Therefore, the express language of the Safety Act's preemption clause requires this Court to find that the Safety Act and its regulatory scheme preempt state common law product liability actions that may result in a finding that a vehicle is defective because the manufacturer exercised an option permitted by federal law. Moreover, well established principles of implied preemption compel a conclusion in this case that the plaintiff's claim must be preempted because it conflicts with articulated federal policy on occupant restraints.

## II. ARGUMENT

The American civil justice system is built upon the twin pillars of state and federal law. Where the two come into conflict, federal law is supreme. One of DRI's missions is to address questions that are germane to the functioning of our civil justice system.[2] With an

[2] The Defense Research Institute's Mission Statement provides:

> The Defense Research Institute is the national membership organization of all lawyers involved in the defense of civil litigation. DRI is committed to: enhancing the skills, effectiveness and professionalism of defense lawyers; anticipating and addressing issues germane to defense lawyers and the civil justice system; promoting appreciation of the role of the defense lawyer; and improving the civil justice system and preserving the civil jury.



expanding federally-regulated commercial environment, federal and state law increasingly have the potential to conflict. In order to recognize such conflicts, and thus function in accordance with both the Constitution's hierarchy of laws and congressional intent, courts must understand that product liability common law decisions influence a manufacturer's behavior as effectively as direct legislation.

The lower court in this case correctly understood this fact and, consequently, properly recognized that the Safety Act and state common law product liability actions have the potential for conflict in areas governed by federal law. It, therefore, correctly held the Safety Act preempts any state common law claims that seek to punish the failure to install air bags in a 1987 motor vehicle, because such an outcome would conflict with federal law.

### A. The Laws of the United States "Shall be the Supreme Law of the Land". U.S. Const. art. VI cl. 2

"The supremacy clause of the United States Constitution dictates that when Congress has enacted legislation which is 'necessary and proper' to implement one of its plenary powers, any state law which comes into conflict

with the federal law is preempted." Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 Notre Dame L. Rev. 1, 12 (1986).

The Safety Act contains an express preemption clause, declaring that its regulatory scheme totally preempts any state law that imposes a duty on manufacturers different from the duties dictated by this regulatory scheme. It provides in relevant part:

> (b) Preemption. – (1) When a motor vehicle safety standard is in effect under this chapter, a State or 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.

49 U.S.C. § 30103(b)(1). Congress' choice of the word "identical", rather than a more expansive term such as "consistent" manifests its intent to preempt all state standards that do not mirror the standards of the federal regulations promulgated under the Act. Wilton, 61 Notre Dame L. Rev. at 16.

### B. Preemption Should not be Confused with Asserting Compliance with the Applicable Federal Law as a Defense to State Common Law Actions.

Petitioners and ATLA misconstrue the lower court's decision. Federal preemption was the basis of the lower court's decision. Federal preemption is the issue before this Court. ATLA, however, describes the lower court as



holding "that the compliance with Motor Vehicle Standard 208 immunizes automakers from product liability based on failure to install airbags . . . ".[3] ATLA fails to recognize the difference between the effect of federal preemption and the assertion of compliance with the federal regulations as a defense to a state product liability common law action.

The defense of compliance only exists within the context of a valid common law action. Specifically, the manufacturer asserts compliance with federal standards as its defense to the plaintiff's claim of defectiveness. If federal law preempts state common law, the court must select the federal standard, pursuant to the Constitution's Supremacy Clause, rather than the state standard when resolving the plaintiff's claim. Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 Wm. & Mary L.Rev. 903, 951 (1996). Simply, if preempted, no state common law claim exists. Therefore, whether the product is defective under state law is not at issue and, the issue of compliance as a defense never materializes. The Restatement (Third) of Products Liability explicitly adopts this analysis. It provides:

> An important distinction must be drawn between the [compliance as a defense to a claim of defectiveness] and the matter of federal preemption of state products liability law. [The Restatement's section on compliance as a defense] addresses the question of whether and

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[3] Amicus Curiae Brief of The Association of Trial Lawyers of America in Support of the Petitioners ("ATLA Brief"), p. 2.

> to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness. When a court concludes that a defendant is not liable by reason of having complied with a safety design or warnings statute or regulation, it is deciding that the product in question is not defective as a matter of the law of that state. The safety statute or regulation may be a federal provision, but the decision to give it determinative effect is a state-law determination. In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, including state tort law, with the federal statute or regulation. The question of preemption is thus a question of federal law, and a determination that there is preemption nullifies otherwise operational state law . . . [W]hen federal preemption is found, the legal effect is clear. Judicial deference to federal product safety statutes or regulations occurs not because the court concludes that compliance with the statute regulation shows the product to be nondefective; the issue of defectiveness under state law is never reached. Rather, the court defers because, when a federal statute or regulation is preemptive, the Constitution mandates federal Supremacy.

Restatement (Third) of Products Liability, § 4, cmt. e, p. 122. The First Circuit Court of Appeals agrees. *See, Wood v. General Motors Corp.*, 865 F.2d 395, 417-18 (1st Cir. 1988).

The lower court in the present case entered summary judgment in Honda's favor on Plaintiff's state law claims because the Safety Act preempted them, not because of



Honda's compliance with Federal Motor Vehicle Safety Standard 208. Compliance was not an issue. As a result, both Petitioners' and ATLA's arguments are postured on a false premise, which undermines the remainder of their arguments. This incorrect foundation prevents both Petitioners and ATLA from engaging in a meaningful analysis of the common law's relationship to the federal regulations.

### C. State Common Law Decisions Constitute Safety Standards Under the Federal Act.

The lower court in this case correctly recognized that the term "standard", as used in the Safety Act's preemption clause, prevents states from imposing "a duty on manufacturers that differs from those imposed by the federal government." *Geier v. American Honda Motor Corporation*, 166 F.3d 1236, 1240 (D.C. Cir. 1999). The court correctly acknowledged: "Common law liability in this specific context, therefore, can reasonably be viewed as constituting a 'standard' that might conflict with Standard 208." *Id.*

Petitioners and ATLA argue the lower court erred because "[a] verdict in a product liability action is not the functional equivalent of a state regulation requiring airbags in cars."[4] They view the common law as nothing more than a mechanism for providing individual plaintiffs with discrete compensation, without having effect beyond the particular case. ATLA writes, "the only requirement imposed by a product liability judgment is

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[4] ATLA Brief, pp. 5-9.

the obligation to compensate the plaintiff for the injury caused."[5] ATLA further argues that an adverse judgment in a particular product liability action will have no prospective impact on either the manufacturer's or other potential plaintiffs' behavior and will not affect any future litigation.[6]

These statements, however, conflict with both this Court's previous pronouncements and the holdings of all the Circuit Courts of Appeal that have addressed the issue. These statements also contradict the recognized purpose and history of product liability common law and, they are contrary to ATLA's previous strategy of using individual common law decisions as a coercive tool to change manufacturers' behavior and consumers' attitudes.

### 1. The Origin and History of Product Liability Common Law Demonstrates that it Creates Standards for Manufacturers' Behavior.

ATLA's contention that product liability common law has no prospective effect on manufacturers' behavior is incredible given the history and development of product liability law. Early product liability decisions were not based upon the courts' desire to compensate particular individuals in particular cases. Rather, these decisions reflected an intent to reallocate, from consumers to manufacturers, the costs associated with the production of dangerous products and thereby compel manufacturers

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[5] ATLA Brief, p. 6.

[6] ATLA Brief, pp. 6-8.



to make safer products. These development decisions show that the courts used the imposition of common law duties as the mechanism to accomplish this public policy goal. Specifically, with such duties in place, the courts compelled manufacturers to absorb, through adverse court decisions, the costs associated with the manufacture of products that did not conform to these new duties.

For example, prior to Judge Cardozo's opinion in *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (N.Y.Ct.App.1916), manufacturers did not owe any duty to the ultimate purchasers of their products, but only to those with whom they contracted. Judge Cardozo, however, relying upon various common law decisions, determined that the privity requirement should not limit manufacturers' duties. He found that manufacturers owed a duty not only to the direct purchaser of the product in question, but also to those individuals they could foresee would use their product. Thus began "the fall of the citadel of privity," the parabolic increase in manufacturers' potential liability, and the judiciary's policy to reallocate, from consumers to manufacturers, the responsibility to prevent injury to those using their products. William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 791 (1966).

Justice Traynor's words in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944), made explicit the courts' policy of reallocating the costs of accidents to influence manufacturers' behavior. He stated, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id.* at 440. In other words, if manufacturers face liability for

their production of unreasonably dangerous products, they will make safer products and, thus, "reduce the hazards to life and health". Similarly, the court in *Greenman v. Yuba Power Products, Inc.*, 377 N.E.2d 897, 901 (Cal. 1963), recognized strict liability as a viable claim against a product manufacturer because adverse decisions from such claims would effectively force manufacturers to avoid production of dangerous products.

Just five years later the development of product liability common law reached new heights. In *Larsen v. General Motors Corporation*, 391 F.2d 495 (8th Cir. 1968), the judiciary again expanded, largely on public policy grounds, automobile manufacturers' duties to include the duty to design their products so that they do not expose their occupants to an unreasonable danger in the event of a collision. The court in *Larsen* recognized this new duty, not as a method of compensating the particular plaintiff, but as a mechanism to alter manufacturers' behavior for the public welfare. The court explicitly stated, "(l)egal acceptance of this [new] duty would go far in protecting the user from unreasonable risks." *Id.* at 504. Thus, the court correctly recognized, as did the lower court in this case, that the threat of financial responsibility due to a breach of a common law duty forces manufacturers to conform their behavior to the dictates of this duty.

The lower court's decision in the present case is consistent with these early product liability decisions. It recognized, contrary to Petitioners' and ATLA's arguments, that product liability law did not develop simply to compensate particular individuals injured in particular accidents. Rather, like legislation, product liability decisions focus on public policy concerns of reallocating



safety expenses and the ability to coerce manufacturers into producing safer products for consumers' welfare. The lower court correctly held, consistent with history, that product liability decisions set standards of performance with which manufacturers must comply. Any position to the contrary ignores history and distorts reality.

### 2. This Court Has Explicitly Held That Common Law Tort Actions Establish Affirmative Standards of Conduct as Effectively as Legislative or Administrative Standards.

On numerous occasions, when performing preemption analyses, this Court has confronted arguments that jury verdicts, pursuant to common law claims, do not establish regulations, standards or requirements and, thus, are not preempted by federal statutes or administrative regulations. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *see also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California product liability law). In each instance, however, this Court has mandated that common law actions, whether based upon state or federal law, establish standards of conduct, that alter behavior effectively as legislative or administrative enactments. *See Medtronic*, 518 U.S. at 510-11 (O 'Connor, J. concurring joined by Rehnquist, Ch. J., Scalia and Thomas, JJ.; *id.* at 504 (Breyer, J. concurring); *Cipollone*, 505 U.S. at 522-23; *CSX Transp.*, 507 U.S.

at 397; *Ouellette*, 479 U.S. at 495; *Garmon*, 359 U.S. at 247. This Court addressed this issue in *Cipollone* and said:

> [C]ommon law damages actions of the sort raised by petitioner are premised on the existence of the legal duty and it is difficult to say that such actions do not impose "requirements or prohibitions." . . .
>
> [I]t is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions.

505 U.S. at 522.

Further, on numerous occasions, this Court has approvingly quoted the following language from *Garmon* in support of this proposition:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. 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 effort 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.

359 U.S. at 247. In fact, Justice Breyer recognized that, from the perspective of a manufacturing defendant, there is virtually no distinction between the duty imposed by common law verdict and legislative or administrative provisions. Justice Breyer, in *Medtronic*, wrote:

> The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for preemption purposes would grant greater power (to set state standards "different from or in addition to" federal standards) to a single state jury than to state officials acting through state administrative or legislative law-making processes.



*Medtronic*, 518 U.S. at 504 (Breyer, J. concurring).

Several rationales buttress this conclusion. First, under generic tort law principles, it is presumed that manufacturers will modify their conduct to avoid potential liability, whether that liability arises from common law claims or positive legislative enactments. The development of product liability law is a compelling example of this principle.

Second, when the federal government, through Congress or an administrative or regulatory agency, establishes a comprehensive scheme for the regulation of specific conduct, persons or entities subject to those regulations must be able to understand the legal duties or requirements engendered. Permitting variations, when a federal regulatory or administrative standard has been established, creates confusion and undermines the certainty and efficiency sought by Congress. *See Ouellette*, 479 U.S. at 495-96.

Consequently, because state common law claims establish "standards" which are identical in effect to positive legislative provisions, they can subvert the purpose, intent and methods of the comprehensive, uniform federal regulatory scheme in place. Accordingly, when a successful state common law action would have the effect of establishing a "standard" which would interfere with

or stand as an obstacle to the implementation of a comprehensive federal regulatory plan or the methods adopted to implement that plan or a specific federal regulation, the action must be preempted to avoid inherent inconsistency. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Ouellette*, 479 U.S. at 494 (concluding that state laws which interfere with the "methods" chosen by Congress to reach a particular goal are preempted); *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 826 (11th Cir. 1989) (finding that any state common law or legislative provision which interferes or conflicts with a federal regulation is preempted).

### 3. Federal and State Courts Have Found That Permitting Common Law "No Airbag" Claims Would Have the Effect of Establishing a "Standard" Which Is Contrary To FMVSS 208.

Numerous federal and state courts have recognized that common law "no airbag" claims can either directly or indirectly establish a "standard" which conflicts with the federal "standard" set forth in FMVSS 208 for passenger restraint systems. *E.g., Geier v. American Honda Motor Co., Inc.*, 166 F.2d 1236, 1240 (D.C. Cir. 1999); *Wood v. General Motors Corp.*, 865 F.2d 395, 401, 402, 410 (1st Cir. 1988); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-15 (9th Cir. 1997); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 n.16 (11th Cir. 1989); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989); *Cox v. Baltimore County*, 646 F. Supp. 761, 764 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095, 1096 (E.D. Mo. 1986); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838, 841 (Minn. Ct. App. 1987); *Miranda v. Fridman*, 647 A.2d 167, 174 (N.J. Sup. Ct. App. Div. 1994); *Cellucci v. General Motors Corp.*, 676 A.2d 253, 258-59 (Pa. Super. 1996); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754, 758 (Wis. Ct. App. 1994).



The Ninth Circuit in *Harris* made this explicit, stating:

> [C]ommon law claims can impose requirements equivalent to those written by a state legislature or regulatory agency and consequently can be pre-empted. . . .
>
> [Common law no airbag] claims, if successful would impose massive liability on a [manufacturer] for its decision to install [a federally approved passenger restraint system] rather than airbags. A judgment for [a claimant] would have an effect on [a manufacturer] identical to a state statute or regulation requiring airbags in all vehicles. Furthermore, "a rule of common law which permits the recovery of monetary damages for its breach self-evidently sets a standard."

*Harris*, 110 F.3d at 1414-15.

The First Circuit employed virtually identical reasoning:

> A state common law action sustaining the theory that a vehicle was defective because it lacked an air bag would, in effect, create a state safety standard related to the same aspect of performance of FMVSS 208 but not identical to FMVSS 208. . . . Allowing a common law action holding manufacturers liable for failing to

> install air bags in motor vehicles would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area.

*Wood*, 865 F.2d at 402 (emphasis added).

This rationale has also been adopted by state appellate courts. For instance, the Wisconsin Supreme Court has recognized:

> A court decision creating common law liability for the failure to install air bags will effectively force automobile manufacturers to choose the air bag option over other statutorily approved options. An automobile manufacturer faced with the prospect of choosing the air bag option, or facing potential exposure to compensatory and punitive damages for failing to do so, has but one realistic choice. *A court decision that removes the element of choice authorized in occupant crash safety regulations will frustrate the statutory scheme.*

*Wickstrom*, 416 N.W.2d at 841 (emphasis in original) (citing *Baird v. General Motors Corp.*, 654 F. Supp. 28, 32 (N.D. Ohio 1986)).

Accordingly, the vast majority of appellate courts that have considered this issue have not only found that common law "no airbag" claims are preempted, but they have consistently premised their analysis, in part, upon the fact that common law actions would have the effect of establishing a standard which is not identical to the applicable version of FMVSS 208.



**4. Trial Lawyer Organizations, Including ATLA, Have Long Recognized that Common Law Decisions Can Coerce Manufacturers' Behavior as Effectively as Can Legislative Enactments.**

Finally, ATLA's current statements that common law decisions do not broadly affect manufacturers' decisions flatly contradict ATLA's and other trial lawyers' publicized and acknowledged strategy to use the common law as a mechanism to force manufacturers to install air bags in their cars, contrary to the federal regulatory scheme.

For example, in 1984 Trial Lawyers for Public Justice organized their "air bag litigation project" to assist trial lawyers in bringing suit against automobile manufacturers for exercising their federally-permitted option to not install air bags in certain cars.[7]

Founder and then Board Member Joan Claybrook initiated the project.[8] The New York Times reported:

> Federal regulators have been arguing for more than a decade about whether Detroit should be forced to equip its cars with air bags, which inflate automatically in crash to protect passengers.
>
> But recently, a small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the air bag

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[7] Trial Lawyers for Public Justice 1984 Annual Report.

[8] *Id.*

> question out of the regulatory agencies and into the courts.[9]

Joan Claybrook expressly described the coercive strategy behind the project: "We are trying to use economic pressure to force [manufacturers] to offer air bags." *Id.* Clearly, "[t]he strategy is an effort to exploit the existing laws of product liability" to suit the trial lawyers' agenda.[10] The project's materials were available "to plaintiff's attorneys working on airbag cases".[11] One year later Ms. Claybrook extolled the broad implications of individual product liability suits in changing industry practice:

> As so often happens in product liability cases, the public in general can also be a major beneficiary of such individual litigation. If the courts hold the manufacturers liable for refusing to install this technology [or even design in the architecture to facilitate retrofit of air bags for those who want them], then the companies must reassess their stubborn resistance from another perspective, the on that should have guided their thinking from the beginning. They must realize that further stonewalling will incrementally increase their liability. They must begin to consider the needs and interests of their users. That is indeed the purpose of the product liability system.[12]

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[9] Tamar Lewin, *The Air Bag Goes to Court*, N.Y. Times, Oct. 29, 1984, at D1, col.4.

[10] *Id.*

[11] Trial Lawyers for Public Justice 1984 Annual Report.

[12] Joan Claybrook, *Can the Court Persuade Detroit to Sell Air Bags?*, American Bar Association Annual Meeting, Washington D.C., July 9, 1985, p. 17.



Other attorneys have recognized the potential coercive effects of the trial lawyers' strategy. In particular, ATLA contributor Thomas Lambert, Jr. argued in TRIAL magazine:

> It needs to be emphasized that the preventive aim of Tort Law is pervasive and runs like a red thread throughout the entire corpus of Torts. For example, the private Tort litigation system has served, and continues to serve, as an effective and useful therapeutic and prophylactic tool in achieving better health care for our people by discouraging and thereby reducing the incidence of . . . mistakes, mishaps and 'misadventures'.[13]

Another contributor to TRIAL magazine wrote:

> Product liability law fosters injury prevention by creating financial incentive to design safe products . . . The message of larger verdicts for the failure to make air bags available can be loudly heard by automobile manufacturers, and has the potential for being more effective than the attempts to regulate over the past dozen years.[14]

Indeed. Common law actions can be as effective at altering manufactures' behavior as federal regulation, if they are allowed to go forward. Plaintiffs' lawyer organizations, generally, and ATLA, in particular, have known

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[13] Thomas F. Lambert, Jr., *Suing for Safety*, Trial, Annual Products Liability Issue, pp. 48-56 (1983).

[14] Stephen Teret and Edward Downey, *Air Bag Litigation: Promoting Passenger Safety*, Trial, July, 1992, at 93-97.

and promoted this fact for over fifteen years. It is disingenuous to now argue common law actions do not create safety "standards" under the Safety Act.

## CONCLUSION

Where federal law and state law conflict, federal law prevails. Because state product liability common law decisions are equal to legislation in coercing manufacturers' behavior or enforcing public policy, these common law decisions can set standards that conflict with federal law. A state product liability action that could result in a finding that a car manufactured in 1987, without airbags is defective conflicts with Federal Motor Vehicle Safety Standard 208, which allowed manufacturers the option to not equip such cars with air bags. As a result the federal law, Standard 208, controls. Such a state common law action is preempted. Any other result upsets the Constitution's heirarchy of laws and the civil justice system's ability to function properly and efficiently. DRI urges the Court to affirm the lower court's decision.

Respectfully submitted,

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