Cipollone & Myrick: Deflating The Airbag Preemption Defense

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Introduction

For the past eighty years, courts have consistently held that a manufacturer is liable for the negligent construction of an automobile.[1] Additionally, courts have recognized a manufacturer's duty of reasonable care in the design of its automobiles to make them safe to the user for their foreseeable use.[2] This foreseeable use encompasses travel on the streets and highways, and includes the possibility of impact or collision with other vehicles or stationary objects.[3] The duty to eliminate an unreasonable risk of foreseeable injury to vehicle occupants has evolved into the doctrine of crashworthiness.[4]

A vehicle's crashworthiness is its ability to reduce or prevent injury to occupants from impact with either objects within a vehicle, or with the vehicle's interior once an accident has occurred.[5] The distinguishing feature of crashworthiness litigation is its emphasis on injury-causing defects as opposed to accident-causing defects or the actions of vehicle drivers. Generally, in crashworthiness cases, plaintiffs contend that due to the defective design of the automobile, they received enhanced or additional injuries they would not have sustained but for the failure to provide adequate occupant protection.[6] One possibility for reducing injuries to vehicle occupants involved in an accident is the installation of airbags in the automobile.[7]

Plaintiff's have claimed that a manufacturer's failure to install an airbag renders the vehicle defective and unreasonably dangerous.[8] In response, the automobile manufacturers have often successfully argued that the National Traffic

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1. *See* Elliot v. General Motors Corp., 296 F.2d 125 (7th Cir. 1961); McPherson v. Buick Motor Co., 217 N.Y. 382 (1916).

2. *See* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

3. *See id.* at 498.

4. *See* Deborah J. Goldman & Martin J. Kaufman, *Recent Developments in Crashworthiness Action: Litigation Trends for the 1990's and Beyond, in* Litigating the Complex Vehicles Case 1992, at 54.

5. *See* Gregory L. Taddonio, Note, *Revisiting* Myrick v. Freightliner*: Applying the Brakes on Restrictive Preemption Analysis,* 14 J.L. & Com. 257, 258 (1995).

6. *See Larsen*, 391 F.2d at 497.

7. "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 35 (1981).

8. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990).

and Motor Vehicle Safety Act of 1966[9] (hereinafter Safety Act or Act) preempts these state common law claims. Although plaintiffs have been litigating common law claims against automobile manufacturers for failure to install airbags in their vehicles for over ten years,[10] federal and state courts continue to grapple with the question of whether a plaintiff may bring such a claim or whether these claims are preempted by federal law.[11] Until recently, most courts have held that the Safety Act[12] preempts such actions relying primarily on the Act's preemption clause,[13] while others have allowed such claims to proceed holding that the Act's savings clause protects these strict liability claims.[14]

This preemption argument was the darling of the defense bar until the Supreme Court's decisions in *Cipollone v. Liggett Group, Inc.*[15] and *Freightliner Corp. v. Myrick.*[16] The teachings of these decisions provide helpful insights for navigating the preemption minefield. Although *Cipollone* and *Myrick* did not involve a failure to install an airbag claim, these cases provided important guidance for interpreting relevant portions of the Safety Act and clarified the current status of federal preemption doctrine, both of which are crucial for analysis of the airbag cases.[17]

This Note discusses and examines arguments for and against the preemption of common law airbag claims. The first two parts establish a general background to the airbag preemption issue. Part I discusses the purpose of the Safety Act and focuses on Federal Motor Vehicle Safety Standard (FMVSS) 208, which provides the requirements for occupant restraint systems in passenger automobiles.[18] Part II discusses pre-*Cipollone* federal preemption doctrine and the framework utilized by the courts to resolve preemption issues. This section includes an analysis of the different types of preemption and examples of how they are applied.

Part III examines the various applications of federal preemption doctrine in the

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9. Pub. L. No. 89-563, 80 Stat. 718 (codified in present form at 49 U.S.C. §§ 30101-30169 (1994 & Supp. I 1995)).

10. *See* Teret & Downey, *Air Bag Litigation: Promoting Passenger Safety,* TRIAL, July 1982, at 93.

11. *See, e.g.,* Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995) (holding no federal preemption of claims for failure to install airbags); Montag v. Honda Motor Co., 856 F. Supp. 574, 578 (D. Colo. 1994) (holding failure to install airbags is expressly preempted by federal law), *aff'd,* 75 F.3d 1414 (10th Cir.), *cert. denied,* 117 S. Ct. 61 (1996); Tammen v. General Motors Corp., 857 F. Supp. 788, 791 (D. Kan. 1994) (holding failure to install airbag claim is not expressly preempted by federal law, but is impliedly preempted).

12. The current version of the Safety Act is found at 49 U.S.C. §§ 30101-30169 (1994 & Supp. I 1995), pursuant to a 1994 recodification of transportation provisions in the United States Code. The codification most often cited in the case law is 15 U.S.C. §§ 1381-1431 (1988).

13. *See* Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988).

14. *See* Tebbets v. Ford Motor Co., 665 A.2d 345 (N.H. 1995).

15. 505 U.S. 504 (1992).

16. 514 U.S. 280 (1995).

17. *See id.*

18. 49 C.F.R. § 571.208 (1996).

airbag cases. This section reviews examples of cases in this area and analyzes the various rationales utilized by courts holding on either side of the issue.

Part IV contains a review of the *Cipollone* and *Myrick* decisions and focuses on the process and rationale utilized by the Supreme Court in finding no preemption in those cases.

Finally, Part V argues that Congress did not intend to preempt common law airbag claims when it enacted the Safety Act. By examining the underlying purposes and intentions of the Safety Act in conjunction with the principles of the federal preemption doctrine outlined in *Cipollone/Myrick*, it becomes clear that the Act neither expressly nor impliedly preempts these negligent design claims.

I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT

In response to rapidly increasing deaths and severe injuries on the nation's highways, Congress enacted the National Traffic and Motor Vehicle Safety Act in 1966.[19] The Safety Act was passed in response to mounting highway deaths and injuries.[20] The first section of the Act entitled "Congressional declaration of purpose," states, "Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents."[21] Thus, courts have consistently held that the primary objective of Congress in passing the Act was to promote safety and reduce highway deaths and injuries.[22] Congress felt that the Safety Act was the only way to ensure the accomplishment of these objectives due to the poor record of the automobile industry for adequate emphasis on safety engineering and the widely held belief that "safety doesn't sell."[23]

The Safety Act sought to increase automotive safety through the promulgation of federal motor vehicle safety standards (FMVSS). Congress envisioned that the safety standards would address two types of dangers: 1) vehicle defects which cause accidents, and 2) vehicle defects which aggravate injuries once an accident has occurred.[24] The latter problem, which is at issue here, received special attention from Congress.[25] Concerning this area of crashworthiness,[26] Congress

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19. *See* S. REP. NO. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709. *See also* Wood v. General Motors Corp., 865 F.2d 395, 397 (1st Cir. 1988).

20. *See* State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 477 (D.C. Cir. 1986).

21. 49 U.S.C. § 30101 (1994).

22. *Wood*, 865 F.2d at 395; Chrysler Corp. v. Tofany, 419 F.2d 499, 511 (2d Cir. 1969); Larsen v. General Motors Corp., 391 F.2d 495, 499 (8th Cir. 1968).

23. S. REP. NO. 89-1301, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710 ("The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in [the auto] industry which has plainly resulted in the inadequate allocation of resources to safety engineering.").

24. *See Wood*, 865 F.2d at 397.

25. *See* S. REP. NO. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709.

26. "Crashworthiness" involves more than mere protection from the second collision. *See, e.g.*, FMVSS 216, 49 C.F.R. § 571.216 (1996) (roof crush resistance).

focused on the devastating impact between the occupants of the vehicle and the vehicle's interior, the so-called "second collision."[27] The Senate Committee noted that the "'second collision' has been largely neglected . . ." and "[t]hat recessed dashboard instruments and the use of seat belts can mean the difference between a bruised forehead and a fractured skull."[28]

Congress implemented this plan by authorizing the Secretary of Transportation[29] to develop and issue motor vehicle safety standards to protect the public from an unreasonable risk of injury due to "the design, construction or performance of motor vehicles . . . ."[30] The Secretary of Transportation subsequently delegated the duty of promulgating safety standards to the Director of the National Highway Traffic Safety Administration (NHTSA).[31]

A. The Preemption Clause

Congress intended to give the Federal government primary responsibility for regulating the automobile industry through the Safety Act.[32] The role of the states in the motor vehicle safety regulatory scheme is articulated in the preemption clause of the Act:

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

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27. *See Wood*, 865 F.2d at 397.

28. S. REP. NO. 89-1301, at 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2710.

29. When passed, the regulatory authority under the Safety Act was delegated to the Secretary of Commerce. Within two months of the Safety Act's passage, Congress created the Department of Transportation and transferred the administration of the Safety Act to the new department. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(a)(6)(A), 80 Stat. 931, 938 (1966). Within the Department of Transportation, the responsibility for writing the FMVSS was delegated to the National Highway Safety Bureau. Exec. Order No. 11,357, 32 Fed. Reg. 8225 (1967). In 1970, Congress transferred the administration of the Safety Act to the National Highway Transportation Safety Administration (NHTSA). *See* Highway Safety Act of 1970, Pub. L. No. 91-605, § 202(a), 84 Stat. 1713, 1739 (1970). The current delegation is found at 49 U.S.C. § 105 (1994).

30. 49 U.S.C. § 105 (1994).

31. *See* 49 C.F.R. § 1.50(a) (1996). The current delegation to NHTSA is codified at 49 C.F.R. § 501.2(a) (1996). *See also* 49 U.S.C. § 105.

32. *See Wood*, 865 F.2d at 396.

standard.[33]

In other words, no state or political subdivision may issue an automobile safety standard that is not identical to the comparable FMVSS.[34] However, states may still establish identical regulations, and regulate on aspects of performance not specifically covered by the Safety Act.[35]

B. The Savings Clause

With respect to safety standards under state tort law, however, the preemption clause's decree of exclusive federal authority is less clear.[36] Nowhere in the preemption section are common law actions addressed, nor does the preemption section identify whether common law actions are preempted as well as state regulations. Notwithstanding the Act's preemption provision, the Act also contains a savings clause that does address common law actions directly: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[37]

Many courts have held that failure-to-install-airbag suits are preempted despite the clear language of the savings clause.[38] Perhaps the most important factor in determining the outcome of these cases concerns the courts' interpretation of these two apparently conflicting sections. The decision of whether or not no-airbag suits are preempted usually turns on the narrow or broad construction given these sections.[39]

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33. 49 U.S.C. § 30103(b) (1994). Section 30103(b) corresponds to 15 U.S.C. § 1392(d) (1988) and is often referred to as the preemption clause.

34. *See Wood,* 865 F.2d at 398.

35. *See* Chrysler Corp. v. Rhodes, 416 F.2d 319 (1st Cir. 1969).

36. *See id.*

37. 49 U.S.C. § 30103(e) (1994). Section 30103(e) corresponds with 15 U.S.C. 1397(k) (1988) and is often referred to as a savings clause.

38. *See, e.g.,* Pokorny v. Ford Motor Co., 902 F.2d 1116, 1118 (3rd Cir. 1990); Kitts v. General Motors Corp., 875 F.2d 787, 789 (10th Cir. 1989).

39. *See, e.g., Pokorny,* 902 F. 2d at 1119 (holding that preemption clause and savings clause must be read together in order to prevent rendering the savings clause a mere redundancy); *Wood,* 865 F.2d at 407 (holding that § 1397(k) should be read narrowly because Congress did not foresee lawsuits claiming design defects when it enacted § 1397(k), thus the section should not be construed to "save" such common law actions); Montag v. Honda Motor Co., 865 F. Supp. 574, 577 (D. Colo. 1994) (holding that the savings clause only preserves those nonpreempted state law tort claims, and that the savings clause must be read narrowly because Congress did not express an intent to undermine the Safety Act through the savings clause), *aff'd,* 75 F.3d 1414 (10th Cir.), *cert. denied,* 117 S. Ct. (1996); Baird v. General Motors Corp., 654 F. Supp. 28, 30 (N.D. Ohio 1986) (holding that § 1392(d) must be construed narrowly in light of § 1397(k)'s express continuation of common law liability).

C. FMVSS 208

FMVSS 208, entitled "Occupant Crash Protection," was first adopted in 1967, and it is a lengthy regulation which "bears a complex and convoluted history."[40] Since the inception of this standard, there has been a national controversy regarding mandatory passive restraint requirements.[41] The standard specifies performance requirements for the protection of vehicle occupants in crashes.[42] The regulation's purpose is to reduce the number of deaths of vehicle occupants and the severity of injuries by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.[43]

In its original form, FMVSS 208 merely required the installation of manual lap belts in all new automobiles.[44] However, it was painfully apparent that the voluntary usage of manual seat belts was too low to achieve any significant reduction in highway deaths or occupant injuries.[45] In 1972, NHTSA amended FMVSS 208 to require the gradual mandatory phase-in of passive restraints in all cars manufactured after 1975.[46] The mandatory passive restraint controversy began with the passage of the Safety Act and has since raged for over thirty years, outlasting seven presidents, eight heads of the Department of Transportation, and more than eight Directors of the NHTSA.[47]

The first mandatory phase-in allowed manufacturers to install manual belts with an ignition interlock system which prevented a car from starting until the seat belts were engaged.[48] Public outcry against this system prompted Congress to eliminate the ignition interlock standard in 1974.[49] As amended in 1975, FMVSS 208 also granted automobile manufacturers the option of installing one of three restraint systems; passive restraints for front and lateral crashes; passive restraints for front crashes plus lap belts for side crashes and rollovers; or manual seat belts

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40. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 34 (1983). For an excellent discussion of the tortured history of FMVSS 208, see Keith C. Miller, *Deflating the Airbag Preemption Controversy,* 37 EMORY L.J. 897, 901-09 (1988).

A complete history of FMVSS 208 is not necessary to understand the preemption issue. However, some background is helpful in understanding the motives and ability of the manufacturers to postpone the introduction of passive restraints for almost thirty years.

41. *See* Hernandez-Gomez v. Leonardo, 884 P.2d 183, 185 (Ariz. 1994).

42. 49 C.F.R. § 571.208 S1 (1996).

43. *Id.* § 571.208 S2.

44. *See* 32 Fed. Reg. 2415 (1967).

45. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 34 (1983).

46. *See* 37 Fed. Reg. 3911 (1972).

47. *See* Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post-*Cipollone: *An End to the Federal Preemption Defense*, 46 BAYLOR L. REV. 141, 145 (1992).

48. *See* Taylor v. General Motors Corp., 875 F.2d 816, 823 (11th Cir. 1989).

49. *See* U.S.C. § 1410b (1970 & Supp. V 1975) (codified in present form at 49 U.S.C. § 30124 (1994)).

alone.[50]

Late in 1975, the decision to impose mandatory passive restraints was postponed until August 1976.[51] In June 1976, The Secretary of Transportation once again delayed introduction of mandatory passive restraint systems and extended the optional alternatives indefinitely, fearing public hostility to the new systems.[52] Four months, later a new Secretary disagreed with the decision and again reversed course reimposing the mandatory requirement.[53] The new standard required the phase-in of mandatory restraints between 1982 and 1984.[54] Then again, in 1981, a new administrator rescinded the mandatory passive restraint requirements.

This decision to rescind the mandatory phase-in was challenged in the courts, and the Supreme Court held that the rescission was arbitrary and remanded the matter for further review.[55] NHTSA then reimposed the mandatory passive restraint requirement, providing for phase-in between 1986 and 1989 unless states with populations equal to two-thirds of the nation's total population passed mandatory seatbelt use laws by April 1989.[56]

Today FMVSS 208 still provides manufacturers with three options depending on the automobile's date of manufacture: (1) a passive restraint system (air bags) with seat belts;[57] (2) a combination of passive restraints, detachable shoulder harness, lap belts, and warning systems;[58] or (3) a three-point manual belt system with an audible warning device.[59] Despite the documented increase in occupant safety afforded by passive restraints, mandatory passive restraints were not required on all passenger automobiles until 1996.[60] As one court has noted, the history of the Safety Act and FMVSS 208 in government imposes standards on a politically and financially powerful industry: "The government makes bold pronouncements, considerable resistance is encountered, the government falls back, time limits come and go with liberal extensions, the party in power has their impact, yet gradually things do change."[61]

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50. *See* 49 C.F.R. § 571.208.S4.1 to S4.1.2.3.2 (1975) (current version at 49 C.F.R. § 571.208.S4.1.5.3 (1996)).

51. *See* 40 Fed. Reg. 16,217 (1975) (proposed amendment to 49 C.F.R. § 571.208 (1974) (current version at 49 C.F.R. § 571.208 (1996)).

52. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 28, 36-37 (1983) (citing Secretary Coleman's Decision of Dec. 6, 1976).

53. *See* 49 C.F.R. § 571.208.S4.1.2, S4.1.3(a) (1977) (current version at 49 C.F.R. § 571.208 (1996)).

54. *See* S. REP. NO. 95-481, at 1 (1977).

55. *Motor Vehicle Mfr's Ass'n*, 463 U.S. at 57.

56. *See* 49 C.F.R. § 571.208.S4.1.3-S4.1.5.1 (1985) (current version at 49 C.F.R. § 571.208.S4.1.3-S4.1.3.3.3 (1996)).

57. *See id.* § 571.208.S4.1.2.1 (1996).

58. *See id.* § 571.208.S4.1.2.2.

59. *See id.* § 571.208.S4.1.2.3.

60. *See id.* § 571.208(a)(1).

61. Alvarado v. Hyundai Motor Co., 908 S.W.2d 243, 246 (Tex. App. 1995, no writ).

Automobile manufacturers have been successful for over thirty years in postponing the mandatory introduction of passive restraints, having "waged the regulatory equivalent of war against the airbag."[62] Given the inability of the regulatory system to provide adequate protection for motorists, persons injured in automobile accidents have pursued their claims of defective design in the courts.[63] As this Note makes apparent, the manufacturers have fought equally hard in the courtroom to prevent the courts from making the installation of airbags an economic necessity.

II. PRE-*CIPOLLONE* FEDERAL PREEMPTION DOCTRINE

The laws of the United States are the supreme law of the land, any state law or state constitution notwithstanding.[64] Federal agency regulations may preempt state law.[65] In determining whether a federal law preempts a state's law, the "sole task is to ascertain the intent of Congress."[66] Thus, the core of federal preemption doctrine is that state law may not override or interfere with federal laws that explicitly express the will of Congress.

However, the Supreme Court has cautioned, "[i]n the interest of avoiding unintended encroachment on the authority of the States, . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption."[67] The presumption against preemption is based on the States' longstanding interest in providing compensation to tort victims. The justification for such caution is that Congress certainly has the power to "act so unequivocally as to make clear that it intends no regulation except its own."[68]

Also, the courts have assumed that there is no preemption in order to ensure that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.[69] As one court noted, "if we are left with a doubt as to congressional purpose, we should be slow to find preemption, '[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.'"[70] Thus, preemption will not lie unless it is "the clear and manifest purpose of

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62. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 28, 49 (1983).

63. *See, e.g.*, Wood v. General Motors Corp., 865 F.2d 395, 400 (1st Cir. 1988) ("In addition to the present action, about two dozen other suits have been recently filed claiming that an automobile was defectively designed because it lacked passive [airbag] restraints.").

64. *See* U.S. CONST. art. VI, cl. 2.

65. *See* Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985).

66. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987).

67. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-64 (1993).

68. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947). *See also* Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996).

69. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

70. Chevron U.S.A., Inc., v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984) (quoting Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943)).

Congress."[71]

The Supreme Court has held that state law is preempted by federal law in three circumstances:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. . . .
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> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . ."
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> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements. . . .[72]

Thus, the three types of preemption are: 1) express; 2) occupation-of-the field; and, 3) conflict. Because neither conflict nor occupation-of-the-field preemption are "explicitly stated in [a] statute's language,"[73] these two types are both forms

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71. Myrick v. Freuhauf Corp., 13 F.3d 1516, 1519 (11th Cir. 1994) (quoting *Easterwood*, 507 U.S. at 664 (citation omitted)), *aff'd sub nom.* Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); *see also Jones*, 430 U.S. at 525; *Rice*, 331 U.S. at 230.

72. English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (quoting *Rice*, 331 U.S. at 230) (citations omitted); *see also* Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984); Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1552 (11th Cir. 1991), *aff'd,* 507 U.S. 658 (1993).

> A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988) (quoting *Rice,* 331 U.S. 218, 230; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987)) (citations omitted).

73. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting *Jones*, 430 U.S. at 525).

of implied preemption.[74] Additionally, conflict preemption can come in two forms. State law will be preempted either when compliance with both federal and state regulations is physically impossible[75] or when the state law stands as an obstacle to the accomplishment and execution of the objectives of Congress.[76]

Express preemption occurs when Congress through explicit language in a statute declares its intention to preclude state regulation in a particular area.[77] Given the apparently unambiguous language in § 30103(b)(1), it becomes clear why some courts have held that failure to install airbag claims are expressly preempted by this clause.[78] However, despite the preemption clause, the question of whether this section expressly preempts state common law product liability claims continues today.[79]

Once a court finds that a claim is not expressly preempted, the court must determine whether the claim is impliedly preempted.[80] Conflict preemption is the most common type of preemption relied upon by the courts to find preemption of state tort airbag claims.[81] Conflict preemption exists when the state law conflicts with a federal regulatory scheme.[82] As the Supreme Court has observed, a conflict arises 1) when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or 2) when it is impossible to comply with both state and federal law.[83] In the airbag cases, the majority of courts finding preemption have ruled that penalizing a manufacturer for failing to install an airbag would frustrate the federal scheme that gave the manufacturers a choice of options.

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74. The Supreme Court has determined that both occupation-of-the-field and conflict preemption are types of implied preemption. Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291, 294 (11th Cir. 1993) (citing Gade v. National Solid Waste Management Ass'n, 505 U.S. 88, 98 (1992) (omitting internal quotation marks)).

75. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

76. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

77. *See* Pokorny v. Ford Motor Co., 902 F.2d 1116, 1120 (3d Cir. 1990); *see also* Chadwell, *supra* note 47, at 151.

78. *See, e.g.*, Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986).

79. *See, e.g.*, Johnson v. General Motors Corp., 889 F. Supp. 451, 457 (W.D. Okla. 1995); Montag v. Honda Motor Co., 856 F. Supp. 574, 576-77 (D. Colo. 1994), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Panarites v. Williams, 629 N.Y.S.2d 359, 360 (N.Y. App. Div. 1995).

80. *See* International Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987) ("Given that the [Clean Water] Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts [state law].").

81. *See, e.g., Pokorny*, 902 F.2d at 1124-25; Taylor v. General Motors Corp., 875 F.2d 816, 827 (11th Cir. 1989) (finding a failure to install an airbag claim would frustrate the federal scheme by taking away the flexibility provided by a federal regulation, and prohibiting the exercise of a federally granted option).

82. *See Ouellette*, 479 U.S. at 490-92.

83. *See* Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (citations omitted)).

Occupation-of-the-field preemption occurs when Congress, by enactment of certain legislation, intends to entirely preclude state regulation in a certain field.[84] As the Supreme Court has instructed:

> Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be found from a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of [the] obligations imposed by it may reveal the same purpose.[85]

III. PREEMPTION IN THE AIRBAG CASES

Over the past ten years, numerous lawsuits have been filed in both state and federal courts claiming that the failure to install an airbag rendered the vehicle unreasonably dangerous and defective. At least sixteen federal district courts have issued published opinions concerning the Safety Act and preemption of airbag claims.[86] At the federal appellate level, five circuits have considered the issue and all have found preemption of no-airbag suits.[87] However, many of the state courts

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84. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 497, 497-501 (2d ed. 1988).

85. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (citations omitted).

86. Sixteen district courts have issued eighteen opinions regarding airbag cases. *See* Johnson v. General Motors Corp., 889 F. Supp. 451 (W.D. Okla. 1995); Tammen v. General Motors Corp., 857 F. Supp. 788 (D. Kan. 1994); Montag v. Honda Motor Co., 856 F. Supp. 574 (D. Colo. 1994), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Pokorny v. Ford Motor Co., 714 F. Supp. 739 (E.D. Pa. 1989); Kolbeck v. General Motors Corp., 702 F. Supp. 532 (E.D. Pa. 1988); Richart v. Ford Motor Co., 681 F. Supp. 1462 (D.N.M. 1988), *rev'd sub nom.* Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989); Heftel v. General Motors Corp., Civ. A. No. 85-1713, 1988 WL 19615 (D.D.C. Feb. 23, 1988); Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1987); Hughes v. Ford Motor Co., 677 F. Supp. 76 (D. Conn. 1987); Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039 (D. Mont. 1987); Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987); Wood v. General Motors Corp., 673 F. Supp. 1108 (D. Mass. 1987) (Wood I), *remanded*, 865 F.2d 395 (1st Cir. 1988) (Wood II); Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987); Baird v. General Motors Corp., 654 F. Supp. 28 (N.D. Ohio 1986); Cox v. Baltimore County, 646 F. Supp. 761 (D. Md. 1986); Vanover v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986); Vasquez v. Ford Motor Co., Civ. No. 86-0657, 1986 WL 18670 (D. Ariz. Nov. 4, 1986). Note, that two of these courts, the Northern District of Georgia and the Eastern District of Pennsylvania, have addressed the issue twice.

87. Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997); Montag v. Honda Motor Corp., 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989); Kitts

which have addressed the issue do not agree with the federal appellate courts.[88] A number of different concerns and interpretations exist among the courts finding preemption and those finding no preemption. A review of some of the arguments advanced for and against preemption of these state common law claims is instructive.

A. *Applicability of 49 U.S.C. § 30103(b) to Airbag Claims*

One source of conflict between the courts concerns the applicability of the preemption clause, § 30103(b), to common law actions. This provision of the Act does not expressly mention actions at common law nor jury verdicts in the courts.[89] The section merely mentions actions by a "state or political subdivision of a state" in setting "any safety standard not identical to the federal standard."[90] Nevertheless, some courts have held that the language of this section applies to common law actions as well as actions by state legislative/regulatory agencies.[91] Thus, a common law decision that an automobile is defective because it is not equipped with an airbag is the equivalent of a state safety standard when reduced to a judgment.[92] Just as a state or political subdivision is precluded from setting a standard not identical to its federal counterpart, a jury is similarly precluded from imposing liability based on a common law standard not identical to the federal standard. Given that FMVSS 208 grants manufacturers options other than the installation of an airbag, a jury finding that an airbag should have been installed is not identical to the federal standard.[93]

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v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988) (Wood II). All of these cases held that the plaintiffs claims were impliedly preempted. These implied preemption holdings were revisited after *Cipollone v. Liggett Group*, Inc. 505 U.S. 504 (1992). *See, e.g.*, Myrick v. Freuhauf Corp., 13 F.3d 1516, 1521-22 (11th Cir. 1994) (holding that *Cipollone* partially superseded its previous decision in *Taylor*). *But cf. Montag*, 75 F.3d at 1417 (holding that *Myrick* did not alter validity of *Kitts*); Brand v. Mazda Motor Corp., No. 95-4139-SAC, 1997 WL 109976 (D. Kan. Feb. 12, 1997) (holding that Medtronic, Inc. v. Lohr, 116 S. Ct. 2290 (1996) did not alter result in *Montag*).

88. *See, e.g.*, Monroe v. Galati, No. 1CA-SA96-0221, 1997 WL 275498 (Ariz. May 27, 1997) (en banc) Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995); Tebbets v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996).

89. *See, e.g.*, 29 U.S.C. § 1144(c)(1) (1994). The Employment Retirement Income Security Act of 1974, where the "state law' which is preempted includes "all laws, decisions, rules, regulation, or other state action having the effect of law."

90. 49 U.S.C. § 30103(b) (1994). There do not appear to be any court decisions holding that a jury is a "political subdivision" of a state.

91. *See, e.g.*, Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986).

92. *See id.*; Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1097 (E.D. Mo. 1986).

93. *See* Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 NOTRE DAME L. REV. 1, 17-20 (1986). Wilton is one of the leading academic authorities that argues passive restraint claims are preempted. His theory is that these common law claims should be preempted because they would defeat the strong policy for

At least two federal district courts, however, have determined that the preemption clause does not preempt state tort law claims in light of the savings clause.[94] According to this rationale, the preemption clause only forecloses states from implementing automobile safety regulations that differ from their federal counterparts and does not directly address common law claims. Hence, Congress made a distinction between an award of tort damages to compensate for injury and the imposition of sanctions for non-compliance with a statutory or regulatory provision by preserving common law claims.[95]

B. *Occupation-of-the-Field*

Courts are also in disagreement over whether Congress intended to occupy the entire field of motor vehicle safety by enacting the Safety Act in 1966. In *Staggs v. Chrysler Corp.*,[96] the district court cited *International Paper Co. v. Ouellette*[97] for the proposition that general savings clauses such as § 1397(k) will not preserve common law claims that interfere with or frustrate the purposes of an act as a whole, "where Congress has carefully drawn a comprehensive statute for dealing with a particular subject."[98] In applying this rationale to the airbag cases, the court found that careful congressional drafting of a complex regulatory scheme for federal highway safety precluded the implementation of nonidentical state standards.[99] In *Doty v. Ford Motor Co.*,[100] the District Court for the District of Columbia shared this conclusion, holding that "Congress has legislated so comprehensively in the area of motor vehicle safety through the Safety Act that it has 'left no room for the States to supplement [Federal law].'"[101]

Courts concluding that there is no preemption of airbag claims have

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uniformity of standards. However, as mentioned previously, the primary purpose of the Act is to promote safety, not uniformity of standards. *See* Harris v. Ford Motor Co., 110 F.3d 1410, 1416-17 (9th Cir. 1997) (Van Sickle, J., dissenting). Uniformity is a means to an end, not an end in itself.

94. *See* Garret v. Ford Motor Co., 684 F. Supp. 407, 411 (D. Md. 1987); Baird v. General Motors Corp., 654 F. Supp. 28, 30 (N.D. Ohio 1986).

95. *See Baird*, 654 F. Supp. at 30-31:

> The preemptive language contained in § 1392d forecloses the states from implementing their own automobile safety regulations. The statutory language does not, however, directly address the state common law, and thus does not provide for express preemption of state common law claims.... Accordingly, the Court finds that Congress did not expressly preempt the plaintiff's common law products liability action....

96. 678 F. Supp. 274, 270 (N.D. Ga. 1987).

97. 479 U.S. 481, 493-94 (1987) (holding that where Congress carefully writes a comprehensive act to address a particular subject, the mere inclusion of a general savings clause in the legislation should not preclude a court from determining that Congress impliedly preempted that particular field).

98. *Staggs*, 678 F. Supp. at 274.

99. *See id.*

100. Civ. A. No. 85-3591, 1987 WL 31143 (D.D.C. Feb. 4, 1987).

101. *Id.* at *2 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

summarily rejected the occupation-of-the-field preemption argument. In *Garret v. Ford Motor Co.*,[102] the court held that two factors undermined the occupation-of-the-field argument. First, the *Garret* court found that the Act's express provision allowing states to enforce identical standards, and even higher standards for vehicles procured for their own use, is inconsistent with the defendant's claim that the Safety Act represented a comprehensive legislative scheme.[103] Second, courts had long recognized the ability of states to regulate areas not specifically regulated by the express text of the Act.[104] Thus the *Garret* court held that the "most reasonable way to reconcile the language of the National Motor Vehicle Traffic Safety Act is that it does not preempt plaintiff's common law claims."[105]

C. *Conflict Preemption*

Still another point of contention is whether common law judgments would conflict with the federal law to the extent that the state common law must be preempted. The arguments for and against conflict preemption arise out of the courts' differing interpretations of impossibility. As noted earlier, conflict preemption occurs when it is impossible for a party to comply with both state and federal regulations or the state law stands as an obstacle to the accomplishment of the objectives of the federal law.[106]

Courts favoring preemption contend that Congress intended FMVSS 208 to be both a minimum and maximum standard. The premise of this argument is that a common law judgment which imposed liability on a manufacturer because a jury found the automobile was defectively designed due to an absence of passive restraints, would amount to a requirement that manufacturers install an airbag in their automobiles.[107] The jury verdict would then become the new industry standard.[108]

D. *Express Preemption*

Express preemption occurs when the explicit Congressional language in a statute indicates a clear Congressional intent to preempt state action in that area. The primary argument for finding express preemption is that the preemption clause is facially unambiguous and has expressly circumscribed the area of motor vehicle safety for the federal law.[109] In *Johnson v. General Motors Corp.*,[110] the court held that Congress expressly preempted state law tort claims based on failure

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102. 684 F. Supp. 407 (D. Md. 1987).

103. *See id.* at 409.

104. *See id.* (citing Chrysler Corp. v. Rhodes, 416 F.2d 319, 323 (1st Cir. 1969)).

105. *Id.* at 412. *See also* Perry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257, 1264 (5th Cir. 1992) (finding no occupation-of-the-field preemption under the Safety Act).

106. *See* TRIBE, *supra* note 84, at 481.

107. *See, e.g.*, Staggs v. Chrysler Corp., 678 F. Supp. 270 (N.D. Ga. 1987).

108. *See id.* at 274.

109. *See* Johnson v. General Motors Corp., 889 Supp. 451, 577 (W.D. Okla. 1995).

110. 889 F. Supp. 451 (W.D. Okla. 1995).

to install airbags because those claims were applicable to the same aspect of performance as FMVSS 208, and these requirements were not identical to the federal standard.[111] The basis for this argument is that state common law damage awards are the functional equivalent of state regulatory standards and are therefore preempted by the preemption clause.[112]

However, the majority of courts, even those finding preemption (implied),[113] have held that these claims are not expressly preempted. The argument against express preemption rests primarily on the existence of the savings clause. It would be expected that given the broadly worded savings clause, which preserves all common law liability, that there would be no express preemption of these claims.

IV. *CIPOLLONE* AND *MYRICK*

Federal preemption analysis changed dramatically with the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*[114] In addition, the Court's decision in *Freightliner Corp. v. Myrick*[115] changed the way that courts now interpret the Safety Act.

A. *Cipollone v. Liggett Group, Inc.*

It is clear that the weight of authority in the years following the introduction of the Safety Act, especially in the federal courts, was heavily in favor of finding that no-airbag claims were impliedly preempted. However, the Supreme Court decision in *Cipollone v. Liggett Group, Inc.* shed an entirely different light on the preemption issue. *Cipollone* did not involve airbags or automotive safety, but rather a common law damages claim against cigarette manufacturers. In *Cipollone*, the son of a woman who developed cancer after smoking for over forty years brought a claim against the cigarette manufacturers alleging: 1) breach of express warranty based on assurances that cigarettes did not cause long-term health problems; 2) fraudulent misrepresentation based on attempts through advertising to negate the effect of federally mandated warning labels; 3) design defect, for failure to use safer alternatives; 4) conspiracy to deprive smokers of information on the effects of smoking; and, 5) failure to warn, based on negligence

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111. Courts in the following cases have held that failure to install airbag claims are expressly preempted: Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997); *Johnson*, 889 F. Supp. 451; Montag v. Honda Motor Co., 856 F. Supp. 574 (D. Colo. 1994), *aff'd*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); Cox v. Baltimore County, 646 F. Supp. 761, 763 (D. Md. 1986); Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1096-97 (E.D. Mo. 1986); Wickstrom v. Maplewood Toyota, Inc. 416 N.W.2d 838, 840 (Minn. Ct. App. 1987); Panarites v. Williams, 629 N.Y.S.2d 359, 366 (N.Y. App. Div. 1995).

112. *See* Collazo-Santiago v. Toyota Motor Corp., 957 F. Supp. 349, 353 (D. Puerto Rico 1997) (quoting Perry v. Mercedes Benz of N. Am., Inc., 957 F.2d 1257 (5th Cir. 1992)).

113. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116, 1125 (3d Cir. 1990).

114. 505 U.S. 504 (1992).

115. 514 U.S. 280 (1995).

in testing, selling, promoting and advertising the product.[116] The manufacturers raised the defense of preemption, arguing that the Federal Cigarette Labeling Act of 1965,[117] and the Public Health Cigarette Smoking Act of 1969[118] protected them from common law liability after 1965. The Court considered whether these claims could survive the language of the Act's preemption provisions which barred states from imposing other warning requirements relating to advertising or promoting cigarettes.[119] The question in *Cipollone* was basically the same as in the airbag cases—whether the Act's preemption clause barred state common law damages claims.

In reversing part of the Third Circuit's holding that the Labeling Acts preempted all state law claims, the Court began its analysis by reviewing some of the basic principles of preemption doctrine; the inviolability of the Supremacy Clause, the presumption that state police powers are not superseded unless that is the clear and manifest purpose of Congress,[120] and the definitions of express and implied preemption. The Court then rejected the Third Circuit's approach of construing the statute as a whole and concluded that the preemptive scope of the Labeling Acts was governed exclusively by the express preemption language of each Act because:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.[121]

Because both statutes contained express preemption clauses, the Court determined that its sole task was to identify the "domain expressly pre-empted by each of those sections."[122] There was no need to perform an implied preemption analysis.

To aid in its analysis, the Court employed several tools of statutory construction. The first was the presumption against preemption.[123] Next, the Court noted that where Congress has spoken on the issue of preemption, there is

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116. *Cipollone*, 505 U.S. at 508.

117. Pub. L. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

118. Pub. L. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331-1341 (1994)).

119. The Act required a specific and conspicuous label on all packages of cigarettes sold in the U.S. which read: "Caution: Cigarette Smoking May Be Hazardous to Your Health." *Cipollone*, 505 U.S. at 514. *See* 15 U.S.C. § 1333 (1994).

120. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996).

121. *Cipollone*, 505 U.S. at 517 (quoting Malone v. White Motor Corp., 475 U.S. 497, 505 (1978)) (internal quotations omitted).

122. *Id.*

123. *See id.* at 518.

no need to infer congressional intent to preempt state law because of the "familiar principle of expression unius est exclusio alterius:[124] Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."[125] Applying the presumption against preemption and the aforementioned rule, the Court then determined that a "narrow reading" of the preemption provision was appropriate.[126] As a result of its analysis, the Court held that none of the petitioner's claims were preempted by the 1965 Act,[127] however, because the language of the 1969 Act was more broad, only some of the common law claims were preempted.[128] Thus, *Cipollone* dramatically altered previous preemption analyses by holding that the preemptive scope of a federal statute or regulation is limited to the express terms of the statute or regulation.

B. Myrick *I*

Following the Supreme Court's decision in *Cipollone* in 1992, many courts reevaluated their prior approaches to preemption analysis.[129] One of the courts to do this was the Eleventh Circuit Court of Appeals, which addressed the preemption question in light of the Safety Act in *Myrick v. Freuhauf Corp.*[130] In *Myrick*, two similar claims were consolidated where accidents occurred due to tractor-trailer rigs jackknifing and causing collisions on the highway. In both cases, claimants alleged that the rigs were negligently designed because they were not equipped with anti-lock brakes. The FMVSS in effect at that time gave the manufacturers "a choice of whether to install anti-lock brakes."[131] Because the manufacturers were given a choice between installing anti-lock brakes or more traditional airbrake systems, they argued that state common law actions based on

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124. The expression of one thing is the exclusion of another.

125. *Cipollone*, 505 U.S. at 517.

126. *See id.* at 518.

127. *See id.* at 518-19.

128. *See id.* at 530-31.

129. *See, e.g.*, Greenwood Trust Co. v. Massachusetts, 971 F.2d 818, 823 (1st Cir. 1992) ("[T]he High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption."); Draper v. Chiapuzio, 9 F.3d 1391 (9th Cir. 1993); Worm v. American Cyanamid Co., 5 F.3d 744, 747 (4th Cir. 1993); Kinley Corp. v. Iowa Utils. Bd., 999 F.2d 354, 358 (8th Cir. 1993); Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1447 (10th Cir. 1993) ("[W]hen the Court recently applied the doctrine of expressio unius est exclusio alterius to preemption cases, it excluded consideration of all forms of implied preemption, including conflict preemption."); Stamps v. Collagen Corp., 984 F.2d 1416, 1420 (5th Cir. 1993) ("Applying *Cipollone*, we reject, at the outset, Collagen's contention that we may resort to the doctrine of implied preemption. . . ."); Toy Mfrs. of Am., Inc. v. Blumenthal, 986 F.2d 615, 623 (2d Cir. 1992); American Agric. Movement, Inc. v. Board of Trade, 977 F.2d 1147, 1154 (7th Cir. 1992).

130. 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom.* 514 U.S. 280 (1995).

131. *Id.* at 1519-20.

a failure to install anti-lock brakes were preempted due to an implied conflict between the federal regulation and the plaintiff's claim. In resolving this issue, the *Myrick* court held that due to express preemption language in the statute, which provided a reliable indicium of Congressional intent, there was no need to infer Congressional intent to preempt state laws.[132] In doing so, the court overruled prior Eleventh Circuit decisions interpreting the Safety Act which had found implied preemption.[133]

C. Myrick *II*

On appeal from the Eleventh Circuit's decision in *Myrick* I, the Supreme Court elaborated on its holding in *Cipollone* vis-a-vis implied preemption analysis in the face of an express preemption provision.[134] First, the Court addressed the manufacturer's express preemption argument and held that there could be no express preemption because the particular safety standard at issue, FMVSS 121, which applies to anti-lock brakes, was suspended and was not in effect for purposes of the preemption clause.[135] The Court then addressed the argument that *Cipollone* completely precluded any consideration of implied preemption, stating,

> [W]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.[136]

The Court then clarified the *Cipollone* holding by stating that *Cipollone* articulated only an inference, and not a rule, that where Congress has expressly preempted a certain area in a statute, matters outside that area are not preempted.[137] Although the Court dismissed the plaintiff's argument that no implied preemption analysis was appropriate under the Safety Act because of the existence of an express preemption clause, the Court nevertheless agreed that summary judgment in favor

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132. *See id.*

133. *See, e.g.*, Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989) (In *Taylor*, the Eleventh Circuit engaged in traditional pre-*Cipollone* preemption analysis. First, the court considered and dismissed the manufacturers express preemption argument, then it performed an implied preemption analysis, finding a conflict between the effect of the state common law claim and the federal statute) (After *Cipollone*, almost all of the circuit courts held that if a preemption provision in a statute was a reliable indicium of Congressional intent, implied preemption was no longer required).

134. Freightliner Corp. v. Myrick, 514 U.S. 280, 287-89 (1995).

135. *See id.* at 289.

136. *Id.* at 288 (quoting *Cipollone*, 505 U.S. at 517) (citations and internal quotations omitted).

137. *See id.* ("At best, *Cipollone* supports an inference that an express preemption clause forecloses implied pre-emption; it does not establish a rule.").

of the defendants on the grounds of implied conflict preemption was not appropriate.

In addition, the Court held that there were two possible grounds for implied conflict preemption: 1) where it is impossible for a private party to comply with the state and federal requirements, or 2) where state law is an obstacle to the accomplishment and execution of the objectives of Congress.[138] The Court made quick work of the manufacturers preemption argument given the fact that no safety standard was in effect at the time. Thus, it was not impossible for the defendants "to comply with both federal and state law because there [was] simply no federal standard to comply with."[139] Additionally, in the absence of a promulgated standard, the Safety Act failed to address the need for anti-lock braking systems at all on tractor-trailers. Therefore, the Court had no basis for concluding that the "lawsuits frustrate 'the accomplishment and execution of the full purposes and objectives of Congress.'"[140]

V. POST-*CIPOLLONE/MYRICK* PREEMPTION ANALYSIS

Based on *Cipollone*, as clarified in *Myrick* II, the current state of preemption analysis appears clear. First, if a federal statute contains an express preemption clause, a court should determine whether that preemption clause alone provides a reliable indication of Congressional intent. In making this determination, the courts should follow the analysis in *Cipollone*: 1) begin with the presumption against preemption, 2) apply traditional canons of statutory construction, and 3) examine the other provisions of the statute in order to determine if there is any reason to go beyond the precise and narrow reading of the preemption clause itself.[141] If a court finds a reliable indication of Congressional intent in the express language and neither the application of the traditional canons of statutory construction nor examination of the other provisions of the statute suggest any reason to infer a different degree of preemption, then there is no need to go beyond the express language itself.[142]

Second, if the court determines that additional inquiry is required beyond a narrow and precise reading of the preemption clause, the court must determine whether the state law in question is in actual conflict with federal law.[143] This conflict analysis requires a determination of 1) whether it is impossible for a private party to comply with both state and federal requirements, or 2) whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[144] Although neither *Cipollone* nor *Myrick* involved airbags, applying the above principles derived from those cases resolves

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138. *See id.* at 287.
139. *See id.* at 288.
140. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
141. *See Cipollone*, 505 U.S. at 518.
142. *See* Wilson v. Pleasant, 660 N.E.2d 327, 334 (Ind. 1995).
143. *Myrick*, 514 U.S. at 287.
144. *See id.*

the airbag controversy.

A. *No Express Preemption*

Having established the framework in which to address the preemption argument, the first step is to determine the extent or scope of preemption intended by Congress.[145] It is clear that the preemption clause of the Safety Act, when read alone, does not provide a reliable indication of congressional intent with respect to its preemptive effect.[146] As the *Myrick* I court stated:

> We are concerned with what Congress expressly stated about preemption, and in the Safety Act, Congress put its statements about preemption in two statutory provisions, one of which we refer to as a preemption clause and the other one of which we call a savings clause. Our terminology notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both deal with what is and is not pre-empted.[147]

Thus, the two clauses taken together are the express preemption provisions of the statute. When interpreting the preemptive scope of the Safety Act, a court should read § 30103(b) in pari materia with § 30103(e) and construe the plain meaning of the language in both sections.[148] Looking first at § 30103(b), it is clear that this section requires preemption of "any safety standard" established by a state if there is a federal motor vehicle safety standard in effect covering the same aspect of motor vehicle safety.[149] The savings clause, on the other hand, provides that compliance with a federal safety standard does not exempt anyone from liability under common law.[150]

Automobile manufacturers have repeatedly argued that the savings clause does not preserve all common law liability claims, but only those that do not conflict with the standards enacted by Congress.[151] Most courts which have addressed this

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145. *See Cipollone*, 505 U.S. at 517.

146. *See Wilson*, 660 N.E.2d at 335.

147. Myrick v. Freuhauf, 15 F.3d 1516, 1526 (11th Cir. 1994), *aff'd sub nom.* 514 U.S. 280 (1995).

148. *See, e.g.*, Pokorny v. Ford Motor Co., 902 F.2d 1116, 1120 (3d Cir. 1990) (The auto manufacturers "argument that Pokorny's common law action is expressly preempted by the Safety Act and Standard 208 is unconvincing, primarily because it focuses on one provision of the Safety Act, § 1392(d), without giving adequate consideration to the Act's savings clause, § 1397(k). The question of express preemption is properly analyzed only after considering both § 1392(d) and § 1397(k).").

149. 49 U.S.C. § 30103(b) (1994).

150. *Id.* § 30103(e).

151. *See* Nelson v. Ford Motor Co., 670 N.E.2d 307, 310 (Ohio Ct. App. 1995), *appeal denied*. This argument has only been accepted by a few courts. *See, e.g.*, Boyle v. Chrysler Corp., 501 N.W.2d 865, 869 (Wis. Ct. App. 1993).

issue have refused to construe the savings clause so narrowly.[152] As one court reasoned, such a construction would render § 30103(e) a mere redundancy because § 30103(b) already provides that where a federal standard does not govern the same aspect of performance, a state standard is not preempted.[153]

Reading the two clauses in conjunction, it is clear that the plain language of § 30103(b) only prohibits states from implementing their own safety standards, and this section does not mention common law liability at all. Given the broadly-worded § 30103(e) savings clause, it would be reasonable to assume that if Congress had intended § 30103(b) to apply to common law claims as well as to state regulatory action, it would have said so. The Supreme Court has recognized that savings clauses similar to § 30103(e) preserve common law damages claims in the face of federal regulation.[154] One such act, the National Manufactured Housing Construction and Safety Act, contains language in the savings clause that is identical to the language in the Safety Act.[155] That legislation has been held to preserve common law damages claims.[156]

Perhaps the clearest enunciation of Congress' intent in 1966 regarding the relation between the two clauses came in the Eighth Circuit's ruling in *Larsen* in 1968, just two years after passage of the Safety Act:

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. . . . The Act is a salutary step in this direction and not an exemption from common law liability.[157]

Thus, § 30103(b), when read in conjunction with § 30103(e), is an explicit statement which provides a reliable indication of congressional intent that a state law cause of action for failure to install an airbag claim is not preempted by the Safety Act or the standards promulgated thereunder. Therefore, given the teachings of *Myrick/Cipollone*, there is no need to perform an implied preemption analysis because the express language is a reliable indication of congressional intent.[158]

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152. *See, e.g.*, Taylor v. General Motors Corp., 865 F.2d 816, 824 (11th Cir. 1989).

153. *See id.*

154. *See* Wilson v. Pleasant, 660 N.E.2d 327, 334-35 (Ind. 1995). In *Cipollone*, the Court noted that Congress, in the savings clause in the Comprehensive Smokeless Tobacco Act of 1986, (15 U.S.C. § 4406(c) (1994)), which reads "Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person.") "preserved state law damages actions based on those products." *Cipollone*, 505 U.S. at 518.

155. 42 U.S.C. § 5409(c) (1994).

156. *See, e.g.*, Shorter v. Champion Home Builders, 776 F. Supp. 333 (N.D. Ohio 1991); Mizner v. North River Homes, Inc., 913 S.W.2d 23, 26 (Mo. Ct. App. 1995).

157. Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968).

158. *See, e.g.*, *Wilson*, 660 N.E.2d at 335.

However, given that the law remains so unsettled in this area, the possibility exists that a court may perform an implied preemption analysis anyway. Even if a court were to engage in an implied preemption analysis, the court would still have to come to the conclusion that the failure to install airbags is not preempted by the Safety Act.

B. No Implied Preemption

Under *Myrick*, the Supreme Court has indicated that implied conflict analysis exists where 1) it is impossible for a private party to comply with both state and federal requirements,[159] or 2) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[160] Implied preemption occurs "when it is physically impossible for a party to comply with both state and federal law."[161] However, it is not impossible for automobile manufacturers to comply with both state and federal requirements in this instance. A manufacturer can install both seat belts and airbags, thereby achieving greater safety for vehicle occupants and fulfilling the goals of the Safety Act. In order for it to be physically impossible to comply with both state and federal requirements, the federal law would have to prohibit the installation of airbags. In that case, a state common law ruling against a manufacturer for not installing an airbag would produce a direct conflict.[162] FMVSS 208 merely permits other alternatives.

In order to determine if a state law stands as an obstacle to the full purposes and objectives of Congress, a court should examine the stated purposes and policies of the statute in general, and the statutory language at issue in particular, as elucidated by the statute's legislative history where possible.[163]

It is clear that the purpose of enacting the Safety Act was to reduce traffic accidents and deaths and injuries to persons relating from traffic accidents.[164] A finding of implied preemption would be contrary to the purpose and objectives of Congress. By authorizing federal regulation of automotive safety while preserving common law claims, Congress provided additional impetus for manufacturers to choose the safest system for the particular automobile they are manufacturing. FMVSS 208 is merely a minimum standard for motor vehicle performance.[165] It would defeat the purpose of the statute if manufacturers were not encouraged to install the safest system for their particular vehicle.

Additionally, an examination of the legislative history reveals that the drafters made a deliberate decision to preserve all common law claims. The Senate

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159. *See* Myrick v. Freuhauf, 514 U.S. 280, 287 (1995). *See also* English v. General Elec. Co., 496 U.S. 72, 79 (1990).

160. *Myrick*, 514 U.S. at 287.

161. California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (citing Florida Lime & Avocado Growers, Inc. v. Paul, 376 U.S. 132, 142-43 (1962)).

162. *See Wilson*, 660 N.E.2d at 339.

163. *See id.*

164. 49 U.S.C. § 30101 (1994).

165. *Id.* § 30111.

Committee Report commented directly on this issue. The original Senate version did not contain an express reservation of common law liability because the drafters did not believe the savings clause was required: "The federal minimum safety standards need not be interpreted as restricting state common law standards of care. Compliance with such standards would thus not necessarily shield any person form product liability at common law."[166]

Additionally, the House Committee was not satisfied that the Senate's version adequately preserved common law liability, and therefore added the savings clause. The House Committee Report stated that it "intended compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract and tort liability."[167]

The remarks of individual Congressmen are also unequivocal. The sponsor of the bill, Senator Magnusson, stated that "compliance with Federal standards does not exempt any person from common law liability."[168] Representative Dingell added: "The Act leaves intact every single common law remedy that exists against a manufacturer for the benefit of the motor vehicle purchaser."[169] Congress thus intended for the Safety Act to be a floor, not an insurance policy against common law liability.[170]

This review of the stated purposes and policies of the Safety Act, the particular language at issue and the legislative history make it abundantly clear that Congress was determined to reduce traffic accidents and deaths on the highways and to accomplish this purpose through both federal regulation and the state common law. Because compliance with FMVSS 208 is not an obstacle to the accomplishment of the purposes of Congress and it is not "physically impossible" to comply, there is no basis for finding implied preemption of airbag claims.

CONCLUSION

The National Traffic and Motor Vehicle Safety Act was enacted in 1966 in order to reduce the carnage on our nation's highways. Federal Motor Vehicle Safety Standard 208 was promulgated to ensure that automobiles provided greater protection to occupants from the "second collision" with the interior of the vehicle. For over ten years, automobile manufacturers successfully argued that the Safety Act impliedly preempted plaintiff's claims that an automobile was defectively designed because the automobile lacked an airbag.

The Supreme Court's reasoning in *Cipollone* and *Myrick* clarified federal preemption analysis and effectively eliminated the implied preemption argument under the Safety Act. A review of the statutory language and legislative history

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166. S. REP. NO. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720.

167. H.R. REP. NO. 89-1776, at 24 (1966).

168. 112 CONG. REC. 21,487 (1966).

169. 112 CONG. REC. 19,663 (1966).

170. *See* Harris v. Ford Motor Co., 110 F.3d 1410, 1416-18 (9th Cir. 1997) (Van Sickle, J., dissenting).

of the Act indicates that Congress intended that state common law actions would survive along with the federal regulatory scheme in order to fulfill the goals of the Act. Today, courts should find that failure to install airbag claims are not preempted by federal law and allow these claims to proceed to a jury for a determination of liability.