



# PRODUCT SAFETY & LIABILITY



## REPORTER

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### Motor Vehicles

#### **Williamson's Focus on Agency Record Clarifies Preemption Analysis, Experts Say**

**T**he U.S. Supreme Court's ruling Feb. 23 in *Williamson v. Mazda Motor of America Inc.* (see related story, this issue) could be instructive for attorneys examining preemption claims in some product liability cases by pointing them to look more closely at the federal agency record and rulemaking process, several experts suggested in BNA interviews after the ruling.

Williamson is likely to reverberate beyond the seat belt issue, observers said. Some saw claims over the type of glass used in vehicle windows as likely to survive preemption, and others saw application of the decision well outside the motor-vehicle context.

The attorneys and professors who spoke to BNA sought to make sense of the court's unanimity as well.

A touchstone for many of the comments was the U.S. Supreme Court's 5-4 opinion in a 2000 case, *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). In *Geier*, the court found claims that an automaker should have installed air bags preempted by a federal regulation that sought to encourage a "variety and mix" of passive-restraint devices.

**Simple Application of Precedent?** "The influence of the agency has been there all along in these cases," Professor Catherine M. Sharkey of the New York University School of Law told BNA. *Williamson*, she said, "brings it to the fore, and I think it should shift attention, litigators' attention, and interest groups—those who represent state interests, those who represent business interests—it should shift their emphasis or focus to . . . what's going to be in that rulemaking record, because that's obviously front and center in the court's analysis of its legal preemption determination."

Sharkey said the opinion "imposes an additional condition [on *Geier*.] Just because there's a choice that's been presented in a federal regulation, that in and of it-

self is not going to preempt a state law tort suit that is requiring one particular option. To me, what's most significant, and in that sense narrows *Geier*, . . . [is that] it squarely puts the focus or highlight on the agency piece."

Professor Nicholas Wittner of Michigan State University's College of Law, however, said that a "choices plus" requirement was in place already in *Geier*—more than the simple availability of a choice to a manufacturer.

Wittner catalogued some of the ways the opinions were similar. In *Geier*, he told BNA, Breyer "gave great deference to the agency; he did the same here. He exhaustively detailed regulatory history there; here there wasn't as much, so it didn't take the court so much time . . . . The only difference . . . is that you see the words that the [agency's provision of a] choice . . . must further a 'significant objective' " in *Williamson*, he said.

Regarding the "significant objective" phrase, Wittner said that the concept was the same in *Geier*. "It is implicit in *Geier* because Justice Breyer's analysis in *Geier* explains why the choice was significant. So I see no difference in the analysis itself. I see this as not breaking new ground at all—just a simple application of *Geier* with a different result."

Martin N. Buchanan, an attorney for the Williamson family, also found the two decisions consistent. He traced the "significant objective" language to *Geier*, but said, "This opinion makes it more clear that that wasn't just casual language . . . , and that's the standard the court is adopting."

To Matthew Wessler, an attorney with Public Justice PC, the regulation at issue in *Geier* was unique. "That will be the rare case," he said. Parties and courts, not just in the motor-vehicle context, he said, "will need to be sensitive to the factual record."

**Vehicle Windows and Beyond.** The experts also looked to the decision's implications.

Wittner said, "Although the decisions and analysis are the same and really don't change the litigation landscape, what will be interesting is to see how it plays out

with the . . . lack-of-glazing cases under FMVSS 205,” referring to claims that vehicle makers should have used laminated glass, for example, rather than tempered glass in the side windows of vehicles. The type of glass can affect the risk of ejection. “They’ve left to another day that particular issue,” Wittner said.

For Buchanan, the implications of the *Williamson* decision were clear: “Prior to today, every single lower court that has decided this issue has concluded that these types of seat belt claims are preempted, so this decision really does correct a very wide misapplication of *Geier*.” He said the decision is significant for motor-vehicle window-glazing suits as well. The same issue is present in those cases, he said, “and the same conclusion would hold true.” He added that *Williamson* might have an impact on the law relating to other federally regulated products.

Sharkey also saw implications beyond the motor-vehicle context. She cautioned that there are “some caveats to very broad applicability,” including a possible limitation to cases involving a statute with a so-called saving clause protecting tort suits. “On the other hand, to the extent [*Williamson*] has propounded a kind of framework . . . , that has reverberations far beyond the Motor Vehicle Safety Act and NHTSA, and to my mind the most significant development is a switch in focus over to the agency record and the rulemaking process for those entities that are concerned with preemption.”

Wittner also said that, in light of this decision, “the landscape of preemption will be affected by the executive order by the Obama administration . . . and also by the ABA’s resolution on preemption—because if you don’t have contemporaneous comments that there should be preemption, then it is less likely that the court would conclude that a tort lawsuit would be preempted.”

**Peace Breaks Out on the Bench.** “It is a surprise,” Buchanan said of the 8–0 result. “There was no indication from the oral argument that it was going to be unanimous.”

The dissenting voices in *Geier*, and in *Wyeth v. Levine*, 129 S.Ct. 1187 (2009), (37 PSLR 274, 3/9/09), ac-

counted for some of the surprise that Justice Stephen G. Breyer collected six other votes for his opinion in *Williamson*. (Justice Clarence Thomas, who provided the eighth vote for the result in *Williamson*, is known to oppose the doctrine of implied preemption, which formed the basis of the majority’s analysis.)

Sharkey told BNA that she was surprised that so many of the justices “would sign on to an opinion that rests so heavily on the agency’s contemporaneous explanation, and its current explanation before the court, as to whether there should be preemption.” It is a type of analysis she has written about and calls “sensible.”

“To me . . . the surprising feature of the lineup . . . is that the dissenters in *Wyeth*—Alito, Scalia and Roberts—would be joining the majority. . . . My read on the *Wyeth* case is that there was a big fight between the majority and the dissent about how broadly or narrowly to read *Geier*. It’s a puzzle,” Sharkey said.

Wessler said that the 8–0 result shows “how really different this case was from *Geier* in terms of the underlying structures of the regulation, and also how straightforward it is once you perform this analysis.” If a court performs the analysis, he said, “it’s actually relatively straightforward to reach the result about what the primary purposes of a regulation are and whether a tort lawsuit actually conflicts with those objectives or not. . . . The real hurdle before *Williamson* was getting courts not to overread *Geier*, and [that’s why] the court took this case. Once you dispatch that hurdle, the framework becomes much clearer and even the result [is one] everyone can agree on. So, a bit of a surprise—but once everyone agrees on how to interpret *Geier*, what it meant, then it’s a fairly straightforward kind of inquiry, and I think everyone was able to agree” that the lawsuit did not conflict with the regulation.

Sharkey, however, was not so sure of this explanation. “You can get a clear framework and still not get unanimity,” she said.

Sharkey also found it curious that the court did not mention the “presumption against preemption” in this opinion, making a contrast with *Wyeth v. Levine*.

BY MARTINA S. BARASH