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Stephen D. Lichtenstein
Bentley College

Gerald R. Ferrera
Bentley College

AIRBAG PRODUCTS LIABILITY LITIGATION: STATE COMMON LAW TORT CLAIMS ARE NOT AUTOMATICALLY PREEMPTED BY FEDERAL LEGISLATION

STEPHEN D. LICHTENSTEIN[1]
GERALD R. FERRERA[2]

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[1]Associate Professor of Law and Chair, Law Department, Bentley College, Waltham, MA.

[2]Professor of Law, Law Department, and research fellow at the Center for Business Ethics at Bentley College, Waltham, MA.

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I. INTRODUCTION

This article addresses an important and recurring issue of federalism, and attempts to resolve the tensions that exist between federal and state laws in the context of recent automobile airbag litigation. Even while airbag incidents have occurred recently, many with regrettably tragic outcomes, this article discusses airbags in quite a different circumstance. In fact, it is the absence of airbags in automobiles that is the common element of the cases discussed herein. The victims allege it is the omission of an airbag which caused their injuries to be worse than if an airbag had been installed.[3] Federal law mandates the installation of airbags, and so this particular issue will be resolved. Since states as well as the federal government regulate safety, the question of federal supremacy or preemption remains. The authors trace the evolution of the preemption doctrine as it relates to airbag litigation, and write further as to how manufacturers adapt, developing business and ethical strategies of compliance to concurrent state and federal regulation.

In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act [hereinafter "Safety Act"] for the purpose of reducing both traffic accidents and death and injuries to persons due to traffic accidents.[4] The Department of Transportation (DOT) is charged with overseeing enforcement of the Safety Act along with the National Highway Traffic Safety Administration (NHTSA).[5] Pursuant to the authority granted in the Safety Act, the Secretary of Transportation promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208 [hereinafter "Rule 208"].[6] Rule 208, amended many times, provides for occupant crash protection and gives auto manufacturers options for providing such protection.[7] Rule 208 specifies equipment requirements for active and passive automobile restraint systems. Generally, these options allow manufacturers to choose from automatic or manual seatbelts with lap and shoulder protections and seatbelt warning/alert lights.[8] In addition, Rule 208 operates in an incremental fashion, continually adopting new technology. For example, passenger cars manufactured in 1989 were required to meet more

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[3] *See generally* Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995) (asserting negligence for failure to include airbag passive restraint system); Tebbetts v. Ford Motor Co., 665 A.2d 345 (N.H. 1995) (asserting defective design in car because it did not contain driver's side airbag), *cert. denied*, 116 S. Ct. 773 (1996).

[4] National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 781 (1966) (codified as amended at 49 U.S.C. §§ 30101-30169 (1995)).

[5] 49 U.S.C. §§ 30111-30127 (1995).

[6] 49 C.F.R. § 571.208 (1995).

[7] *Id.*

[8] *Id.*

stringent safety requirements than those built in 1988.[9] Inflatable restraint systems, or airbags, became a federal requirement in September of 1997.[10]

There has been considerable litigation recently in which occupants in automobiles have been injured even while using the mandated safety equipment installed in their vehicles. The cases typically charge that Rule 208 - approved equipment is simply not adequate; had airbags been installed in these vehicles, the tragic outcomes in many of these accidents could have been avoided.[11] The victims in these "no airbag" cases have brought suit mostly in state courts. Various state common law products liability theories of defective design have been asserted since better safety technology (such as airbags) was available to manufacturers, yet disregarded.[12] Manufacturers have countered that these state suits are preempted by the Safety Act and Rule 208 which establish federal motor vehicle safety standards.[13]

Two recent important decisions involving no airbag litigation, *Tebbetts v. Ford Motor Co.*[14] and *Wilson v. Pleasant*,[15] are interpretive of two provisions of the Safety Act. The former case discussed a preemption clause,[16] and the latter a state common law savings clause.[17] These cases have posed important and controversial legal and ethical issues that have an enormous impact on auto manufacturers' exposure to liability.

This article will discuss the issues emanating from the decisions in *Tebbetts* and *Wilson* with major emphasis on the doctrine of preemption, the Supremacy Clause of the U.S. Constitution,[18] state police powers, the potential of the judiciary to shape business policy, and the ethical obligations of auto manufacturers to the many stakeholders involved. In addition, the authors proffer suggestions regarding the best road to travel when there are different options for meeting the overlapping layers of federal and state safety requirements.

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[9] *Id.*

[10] *Id.*

[11] *See generally Wilson*, 660 N.E.2d at 327; *Tebbetts*, 665 A.2d at 345.

[12] *See Wilson*, 660 N.E.2d at 329; *Tebbetts*, 665 A.2d at 346.

[13] *See Wilson*, 660 N.E.2d at 327-28 (General Motors filed a motion for summary judgment claiming Safety Act and Rule 208 preempt common law claims); *Tebbetts*, 665 A.2d at 346 (Ford moved for summary judgment asserting that the "no airbag" theory violated the supremacy clause and was preempted by the Safety Act and Rule 208).

[14] *Tebbets*, 665 A.2d at 345.

[15] *Wilson*, 660 N.E.2d at 327.

[16] 49 U.S.C. § 30103(b) (1995) (requiring any state legislation to be identical to federal law).

[17] *Id.* at § 30103(e) (noting that compliance with federal law does not exempt manufacturers from liability under state common law).

[18] U.S. CONST. art. VI, § 2 (empowering Congress to preempt state law).

II. CASE ANALYSIS

On May 15, 1991, in Holderness, New Hampshire, Rebecca Anne Tebbetts was fatally injured in an accident while driving a 1988 Ford Escort which was not equipped with a driver's side airbag.[19] Jo-Ann Tebbetts, the plaintiff and administratrix of her daughter's estate, brought suit against Ford and its dealer, Robert H. Irwin Motors, in New Hampshire state court alleging the automobile was defectively designed because it was not equipped with an airbag.[20] Ford's motion for summary judgment was granted by the Superior Court on the grounds the no airbag theory asserted by Tebbetts violated the Supremacy Clause of the United States Constitution,[21] and was impliedly preempted by the Safety Act[22] and by Rule 208.[23] The Supreme Court of New Hampshire reversed and remanded, holding the federal safety standards statute did not preempt tort claims based on state common law.[24] Consequently, the United States Supreme Court denied certiorari in *Tebbetts*.[25]

In a similar case, while driving a 1986 General Motors Chevrolet on November 10, 1988, James Wilson was hit head on by an automobile driven by William Pleasant.[26] Neither automobile was equipped with an airbag. James Wilson was not wearing his seat belt at the time and died at the scene. His estate alleged General Motors (GM) was negligent in designing, manufacturing, and selling a vehicle which failed to be crashworthy because the vehicle was not equipped with an airbag passive restraint system.[27] Like Ford, GM's motion for summary judgment was granted by the trial court on the grounds the Safety Act and safety regulations promulgated under the Act preempted Wilson's state common law claims.[28] The Court of Appeals affirmed, finding that although the Safety Act did not explicitly preempt common law claims, it impliedly did so.[29] The Supreme Court of Indiana vacated the opinion of the Court of Appeals, reversed the summary judgment in favor of GM, and remanded the case for retrial.[30]

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[19] *Tebbetts*, 665 A.2d at 346.

[20] *Id.*

[21] U.S. CONST. art. VI, §2.

[22] 49 U.S.C. §§ 30111-30127 (1995).

[23] 49 C.F.R. § 571.208 (1995).

[24] *Tebbetts*, 665 A.2d at 348.

[25] *Id.* at 345.

[26] *Wilson*, 660 N.E.2d at 327-28.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

In both cases the courts were called upon to interpret two provisions of the Safety Act. In order to crystallize the courts' interpretation and resultant reasoning, it is necessary and useful to first look at the relevant New Hampshire and Indiana state products liability laws. In 1969, New Hampshire adopted the doctrine of strict products liability as contained in the *Restatement (Second) of Torts*.[31] Subsequently, New Hampshire courts have ruled that in actions against manufacturers and sellers of products, plaintiffs are required to prove the accident and resultant damages/injuries were caused by an unreasonably dangerous defect present in the product at the time of purchase.[32] Liability even attaches in the exercise of reasonable care regarding the design.[33] In 1977, Indiana, like New Hampshire, adopted the *Restatement (Second) of Torts* approach recognizing that one who is injured as a result of a mechanical defect in a motor vehicle should be protected under the doctrine of strict liability.[34] In order to prevail on these state law claims, the injured occupant must overcome the automobile manufacturer's defense of the federal Supremacy Clause preemption,[35] and successfully argue that the Safety Act's savings clause[36] preserves plaintiffs' rights otherwise available under state law. The doctrine of federal preemption, which was addressed early in the Court's tenure, will be discussed in the next section.

III. DOCTRINE OF FEDERAL PREEMPTION AND THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

A. Historical Development

The Supremacy Clause, found in Article VI of the United States Constitution, establishes federal law as the supreme law of the land. As early as 1819, in *McCulloch v. Maryland*,[37] the Supreme Court held that when there is a conflict between the state and federal law, the state law is "without effect."[38] A federal

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[31] *See* Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969) (adopting doctrine of strict products liability as expressed in RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

[32] *See* Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676, 680-83 (D.N.H. 1972) (federal court construing New Hampshire products liability law); Chellman v. Saab-Scania AB, 637 A.2d 148, 150 (N.H. 1993); Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 845-47 (N.H. 1978); McLaughlin v. Sears, Roebuck & Co., 281 A.2d 587, 588 (N.H. 1971); Stephan v. Sears, Roebuck & Co., 266 A.2d 855, 857 (N.H. 1970).

[33] *See Thibault*, 395 A.2d at 802.

[34] *See* Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977); Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Miller v. Todd, 551 N.E.2d 1139 (Ind. 1990).

[35] U.S. CONST. art. VI, § 2.

[36] *See generally* 49 U.S.C. §§ 30101-30169 (1995).

[37] 17 U.S. (4 Wheat.) 316 (1819).

[38] *Id.* at 427.

law will prevail over a contrary state law even though enacted within the state's legitimate police powers.[39] In 1824, Chief Justice Marshall stated in *Gibbons v. Ogden*,[40] "[the commerce power] . . . like all others vested in Congress, is complete in itself . . . and acknowledges no limitations, other than are prescribed in the Constitution."[41]

Notwithstanding the congressional power, as recognized in the Supremacy Clause of Article VI and in the Supreme Court's case law precedents on congressional preemption, there is a recognition of state sovereignty and a consequent reluctance to infer preemption. In 1981, in *Maryland v. Louisiana*,[42] the Supreme Court announced that "Congress did not intend to displace state law."[43] The Supreme Court also stated in the 1984 case of *Metropolitan Life Ins. Co. v. Massachusetts* that "[s]tates traditionally have had great latitude under their police powers to legislation as 'to the protection of the lives, limbs, health, comfort, and quiet [of their residents]'."[44] Indeed, the Supreme Court has rejected the argument that federal statutes automatically oust all related state law.[45] Regulation of health and safety matters have emphatically been interpreted by the Court to be primarily, and historically, a matter of local concern.[46] The Tenth Amendment of the United States Constitution requires Congress to act within its delegated powers before it can claim a "dormant" or unused congressional power.[47]

Within the conflict of powers between that reserved to the states and the national interest as expressed in federal legislation, the Supreme Court seeks to establish a balance. In 1985, the Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*[48] held that state sovereignty is "more properly protected by procedural safeguards inherent in the structure of the federal system than by

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[39] *See generally* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[40] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-25, at 481 (1988).

[41] TRIBE, *supra* note 40, at 479.

[42] Maryland v. Louisiana, 451 U.S. 725 (1981).

[43] *Id.* at 746.

[44] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (quoting Thorpe v. Rutland & Burlington R. Co., 27 Vt. 140, 149 (1855)).

[45] Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 719 (1985).

[46] *Id.*

[47] U.S. CONST. amend. X.

[48] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1988).

judicially created limitations on federal power."[49] Congress, and not the federal judiciary, should define the parameters of state sovereignty.[50]

B. Preemption Analysis

The starting point in preemption analysis is to characterize the intent of Congress within the federal statute or regulation, to determine if there is a Congressional manifestation for the federal statute to supersede the historic police powers of the state. When such congressional action establishes a national interest, conflicting state regulation must yield as an invalid infringement upon federal policy. The issue is often one of resolving federal statutory intent regarding preemption. Preemption analysis as developed by the Supreme Court is generally divided into the following three categories: (l) "express preemption," meaning Congress explicitly stated in the federal statutory language its clear intent to entirely preclude state regulation; (2) "implied preemption" or "field preemption," meaning there is "implicitly contained in [the statute's] structure and purpose" an intent to preclude state regulation in that area; and (3) "conflict preemption," meaning that absent any legislative directive, state laws which directly conflict with federal law must yield.[51] In *Cipollone v. Liggett Group, Inc.*,[52] the Supreme Court stated:

> Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'[53]

The United States Supreme Court has recently recognized both occupation of the field, and "conflict preemption," as types of implied preemption.[54] Preemption analysis, as applied to the Safety Act, first requires an examination of its statutory intent. The Safety Act "directs the Secretary of Transportation to develop and issue motor vehicle safety standards."[55]

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[49] *Id.* at 552.

[50] *See* TRIBE, *supra* note 40, at 480 & n.12.

[51] *Id.* at 481 & n.l4. *See also Wilson*, 660 N.E.2d at 328.

[52] Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). *See generally* Kurt B. Chadwell, Note, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 BAYLOR L. REV. 141, 151-52 (1994).

[53] *Cipollone*, 505 U.S. at 516.

[54] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 97-98 (l992). *See also* Public Health Trust v. Lake Aircraft, Inc., 992 F.2d 291, 294 (11th Cir. 1993).

[55] 49 U.S.C. §§ 30101-30169 (1995).

1. Express preemption

For express preemption, courts must find express congressional language that the federal statute regulates the field entirely and that all state laws are thus invalidated. Through the Safety Act, Congress clearly wanted to design a federal policy of national safety standards. The Safety Act contains a preemption provision. The statute goes so far as to prohibit states from establishing motor vehicle safety standards not identical to federal standards.[56] However, there is no indication that Congress intended this federal legislation to preclude entirely state regulation. The preemption provision expressly prohibits state regulations contrary to federal standards.[57] For example, states may not authorize the manufacture of two-point seatbelts since federal regulations mandate three-point seatbelts. The federal standard does not expressly prohibit state common law tort claims based upon design defects. In fact, the same preemption provision contains a savings clause which in effect saves, or preserves plaintiffs' rights by stating that compliance with the Safety Act does not exempt manufacturers from state law claims.[58] Despite the existence of this savings clause, three courts have found there was express preemption of state safety and products liability laws.[59]

2. Implied preemption

The basis of this discussion is the statutory interpretation of the savings clause as relevant to plaintiff's state common law products liability claims alleging a design defect based on the failure to install airbags, and whether these claims are impliedly preempted by the federal Safety Act's section prohibiting a state safety standard not identical to the federal safety standard. The "no airbag" cases, then, can be most accurately viewed as an attempt to reconcile federal and state laws, and to determine whether the claims are impliedly preempted.

a. Occupation-of-the field

The "no airbag" context asks the question whether there is an implied preemption in the Safety Act based on a federal "occupation of the field" of motor vehicle safety? Is there a "'scheme of federal regulation'" with respect to motor vehicle safety

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[56] *See supra* note 16 and accompanying text.

[57] *Id.*

[58] *See supra* note 17 and accompanying text.

[59] Johnson v. General Motors Corp., 889 F. Supp. 451, 457 (W.D. Okla. 1995); Estate of Montag, 856 F. Supp. 574, 576 (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, 763-64 (D. Md. 1986); Vanover v. Ford Motor Co., 632 F. Supp. 1095, 1096 (E.D. Mo. 1986); Vasquez v. Ford Motor Co., No. 86-0657, 1986 WL 18670 (D. Ariz. Nov. 18, 1986).

> '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'?[60]

Are state "no airbag" claims preempted because of a Congressional design to exclusively "occupy-the-field" of motor vehicle safety?[61] The overwhelming tendency has been for courts to find state regulations impliedly preempted by federal law.[62]

b. Conflict Preemption

When there is a state law which is inconsistent with a federal statute, there may be a "conflict preemption" even though there is no express Congressional intent to preempt state regulation.[63] The Supreme Court in *Sears, Roebuck & Co. v. Stiffel Co.*[64] explained the doctrine of conflict preemption, noting "[it] arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full

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[60] Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983) (quoting Fidelity Federal Savings & Loan Ass'n. v. De la Cuesta, 458 U.S. 141, 153 (1982)). *See also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[61] *See* Chadwell, *supra* note 52, at 152-53.

[62] *See* Pokorny v. Ford Motor Co., 902 F.2d 1116, 1122 (3d Cir. 1990); Taylor v. General Motors Corp., 875 F.2d 816, 827 (11th Cir. 1989); Kitts v. General Motors Corp., 875 F.2d 787, 788-89 (10th Cir. 1989); Wood v. General Motors Corp., 865 F.2d 395, 402 (1st Cir. 1988); Waters v. Ford Motor Co., No. 95-3891, 1996 U.S. Dist. LEXIS 3050, at *13 (E.D. Pa. Mar. 13, 1996); Tammen v. General Motors Corp., 857 F. Supp. 788, 789 (D. Kan. 1994); Gills v. Ford Motor Co., 829 F. Supp. 894, 899 (W.D. Ky. 1993); Heath v. General Motors Co., 756 F. Supp. 1144, 1150 (S.D. Ind. 1991); Dallas v. General Motors Corp., 725 F. Supp 902, 906 (W.D. Tex. 1989); Kolbeck v. General Motors Corp., 702 F. Supp. 532, 541-42 (E.D. Pa. 1989); Staggs v. Chrysler Corp., 678 F. Supp. 270, 274 (N.D. Ga. 1988); Hughes v. Ford Motor Co., 677 F. Supp. 76, 85 (D. Conn. 1987) (dicta); Wattelet v. Toyota Motor Corp., 676 F. Supp. 1039, 1040-41 (D. Mont. 1987); Schick v. Chrysler Corp., 675 F. Supp. 1183, 1186 (D.S.D. 1987); Bass v. General Motors Corp., No. SA-86-CA-279, 1987 U.S. Dist. LEXIS 14459, at *6 (W.D. Tex. Sept. 14, 1987); Baird v. General Motors Corp., 654 F. Supp. 28, 31-32 & n.6 (N.D. Ohio 1986); Nissan Motor Corp. v. Superior Court, 261 Cal. Rptr. 80, 82 (Ct. App. 1989); Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838, 840 (Minn. Ct. App. 1987); Miranda v. Fridman, 647 A.2d 167, 174 (N.J. Super. Ct. App. Div. 1994); Cellucci v. General Motors Corp., 676 A.2d 253, 261 (Pa. Super. Ct. 1996), (overruling *Gingold* and *Heiple*); Marrs v. Ford Motor Co., 852 S.W.2d 570, 577 (Tex. App. 1993).

[63] *See Rice*, 331 U.S. at 230.

[64] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964).

purposes and objectives of Congress."[65] The manufacturer's defense in "no airbag" cases relies upon the preemption doctrine precluding the states under the Safety Act from asserting design defect and crashworthiness liability.[66] The outcome of such a defense hinges on how the courts will characterize the intent of Congress to preempt such litigation under the Safety Act.

Professor Lawrence Tribe of Harvard Law School has noted that "state and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict . . . [and] state action must ordinarily be invalidated if its effect is to conduct that federal action specifically seeks to encourage."[67] One could then ask the question whether the Safety Act prohibits a common law products liability claim that may establish a safety standard that *exceeds* the Safety Act? Would numerous state "no airbag" cases, based on the products liability theory of design defect, have the effect of frustrating the federal objectives established by the Safety Act. If so, should the courts, looking to the preemption doctrine, preclude state common law claims?

In their attempt to unravel and resolve the seeming conflict between federal and state law, both the *Tebbetts* and *Wilson* courts first considered the language and legislative history of the Safety Act. The courts then considered the effect and impact of the Supremacy Clause of Article VI of the United States Constitution where there is concurrent state regulation. Both *Tebbetts* and *Wilson* conclude that precedent requires "the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest intent of Congress,"[68] and state law which directly conflicts with federal law has no effect.[69] First, the courts reasoned Congress may use express language which indicates when federal law preempts state law. Second, in the absence of such language, state law is impliedly preempted when it regulates conduct in a field that Congress intended the federal government to occupy exclusively. Third, state law is preempted to the extent it actually conflicts with federal law such as where it would be impossible for a private party to comply with both state and federal requirements. Historically, auto manufacturers had been most successful in defending "no airbag" cases on the theory that implied preemption existed in cases where states attempted to enforce any motor vehicle safety standard not identical to those contained in the federal Safety Act.[70] Notably, most of these decisions in favor of the manufacturers precede

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[65] Hillsborough Co. v. Automated Med. Labs., 471 U.S. 707, 713 (1985). *See generally Sears, Roebuck & Co.*, 376 U.S. at 231.

[66] *See supra* note 12 and accompanying text.

[67] TRIBE, *supra* note 40, at 482-83. *See* Surles v. Ford Motor Co., 709 F. Supp. 732, 734 (N.D. Tex. 1988); Kelly v. General Motors Corp., 705 F. Supp. 303, 305 (W.D. La. 1988).

[68] *Rice*, 331 U.S. at 230.

[69] *McCulloch*, 17 U.S. (4 Wheat.) 316, 427 (1819).

[70] *See* Chadwell, *supra* note 52, at 155-56.

Cipollone v. Liggett Group, Inc.,[71] the preeminent ruling reshaping the focus and limiting the sweep of federal preemption, which proved crucial to the outcomes in *Tebbetts* and *Wilson*, both holding there was no federal preemption of the state common law claims.[72]

C. *Pre-Cipollone Case Law*

Prior to 1992, the overwhelming majority of jurisdictions in "no airbag" cases routinely granted summary judgment in favor of manufacturers, ruling that state law tort claims were expressly or impliedly preempted by the Safety Act. One such case was *Vanover v. Ford Motor Co.*[73] where the court ruled in favor of Ford.[74] In *dicta*, the *Vanover* court prophetically observed that to hold otherwise "would require the installation of airbags on penalty of enormous liability in tort."[75] Further, the court reasoned that such was not the intent of Congress.[76] This was the view of both federal and state courts.[77]

The decision in *Pokorny v. Ford Motor Co.*[78] merits discussion since it presented an expanded interpretation of implied preemption, albeit not as significant as *Cipollone*. John Duffy died in an accident while a passenger in a Ford van. The administratrix, Anne Duffy Pokorny, claimed that since the van was not equipped with airbags, automatic seatbelts, or protective netting on the windows, it was defectively designed.[79] On the issue of no airbags/seatbelts, the court predictably followed the earlier line of cases, holding Rule 208 impliedly preempted Pokorny's common law action since it conflicted with federal law and would act as an obstacle to achieving the goal

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[71] 505 U.S. at 504.

[72] *See generally Wilson*, 660 N.E.2d at 327; *Tebbetts*, 665 A.2d at 345.

[73] Vanever v. Ford Motor Co., 632 F. Supp. 1095 (E.D. Mo. 1986).

[74] *Id.*

[75] *Id.* at 1096.

[76] *Id.* (asserting that the statute, on its face, preempts state tort law).

[77] *See, e.g.*, Taylor v. General Motors Corp. 875 F.2d 816, 827-28 (11th Cir. 1989) (finding Florida tort law preempted by federal law); Kitts v. General Motors Corp., 875 F.2d 787, 788-89 (10th Cir. 1989) (determining that Safety Act preempts plaintiff's "no airbag" claim); Wood v. General Motors Corp., 865 F.2d 395, 418-19 (1st Cir. 1988) (concluding that federal law preempts Massachusetts products liability claim of "no airbags"); Surles v. Ford Motor Co., 709 F. Supp. 732, 734-35 (N.D. Tex. 1988) (noting plethora of cases deciding Safety Act preempts "no airbag" claims, and granting defendant's motion for summary judgment); Kolbeck v. General Motors Corp., 702 F. Supp. 532, 541-42 (E.D. Pa. 1988) (calling this a "close issue," the court ruled federal law preempts common law claims); Baird v. General Motors Corp., 654 F. Supp. 28, 31-33 (N.D. Ohio 1986) (ruling that federal law preempts "no airbag" claim); Nissan Motor Corp. v. Superior Court, 261 Cal. Rptr. 80, 81-82 (Ct. App. 1989) (deciding that the "no airbag" claim is preempted by federal law).

[78] *Pokorny*, 902 F.2d at 1116.

[79] *Id.* at 1117.

of the Safety Act—to provide national uniformity in motor vehicle safety requirements.[80] Turning to the issue of the lack of protective netting, the court allowed the action, reasoning that the potential liability for this type of passive system, unlike liability for failing to provide airbags or seat belts, presents no direct, actual conflict to Rule 208's regulatory framework.[81]

D. Cipollone v. Liggett Group, Inc.

Cipollone and its aftermath provided the impetus for a shift in the interpretation of federal preemption of state products liability claims. In *Cipollone*, Rose Cipollone and her husband, Antonio, filed a complaint in which they invoked the diversity jurisdiction of the federal district court, alleging Rose developed lung cancer because she smoked cigarettes manufactured by the Liggett Group, Inc., Lorillard Inc., and the Philip Morris Co. In 1984, Rose died and her husband filed an amended complaint alleging several different bases of recovery relying on theories of strict liability, negligence, express warranty, and intentional tort. The district court ruled these state common law claims were barred to the extent they relied on advertising and promotional activities after 1966.

The Court of Appeals reversed, holding Cipollone's state law claims were preempted by federal law.[82] The Supreme Court granted certiorari to consider the preemptive effect of the federal statutes. The cigarette manufacturers asserted the Federal Cigarette Labeling and Advertising Act of 1965, and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from any liability based on their conduct subsequent to January 1, 1966,[83] and preempted Cipollone's common law claims for breach of warranties, fraudulent misrepresentation and intentional concealment of information. The Supreme Court, in analyzing preemption and the Supremacy Clause, concluded that state powers are not to be superseded by federal law unless that is "the clear and manifest intent of Congress."[84] Thus, the Court recognized the legitimacy of state law even as it regulates concurrently with federal law.

Writing for the Court, Justice Stevens reasoned that the 1965 Act's preemption provision regarding advertising contained in section 5(b), albeit narrow and precise on its face, merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements in cigarette labels as per section 5(a), or in cigarette advertisements as per section 5(b), and did not

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[80] *Id.* at 1122-26.

[81] *Id.* at 1125-26.

[82] Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990). The jury did, however, award damages to Antonio Cipollone to compensate for losses caused by Respondents' breach of express warranty. *Cipollone*, 505 U.S. at 512.

[83] *Cipollone*, 505 U.S. at 512.

[84] *Id.* at 516 (quoting *Rice*, 331 U.S. at 230).

preempt state law damages actions.[85] Justice Stevens further interpreted the plain language of the preemption clause of the 1969 Act to be much broader than that of the 1965 Act, barring "not simply 'statement[s]' but rather 'requirement[s] or prohibition[s]' imposed under State law."[86] The Court concluded that '5(b) does not preempt all common law claims particularly where Congress has considered the issue of preemption and has included, as here, in the "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."[87] This analysis resulted in the judgment of the Court of Appeals being affirmed in part and reversed in part. The Court allowed Cipollone's common law claims based on express warranty, intentional fraud, misrepresentation, and conspiracy, but denied claims based on a failure to warn, and the neutralization of federally mandated warnings to the extent those claims were based on omissions or inclusions in the advertising or promotions of the cigarette manufacturers.[88]

Tebbetts, and particularly *Wilson*, in applying *Cipollone's* emphasis on the presumption against automatic preemption, decided that since Congress did not include an express preemption clause in the Safety Act, there was no implied preemption, and as a matter of law, it was no longer necessary to consider implied preemption at all.[89] *Wilson* supported this conclusion by citing two post-*Cipollone* cases it considered particularly illustrative.[90]

First, in *Hernandez-Gomez v. Leonardo*,[91] the court considered an automobile design defect allegation. The plaintiff alleged the design of the car failed to adequately protect her because, although the automobile's passive restraint system complied with Rule 208, the car was not crashworthy because it was not equipped with a manual lap belt. Predictably, the trial judge granted Volkswagen's motion for partial summary judgment, ruling the passive restraint system complied with the federal standards which required no lap belt and that the Safety Act preempted state tort law so that compliance with the Safety Act insulated the manufacturer from common law liability.[92] After the Arizona Court of Appeals denied relief, the Arizona Supreme Court, relying

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[85] *Id.* at 518-19. The Court stated that such a "reading comports with the 1965 Act's statement of purpose . . . with respect to any relationship between smoking and health . . . [and] the term 'regulation' most naturally refers to positive enactments by those bodies, not to common-law damages actions." *Id.* at 519.

[86] *Id.* at 520.

[87] *Id.* at 517 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)).

[88] *Cipollone*, 505 U.S. at 530-31.

[89] *Wilson*, 660 N.E.2d at 327; *Tebbetts*, 665 A.2d at 345.

[90] *Wilson*, 660 N.E.2d at 329.

[91] Hernandez-Gomez v. Leonardo, 884 P.2d 183 (Ariz. 1994).

[92] *Id.* at 186.

on *Cipollone*, held the Safety Act did not preempt the state common law tort claim,[93] reasoning courts should avoid debating implied preemption if the text of the statute addresses it, and thus, reliably identifies congressional intent.[94]

Second, in *Myrick v. Fruehauf*,[95] the plaintiff's vehicle collided with an eighteen wheel tractor-trailer. The plaintiff contended that the absence of anti-lock brakes in the tractor-trailer constituted negligent design and rendered it defective.[96] Again predictably, the trial court granted defendant's summary judgment ruling the Safety Act impliedly preempted plaintiff's claim. On appeal, the court reversed and held for the plaintiff.[97] The U.S. Supreme Court granted *certiorari*,[98] and rendered a decision ruling that Freightliner's preemption argument was futile because Myrick's common law claims did not conflict with federal law. The Court reasoned that it was not impossible for Freightliner to comply with both federal and state law, because there was no federal requirement in the Safety Act, or elsewhere, mandating anti-lock brake devices. Absent such a standard, the Court concluded Myrick's lawsuit did not "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress'."[99]

Following *Cipollone*, and its denial of *certiorari* in *Tebbetts*, the Supreme Court was presented with another opportunity in *Medtronic, Inc. v. Lohr*,[100] to construe the doctrine of preemption.[101] Indeed states' rights issues were central to the Court's 1996-97 Term.[102] In *Medtronic*, Lora Lohr was injured when her pacemaker failed necessitating emergency surgery.[103] Lohr filed suit in state court alleging negligence on the part of the manufacturer, Medtronic, as the reason for the failure of the pacemaker.[104] Medtronic removed the case to

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[93] *Id.* at 183-84.

[94] *Id.* at 188.

[95] Myrick v. Fruehauf, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom.*, Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995).

[96] *Id.* at 1518.

[97] *Id.* at 1521-28.

[98] Freightliner Corp. v. Myrick, 115 S. Ct. at 1483.

[99] *Id.* at 1488.

[100] Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996).

[101] *Id.* at 2256.

[102] *See* Linda Greenhouse, *States' Power Among Hard Issues on Supreme Court's New Agenda*, N.Y. TIMES, Oct. 7, 1996, at A1. *See generally* Eva M. Rodriguez, *The Waterway Wars: Native Americans' Claims To Riverbeds Lead To A States' Rights Skirmish*, LEGAL TIMES, Oct. 7, 1996, at S30.

[103] *Medtronic*, 116 S. Ct. at 2248.

[104] *Id.*

federal court, arguing the state law negligence claims were preempted by the federal Medical Device Amendments Act of 1976 (MDA).[105]

The Supreme Court in *Medtronic* prefaced its opinion with the mandate that state powers are not to be superseded absent express legislation indicating otherwise.[106] Congress' legislative purpose, to the extent it may be determined, is the touchstone. The Court concluded Lohr's common law claims were not preempted by federal law. It reasoned the federal statute did not specifically void general state regulations which provide plaintiffs a remedy for violations of common law duties (the federal statute provides plaintiffs with no recovery for injuries).[107]

In this recent case involving conflict preemption, then, the Court will allow concurrent state regulation unless "a particular state requirement threatens to interfere with a specific federal interest."[108] A plurality of the Court found no indication that Congress intended to preclude all common law causes of action.[109] The dissent, written by Justice O'Connor, would essentially end state common law claims if any pertinent federal legislation exists.[110] Justice O'Connor's literal reading of the federal legislation is diametrically opposed to the majority's careful analysis scrutinizing both federal and state legislation in an effort to reconcile the laws and to uphold state regulation to the extent possible.

E. No Preemption Under Wilson or Tebbetts: The Trend?

Applying the principles of *Cipollone*, *Hernandez-Gomez*, and *Myrick* to "no airbag" litigation, the courts in *Tebbetts* and *Wilson* reasoned that the preemption clause in the Safety Act must be considered not alone, but together with the savings clause. If so considered, it can be concluded that any possibility of implied preemption with respect to state common law claims is foreclosed.[111] Further, *Wilson* expresses[112] and *Tebbetts* implies[113] that design

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[105] *Id.* at 2248-49. *See* Medical Device Amendments Act of 1976, Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified as amended in scattered sections of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-374 (1992)).

[106] *Medtronic*, 116 S. Ct. at 2250 (quoting *Rice*, 331 U.S. at 230).

[107] *Id.* at 2257-58.

[108] *Id.* at 2257.

[109] *Id.* at 2251-53. *See generally id.* at 2259-62 (Breyer, J., concurring in part and concurring in the judgment).

[110] *Id.* at 2262 (O'Connor, J., dissenting). Joined by Justice Thomas and Chief Justice Rehnquist, Justice O'Connor concluded that "a fair reading of § 360K indicates that state common-law claims are preempted . . . to the extent that their recognition would impose 'any requirement' different from, or in addition to, [federal] requirements." *Id.* at 2263.

[111] *See Medtronic*, 116 S. Ct. at 2262.

[112] *Wilson*, 660 N.E.2d at 321.

[113] *Tebbetts*, 665 A.2d at 347-48.

defect litigation was not unknown in 1966. Congress would have therefore considered it part of the common law when it first adopted the Safety Act, thereby preserving products liability causes of action such as those presented here. In his dissent to *Wood v. General Motors, Corp.*, Judge Selya stated "[c]ongress made no specific exception for products liability for design defects, and we disserve the proper performance of our role by carving such an exception against the grain of history."[114]

In its decision to reverse and remand, the *Tebbetts* court concluded Congress intended the Safety Act to be "supplementary of and in addition to the common law of negligence and product liability."[115] Therefore, it followed that a jury should be allowed to determine whether manufacturers were negligent, *i.e.*, if they failed to exercise reasonable care, notwithstanding their compliance with the Safety Act and Rule 208. It is probably the manufacturers' worst case scenario - they can be held liable for damages on state claims for conduct that does not violate federal law. This is one of the prices paid for our federalist system. Throughout the dozen or so years that "no airbag" cases have been litigated, a small number of cases recognized the legitimacy of state laws even in the presence of federal laws.[116] The line of cases from *Cipollone*, *Hernandez-Gomez*, and *Myrick*, and now extending to *Medtronic*, instruct that the mere existence of federal regulation does not automatically void state regulations.

In rendering a similar decision as *Tebbetts*, the *Wilson* court reversed and remanded the case, concluding that Congress passed the Safety Act to help prevent the kind of injuries sustained by Mr. Wilson, and its strategy was to pursue those purposes and objectives through both federal regulation and state common law.[117] Thus, the Supreme Court cases, from *Cipollone* to *Medtronic*, signify the Court's recognition of the validity of state regulation. The Court has not reversed its position that federal law is supreme, but will, to the extent possible, uphold both state and federal law by conducting a careful analysis of the meaning and breadth of each set of regulations. This shift in the balance to a more receptive environment for state regulation is consistent with the present Court's decisions regarding states' rights. At the circuit court level and below, the trend, though less pronounced presently, has produced a series of cases in

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[114]Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988).

[115]*Tebbetts*, 665 A.2d at 348 (quoting Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968)).

[116]Perry v. Mercedes Benz, 957 F.2d 1257, 1264 (5th Cir. 1992); Garrett v. Ford Motor Co., 684 F. Supp. 407, 411-12 (D. Md. 1987); Murphy v. Nissan Motor Corp., 650 F. Supp. 922, 928 (E.D. N.Y. 1987); Ketchum v. Hyundai Motor Co., 57 Cal. Rptr. 2d 595, 564 (Cal. 1996); Gingold v. Audi -NSU- Auto Union, 567 A.2d 312, 330 (Pa. 1989), *overruling* Cellucci v. General Motors Corp., 676 A.2d 253 (Pa. Super. Ct. 1996); Nelson v. Ford Motor Co., 670 N.E.2d 307, 311 (Ohio Ct. App. 1995); Muntz v. Commonwealth, 674 A.2d 328, 332 (Pa. Commw. Ct. 1996); Heiple v. C.R. Motors, Inc., 666 A.2d 1066, 1074 (Pa. Super. Ct. 1995).

[117]*Wilson*, 660 N.E.2d at 339.

which plaintiffs have had increasing success in their state common law products liability suits.[118] Compliance with Rule 208 and recognition of Mr. Wilson's claim did not present an obstacle to Congress' purposes and objectives.[119] These cases pose many important and provocative ethical dilemmas for automobile manufacturers.

IV. ETHICAL OBLIGATIONS TO STAKEHOLDERS IN "NO AIRBAG" CASES

A. Stakeholder Analysis

The production of an automobile is an expensive and slow process requiring years of design and then safety testing on the part of automobile manufacturers. This is done in part to diminish products liability exposure by foreseeing motor vehicle accidents and then designing safer products in an attempt to prevent occupant injury and subsequent liability. Since manufacturers know that certain accidents will occur, they have the opportunity to design safer vehicles with the possibility of these accidents in mind. In our administrative law system, the public, as well as automobile manufacturers, are notified of proposed safety federal regulations and are given an opportunity to respond. Within the automobile industry there are strong, established lobbying groups which often are persuasive in convincing the legislators to forestall expensive safety devices such as airbags. When Congress passed the Safety Act, it gave automobile manufacturers the choice of installing airbags or seatbelts, and the majority chose seatbelts as the least expensive, though not the safest option.

In 1968, *Larsen v. General Motors Corp.*[120] first announced the doctrine of crashworthiness.[121] This doctrine requires an automobile manufacturer to design the vehicle so as to provide adequate protection to its occupants during an accident, thereby not enhancing the severity of any sustained injury.[122] Congress has dictated that safe vehicles must have an effective passenger

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[118]Since 1992, seven courts have concluded that state products liability suits are distinct from, and not preempted by, federal law. *See Perry*, 957 F.2d at 1264; *Ketchum*, 57 Cal. Rptr. 2d at 602; *Wilson*, 660 N.E.2d 327; *Tebbetts*, 665 A.2d at 348; *Nelson*, 670 N.E.2d at 311; *Muntz*, 674 A.2d at 332; *Gingold*, 567 A.2d at 330; *Heiple*, 666 A.2d at 1072. Even while these courts are outnumbered by those jurisdictions finding preemption, the trend since *Cipollone* is in favor of a narrower reading of the preemption clause coupled with a recognition of the right of states to legislate on matters historically related to the health and safety of their residents. For courts still finding preemption, see *Waters*, 1996 U.S. Dist. LEXIS 3050, at *13-14; *Johnson*, 889 F. Supp. at 457; *Tammen*, 857 F. Supp. at 789; *Estate of Montag*, 856 F. Supp. at 576; *Gills*, 829 F. Supp. at 899; *Miranda*, 647 A.2d at 174; *Panarites*, 216 A.D.2d at 875; *Minton*, 1996 Ohio App. LEXIS 3092, at *2; *Cellucci*, 676 A.2d at 259; *Marrs*, 852 S.W.2d at 577; *Boyle*, 501 N.W.2d at 869.

[119]*Wilson*, 660 N.E.2d at 339.

[120]*Larsen*, 391 F.2d at 495.

[121]*Id.*

[122]*Id.* at 503.

restraint system through its enactment of the Safety Act.[123] One of the three options for a restraint system, and concededly more expensive, is the airbag system. The Safety Act states that the standards under the Act serve as "minimum standard[s] for motor vehicle . . . performance."[124] The savings clause of that statute declares that federal compliance "does not exempt a person from liability at common law,"[125] thus preserving the plaintiff's right under state common law to sue, *inter alia*, for design defect and lack of "crashworthiness" due to the failure to install airbags that may have prevented the injuries because of an accident. Within this construct, the predominant stakeholders are clearly the manufacturers and the automobile occupants. One could effectively argue that automobile occupants are entitled to the safest option available under a natural and positive law ethical theory.

B. Natural Law

Since the common law has incorporated natural law principles such as due care, reasonable care and foreseeability, all arguable in a products liability design defect suit, natural law rights are relevant to the injured occupant. Professor Lloyd L. Weinreb of Harvard Law School, explains that deontologically there is an argument that "law's very nature impresses on it a minimum moral content."[126] In his book *Natural Law and Natural Rights*, Professor John Finnis, a leading contemporary philosopher of natural law at Oxford University, argues positive laws ought to conform to objective normative principles of natural law.[127] In a subsequent publication, Professor Finnis suggests we are led to an understanding of these principles through awareness of fundamental truths that are self-evident to rational beings.[128] He defines the essential doctrine of natural law as the principle that positive law

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[123] 49 U.S.C. § 30127(b), (d) (1994).

[124] 49 U.S.C. § 30102(a)(9) (1994).

[125] 49 U.S.C. § 30103(e) (1994).

[126] LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 1 (1987); Lloyd L. Weinreb, *The Case for Natural Law Reexamined*, 38 AM. J. JURIS. 1-13 (1993); Igor Grazin, *Natural Law as a Form of Legal Studies*, 37 AM. J. JURIS. 1-16 (1992).

[127] *See generally* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). For a critique of Finnis' natural law ethics see, Ian Duncanson, *Finnis and the Politics of Natural Law*, 19 U. WEST AUST. L. REV. 239-74 (1989); Valerie Kerruish, *Philosophical Retreat: A Criticism of John Finnis' Theory of Natural Law*, 15 U. WEST AUST. L. REV. 224-244 (1983); Anthony J. Lisska, et al., *Finnis and Veatch on Natural Law in Aristotle and Aquinas*, 36 AM. J. JURIS. 55 (1991) (critiquing Finnis' natural law ethics); *see also Symposium, Natural Law* 38 CLEV. ST. L. REV. 1 (1990). For a feminist scholar's critique see generally, Lynne Henderson, *Whose Nature? Practical Reason and Patriarchy*, 38 CLEV. ST. L. REV. 169 (1990). For an insightful supporting argument of natural law see Caryn L. Beck-Dudley & Edward J. Conry, *Legal Reasoning and Practical Reasonableness*, 33 AM. BUS. L. J. 1 (1995) (arguing that Finnis' natural law theory has a place in contemporary legal analysis and may fill a void that legal positivism does not).

[128] *See* JOHN FINNIS, FUNDAMENTALS OF ETHICS 110 (1983).

must comply with objective standards of fundamental rights that assure equality for all.[129] One could argue consumers are entitled to a fundamental inherent right to safety recognized by natural law. When federal safety standards provide for the technology of airbags, as a restraining option that are readily available and economically feasible to implement, it would appear that an injured automobile occupant has a natural law right to this safer "minimum" standard consistent with the state-of-the-art technology.

C. Positive Law

John Austin, the founder of legal positivism, emphasized that law can be analyzed from a moral perspective. In his lectures on jurisprudence, Austin stated that "the matter of jurisprudence is positive law."[130] Positive law is judged to be moral or immoral depending on how it serves the welfare of others.[131] Since positive law is created by the sovereign of the community, in our case Congress, positive morality would include positive laws and contemporary attitudes. The Safety Act, in providing the option of the installation of airbags, is an expression of positive law that clearly serves the welfare of consumers. The moral fault of Congress in enacting this legislation may have been in offering the "option of the installation of airbags" when the safer technology of airbags was available. Austin defined a right as a faculty residing in a determinative person by virtue of a given rule of law which avails against and answers to a duty lying on some other person.[132] The ethical duty of an auto manufacturer under a positive law theory in this case would be that of installing the safest option promulgated under the Safety Act, that is, airbags.

Professor H.L.A. Hart of Oxford University formulated the most widely accepted critical theory of Austin's positive law.[133] In his classic book *Taking Rights Seriously*, Professor Ronald Dworkin argues that although Hart agrees with Austin that "rules of law may be created through the acts of . . . public institutions, . . . Hart finds their authority in constitutional standards . . . accepted in the form of a fundamental rule of recognition by the community which they govern."[134] One could argue safety is a fundamental right recognized by the community and hence the decision by Ford Motor Company not to install airbags violated the underlying ethics of legal positivism.[135]

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[129] *See* FINNIS, *supra* note 127, at 161-64.

[130] JOHN AUSTIN, LECTURES OF JURISPRUDENCE 5 (1822).

[131] *See generally* Rosina L. Hunt, *Natural Law v. Positive Law: Interpreting Morality*, 28 NEW ENG. L. REV. 231 (1993).

[132] *Id.*; *cf.* DAVID LYONS, ETHICS AND THE RULE OF LAW 7 (1984).

[133] *See generally* HERBERT LIONEL A. HART, THE CONCEPT OF LAW and CAUSOTIM IN THE LAW (1961).

[134] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 21 (1977).

[135] Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413-61 (1987) ("Dworkin's kinship with Hart . . . implies that the

D. Utilitarianism

Utilitarian ethics according to John Stuart Mill, establishes principles of justice as "moral rules which concern the essentials of human well-being more nearly and are therefore of more absolute obligation than any other rules for the guidance of life."[136] This rule is the utilitarian principle of "the greatest good for the greatest number" that evokes a grand scheme of benevolence and seeks out the greater happiness of the stakeholders as those who are involved in, and affected by, the decision.[137] Stakeholder analysis requires corporate managers to consider the effect of their decisions on the entire corporate constituency including its employees, shareholders, suppliers, the local community and the customers. Corporations have adopted Codes of Ethics that often prioritized the stakeholders with the customer given top billing.[138] Since 1986, over one-half of the states have enacted what are known as "other constituency" statutes[139] that codify the doctrine of stakeholder analysis and permit directors to establish policy that protects its customers (and other stakeholders) often at the expense of the shareholders. Arguably, constituency statutes could permit or even require directors to prioritize customer relations over stockholders' profit and still be protected by the business judgment rule.[140] States that have enacted constituency statutes support natural law principles of fundamental rights and moral norms deducible from them. One could argue this includes the right to safety. The manufacturer, by selecting seat belts rather than the airbags, is perhaps acting under a utilitarian principle particularly if it applies any sort of a cost-benefit analysis. It certainly is not engaging in stakeholder analysis nor is it within the spirit of the constituency statutes. The manufacturer may argue that by keeping the price of the automobile down, it is providing a "greater good for the greater number." This ethical theory is not justified since it would violate injured consumers' rights concerning their long-term benefit and contribution to society.

Legal Process tradition is more vital than has commonly been supposed."). *See generally* William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 MARQ. L. REV. 673-89 (1984) (asserting that Hart holds law to be an instrument of social control).

[136] JOHN STUART MILL, UTILITARIANISM 73 (1863).

[137] *See* JOHN RAWLS, A THEORY OF JUSTICE 22 (1971).

[138] For example, Johnson & Johnson, Inc.'s credo begins, "[w]e believe our first responsibility is to . . . [those] . . . who use our products and services." *See* JOSEPH W. WEISS, BUSINESS ETHICS, A MANAGERIAL STAKEHOLDER'S APPROACH 99 (1994). It then lists its responsibility to its employees, the community and finally its shareholders. *Id.*

[139] *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1202 (West 1996).

[140] *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (addressing the business judgment rule).

E. Rawlsian Ethics

John Rawls's classic 1971 book, *A Theory of Justice*,[141] established a renaissance in political theory.[142] Rawls theorized about people in the "original position" (*i.e.*, a group of people who are unaware of their social status in society and come together to form a social contract), and would "apply principles that free and rational persons concerned to further their own interest would accept in an initial position of equality as defining the fundamental terms of their association."[143] Moreover, Rawls write that because

> no one in the original position knows his place in society, his class position, or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like, the principles of justice are chosen behind a veil of ignorance . . . [s]ince all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.[144]

Would the people in the original position agree with a judge who allows the automobile manufacturer's preemption defense to trump the plaintiff's claim of design defect? Rawls argued that two principles of justice would be chosen by those in the "original position." The *equal liberty principle* states "that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[145] One cannot enjoy *extensive basic liberty* without having the right to purchase an automobile with the safest available technology that is economically feasible. His second principle of justice, the *democratic equality principle* states "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[146] Certainly, one could argue that a consumer is the least advantaged person within the bargaining power structure of an automobile transaction with respect to its safety features. Rawls's democratic

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[141] *See* RAWLS, *supra* note 137, at viii (stating that the purpose of his philosophy is to present a conception of justice which "generalizes and carries to a higher level the social contract as found, say, in Locke, Rousseau, and Kant . . . [t]he guiding idea is that justice is the first virtue of social institutions").

[142] *See* Victoria Meikle, *Rawls "A Theory of Justice" and Its Critics*, 36 MCGILL L.J. 692, 706 (1991).

[143] RAWLS, *supra* note 137, at 11.

[144] *Id.* at 60; Thomas A. Reed, *Holmes and the Paths of the Law*, 37 AM. J. LEGAL HIST., 273 (1993) ("talk of reasoning from behind 'the veil of ignorance' would have been for Holmes to talk nonsense. People are social creatures, marked by sex, race, intellectual capacity. To decide without reference to oneself, or to our culture's place in history, was to Holmes absurd, misguided and arrogant . . . .").

[145] *See* RAWLS, *supra* note 137, at 66.

[146] *Id.* at 122-26.

equality principle and equal liberty principle would ethically argue in favor of the injured consumer pursuing state common law claims for design defect despite the doctrine of federal preemption.

V. CONCLUSION

One pre-*Cipollone* article suggests that at the trial court level, plaintiffs' likelihood of success in products liability cases has been decreasing, and decisions have turned in defendant's favor.[147] It would appear that the tide has turned, and that within a post-*Cipollone* legal landscape, the doctrine of implied federal preemption has been substantially limited in scope. The Safety Act, with its savings clause, appears to have negated assertions based on preemption doctrine that the Safety Act automatically supersedes plaintiffs' state common law products liability suits for defective design on the basis of no airbags. Arguments have been made, that in high-profile products liability cases where there is strong consumer demand such as with cigarettes, handguns, above-ground swimming pools, and "no airbag" litigation, federal preemption may no longer negate product-category liability in post-*Cipollone* cases.[148] Imposing liability without fault on specific categories of notoriously dangerous products may be a trend of the future. Courts appear positioned to expand the liability of a manufacturer in cases where injuries result from defectively designed products, federal law and cost analysis notwithstanding. Acceptable ethical principles of justice mandate such expansion.

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[147]James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

[148]James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability*, 66 N.Y.U. L. REV. 1336 (1991).