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## Justices deliver automakers setback on pre-emption issue

Robert C. Rodriguez is an associate with Wilson Turner Kosmo LLP in San Diego and a member of the firm's Product Liability Group. His practice is primarily focused on the defense of national automotive manufacturers against negligence and strict products liability lawsuits in both state and federal court.



In what many in the products liability industry viewed as a sharp reversal, the U.S. Supreme Court, in *Williamson v. Mazda*, 131 S. Ct. 1131 (2011), ruled earlier this year in an 8-0 decision that a California personal injury lawsuit was not pre-empted by a federal safety regulation. The *Williamson* case arose out of a 2002 head-on automobile accident in California. Thanh Williamson

was a rear center seat passenger in a 1993 Mazda minivan who died as a result of injuries sustained in the accident. Her estate alleged that Mazda's decision to equip the minivan's rear center seat with only a lap belt, instead of the safer lap-and-shoulder belts, caused her death. Mazda, relying on the Supreme Court's earlier decision in *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861 (2000), argued that Federal Motor Vehicle Safety Standard 208, a newer version of the same regulation at issue in *Geier*, expressly gave manufacturers the choice of installing either lap-and-shoulder or lap belts for rear center seats.

At issue was the scope of the federal pre-emption doctrine. This doctrine requires that when a state cause of action is in direct conflict with federal law or stands as an obstacle to a federal objective, the state law claim must be pre-empted.

In *Geier*, the Supreme Court had held that Standard 208 pre-empted state tort claims seeking to hold a manufacturer liable for the failure to install airbags. The Court's rationale was that in devising its regulations governing "passive restraints," such as airbags and automatic seatbelts, the Department of Transportation sought to preserve a manufacturer's option to choose from various types of restraints and to protect the manufacturer from common law liability for choosing one option over another - with the longer term goals of encouraging innovation and phasing in changes slowly. In short, providing passive restraints choice was a "significant regulatory objective" for the department. As such, "the federal regulation pre-empted a state tort suit that, by premising tort liability on a failure to install airbags, would have deprived the manufacturers of the choice that the federal regulation had assured them."

*Williamson v. Mazda*, however, changed the course. In *Williamson*, no doubt buoyed by the *Geier* decision, Mazda argued that in devising Standard 208, the Department of Transportation had the overarching objective of giving manufacturers "flexibility" in their choice of rear safety belts. Concerned about the costs and feasibility of requiring shoulder belts, Mazda argued that the department had created a scheme resembling for all intents and purposes one that the Court previously held had pre-emptive force in *Geier*. The Court disagreed, and found that Williamson's lawsuit was not pre-empted by Standard 208.

The true test for the Court was whether Williamson's lawsuit was as an obstacle to a "significant regulatory objective." In determining that it was not, the Court explained that in *Geier*, "the regulation's history, the agency's contemporaneous explanation, and its consistently held interpretive views indicated that the regulation sought to maintain manufacturer choice in order to further significant regulatory objectives." In contrast, the Court opined that in *Williamson*, "these same considerations indicate the contrary." It found that allowing manufacturers the choice between rear lap belts and lap-and-shoulder belts, primarily based on reasons of cost-effectiveness, was not a "significant regulatory objective" of the Department of Transportation, such as giving

Wednesday, September 7, 2011

### Judges and Judiciary

#### Names of Brown's judicial advisors offer glimpse

Gov. Jerry Brown has chosen a varied group of prominent lawyers and judges to act as advisors for his judicial nominations, according to multiple sources.

### California Supreme Court

#### Justices likely to rule gay marriage foes can defend Prop. 8

The state Supreme Court didn't seem willing Tuesday to stand in the way of allowing Proposition 8 proponents to defend the same-sex marriage ban in federal court.

### Judges and Judiciary

#### USC professor picked as magistrate judge

Jean Rosenbluth, a professor at the USC Gould School of Law, has been selected to fill a newly created U.S. magistrate judge position in Santa Ana federal court.

### Law Practice

#### Former prosecutor joins Winston & Strawn

The former head of President Barack Obama's task force to combat fraud in the wake of the financial meltdown has joined the San Francisco office of Winston & Strawn LLP as partner.

### Product Liability

#### Social media takes product liability claims to new level

With social media, an unhappy consumer can easily reach out to others and mobilize a campaign against any product. By **Jennifer Taggart** of Demetriou, Del Guercio, Springer & Francis LLP

### Environmental

#### Chevron settles underground pollution suit

Two Chevron Corp. subsidiaries agreed to pay \$24.5 million to settle a pollution lawsuit over alleged failures to properly maintain and operate underground storage tanks at gas stations around the state.

### Product Liability

#### Justices deliver automakers setback on pre-emption issue

Choosing which safety restraint to use becomes more risky for automakers. By **Robert C. Rodriguez** of Wilson Turner Kosmo LLP

### U.S. Court of Appeals for the 9th Circuit 9th Circuit also takes up standing and gay rights

On the same day the state Supreme Court considered legal standing of Proposition 8's

manufacturers the choice to install airbags.

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**Manufacturers cannot simply rely on being given a choice by the federal government, but now must engage in an exhaustive review of the regulatory history to determine whether preserving manufacturer's choice was a 'significant objective' of the government.**

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The *Williamson* Court also found it persuasive that the solicitor general's representation of the Department of Transportation's views was the opposite of its views in *Geier*. The Court noted that in *Geier*, the solicitor general filed an amicus curiae brief and orally argued that in drafting Standard 208, the department intended to pre-empt state tort law claims criticizing manufacturers for exercising one choice over another in passive restraint systems. Conversely, in *Williamson*, the solicitor general filed an amicus curiae brief and orally argued that the department had no such intention with regard to Standard 208's allowance of manufacturer choice related to rear seat belts. While stopping short of holding that the department's view is dispositive, the Court stated that, "In determining whether a federal regulation preempts state law, the federal agency's own views should make a difference."

The test adopted in *Geier* and applied in *Williamson* creates a level of uncertainty for manufacturers regarding the scope of pre-emption when a federal regulation provides for manufacturer design choices. Manufacturers cannot simply rely on being given a choice by the federal government, but now must engage in an exhaustive review of the regulatory history to determine whether preserving manufacturer's choice was a "significant objective" of the government.

In addition, given the deference that the *Williamson* Court gave to the solicitor general's position on pre-emption, manufacturers may have to engage in speculation regarding what the government's position is on the issue. This is especially important given that the Court has now sided with the government on the last two pre-emption cases involving federal auto safety standards. One thing is clear, plaintiffs and defendants are likely to continue to battle over the application and limits of federal pre-emption.

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proponents to defend a gay marriage ban in court, the 9th Circuit published opinions in unrelated cases that involved standing and gay rights issues.

#### **Product Liability**

##### **Making a case in pharmaceutical and medical device product liability**

When making a medical product liability claim, pay attention to the type of product at issue and the U.S. Supreme Court precedent that matches it. By **Lisa M. Baird** and **Michael K. Brown** of Reed Smith LLP

#### **Generic drug ruling may be against interests of safety**

Pre-emption of state law failure-to-warn claims for prescription drugs may carry hidden consequences. By **Shawn Khorrami** and **Alison Wilson** of Khorrami Pollard & Abir LLP

#### **Healthcare/Hospital Law**

##### **LA may bust minor offenses down to fines**

Grappling with budget cuts and overloaded criminal courts, Los Angeles City Attorney Carmen Trutanich is seeking the city's approval to decriminalize low-level misdemeanors and allow other city departments to fine perpetrators instead.

#### **Alternative Dispute Resolution**

##### **Why conflict of interest disclosures matter in arbitration**

Failure to make proper disclosures is not a consequence-free proposition for an arbitrator. By **Ryan C. McKim** of Murray M. Sinclair & Associates and **Arthur Mazirow** of the American Arbitration Association

#### **Criminal**

##### **LA approves realignment plan**

The Los Angeles County Board of Supervisors narrowly approved a plan to accommodate the thousands of state parolees and inmates who will shift to local supervision on Oct. 1 under Gov Jerry Brown's "criminal justice realignment" bill.

#### **Litigation**

##### **School district ends drug testing in settlement**

The Shasta Union High School District has agreed to end its policy of drug testing students who participate in school-related activities to resolve a lawsuit.

#### **Solo and Small Firms**

##### **LA litigation boutique changes its name**

Litigation boutique Browne Woods George LLP has changed its name to Browne George Ross LLP, the firm's principals said Tuesday.

#### **Product Liability**

##### **Gateway points to Concepcion in product liability case**

A Los Angeles federal judge has teed up an issue that could allow a product liability class action to move forward against Gateway Inc., despite

Supreme Court's landmark ruling that has forced similar suits into arbitration.

#### **Litigation**

##### **California AG sued in civil rights claim**

Hundreds of homeowners and former homeowners sued California Attorney General Kamala Harris late Tuesday, accusing her of violating their civil rights.

#### **Judicial Profile**

##### **Caroline B. Kuhl**

Superior Court Judge Los Angeles County (Los Angeles)

#### **Health Care & Hospital Law**

##### **California case law may help patients hoping to sue over generic drugs**

Patients harmed by low-cost versions of brand-name drugs have little legal recourse after the U.S. Supreme Court ruled that states' failure-to-warn laws are preempted by federal regulations for generics - unless they sue in California.

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