

PUBLISHED IN THE LOS ANGELES DAILY JOURNAL
March 17, 2011

Auto Design Safety: Regulation by the People

By Brian S. Kabateck and Jon A. Atabek

Brian S. Kabateck is an experienced trial attorney, consumer rights advocate, and founder of Kabateck Brown Kellner, LLP in Los Angeles. He represents plaintiffs in personal injury, mass torts litigation, class actions, insurance bad faith, insurance litigation, and consumer contingency litigation.

Jon A. Atabek practices in the areas of consumer class actions, mass tort litigation, insurance litigation, and commercial litigation.

No one disputes that seatbelts save lives. We teach that to our children. We make it illegal not to wear them. And we even instruct automobile manufacturers on how to implement seatbelt laws by using regulation and litigation. Unfortunately, regulations can sometimes be unclear, lax, or have a purpose other than just dictating the safest, most cost-effective method of protecting precious cargo. Fortunately, the U.S. Supreme Court's recent decision regarding seatbelt safety affirms the role the people play in filling in gaps in regulation.

When it comes to automobile safety regulation, the law of the land is the U.S. Department of Transportation's Federal Motor Vehicle Safety Standard. The standard often dictates specific aspects of design and manufacture related to automobiles, from where to put a seatbelt, to what kind of seatbelt to use. Assumedly, the Department of Transportation has weighed the cost versus the benefits in establishing its final edicts. But the standard does not always provide simple directions. It sometimes gives suggestions, a list of choices, invites innovation, or some other equivocal direction. In the latter situation, automobile manufacturers are given great leeway in choosing how much to spend to protect lives, a result that brings to mind the old proverb of the fox guarding the henhouse.

Fortunately, there is a more democratic, grass roots method of regulation that helps keep the auto industry in line: the power of litigation. When you sue an automobile manufacturer over the design of their car, whether because the design injured you or caused your car to be less safe and thus less valuable, you are asking a jury to find that the manufacturer made a mistake when designing the car. Specifically, you are asking a jury to say that the manufacturer acted unreasonably when it chose one design over another. If auto manufacturers chose to put cost-savings over safety, 12 jurors can inform the manufacturers that they chose poorly by increasing the amount of the verdict. Thus, products liability cases and consumer class actions help create meaningful incentives to

force automobile manufacturers to make the right decision when weighing our safety.

But whenever a plaintiff asks a jury to apply a safety standard that seems higher than what is required by an applicable federal standard, auto manufacturers argue that only the federal government can determine safety standards - in other words, that the regulatory field has been pre-empted. Of course, preemption does not always apply. On Feb. 23, the Supreme Court handed down *Williamson v. Mazda Motor of America Inc.*, reaffirming the fact that not every federal standard pre-empts related litigation. 2011 WL 611628.

Until we have a better system for keeping the auto industry honest, we have to stick to the old methods.

In *Williamson*, the issue was whether a jury could tell the manufacturer that it was wrong to choose lap-only belts for the rear middle seats of a minivan, instead of lap-and-shoulder belts. The standard in question, 208, did not require manufacturers to use shoulder restraints for rear-middle and aisle seats. In analyzing the intent of this regulation, the Court found that the Department of Transportation had considered several issues, ranging from entry and exit problems related to stretching a belt across an aisle (to attach it to the frame of the car, like most seatbelts), to cost effectiveness. But the department's decision not to require shoulder restraints was an invitation for innovation, not a pass on liability.

The Court compared *Williamson* to *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). In *Geier*, the Court held that a lawsuit was pre-empted by the applicable federal standard, which was intended to give manufacturers a choice between airbags and other restraints. In that case, the plaintiff alleged that it was unreasonable for the manufacturer to not use airbags in the manner described by the plaintiff. A jury verdict in favor of the plaintiff would have effectively eliminated the manufacturer's ability to choose between airbags and other forms of restraint. The Court held that such a verdict would "stand as an obstacle" to the Department of Transportation's goals in issuing that standard.

But that was not the situation. In *Williamson*, the Court effectively agreed with the solicitor general's position that "a standard giving manufacturers 'multiple options for the design of' a device would not pre-empt a suit claiming that a manufacturer should have chosen one particular option, where 'the Secretary [of Transportation] did not determine that the availability of options was necessary to promote safety.'" The Court found that diversity of choice was not one of the Department of Transportation's concerns in passing the standard.

The Court also cited *Geier* for the proposition that "state tort law does not conflict with a federal 'minimum standard' merely because state law imposes a more stringent requirement." Unless the Department of Transportation clearly indicates that the minimum standard is also a regulatory maximum, states can act to further protect themselves through legislative, executive, or judicial means.

The auto industry fights these lawsuits vigorously, thereby slowing the effects of such populist regulation. Both sides have to bring in teams of experts. Deep-pocketed manufacturers are likely to drag plaintiffs through several Courts of Appeal if they are not satisfied with the result. For example, the plaintiffs in *Williamson* were first injured in 2002. Today, in 2011, the Court's decision only allows the Williamsons' case to proceed past the pleading stage. Thus, it often takes a plaintiffs' firm resolve and sound financial health to see these cases to their end.

There are solutions to this problem. Legislators can pass laws creating higher safety standards, thus eliminating the need for a judicial determination. And the California Department of Transportation can always create regulations setting higher safety standards.

Until we have a better system for keeping the auto industry honest, we have to stick to the old methods. This means filing cases and waiting years to see any results. At the very least, the Court has ensured that the people can continue to police automobile manufacturers. *Williamson* lessens the uncertainty associated with preemption issues in automobile design cases, thus making these suits more attractive to plaintiffs' lawyers.

Greater certainty also puts manufacturers on notice that when they choose to put cost savings above our well being, they risk a jury telling them that they made the wrong choice. Perhaps most importantly, the prospect of multimillion dollar judgments should help motivate auto manufacturers to keep our safety a top priority.