

racy of these reports before they appear in the database.

But representatives from consumer groups told CPSC that enforcing strict timelines for reporting and investigating safety reports would prevent a delay in consumers receiving important information on potentially hazardous products.

The notice said CPSC intends to discuss with workshop attendees ways to prevent and handle inaccurate or false safety incident reports, as well as data organization and the process for contacting product manufacturers.

To register for the workshop, interested persons should go to <http://www.cpsc.gov/meetingsignup.html>. Workshop participants may also make a request to give an oral presentation by visiting the website or contacting CPSC directly.

For more information on the workshop and to read the entire notice, go to <http://cpsc.gov/businessof/notices/fr10/jandbworkshop.pdf>

Product Recalls

Car Seats Recalled; Handles Prone To Coming Off, Causing Falls, Agencies Say

Two federal agencies and manufacturer Dorel Juvenile Group Inc. Dec. 18, 2009, jointly announced a recall of about 447,000 car seat carriers following 77 reports of handles partially or fully detaching.

At least three injuries resulted from the incidents, including bumps, bruises and a head injury, according to a news release issued by the Consumer Product Safety Commission and the National Highway Traffic Safety Administration.

The remedy will consist of a free repair kit, the agencies said.

The recall affects car seats manufactured between Jan. 6, 2008, and April 6, 2009, and sold under Safety 1st, Cosco, Eddie Bauer, and Disney brand names. The items were made in China.

Consumers can continue to use the product as a car seat, the agencies said, but should not use the handle until it is repaired.

The items sold nationwide from January 2008 through December 2009 for \$120 to \$220. Investigators opened a preliminary evaluation of the car seats earlier this year (37 PSLR 991, 9/14/09).

The announcement is available at <http://www.cpsc.gov/cpsc/pub/prerec/prhtml10/10084.html>.

Motor Vehicles

Designated Seating Position

NHTSA Gives Automakers More Time, Undoes Preemption Language in Seating Rule

The National Highway Traffic Safety Administration granted an additional year of lead time, to Sept. 1, 2011, for vehicle manufacturers to comply with requirements using a revised definition of "designated seating position" (DSP), the agency announced in a *Federal Register* notice Dec. 23, 2009 (74 Fed. Reg. 68185, 12/23/09).

NHTSA also removed regulatory text preempting state law from the October 2008 final rule, in response to petitions by public interest groups. NHTSA agreed that state tort law determinations do not actually conflict with the DSP definition, and are unlikely to conflict in the future. "In the absence of such a conflict, there can be no preemption of State tort law," the agency wrote.

In October 2008, Joan Claybrook, then president of Public Citizen, blamed Bush administration appointees for insertion of the preemption language.

"NHTSA did the right thing. . . [A]s NHTSA realized when it studied the facts, the narrow exception to Congress's no-preemption mandate that the U.S. Supreme Court erroneously created in *Geier* is not met here.

ARTHUR BRYANT, EXECUTIVE DIRECTOR OF PUBLIC JUSTICE

Lena Pons, a policy analyst at Public Citizen, which filed one of the petitions for reconsideration, told BNA, "Obviously, we're really happy about this." She added, "I suppose we weren't surprised," observing that President Obama issued a presidential memorandum in May directing agencies to review preemptive regulations and preambles (37 PSLR 604, 5/25/09). She also said that the U.S. Supreme Court's preemption decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (37 PSLR 274, 3/9/09) made it harder for agencies to rely on an earlier precedent, *Geier v. American Honda Co.*, 529 U.S. 861 (2000), for sweeping preemption language.

Arthur Bryant, executive director of Public Justice, a public interest law firm, said in an e-mail: "NHTSA did the right thing. . . [A]s NHTSA realized when it studied the facts, the narrow exception to Congress's no-preemption mandate that the U.S. Supreme Court erro-

neously created in Geier is not met here. There is simply no basis for believing that any successful common law claim in this area would prompt the auto manufacturers to take any action that would frustrate federal safety goals. There should be—and is—no preemption here.”

Temporary Seats Are DSPs. The 2008 rule amended the DSP definition “to clarify which areas within the interior of a vehicle meet that definition” and provided a means to calculate DSPs in vehicles. Under the 2008 changes, temporary or folding seats are considered DSPs (36 PSLR 993, 10/13/08).

In its response to the petitions, NHTSA explained the importance of the clarifying language by giving the example of how it is used in the occupant crash protection standard: “[I]f a vehicle has fewer DSPs than the number of individuals able to sit in it, one or more of those individuals would not be protected by seat belts and/or other crash protection systems.”

Several manufacturers and industry groups petitioned the agency for reconsideration, proposing a phase-in period. They said that modifications to auxiliary seats, including anchorage systems for child seats, would be difficult and expensive to complete within the two-year time frame originally given.

NHTSA responded by saying that only a small percentage of vehicles are affected. “Hence, a phase-in based on a manufacturer’s complying production volume would add little safety benefit. . . . [W]e believe that providing an additional year of lead time is a more practical approach,” the agency said.

Conflict Unlikely. Regarding preemption, the preamble to the 2008 rule stated NHTSA’s opinion that state tort judgments requiring more DSPs than the number calculated in the federal definition could lead manufacturers to install an excessive number of seat belts. This, in turn, would decrease safety because it could affect seat belt comfort and convenience, the agency said. The regulatory text included language stating that state law, including tort law, was preempted to the extent it required more DSPs than the federal definition contemplated.

But Public Citizen petitioned for reconsideration, arguing that manufacturers are not likely to install more seat belts than necessary. Instead, if faced with too much room, they would create “void spaces” or impediments.

On reconsideration, NHTSA agreed. Noting the higher cost of lap/shoulder seat belts, the agency said it believes “the most likely impediment or void in vehicles or decrease seating surface width.” The agency found it unlikely that “a tort law judgment would actually conflict with our DSP definition.” It also said it had no knowledge of existing tort judgments in conflict with the definition.

NHTSA added that its calculation procedures, which are “generally based upon the number of 5th percentile adult females that could occupy a seat,” make it unlikely that states would require more DSPs in a given space because it would be difficult for more adults to sit there.

The American Association for Justice also opposed the preemption language, challenging NHTSA’s statutory authority. Having agreed to strike the regulatory text, NHTSA did not address this argument.

NHTSA did not mention Obama’s May 20, 2009, presidential memorandum in its response to the petitions. Pons said this was probably because Public Citizen filed its petition in November 2008, after the election but before Obama took office. But she said, “The executive order changed the disposition [forward preemption] in all the agencies.”

Unlike many other instances in which agencies inserted preemption language, Pons said, “the language was in the [DSP] regulatory text, where it was more damaging and dangerous than language in preambles.” She said the ability to bring lawsuits is important because “we can’t assume agencies are omniscient and will write regulations that will cover every possible outcome.”

NHTSA’s response, as published in the Federal Register, is available at <http://edocket.access.gpo.gov/2009/pdf/E9-30440.pdf>.

Administration

NHTSA Denies Petition; 2008 Final Rule On VIN System Expires With Change

Regulators Dec. 11, 2009, denied two requests that they reexamine segments of an April 2006 final rule on a 30-year extension of the Vehicle Identification Number system (74 Fed Reg 66386, 12/17/09).

One of the rejected petitions asked for a change in the effective date of the final rule. But the National Highway Traffic Safety Administration said that issue was resolved in a correction notice published the day after it received the petition.

The second petition sought a change adding motor cycles and heavy pickup trucks to the scheme allowing analysts to determine, from the code in the identification number, which 30-year period of the VIN system’s life a passenger car, multipurpose passenger vehicle, or 10,000 lb. truck dates from. A separate comment submitted to the agency expressed a similar concern.

But NHTSA said that kind of change should be addressed in the formal system of rulemaking, which began the prior public comment. The agency said that while the changes might benefit the petitioner, a data-analytic firm affiliated with the insurance industry, “We are uncertain as to what adverse effects making these changes might have on others with data systems they rely on the VIN.” The agency wanted to “make sure if a solution in one context does not create problem in another.”

Nonexhaustive Problem. NHTSA added its belief that the problem, at least for now, does not exist” for pickup trucks. Each manufacturer that produces pickup trucks and heavier than 10,000 lbs. “applies the VIN character scheme regardless of vehicles less than 10,000 [gross vehicle weight rating] to all variations of the vehicles,” the agency explained.

“We note that we are continuing efforts to review the VIN system, so the suggested changes could be pursued if further revisions to the VIN system are proposed at a later date,” NHTSA added.

The effective date petition was submitted by Vehicle Consulting Inc. The second petition, on motor cycles and pickup trucks, was submitted by the High