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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Manuel Bernal and Paula Bernal, husband and wife, individually and on behalf of Kevin Bernal, their minor son; Paula Bernal on behalf of her minor child Kenya Bernal; Paula Bernal, surviving daughter of decedent Dolores Pacheco and on behalf of the estate of Dolores Pacheco; Christopher Bernal, individually,

Plaintiffs,

v.

Daewoo Motor America, Inc., a Delaware corporation; Daewoo Motor Co., Ltd., a Korean corporation; Does I-X; Black & White Corporations I-X; ABC Partnerships I-X,

Defendants.

**NO. 2:09-cv-01502-DGC**

**PLAINTIFFS' RESPONSE TO:**

**DEFENDANT DAEWOO MOTOR CO., LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: FEDERAL PREEMPTION BY FMVSS OF PLAINTIFFS' STATE TORT CLAIM**

Daewoo's preemption motion must be denied. Just last month, the U.S. Supreme Court drastically limited the reach of the "seminal" case relied on by

Daewoo in its motion – *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) – and stripped all the other cases cited by Daewoo of any persuasive authority. *See Williamson v. Mazda Motor Company of America, Inc*., -- S.Ct. --, 2011 WL 611628 (U.S. Feb. 23, 2010).

In *Williamson,* the Court held that a federal regulation – Federal Motor Vehicle Safety Standard ("FMVSS") 208 – that gave car makers the option of installing different types of seat belts did *not* preempt common law tort claims. In so ruling, the Court made clear that preemption in the auto safety context is *not* the norm, and is only justified in rare circumstances like in *Geier*, where a carefully crafted regulatory scheme to introduce airbags gradually over time, while encouraging other types of passive restraints, would have been completely undermined by lawsuits insisting that airbags be included in all vehicles immediately. The Court refused to extend *Geier* to another provision in the very same regulation that provided a choice to manufacturers, and instead reaffirmed that, except in such narrow circumstances, *non*-preemption is the rule even where a manufacturer is given a choice of ways to comply with a regulation. The Court further held that regulatory options only preempt where giving car makers an unfettered choice among different kinds of safety devices "[is] a *significant objective* of the federal regulation." *Id*. at *5 (emphasis in original).

Here, although a different safety standard – FMVSS 205 – is at issue, the outcome must be the same. FMVSS 205 simply establishes multiple glazing materials that car makers may use for side windows. It identifies no "significant regulatory objective" of encouraging use of a variety of materials; it does not create the unique options scheme promulgated in the FMVSS 208 airbag regulation; and it lacks the complex and convoluted regulatory history at issue in *Geier*. Instead, FMVSS 205, like the regulation at issue in *Williamson*, is nothing more than a *minimum* federal safety standard, establishing a safety "floor," but permitting manufacturers to improve the safety of their vehicles by installing additional

protections. As such, FMVSS 205 does not preempt a common-law claim, like the one advanced by the Bernals here, that seeks to hold a car manufacturer liable for failing to do more than the minimum required by the regulation.

There is no doubt that *Williamson* applies directly to this case. A week after issuing *Williamson*, the U.S. Supreme Court vacated a decision of the South Carolina Supreme Court (that Daewoo relies on here) finding federal preemption in a virtually identical glazing case involving FMVSS 205.[1] This action by the Supreme Court confirms that *Williamson* bears directly on cases involving FMVSS 205 – if that were not so, the Court would have simply denied the petition for certiorari in *Priester* and left the lower court's decision intact.

The Supreme Court's decision in *Williamson* and its subsequent remand of *Priester* renders all of the case law cited by Daewoo null and void. Meanwhile, the Fifth Circuit's decision in *O'Hara v. General Motors Co.,* 508 F.3d 753 (5th Cir. 2007), remains good law. There, the court adopted the correct reading of *Geier* and held that FMVSS 205 "does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows." *Id.* at 758. This Court should follow the Fifth Circuit's lead in *O'Hara* and the Supreme Court's recent instructions in *Williamson* and find no preemption in this case.

## I. STATEMENT OF FACTS

### A. The Statute.

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") to reduce motor vehicle injuries and deaths, 49 U.S.C. §§ 30101 *et seq.* The Act empowers the National Highway Traffic Safety Administration ("NHTSA") to prescribe minimum motor vehicle safety standards. *Id.* §§ 30101, 30104. In *Geier*, the Supreme Court held that the Safety Act's savings clause

[1] *See Priester v. Ford Motor Co.*, -- S. Ct. --, 2011 WL 676965 (U.S. Feb. 28, 2011) (vacating the lower court's holding that FMVSS 205 preempted common-law claims seeking to impose liability on a car manufacturer for failing to install advanced glazing and remanding to the Supreme Court of South Carolina for further consideration in light of *Williamson*).

expressly "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." 529 U.S. at 870.

**B. FMVSS 205.**

Since 1966, when NHTSA's first rules were adopted, FMVSS 205 has specified minimum requirements for glazing materials in motor vehicles. 49 C.F.R. § 571.205 (Daewoo Exhibit A). But unlike NHTSA's other regulations, FMVSS 205 does not itself contain any design or performance standards; instead, NHTSA simply incorporated the standards for automotive glass created by an outside group, the American National Standards Institute ("ANSI"). *Id.*[2]

Neither the original nor amended versions of ANSI Z26.1 contain any tests, standards, requirements, or guidelines for the design or performance of the actual window systems used in cars. Instead, ANSI Z26.1 has always simply listed various types of window materials (including tempered glass and laminated glass) and specified various tests for determining whether a glazing material qualifies for acceptance under the code. *See, e.g.,* Plaintiffs' Response and Controverting Statement of Facts, Exhibit 2 (hereinafter "Plaintiffs' Response").[3]

[2] The original version of the regulation adopted in 1967 simply provided that "Glazing materials used in windshields, windows, and interior partitions shall conform to United States of America Standards Institute, '*American Standard Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways*.' USA Standard Z26.1-1966, July 15 1966." 32 Fed. Reg. 2408, 2414 (Feb. 3, 1967) (Plaintiffs' Response, Exhibit 2). When the regulation was updated in 1984 to adopt the 1980 version of the ANSI standards (which is the relevant version in this case), the amendment merely "adopt[ed] by reference the 1980 version of American National Standard Z26, the safety code for glazing materials promulgated by the American National Standards Institute," without additional elaboration. 49 Fed. Reg. 6732 (Feb. 23, 1984) (Daewoo Exhibit E). The 1980 version of the ANSI standards is attached hereto as Plaintiffs' Response, Exhibit 3.

[3] NHTSA refers to non-tempered glass materials, such as laminated glass, as "advanced glazing." *See* NHTSA, *Ejection Mitigation Using Advanced Glazing: A Status Report*, 1995 (Daewoo Exhibit K) at vii-viii.

The ANSI standards do not purport to set any definitive standards for window materials in automobiles. The Foreward to the 1980 version of the ANSI standards warns that they are merely "intended to provide *minimum requirements*" for window glazing. Plaintiffs' Response, Exhibit 3 at p. 7. (emphasis added).[4] It goes on to state that "*[t]his standard does not itself state that safety glazings shall be used or to what extent they shall be used in glazing motor vehicles*." *Id.* (emphasis added).

**C. NHTSA's Investigation of Advanced Glazing.**

The 2000 Daewoo Leganza in this case was designed in the mid-1990s and manufactured in or about 1997. Plaintiffs' Statement of Facts in Support of their Motion for Partial Summary Judgment [Doc. 177-180, 184, 186] (hereinafter "SOF") ¶ 15. During that period, NHTSA was investigating whether to amend FMVSS 205 to require advanced glazing in side windows in order to reduce the risks of passenger ejection through the side windows in rollovers.[5]

Between 1995 and 2001, NHTSA's investigations revealed that advanced glazing (such as laminated glass) is far superior to tempered glass in limiting the risk of passenger ejection during a rollover. In 1995, for example, NHTSA issued *Ejection Mitigation Using Advanced Glazing: A Status Report* (Daewoo Exhibit J), which concluded that "[a]dvanced ejection-mitigating glazing at the right and left front side windows could save 1,313 lives and [prevent] 1,290 serious injuries … per year" (*id.* at 1-1) and "greatly reduce[ ] the risk of serious lacerations to the face, scalp, and mouth, as well as fractures of the facial bones and nose, and ocular avulsions." *Id.* at 1-2. In contrast, NHTSA concluded that tempered glass – the type

[4] Plaintiffs' Response, Exhibit 3 does not include page numbers. This quotation is from the Forward to the ANSI Standard on the 7th page of the document.

[5] At that point in time, the most effective ejection mitigation technology – inflatable side curtain airbags, which were recently mandated by NHTSA (multi-year phase-in period effective March 1, 2011) – were not yet available. *See* 76 Fed. Reg. 3212, 3225 (January 19, 2011) ("[V]ehicles that offer inflatable side curtains that deploy in a rollover … first became available in 2002.").

of glass Daewoo used in the Bernals' vehicle – "*offers virtually no resistance to occupant ejection*." *Id.* at 4-1 (emphasis added).

In 1999, NHTSA issued a second status report, *Ejection Mitigation Using Advanced Glazing: Status Report II* (Daewoo Exhibit K), that again determined that advanced glazing in side windows would reduce ejections as compared with tempered glass. The agency concluded, among other things, that "advanced glazing systems could save between 500 and 1,300 lives [per year]." *Id.* at vii. Whereas tempered glass "readily shatters upon impact" (*id.* at 40), "advanced glazing systems may yield significant safety benefits by reducing partial and complete ejections through side windows, particularly in rollover crashes." *Id.* at ix. NHTSA concluded that, although advanced glazing might increase the "number of minor . . . [neck] injuries, … *the benefits from reduced fatalities and serious injuries would greatly exceed any minor disbenefits*." *Id.* at 55 (emphasis added).

In 2001, several years after the design and manufacture of the 2000 Leganza, NHTSA issued its final report, *Ejection Mitigation Using Advanced Glazing*. Daewoo Exhibit L ("2001 Final Report"). As in its previous studies, the 2001 Final Report emphasized the safety benefits of advanced glazing, concluding that the use of this technology could save between 537 and 1305 lives and prevent an estimated 235 to 575 serious injuries each year. *Id*. at vi. The Report unequivocally concludes that "*[a]dvanced glazing systems have the potential to yield significant safety benefits by reducing partial and complete ejections through side windows, particularly in rollover crashes*." *Id*. at ix (emphasis added).

With regard to the potential risks of advanced glazing, the agency identified *no* conclusive hazards, noting that the "*neck measurements from impacts into the glazings were not repeatable*." *Id.* at viii (emphasis added). Although NHTSA's "high[ly] variab[le]" and "limited" data suggested that "impacts into standard tempered glass resulted in lower neck shear loads and neck moments than those into the advanced glazing," the agency concluded that *"[n]o assessment of actual neck*

*injury levels due to shear loads or moments was made since no accepted lateral neck injury criteria exist.*" *Id.* at 36 (emphasis added).

Despite its conclusion that advanced glazing promised "significant safety benefits," NHTSA ultimately decided not to amend Standard 205 to require advanced glazing. *Id.* at 50-51. Central to the agency's decision was the recent emergence of side-airbag technology. *Id.* At car makers' urging, NHTSA had conducted crash tests on prototype side airbag systems, which "established the feasibility of using side inflatable devices to prevent ejections through front side windows." *Id.* at 50.[6] The agency concluded that, despite the "significant safety benefits" of advanced glazing, "these safety benefits are not unique to advanced glazing systems; other safety countermeasures can also prevent ejections." *Id.* at ix. NHTSA ultimately decided that "[a]dvanced glazing systems should be evaluated as one component of comprehensive ejection prevention and mitigation strategies that include … inflatable head protection and/or rollover protection systems." *Id.* at viii-ix.

**D. NHTSA's 2002 Decision Not to Amend Standard 205.**

Based on these findings, in 2002 NHTSA announced its decision not to amend FMVSS 205 to require advanced glazing in all side windows. 67 Fed. Reg. 41365 (June 18, 2002) (Daewoo Exhibit G). NHTSA stated that it intended to continue its research into alternative systems, including the combined use of advanced glazing and side airbags. *Id.* at 41367.[7] NHTSA further noted that "advanced side glazing in some cases appears to increase the risk of neck injury." *Id.* Finally, the agency cited cost considerations, noting that "[a]dvanced side glazing would require modifications to the design of all vehicles currently being produced to make their windows smaller, and the cost of such a design modification would be significant."

[6] Notably, even these airbag tests showed "that there was *some potential for neck injury for non-ejected occupants*." *Id.* at 50 (emphasis added).

[7] As explained below, this research recently culminated in the creation of a new regulation—FMVSS 226—to address ejection mitigation.

*Id.* This decision left the 1984 version of FMVSS 205 intact, with no specific form of glazing mandated.

**E. NHTSA's 2011 Ejection Mitigation Rulemaking.**

In January 2011, NHTSA's ejection mitigation research finally bore fruit in the form of a new regulation – FMVSS 226 – designed to minimize passenger ejections in rollovers. The purpose of the new rule, much like FMVSS 205 itself, is "to reduce the partial complete ejection of vehicle occupants through side windows in crashes, particularly rollover crashes." 76 Fed. Reg. 3212 (January 19, 2011) (Daewoo Exhibit I).

Unlike FMVSS 205, FMVSS 226 establishes a performance standard that requires manufacturers to pass a specified crash test, but does not mandate any particular form of technology. *Id.* Although the new test does not require advanced glazing, the agency stressed that "*optimal test results* … resulted from use of *both* ejection mitigation window curtains *and advanced glazing*." *Id.* at 3223 (emphasis added). Thus, NHTSA expected that manufacturers would meet the standard by "modifying existing side impact air curtains" while "*possibly supplementing them with advanced glazing*." *Id.* (emphasis added). And NHTSA *"[e]ncourage[d] manufacturers to enhance ejection mitigation curtains with advanced glazing* …" in order to achieve the best safety results. *Id.* (emphasis added); *see also id.* at 3219 (emphasizing "the beneficial effect advanced glazing can have and permitting the use of [advanced] glazing to achieve the performance criteria specified in the standard").

NHTSA explained that it had considered requiring advanced glazing, but decided not to due to the relatively high cost of laminated glass as opposed to side curtain airbags. *See id*. at 3249. NHTSA also explained that advanced glazing would not benefit passengers when side windows are rolled down and that, unlike airbags, even laminated glass can become crushed during a rollover. *Id*. at 3219. In

light of these concerns, NHTSA decided to "encourage" car makers to install advanced glazing, but not require them to do so. *Id*. at 3223.

At the end of FMVSS 226's preamble, NHTSA affirmatively stated "that this rule, like many NHTSA rules, prescribes only a minimum safety standard. As such, *NHTSA does not intend this rule to preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule*." *Id.* at 3295 (emphasis added).

**F. This Litigation.**

This lawsuit concerns product liability and wrongful death claims arising from an automobile accident. Manual Bernal was driving his 2000 Daewoo Leganza (the "Leganza"), which was designed and manufactured in Korea by Daewoo Motor Co., Ltd. SOF ¶ 6. During a rollover crash during normal highway conditions, Mr. Bernal suffered severe injuries and was rendered a quadriplegic. SOF ¶ 4. Mr. Bernal's son, Kevin Bernal, was in the front passenger seat and was ejected and injured during the rollover sequence. SOF ¶¶ 1, 13, 25. Mr. Bernal's mother-in-law, Dolores Pacheco, occupied the right rear passenger seat and was partially ejected through the tempered-glass side window, which shattered on impact, even though she was wearing her seatbelt. SOF ¶¶ 2, 13, 14, 16, 26. Her injuries were fatal. SOF ¶ 61.

The complaint alleges, among other things, that the side windows of the Leganza, through which Kevin was ejected and Mrs. Pacheco was partially ejected, should have employed a safer three-layer laminate design that would have kept them wholly within the vehicle, thereby reducing the severity of their injuries and preventing Mrs. Pacheco's untimely death. SOF ¶ 39.

## II. ARGUMENT

Daewoo bears a heavy burden of overcoming the longstanding "presum[ption] that Congress does not cavalierly preempt state-law causes of action." *Medtronic v.*

*Lohr*, 518 U.S. at 485; *see also MCI Sales and Service, Inc., v. Hinton*, 329 S.W.3d 475 (Tex. 2010) (applying presumption against preemption in FMVSS 205 glazing case). Implied conflict preemption only arises when it would be "impossible for a private party to comply" with both federal and state law or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Because FMVSS 205 gave Daewoo the option of using advanced glazing in the side windows of its cars, the sole question is whether the plaintiffs' claim somehow "stands as an obstacle" to federal purposes. It does not.

**A. There Is No Conflict between This Lawsuit and the Options Framework of Standard 205.**

Daewoo's mantra throughout its motion is that, under the Supreme Court's ruling in *Geier v. American Honda Motor Co.*, 529 U.S. 661 (2000), regulatory options exert preemptive force, and that "the rationale of *Geier* is not limited to 'no-airbag' claims." Daewoo Br. at 13 (claiming that the "seminal" case of *Geier* requires preemption of a state tort law claim where an FMVSS permits "optional methods of compliance."). It goes on to rely on a number of cases that, based on a broad (and now repudiated) reading of *Geier,* held that FMVSS 205 preempts common-law claims because it gives car makers the option of utilizing different materials in the side windows of cars. *See id*. at 13-15.[8] Daewoo then attacks the only federal Court of Appeals decision on this issue, *O'Hara v. General Motors Co.,* 508 F.3d 753 (5th Cir. 2007), which found that FMVSS 205 does *not* preempt "no-glazing" claims, as "wrongly decided" because it is based on an allegedly excessively limited view of *Geier*. Daewoo Br. at 11. Unfortunately for Daewoo, the U.S. Supreme Court's ruling in *Williamson v. Mazda Motor Co. of America, Inc.,* 2011

[8] Daewoo Br. at 13-14 (citing *Priester v. Cromer*, 697 S.E.2d 567, 571 (S.C. 2010); *Morgan v. Ford Motor Co*, 680 S.E.2d 77, 94 (W.V. 2009); *Martinez v. Ford Motor Co.*, 488 F. Supp. 2d 1194 (M.D. Fla. 2007)).

WL 611628 (U.S. Feb. 23, 2010), wiped all these arguments away in one stroke by sharply limiting *Geier* to its facts and making clear that regulatory options, standing alone, do not possess any preemptive force.

In *Williamson*, the plaintiffs sued Mazda for failing to install a lap/shoulder harness in the rear-inner seat of a minivan. Mazda argued that the lawsuit was preempted because it would undermine a federal safety standard – FMVSS 208 – that gave carmakers the option of installing either lap/shoulder harnesses *or* lap belts in that seating position. In so arguing, Mazda relied principally on *Geier*, which held that a federal regulation that gave car makers the option of installing either airbags or some other type of passive restraint in their vehicles preempted common-law claims that a car should have been equipped with an airbag. 529 U.S. at 661. The Supreme Court rejected Mazda's reliance on *Geier*, holding that a regulatory option preempts state law only where "a choice among different kinds of… [devices] [is] a *significant objective of the federal regulation*." 2011 WL 611628 at *6 (emphasis added).

In reaching this conclusion, *Williamson* distinguished *Geier* on the ground that it involved a highly unusual options standard that was based on NHTSA's affirmative desire to promote a diverse mixture of technology. The *Williamson* court explained that three factors *all* supported the determination, in *Geier*, that manufacturer choice was an important regulatory objective: the regulation's "history, [NHTSA's] contemporaneous explanation of its objectives, and the agency's current view of the regulation's preemptive effect." 2011 WL 611628 at *6.

First, the *Williamson* Court explained that, for the specific version of FMVSS 208 at issue in *Geier*, "history showed that [NHTSA] had long thought it important to leave manufacturers with a choice." *Id.* at *5. The Court then observed that "[NHTSA's] contemporaneous explanation of its 1984 regulation made clear that manufacturer choice was an important means for achieving its basic objectives." *Id.* Importantly, the agency had previously considered but rejected an "all-airbag" system because it was "worried that requiring airbags in most all vehicles would

cause a public backlash" due to the public's fear of airbags. *Id.* at *6. NHTSA also had a concern about the safety of airbags, for they could injure out-of-place occupants, "particularly children." *Id.* The 1984 regulation therefore "deliberately sought variety – a mix of several different passive restraint systems." *Id.* (quoting *Geier*, 529 U.S. at 878). Finally, the *Williamson* Court noted that, in finding federal preemption of "no-airbag claims," the *Geier* Court had deferred to the United States' view, as expressed in an *amicus* brief, that a lawsuit seeking to hold a manufacturer liable for failing to install an airbag in its cars would "stand as an obstacle to federal purposes." *Id*. at *6.

These factors, "[t]aken together," the *Williamson* Court said, established that "manufacturer choice was an important regulatory objective" for the specific 1984 airbag regulation, and explained why *Geier* ruled that a "no-airbag" lawsuit would undermine the federal purposes of that regulation. *Id.* at *7. Following this same approach, *Williamson* went on to hold that no such objective existed with regard to a different options requirement contained in a different part of FMVSS 208, which simply gave car makers a choice between installing lap belts or lap/shoulder harnesses in rear-inner seats and was not based on any of the agency purposes at issue in *Geier*. *Id.* at *12.

The *Williamson* Court reached that conclusion despite the fact that NHTSA had considered but rejected amending FMVSS 208 to require lap/shoulder belts in all rear-inner seats, explaining that the principal reason for this decision was that "NHTSA thought that this requirement would not be cost-effective" – a rationale, the Court concluded, that "cannot by itself show that NHTSA sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion." *Id.* at *10. Finally, *Williamson* gave weight to the United States' view that "a standard giving manufacturers multiple options for the design of a device would not preempt a suit claiming that a manufacturer should have chosen one particular option, where the

Secretary did not determine that the availability of options was necessary to promote safety." *Id.* at *12 (internal quotations omitted).

In this case, none of these factors even remotely supports a finding of federal preemption. Here, as in *Williamson*, Standard 205 does not reflect any desire on NHTSA's part to promote a diverse array of technology. Far from it: from the very beginning, *NHTSA simply incorporated the list of materials approved by an outside entity* (i.e., the ANSI standards). *See* 49 Fed. Reg. 6732 (Feb. 23, 1984) (Daewoo Exhibit D) ("adopt[ing] by reference the 1980 version of [ANSI] Z26, the safety code for glazing materials promulgated by the American National Standards Institute."). It did so, moreover, without giving any indication that it sought to ensure that car makers had an unfettered choice among different materials listed in the ANSI standards. To the contrary, NHTSA simply stated that ANSI Z26 includes performance tests for "14 items of glazing materials," and that "adoption of the most recent version of Z26 will permit the use of the latest technological developments in glazing." *Id.* The Foreward to the standards, moreover, makes clear that they merely contain "minimum requirements" for the use of glass in motor vehicles. Plaintiffs' Response, Exhibit 3 at 7. By adopting these "minimum requirements" by reference, Standard 205 merely requires that, at a minimum, car makers use one of the materials approved in the ANSI standards. As the United States explained in *Williamson*, an options standard that merely establishes minimum safety requirements does not exert any preemptive force. *See Williamson*, 2011 WL 611628 at *9.[9]

This is precisely what the Fifth Circuit concluded in *O'Hara v. General Motors Co.*, 508 F.3d 753 (5th Cir. 2007). After examining the specifications of the ANSI standards, the *O'Hara* court held that, "[o]n its face, [FMVSS 205] is a

[9] Moreover, unlike *Geier*, this case involves an uncontroversial device – laminated glass – that, unlike the airbag, has never been the subject of any sort of public outcry, and that has in fact been permitted in side windows and mandated for front windshields for nearly four decades. *See* 32 Fed. Reg. 2408, 2414 (Feb. 3, 1967) (Plaintiffs' Response, Exhibit 2). (Indeed, consumers rarely even know what type of glass is installed in their cars).

material standard that sets a safety 'floor' to ensure that the glazing materials used by manufacturers meet certain basic requirements." *Id.* at 760. *O'Hara* further observed that "[t]here is no language in the [rule] commentary indicating that NHTSA intended to 'preserve the option' of using tempered glass in side windows, or that preserving this option would serve the safety goals of [FMVSS] 205." *Id.* at 761. The court held that "[b]oth the text of [FMVSS] 205 and the Final Rule commentary support the conclusion that it is a *minimum safety standard*." *Id.* (emphasis added).

The Texas Supreme Court recently reached the same conclusion in a decision rejecting federal preemption under FMVSS 205. *MCI Sales and Service Inc. v. Hinton*, 329 S.W.3d 475 (Tex. 2010). There, the Court held that "[n]othing in the text of FMVSS 205 indicates that it is anything other than a minimum materials standard. In the absence of the standard, manufacturers could use any material allowed by state law; the standard simply limits the range of available choices." *Id.* at 495. In so ruling, the court rejected the defendant's contention "that NHTSA made a *Geier*-like policy decision to encourage a range of glazing choices," observing that "FMVSS 205 … gives manufacturers a choice of materials and recognizes that no one type is superior in all circumstances." *Id.* at 497. The *MCI* court went on to state that FMVSS 205 "merely narrows the range of manufacturers' choice of glazing materials from potentially unlimited to a short list . . . . We find nothing in the standard's text, history, or NHTSA's comments to indicate that FMVSS 205 is anything other than a minimum standard. As a minimum standard, FMVSS 205 does not preempt the jury finding that MCI should have used laminated glass in the motor coach's windows." *Id.*[10]

[10] Although *MCI* was decided before the U.S. Supreme Court decided *Williamson*, the Texas Supreme Court had the benefit of the United States' views on the preemptive effect of FMVSS 205, as set forth its *amicus* brief in support of *certiorari* in *Williamson*. The *MCI* court quoted the United States as arguing that "[m]anufacturers always have the 'option' of exceeding a minimum safety standard when NHTSA has decided not to mandate a more stringent alternative because of considerations of cost or flexibility – as NHTSA did in this case and, indeed, often

These courts' conclusions that FMVSS 205 is simply a "minimum" safety standard is highly significant in light of the U.S. Supreme Court's teachings in *Geier*. Although *Geier* found federal preemption of the plaintiffs' "no-airbag" claims based on the unique history of FMVSS 208, the Court held that, in general, the Safety Act's savings clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." 529 U.S. at 871. This principle applies in spades to FMVSS 205, which merely obligates manufacturers to, *at a minimum*, use one of the materials specified in the industry standard. Under both *Geier* and *Williamson*, such a standard does not possess any power to preempt.[11]

**B. NHTSA's 2002 and 2011 Decisions Not to Require Advanced Glazing Cannot Be Given Retroactive Effect.**

Failing to identify anything in the actual governing regulation that supports its preemption argument, Daewoo insists that this lawsuit would undermine the purposes underlying the agency's *2002* decision not to require advanced glazing in the side

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does in considering regulatory alternatives. But if such an 'option' alone were enough to trigger federal preemption under *Geier*, the Safety Act's savings clause would be greatly undermined." *Id*. at 499 (quoting Brief for the United States As Amicus Curiae at 15, *Williamson v. Mazda Motor. of Am., Inc*., No. 08-1318). "We agree," wrote the Texas Supreme Court: "Attributing preemptive intent to every deliberate agency decision runs afoul of Congress's choice to define the safety standards as minimum standards and its clear decision to allow juries a place in developing common-law rules that exceed the federally defined safety floor." *Id.*

[11] Daewoo attacks the *O'Hara* court's characterization of FMVSS as a "materials standard" that sets a "safety floor" as "astounding given the fact that NHTSA has expressly rejected that characterization of FMVSS 205." Daewoo Br. at 15 n.8 (citing 64 Fed. Reg. 42330, 42332 (August 6, 1999)). This argument is curious, because NHTSA has done no such thing. In the Federal Register notice cited by Daewoo, NHTSA merely states that FMVSS 205 does not operate "strictly as an equipment standard" insofar as a car maker could not satisfy the standard merely by "install[ing] an otherwise conforming piece of glazing in a location not permitted by [FMVSS] 205." *Id*. at 42332. Daewoo's argument that this illustrates NHTSA's view that Standard 205 is not a "minimum" standard is inexplicable. Daewoo also attacks *O'Hara* on the ground that "the court ignored its own preemption precedent which holds simply and directly that state-law which prohibits an activity expressly authorized by a federal scheme gives rise to an actual conflict." *Id.* (citing *Carden v. Gen'l Motors Corp.*, 509 F.3d 227, 230 (5th Cir. 2007). *Carden*, however, involved the identical issue as *Williamson*, and its pro-preemption conclusion was been overruled by the Supreme Court's decision in that case.

windows of passenger cars. But the car in this case was designed and manufactured in the mid-1990s – years before the agency made its decision not to mandate the use of laminated glass. And, contrary to Daewoo's claim, the agency's 2002 decision cannot be given retroactive effect.

The United States Supreme Court has recognized a "deeply rooted" presumption against retroactivity. *See Landsgraf v. USI Film Products*, 511 U.S. 244, 265-266, 269-70 (1994) (citations omitted). Thus, the conduct of Daewoo in placing a defective vehicle into the stream of commerce in 1997 should be "assessed under the law that existed when the conduct took place." *Id.* at 265.

*Geier* itself confirms that preemption analysis turns on the federal regulatory policy in place *at the time of manufacture*, rather than at the time the accident occurred (or the time the case is heard). In *Geier*, the plaintiff was injured in a 1987 Honda automobile that lacked an airbag. 529 U.S. at 865. At the time the car was manufactured, FMVSS 208 permitted, but did not require, airbags in passenger cars manufactured in 1987. *Id*. at 875. By the time of the plaintiff's 1992 accident, however, Congress had passed a statute affirmatively *requiring* that airbags be installed in all passenger vehicles. *See id*. at 886 (Stevens, J., dissenting).

Notwithstanding the new federal law, the Supreme Court held that the plaintiff's claims were preempted because they conflicted with the version of FMVSS 208 in effect *in 1987*. *Id*. at 875. Thus, the teaching of *Geier* is that Daewoo's preemption arguments must be evaluated as of the date the Bernals' car was manufactured – the late 1990s. And, as shown above, there is no basis for finding federal preemption based on either Standard 205 itself or on the agency's contemporaneous investigations of its beneficial effects.

**C. In Any Event, This Lawsuit Does Not Conflict with NHTSA's 2002 Decision Not To Require Advanced Glazing.**

Even if the agency's post-manufacture activities were relevant to this case, Daewoo's preemption argument would still fail. Daewoo relies heavily on NHTSA's

2002 decision not to require advanced glazing in side windows, attributing preemptive force to the fact that "NHTSA deliberately retained the optional compliance framework established by FMVSS 205 based on its reasoned judgment that such options will further its stated purpose." Daewoo Br. at 9. *Williamson,* however, made crystal clear that a federal agency's decision not to require a particular safety device and, instead, to "retain[ ] [an] optional compliance framework," *id.*, does not preempt state tort lawsuits arguing that a manufacturer should have installed that device in its vehicles.

Just as in this case, *Williamson* involved a FMVSS that gave car makers a choice between utilizing different technologies (lap belts vs. lap/shoulder harnesses). Just as Daewoo argues here, the car maker in *Williamson* relied on the fact that NHTSA had affirmatively decided not amend the regulation to require the particular technology advocated by the plaintiff (the lap/shoulder harness). *See* 2011 WL 611628 at *8. And just as in this case, that decision – like the agency's 2002 decision not to require advanced glazing in all side windows – *left intact the preexisting regulatory option that gave carmakers the choice between lap belts and lap shoulder harnesses*. *Id.* at *7 (NHTSA's decision not to require lap-and-shoulder belts in rear-inner seats "retained manufacturer choice as to which kind of belt to install."). *Williamson* nonetheless held that NHTSA's decision not to require a particular safety device, and instead to leave a preexisting option intact, does not preempt tort lawsuits against a car maker for failing to install that particular device. *Id*. at *10 (holding that a regulation that gives manufacturers multiple options will not exert preemptive force even where a "state tort suit may restrict a manufacturer's choice").

Likewise, in *Sprietsma v. Mercury Marine*, the Supreme Court held that the U.S. Coast Guard's decision *not* to mandate propeller guards on all recreational boat engines did not preempt common-law claims that a boat manufacturer was negligent for failing to install a propeller guard on a particular boat. 537 U.S. 51, 70 (2002).

Just like *Williamson*, *Sprietsma* shows that a federal agency's decision not to require a particular device does not preempt state tort claims predicated on a manufacturer's failure to install that particular device. *See O'Hara*, 508 F.3d at 762 (finding "the parallels between NHTSA's Withdrawal of Rulemaking and … *Sprietsma* to be compelling.").[12]

Nor could it be said that this lawsuit would conflict with NHTSA's *reasons* for declining to require advanced glazing – *i.e.*, a desire to investigate a promising new technology (side airbags); a concern about the costs of requiring design modification of all existing vehicles to accommodate advanced glazing; and a concern that advanced glazing "in some cases appears to increase the risk of neck injury." Daewoo Br. at at 8 (quoting 67 Fed. Reg. at 41,367). Here, too, *Sprietsma* and *Williamson* are dispositive.

In *Sprietsma*, the Court unanimously rejected federal preemption of "no-propeller-guard" claims *despite* the agency's conclusions that propeller guards might cause injuries and be prohibitively expensive. *See* 537 U.S. at 61 (noting that "feasible propeller guards might prevent penetrating injuries *but increase the potential for blunt trauma caused by collision with the guard*" and that "*it would be prohibitively expensive* to retrofit all existing boats with propeller guards because no universal design suitable for all boats and motors in existence had been proved feasible.") (emphasis added) (internal quotations omitted).

The same result is warranted in this case. Just as in *Sprietsma*, NHTSA decided to study the possibility of requiring a particular type of equipment (advanced glazing in side windows) in order to address a safety concern (passenger ejection in

[12] Daewoo attempts to distinguish *Sprietsma* on the ground that NHTSA's decision not to require advanced glazing left a preexisting regulatory option in place, whereas the Coast Guard's decision not to require propeller guards left the area entirely unregulated. *See* Daewoo Br. at 16 ("The connection between FMVSS 205 and *Sprietsma* is unclear since the *Sprietsma* decision did not involve safety options provided by a federal agency for a manufacturer to select from."). As explained above, however, *Williamson* definitively proves this to be a distinction without a difference, because there the Court rejected preemption even though NHTSA's decision not to require lap/shoulder harnesses left a preexisting option intact.

rollover crashes). Just as in *Sprietsma*, there was some indication that the technology would help save lives but also might increase the risk of certain injuries.[13] And just as in *Sprietsma*, the agency concluded, based on safety data and cost concerns, that it would not promulgate a requirement but would continue to study the possible use of advanced glazing in conjunction with side-airbag technology to achieve the agency's overall safety goals. The Supreme Court's ruling that none of these reasons exert preemptive force applies squarely to this case.

In case there was any doubt, the Supreme Court has now reaffirmed this conclusion in *Williamson*. There, as here, the agency decided not to require a particular technology based on a "cost-effectiveness judgment." 2011 WL 611628 at *8. (Among other things, NHTSA had expressed a concern that it would be significantly more expensive for manufacturers to install lap/shoulder belts in rear-inner seats than in outboard seating positions. *Id*.) The Supreme Court held that, although it was conceivable that "an agency could base a decision to preempt on its cost-effectiveness judgment," a court may not "infer from the mere existence of such a … judgment that the federal agency intends to bar States from imposing stricter standards…" *Id*.

NHTSA's statement that advanced glazing "appears" to increase the risk of neck injuries in "some" cases (67 Fed. Reg. at 41367) does not mandate a different result. Daewoo makes much of this statement, arguing that it illustrates a conflict between this lawsuit and NHTSA's purposes. Daewoo Br. at 14, 15. As the *O'Hara* court held, however, NHTSA's isolated reference to "cost concerns and minor safety

[13] *Compare* 2001 Final Report (Daewoo Exhibit L) at ix–x (noting that, despite other safety benefits, "limited" testing with "significant variability" showed that "advanced glazing appears to increase the risk of neck injury") *with Sprietsma*, 537 U.S. at 61 (noting subcommittee's conclusions that "given current technology, feasible propeller guards might prevent penetrating injuries but increase the potential for blunt trauma caused by collision with the guard").

issues . . . . do[] not convey an authoritative message of a federal policy against advanced glazing in side windows."[14] 508 F.3d at 762.

*Sprietsma* illustrates this point as well. As explained above, *Sprietsma* gave zero weight to the fact that the Coast Guard subcommittee had expressed similar safety concerns about propeller guards, showing that isolated references to "some" safety risks are insufficient to form the basis for a finding of implied conflict preemption. *See* 537 U.S. at 61 (rejecting federal preemption of claims that a boat engine should have had a propeller guard despite a subcommittee's finding that propeller guards might "increase the potential for blunt trauma caused by collision with the guard.")

*Williamson* is not to the contrary. There, although the Court observed that NHTSA was "convinced" that lap/shoulder harnesses would increase safety, 2011 WL 611628 at *7, there is no suggestion that this statement was intended to erect a new requirement in federal preemption cases. Not only would such an interpretation effectively overrule *Sprietsma sub silentio*, but it would also turn the presumption against preemption on its head by mandating a finding of preemption *unless* a plaintiff can prove that the federal government is "convinced" of the safety of the technology advocated in a given lawsuit. Under this approach, a finding of preemption would be required even in a case where the federal government has taken no position on the safety of a particular technology – a result that Congress could not have intended, particularly in light of "a statutory savings clause that foresees the likelihood of a continued meaningful role for state tort law." *Williamson*, 2011WL 611628 at *8.

[14] In *Williamson*, too, the regulatory history of FMVSS 208 contained several references to the safety risk of lap/shoulder belts. *See* 2011WL 611628 at *8. The Court was equally dismissive of these isolated comments. *See id.* (explaining that those comments expressing concern over safety did not amount to a "significant safety concern").

In any event, there *is* ample evidence that NHTSA *was* "convinced" that advanced glazing would increase safety. Daewoo's multiple references to the agency's statement about possible neck injuries fails to take account of the findings of the 2001 Final Report on which NHTSA's statement was based.[15] The 2001 Final Report, however, is key: it concludes that "[a]dvanced glazing systems have the potential to yield *significant safety benefits* by reducing partial and complete ejections through side windows, particularly in rollover crashes." *See id.* at viii-ix (emphasis added); s*ee also id.* at vi ("Advanced glazing systems could save 537 to 1305 lives annually. . . . In addition, an estimated 235 to 575 serious… injuries could be reduced annually.").

NHTSA's statement regarding the *possibility* of neck injuries based on "unrepeatable," "highly variable," and "limited data" (Daewoo Exhibit L at 36) did not alter the agency's overall conclusion that advanced glazing would yield "significant safety benefits." It was simply one factor, and a minor one at that, in the agency's analysis. The *chief* factor that led it to decide not to require advanced glazing in all cases was *the emergence of an alternative form of technology – the side airbag*. *See id.* at x.

Thus, NHTSA wrote that, despite the "*significant safety benefits*" of advanced glazing, "*the[se] safety benefits are not unique to advanced glazing systems*" and that "other safety countermeasures" -- such as advanced glazing *and* side airbags -- might prove more effective and less expensive." *Id*. at xiii-ix (emphasis added). The italicized reference to the "significant safety benefits" of advanced glazing reveals that, to use the words of *Williamson*, NHTSA *was* "convinced" that advanced glazing would increase safety overall. It decided, however, that imposing a universal advanced-glazing requirement did not make sense in light of the emergence of the

[15] In this respect, Daewoo is not alone: to our knowledge, no court aside from *O'Hara* has ever considered the findings of NHTSA's 2001 Final Report. This is a crucial omission given that the agency's 2002 decision to withdraw its advanced glazing rulemaking was expressly based on the findings of that report. 67 Fed. Reg. at 41367.

side airbag, which might prove to be a useful component of an ejection mitigation strategy *that includes advanced glazing*.[16]

Finally, if NHTSA had determined that advanced glazing would be undesirable or unsafe in all passenger side windows, it would have banned the technology. But the agency did no such thing; instead, it decided to leave FMVSS 205 intact, giving car makers the option to continue to install advanced glazing side windows. To this day, NHTSA continues to require advanced glazing in the front windshields of all automobiles; to permit it in side windows; and, as explained below, has recently adopted a new rule that actively encourages the use of advanced glazing in all side windows. In this way, the regulatory scheme is virtually identical to the one in *Williamson*, which required lap/shoulder harnesses in most seating positions, permitted them in rear-inner seats, and encouraged manufacturers to use them because they were safer. 2011 WL 611625 at *7-8. The fact that FMVSS 205 continues to permit advanced glazing in side windows is proof positive of the agency's views on the safety of the technology -- and disposes of any argument of implied conflict preemption here.[17]

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[16] *See id.* at xi ("The focus will shift from advanced glazing to development of more comprehensive, performance-based test procedures. If such procedures are feasible, NHTSA wants to focus its efforts on establishing the necessary safety performance that must be achieved, and allow vehicle manufacturers to choose *any technology* that achieves the necessary performance.") (emphasis added).

[17] Daewoo mischaracterizes NHTSA's decision not to require advanced glazing as based on a conclusion that "mandating laminated glass in side windows could increase the risk of neck injuries to belted passengers while providing only limited ejection mitigation benefits." Daewoo Br. at 8. Contrary to this claim, NHTSA did not conclude that advanced glazing would provide "only limited ejection mitigation benefits." To the contrary, as explained above, the agency actually concluded that advanced glazing would provide "significant safety benefits." Daewoo Exhibit L at xiii-xiv. Daewoo also omits the fact that NHTSA's main reason for not requiring advanced glazing was due to the advent of a new technology – side airbags – that it hoped might prove even more effective, especially in combination with advanced glazing. *Id.* As for NHTSA's focus on neck injuries, Daewoo fails to mention that the agency characterized its data on this point as "high[ly] variab[le]" and "limited," and that it also concluded that *"[n]o assessment of actual neck injury levels due to shear loads or moments was made since no accepted lateral neck injury criteria exist.*" *Id.* at 36 (emphasis added).

**D. NHTSA's 2011 Decision to Permit Advanced Glazing in its Ejection Mitigation Rulemaking Confirms that this Lawsuit Does Not Conflict with Federal Purposes.**

Daewoo's reliance on the agency's 2011 ejection mitigation rulemaking is equally unpersuasive. *See* Daewoo Br. at 8, 10. Indeed, NHTSA's own statements about the preemptive effect of that rulemaking conclusively dispose of Daewoo's argument. As noted, NHTSA decided that the best ejection mitigation system would consist of modified side airbag curtains and advanced glazing. 76 Fed. Reg. at 3223. Although the agency decided against requiring advanced glazing as an exclusive ejection mitigation measure (principally because of costs and because windows are not always rolled up and can crush in a rollover), NHTSA repeatedly emphasized the benefits of advanced glazing throughout its 2011 rulemaking; stated that the "optimal" system would utilize both side airbags and advanced glazing; and actively encouraged car makers to install both. *Id.* at 3219, 3223.

Equally telling is the agency's statement at the end of its preamble regarding the preemptive effect of its new rule. *Id.* at 3295. There, NHTSA stated that a lawsuit seeking to hold a manufacturer liable for failing to do more than the minimum required by the regulation would not preempt state-law tort claims. *Id.* That language is tailor-made for this case. FMVSS 226 requires, at a minimum, the use of ejection mitigation side curtains, but also – like FMVSS 205 – gives car makers the option of utilizing advanced glazing as well. Suppose that a car maker were simply to do the minimum required by the standard by installing side curtain airbags, without adding advanced glazing. NHTSA's statement means that, in the agency's view, a lawsuit seeking to hold that car makers liable for failing to add advanced glazing would not conflict with the agency's purposes and would not have any preemptive effect.

That is effectively this case. If NHTSA believes that such a lawsuit *would not* be preempted, then there is no basis whatsoever for this court to conclude that this

lawsuit *is* preempted. *See Williamson*, 2011 WL 611628 at *9 (deferring to NHTSA's view that its regulation does not preempt tort claims). Thus, Daewoo's reliance on post-manufacture events to bolster its preemption motion ultimately hoists the company on its own petard. If the agency's current views on the preemptive effect of glazing claims are relevant to a lawsuit involving a car that was manufactured over a decade ago, then Daewoo cannot prevail. And if the analysis is limited to NHTSA's contemporaneous views on advanced glazing, Daewoo again suffers the same fate, because FMVSS 205's options framework, standing alone, does not exert any regulatory effect, and the agency's comments about advanced glazing were uniformly positive during the relevant time period. In the end, both roads lead to the same conclusion: plaintiffs' claims are not preempted.

## III. CONCLUSION

For all the foregoing reasons, Daewoo's motion for partial summary judgment on federal preemption grounds should be denied.

DATED this 14th day of March, 2011.

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I hereby certify that on March 14, 2011, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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