

June 30, 2010

Via Overnight and E-Mail Delivery

Hon. Blake A. Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: Cause No. 09-0048; *MCI Sales and Service, Inc., f/k/a Hausman Bus Sales, Inc. and Motor Coach Industries Mexico, S.A. de C.V., f/k/a Dina Autobuses, S.A. de C.V. v. James Hinton, Individually and as Representative of the Estate of Dolores Hinton, Deceased, et al.*; In the Supreme Court of Texas.

Dear Mr. Hawthorne:

Petitioners, MCI Sales and Service, Inc. and Motor Coach Industries Mexico, S.A. de C.V. (“MCI”), submit this letter in response to the letter filed by Respondents/Cross-Petitioners, James Hinton, et al. (“Plaintiffs”), on June 10, 2010 regarding federal preemption. Please circulate the attached copies of this letter to the Justices of the Court.

In their June 10, 2010 letter, Plaintiffs ask this Court to take judicial notice of the *Brief for the United States as Amicus Curiae* filed by the Solicitor General on April 23, 2010 in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, pending before the United States Supreme Court. Plaintiffs argue that the Solicitor General’s amicus brief “clearly shows that the United States, the Department of Transportation, and most importantly NHTSA, all disagree with MCI’s position—that FMVSS 208’s ‘non-regulation’ of passenger seatbelts in motor coaches preempts Hinton’s claim.” Not so. The Solicitor General’s amicus brief is not persuasive in this case, does not stand for the broad propositions the Plaintiffs assert, and in a significant way is consistent with one of MCI’s arguments concerning the Fifth Circuit’s opinion in *O’Hara v. General Motors Corporation*, 508 F.3d 753 (5th Cir. 2007), on which the court below erroneously relied.

First, the Solicitor General’s brief contains no arguments whatsoever and expresses no opinion regarding the preemptive effect of the portion of FMVSS 208 relevant to this case: NHTSA’s decision to issue a standard requiring seat belts in motor

coaches only at the driver's position. The Solicitor General's argument primarily is two-fold and directed solely at the specific standard involved in *Williamson*. The Solicitor General argues that the standard at issue in *Williamson* 1) is an "option-only" standard that the California court of appeal found preemptive simply because the standard offered an option and 2) was not safety-based, but was based strictly on cost concerns and technical difficulties. (S.G.'s Br. at 14-15) The Solicitor General never states or even implies that either of these arguments applies to or controls the motorcoach seat belt issue.

In fact, the Solicitor General acknowledges that each subsection of a safety standard and each amendment of a subsection must be separately assessed for its preemptive effect. (See S.G.'s Br. at 11) When the Solicitor General does finally refer to the motorcoach seat belt issue—by mentioning a split in the courts on whether NHTSA's decision not to issue a standard is preemptive—it does not argue that one line of decisions is correct and the other incorrect. Rather, it merely notes the existence of the conflict, then uses that conflict to argue that the Supreme Court needs to grant certiorari in *Williamson* because the Court's *Geier* opinion is subject to differing interpretations on the same issue and needs to be clarified. (S.G.'s Br. at 17-19) Thus, contrary to the Plaintiffs' claims, the Solicitor General does not take a position on the preemptive nature of NHTSA's decision to issue a regulation that requires seat belts in motorcoaches at the driver's position only.

Second, the Solicitor General's overall position on preemption is not as broad as Plaintiffs try to make it. On page 2 of their June 10 letter, Plaintiffs quote a section from the Solicitor General's brief that gives the impression that the Solicitor General's argument is broader than it actually is and is relevant to this case. Plaintiffs quote from the very beginning of the Solicitor General's brief where the Solicitor General appears to argue in broad brushstrokes that the *Williamson* court's holding deprives the Motor Vehicle Safety Act's saving clause of its proper effect and transforms FMVSS 208 from the minimum standard it is.

This argument is not what Plaintiffs try to make it. Simply, the Solicitor General is arguing that the California court of appeals misconstrued the preemptive effect of a particular standard within FMVSS 208 and wrongly held that the particular standard was preemptive when it was not. (S.G.'s Br. at 2-4) The Solicitor General is not arguing that every subsection of FMVSS 208 is only a minimum standard.¹ As noted above, the Solicitor General acknowledges that each subsection of a safety standard and each amendment to a subsection must be reviewed separately for its preemptive effect based on NHTSA's reasons for the subsection or its amendment. (See S.G.'s Br. at 11) The

¹ Clearly the Solicitor General could not argue this, because the Supreme Court concluded in *Geier* that the subsection of FMVSS 208 at issue in *Geier* was preemptive.

Solicitor General does not argue that all of the subsections of FMVSS 208 are minimum standards without preemptive effect.

Third, Plaintiffs also quote the Solicitor General's argument that providing an option does not, in and of itself, clothe a regulation with preemptive effect. Although MCI noted in its brief to this Court that some courts have concluded that FMVSS 208 is preemptive purely because it provides an option, MCI does not need to rely on this reason alone. The underlying reasons behind NHTSA's regulatory decisions made the decisions preemptive.

Fourth, Plaintiffs ignore one acknowledgment in the Solicitor General's brief that is significant here. In addressing the preemptive nature of a particular standard, the Solicitor General looked not only at the final rule and the reasons given therein for the rule, but at all of the notices NHTSA issued concerning the standard and the reasons listed in them. (*See* S.G.'s Br. at 11-17) This position is consistent with what MCI has argued: this Court must look not only at the final rule to determine preemption, but must look at each of NHTSA's pronouncements leading to its decision to change, or not change, a standard. This Court must also look at objective contemporaneous statements or studies that shed light on NHTSA's decisions.

The Solicitor General's position is inconsistent with what a Fifth Circuit panel did in *O'Hara*, when the panel looked only at the final rule—which it criticized for being short—and ignored the 54-page final report (and earlier preliminary reports) that contained a lengthy discussion of NHTSA's reasons for not changing the FMVSS 205 glazing standard. 508 F.3d 753, 759-63 (5th Cir. 2007).

In conclusion, the Solicitor General's brief does not disagree with MCI's position on motorcoach seat belts or on motorcoach glazing. The Solicitor General's brief is completely irrelevant to MCI's position on these issues and does not attempt to take a position on them, nor can a position be implied from the brief. Because the standard at issue in *Williamson* is not the same as the ones before this Court and has a different regulatory history, the Solicitor General's arguments regarding that standard and its history are unhelpful here.²

Very truly yours,

/S/

Thomas C. Wright

TCW:dmb

² MCI disagrees with the Solicitor General's rather narrow interpretation of *Geier*, but MCI has fully briefed its interpretation of *Geier* and will not reiterate its comments here.

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