No dead end for air bag cases

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Do you know more than the general public about how dangerous air bags are? Here is a true-false test.

1. Air bags are designed to deploy only when they are needed.

2. Air bags have prevented far more injuries than they have caused.

3. The primary threat to children from passenger-side air bags is suffocation.

If you answered true to any of these questions, you were wrong.

Until recently, many air bags were designed to deploy in collisions of vehicles traveling as slowly as 6.5 to 8 mph. Authoritative studies establish that there is virtually no risk of death in collisions of 18 mph or less.[1]

While published statistics claim air bags have saved more people than they have killed, that is not true in low-speed collisions. In crashes at speeds less than 18 mph, air bag deployments have killed far more people than they have saved. To date, air bags have killed 169 occupants, mostly in collisions under 18 mph. In few, if any, of these cases would the occupant have been killed or severely injured had the air bag not deployed during the crash.[2]

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The authors navigate the current course of air bag litigation, explaining the significance of recent court decisions and offering suggestions to keep your cases from falling flat.

Ford Motor Co., recognizing the fact that the risk of air bag deployments under 18 mph outweighs the benefits, has raised its deployment threshold to 18 mph. If the crash exceeds 27 mph, the bag deploys with greater force. Other vehicle manufacturers have followed Ford's lead and raised their deployment thresholds.

For years, automakers tried to conceal the hazards of air bags. Documents show that manufacturers, as well as the National Highway Traffic Safety Administration (NHTSA), have always been concerned that if motorists knew all the facts about air bags, they would fear the devices.[3] James Boland, manager of Ford's Safety Research Department, testified during a deposition in an Arizona case, "If we started right off the bat with the first passenger air bag saying, you know, these are dangerous things, we think that the experience the customer experienced would be negative, and that's not something you want to have with a safety device."[4]

It was not always this way. When manufacturers lobbied against a federal air bag mandate, their key argument was that air bags were dangerous. However, since 1970, NHTSA continued to press for the development of air bag technology. Then, Chrysler Corp. realized that air bags could be used to sell cars. In a remarkable turnaround in the late 1980s, Chrysler's chief executive officer, Lee Iacocca, declared on television that he had been wrong—air bags were safe.

After that, the race was on. Manufacturers decided, for marketing purposes, that it was time to install air bags. They started with driver-side air bags in the late 1980s and soon followed with passenger-side bags. They did so long before federal law required air bags beginning in the 1997 model year.

Manufacturers were aware of technology successfully used by General Motors (GM) to minimize air bag dangers. In the

mid-1970s, GM installed dual-inflator air bags in some models. In low-speed collisions, these air bags deployed with minimal force. In higher-speed collisions, where more aggressive deployment is needed, they deployed with full force.[5]

Sadly, in the air bag gold rush of the 1990s, vehicle manufacturers rejected the safer, more technologically sophisticated dual-inflator concept used by General Motors in the 1970s. With few exceptions, manufacturers reverted to single-force inflators that deploy with full force, regardless of the speed of the impact. They then failed to adequately test these overly aggressive, low-threshold systems to determine what injuries they might cause smaller occupants or occupants of any size leaning forward in a "panic brake" posture. Many manufacturers were content with testing only adult male test dummies sitting upright, the only test condition required by federal law.

This was the case even though the Society of Automotive Engineers recommended that testing be done with the full range of anthropomorphic dummies, including dummies representing women and children in various out-of-position postures.[6]

Of course, the decisions made by the manufacturers had consequences. Women and children were, and continue to be, killed by air bags. According to NHTSA, 100 children and 69 adults have been killed by air bags since 1990.[7] When a shocked public learned this, changes began. Consumer groups lobbied for more explicit warning labels. Then, under public pressure, NHTSA finally upgraded the federal air bag test to include the "family of dummies," in various positions, in a variety of real-world crash conditions. The new standard will be phased in over the 2002-2006 model years.

The air bags being designed in response to the new standard hold great promise for reducing catastrophic injuries. Manufacturers are finally returning to dual-inflator air bags. Some new systems also use higher deployment thresholds, lateral-bias flaps that direct the air bag sideways if it strikes an object while inflating, bags that deploy vertically rather than directly at the occupant, and improved crash sensors that trigger prompt inflation of the air bag before the occupant is propelled into the deployment zone. If manufacturers had incorporated these commonsense safety features at the outset, most, if not all, of the problems could have been avoided.

The stronger air bag warnings case is one in which the occupant read the warnings but was still not adequately informed of the dangers of air bags or of ways to minimize them.

These safety features were technologically feasible but were rejected to cut costs. The manufacturers' failure to use these safety features has exposed them to design defect claims that have resulted in dozens of verdicts and settlements, some in substantial amounts. Because 1990s vehicles with poorly designed air bags will move through used vehicle markets for years, air bag injuries and the resultant lawsuits will inevitably continue.

Preemption deflates air bag cases

Despite evidence of auto manufacturers' culpability, car companies have worked hard to avoid responsibility. Those efforts have had some recent success with respect to failure to warn claims. In *Fisher v. Ford Motor Co.*, the Sixth Circuit accepted the industry's argument that federal regulations preempted placing air bag warnings in the vehicles, except the weak sun visor label federally mandated from 1994 to 1996.[8]

In *Fisher*, the plaintiff, a five-foot-one-inch woman in her 70s, was severely injured by the driver-side air bag in her 1996 Mercury Sable. Because of her short stature, the plaintiff sat very close to the steering wheel. When the air bag deployed, it slammed her head back against the seat, causing a skull fracture and a brain hemorrhage. The manufacturer agreed that the air bag, and not the force of the collision, caused the plaintiff's injuries.

At trial, Fisher's attorney contended that Ford knew of the dangers air bags posed to shorter drivers and should have warned about the dangers. At the time, Federal Motor Vehicle Safety Standard (FMVSS) 208 mandated the following warning, which was to be placed on either side of the sun visor:

> Caution—to avoid serious injury
> • For maximum safety in all types of crashes, you must always wear your safety belt.
> • Do not install rearward-facing child seats in any front passenger seat position.
> • Do not sit or lean unnecessarily close to the air bag.
> • Do not place any objects over the air bag or between the air bag and yourself.
> • See the owner's manual for further information and explanations.[9]

Fisher had never seen the visor warning, nor had she read the owner's manual. She argued that these warnings were inadequate and that Ford should have posted more explicit and conspicuous warnings advising of the heightened inflation hazards to short drivers.

Ford countered that additional warnings in the vehicle were prohibited by Safety Standard 208. Although the rule did not explicitly prohibit additional warnings, Ford argued it impliedly did. The trial court ruled in favor of Ford, and the Sixth Circuit affirmed that decision.

The Sixth Circuit started its analysis by examining *Geier v. American Honda Motor Co.*, a recent U.S. Supreme Court case that analyzed preemption in connection with Safety Standard 208.[10] In *Geier*, the Court considered whether the federal regulations preempted tort-based claims arising from failure to install air bags in vehicles manufactured in the mid- to late 1980s. The Court held that these claims were preempted because, although the regulations did not expressly ban state tort actions, they did so impliedly.

In the *Fisher* case, the Sixth Circuit focused on concerns expressed in NHTSA's air bag label rule that warnings should not

cause information overload. The court reasoned that additional warnings, as urged by the plaintiff, would cause just that. It held, therefore, that such warnings were impliedly preempted.

No implied preemption

The *Fisher* decision is astonishing because it is contrary to federal statute and NHTSA regulations. The Federal Motor Vehicle Safety Act created NHTSA and authorized it to promulgate safety standards.[11] According to the act, a federal motor vehicle safety standard is a "minimum standard" for motor vehicle equipment performance.[12] Thus, on its face, Safety Standard 208 did nothing more than set a minimum labeling requirement when it mandated warnings on the sun visor.

The act also contains a "savings clause," which preserves tort claims under common law by providing that "compliance with a motor vehicle safety standard does not exempt a person from liability at common law."[13]

According to the legislative history, the savings clause "is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise affect the rights of parties under common law, particularly those relating to warranty contract and tort liability."[14]

To be sure, *Geier*, the case on which *Fisher* relies, recognized that federal safety standards were minimum standards. However, the Court denied that this meant Safety Standard 208 could not preempt a state tort action. The Court reasoned that a tort claim is impliedly preempted if it is inconsistent with a federal regulation. *Geier* specifically rejected the notion that the language in the safety act regarding minimum standards, as well as the savings clause itself, placed a higher burden on those claiming preemption.

However, before the *Geier* Court concluded there was preemption in the case before it, it engaged in a detailed study of Safety Standard 208. It relied on NHTSA's later interpretation of its own rules, advanced in the form of a brief filed with the Court. The same cannot be said of the Sixth Circuit in *Fisher*. Indeed, it seems clear that the *Fisher* court ignored important facts and points of law.

In an air bag warnings case, trial counsel should argue that the plaintiff's injuries would have been avoided if the manufacturer had an effective overall warnings system.

First, nowhere did the court cite the preamble to the labeling rule or limiting language of the rule itself. The preamble says, "[M]anufacturers are free, of course, to provide additional information *in other places*, such as the owner's manual."[15]

The regulation states:

> No other information shall appear on the same side of the sun visor to which the label is affixed. Except for the air bag alert label placed on the visor pursuant to §4.5.1(c) of this standard, no other information about air bags or the need to wear seat belts shall appear anywhere *on the sun visor*.[16]

Thus, although NHTSA may have expressed concerns about information overload, it explicitly recognized that manufacturers may include other warnings in places in the vehicle other than the sun visor.[17] In light of this, it is difficult to justify the Sixth Circuit's holding that the field of air bag warnings has been impliedly preempted.

Manufacturers themselves did not interpret Safety Standard 208 to preclude additional warnings. Ford, the defendant in *Fisher*, testified as follows through its own officer and Rule 30(b) witness, Paul Butler:

> Q: Did you consider doing anything else in the vehicle to warn the customer about the dangers of the air bag?
> A: Not that I am aware of.
> Q: Let me just throw out some possibilities. Did you consider placing a label on the dashboard that had warnings about the air bag restraint system?
> A: I'm not aware of any consideration that was given to that.
> Q: Is there anything in the federal regulation that would have prohibited that?
> A: No.[18]

Other car makers, including Volvo, Mercedes, and Saab, posted warnings in the vehicle in addition to those placed on the sun visors. Volvo, for instance, placed a label on the dashboard of its vehicles that included the following warning: "Do not install or use any child restraint in the front seat. We also recommend that children who have outgrown child restraint systems sit in the rear seat with the seat belt properly fastened."

A label Mercedes used on its dashboards warned:

> To prevent serious injury or death from inflating air bag:
> • Never install a rear-facing child seat in this front seat.
> • Always use seat belts and child seats correctly.
> • Keep back from the air bag.
> Children are safest in rear seats.
> See sun visor and owner's manual warnings.

Every Saab 900 and 9000 vehicle imported after May 1, 1996, had onboard safety cards that included the following message in the pockets of the front doors and seat backs: "Never use a child seat in the front seat of this vehicle facing rearward or forward." Under *Fisher*, Volvo, Mercedes and Saab violated NHTSA's air bag label rule by posting labels in addition to the NHTSA-mandated sun visor label. The absurd but logical extension of this is that vehicles with supplemental warnings should be recalled.

It is also significant that manufacturers used additional warnings outside the vehicles, such as in showroom brochures giving advice about air bags. Nissan, for example, published an information guide. In it, the company added considerable information about its air bags, noting that occupants should not sit "up against the steering wheel" and warning that air bags would inflate in collisions ranging from 12 to 24 mph.[19]

Undoubtedly, the *Fisher* case, by its own

language, is limited to additional warnings inside the vehicle. However, if its reasoning were to be followed to its logical conclusion, then even warnings outside the vehicle would be impliedly preempted for causing information overload.

Further evidence that additional air bag warnings are not preempted is furnished by NHTSA itself. In 1998, in response to an inquiry from an organization called Parents for Safer Air Bags, NHTSA's chief counsel wrote to the group's director and general counsel that Safety Standard 208 did not preclude additional warnings in the vehicles.

The letter read:

> You asked whether this final rule precluded automobile manufacturers from placing air bag information labels elsewhere in the vehicle (i.e., other than on the sun visor) with a text different than that of the sun visor label.
>
> The answer is no. [Section] 4.5.1(b)(1) of Standard No. 208 specified the precise information concerning air bags that was required to be placed *on the sun visor*, and §4.5.1.(b)(2) specified that "no other information concerning air bags or seat belts shall appear anywhere *on the sun visor*." The standard did not prohibit vehicle manufacturers from placing *other accurate information concerning air bags or seat belts in locations in the vehicle other than the sun visor*.[20]

The *Fisher* court acknowledged the NHTSA letter but gave it short shrift, saying interpretive letters were not legally binding on the court. The court also stated that the letter was written two years after the incident involved in the case and arose from a question about warnings related to children, not adults.

Geier, however, placed special emphasis on NHTSA interpretations of Safety Standard 208, even those made after the promulgation of the rule. In relevant part, the court stated:

> We place some weight upon DOT's [the Department of Transportation's] interpretation of FMVSS 208's objectives and its conclusion, as set forth in the government's brief, that a tort suit such as this one would "stan[d] as an obstacle to the accomplishment and execution" of those objectives. Congress has delegated to DOT authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. DOT has explained FMVSS 208's objectives, and the interference that "no air bag" suits pose thereto, consistently over time. In these circumstances, the agency's own views should make a difference.
>
> We have no reason to suspect that the solicitor general's representation of DOT's views reflects anything other than "the agency's fair and considered judgment on the matter." The failure of the *Federal Register* to address preemption explicitly is thus not determinative.[21]

Children still occupy the front seats of vehicles, and drivers still sit too close to the steering wheel and instrument panel. People do not appreciate the dangers.

Although NHTSA's interpretation, which was written at the request of Parents for Safer Air Bags, was contained in an interpretation letter rather than a court brief, there is no reason to distinguish the two. Another Supreme Court precedent, *Medtronic v. Lohr*, had already established that agency interpretative letters of previously issued rules are entitled to "substantial weight."[22] Moreover, NHTSA affirms its authority in a message on its Web page.[23]

Some cases escape preemption

Even if other courts follow the *Fisher* ruling, air bag warning cases are far from dead. Consider the following:

- *Fisher* was interpreting the version of Safety Standard 208 adopted September 2, 1993, which applied only to vehicles manufactured after September 1, 1994. Virtually no restrictions were placed on vehicles manufactured before that date. Safety Standard 208's warning provisions were amended on November 27, 1996, and apply to all vehicles manufactured after February 25, 1997. That rule, which requires the placement of additional warnings in the vehicle, has yet to be interpreted within the context of a preemption defense.
- *Fisher* limited its holding to the question of whether there could be *different* warnings in the vehicle than those required on the sun visor. Indeed, the trial court permitted the plaintiff to argue that nothing prevented the manufacturer from making a copy of the sun visor warning and placing it more prominently in the vehicle, such as on the steering wheel or the dashboard.
- Just eight days after the Sixth Circuit issued *Fisher*, a different panel of that appellate court published *Hisrich v. Volvo*.[24] In that case, a six-year-old child riding unrestrained in a 1973 Volvo 850 was killed in a collision at less than 8 mph. The trial court refused to instruct the jury on the plaintiff's claim that Volvo's warnings were inadequate. The plaintiff argued that Volvo failed to warn that small children were at special risk of injury. Such a warning was not contained in either an in-vehicle sticker, the owner's manual, or a video provided with the vehicle. The trial court found that the mother would not have heeded any such instruction if she had been warned.

The principal issue on appeal in *Hisrich* was whether Volvo had actually rebutted Ohio's presumption that warnings would have been followed. The Sixth Circuit reversed the trial court, holding that the presumption had not been rebutted.

Interestingly, the *Hisrich* decision makes no mention of *Fisher*. Since the cases were decided only eight days apart, it may be that the panels were unaware of each other's cases. In any event, the two are reconcilable. *Hisrich* involved a car manufactured before September 1, 1994, and a claim that warnings contained in a video outside the vehicle were inadequate. *Hisrich*, therefore, underscores the limits of *Fisher*.

Elements of a good case

One of the problems faced by the plaintiff in *Fisher* was that she had read neither the visor label nor the owner's manual. In theory, this should not have mattered, since the argument was that those warnings were insufficient. However, jurors and

courts expect parties to assume personal responsibility for their safety. The stronger air bag warnings case, therefore, is one in which the occupant read the warnings but was still not adequately informed of the dangers of air bags or of ways to minimize them, such as changing seat position, adding pedal extenders, or installing an on-off switch.

There is no doubt that manufacturers' air bag warnings before February 25, 1997, were inadequate. In March and November 1996, NHTSA convened four focus groups in various studies across the country to test the effectiveness of the sun visor label then in effect. The results of the focus groups were disturbing:

> Participants did not have much detailed awareness of safety warning labels in their family vehicles. A few could mention only the warning on side-mirrors reminding them that "objects in the mirror are closer than they appear."
>
> Some participants with four-wheel-drive vehicles [mentioned] labels addressing getting in and out of the four-wheel-drive gear and information pertaining to rollovers. Only one or two said they believed these labels had anything to do with air bags. A couple of participants whose cars were equipped with air bags said that they thought the sun visor label addressed air bags but that they were not positive. Of the 53 participants, only a few could describe with any certainty or specificity what is contained on their sun visor warning labels.[25]

The focus groups indicate that even the current sun visor warnings, mandated effective February 25, 1997, are not adequate. These warnings state that air bags can kill children and that children 12 years old and younger should be seated in the back seat. NHTSA conducted focus groups and found that various labels it was considering could not adequately explain the dangers of air bags:

> Participants were confused by definitions such as "children" or "under 12." Instead, participants asked that warnings be clearly defined with more universal physical dimensions such as height or weight, or whatever the critical factor.
>
> Some of the labels were considered to be very effective in addressing a particular segment of the population at risk, particularly infants. But some participants were confused by the label's seeming exclusion of children in front-facing car seats, older children, and adults of small stature.
>
> Participants expressed appreciation for clear, easy-to-understand instructions that tell them exactly what *to do* and what *not* to do. Conversely, they did not like instructions that were perceived to be ambiguous or irrelevant.[26]

Take a look around. Children still occupy the front seats of vehicles, and drivers still sit too close to the steering wheel and instrument panel. However, as the focus groups indicate, many people simply do not appreciate the dangers. Manufacturers have a duty to better warn them.

In an air bag warnings case, trial counsel should argue that the plaintiff's injuries would have been avoided if the manufacturer had an effective overall warnings system, including explicit warnings in the vehicle, the owner's manual, and literature and videos distributed by the dealer.

A good warnings case will include at least the following allegations:

1. The manufacturer failed to warn that the air bag system was not tested for smaller occupants, such as women and children.

2. The manufacturer failed to effectively communicate the dangers of air bags by

- failing to use direct language warning of the risk of death;
- failing to post the visor warnings elsewhere in the vehicle;
- failing to advise occupants to move the seat to the rear position on the seat track;
- failing to provide any additional in-vehicle warnings using clear and direct language; and/or
- failing to use crash videos to demonstrate the dangers of air bags.

The effectiveness of the last allegation was recently demonstrated. In *Swanson v. Nissan*, a passenger-side air bag case, jurors viewed graphic crash-test videos.[27] Although the case settled before a verdict, jurors reported that, after watching the videos, they pushed their seats as far back as possible in the seat track.

The public at large, no less than a jury in an air bag case, should receive this kind of truly effective information. ❐

Notes

1. *See, e.g.*, A.C. Malliaris et al., *Harm, Causation, and Ranking in Car Crashes,* Society of Automotive Engineers Paper No. 850090, 6-7 (1985); George Libertiny et al., *Air Bag Effectiveness: Trading Major Injuries for Minor Ones*, Society of Automotive Engineers Paper No. 950871 (1995).

2. The National Highway Traffic Safety Administration has stated that the vast majority of air bag deaths take place in collisions of 15 mph or less. 62 Fed. Reg. 62409 (Nov. 21, 1997). As to its official list of air bag deaths, NHTSA has determined that "none of the occupants would have died if they had not been seated in front of an air bag." *Id.*

3. See manufacturers' comments published in connection with the final rule regarding labeling. Federal Motor Vehicle Safety Standards, 58 Fed. Reg. 46,551, 46,554 (Sept. 2, 1993) (to be codified at 49 C.F.R. pts. 571 & 585).

4. *See* Deposition of James Boland at 88, Phillips v. Ford, No. CV 98-02262 (Ariz., Maricopa County Super. Ct. Oct. 23, 1998).

5. F.H. Klove & Robert Oglesby, *Special Problems and Considerations in the Development of Air Cushion Restraint Systems*, Society of Automotive Engineers Paper No. 720411 (1972).

6. *Occupant Restraint System Evaluation,* Society of Automotive Engineers Paper No. J128 (1994).

7. NHTSA, Air Bag Fatal and Serious Injury Report, *available at* http://www.nhtsa.dot.gov/people/ncsa/SCIFiles/ 08_00rpt.htm (Nov. 2000).

8. 224 F.3d 570, 573 (6th Cir. 2000).

9. Standard No. 208, Occupant Crash Protection, 49 C.F.R. §571.208 (2000).

10. 120 S. Ct. 1913, 1925-26 (2000).

11. 49 U.S.C. §30103-30169 (2000).

12. *Id.* §30102(9).

13. *Id.* §30103(e).

14. H.R. 1776, 89th Cong. (2d Sess. 1966).

15. 58 Fed. Reg. 46,554 (emphasis added).

16. *Id.*

17. *See also* Fidelity Fed. Sav. & Loan Assoc. v. De La Cuesta, 458 U.S. 141, 158 (1982) (stating that regulatory preamble is evidence of administrative construction of regulation).

18. Deposition of Paul Butler at 33-34, Fisher v. Ford, No. 97- CV-7070, (N.D. Ohio Apr. 23, 1998).

19. NISSAN CONSUMER WARNING INFORMATION GUIDE 3 (1996).

20. Letter from Frank Seales, Chief Counsel, National Highway Traffic Safety Administration, to Robert C. Sanders, Director and General Counsel, Parents for Safer Air Bags (Nov. 12, 1998) (emphasis added) (on file with the authors).

21. *Greier*, 120 S. Ct. 1913, 1926 (citations omitted).

22. 518 U.S. 470, 496 (1996).

23. NHTSA, *Welcome to NHTSA's Interpretations Files*, *available at* http://www.nhtsa.dot.gov/cars/rules/interps/welcome.html (last visited Nov. 20, 2000).

24. 226 F.3d 445 (2000).

25. Air Bags Warning Labels II, Focus Group Findings, prepared for NHTSA by Global Exchange, Inc., Contract No. DTNH22-95-D-05152, at 11 (1996).

26. *Id.* at 3 (emphasis in original).

27. No. 97-315 (D. Or. filed Feb. 26, 1997).