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Supreme Court of the United States

Alexis GEIER, et al., Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, INC., et al.

No. 98-1811.

Argued Dec. 7, 1999.
Decided May 22, 2000.

Injured motorist brought defective design action against automobile manufacturer under District of Columbia tort law, contending that manufacturer was negligent in failing to equip automobile with driver's side airbag. The United States District Court for the District of Columbia, William B. Bryant, J., entered summary judgment in favor of manufacturer. Motorist appealed. The District of Columbia Court of Appeals, Rogers, Circuit Judge, 166 F.3d 1236, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) action was not preempted by express preemption provision of National Traffic and Motor Vehicle Safety Act; but (2) Act's savings clause did not foreclose or limit operation of ordinary preemption principles; and (3) action was preempted since it actually conflicted with Department of Transportation standard requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles, abrogating *Drattel v. Toyota Motor Corp.*; *Minton v. Honda of America Mfg., Inc.*; *Munroe v. Galati*; *Wilson v. Pleasant*; *Tebbetts v. Ford Motor Co.*

Affirmed.

Justice Stevens dissented and filed opinion in which Justices Souter, Thomas, and Ginsburg joined.

West Headnotes

[1] Products Liability 35.1
313Ak35.1 Most Cited Cases

[1] States 18.65
360k18.65 Most Cited Cases

Express preemption provision of National Traffic and Motor Vehicle Safety Act did not preempt common law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag; finding that action was not preempted gave actual meaning to Act's saving clause while leaving adequate room for state tort law to operate, for example, where federal law created only minimum safety standard. National Traffic and Motor Vehicle Safety Act of 1966, § § 103(d), 108(k), 15 U.S.C.A. § § 1392(d), 1397(k).

[2] Consumer Protection 11
92Hk11 Most Cited Cases

[2] States 18.65
360k18.65 Most Cited Cases

Savings clause of National Traffic and Motor Vehicle Safety Act did not foreclose or limit operation of ordinary preemption principles insofar as those principles instructed courts to read statutes as preempting state laws that actually conflicted with Act or federal standards promulgated thereunder. National Traffic and Motor Vehicle Safety Act of 1966, § 108(k), 15 U.S.C.A. § 1397(k).

[3] Products Liability 35.1
313Ak35.1 Most Cited Cases

[3] States 18.65
360k18.65 Most Cited Cases

Express preemption provision of National Traffic and Motor Vehicle Safety Act did not foreclose possibility of implied conflict preemption of state law causes of action. National Traffic and Motor Vehicle Safety Act of 1966, § 103(d), 15 U.S.C.A. § 1392(d).

[4] States 18.5
360k18.5 Most Cited Cases

The Supreme Court declines to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

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[5] Products Liability 35.1
313Ak35.1 Most Cited Cases

[5] States 18.65
360k18.65 Most Cited Cases

Neither the express preemption clause of the National Traffic and Motor Vehicle Safety Act, nor the Act's savings clause, nor both together, created any "special burden" with respect to preemption of state common law tort claims beyond that inherent in ordinary preemption principles. National Traffic and Motor Vehicle Safety Act of 1966, § § 103(d), 108(k), 15 U.S.C.A. § § 1392(d), 1397(k).

[6] Products Liability 35.1
313Ak35.1 Most Cited Cases

[6] States 18.65
360k18.65 Most Cited Cases

Common law tort action alleging that automobile manufacturer was negligent in failing to equip automobile with driver's side airbag was preempted in that it actually conflicted with Department of Transportation standard, promulgated under National Traffic and Motor Vehicle Safety Act, requiring manufacturers to place driver's side airbags in some but not all 1987 automobiles; rule of state law imposing duty to install airbag would have presented obstacle to variety and mix of safety devices and gradual passive restraint phase-in sought by standard; abrogating *Drattel v. Toyota Motor Corp.*, 92 N.Y.2d 35, 677 N.Y.S.2d 17, 699 N.E.2d 376; *Minton v. Honda of America Mfg., Inc.*, 80 Ohio St.3d 62, 684 N.E.2d 648; *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114; *Wilson v. Pleasant*, 660 N.E.2d 327; *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345. National Traffic and Motor Vehicle Safety Act of 1966, § 1 et seq., 15 U.S.C.A. § 1381 et seq.

[7] States 18.5
360k18.5 Most Cited Cases

Conflict pre-emption turns on the identification of actual conflict, and not on an express statement of pre-emptive intent.

[8] States 18.5
360k18.5 Most Cited Cases

While pre-emption fundamentally is a question of congressional intent, the Supreme Court traditionally distinguishes between express and implied pre-emptive intent, and treats conflict pre-emption as an instance of the latter.

[9] States 18.5
360k18.5 Most Cited Cases

A court should not find pre-emption too readily in the absence of clear evidence of a conflict.

[10] States 18.9
360k18.9 Most Cited Cases

A specific expression of agency intent to pre-empt, made after notice-and- comment rulemaking, is not required before conflict pre-emption can be found.

****1914** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Pursuant to its authority under the National Traffic and Motor Vehicle Safety Act of 1966, the Department of Transportation (DOT) promulgated Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints. Petitioner Alexis Geier was injured in an accident ****1915** while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, *inter alia*, that respondents (hereinafter American Honda) were negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court granted American Honda summary judgment. In affirming, the Court of Appeals concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit.

Held: Petitioners' "no airbag" lawsuit conflicts with the objectives of FMVSS 208 and is therefore pre-empted by the Act. Pp. 1918-1928.

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(a) The Act's pre-emption provision, 15 U.S.C. § 1392(d), does not expressly pre-empt this lawsuit. The presence of a saving clause, which says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law," § 1397(k), requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations. The saving clause assumes that there are a significant number of common-law liability cases to save. And reading the express pre-emption provision to exclude common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate where, for example, federal law creates only a minimum safety standard. P. 1918.

(b) However, the saving clause does *not* bar the ordinary working of conflict pre-emption principles. Nothing in that clause suggests an intent to save state tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt" sound as if they simply ***862** bar a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute, or a minimum, requirement. This interpretation does not conflict with the purpose of the saving provision, for it preserves actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. Moreover, this Court has repeatedly declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law, a concern applicable here. The pre-emption provision and the saving provision, read together, reflect a neutral policy, not a specially favorable or unfavorable one, toward the application of ordinary conflict pre-emption. The pre-emption provision itself favors pre-emption of state tort suits, while the saving clause disfavors pre-emption at least some of the time. However, there is nothing in any natural reading of the two provisions that would favor one policy over the other where a jury-imposed safety standard actually conflicts with a federal safety standard. Pp. 1919-1922.

(c) This lawsuit actually conflicts with FMVSS 208 and the Act itself. DOT saw FMVSS 208 not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptance--all of which would promote FMVSS 208's safety objectives. The standard's history helps explain why and how DOT sought these objectives. DOT began instituting passive restraint requirements in 1970, but it always permitted passive restraint options. Public resistance to an ignition interlock device that in effect forced occupants to buckle up their manual belts influenced DOT's subsequent initiatives. The 1984 version of FMVSS 208 ****1916** reflected several significant considerations regarding the effectiveness of manual seatbelts and the likelihood that passengers would leave their manual seatbelts unbuckled, the advantages and disadvantages of passive restraints, and the public's resistance to the installation or use of then-available passive restraint devices. Most importantly, it deliberately sought variety, rejecting an "all airbag" standard because perceived or real safety concerns threatened a backlash more easily overcome with a mix of several different devices. A mix would also help develop data on comparative effectiveness, allow the industry time to overcome safety problems and high production costs associated with airbags, and facilitate the development of alternative, cheaper, and safer passive restraint systems, thereby building public confidence necessary to avoid an interlock-type fiasco. The 1984 standard also deliberately sought to gradually phase in passive ***863** restraints, starting with a 10% requirement in 1987 vehicles. The requirement was also conditional and would stay in effect only if two-thirds of the States did not adopt mandatory buckle-up laws. A rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed. It would also have made adoption of state mandatory seatbelt laws less likely. This Court's pre-emption cases assume compliance with the state law duty in question, and do not turn on such compliance-related considerations as whether a private party would ignore state legal obligations or how likely it is that state law actually would be enforced. Finally, some weight is placed upon DOT's interpretation of FMVSS 208's objectives and its conclusion that a tort suit such as this one would stand as an obstacle to the accomplishment and execution of those objectives. DOT 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. Because there is no reason to suspect that the Solicitor General's representation of these views

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reflects anything other than the agency's fair and considered judgment on the matter, DOT's failure in promulgating FMVSS 208 to address pre- emption explicitly is not determinative. Nor do the agency's views, as presented here, lack coherence. Pp. 1922-1928.

166 F.3d 1236, affirmed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, THOMAS, and GINSBURG, JJ., joined, *post,* p. 1928.

Arthur H. Bryant, Washington, DC, for petitioners.

Malcolm E. Wheeler, Denver, CO, for respondents.

Lawrence G. Wallace, Washington, DC, for United States as amicus curiae, by special leave of this Court.

***864** Justice BREYER delivered the opinion of the Court.

This case focuses on the 1984 version of a Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.). The standard, FMVSS 208, required auto manufacturers to equip some but not all of their ***865** 1987 vehicles with passive restraints. We ask whether the Act pre-empts a state common-law tort action in which the plaintiff claims that the defendant auto manufacturer, who was in compliance with the standard, should nonetheless ****1917** have equipped a 1987 automobile with airbags. We conclude that the Act, taken together with FMVSS 208, pre-empts the lawsuit.

I

In 1992, petitioner Alexis Geier, driving a 1987 Honda Accord, collided with a tree and was seriously injured. The car was equipped with manual shoulder and lap belts which Geier had buckled up at the time. The car was not equipped with airbags or other passive restraint devices.

Geier and her parents, also petitioners, sued the car's manufacturer, American Honda Motor Company, Inc., and its affiliates (hereinafter American Honda), under District of Columbia tort law. They claimed, among other things, that American Honda had designed its car negligently and defectively because it lacked a driver's side airbag. App. 3. The District Court dismissed the lawsuit. The court noted that FMVSS 208 gave car manufacturers a choice as to whether to install airbags. And the court concluded that petitioners' lawsuit, because it sought to establish a different safety standard--*i.e.,* an airbag requirement--was expressly pre-empted by a provision of the Act which pre-empts "any safety standard" that is not identical to a federal safety standard applicable to the same aspect of performance, 15 U.S.C. § 1392(d) (1988 ed.); Civ. No. 95-CV-0064 (D.D.C., Dec. 9, 1997), App. 17. (We, like the courts below and the parties, refer to the pre-1994 version of the statute throughout the opinion; it has been recodified at 49 U.S.C. § 30101 *et seq.*)

The Court of Appeals agreed with the District Court's conclusion but on somewhat different reasoning. It had doubts, given the existence of the Act's "saving" clause, 15 U.S.C. § 1397(k) (1988 ed.), that petitioners' lawsuit involved the potential ***866** creation of the kind of "safety standard" to which the Safety Act's express pre-emption provision refers. But it declined to resolve that question because it found that petitioners' state- law tort claims posed an obstacle to the accomplishment of FMVSS 208's objectives. For that reason, it found that those claims conflicted with FMVSS 208, and that, under ordinary pre-emption principles, the Act consequently pre- empted the lawsuit. The Court of Appeals thus affirmed the District Court's dismissal. 166 F.3d 1236, 1238-1243 (C.A.D.C.1999).

Several state courts have held to the contrary, namely, that neither the Act's express pre-emption nor FMVSS 208 pre-empts a "no airbag" tort suit. See, *e.g., Drattel v. Toyota Motor Corp.,* 92 N.Y.2d 35, 43-53, 677 N.Y.S.2d 17, 699 N.E.2d 376, 379-386 (1998); *Minton v. Honda of America Mfg., Inc.,* 80 Ohio St.3d 62, 70-79, 684 N.E.2d 648, 655-661 (1997); *Munroe v. Galati,* 189 Ariz. 113, 115-119, 938 P.2d 1114, 1116-1120 (1997); *Wilson v. Pleasant,* 660 N.E.2d 327, 330-339 (Ind.1995); *Tebbetts v. Ford Motor Co.,* 140 N.H. 203, 206-207, 665 A.2d 345, 347-348 (1995). All of the Federal Circuit Courts that have considered the question, however, have found pre-emption. One rested its

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conclusion on the Act's express pre-emption provision. See, *e.g.*, *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-1415 (C.A.9 1997). Others, such as the Court of Appeals below, have instead found pre-emption under ordinary pre-emption principles by virtue of the conflict such suits pose to FMVSS 208's objectives, and thus to the Act itself. See, *e.g.*, *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (C.A.10 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121-1125 (C.A.3 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 825-827 (C.A.11 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 412-414 (C.A.1 1988). We granted certiorari to resolve these differences. We now hold that this kind of "no airbag" lawsuit conflicts with the objectives of FMVSS 208, a standard authorized by the Act, and is therefore pre-empted by the Act.

***867** In reaching our conclusion, we consider three subsidiary questions. First, does the Act's express pre-emption provision ****1918** pre- empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do. Third, does this lawsuit actually conflict with FMVSS 208, hence with the Act itself? We hold that it does.

II

[1] We first ask whether the Safety Act's express pre-emption provision pre-empts this tort action. The provision reads as follows:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (1988 ed.).

American Honda points out that a majority of this Court has said that a somewhat similar statutory provision in a different federal statute--a provision that uses the word "requirements"--may well expressly pre-empt similar tort actions. See, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 502-504, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (plurality opinion); *id.*, at 503-505, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509-512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part). Petitioners reply that this statute speaks of pre-empting a state-law "safety *standard*," not a "requirement," and that a tort action does not involve a safety *standard*. Hence, they conclude, the express pre-emption provision does not apply.

We need not determine the precise significance of the use of the word "standard," rather than "requirement," however, for the Act contains another provision, which resolves the ***868** disagreement. That provision, a "saving" clause, says that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988 ed.). The saving clause assumes that there are some significant number of common-law liability cases to save. And a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate--for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. See, *e.g.*, Brief for United States as *Amicus Curiae* 21 (explaining that common-law claim that a vehicle is defectively designed because it lacks antilock brakes would not be pre-empted by 49 C.F.R. § 571.105 (1999), a safety standard establishing minimum requirements for brake performance). Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.

****1919 *869** III

[2][3] We have just said that the saving clause *at*

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least removes tort actions from the scope of the express pre-emption clause. Does it do more? In particular, does it foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that "actually conflict" with the statute or federal standards promulgated thereunder? *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Petitioners concede, as they must in light of *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), that the pre-emption provision, by itself, does not foreclose (through negative implication) "any possibility of implied [conflict] pre-emption," *id.*, at 288, 115 S.Ct. 1483 (discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-518, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992)). But they argue that the saving clause has that very effect.

We recognize that, when this Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations promulgated under the Act. See *Freightliner, supra*, at 287, n. 3, 115 S.Ct. 1483 (declining to address whether the saving clause prevents a manufacturer from "us[ing] a federal safety standard to immunize itself from state common-law liability"). We now conclude that the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.

Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations. The words "[c]ompliance" and "does not exempt," 15 U.S.C. § 1397(k) (1988 ed.), sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one. See ***870**Restatement (Third) of Torts: Products Liability § 4(b), Comment *e* (1997) (distinguishing between state-law compliance defense and a federal claim of pre-emption). It is difficult to understand why Congress would have insisted on a compliance-with-federal-regulation precondition to the provision's applicability had it wished the Act to "save" all state-law tort actions, regardless of their potential threat to the objectives of federal safety standards promulgated under that Act. Nor does our interpretation conflict with the purpose of the saving provision, say, by rendering it ineffectual. As we have previously explained, the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor. See *supra*, at 1917-1918.

[4] Moreover, this Court has repeatedly "decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, *ante*, at 106-107, 120 S.Ct. 1135; see *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) *(AT&T)*; *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907). We find this concern applicable in the present case. And we conclude that the saving clause foresees--it does not foreclose--the possibility that a federal safety standard will pre-empt a state common-law tort action with which it conflicts. We do not understand the dissent to disagree, for it acknowledges ****1920** that ordinary pre-emption principles apply, at least sometimes. *Post*, at 1934- 1936 (opinion of STEVENS, J.).

[5] Neither do we believe that the pre-emption provision, the saving provision, or both together, create some kind of "special burden" beyond that inherent in ordinary pre-emption principles--which "special burden" would specially disfavor pre-emption here. Cf. *post*, at 1934-1935. The two provisions, read together, reflect a neutral policy, not a specially ***871** favorable or unfavorable policy, toward the application of ordinary conflict pre-emption principles. On the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create. See H.R.Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966) ("Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather

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than by a multiplicity of diverse standards"); S.Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966). This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.

On the other hand, the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims. That policy by itself disfavors pre-emption, at least some of the time. But we can find nothing in any natural reading of the two provisions that would favor one set of policies over the other where a jury-imposed safety standard actually conflicts with a federal safety standard.

Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is needed. In its absence, state law could impose legal duties that would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very windshield retention requirements that federal law requires. ***872** See, *e.g.,* 49 C.F.R. § 571.212 (1999). Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to " 'destroy itself.' " *AT&T, supra,* at 228, 118 S.Ct. 1956 (quoting *Abilene Cotton, supra,* at 446, 27 S.Ct. 350). We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship. Cf. *post,* at 1935, n. 16. But there is no reason to believe Congress has done so here.

The dissent, as we have said, contends nonetheless that the express pre- emption and saving provisions here, taken together, create a "special burden," which a court must impose "on a party" who claims conflict pre-emption under those principles. *Post,* at 1934-1935. But nothing in the Safety Act's language refers to any "special burden." Nor can one find the basis for a "special burden" in this Court's precedents. ****1921** It is true that, in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), the Court said, in the context of interpreting the Safety Act, that "*[a]t best* " there is an "inference that an express pre-emption clause forecloses implied pre-emption." *Id.,* at 289, 115 S.Ct. 1483 (emphasis added). But the Court made this statement in the course of *rejecting* the more absolute argument that the presence of the express pre-emption provision entirely foreclosed the possibility of conflict pre-emption. *Id.,* at 288, 115 S.Ct. 1483. The statement, headed with the qualifier "[a]t best," and made in a case where, without any need for inferences or "special burdens," state law obviously would survive, see *id.,* at 289-290, 115 S.Ct. 1483, simply preserves a legal possibility. This ***873** Court did not hold that the Safety Act *does* create a "special burden," or still less that such a burden necessarily arises from the limits of an express pre-emption provision. And considerations of language, purpose, and administrative workability, together with the principles underlying this Court's pre-emption doctrine discussed above, make clear that the express pre-emption provision imposes no unusual, "special burden" against pre-emption. For similar reasons, we do not see the basis for interpreting the saving clause to impose any such burden.

A "special burden" would also promise practical difficulty by further complicating well-established pre-emption principles that already are difficult to apply. The dissent does not contend that this "special burden" would apply in a case in which state law penalizes what federal law requires--*i.e.,* a case of impossibility. See *post,* at 1931, n. 6, 1935, n. 16. But if it would not apply in such a case, then how, or when, would it apply? This Court, when describing conflict pre-emption, has spoken of pre-empting state law that "under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"--whether that "obstacle" goes by the name of "conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference," or the like. *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); see *Jones v. Rath Packing Co.,* 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). The Court has not previously driven a legal wedge--only a terminological one-- between

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"conflicts" that prevent or frustrate the accomplishment of a federal objective and "conflicts" that make it "impossible" for private parties to comply with both state and federal law. Rather, it has said that both forms of conflicting state law are "nullified" by the Supremacy Clause, *De la Cuesta*, 458 U.S., at 152-153, 102 S.Ct. 3014; see *Locke*, *ante*, at 109, 120 S.Ct. 1135; *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), and it has assumed that Congress would not want either kind of conflict. The Court ***874** has thus refused to read general "saving" provisions to tolerate actual conflict *both* in cases involving impossibility, see, *e.g.*, *AT & T*, 524 U.S., at 228, 118 S.Ct. 1956, *and* in "frustration-of-purpose" cases, see, *e.g.*, *Locke*, *ante*, at 103-112, 120 S.Ct. 1135; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493-494, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987); see also *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). We see no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of "conflict" (which often shade, one into the other) when applying this complicated rule to the many federal statutes that contain ****1922** some form of an express pre-emption provision, a saving provision, or as here, both. Nothing in the statute suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added "special burden." Indeed, the dissent's willingness to impose a "special burden" here stems ultimately from its view that "frustration-of-purpos[e]" conflict pre-emption is a freewheeling, "inadequately considered" doctrine that might well be "eliminate[d]." *Post*, at 1939-1940, and n. 22. In a word, ordinary pre-emption principles, grounded in longstanding precedent, *Hines*, *supra*, at 67, 61 S.Ct. 399, apply. We would not further complicate the law with complex new doctrine.

IV

[6] The basic question, then, is whether a common-law "no airbag" action like the one before us actually conflicts with FMVSS 208. We hold that it does.

In petitioners' and the dissent's view, FMVSS 208 sets a minimum airbag standard. As far as FMVSS 208 is concerned, the more airbags, and the sooner, the better. But that was not the Secretary's view. The Department of ***875** Transportation's (DOT's) comments, which accompanied the promulgation of FMVSS 208, make clear that the standard deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance--all of which would promote FMVSS 208's safety objectives. See generally 49 Fed.Reg. 28962 (1984).

A

The history of FMVSS 208 helps explain why and how DOT sought these objectives. See generally *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). In 1967, DOT, understanding that seatbelts would save many lives, required manufacturers to install manual seatbelts in all automobiles. 32 Fed.Reg. 2408, 2415. It became apparent, however, that most occupants simply would not buckle up their belts. See 34 Fed.Reg. 11148 (1969). DOT then began to investigate the feasibility of requiring "passive restraints," such as airbags and automatic seatbelts. *Ibid.* In 1970, it amended FMVSS 208 to include some passive protection requirements, 35 Fed.Reg. 16927, while making clear that airbags were one of several "equally acceptable" devices and that it neither " 'favored' [n]or expected the introduction of airbag systems." *Ibid.* In 1971, it added an express provision permitting compliance through the use of nondetachable passive belts, 36 Fed.Reg. 12858, 12859, and in 1972, it mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975, 37 Fed.Reg. 3911. Although the agency's focus was originally on airbags, 34 Fed.Reg. 11148 (1969) (notice of proposed rulemaking); *State Farm*, 463 U.S., at 35, n. 4, 103 S.Ct. 2856; see also *id.*, at 46, n. 11, 103 S.Ct. 2856 (noting view of commentators that, as of 1970, FMVSS ***876** 208 was " 'a de facto airbag mandate' " because of the state of passive restraint technology), at no point did FMVSS 208 formally require the use of airbags. From the start, as in 1984, it permitted passive restraint options.

DOT gave manufacturers a further choice for new

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vehicles manufactured between 1972 and August 1975. Manufacturers could either install a passive restraint device such as automatic seatbelts or airbags or retain manual belts and add an "ignition interlock" device that in effect forced occupants to buckle up by preventing the ignition otherwise from turning on. 37 Fed.Reg. 3911 (1972). The interlock soon became popular with manufacturers. And in 1974, when the agency approved the use of detachable automatic seatbelts, it conditioned that approval by providing ****1923** that such systems must include an interlock system *and* a continuous warning buzzer to encourage reattachment of the belt. 39 Fed.Reg. 14593. But the interlock and buzzer devices were most unpopular with the public. And Congress, responding to public pressure, passed a law that forbade DOT from requiring, or permitting compliance by means of, such devices. Motor Vehicle and School bus Safety Amendments of 1974, § 109, 88 Stat. 1482 (previously codified at 15 U.S.C. § 1410b(b) (1988 ed.)).

That experience influenced DOT's subsequent passive restraint initiatives. In 1976, DOT Secretary William T. Coleman, Jr., fearing continued public resistance, suspended the passive restraint requirements. He sought to win public acceptance for a variety of passive restraint devices through a demonstration project that would involve about half a million new automobiles. *State Farm, supra,* at 37, 103 S.Ct. 2856. But his successor, Brock Adams, canceled the project, instead amending FMVSS 208 to require passive restraints, principally either airbags or passive seatbelts. 42 Fed.Reg. 34289 (1977).

Andrew Lewis, a new DOT Secretary in a new administration, rescinded the Adams requirements, primarily because DOT learned that the industry planned to satisfy those ***877** requirements almost exclusively through the installation of detachable automatic seatbelts. 46 Fed.Reg. 53419-53420 (1981). This Court held the rescission unlawful. *State Farm, supra,* at 34, 46, 103 S.Ct. 2856. And the stage was set for then-DOT Secretary, Elizabeth Dole, to amend FMVSS 208 once again, promulgating the version that is now before us. 49 Fed.Reg. 28962 (1984).

B

Read in light of this history, DOT's own contemporaneous explanation of FMVSS 208 makes clear that the 1984 version of FMVSS 208 reflected the following significant considerations. First, buckled up seatbelts are a vital ingredient of automobile safety. *Id.,* at 29003; *State Farm, supra,* at 52, 103 S.Ct. 2856 ("We start with the accepted ground that if used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries"). Second, despite the enormous and unnecessary risks that a passenger runs by not buckling up manual lap and shoulder belts, more than 80% of front seat passengers would leave their manual seatbelts unbuckled. 49 Fed.Reg. 28983 (1984) (estimating that only 12.5% of front seat passengers buckled up manual belts). Third, airbags could make up for the dangers caused by unbuckled manual belts, but they could not make up for them entirely. *Id.,* at 28986 (concluding that, although an airbag plus a lap and shoulder belt was the most "effective" system, airbags alone were *less* effective than buckled up manual lap and shoulder belts).

Fourth, passive restraint systems had their own disadvantages, for example, the dangers associated with, intrusiveness of, and corresponding public dislike for, nondetachable automatic belts. *Id.,* at 28992-28993. Fifth, airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars. *Id.,* at 28992, 29001; see also 65 Fed.Reg. 30680, 30681-30682 (2000) (finding 158 confirmed airbag-induced fatalities as of April 2000, and amending rule ***878** to add new requirements, test procedures, and injury criteria to ensure that "future air bags be designed to create less risk of serious airbag-induced injuries than current air bags, particularly for small women and young children"); U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Accident Sampling System Crashworthiness Data System 1991-1993, p. viii (Aug.1995) (finding that airbags caused approximately 54,000 injuries between 1991 and 1993).

****1924** Sixth, airbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). 49 Fed.Reg. 28990 (1984). And the agency worried that the high replacement cost--estimated to be $800--could lead car owners to refuse to replace them after deployment. *Id.,* at 28990, 29000-29001; see also *id.,* at 28990 (estimating total investment costs for mandatory airbag requirement at $1.3 billion compared to $500 million for automatic

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seatbelts). Seventh, the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices, *id.*, at 28987-28989--a particular concern with respect to airbags, *id.*, at 29001 (noting that "[a]irbags engendered the largest quantity of, and most vociferously worded, comments").

FMVSS 208 reflected these considerations in several ways. Most importantly, that standard deliberately sought variety--a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement. *Id.*, at 28996. And DOT explained why FMVSS 208 sought the mix of devices that it expected its performance standard to produce. ***879***Id.*, at 28997. DOT wrote that it had *rejected* a proposed FMVSS 208 "all airbag" standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a "backlash" more easily overcome "if airbags" were "not the only way of complying." *Id.*, at 29001. It added that a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. *Id.*, at 29001-29002. And it would thereby build public confidence, *id.*, at 29001-29002, necessary to avoid another interlock-type fiasco.

The 1984 FMVSS 208 standard also deliberately sought a *gradual* phase-in of passive restraints. *Id.*, at 28999-29000. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. *Id.*, at 28999. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. *Ibid.* And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance. *Id.*, at 29000-29001.

Of course, as the dissent points out, *post,* at 1937-1938, FMVSS 208 did not guarantee the mix by setting a ceiling for each different passive restraint device. In fact, it provided a form of extra credit for airbag installation (and other nonbelt passive restraint devices) under which each airbag-installed vehicle counted as 1.5 vehicles for purposes of meeting FMVSS 208's passive restraint requirement. 49 C.F.R. § 571.208, S4.1.3.4(a)(1) (1999); 49 Fed.Reg. 29000 (1984). ***880*** But why should DOT have bothered to impose an airbag ceiling when the practical threat to the mix it desired arose from the likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all? After all, only a few years earlier, Secretary Dole's predecessor had discovered that manufacturers intended to meet ****1925*** the then-current passive restraint requirement almost entirely (more than 99%) through the installation of more affordable automatic belt systems. 46 Fed.Reg. 53421 (1981); *State Farm*, 463 U.S., at 38, 103 S.Ct. 2856. The extra credit, as DOT explained, was designed to "encourage manufacturers to equip *at least some* of their cars with airbags." 49 Fed.Reg. 29001 (1984) (emphasis added) (responding to comment that failure to mandate airbags might mean the "end of ... airbag technology"); see also *id.*, at 29000 (explaining that the extra credit for airbags "should promote the development of what may be better alternatives to automatic belts *than would otherwise be developed* " (emphasis added)). The credit provision *reinforces* the point that FMVSS 208 sought a gradually developing mix of passive restraint devices; it does not show the contrary.

Finally, FMVSS 208's passive restraint requirement was conditional. DOT believed that ordinary manual lap and shoulder belts would produce about the same amount of safety as passive restraints, and at significantly lower costs--*if only auto occupants would buckle up.* See *id.*, at 28997-28998. Thus, FMVSS 208 provided for rescission of its passive restraint requirement if, by September 1, 1989, two-thirds of the States had laws in place that, like those of many other nations, required auto occupants to buckle up (and which met other requirements specified in the standard). *Id.*, at 28963, 28993-28994, 28997-28999. The Secretary wrote that "coverage of a large percentage of the American people by seatbelt laws that are enforced would largely negate the incremental increase in safety to be expected from an automatic protection requirement." *Id.*, at 28997. ***881*** In the end, two-thirds of the

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States did not enact mandatory buckle-up laws, and the passive restraint requirement remained in effect.

In sum, as DOT now tells us through the Solicitor General, the 1984 version of FMVSS 208 "embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." Brief for United States as *Amicus Curiae* 25; see 49 Fed.Reg. 28997 (1984). Petitioners' tort suit claims that the manufacturers of the 1987 Honda Accord "had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags." App. 3 (Complaint, ¶ 11).

In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law--*i.e.,* a rule of state tort law imposing such a duty--by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. It would have required all manufacturers to have installed airbags in respect to the entire District-of- Columbia-related portion of their 1987 new car fleet, even though FMVSS 208 at that time required only that 10% of a manufacturer's nationwide fleet be equipped with any passive restraint device at all. It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. In addition, it could have made less likely the adoption of a state mandatory buckle-up law. Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives that we have just discussed, it is pre-empted. ***882***Hines,* 312 U.S., at 67, 61 S.Ct. 399; see also *Ouellette,* 479 U.S., at 493, 107 S.Ct. 805; *De la Cuesta,* 458 U.S., at 156, 102 S.Ct. 3014 (finding conflict and pre-emption where state law limited the availability of an option ****1926** that the federal agency considered essential to ensure its ultimate objectives).

Petitioners ask this Court to calculate the precise size of the "obstacle," with the aim of minimizing it, by considering the risk of tort liability and a successful tort action's incentive-related or timing-related compliance effects. See Brief for Petitioners 45-50. The dissent agrees. *Post,* at 1936-1938. But this Court's pre-emption cases do not ordinarily turn on such compliance-related considerations as whether a private party in practice would ignore state legal obligations--paying, say, a fine instead--or how likely it is that state law actually would be enforced. Rather, this Court's pre-emption cases ordinarily *assume* compliance with the state-law duty in question. The Court has on occasion suggested that tort law may be somewhat different, and that related considerations--for example, the ability to pay damages instead of modifying one's behavior--may be relevant for pre- emption purposes. See *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988); *Cipollone,* 505 U.S., at 536-539, 112 S.Ct. 2608 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); see also *English,* 496 U.S., at 86, 110 S.Ct. 2270; *Silkwood v. Kerr--McGee Corp.,* 464 U.S. 238, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). In other cases, the Court has found tort law to conflict with federal law without engaging in that kind of an analysis. See, *e.g., Ouellette, supra,* at 494-497, 107 S.Ct. 805; *Kalo Brick,* 450 U.S., at 324-332, 101 S.Ct. 1124. We need not try to resolve these differences here, however, for the incentive or compliance considerations upon which the dissent relies cannot, by themselves, change the legal result. Some of those considerations rest on speculation, see, *e.g., post,* at 1936 (predicting risk of "no airbag" liability and manufacturers' likely response to such liability); some rest in critical part upon the dissenters' own view of FMVSS 208's basic purposes--a view ***883** which we reject, see, *e.g., post,* at 1936- 1938 (suggesting that pre-existing risk of "no airbag" liability would have made FMVSS 208 unnecessary); and others, if we understand them correctly, seem less than persuasive, see, *e.g., post,* at 1936-1937 (suggesting that manufacturers could have complied with a mandatory state airbag duty by installing a *different* kind of passive restraint device). And in so concluding, we do not "put the burden" of proving pre-emption on petitioners. *Post,* at 1939. We simply find unpersuasive their arguments attempting to undermine the Government's demonstration of actual conflict.

One final point: We place some weight upon DOT'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. Brief for United States as *Amicus Curiae* 25-26 (quoting *Hines, supra,* at 67, 61 S.Ct.

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399). 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. *Medtronic*, 518 U.S., at 496, 116 S.Ct. 2240; see *id.*, at 506, 116 S.Ct. 2240 (BREYER, J,. concurring in part and concurring in judgment). And DOT has explained FMVSS 208's objectives, and the interference that "no airbag" suits pose thereto, consistently over time. Brief for United States as *Amicus Curiae* in *Freightliner Corp. v. Myrick*, O.T.1994, No. 94-286, pp. 28-29; Brief for United States as *Amicus Curiae* in *Wood v. General Motors Corp.*, O.T.1989, No. 89-46, pp. 7, 11-16. In these circumstances, the agency's own views should make a difference. See *City of New York v. FCC*, 486 U.S. 57, 64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); ****1927***Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 721, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *de la Cuesta, supra*, at 158, 102 S.Ct. 3014; *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982); *Kalo Brick, supra*, at 321, 101 S.Ct. 1124.

***884** 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." *Auer v. Robbins*, 519 U.S. 452, 461- 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); cf. *Hillsborough County, supra*, at 721, 105 S.Ct. 2371 (expressing reluctance, in the absence of strong evidence, to find an actual conflict between state law and federal regulation where agency that promulgated the regulation had not, at the time the regulation was promulgated *or subsequently*, concluded that such a conflict existed). The failure of the Federal Register to address pre-emption explicitly is thus not determinative.

[7][8][9][10] The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre- emption. See *post*, at 1940; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); *Hillsborough, supra*, at 718, 105 S.Ct. 2371. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. *English, supra*, at 78-79, 110 S.Ct. 2270; see *Hillsborough, supra*, at 720-721, 105 S.Ct. 2371; *Jones*, 430 U.S., at 540-543, 97 S.Ct. 1305. While "[p]re-emption fundamentally is a question of congressional intent," *English, supra*, at 78, 110 S.Ct. 2270, this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter. See, *e.g.*, *Freightliner*, 514 U.S., at 287, 115 S.Ct. 1483; *English, supra*, at 78-79, 110 S.Ct. 2270; see also *Cipollone, supra*, at 545, 547-548, 112 S.Ct. 2608 (SCALIA, J., concurring in judgment in part and dissenting in part). And though the Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere "volume and complexity" of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area, *Hillsborough, supra*, at 717, 105 S.Ct. 2371; see *post*, at 1940, n. 23--so-called "field pre-emption"--the Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. ***885** Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict. While we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, *English, supra*, at 90, 110 S.Ct. 2270, for the reasons set out above we find such evidence here. To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent, as we have said, apparently welcomes that result, at least where "frustration-of- purpos[e]" pre-emption by agency regulation is at issue. *Post*, at 1939-1940, and n. 22. We do not.

Nor do we agree with the dissent that the agency's views, as presented here, lack coherence. *Post*, at 1938. The dissent points, *ibid.*, to language in the Government's brief stating that

> "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car *because of other design features particular to that car* ... would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23 (emphasis added).

And the dissent says that these words amount to a concession that there is no conflict in this very case. *Post*, at 1938. But that is not what the words say. Rather, ****1928** as the italicized phrase emphasizes, they simply leave open the question whether FMVSS

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208 would pre-empt a different kind of tort case--one *not* at issue here. It is possible that some special design-related circumstance concerning a particular kind of car might require airbags, rather than automatic belts, and that a suit seeking to impose that requirement could escape pre-emption--say, because it would affect so few cars that its rule of law would not create a legal "obstacle" to 208's mixed-fleet, gradual objective. But that is not what petitioners ***886** claimed. They have argued generally that, to be safe, a car must have an airbag. See App. 4.

Regardless, the language of FMVSS 208 and the contemporaneous 1984 DOT explanation is clear enough--even without giving DOT's own view special weight. FMVSS 208 sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which petitioners argue would stand as an "obstacle" to the accomplishment of that objective. And the statute foresees the application of ordinary principles of pre-emption in cases of actual conflict. Hence, the tort action is pre-empted.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice STEVENS, with whom Justice SOUTER, Justice THOMAS, and Justice GINSBURG join, dissenting.

Airbag technology has been available to automobile manufacturers for over 30 years. There is now general agreement on the proposition "that, to be safe, a car must have an airbag." *Ante* this page. Indeed, current federal law imposes that requirement on all automobile manufacturers. See 49 U.S.C. § 30127; 49 C.F.R. § 571.208, S4.1.5.3 (1998). The question raised by petitioners' common-law tort action is whether that proposition was sufficiently obvious when Honda's 1987 Accord was manufactured to make the failure to install such a safety feature actionable under theories of negligence or defective design. The Court holds that an interim regulation motivated by the Secretary of Transportation's desire to foster gradual development of a variety of passive restraint devices deprives state courts of jurisdiction to answer that question. I respectfully dissent from that holding, and especially from the Court's unprecedented extension of the doctrine of pre-emption. As a preface to an explanation of my understanding of the statute and the regulation, these preliminary observations seem appropriate.

***887** "This is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), that is, about respect for "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). It raises important questions concerning the way in which the Federal Government may exercise its undoubted power to oust state courts of their traditional jurisdiction over common-law tort actions. The rule the Court enforces today was not enacted by Congress and is not to be found in the text of any Executive Order or regulation. It has a unique origin: It is the product of the Court's interpretation of the final commentary accompanying an interim administrative regulation and the history of airbag regulation generally. Like many other judge-made rules, its contours are not precisely defined. I believe, however, that it is fair to state that if it had been expressly adopted by the Secretary of Transportation, it would have read as follows:

> "No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;
>
> "Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as ****1929** the Secretary may require the installation of airbags in all new cars; and
>
> "Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another."

Perhaps such a rule would be a wise component of a legislative reform of our tort system. I express no opinion about ***888** that possibility. It is, however, quite clear to me that Congress neither enacted any such rule itself nor authorized the Secretary of Transportation to do so. It is equally clear to me that the objectives that the Secretary intended to achieve through the adoption of Federal Motor Vehicle Safety Standard 208 would not be frustrated one whit by allowing state courts to determine whether in 1987 the lifesaving advantages of airbags had become sufficiently obvious that their omission might

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constitute a design defect in some new cars. Finally, I submit that the Court is quite wrong to characterize its rejection of the presumption against pre- emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text, as "ordinary experience-proved principles of conflict pre-emption." *Ante,* at 1922.

I

The question presented is whether either the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), 80 Stat. 718, 15 U.S.C. § 1381 *et seq.* (1988 ed.), [FN1] or the version of Standard 208 promulgated by the Secretary of Transportation in 1984, 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (1998), pre-empts common-law tort claims that an automobile manufactured in 1987 was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to, airbags." App. 3. In *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 34-38, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), we reviewed the first chapters of the "complex and convoluted history" of Standard 208. It was the "unacceptably high" rate of deaths and injuries caused by automobile accidents that led to the enactment of the Safety Act in 1966. *Id.*, at 33, 103 S.Ct. 2856. The purpose of the Act, as stated by Congress, ***889** was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." § 1392(a). The Act defines the term "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance." § 1391(2).

FN1. In 1994, the Safety Act was recodified at 49 U.S.C. § 30101 *et seq.* Because the changes made to the Act as part of the recodification process were not intended to be substantive, throughout this opinion I shall refer to the pre-1994 version of the statute, as did the Court of Appeals.

Standard 208 covers "[o]ccupant crash protection." Its purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements ... [and] equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S2 (1998). The first version of that standard, issued in 1967, simply required the installation of manual seatbelts in all automobiles. Two years later the Secretary formally proposed a revision that would require the installation of "passive occupant restraint systems," that is to say, devices that do not depend for their effectiveness on any action by the vehicle ****1930** occupant. The airbag is one such system. [FN2] The Secretary's proposal led to a series of amendments to Standard 208 that imposed various passive restraint requirements, culminating in a 1977 regulation that mandated such restraints in all cars by the model year 1984. The two commercially available restraints that could satisfy this mandate ***890** were airbags and automatic seatbelts; the regulation allowed each vehicle manufacturer to choose which restraint to install. In 1981, however, following a change of administration, the new Secretary first extended the deadline for compliance and then rescinded the passive restraint requirement altogether. In *Motor Vehicle Mfrs. Assn.*, we affirmed a decision by the Court of Appeals holding that this rescission was arbitrary. On remand, Secretary Elizabeth Dole promulgated the version of Standard 208 that is at issue in this case.

FN2. "The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The lifesaving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience with both devices, it was estimated by [the National Highway Traffic Safety Administration (NHTSA)] that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed.Reg. 34298." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 35, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

The 1984 standard provided for a phase-in of passive restraint requirements beginning with the 1987 model

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year. In that year, vehicle manufacturers were required to equip a minimum of 10% of their new passenger cars with such restraints. While the 1987 Honda Accord driven by Ms. Geier was not so equipped, it is undisputed that Honda complied with the 10% minimum by installing passive restraints in certain other 1987 models. This minimum passive restraint requirement increased to 25% of 1988 models and 40% of 1989 models; the standard also mandated that "after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed.Reg. 28999 (1984); see 49 C.F.R. § 571.208, S4.1.3-S4.1.4 (1998). In response to a 1991 amendment to the Safety Act, the Secretary amended the standard to require that, beginning in the 1998 model year, all new cars have an airbag at both the driver's and right front passenger's positions. [FN3]

FN3. See 49 U.S.C. § 30127; 49 C.F.R. § 571.208, S4.1.5.3 (1998). Congress stated that it did not intend its amendment or the Secretary's consequent alteration of Standard 208 to affect the potential liability of vehicle manufacturers under applicable law related to vehicles with or without airbags. 49 U.S.C. § 30127(f)(2).

Given that Secretary Dole promulgated the 1984 standard in response to our opinion invalidating her predecessor's rescission of the 1977 passive restraint requirement, she provided a full explanation for her decision not to require airbags ***891** in all cars and to phase in the new requirements. The initial 3-year delay was designed to give vehicle manufacturers adequate time for compliance. The decision to give manufacturers a choice between airbags and a different form of passive restraint, such as an automatic seatbelt, was motivated in part by safety concerns and in part by a desire not to retard the development of more effective systems. 49 Fed.Reg. 29000-29001 (1984). An important safety concern was the fear of a "public backlash" to an airbag mandate that consumers might not fully understand. The Secretary believed, however, that the use of airbags would avoid possible public objections to automatic seatbelts and that many of the public concerns regarding airbags were unfounded. *Id.*, at 28991.

Although the standard did not require airbags in all cars, it is clear that the Secretary did intend to encourage wider use of airbags. One of her basic conclusions was that "[a]utomatic occupant protection ****1931** systems that do not totally rely upon belts, such as airbags ..., offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; their development and availability should be encouraged through appropriate incentives." *Id.*, at 28963; see also *id.*, at 28966, 28986 (noting conclusion of both Secretary and manufacturers that airbags used in conjunction with manual lap and shoulder belts would be "the most effective system of all" for preventing fatalities and injuries). The Secretary therefore included a phase-in period in order to encourage manufacturers to comply with the standard by installing airbags and other (perhaps more effective) nonbelt technologies that they might develop, rather than by installing less expensive automatic seatbelts. [FN4] As a further incentive ***892** for the use of such technologies, the standard provided that a vehicle equipped with an airbag or other nonbelt system would count as 1.5 vehicles for the purpose of determining compliance with the required 10, 25, or 40% minimum passive restraint requirement during the phase- in period. 49 C.F.R. § 571.208, S4.1.3.4(a)(1) (1998). With one oblique exception, [FN5] there is no mention, either in the text of the final standard or in the accompanying comments, of the possibility that the risk of potential tort liability would provide an incentive for manufacturers to install airbags. Nor is there any other specific evidence of an intent to preclude common-law tort actions.

FN4. "If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply through the use of automatic belts. Thus, by phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors." 49 Fed.Reg. 29000 (1984).

FN5. In response to a comment that the manufacturers were likely to use the cheapest system to comply with the new standard, the Secretary stated that she believed "that competition, potential liability for any deficient systems[,] and pride in one's product would prevent this." *Ibid.*

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II

Before discussing the pre-emption issue, it is appropriate to note that there is a vast difference between a rejection of Honda's threshold arguments in favor of federal pre-emption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, [FN6] I assume ***893** that such compliance would be admissible evidence tending to negate charges of negligent and defective design. [FN7] In addition, ****1932** if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. *Silkwood v. Kerr- McGee Corp.*, 485 F.Supp. 566, 583-584 (W.D.Okla.1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "[g]ood faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). [FN8]

FN6. *Wood v. General Motors Corp.*, 865 F.2d 395, 417 (C.A.1 1988) (collecting cases). The result would be different, of course, if petitioners had brought common-law tort claims challenging Honda's compliance with a mandatory minimum federal standard--*e.g.*, claims that a 1999 Honda was negligently and defectively designed *because* it was equipped with airbags as required by the current version of Standard 208. Restatement (Third) of Torts: General Principles § 14(b), and Comment *g* (Discussion Draft, Apr. 5, 1999) ("If the actor's adoption [or rejection] of a precaution would require the actor to violate a statute, the actor cannot be found negligent for failing to adopt [or reject] that precaution"); cf. *ante*, at 1920-1921 (discussing problem of basing state tort liability upon compliance with mandatory federal regulatory requirement as question of pre-emption rather than of liability on the merits); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility ...").

FN7. Restatement (Third) of Torts: Products Liability § 4(b), and Comment *e* (1997); *Contini v. Hyundai Motor Co.*, 840 F.Supp. 22, 23-24 (S.D.N.Y.1993). See also Restatement (Second) of Torts § 288C, and Comment *a* (1964) (negligence); *McNeil Pharmaceutical v. Hawkins*, 686 A.2d 567, 577-579 (D.C.1996) (strict liability).

FN8. The subsequent history of *Silkwood* does not cast doubt on this premise. See *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 921-923 (C.A.10 1981) (reversing on ground that federal law pre-empts award of punitive damages), rev'd and remanded, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), on remand, 769 F.2d 1451, 1457-1458 (C.A.10 1985).

The parties have not called our attention to any appellate court opinions discussing the merits of similar no-airbag claims despite the fact that airbag technology was available for many years before the promulgation of the 1984 standard--a standard that is not applicable to any automobiles manufactured before September 1, 1986. Given that an arguable basis for a pre-emption defense did not exist until that standard was promulgated, it is reasonable to infer that the manufacturers' assessment of their potential liability for compensatory and punitive damages on such claims--even ***894** without any pre- emption defense--did not provide them with a sufficient incentive to engage in widespread installation of airbags.

Turning to the subject of pre-emption, Honda contends that the Safety Act's pre-emption provision, 15 U.S.C. § 1392(d), expressly pre-empts petitioners' common-law no-airbag claims. It also argues that the claims are in any event impliedly pre-empted because the imposition of liability in cases such as this would frustrate the purposes of Standard 208. I discuss these alternative arguments in turn.

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III

When a state statute, administrative rule, or common-law cause of action conflicts with a federal statute, it is axiomatic that the state law is without effect. U.S. Const., Art. VI, cl. 2; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). On the other hand, it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. [FN9] Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws--particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers--are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996); *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 116-117, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (SOUTER, J., dissenting) ("If the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred").

FN9. Regrettably, the Court has not always honored the latter proposition as scrupulously as the former. See, *e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

***895** When a federal statute contains an express pre-emption provision, "the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). The Safety Act contains both an express pre-emption provision, 15 U.S.C. § 1392(d), and a saving ****1933** clause that expressly preserves common-law claims, § 1397(k). The relevant part of the former provides:

"Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." [FN10]

FN10. This provision is now codified at 49 U.S.C. § 30103(b)(1). Because both federal and state opinions construing this provision have consistently referred to it as " § 1392(d)," I shall follow that practice. Section 1392(d) contains these additional sentences: "Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard."

The latter states:

"Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." [FN11]

FN11. This provision is now codified at 49 U.S.C. § 30103(e). See nn. 1 and 10, *supra*.

***896** Relying on § 1392(d) and legislative history discussing Congress' desire for uniform national safety standards, [FN12] Honda argues that petitioners' common-law no-airbag claims are expressly pre-empted because success on those claims would necessarily establish a state "safety standard" not identical to Standard 208. It is perfectly clear, however, that the term "safety standard" as used in these two sections refers to an objective rule prescribed by a legislature or an administrative agency and does not encompass case-specific decisions by judges and juries that resolve common-law claims. That term is used three times in these sections; presumably it is used consistently. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). The two references to a federal safety standard are necessarily describing an

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objective administrative rule. 15 U.S.C. § 1392(a). When the pre-emption provision refers to a safety standard established by a "State or political subdivision of a State," therefore, it is most naturally read to convey a similar meaning. In addition, when the two sections are read together, they provide compelling evidence of an intent to distinguish between legislative and administrative rulemaking, on the one hand, and common-law liability, on the other. This distinction was certainly a rational one for Congress to draw in the Safety Act given that common-law liability--unlike most legislative or administrative rulemaking--necessarily performs an important remedial role in compensating accident victims. Cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

FN12. S.Rep. No. 1301, 89th Cong., 2d Sess., 2 (1966); H.R.Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966).

It is true that in three recent cases we concluded that broadly phrased pre- emptive commands encompassed common-law claims. In *Cipollone v. Liggett Group, Inc.*, while we thought it clear that the pre-emption provision in the 1965 Federal Cigarette Labeling and Advertising Act applied only to "rulemaking bodies," 505 U.S., at 518, 112 S.Ct. 2608, we concluded that the broad command in the subsequent 1969 ***897** amendment that "[n]o requirement or prohibition ... shall be imposed under State law" did include certain common- law claims. *Id.*, at 548-549, 112 S.Ct. 2608 (SCALIA, J., concurring in judgment in part and dissenting in part). [FN13] In ****1934***CSX Transp., Inc. v. Easterwood*, where the pre-emption clause of the Federal Railroad Safety Act of 1970 expressly provided that federal railroad safety regulations would pre-empt any incompatible state " 'law, rule, regulation, order, or standard relating to railroad safety,' " [FN14] we held that a federal regulation governing maximum train speed pre-empted a negligence claim that a speed under the federal maximum was excessive. And in *Medtronic, Inc. v. Lohr*, we recognized that the statutory reference to "any requirement" imposed by a State or its political subdivisions may include common-law duties. 518 U.S., at 502-503, 116 S.Ct. 2240 (plurality opinion); *id.*, at 503-505, 116 S.Ct. 2240 (BREYER, J., concurring in part and concurring in judgment); *id.*, at 509-512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part).

FN13. The full text of the 1969 provision read: " 'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.' " 505 U.S., at 515, 112 S.Ct. 2608 (quoting Public Health Cigarette Smoking Act of 1969, 84 Stat. 88).

FN14. 507 U.S., at 664, 113 S.Ct. 1732 (quoting § 205, 84 Stat. 972, as amended, 45 U.S.C. § 434 (1988 ed. and Supp. II)).

The statutes construed in those cases differed from the Safety Act in two significant respects. First, the language in each of those pre-emption provisions was significantly broader than the text of § 1392(d). Unlike the broader language of those provisions, the ordinary meaning of the term "safety standard" includes positive enactments, but does not include judicial decisions in common-law tort cases.

Second, the statutes at issue in *Cipollone*, *CSX*, and *Medtronic* did not contain a saving clause expressly preserving common-law remedies. The saving clause in the Safety Act ***898** unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common-law liability. In light of this reference to common-law liability in the saving clause, Congress surely would have included a similar reference in § 1392(d) if it had intended to pre-empt such liability. *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S.Ct. 1588, 128 L.Ed.2d 302 (1994) (noting presumption that Congress acts intentionally when it includes particular language in one section of a statute but omits it in another).

The Court does not disagree with this interpretation of the term "safety standard" in § 1392(d). Because the meaning of that term as used by Congress in this statute is clear, the text of § 1392(d) is itself sufficient to establish that the Safety Act does not expressly pre-empt common- law claims. In order to avoid the conclusion that the saving clause is superfluous, therefore, it must follow that it has a

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different purpose: to limit, or possibly to foreclose entirely, the possible pre-emptive effect of safety standards promulgated by the Secretary. The Court's approach to the case has the practical effect of reading the saving clause out of the statute altogether. [FN15]

FN15. The Court surely cannot believe that Congress included that clause in the statute just to avoid the danger that we would otherwise fail to give the term "safety standard" its ordinary meaning.

Given the cumulative force of the fact that § 1392(d) does not expressly pre-empt common-law claims and the fact that § 1397(k) was obviously intended to limit the pre-emptive effect of the Secretary's safety standards, it is quite wrong for the Court to assume that a possible implicit conflict with the purposes to be achieved by such a standard should have the same pre- emptive effect " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ante,* at 1921. Properly construed, the Safety Act imposes a special burden on a party relying on an arguable, implicit conflict ****1935** with a temporary regulatory policy-- ***899** rather than a conflict with congressional policy or with the text of any regulation--to demonstrate that a common-law claim has been pre-empted.

IV

Even though the Safety Act does not expressly pre-empt common-law claims, Honda contends that Standard 208--of its own force--implicitly pre-empts the claims in this case.

"We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' *id.*, at 79, 110 S.Ct. 2270, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

In addition, we have concluded that regulations "intended to pre-empt state law" that are promulgated by an agency acting nonarbitrarily and within its congressionally delegated authority may also have pre-emptive force. *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153-154, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). In this case, Honda relies on the last of the implied pre-emption principles stated in *Freightliner*, arguing that the imposition of common-law liability for failure to install an airbag would frustrate the purposes and objectives of Standard 208.

Both the text of the statute and the text of the standard provide persuasive reasons for rejecting this argument. The saving clause of the Safety Act arguably denies the Secretary the authority to promulgate standards that would ***900** pre-empt common-law remedies. [FN16] Moreover, the text of Standard 208 says nothing about pre-emption, and I am not persuaded that Honda has overcome our traditional presumption that it lacks any implicit pre-emptive effect.

FN16. The Court contends, in essence, that a saving clause cannot foreclose *implied* conflict pre-emption. *Ante,* at 1921-1922. The cases it cites to support that point, however, merely interpreted the language of the particular saving clauses at issue and concluded that those clauses did not foreclose implied pre-emption; they do not establish that a saving clause in a given statute cannot foreclose implied pre-emption based on frustration of that statute's purposes, or even (more importantly for our present purposes) that a saving clause in a given statute cannot deprive a *regulation* issued pursuant to that statute of any implicit pre-emptive effect. See *United States v. Locke, ante,* at 104-107, 120 S.Ct. 1135; *International Paper Co. v. Ouellette*, 479 U.S. 481, 493, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) ("Given that the Act itself does not speak directly to the issue, the Court must be guided by the goals and policies of the Act in determining whether it in fact pre-empts an action"); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328, 331, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). As stated in the text, I believe the language of this particular

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> saving clause unquestionably limits, and possibly forecloses entirely, the pre-emptive effect that safety standards promulgated by the Secretary have on common- law remedies. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). Under that interpretation, there is by definition no frustration of federal purposes--that is, no "tolerat[ion of] actual conflict," *ante,* at 1922--when tort suits are allowed to go forward. Thus, because there is a textual basis for concluding that Congress intended to preserve the state law at issue, I think it entirely appropriate for the party favoring pre-emption to bear a special burden in attempting to show that valid federal purposes would be frustrated if that state law were not pre-empted.

Honda argues, and the Court now agrees, that the risk of liability presented by common-law claims that vehicles without **1936 airbags are negligently and defectively designed would frustrate the policy decision that the Secretary made in promulgating Standard 208. This decision, in their view, was that safety--including a desire to encourage "public acceptance of the airbag technology and experimentation with better passive restraint systems" [FN17]--would best be promoted *901 through gradual implementation of a passive restraint requirement making airbags only one of a variety of systems that a manufacturer could install in order to comply, rather than through a requirement mandating the use of one particular system in every vehicle. In its brief supporting Honda, the United States agreed with this submission. It argued that if the manufacturers had known in 1984 that they might later be held liable for failure to install airbags, that risk "would likely have led them to install airbags in all cars," thereby frustrating the Secretary's safety goals and interfering with the methods designed to achieve them. Brief for United States as *Amicus Curiae* 25.

> FN17. 166 F.3d 1236, 1243 (C.A.D.C.1999).

There are at least three flaws in this argument that provide sufficient grounds for rejecting it. First, the entire argument is based on an unrealistic factual predicate. Whatever the risk of liability on a no-airbag claim may have been prior to the promulgation of the 1984 version of Standard 208, that risk did not lead any manufacturer to install airbags in even a substantial portion of its cars. If there had been a realistic likelihood that the risk of tort liability would have that consequence, there would have been no need for Standard 208. The promulgation of that standard certainly did not *increase* the pre-existing risk of liability. Even if the standard did not create a previously unavailable pre-emption defense, it likely *reduced* the manufacturers' risk of liability by enabling them to point to the regulation and their compliance therewith as evidence tending to negate charges of negligent and defective design. See Part II, *supra.* Given that the pre-1984 risk of liability did not lead to widespread airbag installation, this reduced risk of liability was hardly likely to compel manufacturers to install airbags in all cars--or even to compel them to comply with Standard 208 during the phase-in period by installing airbags exclusively.

Second, even if the manufacturers' assessment of their risk of liability ultimately proved to be wrong, the purposes of Standard 208 would not be frustrated. In light of the inevitable *902 time interval between the eventual filing of a tort action alleging that the failure to install an airbag is a design defect and the possible resolution of such a claim against a manufacturer, as well as the additional interval between such a resolution (if any) and manufacturers' "compliance with the state-law duty in question," *ante,* at 1926, by modifying their designs to avoid such liability in the future, it is obvious that the phase-in period would have ended long before its purposes could have been frustrated by the specter of tort liability. Thus, even without pre-emption, the public would have been given the time that the Secretary deemed necessary to gradually adjust to the increasing use of airbag technology and allay their unfounded concerns about it. Moreover, even if any no-airbag suits were ultimately resolved against manufacturers, the resulting incentive to modify their designs would have been quite different from a decision by the Secretary to mandate the use of airbags in every vehicle. For example, if the extra credit provided for the use of nonbelt passive restraint technologies during the phase-in period had (as the Secretary hoped) ultimately encouraged manufacturers to develop a nonbelt system more effective than the airbag, manufacturers held liable for failing to install passive restraints would have been free to respond by modifying their designs to include**1937 such a system *instead of* an airbag.

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[FN18] It seems clear, therefore, that any ***903** potential tort liability would not frustrate the Secretary's desire to encourage both experimentation with better passive restraint systems and public acceptance of airbags.

FN18. The Court's failure to "understand [this point] correctly," *ante,* at 1926, is directly attributable to its fundamental misconception of the nature of duties imposed by tort law. A general verdict of liability in a case seeking damages for negligent and defective design of a vehicle that (like Ms. Geier's) lacked any passive restraints does not amount to an immutable, mandatory "rule of state tort law imposing ... a duty [to install an airbag]." *Ante,* at 1925; see also *ante,* at 1920 (referring to verdict in common-law tort suit as a "jury-imposed safety standard"). Rather, that verdict merely reflects the jury's judgment that the manufacturer of a vehicle without any passive restraint system breached its duty of due care by designing a product that was not reasonably safe because a reasonable alternative design--"including, but not limited to, airbags," App. 3--could have reduced the foreseeable risks of harm posed by the product. See Restatement (Third) of Torts: Products Liability § 2(b), and Comment *d* (1997); *id.,* § 1, Comment *a* (noting that § 2(b) is rooted in concepts of both negligence and strict liability). Such a verdict obviously does not foreclose the possibility that more than one alternative design exists the use of which would render the vehicle reasonably safe and satisfy the manufacturer's duty of due care. Thus, the Court is quite wrong to suggest that, as a consequence of such a verdict, only the installation of airbags would enable manufacturers to avoid liability in the future.

Third, despite its acknowledgment that the saving clause "preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor," *ante,* at 1919, the Court completely ignores the important fact that by definition all of the standards established under the Safety Act--like the British regulations that governed the number and capacity of lifeboats aboard the *Titanic* *[FN19]*--impose minimum, rather than fixed or maximum, requirements. 15 U.S.C. § 1391(2); see *Norfolk Southern R. Co. v. Shanklin, ante,* at 359, 120 S.Ct. 1467 (BREYER, J., concurring) ("[F]ederal *minimum* safety standards should not pre-empt a state tort action"); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 721, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). The phase-in program authorized by Standard 208 thus set minimum percentage requirements for the installation of passive restraints, increasing in annual stages of 10,25, 40, and 100%. Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase. The possibility that exposure to potential tort liability ***904** might accelerate the rate of increase would actually further the only goal explicitly mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants. Had gradualism been independently important as a method of achieving the Secretary's safety goals, presumably the Secretary would have put a ceiling as well as a floor on each annual increase in the required percentage of new passive restraint installations. For similar reasons, it is evident that variety was not a matter of independent importance to the Secretary. Although the standard allowed manufacturers to comply with the minimum percentage requirements by installing passive restraint systems other than airbags (such as automatic seatbelts), it encouraged them to install airbags and other nonbelt systems that might be developed in the future. The Secretary did not act to ensure the use of a variety of passive restraints by placing ceilings on the number of airbags that could be used in complying ****1938** with the minimum requirements. [FN20] Moreover, even if variety and gradualism had been independently important to the Secretary, there is nothing in the standard, the accompanying commentary, or the history of airbag regulation to support the notion that the Secretary intended to advance those purposes at all costs, without regard to the detrimental consequences that pre- emption of tort liability could have for the achievement of her avowed purpose of reducing vehicular injuries. See *Silkwood v. Kerr-McGee Corp.,* 464 U.S., at 257, 104 S.Ct. 615.

FN19. Statutory Rules and Orders 1018-1021, 1033 (1908). See Nader & Page, Automobile-Design Liability and Compliance with Federal Standards, 64 Geo. Wash. L.Rev. 415, 459 (1996) (noting that the *Titanic* "complied with British

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governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about [half] of the people on board"); W. Wade, The *Titanic:* End of a Dream 68 (1986).

FN20. Of course, allowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an "obstacle" to the auto manufacturers' freedom to choose among several different passive restraint device options. Cf. *ante,* at 1923-1924, 1925.

My disagreement with Honda and the Government runs deeper than these flaws, however. In its brief, the Government concedes that "[a] claim that a manufacturer should have chosen to install airbags rather than another type of ***905** passive restraint in a certain model of car because of other design features particular to that car ... would not necessarily frustrate Standard 208's purposes." Brief for United States as *Amicus Curiae* 26, n. 23. [FN21] Petitioners' claims here are quite similar to the claim described by the Government: their complaint discusses other design features particular to the 1987 Accord (such as the driver's seat) that allegedly rendered it unreasonably dangerous to operate without an airbag. App. 4-5. The only distinction is that in this case, the particular 1987 Accord driven by Ms. Geier included no passive restraint of any kind because Honda chose to comply with Standard 208's 10% minimum requirement by installing passive restraints in other 1987 models. I fail to see how this distinction makes a difference to the purposes of Standard 208, however. If anything, the type of claim favored by the Government--*e.g.,* that a particular model of car should have contained an airbag instead of an automatic seatbelt--would seem to trench even more severely upon the purposes that the Government and Honda contend were behind the promulgation of Standard 208: that having a variety of passive restraints, rather than only airbags, was necessary to promote safety. Thus, I conclude that the Government, on the Secretary's behalf, has failed to articulate a coherent view of the policies behind Standard 208 that would be frustrated by petitioners' claims.

FN21. Compare *ante,* at 1925 (disagreeing with Government's view by concluding that tort-law duty "requir[ing] manufacturers of all similar cars to install airbags rather than other passive restraint systems ... would [present] an obstacle to the variety and mix of devices that the federal regulation sought"), with *ante,* at 1926, 1927-1928 (noting that "the agency's own views should make a difference," but contending that the above-quoted Government view is "*not* at issue here").

V

For these reasons, it is evident that Honda has not crossed the high threshold established by our decisions regarding ***906** pre-emption of state laws that allegedly frustrate federal purposes: it has not demonstrated that allowing a common-law no-airbag claim to go forward would impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary set forth with clarity in Standard 208. *Gade v. National Solid Wastes Management Assn.,* 505 U.S., at 110, 112 S.Ct. 2374 (KENNEDY, J., concurring in part and concurring in judgment); *id.,* at 111, 112 S.Ct. 2374 ("A freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-emp[t] state law"). Furthermore, it is important to note that the text of Standard 208 (which the Court does not even bother ****1939** to quote in its opinion), unlike the regulation we reviewed in *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta,* 458 U.S., at 158, 102 S.Ct. 3014, does not contain any expression of an intent to displace state law. Given our repeated emphasis on the importance of the presumption against pre-emption, see, *e.g., CSX Transp., Inc. v. Easterwood,* 507 U.S., at 663-664, 113 S.Ct. 1732; *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), this silence lends additional support to the conclusion that the continuation of whatever common-law liability may exist in a case like this poses no danger of frustrating any of the Secretary's primary purposes in promulgating Standard 208. See *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S., at 721, 105 S.Ct. 2371; *Silkwood v. Kerr-McGee Corp.,* 464 U.S., at 251, 104 S.Ct. 615 ("It is difficult to believe that [the

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Secretary] would, without comment, remove all means of judicial recourse for those injured by illegal conduct").

The Court apparently views the question of pre-emption in this case as a close one. *Ante,* at 1926-1927 (relying on Secretary's interpretation of Standard 208's objectives to bolster its finding of pre-emption). Under "ordinary experience-proved principles of conflict pre-emption," *ante,* at 1922, therefore, the presumption against pre-emption should control. Instead, the Court simply ignores the presumption, ***907** preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes. *Ante,* at 1926 (noting that petitioners' arguments "cannot, by themselves, change the legal result"). In view of the important principles upon which the presumption is founded, however, rejecting it in this manner is profoundly unwise.

Our presumption against pre-emption is rooted in the concept of federalism. It recognizes that when Congress legislates "in a field which the States have traditionally occupied ... [,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S., at 230, 67 S.Ct. 1146; see *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 552, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985); see *United States v. Morrison,* 529 U.S. 598, 660-663, 120 S.Ct. 1740 (BREYER, J., dissenting); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 93- 94, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (STEVENS, J., dissenting); *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 292-293, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (THOMAS, J., dissenting); *Gregory v. Ashcroft,* 501 U.S. 452, 460-464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In addition, the presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes--*i.e.,* that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution ***908** of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). [FN22]

FN22. Recently, one commentator has argued that our doctrine of frustration-of-purposes (or "obstacle") pre-emption is not supported by the text or history of the Supremacy Clause, and has suggested that we attempt to bring a measure of rationality to our pre-emption jurisprudence by eliminating it. Nelson, Preemption, 86 Va. L.Rev. 225, 231-232 (2000) ("Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that the federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes"). Obviously, if we were to do so, there would be much less need for the presumption against pre-emption (which the commentator also criticizes). As matters now stand, however, the presumption reduces the risk that federal judges will draw too deeply on malleable and politically unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes.

****1940** While the presumption is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the pre-emptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law. We have addressed the heightened federalism and nondelegation concerns that agency pre-emption raises by using the presumption to build a procedural bridge across the political accountability gap between States and administrative agencies. Thus, even in cases where implied regulatory pre-emption is at issue, we generally "expect an administrative regulation to declare any intention to pre-empt state law with some

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specificity." [FN23] ***909***California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987); see *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 717-718, 105 S.Ct. 2371 (noting that too easily implying pre-emption "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence," and stating that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive"); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S., at 154, 102 S.Ct. 3014 (noting that pre-emption inquiry is initiated "[w]hen the administrator promulgates regulations intended to pre- empt state law"). This expectation, which is shared by the Executive Branch, [FN24] serves to ensure ****1941** that States will be able to have a dialog ***910** with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

FN23. The Court brushes aside our specificity requirement on the ground that the cases in which we relied upon it were not cases of implied conflict pre-emption. *Ante,* at 1926-1927. The Court is quite correct that *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), and *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987), are cases in which field pre-emption, rather than conflict pre- emption, was at issue. This distinction, however, does not take the Court as far as it would like. Our cases firmly establish that conflict and field pre-emption are alike in that both are instances of implied pre-emption that by definition do "not [turn] on an express statement of pre- emptive intent." *Ante,* at 1927; see, *e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (quoted *supra,* at 1935); *English v. General Elec. Co.*, 496 U.S. 72, 79-80, and n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (noting that field pre- emption rests on an inference of congressional intent to exclude state regulation and that it "may be understood as a species of conflict pre- emption"); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Given that our specificity requirement was adopted in cases involving implied pre-emption, the Court cannot persuasively claim that the requirement is incompatible with our implied pre-emption jurisprudence in the federal regulatory context.

FN24. See Exec. Order No. 12612, § 4(e), 3 C.F.R. § 252, 255 (1988) ("When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings"); Exec. Order No. 13132, § 4(e), 64 Fed.Reg. 43255, 43257 (1999) (same); cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (discussing 21 C.F.R. § 808.5 (1995), an FDA regulation allowing a State to request an advisory opinion regarding whether a particular state-law requirement is pre-empted, or exempt from pre-emption, under the Medical Device Amendments of 1976).

When the presumption and its underpinnings are properly understood, it is plain that Honda has not overcome the presumption in this case. Neither Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits. Indeed, the only mention of such suits in the commentary tends to suggest that they would not be pre-empted. See n. 5, *supra.* In the Court's view, however, "[t]he failure of the Federal Register to address pre-emption explicitly is ... not determinative," *ante,* at 1927, because the Secretary's consistent litigating position since 1989, the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by no-airbag suits. Pre-empting on these three bases blatantly contradicts the presumption against pre-emption. When the 1984 version of Standard 208 was under consideration, the States obviously were not afforded any notice that purposes might someday be discerned in the history

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of airbag regulation that would support pre-emption. Nor does the Court claim that the notice of proposed rulemaking that led to Standard 208 provided the States with notice either that the final version of the standard might contain an express pre-emption provision or that the commentary accompanying it might contain a statement of purposes with arguable pre-emptive effect. Finally, the States plainly had no opportunity to comment upon either the commentary accompanying the final version of the standard or the Secretary's *ex post* litigating position that the standard had implicit pre- emptive effect.

Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from ***911** regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of- purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or regulation. In my view, however, "preemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking." 1 L. Tribe, American Constitutional Law § 6-28, p. 1177 (3d ed.2000).

As to the Secretary's litigating position, it is clear that "an interpretation contained in a [legal brief], not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking[,] ... do[es] not warrant *Chevron*-style deference." *Christensen v. Harris County, ante,* at 587, 120 S.Ct. 1655. Moreover, our pre-emption precedents and the APA establish that even if the Secretary's litigating position were coherent, the lesser deference paid to it by the Court today would be inappropriate. Given the Secretary's contention that he has the authority to promulgate safety standards that pre-empt state law and the fact that he could promulgate a standard such as the one quoted *supra,* at 1928-1929, with relative ease, we should be quite reluctant to find pre-emption based only on the Secretary's informal effort to recast the 1984 version of Standard 208 into a pre-emptive mold. [FN25] See ****1942 *912***Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 721, 105 S.Ct. 2371; cf. *Medtronic, Inc. v. Lohr*, 518 U.S., at 512, 116 S.Ct. 2240 (O'CONNOR, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference"); *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 743-744, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking-- whether contemporaneously with the promulgation of the allegedly pre-emptive regulation or at any later time that the need for pre-emption becomes apparent [FN26]--respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context and the APA's requirement of new rulemaking when an agency substantially modifies its interpretation of a regulation. 5 U.S.C. § 551(5); *Paralyzed Veterans of America v. D.C. Arena L. P.*, 117 F.3d 579, 586 (C.A.D.C.1997); *National Family Planning & Reproductive Health Assn. v. Sullivan*, 979 F.2d 227, 240 (C.A.D.C.1992).

FN25. The cases cited by the Court, *ante,* at 1927, are not to the contrary. In *City of New York v. FCC*, 486 U.S. 57, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988), for example, we were faced with Federal Communications Commission regulations that explicitly "reaffirmed the Commission's established policy of pre-empting local regulation of technical signal quality standards for cable television." *Id.*, at 62, 65, 108 S.Ct. 1637. It was only in determining whether the issuance of such regulations was a proper exercise of the authority delegated to the agency by Congress that we afforded a measure of deference to the agency's interpretation of that authority, as *formally* expressed through its explicitly pre-emptive regulations. *Id.*, at 64, 108 S.Ct. 1637; see also *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700-705, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (regulation); *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S., at 158-159, 102 S.Ct. 3014 (regulation); *Blum v. Bacon*, 457 U.S. 132, 141-142, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982) (Action Transmittal by Social Security Administration); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S., at 327, 101 S.Ct. 1124 (order of Interstate Commerce Commission); *United States v. Shimer*, 367 U.S. 374, 377, 81 S.Ct. 1554, 6 L.Ed.2d 908

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(1961) (regulation). I express no opinion on whether any deference would be appropriate in any of these situations, but merely observe that such situations are not presented here.

FN26. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S., at 721, 105 S.Ct. 2371 (noting that agency "can be expected to monitor, on a continuing basis, the effects on the federal program of local requirements" and to promulgate regulations pre-empting local law that imperils the goals of that program).

* * *

Because neither the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt ***913** petitioners' cause of action, and because I cannot agree with the Court's unprecedented use of inferences from regulatory history and commentary as a basis for implied pre-emption, I am convinced that Honda has not overcome the presumption against pre-emption in this case. I therefore respectfully dissent.

120 S.Ct. 1913, 529 U.S. 861, 146 L.Ed.2d 914, 68 USLW 4425, Prod.Liab.Rep. (CCH) P 19,795, 00 Cal. Daily Op. Serv. 3950, 2000 Daily Journal D.A.R. 5277, 2000 CJ C.A.R. 2826, 13 Fla. L. Weekly Fed. S 344

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• 1999 WL 1076223 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Nov. 30, 1999)

• 1999 WL 1049890 (Appellate Brief) BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT (Nov. 19, 1999)

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Brett Kavanaugh – Product Liability

Allegation: In *Green v. General Motors Corp.*, Mr. Kavanaugh once again represented big business attempting to overturn a jury verdict in favor of a 24-year-old who became a quadriplegic due to the defective design of the car manufactured by defendant. 310 N.J. Super. 507 (1998).

Facts:

- **Mr. Kavanaugh relied on Third Circuit precedent that supported his client's position on appeal, that the judge had made an improper jury instruction.**
  - ✓ The defendant argued that the jury should have been able to consider the plaintiff's own negligence in speeding, which was conceded by the defendant.
  - ✓ The defense urged the Superior Court of New Jersey to accept a Third Circuit holding that juries had to be allowed to consider factors such as speed and the plaintiff's driving. *Huddell v. Levin*, 537 F.2d 726, 741 (3rd Cir. 1976).
  - ✓ Ultimately, the Superior Court of New Jersey "respectfully disagreed" with the Third Circuit's speed analysis. *Green v. General Motors Corp.*, 310 N.J. Super. 507, 523 (1998).
- **The court ruled in favor of Mr. Kavanaugh's clients, General Motors, on a number of issues that were argued on appeal.**
  - ✓ The appellate court agreed with Mr. Kavanaugh's client's position that the trial court had wrongly awarded prejudgment interest on future medical expenses and lost earnings. This amount had exceeded $8.5 million. *Id.* at 533.
- **As a member of the appellate team, Mr. Kavanaugh had a duty to zealously advance his client's positions. He did so by making reasonable arguments that relied on established precedent.**
  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

Superior Court of New Jersey,
Appellate Division.

Michael GREEN, Plaintiff-Respondent-Cross-Appellant,
v.
GENERAL MOTORS CORPORATION, Defendant-Appellant-Cross-Respondent,
and
Delores Parmentier, Breza Bus Service, Inc., and Goodyear Tire & Rubber
Company, Defendants.

Argued Jan. 27, 1998.
Decided March 18, 1998.

Motorist, who was rendered a quadriplegic as a result of an automobile accident, brought design defect products liability action against automobile manufacturer. The Superior Court, Law Division, Essex County, entered judgment for motorist, with damage award totaling more than $25 million. Manufacturer appealed. The Superior Court, Appellate Division, Dreier, P.J.A.D., held that: (1) accident severity and speed were not factors to consider in determining whether automobile's roof design was defective; (2) motorist presented reasonable alternative roof design, as required to recover in action premised on defective design; (3) trial court's improper placement of burden of proving allocation of injuries between accident and defective design on motorist was harmless error; (4) trial court's improper instruction on manufacturer's duty to inspect and test automobile roof was harmless error; (5) motorist was not entitled to award of prejudgment interest on future damages; (6) prejudgment interest would not be tolled during two-year period in which action was not brought to trial; (7) damages for future medical expenses should have been reduced to present value using some reasonable discount rate; and (8) manufacturer was not entitled to credit for settlement between motorist and other driver involved in accident.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] **Products Liability** 36
313Ak36 Most Cited Cases

Accident severity and speed of vehicle at time of impact were not factors to consider in determining whether automobile's roof design was defective.

[2] **Products Liability** 11
313Ak11 Most Cited Cases

Design defect does not come into being at time of accident; rather, it occurs when defective product is placed into stream of commerce.

[3] **Products Liability** 36
313Ak36 Most Cited Cases

In determining whether automobile was defective, jury had to determine the risks and alternatives that should have been known to reasonable manufacturer, and then assess whether manufacturer discharged its duty to provide reasonably fit, suitable, and safe vehicle, employing a risk-utility analysis.

[4] **Products Liability** 11
313Ak11 Most Cited Cases

In defective design case, issue upon which most claims will turn is proof by plaintiff of reasonable alternative design, the omission of which renders product not reasonably safe.

[5] **Products Liability** 36
313Ak36 Most Cited Cases

Motorist, who was rendered a quadriplegic as a result of automobile accident, presented reasonable alternative roof design for automobile, as required to recover in action premised on defective design.

[6] **Damages** 15
115k15 Most Cited Cases

Since automobile driver's injuries were caused totally by defective product, and not by collision with van, injuries could not be apportioned between automobile manufacturer and automobile driver and/or van driver.

[7] **Products Liability** 40

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313Ak40 Most Cited Cases

Automobile driver's own negligence with respect to his claim of a defective product was limited to whether he unreasonably proceeded in the face of a known danger; furthermore, this "known danger" was not the obviously known consequences of driver's speed, but rather was that posed by automobile's faulty roof design.

[8] Appeal and Error 1064.1(9)
30k1064.1(9) Most Cited Cases

Although trial court, in design defect products liability action, improperly placed on automobile driver the burden of proving allocation of injuries between accident, for which driver and/or driver of van with which he collided were responsible, and design defect, for which automobile manufacturer was responsible, error favored manufacturer and, therefore, was harmless.

[9] Appeal and Error 1064.1(8)
30k1064.1(8) Most Cited Cases

Trial court's improper instruction, in defective design products liability action, on automobile manufacturer's duty to inspect and test automobile roof, to which automobile manufacturer did not object, was harmless error, since it was not clearly capable of producing unjust result.

[10] Products Liability 13
313Ak13 Most Cited Cases

Proof of failure to test or of inadequate testing may be evidential as explanation of why design was defective, but it is not in itself proof of separate basis for liability.

[11] Appeal and Error 181
30k181 Most Cited Cases

Reviewing court will reverse on appeal for errors that lacked an objection only if errors cut mortally into substantive rights of defendant.

[12] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Driver, who was rendered a quadriplegic as a result of design defect in automobile, was not entitled to award of prejudgment interest on future medical expenses and future lost earnings, where prejudgment interest on portions of losses that driver had not yet suffered exceeded $8.5 million. R. 4:42- 11(b).

[13] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Denial or suspension of prejudgment interest in products liability action is left to sound discretion of trial judge, based on considerations of equity, fairness, and justice, viewed in factual context of case at hand. R. 4:42- 11(b).

[14] Interest 39(2.50)
219k39(2.50) Most Cited Cases

Prejudgment interest would not be tolled during two-year period in which design defect action was not brought to trial because injured driver was obtaining new liability expert after his initial expert suffered incapacitating strokes, since manufacturer had use of sums due for that period and could invest them.

[15] Appeal and Error 1178(6)
30k1178(6) Most Cited Cases

[15] Damages 226
115k226 Most Cited Cases

In design defect action, damages for future medical expenses should have been reduced to present value using some reasonable discount rate, and jury's use of total offset method warranted remand and remittitur.

[16] Trial 114
388k114 Most Cited Cases

While expert witness is prohibited from presenting bottom line evidence of future wage losses in design defect products liability action, attorney may include bottom line income loss calculation in summation.

[17] Damages 63
115k63 Most Cited Cases

Since jury in defective design products liability action made no determination of liability of driver of van which collided with plaintiff's automobile, and found only that as between plaintiff and automobile manufacturer, manufacturer was 100% responsible for plaintiff's injuries, manufacturer was not entitled to credit for settlement between van driver and plaintiff.

****206 *511** Brett M. Kavanaugh (Kirkland & Ellis) of the District of Columbia Bar, Washington, DC,

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admitted pro hac vice, for defendant-appellant- cross-respondent (Tansey, Fanning, Haggerty, Kelly, Convery & Tracy attorneys; Thomas F. Tansey, Woodbridge, and James N. Tracy, on the brief).

****207** Maurice J. Donovan, West Orange, for plaintiff-respondent-cross- appellant (Benjamin M. Del Vento, Newark, attorney; Benjamin M. Del Vento, of counsel, Mr. Donovan, on the brief).

Before Judges DREIER, PAUL G. LEVY and WECKER.

The opinion of the court was delivered by

DREIER, P.J.A.D.

Defendant, General Motors Corporation (GM), appeals from a final judgment based upon a jury award in favor of plaintiff, who was driving a GM vehicle when involved in an accident that rendered him a quadriplegic. The jury awarded $13,000,000 for future medical expenses, $149,315 for loss of past income, $305,860.35 for loss of future income, and $4,000,000 for pain and suffering. Plaintiff's past medical expenses of $312,000 have been stipulated. The total damage award was therefore $17,767,175.35, which with prejudgment interest and costs, and a credit for a settlement with other defendants, totaled $25,110,484.90. GM also appeals from the denial of its motions for a judgment n.o.v., a new trial, or a remittitur. Plaintiff cross-appeals from a portion of the judgment granting defendant a $799,000 credit for amounts received from other defendants who settled after an initial trial had ended in a hung jury. The court deducted this amount from the final judgment after computation of the prejudgment interest noted earlier. Considering that the jury returned a verdict for plaintiff, we will examine the facts in a light favorable to plaintiff, except where any alternative facts may bear upon one of the many issues raised by GM.

On the day of the accident, June 9, 1986, plaintiff, then twenty-four years old and five feet, nine inches tall, was employed as a "car jockey" by Sullivan Chevrolet, an automobile dealership in Roselle Park. He was driving one of his employer's automobiles, ***512** a brand new 1986 Chevrolet Camaro IROC (International Race of Champions) Z28 sports coupe, a two-door vehicle designed and manufactured by defendant.

The Camaro was equipped with a "T-roof," a "luxury option" [FN1] provided by GM. In 1986, the Camaro was constructed with both an "A-pillar" and a "B-pillar." The A-pillar consisted actually of two pillars and a header which held the front windshield and supported the door hinges. The B-pillar similarly supported the rear window. In the T-roof Camaro there was a steel "center T-bar" welded into the center of the front windshield header and the rear window header. The roof design is called a "T-roof" or "T-top" because the T-bar is the only connection between the A and B pillars. Removable glass panels were supported by the front and rear headers and the T-bar, and provided a convertible-like feeling and driving experience when they were removed. When installed, they provided greater protection from the weather and more security than a canvas-top convertible.

> FN1. A "luxury option" is distinguished from a "performance option" which enhances the ability of the vehicle to proceed from one point to another beyond that of the base car. Therefore, a "T-roof" as opposed to a standard roof was offered solely for its appearance or comfort.

As plaintiff drove the Camaro north on Chandler Avenue with both glass panels inserted and the side windows rolled up, he was accompanied by a friend, Marc Alexander, seated in the front passenger seat. Both plaintiff and Alexander were wearing their seat belts. The legal speed on Chandler Avenue was twenty- five miles per hour; however, plaintiff was apparently greatly exceeding the speed limit. As he came over a slight rise on Chandler Avenue, plaintiff saw a school van proceeding south on Chandler Avenue. According to the driver of the van, her speed was approximately twenty-five miles per hour when she first saw plaintiff's car. The only indication of how much this speed may have actually decreased by the time of the collision, is the van driver's estimate that her speed at contact was five miles per hour.

***513** When plaintiff first observed the school van, it was only one or two car lengths away and was "right in the middle of the road" and "on the center line." We assume, however, that since the driver of the van was more elevated than plaintiff, she may have seen ****208** the Camaro slightly before plaintiff could see her. To avoid a head-on collision, plaintiff applied

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the Camaro's brakes and attempted to steer to the right, however, the left rear side of the Camaro, just behind the driver's-side door, struck the left front corner of the van at a thirty to forty-five degree angle.

The question of the speeds of the van and Camaro were disputed, and the record shows various estimates. Both plaintiff and the passenger estimated the Camaro's speed as between forty and fifty miles per hour. Plaintiff's expert, Donald Phillips, testified that there was insufficient physical evidence to perform a reliable reconstruction of speeds at impact. The van driver estimated plaintiff's speed at seventy-five miles per hour (and testified that plaintiff was on the wrong side of the road and did not decrease his speed). An employee of the Department of Public Works, who was travelling south on Chandler Avenue, 200 feet behind the school van in a dump truck, estimated plaintiff to be proceeding between sixty and seventy miles an hour. Defendant's expert estimated the Camaro's speed at between sixty-seven to seventy-six miles per hour. Therefore, if we accept the van driver's estimate that her vehicle was proceeding at five miles per hour at the time of the impact, and plaintiff's minimum estimate of his speed at forty miles per hour, the lowest closing speed between the two vehicles would have been forty-five miles per hour. If we accept the van driver's estimate of her speed and the maximum speed she and the independent witnesses placed upon the Camaro, the closing speed could have been as high as eighty-one miles per hour.

Plaintiff's medical expert explained that plaintiff had suffered a compression fracture of his spinal cord. Such an injury does not cause instantaneous paralysis, and therefore it "would take a longer time to show all the symptoms of spinal cord injury as ***514** opposed to a sudden disruption of the cord completely through." There was other eyewitness testimony that plaintiff could move his arms and legs immediately after the accident. But, unfortunately, this spinal cord injury quickly and permanently rendered plaintiff a quadriplegic.

Plaintiff's engineering expert's theory of the cause of plaintiff's injury focused on the collapse of the T-bar and "B" frame. When the Camaro hit the school bus to the rear of the driver's door and behind the center of gravity of the car, it spun, causing plaintiff's seat belt to force him back into his seat so that his head was just under the rear portion of the T-bar and B frame which deformed downward onto the back of plaintiff's head. The collapse of the T- bar compressed his spine and caused the compression fracture to his C5, C6, and C7 vertebrae. It was undisputed and is apparent from the photographs that the rear roof of the T-top caved downward in the accident.

Neither plaintiff nor Alexander had any post-accident memory of the accident beyond the instant of impact. Immediately after the accident, however, plaintiff was found outside of the Camaro lying facedown on the ground. [FN2] A neighbor who heard the crash ran to the site, and as she arrived she saw the driver's side door of the Camaro swing out, following which plaintiff "stepped out of the car." She testified that a "dazed" plaintiff took a "couple of steps," and "fell straight on his face." Defendant, through extensive expert testimony, contended that plaintiff was thrown from the car and suffered his injuries when he landed on his head. Plaintiff's expert testified that the lack of injuries that would have been commensurate with plaintiff so landing made such a scenario a virtual impossibility. This conclusion, coupled with the independent ***515** witness who saw plaintiff open the door and walk away from the vehicle, certainly provides a sufficient basis for the jury's implicit factual finding that plaintiff was not ejected from the car.

> FN2. Within seconds of the collision, and apparently after plaintiff left the car, it caught fire while Alexander was still sitting inside. Alexander was pulled out by a witness who observed burns on the back of Alexander's head and ears. Alexander testified that he incurred third- degree burns on his arm, neck and face, but medical personnel observed no burns on plaintiff's body, corroborating plaintiff's testimony that he suffered no burns in the accident.

The verdict was taken by special interrogatories. The jury found specifically that the "collapse of the rear roof of the T-Top Camaro****209** caused it to strike the plaintiff on his head." It also found that the "roof collapse" was caused by a "design defect of the T-Roof Camaro." Finally, it determined that the roof collapse was a proximate cause of plaintiff's injuries, and that 100f his injuries were "solely attributable to the design defect of the T-Roof Camaro." Presumably because of the earlier settlement, the jury was given no interrogatories relating to the responsibility of the driver of the van or her employer, and we have not been informed by the record on appeal whether GM had ever made a

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cross-claim for contribution against these former defendants, and if so, whether this claim was withdrawn when these defendants were released by plaintiff.

The additional facts concerning the trial, including those relating to the testing of the Camaro, the judge's charge and testimony relating to damages will be discussed when these issues are explored.

Defendant has raised five points on this appeal, some with subparts. We have departed somewhat from defendant's organization of the arguments and will address each point accordingly.

I. The Judge's Instruction on Speed

[1] GM first contends that the trial judge mistakenly instructed the jury that it could not consider evidence of accident severity and speed in determining whether the Camaro's T-roof design was defective. Before we proceed to the jury instructions, we must examine the nature of plaintiff's claim. Plaintiff has not contended here that GM or the van driver were responsible for the accident. Plaintiff's cause of action against GM was based upon a crashworthiness theory. He claims that whoever might be responsible for the accident, GM was obliged to design a vehicle that ***516** would maintain the integrity of the passenger compartment sufficiently to prevent additional injury to the occupant. If plaintiff had not suffered the injury from the T-bar and B frame deflection, he would have had no claim against GM for the accident that resulted in large part from his faulty driving. Also, if the van driver were to some extent responsible for the accident, GM could have had that responsibility assessed by a timely request to the court to have the jury fix the van driver's percentage responsibility.

[2] Given this narrow framework, we will focus on plaintiff's claim against GM. A design defect does not come into being at the time of an accident. Rather, it occurs when a defective product is placed into the stream of commerce. *See* Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 48-49, 675 A.2d 620 (1996), and the cases cited therein. One of the differences between the causes of action for strict liability, negligence, or even some warranty claims is the way each focuses upon this time frame. If we were to look for negligence, we would focus upon the conduct of the manufacturer during the period of design, manufacture and distribution of the Camaro, including its testing and construction. If we were to look at a warranty claim, we would examine the performance of the car and determine whether it was "fit for the ordinary purposes for which" the car was used. N.J.S.A. 12A:2-314. A claim for strict liability, however, focuses on the car as it enters the stream of commerce to see whether it was defective. Zaza, *supra*, 144 N.J. at 49, 675 A.2d 620.

These neat temporal lines have been blurred over the years as we have come to realize that a claim for strict liability is akin to a negligence claim in that the central focus is upon the reasonableness of the manufacturer putting the defective product onto the market. *Id.* at 50, 675 A.2d 620. This is different from examining the manufacturer's conduct for negligence before the product was marketed. We do not look to see whether a particular designer acted unreasonably or whether a test engineer failed to perform a particular test, but rather whether a reasonable manufacturer, ***517** knowing the harmful propensities of the product, would have placed it onto the market in its condition. *Ibid.*

Under the New Jersey Products Liability Act, N.J.S.A. 2A:58C-1 *et seq.* (PLA or the Act), the causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action, the essence of which is strict liability. ****210***Jurado v. Western Gear Works*, 131 N.J. 375, 384-85, 619 A.2d 1312 (1993); *Tirrell v. Navistar Int'l, Inc.*, 248 N.J.Super. 390, 398-99 n. 5, 591 A.2d 643 (App.Div.), *certif. denied*, 126 N.J. 390, 599 A.2d 166 (1991). The Act, however, was non-exclusive, and the Legislature intended that the existing common law would continue to be applied, except where specifically changed by the Act. Senate Judiciary Committee Statement to Senate Bill No. 2805 (1987), *reprinted following* N.J.S.A. 2A:58C-1. The Act incorporated the standard from *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 169, 406 A.2d 140 (1979), which required: "If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes ... the seller shall be responsible for the ensuing damages." The PLA used a shorthand reference to this standard in N.J.S.A. 2A:58C-2, but as is clear from the Senate Judiciary Committee Statement, no change in the law was intended.

[3][4] Thus, in determining whether the Camaro was defective, a jury must determine the risks and alternatives that should have been known to a reasonable manufacturer, and then assess whether the manufacturer discharged its duty to provide a "reasonably fit, suitable and safe" vehicle. [FN3] To

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do this, the jury employs a risk-utility analysis. *Jurado v. Western Gear Works, supra,* 131 *N.J.* at 385, 619 *A.*2d 1312. Although there are seven listed factors in the classical statement of the risk-utility analysis, see ***518** *Cepeda v. Cumberland Eng'g Co.,* 76 *N.J.* 152, 174, 386 *A.*2d 816 (1978) and its progeny, the prevalent view is that, unless one or more of the other factors might be relevant in a particular case, the issue upon which most claims will turn is the proof by plaintiff of a "reasonable alternative design ... the omission ... [of which] renders the product not reasonably safe." *Restatement (Third) of Torts: Products Liability* § 2(b) (Proposed Final Draft, April 1, 1997). [FN4] *See Congiusti v. Ingersoll-Rand Co., Inc.,* 306 *N.J.Super.* 126, 138-39, 703 *A.*2d 340 (App.Div.1997); *Grzanka v. Pfeifer,* 301 *N.J.Super.* 563, 579, 694 *A.*2d 295 (App.Div.), *certif. denied,* 152 *N.J.* 189, 704 *A.*2d 19 (1997); *Smith v. Keller Ladder Co.,* 275 *N.J.Super.* 280, 283-84, 645 *A.*2d 1269 (App.Div.1994).

FN3. *Suter v. San Angelo Foundry & Mach. Co., supra,* also teaches us that "[f]itness and suitability are terms synonymous with safety." 81 *N.J.* at 169, 406 *A.*2d 140. Thus the sole standard in the usual case is reasonable safety.

FN4. The full text of § 2(b) of the *Restatement (Third) of Torts: Products Liability, supra,* is that a product
is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.
In instances where other risk-utility factors need be considered, they are not excluded by this formulation. *See id.* at cmts. b and e.

Plaintiff's premise in this case is that although he was negligent in the operation of the vehicle, his injuries did not flow from this negligence, but rather from the faulty design of the Camaro which should have protected plaintiff under the circumstances of this accident. Defendant counters with a claim that the speed of the vehicle in this case, which may have been over double the legal limit, was a factor that the jury should have considered in determining whether the Camaro was defectively designed. The trial judge rejected defendant's view after a long and contentious argument. The judge charged the jury that the speed of the vehicle, the use of a seat belt, the use of the vehicle, crossing lanes of traffic and the like could be considered by the jury only on the issue of proximate cause, that is, the allocation of the cause of plaintiff's injuries or of damages between those responsible for the accident and the alleged crashworthiness deficit. Speed could not ***519** be considered on the issue of whether the Camaro was defectively designed.

The applicable portions of the charge on this subject read as follows:

> In this case the plaintiff alleges and has the burden of proving that the 1986 T-top Camaro was defectively designed because it was not crashworthy and that this defect was a proximate cause of plaintiff's injuries. The defendant, by way of response, ****211** denies that the vehicle was defectively designed and contends that Michael Green's injuries were caused by his own conduct.
> In this regard, please keep in mind that the conduct of the plaintiff concerning speed, seat belt use, use of the vehicle, crossing the lanes of traffic, etc., can only be considered by you on the issue of proximate cause. It cannot be considered by you as to whether the Camaro was defective.
> ....
> ... [E]ven if you determine that the Camaro roof system was defective, you must go on to consider whether the defect was a proximate cause of plaintiff's injuries. Plaintiff must prove by a preponderance of the evidence that any defect in the Camaro roof system, whatever you may find it to be, was a proximate cause of his injuries.
> By proximate cause I mean that the defect in the Camaro was a substantial factor that singly or in combination with another cause brought about plaintiff's injuries.... You may consider whether the speed of the Camaro at the time that it collided with the bus and the resulting severity of the accident was the proximate cause or the sole proximate cause of plaintiff's injuries.
> ....
> In relation to speed, ... you may take into account that except where otherwise posted it shall be lawful for the driver of a vehicle to drive at a speed not exceeding 25 miles per hour in any business or residential zone. Please remember that speed is only relevant on the subject of proximate cause and not on the question of whether the product was

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defective.

Defendant reiterated its objection at the new trial motion, but the judge again noted that speed was not a factor in this case.

> With respect to the speed of the vehicle, I don't think I ever suggested certainly that the jury could not consider the severity of the impact on the issue of crashworthiness or the design defect, but certainly the issue of speed, how fast the vehicle was going, was not pertinent to the design of this particular car. It was not relevant. Certainly [it was] relevant on the issue of proximate cause, that was my determination then, it is still my determination today.
>
> The speed of this vehicle was not relevant as to how the vehicle was designed, when it was designed and all of the factors that were taken into account by the design people, the design team, the design managers, and the design engineers. They had a number of things to consider, but what Mr. Green did on the date of ***520** this accident is not pertinent, not relevant to whether that design was defective or not.

We agree with the trial judge. When GM placed this vehicle on the market, it certainly knew that it would be driven at lawful speeds up to fifty-five miles per hour and in some states sixty-five miles per hour. It also knew that the vehicle might collide with another vehicle similarly operated. The experts in this case testified to the crash-testing of vehicles with a purpose of maximizing the safety of the occupants. The experts further testified that the only relevant speed factor in an accident between vehicles of the same size and weight [FN5] is the closing speed between the two vehicles, there being no difference between a vehicle hitting a fixed object at eighty miles an hour and two vehicles travelling forty miles per hour in opposite directions hitting each other. The closing speed between plaintiff's vehicle and the school van of between forty-five and eighty-one miles per hour is well within the range reasonably to be expected in the design of the Camaro.

> FN5. There would be a difference in impact depending on the mass of the vehicle that was travelling at the particular speed, since the force exerted is dependent on both the mass and speed of the vehicle. For example, if a car is hit by a freight train going ten miles per hour or an insect flying or being blown at the same speed against the car, the damage to the car is devastating in the first case and non-existent in the second. This aspect of the cause of the damage to the Camaro was not explored at trial.

Plaintiff's expert testified that closing speeds of up to 110 miles per hour must be anticipated and designed for by automobile ****212** manufacturers, and the speed in this case was well within the realm of anticipated accident speeds that a responsible manufacturer would and does consider in designing an automobile that is reasonably crashworthy. While GM's expert did not discuss particular speeds, he testified that all accident circumstances should be considered in evaluating crashworthiness. He acknowledged that two vehicles travelling within the legal limits could have a 110 mile per hour closing speed. GM's estimate of the closing speed in this case was at least thirty miles per hour under the 110 mile per hour speed. We see, therefore, that if GM was required to ***521** design a reasonably safe vehicle for its intended and reasonably foreseeable use, it should, if possible, have designed a vehicle that could reasonably withstand a crash at considerably higher speeds than in this case.

Also, the speed limit and manner of driving were irrelevant to the plaintiff's crashworthiness issue. As stated in *Green v. Sterling Extruder Corp.*, 95 *N.J.* 263, 471 *A.*2d 15 (1984), once the defendant has "a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct." *Id.* at 272, 471 *A.*2d 15 (quoting Patricia Marschall, "*An Obvious Wrong Does Not Make a Right: Manufacturer's Liability for Patently Dangerous Products,*" 48 *N.Y.U. L.Rev.* 1065, 1088 (1973)). *See also* *Ramos v. Silent Hoist & Crane Co.*, 256 *N.J.Super.* 467, 481, 607 *A.*2d 667 (App.Div.1992) (noting that to appraise contributory negligence against a plaintiff would "excuse the very conduct that gives rise to strict liability on the part of the manufacturer" as well as to the manufacturer's negligence). Thus, the Camaro had to be designed, if feasible, to protect the integrity of the passenger compartment in an accident at a closing speed that could be reasonably anticipated by the manufacturer. If it was not, then the Camaro was defective, regardless of plaintiff's driving speed within such protectable limits. The speed at which plaintiff was driving might theoretically have been greater than that at which plaintiff's reasonable alternative designs would have afforded protection, but such was not the testimony. If the speed was beyond the design

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limits, speed would have been a proper factor to determine proximate cause and a later apportionment of liability. Since the closing speed in this case was recognized to be well within the acknowledged design parameters, and the passenger compartment remained intact, with the exception of the deforming T- bar roof, the trial judge correctly ruled that speed was not a factor in determining whether the vehicle was defective.

As noted in the portions of the charge we quoted earlier, the trial judge did not rule out speed as a factor in the case. ***522** Plaintiff's speed was a definite factor in bringing about the accident, and the jury was told specifically and carefully that it could consider plaintiff's speed. However, speed properly was a factor solely in determining proximate cause, and this was carefully explained to the jury. [FN6] Insofar as plaintiff's injuries were caused solely by the product defect, speed was not relevant.

> FN6. As is explained later in more detail, the limitation of the type of plaintiff's conduct that can be considered to offset responsibility for a design defect precluded the jury from considering any conduct by plaintiff other than that he unreasonably proceeded in the face of the known danger of the defective design. *See Cartel Capital Corp. v. Fireco of New Jersey*, 81 *N.J.* 548, 562-63, 410 *A.*2d 674 (1980); *Suter v. San Angelo Foundry & Machine Co., supra*, 81 *N.J.* at 158, 406 *A.*2d 140.

Defendant urges that the argument against consideration of speed with respect to the defect was overwhelmingly rejected in *Huddell v. Levin*, 537 *F.*2d 726 (3d Cir.1976). The speed issue in *Huddell* was somewhat different from the one before us, but we will analyze it, analogizing the defective seat belt and headrest in *Huddell* with the alleged defective roof design in the case before us. The plaintiff in *Huddell* argued that if a seat belt and headrest design was faulty "it remains faulty whether an accident occurs at 5 m.p.h. or 100 m.p.h." *Id.* at 740. The Third Circuit rejected this argument, stating that the severity of the impact went to the heart of the question of a defect "in terms of the ordinary purposes for which the product, the head restraint, was designed." *Ibid.* The *Huddell* court reasoned that if the seat belt or head restraint failed to protect the wearer in a five mile per hour crash, there would be ****213** an inference of a defect, but that if the seat belt failed in a 100 mile per hour crash, the same argument might lose its validity. "At least in the context of safety design, we see no meaningful way to evaluate the defectiveness *vel non* of a product except in the context of a particular risk." *Id.* at 741.

The problem with the *Huddell* analysis is that it failed to assess the defect and any reasonable alternatives asserted by the plaintiff against the reasonably anticipated use of the product. Although ***523** the manufacturer is not an insurer of the safety of the occupant of a vehicle, the fifty to sixty mile per hour rear-end hit of the 1970 Chevrolet Nova in *Huddell* certainly was a foreseeable accident, and the reasonable alternative design suggested by the plaintiff of a larger and more deformable head restraint correctly persuaded the *Huddell* court that there was sufficient evidence to submit the issue of defect to the jury. *Id.* at 736. We must respectfully disagree, however, with the speed analysis in *Huddell.* The ten versus the hundred mile per hour rear-end collision comparison was appropriate, because a hundred mile per hour hit would be outside of the design parameters. But the anticipatable fifty to sixty mile per hour rear-end hit, with a reasonable alternative design presented, causes us to question whether speed should have been a factor in determining whether there was a defect in the design of the *Huddell* seat belt/headrest assembly. [FN7] Therefore, we depart from *Huddell* and agree with the trial judge's decision in this case to limit the consideration of speed to the issue of proximate cause of plaintiff's injuries.

> FN7. We are not, however, privy to all of the proofs in *Huddell* with respect to the technology available for the construction of the 1970 Chevrolet Nova. If the injury and death of the plaintiff in *Huddell* in a fifty to sixty mile per hour rear-end hit could not reasonably have been avoided by the use of the technology of the time, then the factor of speed would very much be a factor in determining the reasonableness of the design. Available technology, however, is not an issue in the case before us.

II. Reasonable Alternative Design

[5] Plaintiff accepted his duty under the risk-utility formulation (or the alternative *Restatement* formulation) to present a reasonable alternative design to the jury. Plaintiff came forward with two

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such designs, both of which he contended would have prevented the B-pillar and roof deformity. The first alternative challenged the fundamental safety of the T-bar configuration itself and merely claimed that the basic Camaro design with a standard full sheet- metal roof provided sufficient stability to maintain the integrity of the passenger compartment, even in an oblique side ***524** impact such as in the case before us. GM's own tests confirmed this claim. With this design, plaintiff argued that if there were no other design that would have maintained the roof's stability, then the risk of an injury such as this far outweighed any social utility of the T-bar and glass roof. This alternative of not marketing the specific product at all is explored in comment e of the *Restatement (Third) of Torts: Products Liability* § 2(b), *supra.*

Plaintiff's second alternative design posited two stabilizing bars, one connecting the left corners of the A (front) and B (rear) pillars, and the second connecting the right corners of these pillars. The sheet metal roof still would be replaced by two glass panels up to the T-bar, but the roof pillars and T-bar would have been stabilized by the additional side bars.

Defendant's opposition to this configuration was interesting. It asserted that the use of these two additional supports was theoretical at best in that they had never been tested, and that there was no showing that they would have protected the passenger compartment against the roof deformities from the side impact. Note that the redrafted comment f to the *Restatement (Third) of Torts: Products Liability* § 2, after noting that the requirement of an expert depends upon the feasibility and understandability of the alternative design, states:

> Subsection (b) does not, however, require the plaintiff to produce a prototype in order to make out a prima facie case. Thus, qualified expert testimony on the issue suffices, even though an expert has produced no prototype, if it reasonably supports the conclusion that a reasonable alternative design ****214** could have been practically adopted at the time of sale.

Comment f also supports plaintiff's claim that the jury could consider his expert's suggestion that the original roof design without the T-bar construction was an alternative which would have protected plaintiff. The comment notes:

> Furthermore, other products already available on the market may serve the same or very similar function at lower risk and at comparable cost. Such products may serve as reasonable alternatives to the product in question.

Obviously, the jury accepted plaintiff's alternative design evidence and disagreed with defendant.

***525** Moreover, following the verdict in this case and the attendant press coverage, plaintiff's attorneys were contacted by attorneys representing a plaintiff in a similar accident in Tennessee where defendant had apparently been more forthcoming in its discovery. Although plaintiff in this case had requested all testing of alternative designs, defendant did not supply plaintiff with the testing of a design remarkably similar to the one suggested by plaintiff's expert. [FN8]

> FN8. Because defendant was still arguing on this appeal that the alternative of inserting side rails should have been rejected because it had not been tested, plaintiff successfully moved before us to expand the record to include the extensive data the attorneys had received from the Tennessee plaintiff. Defendant first claimed that all of this material had been produced for plaintiff, but then, after searching its own records, withdrew the explanation.

Defendant also claimed that plaintiff's design was different because plaintiff's expert had suggested the two side rails in addition to the T-bar. Defendant's own design had the two side rails suggested by plaintiff's expert, but instead of the welded T-bar in plaintiff's design, defendant's design had the glass panels merely being separated by a simulated T-bar that apparently was not structurally connected to the front and rear pillars. We find this distinction unavailing, since if the sidebars alone protected the passenger compartment, plaintiff's expert's suggestion of the sidebars and a connected T- bar would have provided more protection, not less. The revelation of defendant's own alternative design akin to the one suggested by plaintiff, well supported by defendant's own testing, should put to rest the issue of a reasonable alternative design in this case.

III. Burden of Proving Allocation of Injury

Defendant raises another issue arising from *Huddell v. Levin, supra.* GM contends that plaintiff failed to discharge his burden of allocating the injuries between the accident, for which plaintiff and/or the van driver were responsible, and the design defect for which GM was responsible. Defendant contends

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that although the ***526** judge placed the burden upon plaintiff in accordance with *Huddell v. Levin,* the apportionment proofs were non-existent.

[6][7] We disagree for two reasons. First, between plaintiff and defendant, the jury found that plaintiff's injuries were caused totally by the defective product. Therefore, there was nothing to apportion. This finding has an ample basis in fact. But for the crushing injury to plaintiff's spine, plaintiff was virtually uninjured; he literally walked away from the accident, not even suffering the burns that affected Alexander who had to be helped from the car. Furthermore, plaintiff's own negligence with respect to his claim of a defective product is limited to whether he unreasonably proceeded in the face of a known danger. *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 158-60, 406 *A.*2d 140. Such "known danger" was not the obviously known consequences of plaintiff's speed, but rather must be that posed by the faulty roof design. *See Cartel Capital Corp. v. Fireco of New Jersey, supra,* 81 *N.J.* at 562-63, 410 *A.*2d 674. (There, plaintiff's employees would have had to have been aware of the defective fire extinguisher, not merely the obvious danger of placing grease-soaked paper plates in front of an open-hearth fire.)

[8] The second basis for rejecting defendant's claim warrants detailed discussion since it has been left open by ****215***Crispin v. Volkswagenwerk AG,* 248 *N.J.Super.* 540, 569 n. 1, 591 *A.*2d 966 (App.Div.), *certif. denied,* 126 *N.J.* 385, 599 *A.*2d 162 (1991). The uncertainty concerning where New Jersey places the burden of proof for allocating causation of injuries in a crashworthiness case has attracted national attention. The Reporters' Note for the *Restatement (Third) of Torts: Products Liability* discusses two approaches to the burden of proof question. The annotation to comment d of § 16 states the majority view as the "*Fox-Mitchell* [FN9] approach," which places the burden of allocating the harm caused by the accident upon the defendant. The opposing minority view ***527** is the *Huddell* approach under which "[i]f the plaintiff is unable to quantify the increased harm, even if the plaintiff can establish that some increased harm was caused by the defendant, the plaintiff is unable to recover." *Restatement (Third) of Torts: Products Liability* § 16, Reporters' Note, cmt. d (Proposed Final Draft, April 1, 1997) [hereinafter Reporters' Note].

FN9. *Mitchell v. Volkswagenwerk AG,* 669 *F.*2d 1199 (8th Cir.1982); *Fox v. Ford Motor Co.,* 575 *F.*2d 774 (10th Cir.1978).

In a thirteen-page discussion, the Reporters list twenty-three states, including New Jersey, as either adopting the *Fox-Mitchell* approach or likely to do so. Only six states appear to follow the *Huddell* approach. [FN10] The Reporters' Note at comment d of § 16 cites the footnote in *Crispin, supra,* noting the open issue in New Jersey, in which Judge Baime states:

> FN10. The Reporters' Note at comment d further states that the *Fox-Mitchell* approach, which is the source of § 16(c) of the new *Restatement,* "reflects the more recent developments." They also explain that much of the authority stems from federal courts, assuming how the courts of the state in which they sit would hold. Of decisions actually rendered by state appellate courts, thirteen favor the *Restatement* rule and only three states (all intermediate appellate court decisions) favor the *Huddell* position.

> A rule placing upon the defendant the burden of proof with respect to the apportionment of damages may be more in line with our Supreme Court's recent decision in *Scafidi v. Seiler,* 119 *N.J.* 93, 111-113, 574 *A.*2d 398 (1990). *See also Fosgate v. Corona,* 66 *N.J.* 268, 272-273, 330 *A.*2d 355 (1974). However, this issue is not before us and we need not resolve it.
> [248 *N.J.Super.* at 569 n. 1, 591 *A.*2d 966].

Lastly, the Reporters' Note points out that since *Crispin* the issue has been treated in only two trial court opinions, *McLaughlin v. Nissan Motor Corp., U.S.A.,* 267 *N.J.Super.* 130, 135, 630 *A.*2d 857 (Law Div.1993), and *Thornton v. General Motors Corp.,* 280 *N.J.Super.* 295, 299-303, 655 *A.*2d 107 (Law Div.1994). *McLaughlin* follows the *Huddell* approach; *Thornton* rejects it.

The Supreme Court in *Waterson v. General Motors Corp.,* 111 *N.J.* 238, 544 *A.*2d 357 (1988), treats a similar but not identical issue of the allocation of injuries between the manufacturer of a defective automobile and a motorist who failed to wear a seat belt. While the basis of liability in *Waterson* may be different from the ***528** case before us, both involve a second injury. In the seat belt case, the Court placed the burden upon "defendant [to] ... demonstrate that nonuse of a seat belt increased the extent or severity

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of plaintiff's injury." *Id.* at 269, 544 *A.*2d 357. See also *Schwarze v. Mulrooney,* 291 *N.J.Super.* 530, 540-41, 677 *A.*2d 1144 (App.Div.1996), where in a second injury case involving a shifting load, Judge Baime determined that the defendant had the burden to present evidence enabling the jury to apportion damages. *Cf. Thorn v. Travel Care, Inc.,* 296 *N.J.Super.* 341, 349, 686 *A.*2d 1234 (App.Div.1997) (another seat belt case placing the burden on defendant). Although the Supreme Court has not yet spoken definitively on this subject, we agree with Judge Baime and the *Restatement* Reporters that the direction indicated by the Supreme Court in such cases as *Scafidi, supra,* and *Fosgate, supra,* is with the majority of state courts that have considered the allocation issue.

It thus appears to us that we should apply sub-sections 16(b) and (c) of the *Restatement (Third) of Torts: Products Liability.* These sections read:

> (b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited ****216** to the increased harm attributable solely to the product defect.
>
> (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes. [FN11]

> FN11. Note that the *Restatement (Third) of Torts: Products Liability* § 16(c) "does not formally shift any burden of proof to the defendant. Its effect is that, if the plaintiff has established that the product defect increased the harm over and above that which the plaintiff would have suffered had the product been nondefective, and if at the close of the case proof does not support a determination of the harm that would have resulted in the absence of the product defect then the defendant is liable for all the harm suffered by the plaintiff." Reporters' Note, § 16(c), cmt. d.

We therefore reject defendant's claim that plaintiff did not carry his burden of proof, since the court's decision to follow *Huddell v. Levin* and place the burden on plaintiff was in error. However, as this error favored defendant, it was clearly harmless. Placing the ***529** burden on defendant, where it properly belongs, reveals that defendant did not meet its burden, and therefore no allocation evidence was required of plaintiff.

IV. Charge on a Duty to Inspect

[9] Defendant next raises an objection to a portion of the judge's charge relating to defendant's duty to inspect and test the T-roof designed car. Inexplicably, after the judge charged the risk-utility elements for a design defect; GM's obligation to produce a product fit, suitable and safe; and plaintiff's obligation to prove an alternative safer design, the judge added an additional charge. He stated:

> In determining whether the Camaro was defective, you may take into account that a manufacturer is also under a duty to make reasonable inspection and tests of its products for the purpose of locating obvious or hidden but discoverable defects in the product.

The charge continued for nearly two pages in the transcript, discussing GM's duty to exercise reasonable care in the testing of the Camaro and posing the question of what a reasonable manufacturer would or would not have done under the circumstances.

Notwithstanding the court having given this charge, which obviously did not relate to a design defect, but rather to negligence, [FN12] none of the special jury interrogatories dealt with this issue. Furthermore, the record is replete during both the plaintiff's and defendant's cases with reference to GM's extensive testing of the Camaro both with and without the T-bar roof. We are at a loss therefore to understand why the trial judge gave this portion of his charge.

> FN12. The charge itself is taken from a former model charge to be given in a manufacturing defect case where a plaintiff's claim is based upon a negligence theory of failure to inspect.

[10] It is clear that a breach of any duty to test, insofar as it may exist, is relevant to a negligence cause of action, or in a rare case to a manufacturing defect, but not a design defect claim. As defendant correctly notes, a product that is not defective and has ***530** not been tested at all remains free of a defect. Similarly, a defective product that has been extensively tested is still defective. Proof of a failure to test or of inadequate testing may be evidential as an explanation of why a design was defective, but it is not in itself proof of a separate basis for liability.

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[FN13]

FN13. Testing might also have some relevance in the area of a manufacturing defect on the issue of what was a reasonably safe product, or the unavoidably unsafe product defense, *N.J.S.A.* 2A:58C-3a(3). Similarly, in a warning defect case, testing could be relevant if a plaintiff wished to explain that adequate testing would have caused the manufacturer to warn of a particular problem which was discoverable, or if a defendant wished to claim that extensive testing did not reveal a problem and therefore the manufacturer could not reasonably have known of the problem, and there was thus no necessity to warn. (While here plaintiff did claim that defendant performed inadequate side impact testing, the defect in design was not dependent on this testing). It is also possible that if the defendant were relying upon a state-of-the-art defense under *N.J.S.A.* 2A:58C-3a(1), testing might in some way indicate that there was no practical and technically feasible alternative design.

The charge was relevant only to appraise an aspect of the manufacturer's conduct ****217** which was not properly in issue. The Supreme Court has made it clear that the manufacturer's negligence is not an issue in a strict liability case. In *Waterson v. General Motors Corp., supra,* the Court stated:

> The essence of an action in strict liability is that the injured party is relieved of the burden of proving the manufacturer's negligence. The injured party need prove, for the party's prima facie case, only that the injury- causing product was unsafe or unfit for its intended or foreseeable use at the time it left the manufacturer's control and that the injuries sustained arose from the unsafe or unfit condition of the product.
>
> [111 *N.J.* at 267-68, 544 *A.*2d 357].

The Senate Judiciary Committee Statement, *supra,* accompanying the PLA made it clear that the initial sections define the new product liability action as falling within the categories of manufacturing defects, warning defects, and design defects, and "[e]xcept as modified by the provisions of sections 3 and 4, the elements of these causes of action are to be determined according to the existing common law of the State." Negligence had long been subsumed within strict liability prior to the PLA. *See* ***531***Realmuto v. Straub Motors, Inc.,* 65 *N.J.* 336, 322 *A.*2d 440 (1974); *Collins v. Uniroyal, Inc.,* 64 *N.J.* 260, 315 *A.*2d 16 (1974); *Heavner v. Uniroyal, Inc.,* 63 *N.J.* 130, 305 *A.*2d 412 (1973). Thus, if negligence principles were not to have been applied prior to the Act, as stated in *Waterson,* the same rule would apply to a design defect claim under the Act.

We have analyzed this aspect of the charge in detail to see whether it might reasonably have influenced the jury against defendant. The judge informed counsel that he was including this charge as a consideration for the reasonableness of defendant's conduct in designing the car as it did. GM did not specifically object to the charge, although at one point defendant requested the court only to give the model charge as testing was "captured by the risk-utility factors." We read this objection to have told the court that testing was a fair consideration, but that a separate charge was unnecessary. The objection certainly would not put the judge on notice of defendant's opposition to any charge at all related to the subject of testing. Plaintiff's summation referred to a lack of testing of the T-bar roof, not as a separate basis of liability, but only as an attack upon defendant's having permitted the defective vehicle to be placed on the market and defendant having an inadequate basis to certify that the T-roof Camaro complied with federal motor vehicle safety standards.

[11] We have read this section of the charge in the context of the charge conference, the charge as given, the objections and the interrogatories given to the jury which, as we noted, contain no reference to the testing, but looked only to the issues of defect and proximate cause. Pursuant to *R.* 1:7-2, it was defendant's obligation to make a specific objection to this aspect of the charge before the jury retired, and "no party may urge as error any portion of the charge to the jury or omissions therefrom unless objections are made thereto before the jury retires to consider its verdict." *Ibid.* We are, of course, cognizant of our power to notice plain error, but in the context of the jury's findings, the addition of this charge concerning the duty to test has not been shown "to ***532** have been clearly capable of producing an unjust result." *R.* 2:10-2. The charge failed to affect "a substantial right of plaintiff." *Atlas v. Silvan,* 128 *N.J.Super.* 247, 252, 319 *A.*2d 758 (App.Div.1974). We will reverse on appeal for errors that lacked an objection only if the errors " 'cut mortally into the substantive rights of the defendant.' " *State v. Shomo,* 129 *N.J.* 248, 260, 609 *A.*2d 394 (1992) (quoting *State v.*

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Harper, 128 *N.J.Super.* 270, 277, 319 *A.*2d 771 (App.Div.), *certif. denied,* 65 *N.J.* 574, 325 *A.*2d 708 (1974)). We therefore determine this error to be harmless. *R.* 2:10-2.

V. Damages

We now proceed to assess the damage award. Defendant objects to several aspects of this award: first, the award of interest on future damages; second, the award of prejudgment interest for two years during which plaintiff allegedly delayed the trial; and third, the apparent failure of the jury to discount plaintiff's award for future medical expenses to their present value. On cross-****218** appeal, plaintiff objects to the court having granted the $789,000 offset for the former co-defendants' settlement.

a. Interest on Future Damages

[12] With regard to the $13,000,000 award for future care and medical expenses and the $305,860.35 award for future lost income, GM objects to the award of prejudgment interest. In truth, the award of prejudgment interest for amounts that will not be incurred by plaintiff until after judgment is "questionable." *Ruff v. Weintraub,* 105 *N.J.* 233, 245, 519 *A.*2d 1384 (1987). The Court explained away the logical inconsistency. It first recognized the validity of the argument that the damages would not accrue until after judgment, but then stated:

> However, the public interest in encouraging settlements is an adequate independent basis for the application of the prejudgment interest rule in this case. Thus, this is not an "exceptional" case, as that term has been interpreted [under *R.* 4:42-11(b)].
>
> ***533** Since rule 4:42-11(b) allows for the suspension of prejudgment interest only in "exceptional cases," the trial court's assessment of prejudgment interest on the entire award was proper in this case.
>
> [*Id.* at 245, 519 *A.*2d 1384].

Where the awards are modest, we can understand the Supreme Court's policy to encourage settlement. Perhaps an unstated additional reason is to defray plaintiff's attorney's fees attributable to sums that plaintiff will be forced to pay third parties or which would reduce a compensatory stream of lost future income. [FN14] In the case before us, however, of the $17,767,175.35 judgment returned by the jury, $13,305,860.35 represented future medical expenses and future lost earnings. Based upon the proof submitted to the court concerning the interest for the seven-year period commencing six months after the date of the filing of the complaint through the date of judgment, *R.* 4:42-11(b), the prejudgment interest on the portions of the losses that plaintiff *had not yet suffered* exceeded $8,500,000.

FN14. This court has previously also justified the assessment of prejudgment interest for future loss on the theory that the "interest factor simply covers the value of the award for the period during which the defendants had the use of the moneys to which plaintiffs are found to be entitled." *Statham v. Bush,* 253 *N.J.Super.* 607, 617, 602 *A.*2d 779 (App.Div.1992) (quoting *Busik v. Levine,* 63 *N.J.* 351, 360, 307 *A.*2d 571 (1973)). Such reasoning does not apply, at least under the facts of this case. A plaintiff loses nothing when post-judgment losses are paid without interest. This aspect of the justification for such interest was apparently abandoned in *Ruff. See Statham, supra,* 253 *N.J.Super.* at 618, 602 *A.*2d 779 (discussing *Ruff, supra,* 105 *N.J.* at 245, 519 *A.*2d 1384).

This is an exceptional case. It took seven years to reach trial, but the interest on all sums that accrued during this seven-year period is not questioned by defendant. This was a hotly contested case on the issue of liability, and whatever we may think of defendant's position on the merits of the case, an assessment of prejudgment interest of this magnitude amounts to a penalty bordering on confiscation. [FN15] This is especially so when we look at ***534** the fact that the award spans periods of time when the interest rates were seven and one-half, eight or even eight and one-half percent, although the actual post-judgment rates, which will properly affect post-judgment payments due to plaintiff, will be far less.

FN15. *See* Pressler, *Current N.J. Court Rules,* comment 8 on *R.* 4:42-11 (1997) (stating that suspension of prejudgment interest should be cautiously exercised with consideration of the underlying purpose of *R.* 4:42-11, "namely that prejudgment interest is not a penalty but is rather a payment for the use of money"). We take this statement as applying principally to pre-judgment damages because a defendant has not withheld reimbursing a plaintiff for any

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sums that the plaintiff has not yet advanced.

[13] The Supreme Court in *Ruff* recognized this prejudgment interest as a fiction, but determined that a *reasonable* award furthers the interests of speedy trials and calendar control and provides a payment to needy plaintiffs. *See* 105 *N.J.* at 245, 519 *A.*2d 1384. We note that defendant properly did not include within its objections the prejudgment interest on the $4,000,000 payment for plaintiff's future pain and suffering. *See Friedman v. C & S Car Serv.*, 108 *N.J.* 72, 78, 527 *A.*2d 871 (1987). But it appears ****219** reasonable to us that the payment of the prejudgment interest on this $4,000,000 for the seven-year prejudgment period is sufficient to further the goals expressed by the Supreme Court in *Ruff.* The denial or suspension of prejudgment interest is left to the sound discretion of the trial judge, based on considerations of equity, fairness and justice, viewed in the factual context of the case at hand. *Dall'Ava v. H.W. Porter Co.*, 199 *N.J.Super.* 127, 129-31, 488 *A.*2d 1036 (App.Div.1985). In addition, we may exercise our original jurisdiction. *R.* 2:10-5. In this "exceptional case," we therefore vacate the prejudgment interest on the awards for future medical expenses and lost income. [FN16]

FN16. We cannot help but note that in the Punitive Damage Act, *N.J.S.A.* 2A:15-5.14b, the Legislature has placed a $350,000 cap on the award of punitive damages. Since, as we have noted earlier, interest on future medical expenses and earnings has been upheld solely on the basis of an inducement to settle, and constitutes a *quasi*-punishment for not settling, it stands on a similar footing to a punitive damage award. While we realize that this interest is not actually encompassed in the Punitive Damage Act, the prejudgment interest on the post-judgment expenses in the case before us would be over twenty times the maximum limit on punitive damages, an issue stricken from this case. It seems anomalous that if defendant had wantonly designed the car to inflict this injury, the damages, if the Punitive Damage Act applied, would be limited to $350,000. But for trial delays, not all attributable to defendant, it would be punished for over $8,500,000. This argument, of course, could not have been considered by the Supreme Court in *Ruff,* as the case was decided some eight years prior to the enactment of the statute.

535 *b. Tolling of Interest

[14] Defendant also asserts that all prejudgment interest should have been totally tolled for a two-year period, February 1994 through February 1996, where the delay was caused solely by reason of plaintiff's failure to bring the case to trial. Actually, most of this delay was caused by plaintiff being required to obtain a new liability expert after his initial expert suffered incapacitating strokes. The judge found no misconduct or lack of cooperation and a reasonable basis for the various adjournments required by plaintiff. He therefore determined that there was no reason to foreclose interest for this period.

As to sums due for this period, defendant had use of the funds and could invest them; plaintiff lost this income. The prejudgment interest rule provides a sensible adjustment. The judge made a reasoned decision not to suspend prejudgment interest for this two-year period, and we find no fault with the judge's decision.

c. Proof of Future Medical Expenses--Failure to Discount

[15] Defendant next attacks plaintiff's proof of future medical expenses. Plaintiff's medical expert, Dr. Martin, testified concerning both the amount of plaintiff's annual medical costs, and also about how these costs would be projected into the future. He based these latter projections upon his consultation with plaintiff's economist, Dr. Richard Ruth, to compute the difference in the costs of medical treatment from 1989 when the witness examined plaintiff to the 1996 trial. He based his conversion factor on the increase in the medical services component of the consumer price ***536** index. Applying that percentage charge to plaintiff's medical expenses increased the approximate figure of $220,000 per year from 1989 to $369,250 in 1996. [FN17] (In fact, the base figure of $220,000 was initially increased to $250,000 to account for various elements of medical treatment for which the witness had been given no particular figures). [FN18] He recognized that plaintiff's life expectancy because of his injuries would be less than the normal life expectancy for his age, and reasoned that plaintiff had a ****220** projected life expectancy of approximately thirty-five years.

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FN17. Defendant also questioned Dr. Martin's ability to testify as an economist. He stated, however, that he based his cost projections on his conversation with Dr. Ruth, an economist who testified later in the case and provided a sufficient foundation for Dr. Martin's testimony. The judge, therefore, properly ruled that Dr. Martin's testimony on the consumer price index would be received subject to Dr. Ruth's anticipated expert opinion concerning the consumer price index.

FN18. Defendant did not object to the various categories of future expenses that would be necessary in plaintiff's care and treatment. Special cars, chairs, house renovations, as well as medication and therapy all were included without objection.

Dr. Martin was asked to describe "the formula one would use in order to arrive at what his future cost would be." Over defendant's objection, he answered as follows:

> You take the figure of $369,250 and you multiply that by the 35 years of expected life--of life expectancy and you get the final figure.

At the next trial session, plaintiff's attorney returned Dr. Martin to this topic:

> Q: Doctor, could you just tell us one more time how we take that figure $369,250 and predict how much money is necessary to maintain [plaintiff] medically and with the equipment and with the care that you deem is proper for someone with his condition?
>
> A: Well, we multiply that figure by the projected ... life expectancy at this time of about 35 years.

The jury awarded plaintiff $13,000,000 for his future medical expenses. We note that 35 years multiplied by $369,250 equals $12,923,750.

***537** *Tenore v. Nu Car Carriers, Inc.*, 67 *N.J.* 466, 341 *A.*2d 613 (1975), holds that expert economic evidence "purporting to show plaintiff's aggregate damages," there a wage loss claim, was improper, primarily because the projection before the jury of a "gross figure" or "total resulting damage figure" submitted by an expert "tends to exert an undue psychological impact leading to the danger of its uncritical acceptance by the jury in the place of its own function in evaluating the proofs." *Id.* at 482-83, 341 *A.*2d 613. The plaintiff's experts may, however, "provide the jury with their analyses of trends of future wage increases and discount interest rates generally," and the jurors can "use those trends and rates in arriving at their own independent single-figure appraisal of plaintiff's pecuniary loss." *Id.* at 483-84, 341 *A.*2d 613.

In *Genovese v. New Jersey Transit Rail Operations, Inc.*, 234 *N.J.Super.* 375, 560 *A.*2d 1272 (App.Div.), *certif. denied*, 118 *N.J.* 195, 570 *A.*2d 960 (1989), the trial judge himself elicited testimony from the plaintiff's expert economist "announcing 'bottom line' wage loss figures." *Id.* at 378, 560 *A.*2d 1272. On the next day of trial, the judge concluded that he had erred because such expert testimony "clearly violated the prohibition of such testimony announced in *Tenore*," and he twice instructed the jury to "disregard the bottom line figures." *Ibid.* The jury found the defendant liable, and assessed damages of $413,000. *Id.* at 377, 560 *A.*2d 1272. Noting that the jury's damage verdict of $413,000 was "suspiciously near one of the witness's bottom line figures of $425,000," this court reversed the damage verdict and remanded for retrial on that issue. *Id.* at 379, 383, 560 *A.*2d 1272. Referring to the *Tenore* rule, in *Genovese* we concluded that the trial judge's curative instructions were insufficient to overcome the "strong psychological impact on the jury of the court-invited testimony of gross numbers." *Id.* at 379, 560 *A.*2d 1272.

In *Dunn v. Praiss*, 256 *N.J.Super.* 180, 606 *A.*2d 862 (App.Div.), *certif. denied*, 130 *N.J.* 20, 611 *A.*2d 657 (1992), the plaintiff's economic expert wrote his damage assumptions, calculations and conclusions on four charts which, over the defendants' objection, were permitted into evidence, and accompanied the jury into the ***538** jury room as an exhibit (a separate error, not repeated here). *Id.* at 196-99, 606 *A.*2d 862. On the last chart was a summary that, among other things, said "28 x $36,350." *Id.* at 197, 606 *A.*2d 862. On the issue of economic loss, the jury awarded $1,017,800 to the plaintiff. *Id.* at 198, 606 *A.*2d 862. (The 28 years, multiplied by $36,350, equals $1,017,800). As in *Genovese*, in *Dunn* we reversed the damage verdict and remanded for a retrial on that issue. *Id.* at 202, 606 *A.*2d 862.

[16] We recognize that while *Tenore* "bars 'bottom line' evidence of future wage losses," *Tenore* "does not, however, bar an attorney's argument in summation which includes the bottom line income loss calculation which the expert witness is forbidden

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to make." *Lovenguth v. D'Angelo*, 258 *N.J.Super.* 6, 9-10, 609 *A.*2d 47 (App.Div.1992), *appeal dismissed*, 133 *N.J.* 417, 627 *A.*2d 1128 (1993). There, however, we were careful to state "that we deal here only with a future income loss summation argument that ****221** completes the arithmetic prohibited to the expert witness." *Id.* at 10, 609 *A.*2d 47. We see no reason not to apply the *Tenore* principles, as interpreted by the cases, to testimony concerning the cost of future medical and care expenses.

In its post-trial motion, defendant argued that "what Dr. Martin did violates the *Dunn* case." The judge disagreed, pointing out that the plaintiff's expert is "allowed to give the jury a yearly figure and to give the jury either a life expectancy figure or a work life expectancy figure," and concluding that he perceived no prejudice in this case, "as long as the expert does not give a bottom line figure." According to the judge, Dr. Martin did not do so:

> Yes, Dr. Martin, it might have been better had he not said do the math. But the point is that it's there in black and white and there was nothing improper about giving the jury those two figures. I can't--it's very difficult to conclude now that the jury placed too much emphasis on a bottom line figure. Indeed, he--they weren't given the bottom line figure. The true evil, I think, is for the doctor to have multiplied it all out and arrive at a figure of $12,923,000. The jury's seeing that then perhaps might have been swayed too much by the expert's math.

Plaintiff argues that Dr. Martin's testimony did not contravene *Tenore*, because he merely presented a "formula for calculating ***539** future medical costs," but he "did not make the ultimate calculation of the future medical costs," in that he did not do the multiplication and present the jury with the resulting "bottom line number." While defendant acknowledges that "Martin did not actually put pen to paper to write out the number for the jury," defendant, relying on *Dunn*, argues that Dr. Martin's formula was the "equivalent of a 'projection of a gross figure before the jury submitted by an expert,' which *Tenore* holds is improper."

Dr. Martin did not calculate each year's loss, with inflation factors, and discounting, but only calculated the then-current cost of plaintiff's care and life expectancy. Had he stopped there, and left the use of these figures to the economist, there may not have been error. His problem, as will be explained, was his telling the jury to multiply the 1996 figure by plaintiff's life expectancy, in effect testifying to a total-offset recovery theory, discussed *infra*. Hence we find that plaintiff's proof of future medical expenses was admitted in error. This error was compounded by the omission of instructions on applying present value discounting.

Dr. Martin's testimony was not the sole basis for the calculation of future medical expenses and wage loss damages. Plaintiff's economist, Dr. Ruth, testified in detail concerning two ways to compute future damages: the total offset method and the standard method. The total offset method posits that the rate of inflation will cancel the fair return from the amount awarded when it is prudently invested, and therefore a jury may merely multiply the annual amount necessary to make the plaintiff whole by the relevant number of years. Where the issue is one of lost wages, the net wages after taxes would merely be multiplied by the number of remaining years of the plaintiff's working life; and the future medical expense or future pain and suffering would similarly be multiplied by the plaintiff's life expectancy. This was obviously the method testified to by Dr. Martin and was the first of the two methods proposed by Dr. Ruth.

The second method requires the discounting of the stream of income to its present value, using an appropriate discount rate. ***540** In the case before us, taxes would not be a consideration since the amount of the lost wages would be discounted on an after-tax basis. *Caldwell v. Haynes*, 136 *N.J.* 422, 436-40, 643 *A.*2d 564 (1994). The medical expenses would be largely deductible on plaintiff's tax return, [FN19] unless there is a radical amendment of the Internal Revenue Code.

> FN19. The fund would, if accurately awarded and used, generate income to which an appropriate amount of the principal would be added, so that the fund would be exhausted in the last year of plaintiff's life. The income, therefore would be less than the expenses, which would be deductible when they exceed a certain percentage of plaintiff's income.

****222** As this court noted in *Friedman v. C & S Car Serv.*, 211 *N.J.Super.* 657, 670-73, 512 *A.*2d 560 (App.Div.1986), *rev'd*, 108 *N.J.* 72, 527 *A.*2d 871 (1987), the total offset method does not reflect reality. [FN20] The critical determination is the selection of a reasonable discount rate for the

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standard method. As was noted in our opinion in *Friedman,* from the period of 1926 through 1985 the rate of return for common stocks, corporate bonds, and government bonds exceeded the rate of inflation by varying amounts. *Id.* at 671, 512 *A.*2d 560. What was true in the double-digit inflation of past years, is even more true at the current time when inflation apparently is in check and has for the past few years been held to approximate three percent or even less. Investments in quality common stocks have for the past few years exceeded twenty percent, and, while we assume that these rates cannot be duplicated year after year, a balanced portfolio of stocks, corporate and government bonds and certificates of deposit ***541** certainly would yield far in excess of the projected inflation rates, especially for a portfolio of the size of plaintiff's net award. Even if inflation rates should rise, prudent investment returns should keep well ahead of inflation.

> FN20. The Supreme Court's reversal was on the basis that a pain, suffering and disability judgment should not be discounted, as plaintiff's was not in this case. The Supreme Court distinguished the pain and suffering damages from the economic damages in *Tenore, supra,* where discounting was ordered. The Court required that such economic damages be discounted to present value because such calculation was "neither artificial nor unrealistic." 108 *N.J.* at 78, 527 *A.*2d 871. Despite the Supreme Court's reversal, our opinion in *Friedman* provides a good discussion of the necessity to discount awards for future economic expenses.

These considerations were totally absent from Dr. Martin's testimony, and Dr. Ruth's charts described in the record (and shown to us at oral argument) listed only two columns, one for the total offset computation, and one for a one percent discount rate. Dr. Ruth did testify, however, that if the jury chose to use a different rate it could do so, but this testimony was not aided by any percentage figures by which the jury could adjust its total award. Dr. Ruth was not cross-examined.

Similarly, the trial judge in his charge did not aid the jury beyond the standard charge that it should take into consideration the factor of inflation and the discounting of its damages award for post-judgment medical expenses and future pecuniary losses to present value. The court did not fill in the gap left by the expert witnesses as to what percentages the jury could apply and how to apply them, even though these percentages are supplied as a table attached to our court rules. *See* Pressler, *Current N.J. Court Rules,* Appendix I. The appropriate line representing plaintiff's future life expectancy, as testified to by Dr. Martin without opposition, showing percentage rates in a reasonable range might have given the jury greater options. The brief comment that the jury could use a different rate, if it wished, was insufficient. [FN21]

> FN21. While the judge also noted that the jury should take taxes into consideration, there was no indication that the future medical expenses would constitute a tax deduction which would largely offset the taxes on the income portion of the income and principal which was to be applied to defray the expenses.

We note that defendant offered no evidence on this subject nor even cross-examined Dr. Ruth to bring out the additional figures that could have made the process more understandable to the jury. Here, the array of witnesses called by defendant indicated that this case was prepared with immense resources and with a complete understanding of the issues to be determined. The trial ***542** judge is not expected to try the case for either a plaintiff or defendant. But the judge still has an obligation to make the jury function understandable. Dr. Ruth's testimony explained the application of a one percent discount, and he told the jury that it could also use a two percent, three percent, or four percent discount rate. Dr. Ruth, however, neglected to mention how the jury would perform this function.

While in no way excusing defendant's failure to present evidence on this point, it is apparent to us that the jury's verdict should have been reduced to present value using some reasonable discount rate. We therefore****223** remand the matter to the Law Division on this point for a supplemental hearing. The judge may effect a remittitur after the parties present any necessary proofs concerning a fair market return on a balanced portfolio of prudent investments and a reasonable estimate of medical expense inflationary costs. We recognize this is far from an exact science, but a total disregard of these factors, which in effect applies the total offset method, flies in the face of present reality and demands our

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intervention to achieve substantial justice between these parties. [FN22] We trust that on remand the court can order payment of all sums not in dispute, if that has not been accomplished by this date.

FN22. We understand that our taking this action will affect the amount of the adjustment for prejudgment interest we have already discussed. We also suggest, but cannot order, that the parties consider structured payments that would provide for the actual medical bills, thus compensating for estimates or predictions of plaintiff's longevity, the costs of future services, medical advances, and the like. The authority to direct rather than merely suggest such a solution, with its attendant lower costs, can only come from a legislative or Supreme Court direction.

VI. Application of Settlement Proceeds

Plaintiff has cross-appealed from the judge's decision to deduct $799,000 from the award. The deduction represents the settlement of plaintiff's claim against the van driver and her employer. Plaintiff claims that the jury's determination that 100% of plaintiff's injuries were caused by the defective design of the Camaro ***543** forecloses any liability that the settling defendants could have had in this case. Defendant argues that the settling former co-defendants' liability was not adjudicated in this case, and that they may have been liable for some percentage. GM reasons further that the former co-defendants' liability would have encompassed not only injuries related solely to the accident, but also injuries relating to plaintiff's second injuries assessed under his crashworthiness claim.

Again, we must view the twin issues of causation of the accident and causation of the injury. Given plaintiff's claim that the van was straddling the center line forcing plaintiff to swerve around it (and putting to one side the independent witness' description of plaintiff having been on the van's side of the road with the van totally within its own lane), it is conceivable that a jury could have allocated some small percentage of negligence assessed against the settling former defendants. We proceed with this assumption to determine whether the jury's determination exonerated the settling defendants.

Huddell v. Levin, supra, provides an answer, namely, that the settling defendants in our case would have been in the position of the defendant Levin in that case. The court stated that "Levin may be held liable for *all* injuries, but General Motors may only be held liable for 'enhanced injuries'." 537 *F.*2d at 738 (emphasis in original). Such injuries would be "for the entire consequences of ... [the] accident which the automobile manufacturer played no part in precipitating." *Id.* at 739. A similar statement can be found in *Waterson v. General Motors Corp., supra,* 111 *N.J.* at 271, 544 *A.*2d 357, "A party responsible for the accident is always also responsible for the injuries incurred as a result of the accident." The 100 [[[[judication by the jury in plaintiff's claim against GM tells us nothing concerning the respective liabilities of the van driver to plaintiff or the van driver to defendant for contribution. Theoretically, the van driver might have been liable for a percentage of all damages occasioned by the accident, unless a court held that the design defect was an independent intervening cause, relieving the van driver of her liability.

***544** As we noted earlier, plaintiff's comparative negligence could have been assessed against the van driver's, but plaintiff's comparative fault as against GM would be limited to plaintiff unreasonably proceeding in the face of a known danger. *Suter v. San Angelo Foundry & Mach. Co., supra,* 81 *N.J.* at 158-60, 406 *A.*2d 140; *Cartel Capital Corp. v. Fireco of New Jersey, supra,* 81 *N.J.* at 562-63, 410 *A.*2d 674. [FN23] GM, however, may have ****224** been able to hold the van driver for contribution for some percentage of the total fault responsible for plaintiff's injury. Plaintiff settled with the van driver and her employer after the earlier trial ended in a mistrial because of a hung jury, and GM apparently was satisfied not to have made a cross-claim for contribution or to have applied to the court to assess any percentage responsibility to the settling parties.

FN23. The *Restatement (Third) of Torts: Products Liability* notes that New Jersey is in a small minority of states applying this quasi- assumption of risk rule that grew out of comment n to § 402A of the *Restatement (Second) of Torts*. This rule had been an answer to the old total bar of a plaintiff's contributory negligence. At some point the Court may wish to reassess this rule so firmly stated in *Suter, Cartel Capital* and their progeny. If this were done, the assessment in Part I of this opinion might yield a different result. The Reporters for

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> the *Restatement (Third) of Torts: Products Liability* note that the courts of the country are "sharply split" on the issue of whether a plaintiff's negligent conduct leading to an accident should be the subject of comparative fault. They conclude that a "majority of the courts allow the introduction of plaintiff's conduct as comparative fault in a crashworthiness context." Reporters' Note, § 16, cmt. f. Our rules of limited comparative fault place us with the minority on this issue.

If the settling former co-defendants had been found to have no liability, the principles announced in *Rogers v. Spady*, 147 *N.J.Super.* 274, 278, 371 *A.*2d 285 (App.Div.1977), and confirmed in *Young v. Latta*, 123 *N.J.* 584, 591, 589 *A.*2d 1020 (1991), would permit plaintiff without question to keep the $799,000 as a windfall, [FN24] in addition to the award in this case. *See also* ***545***Johnson v. American Homestead Mortg. Corp.*, 306 *N.J.Super.* 429, 436- 37, 703 *A.*2d 984 (App.Div.1997). But, the windfall exists only where a jury determines that the settling party was 0% negligent. If a percentage of liability had been assessed against these former co-defendants, that percentage of the verdict would have been deemed satisfied. *Young v. Latta, supra*, 123 *N.J.* at 591, 589 *A.*2d 1020; *Rogers v. Spady, supra*, 147 *N.J.Super.* at 277, 371 *A.*2d 285. Lastly, a settlement may be, as here, accomplished with one who is neither exonerated nor assigned a percentage because the non-settling defendant never requested such a finding. Plaintiff claims that in such a case the non-settling defendant, GM, loses its right to claim a credit.

> FN24. In truth, such a settlement is only a windfall by hindsight. Plaintiffs and defendants settle for a variety of reasons, and are guided by enlightened self-interest as it is perceived at the time.

In *Young v. Latta, supra*, the Court assessed the consequences of the usual cross-claim for contribution and a delayed assertion of the claim without a formal cross-claim.

> Although early and diligent pursuit of a non-settling tortfeasor's claim for credit seems to have obvious advantages, there may be tactical reasons, not readily apparent to us, why the non-settler would delay asserting that claim. We emphasize that in this context trial courts should not countenance delay-- that is, the court should not permit the non-settler to wait until the last minute before alerting the court and the plaintiff's lawyer that the settler's conduct will be at issue. Because tactics cannot be allowed to foil discovery, in the context of a claim for credit the court should enforce strictly the Rules setting forth the time prior to trial within which answer to interrogatories may be amended to set forth a settler's fault. *See Rule* 4:17-7.
>
> [123 *N.J.* at 597-98, 589 *A.*2d 1020].

Here, however, the assertion was not just delayed, it was nonexistent. GM never claimed that the jury should assess the van driver's responsibility for plaintiff's injuries; no credit was even suggested until GM requested the $799,000 offset. In such a case, we refer to *Mort v. Besser Co.*, 287 *N.J.Super.* 423, 671 *A.*2d 189 (App.Div.1996), *certif. denied*, 147 *N.J.* 577, 688 *A.*2d 1053 (1997). There, in a slightly different setting (where the settling defendant had no separate liability as a matter of law, *id.* at 433, 671 *A.*2d 189), Judge Keefe commented on the obligations of the non-settling defendant to protect the record.

> Clearly, a non-settling defendant has the right to have a settling defendant's liability apportioned by the jury. ***546***Kiss v. Jacob*, 138 *N.J.* 278, 283-84, 650 *A.*2d 336 1994); *Cartel Capital Corp. v. Fireco of N.J.*, 81 *N.J.* 548, 566-67, 410 *A.*2d 674 (1980); *Rogers v. Spady*, 147 *N.J.Super.* 274, 278, 371 *A.*2d 285 (App.Div.1977). However, that liability must be proven. ****225** The fact of settlement does not prove the settlor's liability. "[I]f no issue of fact is properly presented as to the liability of the settling defendant, the fact finder cannot be asked, under *N.J.S.A.* 2A:15-5.2 or otherwise, to assess any proportionate liability against the settler." *Young v. Latta*, 233 *N.J.Super.* 520, 526, 559 *A.*2d 465 (App.Div.1989), *aff'd*, 123 *N.J.* 584, 589 *A.*2d 1020 (1991).
>
> [*Id.* at 431-32, 671 *A.*2d 189].

This duty on the part of the non-settling defendant to provide percentage of fault applicable to the settling party is also reflected in the proposed *Restatement (Third) of Torts: Apportionment of Liability*, § 27B (Council Draft No. 2, Nov. 13, 1997), which states:

> The plaintiff's recoverable damages are reduced by the comparative share of damages attributable to a settling tortfeasor who otherwise would have been liable to nonsettling defendants for contribution.

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> The settling tortfeasor's comparative share of damages is the percentage of comparative responsibility assigned to the settling tortfeasor multiplied by the total damages of the plaintiff.

Comment f to this section requires the non-settling defendant to prove "that the settling tortfeasor's tortious conduct was a legal cause of plaintiff's injury ..., that the settlement was for the injuries for which the plaintiff is suing, and that defendant would otherwise have a valid contribution claim against the settling tortfeasor." *Id.* at cmt. f. [FN25] Thus, we have before us what appears to be the first case of a procedural bar to the assessment of the settling defendant's liability for the accident. We see no reason to treat the bar any differently from any other assertion of a defendant's factual or legal inability to assert the contribution claim.

> FN25. The Reporters' Note at comment f of § 27B to *Restatement (Third) of Torts: Apportionment of Liability* cites as authority *Spaur v. Owens-Corning Fiberglas Corp.*, 510 *N.W.*2d 854, 863-64 (Iowa 1994). *Cf. Ball v. Johns-Manville Corp.*, 425 *Pa.Super.* 369, 625 *A.*2d 650, 661 (1993). In *Spaur*, there was no legal or factual basis for the non- settling defendant's claim. In *Ball*, the issue turned on factual bases for the claim against the settling defendants.

[17] The jury in our case made no determination of the van defendant's liability. It found only that as between plaintiff and ***547** defendant, defendant was 100% responsible for plaintiff's injuries. This finding would have been the same whether on one hand the school van had completely blocked the road and plaintiff had been operating his vehicle within the legal limit, or on the other, if the van were standing still in its own lane with its flashers activated. Defendant, by failing to have the jury assess the van driver's percentage of fault, gave up its potential claim to contribution. Under the entire controversy doctrine it is now too late to assert the claim. Defendant is not entitled to any credit for the settlement even if it amounts to a windfall to plaintiff.

VII. Application of Pro Tanto Credits

Defendant also claims that if a *pro tanto* credit were to be found proper, the credit should be against the verdict before prejudgment interest is assessed rather than after. Defendant properly notes that applying the credit to the judgment after the prejudgment interest is assessed in effect gives plaintiff the benefit of prejudgment interest on the credit, an amount that itself is subject to no such interest. We have vacated the credit, and therefore the issue is moot.

VIII. Conclusion

We affirm the liability judgment in favor of plaintiff. We vacate the prejudgment interest awarded on post-judgment medical expenses and earnings. We remand that portion of the jury's verdict that awards post-judgment medical expenses and earnings. We direct the judge to enter a remittitur after further argument, with or without proofs, reflecting the present value of these awards as more extensively described in this opinion. We reverse the judge's determination to give defendant a *pro tanto* reduction of the judgment based on plaintiff's settlement with the former defendants, the van driver and bus company. This amount shall be restored to the judgment. Except as stated, we affirm the damage award.

709 A.2d 205, 310 N.J.Super. 507, Prod.Liab.Rep. (CCH) P 15,201

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VII. Judicial Nominations

Brett Kavanaugh – Judicial Nominees

Allegation: While working in the White House Counsel's office, Brett Kavanaugh played a key role in selecting many of President Bush's right wing judicial nominees, and he coordinated the unsuccessful nominations of Miguel Estrada and Priscilla Owen.

Facts:

- Judicial nominees are selected by the President. Whatever one thinks of President Bush's prior judicial nominees, their selection cannot be attributed to an associate counsel to the President.

- Prior to the President's final decision, the judicial selection process is a collaborative one.

  - ✓ The White House Counsel's Office consults with home state senators on both district and circuit court nominees. The Department of Justice and the White House Counsel's Office participate in interviews of judicial candidates. A consensus is reached on the best candidate for the position, and a recommendation is made to the President.

- Over 99% of President Bush's nominees to the federal district and circuit courts have received "well-qualified" or "qualified" ratings from the ABA – the Democrats "Gold Standard."

- One non-partisan study conducted early last year concluded, based on a review of American Bar Association ratings, that President Bush's nominees are "the most qualified appointees" of any recent Administration.

- Miguel Estrada and Priscilla Owen would have been confirmed if given an up-or-down vote by the full Senate.