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

March 24, 2010.

Appearances:

Thomas C. Wright, Wright Brown & Close, LLP, Houston, TX, for petitioners and cross-respondents.
Thomas K. Brown, Fisher Boyd Brown Boudreaux & Huguenard, LLP, Houston, TX; and Craig T. Enoch, Winstead PC, Austin, TX, for respondents and cross-petitioners.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first case from McClinton County, MCI Sales and Service v. James Hinton.

MARSHAL: May it please the Court, Mr. Wright will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS C. WRIGHT: Chief Justice Jefferson and may it please the Court, the jury found in this case that the failure to have seatbelts on a motor coach bus and the failure to have laminated glass on the sides of the bus was an unreasonably dangerous condition. Those findings conflict with the careful federal policy set out by the agency charged with safety in these vehicles, the NHTSA, and are, therefore, preempted. I'd like to first talk about the glazing issue, the glass on the side of the bus. The regulations, that's Part 205 of Section 571, give the manufacturers of buses at least two, maybe several choices, but the two that are at issue in this case, two choices for the kind of glass you use on the side windows--laminated glass, which is what the plaintiffs contended for and tempered glass, which is what this bus had. The bus had two panes of tempered glass. Now the NHTSA in its standard referred to ANSI, the American National Standard, that gives these various descriptions of the kind of glass that could be used in vehicles. Both the ANSI and the NHTSA have concluded that there is no one kind of glass that is the best in all circumstances. In fact, in the case decided last week that we provided the Court from Tennessee, the Lake case, the Court goes into detail in talking about the reasons for not requiring laminated glass in all circumstances. The NHTSA has determined that in some circumstances laminated glass will increase neck injuries because it is more resistant to the force that is going to be applied against it.

JUSTICE NATHAN L. HECHT: What circumstances?

ATTORNEY THOMAS C. WRIGHT: Well, for example, if there were a circumstance where the bus was jostled sufficiently to throw somebody into the window, but it didn't tip over, they would have more of a neck injury in that circumstance. Now the O'Hara Court, to be fair, looked at that and criticized NHTSA's determination and said well, it's only a slight increase and it's only slight neck injuries, but we submit that when the courts and the juries get into second-guessing the NHTSA's safety determinations, then that's a prime case for the application of [inaudible] and doctrines. This is not like a situation in which the NHTSA has made no rule or has declined to regulate at all. So it's because of this choice that's given the manufacturer that we believe the glazing claim is preempted. It's much like Geier. Geier, of course, had to do with seatbelts, but the principle that Geier stands for is where the regulators have given the manufacturer a number of choices and the tort rule argued in the state trial or federal trial, whatever it is, by the jury, where the finding would eliminate one of those claims or one of those options that the manufacturer has, then the claim is preempted.

JUSTICE NATHAN L. HECHT: But it seemed like in Geier that the reason for the choices was that the agencies thought that the choice was safer, that having the choice was safer than not having the choice. How does that compare to the lamination issue here?

ATTORNEY THOMAS C. WRIGHT: Well, many cases that are described here have just stopped at saying where the agency gives choices and the [inaudible] takes one away, it's preempted. In some cases, it said well it has to be that there's a safety reason for the choice, but no one has said that it has to be exactly the situation in Geier. Geier had this timing issue and I think in that case, the agency wanted to do further studies and so forth, but in this case, it's not a question of doing further studies. It's a question of we don't know what circumstance this bus is going to be used in. We don't know what kind of accident is going to happen and there's no one type that's going to be better in all circumstances.

JUSTICE EVA GUZMAN: Does the large size of the windows here, does that create some sort of special or design-related circumstance that would avoid the preemption because the windows are so large.

ATTORNEY THOMAS C. WRIGHT: Well, I saw in their brief. They did not plead that or raise that before and if you look at their citation to the record.

JUSTICE EVA GUZMAN: Assuming that they had that, what impact does it have to this case?

ATTORNEY THOMAS C. WRIGHT: Well, there's no evidence that these windows were any larger than any other motor coach industry, window. And so this is not any kind of special design.

JUSTICE EVA GUZMAN: When the NHTSA, though, promulgated the safety standards, is there anything in there that relates to the size of the windows. In other words, you've got a motor coach and some of them have very small windows and

then you have these large windows and you can imagine why that design would be different.

ATTORNEY THOMAS C. WRIGHT: Well, I have not seen anything in the NHTSA regulations that distinguish it between the size of the windows and I don't think there's anything in the record to show that the size of the windows is larger than what it was when NHTSA passed these regulations.

JUSTICE EVA GUZMAN: So if NHTSA failed to address then a safety standard for buses with large windows, what impact would that have on [inaudible].

ATTORNEY THOMAS C. WRIGHT: Absolutely not, Your Honor, absolutely not. They addressed the standard for all buses. They have repeatedly gone back to this glazing issue even in the past decade as shown by the various documents, some of which have been submitted to the Court on judicial notice and the thing is the NHTSA has decided that look, glazing is not the best way to stop ejections. In fact, the only laminated glass in this bus came out. It was a windshield. So lamination is not going to keep the window in place and that's why NHTSA is saying.

JUSTICE EVA GUZMAN: How does affect the type of injury though when you've got a window that big. I could envision someone being severely injured.

ATTORNEY THOMAS C. WRIGHT: These windows will not decapitate you.

JUSTICE EVA GUZMAN: It could, I mean, conceivably.

ATTORNEY THOMAS C. WRIGHT: Well, this type of glass cannot be annealed glass. Annealed glass is the kind that you might have in your house or whatever, if you break, it's got the big shards. The tempered glass that we have is the kind that breaks into little small pieces and the laminated glass that the plaintiffs argue for will similarly break, but the plastic membrane in between the two kinds will keep it in place. So I don't think there's any question about one of these kinds of glasses decapitating people.

CHIEF JUSTICE WALLACE B. JEFFERSON: Am I correct to conclude that if were to accept your argument on this point then the Fifth Circuit, the Federal Court would say State law applies, but our Court, the State Court would say State law is preempted, is that correct?

ATTORNEY THOMAS C. WRIGHT: Isn't that ironic? Yes, Your Honor, and it is a question of Federal law and O'Hara's been criticized by not only Lake, but the Morgan case, the Supreme Court of West Virginia, and they both decided not to follow it. I think.

JUSTICE HARRIET O'NEILL: More courts have followed it than have not.

ATTORNEY THOMAS C. WRIGHT: More courts have followed it. Well, not any appellate courts. As the chart that we handed out to Your Honor demonstrates, there are only district courts that follow O'Hara. There is no other case other than O'Hara finding preemption on a [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Those cases have been appealed, Spruell, Burns or McCracken, are they at the relative circuit courts now or do you know?

ATTORNEY THOMAS C. WRIGHT: We haven't found the decisions. I don't know if they're pending in those appellate courts or not, but the ones we have cited to the Court in our bench brief are the ones that have been decided, the ones that we could find as of last week. Now, I want to turn briefly to the seatbelt claim. The seatbelts have a different history than glazing. The seatbelt claim is, I think, very similar to the issue that was in BIC Pen, for example, and I will get to that in a minute, but in 1973, the NHTSA after saying that people had started supporting seatbelts in buses, issued a proposed rule making where they put out as an alternative that they would have a two-point seatbelt, not a three-point like the plaintiff's arguing for, but just a lap belt. And after a year study, they withdrew that and gave as reasons for withdrawing that that the

current design was adequate and that they did not find that seatbelts were desirable and they said as such time they do find it, then they would propose something else and that has been NHTSA's stance over the years despite the fact that the NTSB, as this jury was repealing told, the agency that investigates accidents, but does not have the regulatory authority, the NTSB has consistently asked for seatbelts to be on buses and the NHTSA has consistently said no.

JUSTICE DAVID M. MEDINA: Why is that? It seems like there are all kinds of regulations to buckle up children, buckle up passengers, you just can't ride without getting a seatbelt and these big old vehicles that sometimes crash, you can sit there and ride at your own risk. What's the policy reason behind it?

ATTORNEY THOMAS C. WRIGHT: The policy reason was as described in the 1992 letter from Paul Jackson Rice to, in fact, our client, Norm Littler, said there's, the NHTSA had found no safety reason to put on these seatbelts and the explanation that's given in some of the other documents that we've provided is that the seatbelt usage rate was low at that time and if people are not wearing their seatbelts, it's going to be an affirmative danger to other people who are wearing their seatbelts and the seats are going to have to be reconfigured to hold the load of the seatbelt so they're going to have to be stiffer. There is some, we've been criticized for never studying this compartmentalization thing, but if you've been on a bus, you know that you can see that if you're thrown into the seat in front of you, which is pretty close to you, it's got give to it and that's the idea here. Now, what happens in a rollover is quite different and since the advent of the many accidents that have occurred in the last decade, NHTSA, as the plaintiffs have pointed out is now restudying this again and seems to be on the verge or recommending seatbelts, but as the.

JUSTICE NATHAN L. HECHT: It seems like, not to oversimplify it, if NHTSA says we can't tell whether it's safe or not that's different from saying having seatbelts would not be as safe and, therefore, you should have them and why should the first one, which seems like what they've done in this case, be preempted.

ATTORNEY THOMAS C. WRIGHT: Well I don't believe it's a fair characterization to say that we can't tell whether they're safe or not. I think their determination is similar to the glasses. Sometimes it's safer and sometimes it's not. It's not going to help people who are trying to get off the bus because the bus is on fire. So seatbelts, if they were to be used and if you knew what kind of accident was going to happen, might help some people, but there is no one safety device that's going to help everybody.

CHIEF JUSTICE WALLACE B. JEFFERSON: But there's been a lot of talk about preemption over the years and the Supreme Court's kind of gone back and forth, but at least the initial assumption was that there would not be preemption because the presumption is no preemption because state courts determine their tort laws and that it would take some act of expressed preemption or unnecessary implication for preemption before a state court would give up its authority, its police power over regulating the common law personal injury cases and that sort of thing. Now this is a case where there is no expressed preemption and there is no specific regulation that says seatbelts shall be in motor carriers or shall not be in motor carriers. So given all of that, why wouldn't this fit into that category of cases where a state authority prevails over federal and in this case, federal silence on the question.

ATTORNEY THOMAS C. WRIGHT: Well, there's a couple of things in answer to your question. First, in Geier, the Court said there is no special burden for people trying to demonstrate preemption, at least in that circumstance, and commentators and courts have said well, that means that presumption against preemption is out the window and then in Wyeth, Wyeth says there is a presumption, but Wyeth embraces Geier and Wyeth says Geier is distinguishable because in Geier, there is a regulation and in Geier, the Court did not say, I mean the regulators did not say airbags are bad and don't use them. It was, again, you can do A or you can do B.

JUSTICE NATHAN L. HECHT: But it seems that the Supreme Court was saying it is safer to have the choice than to not have the choice.

ATTORNEY THOMAS C. WRIGHT: Well I think the Supreme Court was looking at what NHTSA said.

JUSTICE NATHAN L. HECHT: Well I mean that that seemed to matter to them that the agency had just not said well do

whichever you want, but they had said no, people will be safer in the end if you have this choice.

ATTORNEY THOMAS C. WRIGHT: Well, I think just like in the bus case, it really depends on what kind of accident is in in a car whether they're going to be safer with an airbag or a seatbelt and so similarly in the bus, it kind of depends on what accident you're going to have, which you can't tell in advance.

JUSTICE DAVID M. MEDINA: I may have missed this because you were talking about the similarities between these issues and BIC Pen v. Carter.

ATTORNEY THOMAS C. WRIGHT: In BIC Pen, this Court noted that the agency had considered and rejected a more stringent standard and that's exactly what happened here. NHTSA considered and then rejected and withdrew the standard that they're arguing for, seatbelts in all passenger positions. In fact, they're even arguing for a more stringent one, the three-point. I guess that's more stringent than a two-point, but that distinction aside, the agency considered it, proposed it and withdrew it and that cannot be distinguished on any principled basis from what the Consumer Protection Commission did in BIC Pen. They considered a more stringent standard for the lighter and they rejected it for safety reasons and this agency did the same thing. They found no safety reason for seatbelts. They found the usage rates were too low to justify it and they did a balance. We may not agree with their balance, but is that for us to do. Is that for a jury in Texas to do? As this Court noted in Daimler, do we want juries around the country to decide what kind of seatbelt latch should be installed or should that be decided the NHTSA. Like the West Virginia Supreme Court said in Morgan, they've got some 50-odd counties. If they let each of their counties decide to eliminate one of the possibilities that a manufacturer has, they're not going to have any left and there could be circumstances where somebody would say I was trapped in the back of that bus and it was on fire and I couldn't get out of my seatbelt. The seatbelt didn't malfunction. It was just I was nervous. Why did you put a seatbelt in this bus?

JUSTICE EVA GUZMAN: They're reconsidering the seatbelt issue, that policy argument that someone might be trapped seems to take on a different tone, if you will, since now we have a movement towards seatbelts.

ATTORNEY THOMAS C. WRIGHT: Well, we've got a movement. We don't know what they're going to do and we don't know that they're going to require exactly what the plaintiffs attempted to prove in terms of a safer alternative design, which is specifically a three-point seatbelt. This regulation requires seatbelts for drivers and it requires seatbelts for all passenger positions in buses that weigh less than 10,000 pounds and in each of those circumstances, the seatbelt can be a two-point or a three-point belt, but as the Court said in Carden in a footnote, you have to look at what the regulations were at the time bus was manufactured and at the time this bus was manufactured, the regulations and the regulatory history gave us a choice on the kind of glazing and did not require seatbelts and it wasn't because they weren't thinking about it.

JUSTICE EVA GUZMAN: So how does the seatbelt claim frustrate that federal scheme?

ATTORNEY THOMAS C. WRIGHT: Well the seatbelt claim frustrates the federal scheme because we've got.

JUSTICE EVA GUZMAN: To the extent there is one.

ATTORNEY THOMAS C. WRIGHT: Well I think there is one. There is, you know, we all in Texas get critical of the federal government from time to time, maybe I should just say I do to avoid bringing everyone into that comment, but the fact is the NHTSA proposed this seatbelt requirement and then decided not to do it after they studied and found that there was no safety reason to have seatbelts and if the NHTSA is saying there is no safety reason to have seatbelts, how is it that a jury finding that the bus is unsafe because it doesn't have seatbelts not in conflict with that NHTSA determination and scheme. And so, NHTSA has, over the years, thought that there would be better approaches than requiring seatbelts. Now it looks like maybe they will. We don't know yet. They haven't done it, but the question is what was in effect in 1995 when this bus was made and imported.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any other questions? Thank you, Mr. Wright. The Court is ready to hear argument from the cross-petitioner and Respondent.

MARSHAL: May it please the Court, Mr. Ina and Mr. Brown will present argument for the Respondent.

ORAL ARGUMENT OF THOMAS K. BROWN ON BEHALF OF THE RESPONDENT

ATTORNEY THOMAS BROWN: May it please the Court, I'm Tom Brown. I will be addressing the preemption issues in response to the Petitioner's claims. Mr. Enoch will be addressing the Chapter 33 issue, which is the heart of our petition. I'm going to reserve five minutes for co-counsel and take 15 to address preemption. If I could begin by going back to this fundamental principle, the central question in every conflict preemption case is whether there is an actual, discernible conflict between federal law on one hand and the state common law on the other. One of the things you've heard this morning is you've heard various explanations of a federal policy against seatbelts, things like people being trapped in buses because of fire, people who are unbelted hitting people who are not belted or who are belted. The improved thing to realize is all of this source material, with all due respects, Mr. Wright, there's absolutely nothing in the federal regulation or any official pronouncement or unofficial pronouncement by NHTSA that sets out any sort of policy like that. Here's what NHTSA has done. In 1973, NHTSA early on in the process of regulating vehicles, put out a proposal that said we're going to regulate all buses by changing the way their seats are designed, make them more forgiving, higher seatbacks, cushioned seats, absorption parameters, and we may also look at seatbelts. They came back a year later in 1974 and this is very important, they said when we look at the big intercity buses, we're satisfied with the way their seating design is for now. In other words, they say specifically we don't think that changing that is going to substantially reduce injuries, but they said only one thing about seatbelts. Seatbelt usage surveys do not show that a sufficient number of people would use them to make them cost-effective. That's all they said about seatbelts. That was in 1974.

JUSTICE NATHAN L. HECHT: How far do we go in trying to find out what they were thinking?

ATTORNEY THOMAS BROWN: You know, Justice Hecht, I don't think we should go beyond the actual statute and certainly not beyond the formal pronouncement. Justice Thomas in his concurrence in Wyeth pointed out that we can't let implied preemption become some free-wheeling judicial inquiry into all manner of speculation. When we look at the statute here, we see a statute that says nothing about passenger seatbelts on big buses. You don't have to have them. They don't ban you from having them. It's simply silent. It's very, very similar to two critically important US Supreme Court cases--Sprietsma and Mercury Marine, because in both of those, the Court very clearly said when there is an absence of regulation, we're not going to find it preemptive unless it is accompanied by some truly identifiable policy that says we don't want this thing. I mean, think back to Sprietsma. In Sprietsma, the Coast Guard had some pretty decent arguments against propeller guards. They said, look, propeller guards might prevent penetrating injuries, but they're going to definitely increase blunt injuries. They're going to hamper the way motor boats operate and, more importantly, we don't even see a uniform way to do it that every manufacturer could follow. Therefore, the Coast Guard says in '89, we're not going to require propeller guards. Common law claim comes in and says yes, this boat should have propeller guards and what the Supreme Court said was, we understand that the Coast Guard thought this over carefully. We even understand that they had safety reasons for not requiring propeller guards, but if I can quote them, it is quite wrong to view that decision as the functional equivalent of a regulation prohibiting the states and their political subdivisions from a dock in such a regulation. The Coast Guard did not take the further step of deciding as a matter of policy that the state should not impose some version of the propeller guard regulation and they most definitely did not reject propeller guards as unsafe. Your Honor, we could put the word passenger seatbelts on buses, substitute it in there for propeller guards and the facts of this case and this rationale the Supreme Court in Sprietsma apply perfectly to what we're talking about today.

JUSTICE DALE WAINWRIGHT: Sprietsma does recognize using its terminology that the failure of the federal officials affirmatively to exercise their full authority can take on the character of a ruling.

ATTORNEY THOMAS BROWN: Yes it does.

JUSTICE DALE WAINWRIGHT: It's not totally unequivocal.

ATTORNEY THOMAS BROWN: No, but I think the key thing there, if you look at it, Justice Wainwright, what they say in Sprietsma and this is by the way beautifully explained in a case that we cited called Fellner v. Tri-Union Feuds. It's a Third Circuit case, [inaudible] denied, but here's the critical issue and I think you see this even in Sprietsma. The Court says a failure to regulate can be preemptive, but essentially it's only in two situations. It is applicable in a field preemption setting. You're looking at the NLRB. You're looking at ERISA. These are situations where in field preemption where the federal courts have totally occupied the field, they don't operate, they don't require, no requirement. That's preemptive. And in the second instance where you sometimes see this is where the Court has gone that extra step and said, for example, in this case, not only are we not going to require seatbelts, but we're going to say we don't want you to require seatbelts. When you see those situations, the absence of regulation can be preemptive, but in both Myrick, which is a safety act case, a vehicle case, and in Sprietsma, which is based on the boating act, which is obviously a very, very similar statute, in both of those sort of situations, where there's a clear awareness on the part of Congress that state law is going to operate, the Courts have said there, there is no preemptive effect simply because there was a failure to regulate.

JUSTICE NATHAN L. HECHT: What about laminated glass?

ATTORNEY THOMAS BROWN: Laminated glass. It's very simple. I believe O'Hara got it right. I think the Fifth Circuit was actually correct on this, Justice Hecht, and the key distinction between the way O'Hara saw it in the Fifth Circuit and the West Virginia Court in Morgan v. Ford saw it was the view of the actual standard and let me just say this. The Lake v. Memphis Landmin [sp], that Tennessee appellate case, it just says, hey, we see two choices, O'Hara and Morgan and we're going to follow Morgan. It doesn't offer any independent rationale. So when you look at Morgan and O'Hara, here's the distinctive issue that I think led O'Hara to the correct result. They looked at 205 and said what the industry has said for years. 205 is a material standard. It's not a performance standard. When you go back and look at 205, there's nothing about performance that's in there. It is a classic material standard that says if you're going to use glass in a motor vehicle, it's got to be one of these types and so the O'Hara court looked at that and said and here I think is an important thought. Geier protects choice when it is choice with a purpose. Geier never gave a blanket preemptive effect to choice. I mean, if that were true, you could do what they're saying in this case, which is say well they gave us a choice to do nothing or do something and we did nothing in terms of protecting passengers. Therefore, we follow the choice. Geier is not that broad. The idea of Geier is that it's choice with a purpose and the O'Hara court said that. O'Hara court said look, 205 is a materials standard that gives you various options of what you can put in a bus that has to meet these basic standards, but it is nothing more than that and as a result, it's much like this Court determined in Wells in the Great Dane v. Wells case. A minimum standard like that can certainly be supplemented by the common law.

JUSTICE NATHAN L. HECHT: This doesn't seem to me like Geier, but it is odd that you're given a choice and you really don't have a choice. I mean, NHTSA gives you a choice, but a jury doesn't give you a choice.

ATTORNEY THOMAS BROWN: Well, you know, there's some truth to that, but I think it's like the Geier court said, if you recall. When they were talking in Geier, they said, listen, we recognize that under the common law savings clause, there are going to be occasions where a common law jury, a state jury is going to say do something that is a higher standard than what the federal regulations have said, but here's what the Court said in Geier. Occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce safety standards. I mean, that's the way Congress put the statute together. They gave that common law savings clause, I believe, very clearly out of a recognition that there truly is a complementary role to be played by state court juries. You see this also.

JUSTICE NATHAN L. HECHT: Even if they go opposite ways?

ATTORNEY THOMAS BROWN: Excuse me?

JUSTICE NATHAN L. HECHT: Even if they go opposite ways?

ATTORNEY THOMAS BROWN: Even if they go different ways. If there's truly a direct actual head-on conflict.

JUSTICE NATHAN L. HECHT: Well, in the laminated glass case, they could go opposite ways. One jury could find

laminate is better. The other jury could find the other kind is better.

ATTORNEY THOMAS BROWN: You know, there is always that possibility and I would say you could see how logically that sounds like an untenable situation, but I would say one thing obviously, there are practical issues to whether that would happen, but more importantly, that's not for us to decide, I don't believe, with all due respect, because Congress has said we're going to leave room for the states to operate. We're not totally occupying this field. We're going to allow states to operate through their common law, through jury verdicts, not through regulation. That's got to be identical, but through common law cases, that's exactly what the saving clause means. So when we look at this particular care and you say where is, if someone asks, where is the federal purpose that would be obstructed by the jury verdict here. A jury in McClinton County said we look at a bus accident where a bus tips over on its side, six people are killed and everyone on the bus is injured and we think that bus needs seatbelts. How does that finding conflict with the federal purpose when the federal purpose that we see here, was it in 1974, the Court said not enough people are wearing seatbelts to require it. They never have spoken formally on the issue again until in the 2000's when they said, we're going to require seatbelts. Now that vacuum of over 30 years cannot stand for an expression of a congressional opposition to passenger seatbelts. It's simply leaving the manufacturers free to operate. In 1989, NCI wrote to NHTSA and we've got this in our brief and they said, hey, Arizona wants us to put some seatbelts on buses. How do we anchor them? And what NHTSA wrote back was not seatbelts. We don't want seatbelts. No, they wrote back and they said, we leave that entirely up to your discretion because our standards don't dictate. It's up to you. That does not indicate a federal policy against passenger seatbelts.

JUSTICE HARRIET O'NEILL: If the seatbelt claim is not preempted, do we breach the laminated glass claim?

ATTORNEY THOMAS BROWN: I don't believe you do. In this case, Justice O'Neill, every plaintiff had a causative finding related to the absence of seatbelts. Certain plaintiffs, particularly those who were ejected, which I believe were somewhere in the neighborhood of 13 people, the ejected plaintiffs had a separate causative finding on the glass claim. So, no, if you find that the seatbelt claim is not preempted, there truly is no need to reach the glass preemption claim. The one thing I would like to add to this discussion is there is a critical letter that gets talked about and you'll see it not only in the MCI briefing, but you see it in that Lake v. Memphis Landmin [sp] case and if you will recall, this is that 1992 letter that was talked about earlier by Mr. Wright. A couple things I would like to say about the '92 letter in the closing of my time. That letter to me is very, very similar to the one that you looked at in the Limmer case and that was the Rowe letter, Shelley Rowe, who was the director of the Office of Transportation for the Federal Highway Administration and you will recall in that case, the plaintiff's attorney sent a letter to Mrs. Rowe and said how do you view this particular issue. It was conspicuity tape, is a traffic control device. Rowe writes back and says no it's not. And what the Court said and I think rightly is we don't need to confuse an informal statement of an employee of an agency of a formal regulation and we disregard that letter because when we look at it and really test it, it doesn't hold up. Can I take you now to this 1992 letter? MCI had written to no intention to NHTSA and said is a New York statute that requires seatbelts going to be preempted. General Counsel writes back and says, accurately, yes, because it falls within the expressed preemption clause. Then he makes a single statement that has been elevated to the level of congressional purpose. He says, because NHTSA expressly finds there is no need for seatbelts or any other form of occupant protection on a bus. The problem with that and this is a great example of why you don't put too much weight in informal private letters as he misstates what was actually found by NHTSA in '74. He footnotes it and says I'm talking about '74, but in '74, NHTSA never expressly determined there was no safety need for seatbelts. NHTSA said we cannot justify the regulation when no one is wearing seatbelts and literally, I went back and looked carefully at that '74 language and I would invite the Court do so. What you will find is the NHTSA says seating standards. We don't see a need for seating standards, but as to seatbelts, they say one thing and one thing only--not enough people are wearing them to make an effective standard and that's the last thing they said until they came out in 2007 and said we're about to require seatbelts. That was reaffirmed in 2009 that said we're going to have seatbelts on buses by 2010 or 11 and in closing, I would simply say as to that seatbelt claim. This is no different than what we saw in Great Dane v. Wells. In that case, the common law claim was moving in front of where the government was going, but in doing so, it was not conflicting. Right here, this jury operated in a regulatory vacuum when it said this bus ought to have seatbelts and a manufacturer, who for 40 years, has done no testing or improvement in passenger safety, ought to have put them on. That does not conflict with a regulatory vacuum that is only filled or completed by an agency that says we think you're right and we're going to require exactly the same thing. I'll yield the remainder of my time to Mr. Enoch. Thank you.

ATTORNEY CRAIG ENOCH: May it please the Court, I'm here to present James Hinton's petition for cross petition for review on addressing the error we believe was in the court of appeals' opinion where it held that a Central Texas bus was a settling person under the comparative negligence Chapter 33 of the text, the Civil Practice and Remedies Code. I wish to make just two points in the brief time that I have available. A settling person is a person who has promise to pay money to a claimant. Now, of course, we have the separate issue at the time of submission, but I believe the big issue here was there a promise to pay money to James Hinton or any other claimant in this case by a Texas Central bus. I believe the Court will find that there is no promise to pay in the facts of this case. Further, the court of appeals reversed the trial court's judgment. The trial court's ruling on whether to submit Central Texas bus as a settling person is a discretionary ruling and we believe the court of appeals to reverse that decision has defined that the trial court clearly erred. So in our petition, our point is not that the court of appeals clearly erred. Our position is that the court of appeals cannot hold that the trial court clearly erred in declaring Central Texas not a settling person because there is o promise to pay in this record. My point would simply be this that the insurance company that was involved in this case thought the claims far exceeded the value of the policy and paid the policy proceeds into the registry of the bankruptcy court and the bankruptcy court had a choice to either send all the parties back to a state court to liquidate their tort claims or it could set up a mechanism to resolve the liquidation of those tort claims within the bankruptcy court. The first step was to go to a mediator and the mediator said okay, I'm looking at all these claims. They exceed the amount of funds that are available. You are going to have to, if you all agree, we will split them up on percentages. Some of them chose not to agree and put at risk their recovery in the trial plan that came out later. This is not an uncommon. It's uncommon in the bankruptcy court because usually they go back to a trial court to resolve. But the circumstance of an insurance company paying the face value of a policy into the registry of the court to let the claimants fight over it is not an uncommon problem. It happens regularly. I'll point the Court to also Chapter 33.0011, subsection 6(b). It purposely contemplates that a co-defendant in bankruptcy to the extent insurance proceeds are available may be added as a responsible third party, may be joined as a responsible third party. MCI tried to join Texas Central Bank as a responsible third party. They failed to do so because they didn't do so timely and the trial court said it's not a responsible third party. They go up on appeal. They lose that issue and that issue is not here before the Court. They didn't bring that issue. The statute specifically contemplates that they could have. If the Court adopts their rule, that a co-defendant goes into bankruptcy where the claimants must battle their claims in bankruptcy court and the insurance company deposits the funds in the registry of the Court and this Court concludes that's a promise to pay by the debtor to a claimant, that ruling will swallow subparagraph 6(b) of that particular Chapter 33 because there would be no need ever to add them as a responsible third party because they would always be a settling person because the mere payment of the funds into the registry of the Court becomes the promise to pay.

CHIEF JUSTICE WALLACE B. JEFFERSON: Hinton had not received any of those funds at the time of submission, is that correct?

ATTORNEY CRAIG ENOCH: That's correct so I don't think the payment paid for submission is really the issue. It's was there a promise to pay. Although they do say in their brief that this deposit in the court was a payment, but at the very least, it was a promise to pay.

JUSTICE NATHAN L. HECHT: So I'm trying to be sure I understand your position. If there hadn't been a bankruptcy and the same sequence of events happened, it just happened in state court, would they be settling persons or not. Is it your position that because they voluntarily pay the money into the registry of the court to have it divvied up however that that keeps them from being a settling party or that it's the presence of the bankruptcy court that does it?

ATTORNEY CRAIG ENOCH: Your Honor, I think it's because the payment into the registry of the Court is not a promise to pay by the debtor and I'll give you an example. I'm sorry I didn't cite this in the brief because I didn't think on the reasoning was particular relevant, but post submission will provide you the site to Pacesetter v. Pearce Homes. It's [inaudible] I'm sorry I forget the page, but it's a 2002 decision out of the Austin Court. This very argument that MCI makes about settling person was the argument that was made in the Pacesetter's case when the two defendants were arguing over contribution, Pacesetter was arguing that Pierce Homes was a settling defendant, a settling person. The reason because Pierce Homes paid the plaintiff. They paid the plaintiff before submission and the point of that was the argument was made that they went off, they had agreed to go to arbitration. They went to arbitration. The arbitrator made the award. Pierce Homes paid the award without challenging it, without taking it further on appeal, came back to the trial court where the trial court finished up other issues

and they said that person paid a claimant for their potential liability and was a settling person. The court of appeals says no, no, no. They litigated the issue. They're not a settling person and I think their argument would allow in that circumstance even after an arbitration paid before the case is tried to make them a declared settling person. In our case, same thing. The mere payment of money in the registry of the Court where the claimants are left to battle over it cannot be a promise to pay.

JUSTICE NATHAN L. HECHT: So in that situation, your position is the remedy is responsible third parties.

ATTORNEY CRAIG ENOCH: Yes, Your Honor, and they attempted to bring that. They were late in doing so and the Court didn't allow it. That issue is not before the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any other questions? Thank you.

REBUTTAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF PETITIONER

ATTORNEY THOMAS C. WRIGHT: May it please the Court, the passengers being thrown around the bus and the egress when the bus is on fire is discussed in Appendix 11 to our brief on the merits on page 12. It's a study commissioned by the Department of Transportation, the parent agency that's over NHTSA, over NTSB and so I'm creative, but not that creative. I would say that Sprietsma is very important in this case because Sprietsma itself says, as Justice Wainwright pointed out, that the failure to regulate can sometimes be preempted. In Sprietsma, the Coast Guard itself said that its actions were not intended to be preempted and Sprietsma, as most courts have characterized it, involves a complete lack of regulation. That is not what we have here. On the seatbelt issue, we have a determination not to require seatbelts for safety reasons.

JUSTICE EVA GUZMAN: Can you discuss this choice with its purpose language. I guess I'm trying to.

ATTORNEY THOMAS C. WRIGHT: Well, that's what O'Hara says. Other courts have not gone that far to say choice with a purpose, but there is a purpose. So the question is not whether we agree with the purpose, not whether we think that the NHTSA was wrong or should have done something else sooner, but did they have a safety, a policy reason for not requiring seatbelts. The answer to that is clearly yes, even according to Mr. Brown, their decision was based on the low usage rates. These other documents show what will happen if there are seatbelts on the bus and people are not using them.

JUSTICE EVA GUZMAN: How does a low-usage rate though equate to, I guess, a purpose? It's almost saying we're not going to.

ATTORNEY THOMAS C. WRIGHT: Because it will be affirmatively harmful to other passengers if they're not used.

JUSTICE EVA GUZMAN: But does that equate to low-usage rate? Does that mean that we have to have some sort of reasoning they're not being used because they're harmful or they're not being used so we're not going to regulate it?

ATTORNEY THOMAS C. WRIGHT: Well the Geier case, I believe, points out the history in seatbelts in cars and the debacle that happened when the government mandated that you couldn't start your car unless your seatbelt was fastened sometime ago and people, the country would not accept that. So there is a lot of balancing. You want people to use the safety device. It's like the lighter. If it will make it too hard to use, nobody's going to use it. They are going to go back to matches. If you make these buses too onerous, people may not buy them. People may decide, look, if I've got to wear a seatbelt, I'm just going to ride in my car because the bus has an aisle. You're supposed to be able to walk down the aisle. There's no stewardess like there is on an airplane making you sit down and do your seatbelt.

JUSTICE DAVID M. MEDINA: I think people use buses because it's a cheap way to get around to wherever you're going and they don't have cars.

ATTORNEY THOMAS C. WRIGHT: Well, that's for some kind of thing. This trip, I believe the evidence would show these are a group of friends that chartered a bus to go from Hewitt, that's not exactly where they were, but anyway that area, up to

Dallas and I believe they all had cars, but I think they would have preferred to ride in community up on the bus. So you can say a lot of things about NHTSA, but you can't say that they have just completely ignored this issue for 30 years. The NTSB has the evidence in this case demonstrated. It was all over NHTSA's case all these years and you know what? No is an answer. It doesn't mean you're being ignored. No is an answer. I've had to say that to my children once in awhile, but the idea that NHTSA has ignored this because they have not required it is just simply not true. But it is interesting and it should be a clear sign of why this case should be preempted that the evidence in this case focused a great deal on how underfunded NHTSA was, how they were wrong, how NTSB had the right attitude. Are we going to get in a situation of having juries decide between two federal agencies which one had the right idea, which one didn't do the right thing, which one was underfunded, didn't study enough, came up with a wrong rule. All we need to know is that NHTSA made this rule and made it for a safety reason. The same thing applies to the glazing issue.

JUSTICE DAVID M. MEDINA: Can you respond to the promise to pay issue before you run out of time?

ATTORNEY THOMAS C. WRIGHT: Yes, if this Court adopts the plaintiff's position, you're going to turn the clock back about 25 years. It was not just put in the registry of the court. You don't need to be that broad. In this case, there was a plan agreed to by the plaintiffs under which they would apportion this money. The mediators came up with this apportionment, but the most critical thing is in the litigation plan, the Hintons, plural and meaning all of these claimants that are in this case here, could at any time agree among themselves to take the money. The other group of plaintiffs took their money early. This group did not. At any time, they could have taken it.

JUSTICE DAVID M. MEDINA: Doesn't that create a problem when they don't take the money and there's no agreed settlement? It's just an insurance company trying to get out of the litigation to save its costs, [inaudible] the policy limits, don't have to pay defense costs, case is over for them. Let everyone else fight for the money.

ATTORNEY THOMAS C. WRIGHT: Well if they don't want any of the money, they could have dropped their claim and then that individual would not be a settling person, but they kept their claim. They wanted to ride this fence and you have to ask yourself why did they leave the money in the bankruptcy court so long. The only reason is to try to get around Chapter 33 settling party and they talk about the Dow case and other cases that are completely different. These people not only had the right to get the money out at any time, they were limited, they could not get more than 10% more than the mediator found. So it's not like one of them could get all the money and the rest of them would be gone. In their briefing, they used the word "Hinton" to talk sometimes about Mr. Hinton himself and sometimes about the whole group. There was no possibility that the whole group was not going to get any money because the insurance company couldn't get it back, the [inaudible] bowers, they had already gotten their settlement out of the bankruptcy court.

JUSTICE DAVID M. MEDINA: What happens if a party disagrees with their allocation?

ATTORNEY THOMAS C. WRIGHT: They didn't have the right to disagree. This so-called litigation was they chose a special master. There was nobody opposing them. Central Texas, the bus company or the bus driver didn't have any lawyer in there arguing against their position. We didn't have any standing to be in there and were expressly uninvited. So they go in front of a special judge and among themselves decide how to divide up the money. That's not litigation. And we respectfully ask the Court to reverse and render on preemption and thank you for your attention.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Wright. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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