IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRANCISCO AYALA AND EDUVIGES AYALA, INDIVIDUALLY, AS REPRESENTATIVES OF THE ESTATE OF YANCEY AYALA, DECEASED, AND AS NEXT FRIENDS OF FRANCISCO SERGEY AYALA, A MINOR	§	CIVIL ACTION NO. 2-04CV-395
vs.	§	
FORD MOTOR COMPANY	§	

PLAINTIFFS' RESPONSE TO DEFENDANT FORD MOTOR COMPANY'S MOTION FOR PARTIAL SUMMARY TUDGMENT

INTRODUCTION

Plaintiffs Francisco Ayala and Eduviges Ayala, Individually and as Representatives of the Estate of Yancey Ayala, Deceased, and as Next Friends of Francisco Sergey Ayala, a Minor (hereinafter "Plaintiffs"), respectfully submit this Response to the Motion for Partial Summary Judgment filed by Defendant Ford Motor Company (hereinafter "Ford").

Ford's motion argues that Ford is permitted to claim the presumption of non-liability based on compliance with applicable federal regulatory standards codified at TEX. CIV. PRAC. & REM. CODE § 82.008(a) and that Plaintiffs may not rebut the presumption under TEX. CIV. PRAC. & REM. CODE § 82.008(b)(2) because such a finding by the jury would conflict with federal law, as described in the Supreme Court's decision in *Buckman Co. v. Plaintiffs' Legal Comm., 531* U.S. 341 (2001). The motion is without merit and should be denied.

First, because the state and federal statutes and regulatory regimes at issue in *Buckman* and this case are so widely divergent, *Buckman* preemption is inapplicable to

this case. Congress intended for state tort law to play an integral role in furthering the statutory goals of the National Traffic and Motor Vehicle Safety Act (hereinafter the "Safety Act"), which counsels against finding conflict preemption. Moreover, Section 82.008(b)(2) simply does not impede or frustrate federal law.

Second, courts have narrowly construed *Buckman* and limited it to cases where plaintiffs directly allege fraud on a federal agency as part of their affirmative claims for relief, not where plaintiffs' claims are based on standard state tort law theories and agency interactions arise in the case as a defense or other collateral matter. Just two months ago, a federal district court in Iowa rejected a *Buckman* motion by Ford on this ground – as have numerous other courts involving other defendants.

Finally, if Ford is correct that Section 82.008(b)(2) is preempted, the Court must invalidate all of Section 82.008 because subsection (b)(2) cannot be severed from the remainder of the section without doing great violence to the intent of the Texas Legislature in enacting the provision. Compliance with federal regulatory standards was not meant to absolutely immunize manufacturers; yet Ford's argument, if accepted, would bring about that result.

STATEMENT OF GENUINE ISSUES

Plaintiffs controvert the following facts set forth in Ford's Motion, though none of those facts is essential to Ford's motion or this response, which involve only the legal question of whether Section 82.008(b)(2) is preempted. First, Ford claims that the power window switch design in question was governed by Federal Motor Vehicle Safety Standard **118** (hereinafter "FMVSS 118"). See Ford Motion at 1, Statement D. In fact, prior to amendment effective September 14, 2004, FMVSS 118 did not regulate switches in motor vehicle occupant compartments for operating power windows. See Federal Motor Vehicle Safety Standards; Power-Operated Window, Partition, and Roof Panel

Systems, 69 Fed. Reg. 55517, 55519 (Sept. 15, 2004), attached as Exhibit A hereto. Second, Ford claims that the power window switch design of the vehicle in question complied with FMVSS 218. See Ford Motion at 2, Statement G. Actually, as noted above, FMVSS 118 had not been amended to govern window switches as of the date of manufacture of the vehicle at issue in this case; thus Ford's factual claim is erroneous. Next, Ford asserts that it is entitled to the presumption of no defect in Section 82.008(a), see Ford Motion at 2-3, Statements I and L, but, again, no standard was then "applicable to the product at the time of manufacture and that governed the product risk that allegedly caused harm." TEX. CIV. PRAC. & REM. CODE § 82.008(a).[1]

ARGUMENT

I. TEX. CIV. PRAC. & REM. CODE § 82.008(b)(2) Is Not Preempted

A. The Court Must Apply the Presumption Against Preempting State Product Liability Law

Ford bases its preemption argument on the claim that TEX. CIV. PRAC. & REM. CODE § 82.008(b)(2) conflicts with federal law and is therefore impliedly preempted. Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and 'objectives of Congress," *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002) (quotations omitted). In order to prevail, however, Ford must overcome the presumption against preemption that obtains in all preemption cases, especially those like that, like this one, threaten invalidation of state tort law. As the Supreme Court observed in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), which involved federal preemption of state product liability law:

[1] Ford also claims that Plaintiffs have asserted that the entirety of Section *82.008* is preempted, see Ford Motion at 2, Statement K, but that allegation does not appear in Plaintiffs' most recent amended complaint.

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. **In all preemption cases,** and particularly in those in which Congress has "legislated.. . in a field which the States have traditionally occupied," Rice *v.* Santa Fe *Elevator Corp., 331* U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947), we "start with the assumption that the historic police powers of the States were not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ibid.*

Id. at 485 (emphasis added, ellipses in original); *accord Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. *597, 605* (1991); *Hillsborough County v. Automated Med. Labs., Inc., 471* U.S. 707 (1985). The presumption against preemption is equally applicable in conflicts preemption cases: "Where a state statute conflicts with, or frustrates, federal law, the former must give way. In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption." CSX *Trnsp., Inc. v. Easterwood,* 507 U.S. 658, 663-64 (1993) (citations omitted); *Chamberlan v. Ford,* 314 F.Supp.2d 953,958 (N.D. Cal. 2004) ("There is a presumption against implied preemption of State law in areas traditionally regulated by the States")?

In *Buckman,* the Court declined to apply the traditional presumption against preemption of state product liability law employed in *Medtvonic* because plaintiffs' claims were directly founded on "the relationship between a federal agency and the

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[2] Some decisions predating *Buckman* ignore precedent like *Easterwood* and fail to apply an anti-preemption presumption where implied preemption is at issue. See, e.g., *Perry v. Mercedes Benz of North America, 957* F.2d 1257, 1261 (5th Cir. 1992). However, in *Buckman,* the Court did not decline to apply a presumption because of a categorical rule against doing so in implied preemption cases; rather, the Court assumed the presumption would apply in implied preemption cases founded on state, rather than federal interests. *See Buckman,* 531 US. at 347-48. Thus, *"Buckman* reaffirmed the principle that the first thing courts must address is whether there is an anti-preemption presumption." Caraker *v. Sandoz Pharmaceuticals Corp.,* 172 F. Supp. 2d 1018, 1039 n. 17 (S.D.Il. 2001) (applying presumption in implied preemption case). Moreover, *Medtronic* makes clear that the anti-preemption presumption applies "in all preemption cases." 518 U.S. at 485.

entity it regulates," which is "entirely federal in character," and existed "solely by virtue of the FDCA disclosure requirements," as distinct from "traditional state tort law which had predated the federal enactments." *Id.* at 347, 352-53. This differentiated *Buckman* from *Medfronic,* which "arose from the manufacturer's alleged failure to use reasonable care in the production of the product, not solely from the violation of FDCA requirements," id. at 352, and where the anti-preemption presumption therefore applied.

Here, as in *Medtronic,* Plaintiffs' claims are firmly based on Texas product liability law. While one aspect of that law, Section 82.008(b)(2), looks to a defendant's interaction with a federal agency, the fact that the Texas Legislature has chosen to import this inquiry into Texas law does not lessen the solicitude for state police power that courts are enjoined to exercise when analyzing preemption. Where a state's choices about protecting the health and safety of its citizens through its product liability law are at stake, courts must apply the traditional presumption against preemption out of deference to the role of states as "independent sovereigns in our federal system," *Medtronic,* 518 U.S. at 485 – a concern not implicated when the plaintiff's claims or defenses depend solely on federal law, as in *Buckman.* The Court should therefore apply the customary presumption against preempting state tort law in this case.

B. Unlike in *Buckman,* There is No Conflict Between the Applicable State and Federal Regulatory Reaimes

Buckman, which Ford contends governs this case, turns on the specific requirements of a particular federal regulatory regime. Crucial differences between that regime and the state requirements at issue in *Buckman* and those in play here, however, dictate a different outcome to the preemption question.

Initially, it is important to appreciate the limited preemptive scope of the Safety Act. The Safety Act does no more than "set[] up a web of very thin strands of preemption." Campbell v. General *Motors, Corp.*, 19 F. Supp. 2d 1260, 1273 (N.D. Ala. 1998). It "was not 'intended to centralize all authority over the required area in one decision-maker: the Federal Government."' *Id.* at 1273 (quoting *Freightliner Corp. v. Myrik,* 514 US. 280, 286 (1995)). Rather, "states play a role in the enforcement of the [Safety Act's] federal regulatory scheme." *Juvenile Products Manufacture Ass'n, Inc. v. Edmisten, 568* F. Supp. *714, 717* E.D.N.C. *1983); accord Chamberlan v. Ford,* 314 F.Supp.2d 953, 958-60 (N.D. Cal. 2004) ("motor vehicle safety is an area of traditional State police power.. . Congress did not intend the MVSA to be a pervasive scheme"). Congress' primary goal in enacting the Safety Act was automotive safety, not uniformity through federal regulation. *See Perry v. Mercedes Benz* of *North America, 957* F.2d 1257, 1265-66 (5th Cir. 1992); *accord Hyundai Motor Co. v. Alvarado, 974* S.W.2d 1, 10-12 (Tex. 1998). And Congress fully expected that regulating the conduct of the automakers through the mechanism of state tort law would further its goal of automotive safety, not hinder it, See *Perry*, 957 F.2d at 1266 ("Congress evidently thought that preserving common law liability would further the goal of motor vehicle safety").

The complimentary role states are intended to play in the realm of motor safety is ensured by the Safety Act's preemption provision and savings clause. The preemption provision preempts only *lower* safety standards than those set by National Highway Traffic Safety Administration (hereinafter "NHTSA"), see 49 U.S.C. § 30103(b), while the savings clause provides: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). Together, these provisions confirm that "'Congress sought to meet its goal of minimizing the number of deaths and injuries caused by auto accidents by

setting forth minimum standards *and* leaving common law liability in place."' *Alvarado,* 974 S.W.2d at 11 (quoting Perry, 957 F.2d at 1265-66) (emphasis in original); *accord, Pokorny v. Ford Motor Co., 902* F.2d *1116,* 1122-23 (3d Cir.), *cert. denied, 498* U.S. 853 (1990).

In this case, Ford relies on implied conflict preemption of the sort employed in *Buckman,* not the express preemption set forth in 49 U.S.C. § 30103. And state rules not expressly preempted may still be impliedly preempted through the "ordinary workings of conflict pre-emption principles." *See Geier v. Am. Honda Motor Co., 529* US. 861, 869 (2000). But while a "limited express preemption provision does not foreclose the operation ordinary conflict preemption principles.. . neither must it be ignored in the analysis. That analysis is peculiar to the statutes in question and must be resolved by guidance as to the legislative purpose behind the federal law." *Jeffers v. Wal-Mart Stores, Inc.,* 171 F. Supp. 2d 617, 623 (S.D.W.V. 2001); *accord, e.g., Medtronic,* 518 U.S. at 485 ("'the purpose of Congress is the ultimate touchstone' in every pre-emption case") (quoting in part *Retail Clerks v. Schermerhorn, 375* U.S. 96, 103 (1963)); *Gade v. Nat'l Solid Waste Management Ass'n, 505* U.S. 88, 96 (1992) (same). Because it is the purpose of the federal statute at issue here to further Congress' goal through the functioning of state tort law – unlike in *Buckman* – the Court should be especially hesitant to hold that same tort law impliedly preempted.

More specifically, there is simply no conflict between Section 82.008 and the Safety Act of the sort that compelled the outcome in *Buckman.* The preemptive federal regulations at issue in *Buckman* governed an exhaustive approval process for certain medical products requiring applicants to submit information to the FDA such as proposed labels, statements about similar products, supporting data and other materials. See 531 U.S. at 344-46. The approval process amounted to a "comprehensive

scheme. . . [that] imposes upon applicants a variety of requirements that are designed to enable the FDA to make its statutorily required judgment as to whether the device qualifies" for approval. The *Buckman* court also noted the variety of statutory tools at the FDA's disposal to require that applicants communicate truthfully. See id. at 349. Thus, the heart of the federal-state conflict in *Buckman* involved competing ways to prevent and punish fraud by applicants against the FDA – through the FDA's federal rules, or via state court adjudications of fraud-on-the-FDA claims. See *id.* at 348-51.

By contrast, Section 82.008(b)(2), as it would apply in this case, makes no effort to police mandatory communications between companies like Ford and NHTSA. Section 82.008(b)(2) covers not merely fraud perpetrated by a regulated entity on an agency, but simply the non-fraudulent decision by an entity not to share information relevant to the adequacy of the agency's standard. See **TEX.** CIV. PRAC. & REM. **CODE** § 82.008(b)(2). Thus, in this case, Section 82.008(b)(2) would allow Plaintiffs to rebut the presumption of non-liability by introducing into evidence documents and other information Ford chose not to submit to NHTSA in the rulemaking conducted prior to the promulgation of FMVSS 118. This choice by Ford was not a violation of any of the federal anti-fraud or law enforcement provisions Ford cites in an effort to analogize this case to *Buckman*. See Ford Motion at 8 (citing 18 U.S.C. § 1001; 49 U.S.C. §§ 30163, 30165 and 30166; 49 CFR § 510.1-12; 49 CFR § 578.1-6). Nor did it constitute "fraud." Instead, under NHTSA rules, Ford's decision to submit information to the administration about FMVSS 118, or not, was entirely up to Ford. See 49 CFR § 553.17 ("Any interested person *may* participate in rulemaking proceeding by submitting comments in writing containing information, views or arguments") (emphasis added). Putting the evidence Ford legally withheld from NHTSA before a state court jury therefore does not penalize Ford for committing fraud on a federal agency, and NHTSA's anti-fraud rules and

Section 82.008(b)(2) are not alternate methods to reaching the same goal (preventing fraud against NHTSA). Nor does Section 82.008(b)(2) conflict with federal policy because NHTSA rules take no position one way or the other as to the submission of information by automakers while NHTSA considers a new safety standard. Such rules neither require such submissions nor punish failure to make them. Accordingly, there is no contradiction between Section 82.008(b)(2) and the Safety Act; the two operate in separate spheres and pose no risk to one another.

Nevertheless, Ford argues that, as in *Buckman,* the operation of Section 82.008(b)(2) in a case like this will "cause applicants to fear that their disclosures to [the agency], although deemed appropriate by the Administration, will later be judged insufficient in state court," resulting in a "deluge of information that the Administration neither wants nor needs." *Buckman,* 531 U.S. at 351; Ford Motion at 4. The flaw in this argument is that, unlike in situations where applicants are required to provide required information to obtain regulatory approvals, NHTSA does not "deem appropriate" or inappropriate automakers' submissions about proposed safety standards. Nor does NHTSA take a position on "wanting or needing" disclosures from manufacturers. As noted above, the Safety Act and NHTSA are legally unconcerned with whether Ford shares potentially relevant information. Hence, if manufacturers deluge NHTSA with data to avoid rebuttal of the presumption embodied in Section 82.008(b)(2), NHTSA will not be "burdened," see *id.,* or otherwise negatively affected. NHTSA rules and policy are completely neutral as to whether manufacturers should submit no information, some information or a torrent of information; legally, there is no such thing as too much. Consequently, introducing evidence that a manufacturer has not previously shared with a regulatory body in a state trial cannot be said to infringe upon NHTSA decision-making.

To be preempted, Section 82.008(b)(2) must squarely and concretely conflict with the Safety Act. "Speculative or hypothetical conflict is not sufficient: only State law that 'actually conflicts' with federal law is preempted." *Chamberlan v. Ford, 314* F. Supp. 2d at 957 (quoting *Cipollone v. Liggett Group, Inc., 505* U.S. 504, 516 (1992)); accord *Rice v. Norman Williams* Co., 458 U.S. 654, 659 (1982). Because the overall structure and purpose of the Safety Act disfavors preemption of state tort suits, and because Section 82.008(b)(2) in no way duplicates or intrudes upon federal remedies for fraud on the FDA, the Court should deny Ford's motion,

C. *Buckman* Preemption Does Not Apply to Traditional State Tort Claims

Even if Section 82.008 threatened greater conflict with the Safety Act, preemption under *Buckman* would still be unwarranted because Plaintiffs' claims are founded on traditional state law tort theories of product liability, not fraud on NHTSA. Since *Buckman,* most courts have rejected the understandably vigorous efforts of product manufacturers to expand its holding beyond causes of action for fraud on federal agencies to defenses and other collateral issues. This Court should do likewise.

The decision in *Buckman* repeatedly emphasized that the plaintiff's claims existed "solely by virtue of [federal] disclosure requirements," not "traditional state tort law." 531 U.S. at 352-53. Accordingly, "[c]ourts have generally read *Buckman's* specific holding rather narrowly," *Caraker v. Sandoz Pharmaceuticals Corp.,* 172 F. Supp. 2d 1018, 1039 n. 17 (S.D. Il. 2001), limiting it to instances where the plaintiffs' causes of action were directly based on fraud against a federal agency, and plaintiffs sought to recover for that fraud. See, e.g., *Woods v. Gliatech, Inc.,* 218 F. Supp. 2d 802, 809 (W.D. Va. 2002) ("it is worth noting that a number of courts have read *Buckman* to apply only to fraud claims that necessarily depend on violations of specific federal requirements. These

courts rely on Buckman's distinction between fraud on the FDA claims and other state tort claims for fraudulent labeling") (quotation omitted). The most analogous example occurred just two months ago in another case involving Ford, where Ford made arguments essentially identical to those it makes here.

In *Baier v. Ford Motor* Co., __ F. Supp. 2d __, 2005 WL 928615 (N.D. Iowa, April 21, 2005), Ford argued that the plaintiff's product defect claims were barred by Iowa's statute of repose. *Id.* at 3. The plaintiff countered with an exception to the statute of repose in cases where the manufacturer "intentionally misrepresents facts about the product or fraudulently conceals information about the product and that conduct was a substantial cause of the claimant's harm." *Id.* Since the misrepresentation the plaintiff proffered was Ford's concealment of unfavorable test results from NHTSA, Ford argued that the exception was preempted by *Buckman*. The *Baier* court emphatically rejected Ford's argument:

> *Buckman* does not apply in the present case. In the [sic] this case, the plaintiffs are not seeking to hold Ford liable for fraud alleged to have been perpetrated against a federal agency. Rather, the plaintiffs are attempting to hold Ford liable for alleged defects in the manufacture of a product, an area which state law has traditionally occupied. The allegedly fraudulent concealment committed by Ford only arises in the present case as an attempt to get past a bar on plaintiffs' tort claims. *Buckman* prohibits a plaintiff from bringing a state-law fraud cause of action against a defendant based on fraud committed against a federal agency. The fraud "claim" in this case is not a cause of action, but rather is an exception to a statute of repose. The plaintiffs are not seeking to punish the defendant for fraud committed against a federal agency, but are seeking to hold Ford responsible for alleged defects in the design and manufacture of a car. Therefore, *Buckman* does not apply and the plaintiffs' claim of concealment, to avoid Iowa's statute of repose, is not preempted by federal law.
>
> Furthermore, there is no evidence that Congress intended to impliedly preempt product liability claims of the type brought by the plaintiffs in this case. Federal law impliedly preempts a common law claim when that "claim would conflict with, or stand as an obstacle to accomplishing the purposes" of the federal regulation. *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398,400 (8th Cir. 2000). In the present case, Ford has not cited any

> specific federal regulation that the plaintiffs' claims would conflict with or to which the claims would stand as an obstacle. Instead, Ford argues that allowing the plaintiffs' claims to move forward would "retroactively burden the relationship between NHTSA and Ford." However, the Eighth Circuit Court of Appeals has held that a product liability claim regarding alleged defects in an automobile was not impliedly preempted under NHTSA. Id. at 402. Therefore, because there is no evidence that the purpose of any federal regulations would be in conflict. with the plaintiffs' state common law claims, the plaintiffs' claims are not impliedly preempted by federal law.

Id. at 9.

Baier represents persuasive authority this Court should follow. As in *Baier,* Plaintiffs here do not seek to punish Ford for withholding information relating to FMVSS 118, but for violating state tort law relating to product defects, "an area which state law has traditionally occupied." *Id.* Likewise, the "fraud 'claim"' here – or claim of non-fraudulent withholding – is not a cause of action, but a statutorily prescribed way to avoid a defense asserted by Ford. Here too, the fact that product liability claims are not generally preempted by the Safety Act counsels against extending *Buckman* to these facts.

Other decisions, some also involving Ford, join *Baier* in confining *Buckman* preemption to cases where the plaintiff directly seeks relief for a defendant's fraud against a federal agency. For instance, in *Chamberlan,* the Court rejected Ford's reliance on *Buckman* in a case where the plaintiffs sought a judicial recall of certain vehicles, holding *Buckman* "inapposite.. . because the Plaintiffs neither base their claims on the MVSA nor allege 'fraud on the agency' by Defendant." 314 F. Supp. 2d at 967. Similarly, in White *v. Ford Motor* Co., 2003 WL 23353600 (D. Nev. 2003), the Court rejected 'Ford's argument that the plaintiffs could not introduce evidence of Ford's communications with NHTSA during a recall investigation because it was prohibited by *Buckman*: Plaintiffs "are not attempting to prove liability for their injuries by way of a

state tort action alleging violation of NHTSA regulations, such that the preemption holding of *Buckman* would come into play." *Id.* at 23 n. 18. Here too, the Plaintiffs do not propose to offer evidence of withheld information to establish liability based on a violation of NHTSA regulations; rather, Ford's liability, if any, will be based on transgressing Texas defective product law.

Other courts have also held that *Buckman* does not apply to claims based on state law - even where some aspect of the case entailed a jury's inquiry into the interaction between the defendant and federal regulators. In Dawson v. *Ciba-Geigy Corp., USA, 145* F. Supp. 2d 565 (D.N.J. 2001), the court rejected the defendant's claim that the plaintiffs' state law misrepresentation claims were preempted: "*Buckman* thus clarified that traditional state law tort claims **(even those which parallel [federal] requirements), are** not necessarily preempted by [federal law] and are not necessarily the same as 'fraud on the FDA' type claims." Id. at 573 (emphasis added, parenthetical in original). Here, as in *Dawson*, plaintiffs' rebuttal to the non-liability presumption under Section 82.008(b)(2) may parallel NHTSA interactions, but because relief is sought on traditional state law tort claims, preemption is inappropriate.

Similarly, in *Zahl* v. *Harper*, 282 F.3d 204 (3d Cir. 2002), the Third Circuit rejected the claim that New Jersey was preempted from disciplining a doctor based on the doctor's alleged fraud in dealings with Medicare. The *Zahl* Court noted that *Buckman* is based on claims for relief directly predicated on fraud against a federal agency, whereas "here, in contrast to *Buckman,* the proceedings against Zahl are based upon the historic primacy of state regulation of matters of health and safety **and only indirectly and tangentially affect federal interests."** *Id.* at 212 (emphasis added). The instant case is also one where the plaintiffs' claims are based on state health and safety regulation, an

area of state authority expressly countenanced by the Safety Act, and where the inquiry "only indirectly and tangentially affect[s] federal interests." *Id.*

In St. *Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation, 2004* WL 45503 (D. Minn. 2004), the court rejected *Buckman* preemption where plaintiffs' state law labeling and failure to warn claims entailed introducing evidence of the defendants' misrepresentations to the FDA:

> Defendant apparently would have the Court read' *Buckman so* as to preempt any and all claims in which any inquiry into the FDA regulatory process is necessary.
>
> It is difficult to adopt such an expansive reading of *Buckman*.. . The critical distinction between *[Medtronic]* and *Buckman* is not that a court or jury would have to examine what the FDA knew, and when it knew it. Instead, the meaningful distinction is a fundamental difference I the very source of the cause of action. That is, in *[Medtronic],* the cause of action was based in traditional state tort law; in sharp contrast, the cause of action asserted in *Buckman* depended entirely on the regulatory relationship between the federal government and the FDA.

Id. at 16-17. In this case, as in *St. Jude,* it may be that rebutting the presumption under Section 82.008(b)(2) could feature some "inquiry into the [federal] regulatory process," and it is possible that a jury may therefore consider "what [NHTSA] knew, and when it knew it," but that does not warrant expanding *Buckman* to preempt Plaintiffs' rebuttal rights under Texas tort law. See *id., accord Bryant v. Hoffman-La Roche, Inc., 585* S.E.2d *723, 725* (Ga. Ct. App. 2003) (rejecting *Buckman* preemption where state law tort claims alleged); *Woods, 218* F. Supp. 2d at *810* (same); *Eve v. Sandoz Pharmaceutical Corp., 2002* WL 181972 at 3-5 (S.D. Ind. 2002) (same); *Caraker,* 172 F. Supp. 2d at 1039 (same); *Globetti v. Sandoz Pharmaceutical Corp.,* 2001 WL 419160 at l-3 (N.D. Ala. 2001) (same).

Ford places reliance in *Garcia v. Wyeth-Ayerst Labs, 385* F.3d 961 (6th Cir. 2004), see Ford Motion at 9-10, but that decision does not merit adherence by this Court. In the first place, the plaintiff in *Garcia* conceded that *Buckman* preemption applied to her case,

see *id.* at 965; thus the Court had no occasion to consider arguments of the sort Plaintiffs make here, and the portion of the decision on which Ford relies is necessarily *dicta.* For example, the court observed, without any analysis or support whatsoever, that the difference between *Buckman* preemption of a cause of action directly based on defrauding a federal agency, and preemption of a rebuttal to a presumption of no defect under state tort law, is "immaterial." The complete absence of any reasoning supporting this conclusion, no doubt due to the plaintiff's concession of the point, deprives *Garcia* of significant persuasive value. Moreover, *Garcia* failed to cite or consider the many decisions, some of which are cited above, that distinguish between basing recovery on fraud against a federal agency as opposed to litigating a state claim that requires tangential inquiry into federal regulatory workings. This lack of reference to other applicable case law also renders *Garcia* dubious precedent.

Most important, *Garcia,* like *Buckman,* involved the federal Food, Drug and Cosmetic Act, not the Safety Act. For the reasons discussed above, the Safety Act reflects Congress' concern that, in the automotive setting, state tort remedies remain viable as important tools furthering Congress' goal of promoting public safety. Unlike in *Buckman* and *Garcia,* the implied preemption question must be considered against this unique statutory and legislative backdrop. Moreover, the specific nature of the federal standards-setting process under the Safety Act, the absence of any requirement that manufacturers submit information during comment periods, the fact that Ford's withholding of information does not implicate any federal anti-fraud rule, and the fact that Section 82.008(b)(2) therefore makes no effort to police fraud on NHTSA, all present distinct circumstances that render cases decided according to the dictates of different state and federal regulatory regimes, such as *Buckman* and *Garcia,* inapposite.

In the end, the weight of authority, including the most persuasive authority, indicates that *Buckman* should not be read to preempt state legal proceedings unless plaintiffs directly seek to impose liability because of fraud directed against a federal agency. It is not enough that a state court jury may examine agency communications or the lack thereof. Where, as here, plaintiffs' claims are based on traditional state law, and questions of agency interactions arise tangentially, *Buckman* preemption does not apply.

II. If *Buckman* Preemption Is Applicable, the Entiretv of Section 82.008 is Preempted

Ford assumes that, if the Court accepts its preemption argument, the remainder of the Section 82.008 will stand despite the inoperability of subsection (b)(2). In fact, if the Court accepts Ford's preemption argument, it should further hold that the entire section is invalid.

Section 82.008 was enacted in 2003 as part of Texas House Bill 4, which contains the following severability provision: "If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."[3] Like all legislative enactments, severability is a question of legislative intent. See Corp. *Health* Ins., Znc. *v. Tex.* Dept. *of Ins.*, 215 F.3d 526, 539-40 (5th Cir. 2000), *vacated on other grounds, 536* U.S. 935 (2002); *Tex. Dept. of Banking v. Restland Funeral* Home, Inc., 847 S.W.2d 680, 682 (Tex. App. - Austin 1993). Thus, the severability

[3] See House Bill 4, § 23.03. The text of House Bill 4 can be found at the Texas Legislature's Online website at http://www.capitol.state.tx.us/cgibin/db2www/tlo/billhist/Hmatrix.d2w/report?LEG=78&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=00004&SORT=Asc.

question here is whether the Texas Legislature intended that the remainder of Section 82.008 "can be given effect without the invalid provision or application," i.e., subsection (b)(2).

The legislative history of Section 82.008 makes clear that the Texas Legislature did not intend for the presumption embodied in that section to stand alone, without each of the statutorily prescribed means for rebutting it. Initially, this is obvious from the nature of a presumption. "Most presumptions are rules of evidence calling for a certain result in a given case **unless the adversely affected party overcomes it with other evidence.** A presumption shifts the burden of production or persuasion to the opposing party, **who can then attempt to overcome the presumption."** *Blacks* **Law** Dictionary (8th ed. 2004) (emphasis added). In other words, a presumption without the ability to rebut it is not a presumption at all but an absolute rule of law, and there is every indication that the drafters of Section 82.008 rejected an absolute rule protecting manufacturers based on their compliance with federal standards.

On the contrary, the evidence is clear that the Legislature did not want manufacturers to be immunized in instances where they failed to disclose information relevant to the adequacy of the standard. In colloquy before the passage of House Bill 4 the House and Senate sponsors of House Bill 4 stated:

> The purpose of the government standards defense is to provide manufacturers some protection where they comply with mandatory federal standards that are specifically designed to address that alleged defect in question in a lawsuit. However, **the bill does not create immunity for a manufacturer...** If the manufacturer learns of information that demonstrates that the standard is not, in fact, adequate and fails to share that information with the federal government, this evidence can be presented to the factfinder to show that the standard is not adequate and thereby rebut the presumption.

Tex. House Journal, 78th Leg. R.S., 84th day, June 1, 2003, pp. 6038; Tex. Senate Journal, 78th Leg. R.S., 84th day, June 1, 2003, pp. 5005-06 (emphasis added). This legislative

history could hardly be clearer: Section 82.008 was not intended to provide absolute immunity; rather, the protection was intended to depend on what a manufacturer did with information relevant to the adequacy of the standard. Moreover, the legislators involved in the drafting of Section 82.008 confirm that this was the intent of the Legislature. See Affidavits of Rep. Vilma Luna and Sen. Juan Hinojosa, attached hereto as Exhibit B. Yet if Ford's motion is granted and subsection (b)(2) is carved from Section 82.008 while the remainder is given effect, Ford will have obtained exactly what the drafters of this legislation did not intend to confer: full immunity regardless of Ford's disclosures and regardless of the implications the withheld material might have for the adequacy of FMVSS 118.

That the presumption found in Section 82.008(a) cannot stand without its rebuttal provisions is apparent when Section 82.008 is contrasted with the Michigan statute at issue in *Garcia,* on which Ford relies for its argument about severability here. See Ford Motion at 10. Unlike Section 82.008, the Michigan statute does not establish a rebuttable presumption. Compare Mich. Comp. Law § 600.2946(5) with C.P.R.C. § 82.008(a). Rather, the Michigan law simply provides that a manufacturer is "not liable" if the drug at issue was approved by the FDA. See Mich. Comp. Law § 600.2946(5) Thus, the court in Garcia correctly characterized this provision as "immuniz[ing] drug manufacturers from liability," though the immunity is "subject to [the] exception[]" involving fraud on the FDA. 385 F.3d at 963-64. The Sixth Circuit therefore recognized that the severability question in Garcia was "whether the Michigan Legislature would have preferred the situation where drug manufacturers would enjoy immunity in the absence of a federal finding of bribery or fraud on the FDA, or the situation urged by the Plaintiff where drug manufacturers would enjoy no such immunity at all." 385 F.3d at 967 (emphasis added).

While the Garcia court determined that the Michigan Legislature would have preferred immunity without exceptions to no immunity at all, see ***id.,*** the legislative history in Texas, as discussed above, leads to the opposite conclusion. The drafters of Section 82.008 expressly stated in the legislative history that they were not granting immunity to product manufacturers, but only establishing a rebuttable presumption. That presumption is incoherent without both of its means for rebuttal. Allowing it to stand alone, effectively granting total immunity for manufacturers, distorts the Legislature's purpose in enacting Section 82.008. Because the presumption in Section 82.008 cannot be divorced from the rebuttal provisions without doing violence to the intentions of the Texas Legislature, this Court should reject Ford's argument as to severability and hold that, if subsection (b)(2) is preempted, the entire section is invalid.

Respectfully submitted,

By: _____

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on the following in accordance with the Federal Rules of Civil Procedure by e-file on June 28, 2005 and U. S. Mail:

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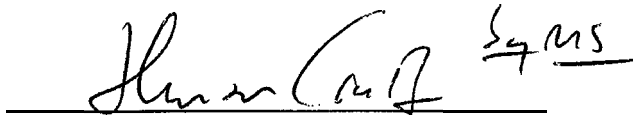


Hunter Craft

Regulatory Review proceeding. In FR Doc. 04–6822, published in the Federal Register of April 1.2004, the document incorrectly indicated that a new or modified information collection exists that requires approval by the Office of Management and Budget ("OMB"), and contained an incorrect **DATES:** section. This document corrects the **DATES** section to read: **DATES:** Effective June 1, 2004.

Dated: September 9, 2004.

Linda C. Chang,

Division *Chief, Mobility Division.*

[FR Doc. 04-20784 Filed Q-14-04; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–2670; MM Docket No. 02-335; RM–10545]

Radio Broadcasting Services; Coopersville, Hart and Pentwater, MI

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document denies a Petition for Reconsideration filed by Fort Bend Broadcasting Company directed to the ***Report and Order*** in this proceeding. See 69 FR 8334, February 24, 2004. With this action, the proceeding is terminated.

DATES: Effective September 15, 2004.

FOR FURTHER INFORMATION CONTACT: Robert Wayne, Media Bureau (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the ***Memorandum Opinion and Order*** in MB Docket No. 02-335 adopted September 1, 2004, and released September 3.2004. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. telephone 1–800-378-3160 or *www.BCPIWEB.com*. The Commission will not send a copy of this ***Memorandum Opinion and*** Order pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because this document denied the petition for reconsideration.

Federal Communications Commission.

John A. Kacousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04-20788 Filed 9–14–04; 8:45 am]

BILLING CODE 671241-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Adminlstration

49 CFF? Part 571

[Docket No. NHTSA 2004-I 9032]

RIN 2127–AG36

Federal Motor Vehicle Safety Standards; Pow&-Operated Window, Partition, and Roof Panel Systems

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: *Final rule.*

SUMMARY: This. final rule amends our standard for power-operated windows, partitions, and roof panel systems to require that switches for these windows and other items in new motor vehicles be resistant to accidental actuation that causes those items fo begin to close. The purpose of this amendment is to reduce the number of injuries and fatalities to people, especially children, that occur when they unintentionally close those power-operated hems on themselves by accidentally leaning against or kneeling or standing on the switch or when other occupants accidentally actuate the switch in that manner.

There are simple, effective and inexpensive manufacturing solutions that vehicle manufacturers can use to meet the requirements of this final rule. Vehicle manufacturers could comply by shielding or recessing their switches or by designing them so that pressing on them in the manner described above will not cause these windows and other items to begin to close.

Although they need not do so, manufacturers may choose instead to address the problem through the use of more advanced technology. Manufacturers that install power-operated windows, partitions or roof panel systems meeting the automatic reversal requirements of the standard need not comply with the requirements of this final rufe.

In this document, the agency is also denying two petitions for rulemaking requesting that the agency require power windows in new vehicles to be equipped with an automatic reversal system or other anti-entrapment feature.

DATES: *Effective* Date: The amendment made in this final rule is effective November 15, 2004.

Compliance Date: This final rule becomes mandatory for all vehicles manufactured for sale in the U.S. on or after October 1, 2008. Voluntary compliance is permitted before that date.

Petitions: If you wish to submit a petition for reconsideration for this rule, your petition must be received by November 1, 2004.

ADDRESSES: Petitions for reconsideration should refer to the docket number above and be submitted to: Administrator, *Room* 5220, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20.590.

See the **SUPPLEMENTARY INFORMATION** portion of this document (Section X; Rulemaking Analyses and Notice) for DOT's Privacy Act Statement regarding documents submitted to the agency's dockets.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may call Mr. Michael Pyne, Office of Crash Avoidance Standards (Telephone: 202–366-2720) (Fax: 202–366–4329).

For legal issues, you may call Mr. Eric Stas, Office of the Chief Counsel (Telephone: 202–366–2992) (Fax: 202-366-3820).

You may send mail to these officials at National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

This final rule amends Federal Motor Vehicle Safety Standard No. 118, *Power-Operated Window, Partition, and Roof Panel Systems,* to add a requirement for new vehicles that will make switches for those systems resistant to accidental actuation, particularly by children.* These amendments to the standard apply to passenger cars, multipurpose passenger vehicles, and trucks with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lbs.) or less.[2]

Available information indicates that a small, but persistent problem of injuries and fatalities are occurring when vehicle occupants (particularly young children) unintentionally close power windows on themselves or other occupants when they accidentally actuate power window switches by leaning against or kneeling or standing on them. Although these power window incidents are generally low-frequency events, averaging about 15 deaths per year in recent years (1999–2002), there is a higher incidence in some individual years (e.g., five deaths of this type were recorded in 1998, and a similar number have been reported in 2004).

These tragic incidents continued to occur despite other safeguards in the standard (*i.e.*, requirement in S4 that power windows will only operate when the key is in the ignitions or when the presence of an adult can be presumed for some other reason, e.g., the key has been removed, but neither vehicle front door has been opened since the removal of the key).

Research has led the agency to conclude that switch design is related to such injuries. In the accidental actuation incidents for which the type of switch is known, virtually all of the vehicles involved had "rocker" and "toggle" switches, which are much more prone to accidental actuation as compared to pull up-push down type switches that must be lifted to close the window.* If the accidental pressure of a knee, foot or elbow actuated a pull up-push down switch, it would cause the window to open, not close. Rocker and toggle switches are also much more prone to accidental actuation if they are not shielded or recessed so that they cannot readily be contacted by a foot, knee or elbow.

Accordingly, the agency has decided to amend FMVSS No. 118 by adding a new paragraph S6, specifying that power window switches in new motor vehicles subject to the standard must pass an accidental actuation test that uses a test device simulating a child's knee. The test device is a hemisphere with a smooth, rigid surface and a radius of 20 *mm* ± 1 mm. When the test device is applied with a force not to exceed 135 Newtons (30 lbs.) to any switch or the housing surrounding a switch that can be used to close a power-operated window, partition, or roof panel, such application must not cause the window, partition, or roof panel to begin to close.

The accidental actuation test in S6 does not apply to switches that are both roof-mounted and incapable of "*one*-touch" closure. In addition, they do not apply to power-operated systems that meet the automatic reversal requirements of S5 of the Standard. We note that while a number of vehicles have automatic reversal systems, we are not aware of any that are certified to meet the requirements of S5. However, we believe that exclusion from the accidental actuation test in S6 would be appropriate for any such systems, because either inadvertent actuation would not occur or entrapment would be prevented by the system.

We believe that the accidental actuation test in S6 provides a simple and effective means of evaluating power window systems and will enhance the protection of people, especially children, thereby furthering NHTSA's mission of preventing motor vehicle-related deaths and injuries. We estimate that, on average, at least one child fatality and one serious injury (e.g., brain damage from near suffocation) per year could be prevented by the requirements of this final rule. The agency believes that this estimate is conservative because, in making our estimate, we excluded cases in which more than one child was in the vehicle (because both inadvertent switch actuation and intentional switch actuation are possible causes of the injury in those cases) and cases in which the type of switch was unknown. If further information on these cases were available, it might indicate that the estimated benefits should be higher.

There are simple, effective, and inexpensive manufacturing solutions that vehicle manufacturers can use to meet the requirements of this final rule. *Vehicle* manufacturers could comply by shielding or recessing their switches or by designing them so that pressing on them in the manner described above will not cause these windows and other items to close. Many vehicles already incorporate those solutions.

Although they need not do so, manufacturers may choose to address the problem through more advanced technology. Manufacturers need not comply with the new requirement if they use power-operated windows, partitions or roof panel systems meeting the automatic reversal requirements of the standard.

All new light vehicles produced on or after October 1, 2008, for sale in the U.S. must comply with the amended power window switch requirements in this final rule. The agency believes that this four-year lead time will allow manufacturers to incorporate the required changes into their vehicles in accordance with their normal production cycles. As a result, the cost impacts of this rule should be close to zero.

Further, this document denies two petitions for rulemaking requesting that the agency mandate the installation of automatic reversal systems that comply with the requirements of S5 in all new vehicles. We have reached this decision because much of the potential benefit that might be provided by those systems will instead be provided by the accidental actuation test. Further, while the cost of better switches will be negligible, the cost of automatic reversal systems is significant.

II. Background

Requirements of FMVSS No. 118

Federal Motor Vehicle Safety Standard (FMVSS) No. 118, *Power-Operated Window, Partition, and Roof Panel Systems,* regulates power-operated windows, partitions, and roof panels by specifying requirements to

[1] We note this rulemaking does not address incidents in which one occupant intentionally operates the switch by hand and either knowingly or unknowingly entraps another person.

*For the sake of simplicity, the preamble to this final rule collectively refers to these three types of systems-power windows, interior partitions, and power roof panels (sunroofs)—as "power windows," all of which are covered by FMVSS No. 118. Power roof panels and partitions are similar to power windows in their operation. However, any distinctions in applicability among the three types of systems will be delineated clearly in both the preamble and the amended regulatory text.

[3] In adopting that provision, the agency reasoned that the key would normally be in the ignition only if the driver were still in or near the vehicle, and thus in a position to supervise the operation of the vehicle windows.

[4] "Rocker" switches are designed to pivot on a center hinge, effectively operating like a "see-saw." "Toggle" switches operate using small levers that push back and forth to open and close a window. As a result of their design, downward pressure (e.g., caused by a child kneeling or leaning) on a rocker or toggle switch could result in a window's either opening or closing, depending upon how such force is applied.

In contrast, "push-pull" switches function such that pressing down on the switch will only cause the window to open, but the switch must be actively pulled up in order to close the window. Thus, accidental pressing with a hand, knee or foot on a push-pull switch could not cause a window to close, allhougb it might cause it to open.

reduce the likelihood of death or injury from their accidental operation. As a matter of particular concern, the standard addresses the threat to unsupervised children of being strangled or suffering limb-crushing injuries by closing power windows. The standard applies to passenger cars, multipurpose passenger vehicles, and trucks with a gross vehicle weight rating (GVWR) of 4,536 kg (10,000 lbs.) or less.

When the standard was first adopted, it required that activation of power windows be linked to the vehicle's ignition lock. The standard prohibited activation of power windows unless the vehicle's ignition was turned to the "On." "Start." or "Accessory" position. The agency presumed that making the presence of the ignition key a precondition to power window activation would help ensure that a driver would be present to provide adult supervision and also would provide a simple means of disabling the power windows in a parked vehicle (i.e., key removal).

Since its initial adoption, FMVSS No. 118 has undergone periodic revision in order to accommodate technological developments related to power window systems. For example, the standard has been amended to permit power windows to close in certain situations in which the key is not in the ignition, but the existence of adult supervision could be presumed for other reasons (see section S4 of FMVSS No. 118).

In the most recent rulemaking. which was in 1991. NHTSA responded to the interest of manufacturers in offering remote controls for window closing (see 56 FR 15290 (April 16, 1991)). When amending the standard, the agency was mindful that the unrestricted allowance of remote controls, especially ones that activated windows using radio frequency signals that can penetrate obstructing walls, could pose a danger to child occupants because the person activating the window might not be able to see a child in the window opening. Therefore, to help ensure the proximity of a supervising person, the agency amended the standard to permit power windows to be operable through the use of remote controls only if the controls had a very limited range (i.e., not more than 6 meters (m) (20 ft)). A longer range, up to 11 m (36 ft), was permitted for controls that were operable only if there were an unobstructed line of sight between the control and the vehicle.

Another condition enumerated in section S4 allows power windows to operate in the interval after ignition key removal but before either front door of the vehicle is opened. Another condition allows windows to close by use of a key lock on the outside of the vehicle. Windows are also permitted to close if they initially are open only 4 mm (0.16 in) (i.e., to facilitate closing of doors on a vehicle with an air-tight occupant compartment).

Section S5 makes an exception to the allowable conditions for power window operation listed in section S4 if the vehicle is equipped with an automatic reversal or "anti-entrapment" feature that complies with specified operational force levels. In adopting this exception, the agency reasoned that the provisions permitting remote control of a power window need not be premised on the likely proximity of supervision, if the window closing system itself could sense the chifd's hand or head when it became trapped between the window and the window frame, and thereupon stop and reverse to release the child. Therefore, the agency established a provision permitting power windows equipped with an automatic reversal system to be closed in any manner (e.g., with or without a key) desired by the manufacturer. It also permitted remote controls of unrestricted range, as well as new products (e.g.. devices to open and close windows automatically in response to heat and rain), if there is an automatic reversal system.

However, we note here that the present rulemaking action was deemed necessary because deaths and serious injuries involving power windows continue to despite the safeguards already incorporated in the standard. The complete success of the earlier safeguards is dependent on children not being left unattended in vehicle, or, if they are, on removal of the ignition key. However, power window injuries and fatalities are occurring in cases where children were left alone in vehicles with keys in the ignition. These tragic injuries and loss of life could have been prevented if a supervising adult had removed the key from the ignition, but the persistent recurrence of such incidents involving children have led us to the conclusion that the additional protections set forth in this rulemaking are necessary.

Power Window Stitches in Motor Vehicles

Prior to the amendments contained in this final rule, FMVSS No. 118 has not regulated the switches provided in motor vehicle occupant compartments for operating power windows. In vehicles equipped with power windows, those switches generally are of three types: (1) "Rocker" switches, (2) "toggle" switches, and (3) "push-pull" switches.

Power windows with rocker switches, which are very common in current motor vehicles, are particularly susceptible to inadvertent closure because almost any contact with the switch can cause the window to operate. Power windows with toggle switches are similarly susceptible to inadvertent actuation.

In contrast, power windows operated by push-pull (fishhook-style) switches are considered resistant to inadvertent closure because incidental contact with those switches will not readily cause a window to begin to close, although it may cause a window to open. Only by actively pulling upwards on push-pull switches is it possible to operate such windows in the closing direction.

Protection from inadvertent actuation of power windows also may depend on switch location and orientation in a vehicle. For example, a rocker switch that is set into a recess on a vertical door panel is inherently less susceptible to casual contact by occupants, especially a child standing or kneeling on a door armrest while being partially extended outside of the open window, than is a switch mounted flush on a horizontal surface. Likewise, console-mounted switches for sunroofs are very susceptible to inadvertent actuation as compared to switches located on the vehicle's headliner, because a child attempting to look out of an open sunroof would very likely stand on the console to do so.

II. Petitions for Rulemaking

The Moore Petition

On September 26, 1995, Michael Garth Moore, an attorney in Hilliard, Ohio, submitted a petition for rulemaking[5] to NHTSA requesting that the agency amend FMVSS No. 118 in two areas. First, the petitioner asked the agency to require that all power windows be equipped with an anti-entrapment safety feature, so that a vehicle's windows would stop and reverse direction if they were to encounter an obstruction while closing.

In his petition, Mr. Moore stated that automatic reversal technology is of proven effectiveness and is economically feasible for mandatory installation. The petitioner further stated that, while it was difficult to determine the magnitude of child injuries and fatalities related to power windows, the prevention of even one

[5] Docket No. NHTSA-2004-17216-21. (The original docket number for this rulemaking was Docket No. NHTSA-96-117. However, with the advent of NHTSA's electronic docketing system, available et *http://dms.dot.gov/*, all relevant materials discussed in this notice have also been included in Docket No. NHTSA-2004-17216.)

AFFIDAVIT OF VILMA LUNA

BEFORE ME, the undersigned official on this day appeared Vilma Luna, who is personally known by me, first being duly sworn according to law, upon her oath, deposed and said:

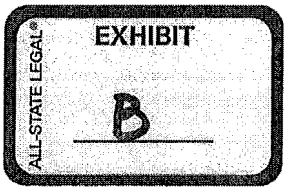
1. "My name is Vilma Luna. I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein and they are all true and correct.

2. "I was a Texas State Representative during the 78th Legislature of 2003. During the Regular Session. House Bill 4 was passed, which addressed several aspects of civil litigation including product liability.

3. "I was a member of the Conference Committee appointed to consider the differences between the House version and the Senate version of House Bill 4. I was substantially involved in negotiating with the sponsors and proponents of the portions of House Bill 4 that dealt with products liability, especially the provision on compliance with government standards. 1 was assisted by Mikal Watts and Alex Miller in negotiating and discussing with Representative Nixon, Representative King, and Alan Waldrop language they wanted in the bill that would provide some protection to manufacturers of products that comply with mandatory federal safety standards.

4. "One of the challenges of the government compliance statute was to give some deference to a safety standard created by the federal government without unconstitutionally delegating our legislative authority to the federal government. It was agreed that the government compliance statute would not create immunity for a manufacturer, but rather, would only provide an evidentiary presumption that a design is not defective if it meets a mandatory standard that is adequate to protect consumers from the defect at issue in the litigation. Instead of abdicating to the federal government, we made a conscious decision to allow Texas juries or factfinders to determine whether a federal safety standard is adequate.

5. "It was also the intent of this provision to allow Texas juries or factfinders to consider the conduct of the manufacturer in its openness and honesty with the federal government, when deciding whether the presumption has been rebutted. It was agreed between those negotiating whether to include the government compliance statute that although we cannot require a manufacturer to provide relevant information to the federal government, we can refuse to provide an evidentiary presumption to a manufacturer that is found to have not provided relevant material and information. This was such an important portion of the government compliance statute that it was decided we would create specific legislative intent to explain that while this bill does not affect a manufacturer's requirements under federal law. a manufacturer that is not open and honest with the government will not be entitled to the evidentiary presumption created under this Texas statute, Retaining the ability to not provide an evidentiary presumption to a manufacturer that withheld or misrepresented relevant information or material



to the government was a material aspect of the government compliance statute and the purpose and intent of the provision.

6. " The language of the legislative intent was negotiated by Representative King, Alan Waldrop, Mikal Watts, Alex Miller, and 1, as a question and answer format that would be react on the floor of the House and placed in the I-louse Journal. A true and correct copy of that legislative intent and those questions and answers that were made on the floor of the Texas House and set forth on pages 6038 through 6040 of the House Journal for June I, 2003, are attached hereto as Exhibit "A." Although my first question references "Section 82.009," the questions and answers are in reference to what was eventually enacted as Section 82.008 of the 'l'exas Civil Practice and Remedies Code.'"

Affiant said nothing further.

SIGNED this the 20th 22ND day of June, 2005.

VILMA LUNA

STATE OF TEXAS §
§
COUNTY OF NUECES §

Subscribed to and sworn before me, this 20th 22ND day of June, 2005, to certify which witness my hand and seal of office.

Notary Public, State of Texas

ROBERT HANEY
Notary Public, State of Texas
My Commission Expires
JANUARY 6, 2007