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**Re: Docket No: PHMSA-2009-0017 [PDA-34(R)]; Common Law Tort  
Claims Concerning Design and Marking of DOT Specification 39  
Compressed Gas Cylinders**

Gentlemen:

Pursuant to your invitation, Amtrol submits these Comments in rebuttal to Plaintiffs Elders' Comments, filed herein on or about March 13, 2009, in reference to the above captioned matter. Amtrol further adopts and incorporates the Comments of the Gases and Welding Distributors Association, Inc., in favor of Amtrol's Application for an administrative determination that federal hazardous materials transportation law preempts state common law tort claims alleging negligent design and failure to warn of possible hazards by the manufacturer of DOT specification 39 compressed gas cylinders beyond the requirements of the Hazardous Materials Regulations, as set out in their Comments filed herein on or about March 9, 2009.

Briefly, the Plaintiffs fail to address the preemption criteria discussed in Part II of the published notice of the PHMSA. Moreover, they misconstrue and misapply the recent Supreme Court cases of Riegel v. Medtronic, \_\_\_ U.S. \_\_\_, 128 S.Ct. 999, which relates to express preemption by federal law; and Wyeth v. Levine, 555 U.S. Lexis 1774, 173 L.Ed.2d 51, which does not relate to express federal preemption of state law, but only "with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives". In this instance, the Hazardous Materials Transportation Act expressly preempts state law, including Plaintiffs' common law tort claim.

**Preemption Criteria.**

In its published notice, titled "Common Law Tort Claims Concerning Design and Marketing of DOT Specification 39 Compressed Gas Cylinders", 74 Fed.Reg. 5723, the Pipeline and Hazardous Materials Safety Administration set forth the standards for federal preemption in Part II. In soliciting public comments, the PHMSA advised interested parties that their comments "should specifically address the preemption criteria discussed in Part II", including certain enumerated questions. The Plaintiffs' Comments, filed March 13, 2009, address the enumerated questions, but otherwise fail to "address the preemption criteria discussed in Part II". Part II makes it clear that, by basing their claim against Amtrol solely on the "covered" areas of design, labeling and marking of the DOT 39 cylinder, the Elders claim is preempted.

The preemption criteria applicable in this instance are set out in Part II. As noted by the PHMSA, "Section 5125 of 49 USC contains express preemption provisions relevant to this proceeding." In Part II, the PHMSA first addresses 49 USC 5125(a), the "dual compliance" and "obstacle" criteria that PHMSA's predecessor agency, the Research and Special Programs Administration, had applied in issuing inconsistency rulings prior to 1990, under the original preemption provisions of the Hazardous Materials Transportation Act (HMTA).

Continuing in Part II, the PHMSA then addresses Section (b) of 49 USC 5125. As it notes, "Section (b)(1) of 49 USC 5125 provides that a non-federal requirement concerning any of the following subjects is preempted – when the non-federal requirement is not "substantively the same as" a provision of federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous material safety regulation or directive issued by the Department of Homeland Security." In other words, as relevant to this matter, Section 5125 provides that any law, regulation, order or other requirement of a state or federal subdivision "that is not substantively the same" as certain specified "covered" areas is preempted. Included among those "covered" areas is: "the packing, repacking, handling, **labeling, marking** and placarding of hazardous materials" (49 USCA §5125(b)(1)(B)); and "the **design**, manufacturing, fabricating, marketing, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material" (49 USCA §5125(b)(1)(E)). (Emphasis added.)

As set out by the PHMSA, to be "substantially the same", the non-federal requirement must conform "in every significant respect to the federal requirement. Editorial and other similar *de minimis* changes are permitted." (49 CFR §107.202(d); 74 Fed.Reg. 5725.)

In Part II, the PHMSA then goes on to explain the background behind the "covered" subjects set out in 49 USC §5125(b). As noted by the PHMSA, 2002 amendments and 2005 reenactment of the preemption provisions of Section 5125 "reaffirmed Congress' longstanding view that a single body of uniform federal regulations promotes safety (including security) in the transportation of hazardous materials". As the PHMSA noted, more than 30 years ago the Senate Commerce Committee "endorsed the principle of preemption in order to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous material transportation".

The PHMSA specifically noted:

"When Congress expanded the preemption provisions in 1990, it specifically found:

(3) Many states and localities have enacted laws and regulations which vary from federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) Because of the potential risks to life, property and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) In order to achieve greater uniformity and to promote the public health, welfare and safety at all levels, federal standards for regulating the transportation of hazardous materials in intrastate, interstate and foreign commerce are necessary and desirable." (75 Fed.Reg. 5726.)

As the PHMSA noted, citing Colorado Public Utility Commission v. Harmon (10th Circ. 1991), 951 F.2d 1571, 1575, "A United States Court of Appeals has found uniformity was

the "linchpin" in the design of the federal laws governing the transportation of hazardous materials."

The Comments of the Elders fail to address these preemption criteria. As seen, the standards at issue pertain to "covered subjects" of the Hazardous Materials Transportation Act and the Department of Transportation Regulations. Any law, regulation, order, ruling, provision or other requirement of the state or political subdivision thereof which concerns such a "covered subject" and which is not "substantively the same" as the provisions of the act or regulations, is preempted.

Furthermore, the Comments of the Elders fail to consider the language of the PHMSA's September 11, 2007, letter and citations set forth therein. In its September 11, 2007, letter, the Office of Chief Counsel of the PHMSA cited 70 Fed.Reg. 2818, titled "Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage". The September 11, 2007, letter indicates that the labeling and design regulations are applicable not just when the cylinder is in transportation, but "at all times that the packaging is marked to indicate it conforms to the applicable specification requirement". In other words, at any time that one represents that this is a DOT 39 cylinder, then these are the regulations that apply.

Although in its 2007 letter the PHMSA indicated it was premature to render a ruling on the issue because governmental activity was not yet involved, it set out its position in the following language:

"We would have a concern with any state law, regulation, or judicial decision that imposed additional manufacturing or marketing requirements on any DOT specification packaging, including a specification 39 cylinder. It would be impractical and burdensome for a manufacturer of these cylinders to have to vary their design, manufacturing process, and markings to accommodate additional and possibly conflicting requirements that varied from state to state – especially requirements for additional wording that indicates or implies that the cylinder is suitable for refilling with a hazardous material and continued use over many years, in conflict with the specific markings required by the HMR. These required markings are part of the safety requirements in the DOT specification for these cylinders and must not be compromised. Claims that the DOT specification is inadequate are properly raised in a petition to

change the specification, in accordance with 49 CFR §§106.95-106.105, rather than any lawsuit that would impose the additional manufacturing and marking requirements in only one state or local jurisdiction and disrupt the principle of national uniformity." (September 11, 2007, letter, page 3.)

The foregoing are the preemption criteria applicable to this matter, as set out by the PHMSA in Part II. The Plaintiffs do not challenge these criteria, except to the extent of their Comments in response to the PHMSA's enumerated questions.

**Question #1: The meaning of a state "requirement" in 49 USC 5125 and whether that term must be construed to include state common law tort claims, in light of the Supreme Court's holding in Riegel v. Medtronic, \_\_\_ U.S. \_\_\_, 128 S.Ct. 999, 1007 (2008), "that common law causes of action for negligence and strict liability do impose "requirements"."**

49 USC 5125(b) deals with express preemption under the Hazardous Materials Transportation Act, and provides that any law, regulation, order or other requirement of a state or political subdivision "that is not substantially the same" as certain specified "covered" areas is preempted. Included among those "covered" areas are the two areas at issue in the Elders' common law claim here: "the packing, repacking, handling, **labeling, marking**, and placarding of hazardous materials" (Section 5125(b)(1)(B)); and "the **design**, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified or sold as qualified for use in transporting hazardous material" (Section 5125(b))(1)(E)).

In Riegel v. Medtronic, (\_\_\_ U.S. \_\_\_), 128 S.Ct. 999, 1007 (2008), the Supreme Court addressed common law allegations that a Medtronic catheter, which ruptured during heart surgery, was designed, labeled and manufactured in a way that violated state common law. The Plaintiffs here acknowledge that the Supreme Court Opinion holds that the term "requirement" includes state common law tort claims. However, the Elders then claim that the Riegel Opinion is "inapposite", because the accident in question occurred only after the cylinder was no longer in interstate transportation. In so doing, the Plaintiffs ignore the fact that the sole allegations of product liability or negligence they have brought against Amtrol relate to "covered" areas: labeling, marking, and design of the cylinder. Plaintiffs also ignore the PHMSA's finding, cited above, that labeling and design regulations are applicable not just when the cylinder is in transportation, but "at all times that the packaging is marked to indicate it conforms to the applicable specification requirement".

Since those are the only allegations brought against Amtrol, the Plaintiffs' claim is preempted.

Riegel is controlling. In Riegel, the Supreme Court addressed the Medical Device Amendments of 1976 (MDA), which created a scheme of federal safety oversight for medical devices (21 USC §360(k)(a)). The MDA calls for federal oversight of medical devices that varies with the type of device at issue. The most extensive oversight is reserved for Class III devices that undergo the premarket approval process. These devices may enter the market only if the FDA reviews their design, labeling and manufacturing specifications and determines that those specifications provide a reasonable assurance of safety and effectiveness.

The regulations applicable to DOT 39 cylinders, under the scheme set up by the Hazardous Materials Transportation Act, are similar. DOT 39 cylinders are subject to 49 CFR Parts 171, 173 and 178, and specifically are subject to the specifications of 49 CFR 178.65, which expressly relates to "Specification 39; Non-Reusable (Non-Refillable) Cylinders". Those specifications set out requirements for type, size, service pressure and test pressure (Section 178.65-2; "inspection by whom and where" (Section 178.65-3); "duties of inspector" (Section 178.65-4); "material; steel or aluminum" (Section 178.65-5); "manufacturer" (Section 178.65-6); "wall thickness" (Section 178.65-7); "openings" (Section 178.65-9); "safety devices" (Section 178.65-10); Section 178.34(d), "pressure tests", (Section 178.65-11); "flattening test" (Section 178.65-12); "rejected cylinders" (Section 178.65-13); "marking" (Section 178.65-14); and "inspector's report" (Section 178.65-15).

The role of these extensive regulations is similar to the requirements for "Class III devices" under the Medical Device Amendments – the cylinders undergo the premarket approval process.

Just as the Supreme Court found in Riegel, the meaning of a state "requirement" in 49 USC 5125 must be construed to include state common law tort claims. In the Riegel case, the Supreme Court addressed in broad terms what was meant by the use of the term "requirements", and established unequivocally that it included state common law tort claims. Speaking for the majority, Justice Scalia states as follows:

"Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a state's "requirements" includes its common law duties. As the plurality opinion said in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)], common law

liability is "premised on the existence of a legal duty", and a tort judgment therefore establishes that the Defendant has violated a state law obligation. (Citation omitted.) And while the common law remedy is limited to damages, a liability award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy".

In the present case, there is nothing to contradict this normal meaning. To the contrary, in the context of this legislation excluding common law duties from the scope of preemption would make little sense. State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or a strict liability standard, is less deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: how many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. As Justice Breyer explained in [Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)], it is implausible that the MDA was meant to "grant greater power to set state standards "different from or in addition to federal standards" to a single state jury than the state officials acting through state administrative or legislative lawmaking processes." 518 U.S. at 504. That perverse distinction is not required or even suggested by the broad language Congress chose in the MDA, and we will not turn somersaults to create it." (Riegel, slip opinion, pages 10-11.)

The situation presented by the Elders' common law claim against Amtrol here is similar. The PHMSA has gone to great lengths to explain the cost-benefit analysis undertaken by the Department of Transportation and interested parties in promulgating the regulations applicable to DOT 39 cylinders. (See particularly the discussion at 70 Fed.Reg. 2818, titled "Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage",

which sets out the various entities: including OSHA; the Bureau of Alcohol, Tobacco and Firearms; the Environmental Protection Agency; local governments; etc., which were considered in developing the DOT 39 regulations; see also the discussion of cost benefit analysis conducted in development and promulgation of standards for design, manufacture, labeling and testing of DOT 39 cylinders at "Federal Register issued on August 24, 1971, regarding cylinder specifications . . ." filed herein by the PHMSA as document 0004.)

**Question #2: Whether the common law tort claims relating to the design and marking or labeling of a DOT specification 39 cylinder by the cylinder's manufacturer are "about the designing, manufacturing, or marking of a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce".**

As set out in response to question one, the express preemption provisions of the MDA (Riegel v. Medtronic), and the HMTA, 49 USC §5125, preempt not just state statutes or regulations, but also preempt some common law causes of action.

In question two, the PHMSA asks whether the Elders' specific claim here, "relating to the design and marking or labeling of a DOT specification 39 cylinder by the cylinder's manufacturer", is preempted under the HMTA. Amtrol hereby adopts and incorporates herein by reference the arguments on that issue made by the Gases and Welding Distributors Association, Inc., and their Comments filed herein on March 9, 2009.

For further support, Amtrol notes as follows:

Plaintiffs contend that their common law claim has to do with the use of the cylinder by an end user, and that their claims are not "about warnings or designs dealing with cylinders qualified for use in transporting hazardous material in commerce". They then rely, almost entirely, on the recent Supreme Court Opinion of Wyeth v. Levine, 555 U.S. Lexis 1774, 173 L.Ed.2d 51. Plaintiffs' reliance on the Wyeth Opinion is misplaced, as the Supreme Court itself made apparent in its Opinion.

The Wyeth Opinion had to do with Food and Drug Administration regulations, which did not include an express preemption provision, and which permitted state common law claims to proceed throughout its history. The Supreme Court made a specific distinction between the FDA regulations, not containing express preemption language, and the express preemption language in the Medical Devices Amendments, as well as the Hazardous Materials Transportation Act. The Plaintiffs simply ignore that language.

In Wyeth, the Supreme Court, addressing the Food and Drug Administration regulations, drew a bright line distinction between it and Riegel and between it and the HMTA. It noted as follows:

"If Congress thought state law suits posed an obstacle to its objections, it surely would have enacted an express preemption provision at some point during the FDCA's 70 year history. But despite its 1976 enactment of an express preemption provision for medical devices, see Section 521, 90 Stat. 574 (codified at 21 USC §360k(a)), Congress has not enacted such a provision for prescription drugs. See Riegel, 552 US at \_\_\_\_\_, 128 S.Ct. 999, 1009, 169 L.Ed.2d 892, 905 ("Congress could have applied the preemption clause to the entire FDCA. It did not do so, but instead wrote a preemption clause that applies only to medical devices"). Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness. As Justice O'Connor explained in her Opinion for a unanimous Court, "The case for federal preemption is particularly weak when Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." (Wyeth v. Levine, 173 L.Ed.2d at 66.)

The Wyeth v. Levine Court, further addressing the distinction between the FDA, which did not contain express preemption language, and the MDA, which did contain such language, stated as follows:

"This Court has recognized that an agency regulation with the force of law can preempt conflicting state requirements. See, e.g., Geier v. American Honda Motor Co., 529 US 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000); Hillsborough County v. Automated Medical Laboratories, Inc., 471 US 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption. We are faced with no such

regulation in this case, but rather with an agency's mere assertion that state law is an obstacle to achieving its statutory objectives. Because Congress has not authorized the FDA to preempt state law directly, cf. 21 USC §360k (authorizing the FDA to determine the scope of the Medical Device Amendments' preemption clause), the question is what weight we should accord the FDA's opinion."

The Court in the Levine case then gives other examples of express preemption, similar to the MDA express preemption found in the Riegel case. These other examples are set forth in footnote 9 of the Opinion. The examples include, most significantly, 49 USC §5125(d), which, in the words of the Supreme Court in the Levine case, authorize "the Secretary of Transportation to decide whether a state or local statute that conflicts with the regulations of Hazardous Waste Transportation is preempted".

Thus, the Supreme Court, in the Wyeth v. Levine Opinion itself, says that its findings there are inapplicable to the DOT regulations authorized, in fact mandated by Congress, under the Hazardous Materials Transportation Act (49 USC §5125).

**Question #3: Whether and how common law tort claims relating to the design and marking or labeling of a DOT specification 39 cylinder by the cylinder's manufacturer affect transportation of the cylinder when filled with a compressed gas.**

Plaintiffs contend that their common law tort claims "had nothing to do with the marking or labeling while the cylinder was in transportation and have no effect upon such transportation". Plaintiffs can only make this claim by failing to "address the preemption criteria discussed in Part II" of 74 Fed.Reg. 5723. As noted there, Congress specifically found that "because of the potential risks to life, property and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable".

In furtherance of that consistency, the definition of "transportation" as applied by PHMSA in its rule making and commentary in regards to the Hazardous Materials Transportation Act is necessarily broad. In prior commentary, which the PHMSA has cited in addressing the Plaintiffs' claims here, it noted:

"It is important to note that DOT specification packagings, such as rail tank cars, cargo tank motor vehicles, *and cylinders*, are subject to DOT regulation at all times that the packaging is

marked to indicate that it conforms to the applicable specification requirements."

Pursuant to that finding, it is immaterial whether the cylinder in question was at its final destination or was still in transportation, if it was marked indicating it was a DOT cylinder. DOT 39 cylinders are subject to DOT regulation that all times that it is marked to indicate it conforms to the applicable specification requirements.

The reason for such consistency is set out by the PHMSA in its prior commentary, at 70 Fed.Reg. 20018, *et seq.* There, the PHMSA noted that there had been uncertainty in the regulated community and among federal, state and local agencies with hazardous materials safety responsibilities concerning whether and to what extent the Hazardous Materials Regulations applied to particular activities and operations. It noted that it had been asked to address the extent to which state and local agencies may regulate hazardous materials safety, "particularly at facilities where the distinctions among pre-transportation, transportation, and non-transportation operations are not clearly articulated" (70 Fed.Reg. 20018).

As noted by the PHMSA, clarifying the applicability of the HMR helps to "eliminate uncertainty on the part of the regulated public, thereby facilitating compliance and enhancing hazardous materials safety and security". The PHMSA also noted that clarifying the applicability of the regulations "also has the beneficial effect of reducing or eliminating confusion concerning regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Environmental Protection Agency (EPA), and Occupational Safety & Hazard Administration (OSHA) that apply to materials that are also covered by the Hazardous Materials Regulations. The PHMSA also noted that "clarifying the applicability of the HMR helps states, local governments, and tribal governments to determine areas where they may regulate with out being subject to preemption under federal hazardous material transportation law".

Further, the PHMSA noted the special role played by manufacturers of DOT 39 cylinders, such as Amtrol, in carrying out its regulatory scheme. The PHMSA noted:

"Federal HAZMAT law also recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce or by persons who manufacture and maintain containers that are represented or sold as qualified for use for such transportation."

To summarize, if the cylinder was marked indicating it was a DOT 39 cylinder, it was by definition subject to DOT regulation, even if it no longer was in the process of interstate transportation. Consequently, any state requirements of additional manufacturing specifications or packaging warnings affect the regulatory scheme for transportation of such cylinders, and are preempted.

**Question #4: The manner in which the Elders' decedent was using the DOT specification 39 cylinder which ruptured, including: (a) the identity of the owner of this cylinder; (b) the date on which the cylinder was last refilled and who refilled it; and (c) whether this cylinder was permanently located at the site of the rupture or whether the decedent had transported this cylinder to the location where he was "preparing to use the cylinder to fill a refrigerant with coolant", according to the April 1, 2008, memorandum opinion of the bankruptcy court.**

This will supplement the answer to question number four supplied by the Plaintiffs, to the extent information is known from police or private investigation and discovery. Apparently the cylinder in question was the decedent's. Decedent was self-employed, working part-time in the refrigeration business. At the time of the accident, he was servicing one of the refrigeration units at a restaurant. He held a certification card, Type I and Type II, from the Refrigeration Service Engineers' Society (RSES) as a certified technician through the Proper Refrigerant Practices Program. Such certification is required to purchase R22 refrigerant. Because he was self-employed, there was no OSHA investigation of the incident.

On the day before the accident, Mr. Elder had put a new compressor and fan unit in the salad refrigerator at the Lynch Street Bistro. It quit working and he had been called back to service the equipment again on the day the incident took place. The refrigerator was designed to use R134a refrigerant and the invoice for the day before indicates that it was charged by Mr. Elder with R134a.

On the day in question, decedent arrived at the restaurant sometime prior to 10:30 a.m. The outside temperature was one degree above zero Fahrenheit. The decedent brought the subject cylinder of refrigerant, labeled R22, into the kitchen, where he placed it in one of the sinks and ran hot water over the cylinder. The water was set at 170 degrees, because the restaurant had an automatic dishwasher. The decedent apparently went back out to his truck, leaving the water running on the R22 cylinder, and when he returned, the cylinder exploded and he was struck.

**Hoagland, Fitzgerald, Smith & Pranaitis**

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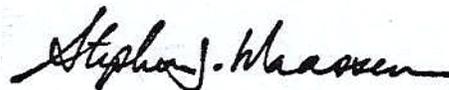
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Investigation and discovery give no indication why the R22 cylinder was being used in this instance. The decedent was self-employed, and had scanty records, so the parties have been unable to discover any information about the history of the cylinder in question. There is no indication when and from whom the decedent obtained the cylinder, how it was stored, and how long it had been stored in his truck. It had been transported from his truck to the sink of the restaurant, just prior to the explosion.

There also is no explanation why this cylinder, which presumably contained R22 refrigerant, was being used to service a unit designed for R134a. Boroscopic inspection of the one-way valve of the cylinder showed no conclusive evidence of tampering with the valve. There is no evidence to indicate whether the cylinder had been refilled; whether the decedent planned to charge the R134a refrigerator unit with R22; or whether the decedent merely planned to charge the unit with R22 for testing purposes only to check for leaks. Had he done so, this would have been a violation of EPA regulations, when the R22 was released into the atmosphere.

**Conclusion.** Ultimately, this case is controlled by the preemption criteria discussed by the PHMSA in Part II. As the PHMSA noted there, Congress has held the long-standing view "that a single body of uniform federal regulations promotes safety (including security) in the transportation of hazardous materials". Also, as noted by the PHMSA, the labeling and design regulations are applicable not just when the cylinder is in transportation, but "at all times that the packaging is marked to indicate it conforms to the applicable specification requirement". Accordingly, under the preemption criteria discussed in Part II by the PHMSA, the Plaintiffs' state common law tort claim is preempted.

Sincerely,



Stephen J. Maassen

SJM/jb

Enclosure

cc: Rex Carr, Esq.  
Corey Kraushaar, Esq.  
William A. Holland, Esq.