

Enforcement Litigation

I

The Traffic Safety Act gives the NHTSA authority to require manufacturers of motor vehicles and replacement equipment to notify purchasers of defects related to motor vehicle safety and noncompliances with Federal motor vehicle safety standards and to remedy the defect or noncompliance at manufacturer expense. The recall remedy was added to the Act in 1974. Prior to that time the manufacturer was only required to notify purchasers of the defect or noncompliance. The 1974 amendments increased from \$400,000 to \$800,000 the maximum civil penalty for failure to issue notifications, and the NHTSA's investigative authority was increased by giving the agency subpoena power, its right to hold investigative hearings and conduct examinations of witnesses under oath.

In the defect enforcement cases the agency has been attempting to develop a per se theory of defect law, largely because of the limitations of existing accident information. Under this theory, the demonstrated failure of a critical safety component (wheels, brakes, steering, lights, etc.) would establish the existence of the safety defect whether supporting accident data exists or not. (This is analagous to the per se theory used by the government in anti-trust cases where evidence of certain economic practices is so pernicious that it is considered a per se violation of anti-trust law). The need for the establishment of a per se defect theory has emerged from the experience of our litigation and our increasing knowledge of industry record-keeping practices and available data files.

II

The industry argues that to prove the existence of a safety defect, the agency must in every case show that:

- (1) some threshold number of accidents, injuries or deaths have occurred; and
- (2) some threshold number of accidents, injuries or deaths will occur in the future.

The agency has based its case on accident information where the information was available and appropriate. In the Kelsey-Hayes Wheel case, for example, the agency relied

primarily on number of failures. The manufacturer, General Motors, agreed that the exploding wheels created an unreasonable risk to safety but refused to admit the wheels were defective. To prove the existence of a "defect in performance" under the statute, the agency turned to accident information. In pre-trial discovery the agency obtained from General Motors 2361 unverified reports of wheel failures. Taking a sample of those reports, the agency then obtained 160 owner affidavits. From the affidavits a statistician predicted that 700 of the owners who had reported wheel failure would, if asked, provide affidavits recounting some 1500 wheel failures. The agency then filed a motion for summary judgment on the basis of those affidavits, arguing that the large number of failures proved, as a matter of law, the existence of a "defect in performance." The District Court agreed with the agency and granted the motion for summary judgment. The Court of Appeals substantially agreed but thought the manufacturer had the right to attempt to prove, as an affirmative defense, that the vehicle owners themselves had caused the large number of failures through gross and unforeseeable abuse. The Court of Appeals therefore remanded the case to provide General Motors the opportunity to try its affirmative defense. At that point General Motors decided to settle the case and recall the wheels.

Although accident information may, on occasion, be useful, the industry's insistence that the agency always prove safety-defect cases by accident information alone is excessively rigid. From both a practical and statutory standpoint, reliance upon numbers alone would confine the agency's effectiveness and distort fulfillment of its statutory mission.

The practical problems begin in the first phase: data collection. Accident information is often erroneous, incomplete or unavailable. Although accident investigation systems are often mentioned as reliable data sources, they contain inherent limitations when used to define and substantiate the realm of all possible safety defects. The system usually involves a very limited geographical area. Its initial input is reports prepared by police who are not trained to identify safety defects. A group of investigators further limits the scope of the survey by selecting from the police reports a very small population of vehicle accidents for investigation. The investigation team then inspects the vehicle, records the road and driver conditions, and explores possible causal factors.

Sometimes it cannot finally determine the cause of the accident. In severe accidents, the question of whether a part broke before or because of the accident is a recurring and often unanswered one.

Thus, the accident investigation system, though useful for locating some possible defects, is insufficient to pick up and prove the existence of all or a majority or, perhaps, even a substantial proportion of existing safety defects.

A second major source of accident information is owner reports. Like the accident investigation systems, these reports are useful indicators of some possible safety defects but not definitive with respect to all possible safety defects. The first problem is that not all people who suffer accidents report them to the agency. The second problem is accuracy. Owners and their mechanics may not be able to correctly identify the cause of the accident. When the agency itself attempts to investigate the cause, it frequently finds the owner has repaired or modified the vehicle and disposed of the evidence.

Thus, the collection of accident data is a flawed and uneven process. Where available, accident information may help identify certain safety defects. At present, however, it cannot locate all possible safety defects. Enforcement cases which are confined in their basis and proof to available accident information may thus exclude a major portion of the safety defects in existence.

The practical problems with this approach continue in the second phase: proof before the court. Accident information collected in an investigation usually does not satisfy the evidence rules of the court. Owner reports, for example, cannot be submitted into evidence to prove the truth of the matter reported. Instead, to support certain motions, the agency gathers affidavits from the owners. This process is costly and time-consuming, but trifling compared to the agency's cost at trial, where it must present witnesses to testify. The judge in the Ford Seat Back case recently suggested that at trial, to prove that the defect caused the accidents and that the accidents and injuries occurred, the Government must bring before the court all the owners reporting accidents, their mechanics and doctors, and other relevant witnesses. Requiring the agency to prove hundreds of tort cases in the context of each safety-defect case would unreasonably tax the time and funds of the court and both parties.

Like owner reports, accident investigation statistics, too, pose evidentiary problems in court. Because they stem from police reports which are frequently considered hearsay, courts might reject them. Other courts might accept the statistics into evidence but limit their weight because of doubts about their reliability and accuracy. Thus, proving a case based on numbers of accidents and injuries known to have occurred is a difficult, costly and time-consuming exercise.

The industry argues further that the agency, to prove the existence of a safety defect, must show not only that some threshold number of accidents, injuries or deaths have occurred, but also that some threshold number of accidents, injuries or deaths are likely to occur in the future. The industry calls this prediction of future events "risk analysis". It bases risk analysis on (1) the limited and inaccurate accident information available and (2) certain unproven assumptions. The reliability of risk analysis is thus inherently questionable. In addition, risk analysis consistently underestimates the future risk because, in each case, the number of accidents that occurred is probably greater than the reports of accidents, on which the analysis relies.

Proving every case according to the industry's scheme would, then, (1) limit the possible safety defects to those which appear from accident data and (2) impose severe cost, time and evidentiary burdens on any litigation emerging from the accident-based decision.

In addition to the practical difficulties, sole reliance on numbers of accidents presents statutory problems. The Act's purpose is preventive. The agency would be violating that goal if in every case it waited for evidence of a significant number of accidents, injuries or deaths to accumulate. In addition, the Act specifies several ways of finding safety defects: testing, inspection, investigation, research, examination of communications, or "otherwise". The Act thus directs the Secretary to use any means available, not just accident information, to discover safety defects. The industry's recommended approach would significantly undermine the statutory purpose and effectiveness.

For these reasons, the agency, while using accident data where it is available and relevant, is now seeking to prove the existence of safety defects in simpler, clearer and less costly ways. The agency, in the currently developing case law, is offering to the courts a per se theory. In each of the cases now pending, the critical question is not whether a

defect exists but whether the defect relates to motor vehicle safety.

The per se theory applied to this question would establish certain broad and simple principles: If a defect causes failure of a critical vehicle component or of a major vehicle control system, it is safety related. If a defect causes vehicle fire, it is safety related. If a defect suddenly moves the driver away from steering, accelerator and brake controls, it is safety related. The agency has tested the viability and scope of this theory in four cases. (The agency at one time was testing the theory in five cases but the fifth case, Engine Mounts, which involved loss of speed control, was settled before trial with a recall and a civil penalty.) Each case, and its alleged hazard, is listed below. A more detailed description of the cases discussed in this memorandum appears in the attached appendix.

1. Defect causes failure of major vehicle control system
 - a. Pitman Arms - loss of steering system
2. Defect causes failure of critical vehicle component
 - a. Windshield Wipers - wipers fall off in rain and snow
3. Defect causes fire
 - a. Quadrajets-Carburetor - carburetor plug leaks fuel, causing fire in engine compartment.
4. Defect causes sudden removal of driver from vehicle control instruments
 - a. Seat Back - seat collapses sideways and rearward, throwing driver off balance and away from steering wheel, brakes and accelerator pedal

United States v. General Motors (Pitman Arms)

This case was appealed from an adverse district court ruling which involved the question of whether a low speed (less than 10 mph) failure of a critical safety system (steering) creates an unreasonable risks of accident occurrence. While high speed failures are admittedly dangerous, the manufacturer contended successfully in the district court that the Government had not met its burden to show that such failures did indeed occur at high speeds. During the course of the trial, however, the Government did show that a large number of failures had occurred. The court found that the large number of replacement part sales, some 26,000, for a vehicle population of some 234,000 1959 and 1960 Cadillacs, was a strong indication of a large number of failures. What the trial court held, however, was that the Government failed in its burden of proof to establish that these failures imposed an unreasonable risk of accident, death or injuries.

On appeal the Government contended that low speed failures do present such hazards, relying, in part, on accident statistics which indicated that a significant proportion of all accidents, injuries, and deaths do occur at low speeds. The Government also sought to have the lower court's apparent reliance on a quantitative "risk analysis" overruled on the grounds that any such analysis is unreliable and is, in addition, irrelevant.

On June 28, 1977 the Court of Appeals for the District of Columbia ruled in the Government's favor and indorsed the agency's per se theory:

"The evidence is uncontradicted that General Motors sold six times as many pitman arm replacements for the 1959-60 Cadillac models as for adjacent years; that steering pitman arm failures have occurred while these models were being driven; and that when the steering pitman arm fails, the driver loses control of the car. We hold that, under the statute these uncontradicted facts demonstrate an 'unreasonable risk of accidents' stemming from the defect."

The Supreme Court denied review.

United States v General Motors (Carburetors)

The Government sued GM contending that about 375,000 1965-1966 Chevrolets and Buicks contained a safety related defect arising from faulty carburetor plugs. As a result of the defect, fires occur in the engine compartments of these vehicles. These fires can and have spread to the passenger compartment as well.

General Motors admitted that there had been at least 665 reported incidents of engine compartment fires in vehicles equipped with the Rochester Quadrajet Carburetor. The Government asserted that GM received reports of 947 to 1306 carburetor failures and at least 958 fires in the vehicles in question. The Government also claimed that there were high sales of replacement parts and that a single manufacturer of these plugs supplied the distribution system with an average of 1950 replacement plugs per month during a six month period.

The Government won in the District Court on a motion for summary judgment and was awarded a \$400,000 civil penalty. GM appealed and applied for a stay of the recall order. The stay was denied. GM then recalled the vehicles.

On appeal, General Motors contended that the Court ignored General Motor's risk analysis which attempted to quantify and minimize the future occurrence of failures and resultant accidents and injuries.. The Government, of course, argued primarily that the estimate of future failures, accidents, injuries and deaths is irrelevant under the per se theory.

The Court of Appeals for the District of Columbia again accepted the Government's per se theory of defect law:

"In our view, where a defect -- a term used in the sense of an 'error of mistake' -- has been established in a motor vehicle, and where this defect results in hazards as potentially dangerous as a sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future, then the defect must be viewed as one 'related to motor vehicle safety,' and the Act's basic purpose of protecting the public requires that notification be provided.

United States v. Ford (Brackets)

The Government sued Ford contending that over one-half million 1968 and 1969 Mustangs and Cougars contain a defect related to motor vehicle safety in the front bucket seats. The seats fail suddenly when the inboard seat back hinge pin-pivot arm bracket snaps, allowing the seat back to fall rearwards in a clockwise direction. Failure can throw the driver backward and sideways, causing impairment of visibility, loss of steering, brake and accelerator control, and injury (even when an accident does not occur). During the course of the District Court litigation, Ford admitted that between 135,000 and 170,000 seat bracket failures had occurred.

The District Court granted the Government's motion for summary judgment. Ford appealed and applied for a stay of the District Court order. Unable to obtain a satisfactory stay, Ford finally recalled the vehicles.

The Court of Appeals rejected Ford's appeal.

United States v. Ford (Wipers)

Here the Government contended that sudden and unforwarned failure of the windshield wipers installed on some 189,000 1971-1973 Capris can result in immediate impairment of driver visibility during adverse weather conditions thereby increasing the risk of accident occurrence. As evidenced by replacement part sales, there is a 40% failure rate.

Several important principles were in issue in this litigation. The first is that in order to demonstrate the safety effect of a particular component failure, it is not necessary to produce evidence solely limited to failures which have occurred on the vehicles which are the subject of litigation. Thus, evidence of a wiper failure on a Plymouth would be admissible to show the likely effect of wiper failure on a Capri. The second is that although the NHTSA may focus on its de novo enforcement litigation it may establish other modes of failure involving the same component in order to establish that a defect exists. Thus, while the NHTSA investigation focused on wiper failure resulting from inadequate linkages in the wiper system, during the litigation the Government may additionally establish that failure resulted from faulty wiper motors as well. The third is that the Government may rely on comparative warranty and replacement part sales data in order to prove the existence of a defect. The fourth is that courts should not rely on quantified "risk analyses" of a particular component failure but should instead rely on the demonstrable effects of such failure on driver performance. The fifth is that a component which is universally recognized as providing an added margin of safety under specialized driving conditions, i.e., adverse weather, presents a per se unreasonable risk to the motoring public when it fails under those conditions. The sixth is that any defect which disables a vehicle causing it to park along the roadside presents an unreasonable risk to safety because of the hazards attendant to such parked vehicles.

After the trial the court ruled in favor of the Government.

Enforcement

Enforcement

- **Recognition that investigative - litigation effort is law enforcement activity**
 - **Safety standards**
 - **Defects**
 - **Bumpers**
 - **Odometers**
 - **Fuel economy standards**
- **The role of prosecutorial discretion**

Enforcement

1974 amendments to Vehicle Safety Act make mandatory recall of noncomplying or defective vehicles at manufacturer's expense

Enforcement - Defects

Defects which relate to motor vehicle safety must be corrected by manufacturer

"Defect includes any defect in performance, construction, components, or materials in motor vehicles or motor vehicle equipment."

"Motor vehicle safety means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles."

Enforcement-Defects

Industry Defect Position:

- Some threshold number of accidents, injuries or deaths have occurred, and
- Some threshold number of accidents, injuries or deaths will occur in the future

Enforcement-Defects

- **Inadequacy of accident, death and injury data attributable to a defect**

Enforcement - Defects

- **The per se theory of defect law:**

- The demonstrated failure of a critical safety component (wheels, brakes, steering, lights, etc.) establishes the existence of a safety defect whether supporting accident data exists or not

See Exhibit F

Reinforcement - Defects

The development of the large number of failures (per se) theory

- **Wheels**
 - 200,000 trucks (1960-65)
 - 2,361 wheel failures
- **Pitman Arms**
 - 284,000 Cadillacs (1959-60)
 - 26,000 failures
- **Quadrajets Carburetors**
 - 375,000 Chevrolets and Buicks (1965-66)
 - 1,306 failures
 - 1,227 fires
- **Seat Brackets**
 - 800,000 Ford Mustangs and Cougars (1968-69)
 - 130,000-170,000 failures
- **Windshield Wipers**
 - 189,000 Capris (1971-73)
 - 75,000 failures