

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

CENTER FOR AUTO SAFETY, )  
1825 Connecticut Avenue, NW )  
Suite 330 )  
Washington, DC 20009, and )

PUBLIC CITIZEN, INC., )  
1600 20<sup>th</sup> Street, NW )  
Washington, DC 20009, )

Case No. \_\_\_\_\_

Plaintiffs, )

v. )

NATIONAL HIGHWAY TRAFFIC )  
SAFETY ADMINISTRATION, )  
400 7<sup>th</sup> Street, SW )  
Washington, DC 20590, )

Defendant. )

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action, brought by two public interest membership organizations, challenges a practice of the National Highway Traffic Safety Administration (“NHTSA”) that allows automakers to limit defect notices and recalls of defective motor vehicles to certain states. By allowing automakers to treat identical vehicles from neighboring states differently, NHTSA is endangering the public and violating both the National Traffic and Motor Vehicle Safety Act (“Safety Act”) and the Administrative Procedure Act (“APA”). Accordingly, plaintiffs seek a declaration that NHTSA’s practice is unlawful and an order enjoining NHTSA from permitting auto manufacturers to engage in regional recalls in the future.

## Jurisdiction

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

## Parties

2. The Center for Auto Safety is a non-profit consumer advocacy organization that, among other things, works for strong federal safety standards to protect drivers and passengers. The Center was founded in 1970 to provide consumers a voice for auto safety and quality in Washington and to help “lemon” owners fight back across the country. The Center, which today has over 15,000 members, advocates for auto safety before the Department of Transportation and in the courts.

3. Public Citizen, a nationwide consumer advocacy organization, is a nonpartisan, non-profit group founded in 1971, with a membership of approximately 160,000. Public Citizen advocates before Congress, administrative agencies, and the courts for strong and effective health and safety regulation, and has a long history of advocacy on matters related to auto safety.

4. The Center for Auto Safety and Public Citizen bring this action on behalf of their members who have been excluded from past and ongoing auto safety recalls because of their states of residence and who currently own vehicles subject to recalls in other states. Some of these vehicles have already manifested the defect that prompted the safety recall, causing their owners to seek out repairs or replacements themselves. Further, because NHTSA permits manufacturers to avoid giving notice of defects to those owners whose vehicles neither are nor were initially registered in a recall state, other members likely have vehicles covered by regional recalls of which they are unaware. Based on the size of the present membership of both groups, the experiences of members excluded from past and present regional recalls, and the frequency

with which NHTSA has allowed regional recalls, many of plaintiffs' members will likely be excluded from both notice of and remedies for serious safety defects in the future. These members will therefore be forced to bear the cost of remedying defects for which manufacturers would otherwise be responsible. These members and their families will also be at heightened risk of dangerous crashes because of unmitigated defects in their own vehicles and in those with which they share the road.

5. The Department of Transportation ("DOT") is the federal agency charged with providing safe transportation for all Americans. 49 U.S.C. § 101. NHTSA is an agency within DOT. 49 U.S.C. § 105. By delegation from DOT, NHTSA is responsible for implementing the programs created by the Safety Act with the goal of reducing deaths, physical injuries, and economic losses associated with vehicle crashes and malfunctions. 49 U.S.C. § 30118; 49 C.F.R. § 1.50(a). As such, NHTSA is charged with ordering and monitoring safety recalls.

#### NHTSA's Role in Enforcing the National Traffic and Motor Vehicle Safety Act

6. The stated purpose of the Safety Act is to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101. NHTSA is responsible for pursuing this goal through three main activities. First, NHTSA prospectively promulgates safety standards that all new motor vehicles must meet before they may be sold to the public. 49 U.S.C. § 30111. Second, NHTSA investigates reported vehicle failures to distinguish anomalous malfunctions from failures that are indicative of a whole class of defective vehicles. 49 U.S.C. § 30166. Third, when NHTSA determines that a line of motor vehicles is defective, it initiates a safety recall, or if a manufacturer voluntarily implements a recall, NHTSA oversees it. 49 U.S.C. §§ 30118-20.

7. Under the Safety Act, “the manufacturer of [a] defective or noncomplying motor vehicle . . . shall remedy the defect or noncompliance without charge when the vehicle or equipment is presented for remedy.” 49 U.S.C. § 30120(a). The provision of this free remedy to owners of a class of vehicles is called a “recall.” The Act defines “defect” to include “any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.” 49 U.S.C. § 30102(a)(2). The Act defines “motor vehicle safety” as “the performance of a motor vehicle . . . in a way that protects the public against unreasonable risk of accidents . . . .” 49 U.S.C. § 30102(a)(8). A recall is required under the Act even if only a small proportion of vehicles actually contain a defective part, if common sense suggests the potential for a dangerous malfunction in a non-*de minimis* number of vehicles. United States v. General Motors Corp., 565 F.2d 754 (D.C. Cir. 1977).

8. The notification and recall provisions of the Safety Act are automatically triggered when NHTSA or a manufacturer identifies a defect related to motor vehicle safety. First, NHTSA must require the manufacturer to notify all dealers and “each person registered under State law as the owner” of one of the defective vehicles. 49 U.S.C. § 30119(d)(1)(A). NHTSA’s longstanding regulations require manufacturers to use specific language, both on the mailing envelope and in the notification itself, to encourage consumers to have their vehicles repaired “as quickly as possible.” 49 C.F.R. §§ 577.2 & 577.5. In addition, the notification from a manufacturer must inform consumers how to minimize the risk associated with the defect before the vehicle is repaired. 49 C.F.R. § 577.5.

9. The Safety Act also provides for the situation in which a defect is relatively unlikely to manifest itself in a particular vehicle. In such a case, the manufacturer may include a

statement in the notification letter that a defect may not exist in the particular vehicle.

49 U.S.C. § 30119(a)(2); 49 C.F.R. § 577.5(d). However, no section of the Safety Act, or any of the accompanying regulations, excuses manufacturers from notifying all owners of a class of vehicles based on the manufacturer's judgment that the risk posed by a defect is comparatively small in some of those vehicles.

10. Second, when a defect related to motor vehicle safety is identified, the Safety Act requires manufacturers either to repair or replace the defective part, or to refund the owner's purchase price. If a vehicle is subject to the notification requirement, the free remedy must be provided promptly. 49 U.S.C. § 30120. As is the case with the notification procedures, the recall provisions of the Safety Act are intended to encourage owners of potentially defective vehicles to have them inspected and repaired before they malfunction. If no defect exists in a particular vehicle brought in for inspection, the manufacturer is required only to verify and record the absence of the defect in that vehicle. 49 C.F.R. § 573.7(b)(4).

11. A manufacturer is required to track the number of vehicles involved in a recall, the number of notifications and remedies provided, and the number of vehicles inspected and determined not to possess the defect. 49 C.F.R. § 573.7(b)(4). If NHTSA determines that consumer participation in the remedy program is too low, it may require the manufacturer to issue a follow-up notification to owners or to use another form of media to disseminate information about the safety defect. 49 U.S.C. §§ 30119(e), 30119(d)(2).

12. The Safety Act provides for only one limited exception to the otherwise-mandatory notification and recall procedures outlined above. If, upon application of a manufacturer, NHTSA determines that a defect is inconsequential to motor vehicle safety, it may

exempt the manufacturer from the statutory recall requirements, but only after publishing notice in the Federal Register and allowing an opportunity for public input. 49 U.S.C. § 30118(d).

### NHTSA's Practice of Allowing Regional Recalls

13. Following the adoption of the notice and remedy provisions of the Safety Act, NHTSA presided over thousands of nationwide safety recalls. However, since at least the mid-1980s, NHTSA has allowed manufacturers to limit both the notification and remedy aspects of certain recalls to a few states, usually excluding the majority of the country. NHTSA refers to such recalls as “regional recalls.”

14. On information and belief, until 1998, NHTSA allowed regional recalls on an ad hoc basis, apparently without any particular guidelines concerning what types of defects were appropriate for a regional recall. NHTSA appeared to allow manufacturers virtual carte blanche in deciding when to restrict recalls and to which states or counties.

15. For example, between 1992 and 1998, manufacturers conducted several regional recalls to repair components that corroded when exposed to salt. Because corrosion occurred faster in states that used more salt on their roads, manufacturers limited their recalls to the states that they claimed used the most salt. However, in different corrosion-related recalls, manufacturers selected different states for inclusion; for example, some corrosion recalls included Missouri, Minnesota, and West Virginia, while others did not. *See, e.g.*, NHTSA Recall Nos. 98-V005, 97V-159, *at* <http://www.nhtsa.dot.gov/cars/problems/regional/regional.html>. Further, no corrosion recall included any part of California, although California uses more salt in its mountainous regions per application than many of the included states. Transportation Research Board, Highway Deicing:

Comparing Salt and Magnesium Acetate 22 (1991), at

<http://gulliver.trb.org/publications/sr/sr235.html>.

16. Similarly, when Ford Escorts were recalled to fix cracked fuel tanks that could leak and result in a fire, NHTSA permitted Ford Motor Company to limit its recall to all or parts of 12 states. The list included only the 10 southernmost counties in California and excluded both Death Valley, the hottest location in the United States, *see* US Geological Survey, Death Valley's Incredible Weather (2003), *at*

<http://wrgis.wr.usgs.gov/docs/usgsnps/deva/weather.html>, and New Mexico, whose neighboring states of Arizona and Texas were both included.

#### NHTSA's 1998 Letter to Manufacturers

17. In July 1997, NHTSA sent a letter to major auto manufacturers stating that the agency had “concerns” about the practice of regional recalls and that, in the future, manufacturers should consult NHTSA before announcing a regional recall. In addition, the letter stated that NHTSA would audit all regional recalls. NHTSA’s letter did not formally set forth any rules to govern future regional recalls.

18. In August 1998, NHTSA sent a follow-up letter to vehicle manufacturers that delineated specific conditions under which regional recalls would be permitted. These conditions were neither published in the Federal Register nor posted on NHTSA’s website. Although NHTSA characterized the standards described in the letter as “policy guidelines,” they set forth specific criteria to be used in evaluating proposed regional recalls, as well as specific procedural requirements governing how these recalls would be conducted.

19. In its August 1998 letter, NHTSA created two categories of recalls as to which

geography was relevant: (1) those in which the defect could manifest itself after a single or short-term exposure to certain weather conditions; and (2) those in which the defect did not manifest until the vehicle had longer exposure to certain weather conditions. NHTSA deemed the first group, termed “Short-Term Exposure to Meteorological Conditions,” inappropriate for future regional recalls because of the potential for a single weather event to occur in an excluded region or for a vehicle to travel to an affected region for a short period of time. NHTSA permitted the second category, “Long-Term Exposure to Environmental Conditions,” to remain eligible for regional recalls when the manufacturer could demonstrate that “the relevant environmental factor (or factors) is significantly more likely to exist in the area proposed for inclusion than in the rest of the United States.” NHTSA also stated that a manufacturer must base its proposed regional recall on objective data, not “merely on differences in complaint rates among the states.”

20. In addition to creating a standard for evaluating regional recalls proposed by manufacturers, NHTSA’s 1998 letter imposed other substantive and procedural requirements. First, all future regional recalls would have to include vehicles currently registered, and sometimes vehicles originally sold, in the included states. However, NHTSA did not provide for locating vehicles that had been registered, or spent time, in an included state for a period after the time of purchase, but before the recall.

21. Second, NHTSA provided that companies would usually be required to provide one follow-up notification two to three years after the original notification, to inform owners who moved into the area during that period. However, on information and belief, NHTSA has not required any manufacturer to conduct such a notification to date.



22. Third, NHTSA recognized that some vehicles that travel extensively in included states are registered in excluded states. However, the letter noted with approval a manufacturer's practice of providing a free repair for these vehicles only *after* they both exhibited the defect and the dealership obtained special approval from the manufacturer to provide the remedy. NHTSA did not require manufacturers to provide notice of defects to all owners and did not require that consumers who were excluded from regional recalls would receive a free remedy if their vehicle manifested a defect.

23. Finally, NHTSA set forth a list of 20 states, plus the District of Columbia, that it required manufacturers to include in any future corrosion-related recall: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Iowa, and Missouri. NHTSA did not explain its reasoning for including these particular states. For vehicles with defects that are not corrosion-related, NHTSA continued to permit manufacturers to conduct regional recalls in states largely of their own choosing.

24. Regional recalls sometimes include only consumers whose vehicles are registered in the included states at the time of the recall, but not vehicles that were sold in an included state and moved to an excluded state before the recall. Similarly, the 1998 letter makes no provision for vehicles that were sold second-hand in an included state and then moved to an excluded state.

25. Under the standards set forth in NHTSA's 1998 letter, owners who live in excluded states but who drive to work in, or otherwise regularly drive to, included states are not guaranteed notice of these defects or a free remedy. Thus, several corrosion recalls that have included both the District of Columbia and Maryland excluded the significant number of

Virginia residents who commute to the District of Columbia or Maryland on a daily basis. *See, e.g.*, NHTSA Recall Nos. 97V-159, 01V-200, *at*

<http://www.nhtsa.dot.gov/cars/problems/regional/regional.html>.

26. The arbitrariness of NHTSA's policy, as codified in the 1998 letter, is exhibited by the 1999 regional recall of the Ford Windstar. NHTSA Recall No. 99V-309, *at* <http://www.nhtsa.dot.gov/cars/problems/regional/regional.html>. A defect in the construction of the fuel tank led to stress fractures, creating a serious risk of fire. Because the propensity for the fuel tank to crack seemed partially related to hot temperatures, Ford recalled the Windstar in 11 states, plus the 10 southernmost counties in California and Clark County in Nevada. As it did in an earlier Ford Escort recall, Ford excluded the county that includes Death Valley, California, as well as New Mexico, North Carolina, Tennessee, and Virginia. All of these states have high monthly average temperatures that are roughly the same as those of the included states. *See, e.g.*, Netstate, *at* [www.netstate.com](http://www.netstate.com). NHTSA has never demanded that Ford expand this recall, despite the presence of dozens of reports in its own consumer complaint database of Windstars that actually developed cracks, but that were excluded from the recall.

FIRST CAUSE OF ACTION  
(For Violation of the Safety Act)

27. Plaintiffs incorporate paragraphs 1 through 26, as though fully set forth here.

28. NHTSA's practice of permitting manufacturers to conduct regional recalls violates the Safety Act, which requires that all owners of defective motor vehicles receive notice and a free remedy. 49 U.S.C. § 30101 *et seq.*

SECOND CAUSE OF ACTION  
(For Violation of the Administrative Procedure Act)

29. Plaintiffs incorporate paragraphs 1 through 26, as though fully set forth here.

30. NHTSA's rule setting forth the circumstances under which regional recalls will be permitted, and accompanying required procedures, is arbitrary, capricious, and an abuse of discretion in violation of the APA. 5 U.S.C. § 706(2)(A).

THIRD CAUSE OF ACTION  
(For Violation of the Administrative Procedure Act)

31. Plaintiffs incorporate paragraphs 1 through 26, as though fully set forth here.

32. NHTSA's 1998 letter to manufacturers sets forth a de facto legislative rule issued without notice and comment rulemaking, in violation of the APA. 5 U.S.C. §§ 553 & 706(2)(D).

WHEREFORE, Plaintiffs pray that this Court:

(A) Declare that NHTSA's practice of allowing regional recalls violates the Safety Act;

(B) In the alternative, declare that, even if regional recalls are consistent with the Safety Act, (1)NHTSA's current standards regarding where and when to allow regional recalls are arbitrary and capricious; and (2) NHTSA's 1998 letter constitutes a legislative rule, issued without notice and comment procedures, in violation of the APA;

(C) Enjoin NHTSA from approving future regional recalls;

(D) Award plaintiffs their costs and reasonable attorneys' fees; and

(E) Grant such other relief as this Court may deem just and proper.

Dated: March 10, 2004

Respectfully submitted,

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