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# CENTER FOR AUTO SAFETY

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May 15, 2002

Dr. Jeffrey Runge, Administrator  
National Highway Traffic Safety Administration (NHTSA)  
400 7th Street SW  
Washington DC 20590

Dear Dr. Runge:

Some thing is clearly wrong when NHTSA says, "It's not hot in Death Valley and it doesn't snow hard in Buffalo." Yet that what's NHTSA said in approving geographic recalls by Ford. The average yearly temperature high in Death Valley is 89.4° compared to 69.3° for downtown Santa Barbara. Yet NHTSA allowed Ford to call Santa Barbara hot and Death Valley not. NHTSA called Arizona and Texas hot but in between New Mexico not. Residents of Las Cruces NM don't feel so cool with an average yearly high temperature of 77.3° which is one degree higher than Dallas at 76.3°.

Buffalo NY gets 91.1" of snow each year compared to 33.2" for Des Moines and 31.2" for Omaha NE. With an average low temperature of 17° in January, Buffalo is only 5.8° warmer than Omaha's 11.2° in January. Yet Omaha gets a recall (97V-019) for engine fans on 1992-95 Ford Taurus and Mercury Sables and 1992-94 Ford Tempo and Mercury Topaz's that get blocked by some of that 31" of snow while the same vehicles don't get a recall in Buffalo despite 91" of lake effect snow and bitterly cold weather. In both states, the fan stops rotating and overheats setting the car on fire.

The people in Death Valley are exposed to even worse fire defects. Fuel tanks on 1988-90 Ford Aerostars and 1995 Ford Windstars can develop cracks due to high ambient temperatures. Then fuel and vapors leak out waiting only for an ignition source to erupt into flames. When NHTSA excludes the hottest spot in the nation, Death Valley CA, yet includes temperate Santa Barbara in heat related recalls, this is at best discretion run amuck. (See Attachment A for a list of Ford heat related recalls.)

The National Traffic and Motor Vehicle Safety Act of 1966 treats all vehicles equally regardless of where they are sold or registered. If there is a safety defect, the Act requires the vehicle to be recalled whether it is in Alaska, Florida, or anywhere in between. Given the mobility of society, cars travel from one area to another. Regional recalls make little sense if safety is a priority. Yet after 25 years of every state recalls, NHTSA in the mid-1980s gave in to automakers threats not to do any recall if they had to do the whole country. Geographic recalls reduce auto company recall costs at the expense of public safety.

Many of the limitations such as Buffalo and Death Valley make little sense while others are completely inconsistent. The number of salt belt states varies from 14 to 22 depending on the recall and manufacturer. New Mexico is between hot states Arizona and Texas but is not hot. At some point NHTSA itself realized auto makers were taking flagrant advantage of geographic recalls and engaged in what amounts to secret rulemaking by writing to manufacturers in a vain effort to limit some of the more egregious abuses. (Attachment B.) We are shocked to see this letter tells manufacturers they do not have to comply with 49 CFR 577.8 which prohibits disclaimers that is no defect. NHTSA even goes on to say it will juggle the numbers in public reporting on recall completion rates by not including recalls with such disclaimers in its totals. No wonder NHTSA hired Arthur Andersen to audit its new defect early warning system.<sup>1</sup> If NHTSA wants to amend its regulations, it must go through

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<sup>1</sup> "Andersen lands [\$5 million] NHTSA contract," Automotive News, 17 (Mar. 4, 2002).

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the Administrative Procedure Act which provides for public input. Like President Bush's Energy Policy, the only input came from the regulated industry.

Even the purported consumer safeguards in this secret policy have been violated. NHTSA told manufacturers who took advantage of geographic recalls that they "must assure that vehicles from outside the designated area that experience a problem due to the defect are taken care of appropriately." Right under NHTSA's nose in its own website are consumer complaints showing this policy is violated. For example in fuel tank recall of 1995 Ford Windstars (99V-309), there are 32 complaints about fuel tanks cracking and leaking fuel on NHTSA's website. Many are from consumers who were outside Ford's contrived hot belt. All of these consumer complained to NHTSA that Ford had refused to replace their fuel tanks for free but NHTSA never confronted Ford over its refusal to take care of these defects. Given this violation of the NHTSA policy, has Ford complied with the other part of the policy to send "at least one follow-up notification, usually after two or three years?" And why on the fuel tank recall for 1988-90 Aerostars (98V-190) was Ford allowed to limit the recall period to replacement by March 31, 2002. CAS is unaware of any other recall (except for tire recalls which have a statutory cut off period) where the manufacturer was allowed to cut off the recall.

The complaints to NHTSA also show something else - the cracks are not small as Ford's recall notice misleadingly implies. Consumers report they are 3" long and gasoline pours onto the ground. How a company which made the exploding Pinto could continue to have such a callous disregard for fuel tank hazards is unfathomable. With 18 of the 37 geographic recalls conducted since 1994 when NHTSA first began listing them on its Website,<sup>2</sup> it is clear that Ford is using them to limit its recall costs at the expense of consumers. In comparison, GM and Chrysler together have only half the number of geographic recalls as does Ford with GM having 5 and Chrysler 4 respectively. Ford has a long history of duping NHTSA to avoid and limit the scope of recalls. For example, Ford was fined \$425,000 in the ignition switch investigation. In the Thick Film Ignition Module or stalling investigations, Ford so successfully concealed documents from NHTSA that it avoided a recall and a penalty because NHTSA found out about the concealment too late to take action.

Many of the geographic recalls relate to rust and corrosion of vehicle components. Why NHTSA should capitulate to manufacturers demands to limit rust and corrosion recalls is a complete mystery since one of NHTSA most successful recalls (79V-078) forced Fiat to buy back up to 31,702 1970-71 vehicles for rusting undercarriages. Fiat was unsuccessful in its legal efforts to block NHTSA enforcement actions. Fiat Motors of North America, Inc. v. National Highway Traffic Safety Administration, 489 F.Supp 13 (SD NY 1979). Thus the only time a manufacturer has gone to court over a national corrosion and rust recall, it has lost. When the agency wins big time, it shouldn't concede defeat the next time.

Next to consumers, California with 12% of the nation's vehicles is the biggest victim of geographic recalls because auto makers can cut recall costs 12% by excluding California. Only one of the 37 geographic recalls includes all of California. As CAS demonstrated by finding 30 failure reports outside the geographic recall area including two accidents in Georgia and

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Although NHTSA's Website lists 42 geographic recalls since 1994, this number is in error. First, NHTSA combined two Ford recalls, 97V-144 and 97V-145, into a single recall. Second 6 of the 42 recalls listed on NHTSA's Regional Recall page are by regional Toyota distributors, Gulf States Toyota Distributors, Inc. and Southeast Toyota Distributors, Inc. These are recalls of the entire fleet sold by these distributors. They just happen to market only in specific states just as do regional distributors such as Daewoo Puerto Rico, Daewoo Motor Guam and Mitsubishi Motor Sales of Caribbean, Inc. whose recalls are not included on NHTSA's Regional Recall Web page.

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California in Ford's first subframe bolt corrosion recall on Ford Taurus, Mercury Sable and Lincoln Continental (93V-106), corrosion failures occur in California.

Perhaps stung by CAS expose of the failure of geographic recalls to protect consumers, NHTSA does not put the city and state information on the public domain website and has taken this information out of the Vehicle Owner Questionnaires (VOQs) maintained at the Technical Information Service (TIS) library for public access. This makes it very difficult for the public to analyze the inadequacies of geographic recalls. When NHTSA first redacted personal identifier information from complaints, it only redacted the name and street address. CAS challenged the agency and lost on that limited redaction in Center for Auto Safety v. National Highway Traffic Safety Administration, 809 F.Supp 148 (1993). At that time, NHTSA took the position that providing the city and state protected the privacy of the consumer while allowing the public to oversee whether the agency was doing its job. Since identifying the city and state in which a consumer lives cannot possibly identify the consumer, the only apparent motivation for the change in policy is to keep the public in the dark about how little geographic recalls do to remedy safety defects. An agency that does it job should not make it difficult for the public to determine whether it is doing its job.

CAS requests the following:

- 1) Revert to the agency's prior policy of requiring every state recalls.
- 2) Stop redacting the city and state from VOQ's stored on the optical scanner used to provide public access to complaints at TIS.
- 3) Place the city and state on each complaint summarized on the complaint data base on NHTSA's Website in the same fashion as it was provided on computer printouts which was replaced by the web as the means of conveying complaint data base information. Better technology should not mean less information.

The Center for Auto Safety has observed and cared for NHTSA's safety defects and recall program over the years. We were instrumental in getting the repair for free provision written into the Safety Act. We were responsible for the petition that amended the defect notification regulation that these geographic recalls violate. We were instrumental in getting the civil fine doubled and the second notice requirement put into the law. We were the only consumer group invited to testify before both the Senate and House Commerce Committees in hearings leading to passage of the TREAD Act which gave NHTSA much greater authority and mandates in the recall process.

We are greatly saddened to see the agency become a shadow of its former self in standing up to the auto industry to protect the public health and safety. Through successful litigation in the 1970's under the brilliant leadership of Chief Counsel Frank Berndt, the agency successfully established a per se defects enforcement policy in a string of cases described in Attachment C, a memorandum prepared by his office. That policy was not only untouched, but endorsed, by the DC Circuit in the X-Car case, United States v. General Motors Corp., 841 F2d 400 (1988). Defects such as stalling and windshield wiper failure that NHTSA got courts to hold were per se defects in the 1970's are routinely contested by auto makers today. As the new Administrator, you have a unique opportunity to restore the luster to NHTSA's enforcement by saying enough is enough and stopping geographic recalls as a start. Congress didn't add criminal penalties, a nearly 20 fold increase in civil penalties and mandatory new disclosures in the TREAD Act for NHTSA to be a reluctant enforcer.

Sincerely,



Clarence M. Ditlow  
Executive Director

## Attachment A - FORD HEAT BELT RECALLS

### **NHTSA Recall No. 97V144/Ford Recall No. 97S79**

*Vehicles:* Ford 1995 Escort and Mercury Tracer equipped with 1.9L engines and manufactured from April through October 1995.

*Population:* 64,000 vehicles built at the Hermosillo or Wayne Assembly Plants, and originally sold or currently registered in the states of Alabama, Arkansas, California, Florida, Georgia, Hawaii, Louisiana, Mississippi, Nevada, Oklahoma, South Carolina, and Texas.

*Problem:* Cracks can develop in the fuel tank near the heat shield attachment resulting in fuel leakage if the cracks go through the fuel tank wall. Fuel leakage in the presence of an ignition source can result in vehicle fire.

*Remedy:* Dealers will remove the heat shield attachments. This will not affect heat shield location or function, as the attachments are intended to keep the shield in place until the fuel tank is installed in the vehicle. After installation, the fuel tank straps retain the heat shield.

### **NHTSA Recall No. 97V145/Ford Recall No. 97S80**

*Vehicles:* Ford 1995 Escort and Mercury Tracer equipped with 1.9L engines and manufactured from April through October 1995.

*Population:* 600 vehicles built at the Hermosillo or Wayne Assembly Plants, and originally sold or currently registered in the state of Arizona.

*Problem:* Cracks can develop in the fuel tank near the heat shield attachment resulting in fuel leakage if the cracks go through the fuel tank wall. Fuel leakage in the presence of an ignition source can result in vehicle fire.

*Remedy:* Dealers will remove the heat shield attachments. This will not affect heat shield location or function, as the attachments are intended to keep the shield in place until the fuel tank is installed in the vehicle. After installation, the fuel tank straps retain the heat shield.

### **NHTSA Recall No. 98V190/Ford Recall No. 98M03**

*Vehicles:* Ford 1988-1990 Aerostar manufactured from October 1987 through November 1989.

*Population:* 140,000 mini-vans currently registered in the states of Alabama, Arizona, Arkansas, California (10 southern counties of Los Angeles, Orange, San Bernardino, San Diego, Riverside, Ventura, Santa Barbara, San Luis Obispo, Imperial, and Kern), Florida, Georgia, Hawaii, Louisiana, Mississippi, Nevada (Clark County), Oklahoma, South Carolina, and Texas, and in the U.S. Territories covered by the Federal statutes.

*Problem:* The upper portion of the fuel tank can develop small cracks due to extended exposure to very high ambient temperatures. Fuel vapor or leakage could occur at these cracks. If an ignition source is present, fire could result.

*Remedy:* Dealers will replace the fuel tank, regardless of mileage, through March 31, 2002. This coverage will only be structural cracks at the top of the tank and will not include other damage caused by crash or road debris.

### **NHTSA Recall No. 99V309/Ford Recall No. 99S33**

*Vehicles:* Ford 1995 Windstar manufactured from January 1994 through August 1995.

*Population:* 70,116 mini vans sold or currently registered in the states of Alabama, Arizona, Arkansas, California (10 southern counties), Florida, Georgia, Hawaii, Louisiana, Mississippi, Nevada (Clark County only), Oklahoma, South Carolina, and Texas.

*Problem:* These mini vans can develop cracks in the fuel tank in the forward strap area of the standard 20-gallon tank due to a combination of factors that are present in certain very hot areas of the country. The cracks could result in fuel leakage if they propagate through the wall of the tank. Fuel leakage, in the present of an ignition source, could result in fire.

*Remedy:* Dealers will install a brace assembly at the strap bolt hole location and replace the tank strap with a revised, longer strap. Dealers will also inspect the tanks for leaks. If a leak exists and is the result of a crack in the fuel tank, the tank will be replaced in addition to the installation of a spacer and longer strap.

## Attachment B - NHTSA SECRET GEOGRAPHIC RECALL POLICY

### CERTIFIED MAIL RETURN RECEIPT REQUESTED

Various Major Vehicle Manufacturer Reps.

Dear Mr. :

Last year I sent letters to the various manufacturers of passenger cars and light trucks of the National Highway Traffic Safety Administration's (NHTSA) concerns regarding several safety recalls in which the manufacturer had limited the geographic scope of the recall. In that letter, I noted that, as a general matter, safety-related defects must be remedied on a nationwide basis, unless the manufacturer can justify a limited geographic scope.

Since that time, NHTSA has considered the matter and has developed the following policy guidelines with respect to safety recalls which may have a limited geographic scope. The primary objective of that policy is to ensure that the owners of all vehicles for which a safety defect may cause adverse safety consequences have the opportunity to obtain a free remedy from the manufacturer.

#### **NHTSA Regional Recall Policy**

In the past, manufacturers have proposed to conduct regional recalls under the following two general circumstances: (1) when the consequences of the defect occur as the result of a short-term or single exposure to a particular meteorological condition; and (2) when the consequences of the defect generally occur only after long-term or recurring exposure to environmental conditions. One common example of the latter category is a recall for a defect related to corrosion caused by road salt, but it also includes defects related to long-term exposure to temperature extremes or other environmental factors.

(1) Short-Term Exposure to Meteorological Conditions: NHTSA has concluded that, in general, it is not appropriate for a manufacturer to limit the scope of a recall to a particular geographical area where the consequences of the defect can occur after a short-term exposure to a meteorological condition, such as extreme heat or cold or severe precipitation. While it is true that these conditions are more likely to occur in some regions of the United States than in others, they can occur on an occasional basis over a widespread area. Moreover, if only a single or brief exposure to a particular condition can lead to a safety problem, vehicles from throughout the country will be at risk if they are temporarily located or operated within the designated "high-risk" area (e.g., on a business or vacation trip). In the past, safety-related defects of this nature have almost always been addressed by nationwide recall campaigns.

In recognition of the fact that the likelihood of experiencing a safety problem as a result of this type of defect is relatively low in certain regions of the country, NHTSA believes that in some cases it may be permissible for a manufacturer to modify the content of the owner notification letter that is sent to owners in those areas. Therefore, notwithstanding 49 CFR 577.8 ("Disclaimers"), the agency may act favorably on requests by manufacturers to include language in the letters to owners of vehicles in "low-risk" states (or portions of states) that indicates that

the defect is unlikely to cause a safety problem if the vehicle is not exposed to the meteorological condition at issue. However, the letter must make it clear that the owner will be able to obtain a free remedy for the defect if he or she wishes.

We note that owners of vehicles that are unlikely to experience the specified meteorological condition would usually not be motivated to have the recall work completed. Therefore, ODI would not normally request a manufacturer to conduct a follow-up notification campaign solely on the basis of a low nationwide recall completion rate, and it would not include such recalls in its computation of average recall completion rates.

(2) Long-Term Exposure to Environmental Conditions: Proposals to conduct regional recalls in cases where the consequences of the defect occur only after recurring exposure to environmental factors raise different issues, since intermittent trips or freakish weather conditions will not create a safety problem. In such cases, if the manufacturer is able to 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 will approve a regional recall. The manufacturer's justification for such a proposal should be based on objective factors, and not merely on differences in complaint rates among the states.

When such a regional recall is approved by the agency, the manufacturer will be required to send a notification letter to the owners of subject vehicles currently registered in the designated states (or portions of states) and, in some cases, to the owners of vehicles originally sold in the designated states. The manufacturer will only have to provide the free recall remedy to those vehicles. However, since it is possible that other vehicles may be exposed to the condition in question (e.g., because they are located in "border states" near the states covered by the recall or because they are regularly driven in those states), manufacturers must assure that vehicles from outside the designated area that experience a problem due to the defect are taken care of appropriately. We note that one manufacturer has implemented such a program in connection with some of its previous regional recalls (see, e.g., recall 97V-159, in which all Ford Motor Company dealers were notified that if a vehicle not covered by the recall exhibited the problem in question, the dealer should contact the Regional Office to obtain approval to provide the recall repair to the consumer at no charge). In addition, since vehicles that are registered outside of the designated states at the time of the original notification campaign may subsequently be sold to residents within those states, in most cases, ODI will require manufacturers to conduct at least one follow-up notification, usually after two or three years, to ensure that owners who move into the area in question after the original notification campaign are aware of the recall and of the need to have the recall work completed.

During the past ten years, ODI has concurred in proposals by several manufacturers to conduct regional recalls to address safety problems caused by corrosion due to long-term exposure to road salt. Such salt is used predominantly in states located in the Northeast. However, different manufacturers have designated different states for inclusion in such recalls, without attempting to justify the particular states selected. We have reviewed several factors, including the use of road salt in the various states and the past practices of vehicle manufacturers, and has determined that, at a minimum, vehicles originally sold in or currently registered in the following states must be included in any regional recall related to corrosion caused by road salt: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, West Virginia, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Iowa, and Missouri.

If you have any technical questions concerning these issues, please contact Mr. White at (202) 366-5226.

Sincerely,

**Kenneth N. Weinstein**  
**Associate Administrator**  
**for Safety Assurance**

# **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

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## ***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 of 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***

# ***Enforcement - 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
- **Quadrajet 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

## 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 analogous 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 unforewarned 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.