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STATEMENT BY JOAN CLAYBROOK ON THE GM/NHTSA COBALT INVESTIGATIONS  
NHTSA Reliance on a "Trend" NOT Required in the Law or Regulations

A Memorandum by the House of Representatives Committee on Energy and Commerce staff reveals that in September 2007 the Chief of NHTSA's Defects Assessment Division (DAD) proposed an investigation of "frontal airbag non-deployment in the 2003-2006 Chevrolet Cobolt/Saturn Ion." But on November 15, 2007 DAD was overruled by a decision-making panel in the Office of Defects Investigation (ODI) after briefing them and despite there being 29 complaints, 4 fatal crashes, and 14 field reports. The ODI reviewing panel indicated it did not identify any discernable trend.

However, the chief of the Defects Assessment Division stated in an email in September 2007 that "the issue was promoted by a pattern of reported non-deployments in VOQ [Vehicle Owners' Questionnaires] complaints that was first observed in early 2005. Since that time, the Defects Assessment Division] has followed up on the complaints, enlisted the support of NCSA's Special Crash Investigations (SCI) team, discussed the matter with GM, and received a related EWD [early warning] Referral. Notwithstanding GM's indications that they see no specific problem pattern, DAD perceives a pattern of non-deployments in these vehicles that does not exist in their peers...."

In addition to the fact that this case generated more relevant information than many others where ODI did open an investigation (including on air bag non-deployments), NHTSA's statute and regulations do not require or even suggest that the agency must establish a trend or pattern before it can open a safety defect investigation.

NHTSA also has informal but detailed "Office Procedures for Conducting Defect Investigations". The only reference in this 16 page document to "trend" data is: "if DAD believes that the available information may indicate that a safety-related trend is developing," a staff analyst prepares an "Initial Evaluation (IE) Resume and a memo summarizing the information. A definitive trend is not indicated as a requirement to open an investigation.

In the 1970's NHTSA's Chief Counsel addressed this issue. His memorandum explaining NHTSA's Per Se theory of defect law states: "The demonstrated failure of a critical safety component ... establishes the existence of a safety related defect whether supporting accident data exists or not." He used it successfully in four court challenges:

- Pitman arms failure causing loss of control
- Windshield wipers falling off in snow and rain
- Quadrajete carburetor causing fire
- Seat backs collapsing sideways and backward

As he explained in his memorandum, there are serious limitations on available accident information. The industry argues that to prove a defect the agency must show some threshold number of accidents, injuries or deaths have occurred, and will occur in the future. He explained that accident information, and owner reports have inherent deficiencies of availability, reliability, and accuracy. In addition, they present practical burdens and have evidentiary difficulties as proof in court, including excessive cost and time-consuming demands.

Reliance on accident information also presents statutory problems, the memo explains, because the purpose of the safety Act is preventive. NHTSA would be violating that goal if it waited for evidence of some significant number of accidents, deaths or injuries to accumulate. The Act also specifies a number of ways of finding safety defects, including 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 former Chief Counsel's reasons for his approach are still relevant today. NHTSA has fallen into a bureaucratic quagmire that it uses to avoid opening investigations and determining safety defects while people are dying unnecessarily on the highway. The statement recently by the current Chief Counsel, Kevin Vincent, that NHTSA could not open an investigation in the Cobalt/Saturn case because it could not establish an "unreasonable risk to safety" is completely wrong, and not grounded in any legal requirement. That standard applies to determining a safety defect exists, not opening an investigation. It is past time for NHTSA to put the public first in its safety defect decisions.

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