

October 19, 2015

Docket Management Facility, M-30
U.S. Department of Transportation
West Building Ground Floor, Rm. W12-140
1200 New Jersey Avenue SE
Washington, DC 20590

**RE: Docket No. NHTSA-2015-0095 Request for Public Comments on NHTSA
Enforcement Guidance Bulletin 2015-01: Recommended Best Practices for Protective
Orders and Settlement Agreements in Civil Litigation**

The Center for Auto Safety (CAS) appreciates the opportunity to comment on the National Highway Traffic Safety Administration's (NHTSA's) Request for Public Comments on NHTSA Enforcement Guidance Bulletin 2015-01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation. CAS supports NHTSA's efforts to acquire all safety-related information produced in litigation as a matter of public policy, but believes the agency has the statutory authority to do more than simply produce a guidance document.

Even before the National Traffic and Motor Vehicle Safety Act of 1966 was passed, auto manufacturers used confidentiality agreements and protective orders to conceal safety defects. A most extraordinary 1962 lawsuit, *Petry v. General Motors*, involving the direct air heater in 1961-69 Chevrolet Corvairs was uncovered by the Senate Commerce in "Auto Safety Oversight Hearing – Corvair Heater," 92nd Cong., 1st Sess. (Feb. 16, 1972). According to the testimony of attorney Edward L. Wolfe at the hearing (*Id.* at 220-21):

I compromised and settled it for \$125,000. But there were other conditions.

These other conditions were, first, all of the depositions, the sworn testimony taken, which was principally the testimony taken of General Motors' employees, was to be turned over to them In other words, my whole file was taken as a condition of the settlement. And in addition to that we had to sign, my client and my law firm, myself, that we would not talk, write, advertise or promulgate the facts of the Petry case, and particularly the theory of liability relative to the defective heater.

In addition to that, the complaint which was filed which alleged the design in defect, that had to be amended and the theory of the defective design deleted or eliminated and the new complaint would indicate only that the theory of liability was failure to manufacture the automobile . . .

Thus not only was there a confidentiality settlement with documents destroyed, not just protected, but also the sole remaining public document, the complaint, was amended to show a manufacturing defect that would apply only to a single Corvair as to a design defect that would apply all 1961-69 Corvairs. In November 1971, nine years after the Petry case, NHTSA

caught up to GM and found all 1961-69 Corvairs had defective defect heaters and required statutory defect notice to be mailed to owners. But GM had the last laugh and cruelly refused to pay for remedy of the defective heaters as the Safety Act did not require “repair for free” at that time. (NHTSA ID 71-0224, now 71V224.)

Thus for decades, manufacturers have required victims of vehicle defects to sign confidentiality agreements prior to receiving compensation via settlement while their must attorneys agree to protective orders on discovery in order to advance their client’s case. This practice prevents victims from reporting vehicle safety defects to NHTSA as well as to the media and other organizations, effectively giving manufacturers control over vital safety information that reaches the agency, as well as the public at large. Such concealment of safety information leads to deaths and injuries while recalls are delayed or avoided.

Some of the more famous cases include:

[Chevrolet Motor Mounts](#)
[Chrysler Minivan Liftgate Latch](#)
[Firestone 500 Steel Belted Radials](#)
[Ford Pinto Fuel Tank](#)
[Ford Transmissions Failure to Hold in Park](#)
[General Motors X-Car Brake Lock-up](#)
[Audi Sudden Acceleration](#)
[Evenflo Child Restraint False Latching](#)
[Ford Cruise Control Deactivation Switch Fires](#)
[Takata Seat Belt Buckle](#)
[Ford Ignition Switch Fires](#)
[General Motors Side Saddle Gas Tank Fires](#)
[Ford Explorer-Firestone Wilderness/ATX Tire Failure & Rollover](#)
[Jeep Grand Cherokee Fuel Tank](#)
[General Motors Ignition Switch](#)
[Toyota Sudden Acceleration](#)
[Takata Airbag Inflator Ruptures](#)

Over the last thirty years, CAS has discovered numerous defects that killed and injured thousands of consumers only by searching for the tip of the iceberg, complaints in lawsuits because the settlements and discovery are protected and confidential. Some examples of these include:

In [December 1989 CAS petitioned NHTSA](#) to recall Evenflo's “One Step” child seats for defective buckles used to fasten integral shield/restraint harness assembly on series. A key element to CAS’ petition was a search of all child restraint lawsuits reported to the Association of Trial Lawyers of America and the Institute for Injury Reduction which turned up fifteen cases where children in One Step seats had a severely debilitating or fatal injury with the next highest seat being the Evenflo “Dyn-O-Mite” with six reported cases. Both seats were included in the record recalls.

In 1992, [CAS petitioned NHTSA to recall GM C/K pickups](#) susceptible to fire after finding multiple examples of settlements intended to prevent the release of incriminating documents. Tragically, GM refused to recall and [NHTSA settled for \\$52 million in safety programs](#) even though more than [2,000 people were killed in fatal fire crashes of GM pickups](#). In 2003, a US

[District Court in Montana released the total number of C/K settlements](#) but not the settlements themselves or any protected discovery. The total paid out in [331 individual settlements was an incredible \\$495 million](#). Had these settlements and protected documents been made public as they occurred, many of the thousands C/K side saddle burn deaths and injury victims could have been saved by a timely recall.

[Ford and Firestone](#) made a habit of requiring confidentiality agreements before settlement and sealing documents while attempting to cover up tread separation problems. The incredible delay in a NHTSA decision on faulty GM ignition switches was certainly due in part to a [series of confidential settlement agreements](#) reached with plaintiffs. Multiple manufacturers of vehicles containing defective Takata airbags [have sought to delay the spread of information](#) using the same tactic.

While CAS agrees that the issuance of an “Enforcement Guidance Bulletin” may produce some positive results, the problem remains how does NHTSA or the public learn about these confidential settlements? While NHTSA has created a mechanism to allow disclosure to the agency, there is nothing to require disclosure to the agency. Moreover, the Guidance Bulletin does not require a manufacturer to disclose whether a document has been publicly disclosed or released from a protective order in another proceeding. In addition to requiring settlement agreements to provide for the disclosure of safety information to NHTSA, the agreements should be required to disclose if any protected document has been made public in a prior proceeding.

We would like to stress that NHTSA has had the statutory authority to force disclosure of all lawsuits and claims involving a death or injury due to a vehicle safety defect since the passage of the Early Warning Reporting requirements in the TREAD Act fifteen years ago. Unfortunately, [as pointed out earlier this year](#) by the Department of Transportation’s Inspector General, NHTSA has failed both in implementation of EWR as well as in monitoring manufacturer reports for completeness. The agency should use this authority to require submission of all protected documents to the agency under EWR that have been made public anywhere.

Finally, the agency should modify the Guidance Bulletin to specifically allow for submission of relevant motor vehicle safety information to any defect or non-compliance investigation being conducted by the agency. To say the information is available to NHTSA is only a small part of the task. Mechanisms must be created to ensure that the safety information reaches the agency in a timely fashion to obtain vehicle recalls before consumers are needlessly killed or injured as documented by CAS in the above examples.

Respectfully submitted,

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