

CENTER FOR AUTO SAFETY

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November 25, 2003

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

Dear Dr. Runge:

In closing its investigation into stalling on the 2000-02 Ford Focus without a safety recall, NHTSA is gambling with Focus owners' lives that they won't be killed or injured when their cars stall. This is bad law and bad safety. NHTSA has litigated and won this issue. Class action attorneys have litigated and won this issue. NHTSA has conducted over 100 real safety recalls (Appendix) rather than service campaigns inaccurately labeled as safety recalls by NHTSA. As Judge Michael Ballester held: "stalling, under almost any circumstances, presents an unreasonable risk to automobile safety and to the safety of the occupants of any such vehicle. It would defy common sense and the weight of the evidence to find otherwise." (Howard v. Ford Motor Co., No. 783785-2, Alameda County, Calif. Super Ct. 12 (Oct. 11, 2000)). By caving in to Ford, NHTSA admits that its lawyers are either less capable or more politically bound than class action attorneys who can win trials on stalling as a safety defect.

In the 1970's when NHTSA was more enforcement oriented, the agency won two cases, *United States v. General Motors Corp.*, 417 F.Supp 983 (D.D.C.), aff'd 558 F.2d 754 (1977) and *United States v. Ford Motor Co.*, 453 F.Supp 1240 (D.D.C., 1978) where US District Courts held vehicles stopped on the roadway or even on the roadside were safety defects. In the first case, *United States v. General Motors*, involving Rochester Quadrajet carburetors on GM vehicles where NHTSA determined both carburetor fires and stalling were safety defects, the court found and held:

(28) In California alone, approximately 100 people per year are killed as a result of vehicle disablement whether they remain in the vehicle or walk to get assistance. Vehicle disablement Study, April 1974, prepared for NHTSA, U. S. Department of Transportation.

(29) On the Interstate System, approximately 3.5 per cent of all vehicle collisions involve parked cars on the shoulder of the highway. "Fatal Accidents on Completed Sections of the Interstate Highway System, 1955." Public Roads, Vol. 35, No. 10, October, 1955. [417 F.Supp at 937.]

(6) It is not necessary that a collision or death has occurred or will occur as a result of the defect. The purpose of the Act is to provide owners with an adequate margin of safety to protect against vehicle failures, which are in and of themselves an accident under the Act, and which result in an unreasonable risk of personal or property damage. See 15 U.S.C. § 1401(a)(3)(B) as amended, S.Rep.No.1301, 89th Cong., 2d Sess. 6

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(1988) at 3, U.S. Code Cong. & Admin. News 1988, p. 2709, *United States v. General Motors Corp.* ("Wheels"), *supra*, at 435. [Id. at 931.]

(8) Even if this "defect" were not *per se* related to "motor vehicle safety," the uncontested facts of this case establish that fuel inlet plug failure results in several obvious and undeniable safety hazards. First, once the plug fails, the car "will stop running." The driver must then either abandon his vehicle in the midst of oncoming traffic or, if he can, pull over to the side of the road. Both situations are dangerous. [Id. at 931-39.]

In the second case involving windshield wipers that could fail and force motorist to stop on the road just as does stalling, *United States v. Ford*, the court held:

11. * * * Even if drivers pull to the side of the road and bring their vehicles to a stop on the shoulder they are still exposed to the risk of being struck from behind by a moving vehicle. Some drivers, unable to proceed because of loss of forward visibility, have even brought their vehicles to a stop in the middle of lanes intended for moving traffic. Having brought their vehicles to a stop, drivers imperiled by the windshield wiper failure have exited their vehicles in order to extricate themselves from the unsafe circumstances into which they have involuntarily been thrust. This too exposes them to the further risk of being struck by a moving vehicle. Vehicle collisions and attendant injuries have been associated with windshield wiper failure in the past.

For the foregoing reasons, the Court concludes that the Design Level I and Design Level II pivot assemblies contain a "defect" and that said "defect" poses an unreasonable risk within the meaning of the Safety Act. [453 F. Supp. at 1250.]

Former NHTSA Chief Counsel Frank Berndt who was the chief legal architect in establishing a *per se* defects theory before the Courts pointed out in his memo on Enforcement Litigation that "any defect which disables a vehicle causing it to park along the roadside [much less than stall in traffic] presents an unreasonable risk to safety because of the hazards attendant to such parked vehicles." (A copy of the memo is attached.) Even when the Court of Appeals ruled against NHTSA in the X-Car Brake Lockup performance case, *United States v. General Motors*, 841 F.2d 400 (D.C. Cir. 1988), the Court went out of its way to uphold the validity of the earlier defects cases outlined in Chief Counsel Berndt's memo.

Ford attempts to use an unpublished 1986 study by the Transportation System Center (TSC), "Analysis of Stalling Problems," in its letter of November 19, 2003 to justify a pseudo-service campaign. Rather than supporting Ford, the study supports a safety recall. Ford attempts to make it seem that stalling recalls are not safety-related because there are fewer accidents attributed to stalling than other problems that lead to recalls. In fact TSC's study is precisely the opposite - manufacturers conduct stalling-related recalls, despite the lower rate of accidents attributed to stalling, because they recognize stalling is a safety-related defect as NHTSA successfully established through its defects litigation in the 1970's.

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NHTSA reaches a new low in safety and misleading the public in giving this a safety recall identification number, 03V-482 on its website. First, it's not a safety recall. Second, it's not even a "safety improvement campaign" as NHTSA states on its website because nothing is being improved until the Focus stalls and then it may be too late for the unlucky occupants.

In getting NHTSA to accept this pseudo-service campaign which was a first within Ford, let alone NHTSA, Ford cited two stalling investigations closed without a recall in the mid-1980's when NHTSA was closing investigation right and left without a recall. Ford even had the audacity in its November 19, 2003 letter to NHTSA to cite EAS4-029 where Ford withheld documents from NHTSA which Judge Ballechey relied on in finding that Ford fraudulantly concealed stalling caused by TFI module failure from NHTSA.

In responding to Ford on November 21, NHTSA makes no mention of the successfully litigated defects cases which were cited with approval by none other than Judge Kenneth Starr in his X-Car Brake Lockup decision which came after both EAS4-029 and the TSC stalling study which Ford used to construct its house of cards. Although NHTSA expresses uncertainty over the outcome of litigation of the stalling in this investigation on failed fuel pump in the 2000-02 Ford Focus, this is virtually a legal slam dunk. NHTSA should reopen the investigation (EA02-022) and litigate rather than cave in to Ford.

Sincerely,


Clarence M. Ditlow
Executive Director

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Appendix
STALLING RECALLS, 1968 to 2002

Make	Model	Year	Recall #	# of Vehicles
BMW	745	2002	02V150 000	8412
GM	ENVOY TRAILBLZR BRAVADA	2002	02V121 000	60,044
HONDA	ACCORD CIVIC CR-V ODYSSEY PRELUDE ACURA CL TL	1997-2000	02V120 000	1,000,000
SUPREME	STARTRANS CLASSIC AMERICAN	1999-2001	02V115 000	8
HYUNDAI CARIB	SANTA FE	2001	02V111 000	248
MITSUBISHI	DIAMANTE	2002	02V100 000	3,885
FREIGHTLNR	THOMAS MVPER	1995-2001	02V085 000	4,800
KIA	OPTIMA	2001	02V040 000	4,286
HYUNDAI	SANTA FE	2001	01V388 000	15,241
HYUNDAI	XG300	2001	01V362 000	1,962
HONDA	CIVIC	2001	01V183 000	56,269
HONDA	GL1800	2001	01V133 000	8,107
FORD	COUGAR	1999-2000	01V031 000	120,000
DAEWOO PR	LANOS	2000-2001	01V020 001	1,362
DAEWOO	LANOS	2000-2001	01V020 000	27,884
FORD	CONTOUR MYSTIQUE	1995-1996	00V367 000	263,757
HYUNDAI CARIB	SONATA ELANTRA	1999-2000	00V259 002	1,421

Make	Model	Year	Recall #	# of Vehicles
HYUNDAI	SONATA ELANTRA	1999-2000	00V259 001	165,977
MAZDA	626	1998	00V134 000	31,000
KIA	SPORTAGE	1997-1999	99V325 000	76,986
KIA	SEPHIA	1998-1999	99V317 000	102,944
EXCELSIOR HENDERSON	SUPER X	1999	99V299 000	857
HARLEY DAVIDSON	FLT	1999-2000	99V292 000	52,126
FREIGHTLNR	FLC,FLD,FLN	1998-1999	99V181 002	320
KENWORTH	T/W SERIES PETERBILT 300 SERIES	1998-1999	99V181 000	272
BUELL	M2 CYCLONE	1999	99V140 000	1,177
BUELL	X1 LIGHTNING	1999	99V134 000	1,765
BUELL	LIGHTNING M1 CYCLONE THUNDERBLT	1996-1999	99V097 000	10,255
BUELL	S1 LIGHTNING	1996-1998	99V097 000	3,878
KAWASAKI	VN 1500 DRIFTER	1999	99V067 000	2,779
CATERPILLAR	C10, C12 3406E	1999	99B-023 000	826
SUZUKI	GSX-R750w TL1000RW	1998	98V287 000	6,087
GULF STATES TOYOTA	CAMRY RAV 4	1998-1999	98V279 000	1,519
SOUTHEAST TOYOTA	RAV4 AVALON SIENNA	1998-1999	98V278 000	1,960
HOMB & PARK	ROADTREK	1998	98V261 000	404
FORD	PROBE	1997	98V206 002	5,700
MAZDA	626 MX6	1997	98V206 001	40,000

Make	Model	Year	Recall #	# of Vehicles
HONDA	PASSPORT	1998	98V170 002	16,838
ISUZU	AMIGO, RODEO	1998	98V170 001	55,475
HARLEY DAVIDSON	FL SERIES	1994-1998	98V158 000	55,013
VOLKSWAGN	BETLE	1998	98V100 000	8,500
HOLIDAY RAMBLER	ENDEAVOR	1998	98V074 000	47
HONDA	PASSPORT	1994-1995	97V034 002	42,092
ISUZU	RODEO PCKUP TRCK	1994-1995 1995	97V034 001	118,485
THOMAS	SAF-T-LINER	1994-1996	97V018 000	1,800
HARLEY DAVIDSON	SOFTAIL XL FX FL	1995-1997 1995-1997 1995-1996 1994-1997	96V204 000	176,515
BLUE BIRD	TC2000 Q-BUS	1996 1996	96V198 000	5
CRWN COACH	SCHOOL BUS	1992	96V168 000	101
VOLKSWAGN	GOLF JETTA PASSAT CORRADO	1993-1995 1993-1995 1993-1995 1993-1995	95V178 000	34,000
NISSAN	DSL- UD1800 UD2300 UD2600 UD3000	1995	95V176 000	890
THOMAS	MVP-EP	1994-1995	95V170 000	300
HONDA HONDA MOTORCYCLE	GL1500SE ST1100A ASPENCADE INTERSTATE ST1100 GL01500	1990-1993 1992-1993 1991-1993 1991-1993 1991-1993 1988-1990	95V128 000	54,388
SAAB	900	1995	95V066 000	5,383
HYUNDAI	ACCENT	1995	95V043 000	5,306

Make	Model	Year	Recall #	# of Vehicles
MERCEDES	124 (E CLASS)	1992-1995	95V031 000	50,000
MAZDA	PROTÉGÉ	1995	95V033 000	5,760
THOMAS	CITILINER BUS	1994-1995 1994-1995	95V006 000	80
WESTERN STAR	CONVENTIONA L	1994	94V247 000	192
AM GENERAL	HUMMER	1992-1994	94V164 000	2,300
AM GENERAL	HUMMER	1992-1993	94V162 000	1,300
OSHKOSH	MB-FD MB-FG MC-FD MC-FG MT-FD	1989-1990 1990-1991 1989-1990 1990-1991 1989-1990	94V130 000	398
HYUNDAI	ELANTRA EXCEL	1994 1994	94V090 000	600
VOLKSWAGN	CORRADO	1990-1991	94V068 000	8,500
FORD TRUCK	B600 B700	1987-1994 1987-1994	94V056 000	3,660
DODGE PLYMOUTH	NEON NEON	1995 1995	94V033 000	7,100
CHRYSLER	CONCORDE LHS NEW YORKER INTREPID VISION	1994	94V024 000	110,000
VOLKSWAGN	CORRADO	1992-1993	93V102 000	4,300
BMW	525	1989	92V174 000	15,900
JAGUAR	XJ-S	1992	91V155 000	700
YUGO	G V PLUS	1990-1991	91V130 000	3,676
VOLKSWAGN	CORRADO	1990-1991	91V068 000	8,500
COLTEC	HOLLEY 12-801 12-802	N/A	91E034 000	493

Make	Model	Year	Recall #	# of Vehicles
VOLKSWAGN	CABRIOLET SCIROCCO JETTA GOLF	1985-1987 1985-1987 1985-1987 1985-1987	87V053 000	278,520
VOLKSWAGN TRUCK	CAMPER VANAGON SYNCRO	1986-1987 1986-1987 1986-1987	87V052 000	15,500
WESTERN STAR	WESTERN STAR	1986	87V030 000	90
THOMAS	ALL	1985	86V021 000	468
PEUGEOT	505	1986	86V019 000	200
PORSCHE	944	1985	85V039 000	1,530
VOLKSWAGN	SCIROCCO	1985	85V090 000	20,560
YAMAHA	VM12N VM12NC	1985 1985	85V041 000	5,757
VOLKSWAGN	CONVRTBLE SCIROCCO	1985 1985	84V152 000	4,000
CHRYSLER	HORIZON TURISMO OMNI CHARGER	1985	84V116 000	2,385
TOYOTA	CRESSIDA SUPRA	1983-1984 1983-1984	84V108 000	74,275
SAAB	900	1981-1982	84V019 000	24,705
TOYOTA	CRESSIDA CELICA SPRM CAMRY COROLLA VAN(WAGON)	1984 1984 1983-1984 1984 1984	83V133 000	48,737
HONDA	ACCORD	1984	83V130 000	47,253
VOLKSWAGN	RABBIT F-LP RABBIT CONV SCIROCCO FOX 4000	1977-1980 1980-1982 1976-1982 1976-1979 1980-1981	83V117 000	930,000
BENNETT	AMBULANCE	1983	83V072 000	20

Make	Model	Year	Recall #	# of Vehicles
VOLVO	DL GL	1982 1982	82V134 000	31,420
FORD TRUCK	FORD TRUCK	1980-1983	82V124 001	1,000
FORD TRUCK	BOONOLINE E250 E350 F250 CLUB WAGON	1983 1983 1983 1983 1983	82V124 000	650
ALFA ROMEO	SPIDER	1977-1981	82V052 000	8,582
DELOREAN	DELOREAN	1981-1982	82V030 000	5,342
VOLVO	DL	1981	81 V131 000	5,750
FORD	B-600 & B-700 SCHOOL BUS CHASSIS F-600,-700,-800 SERIES COWL CHASSIS	1980-1981	81 V072 000	11,700
CHRYSLER	LEBARON CORDOBA NEWPORT NEW YORKER GRAN FURY DIPLOMAT MIRADA ST. REGIS	1981	81V055 000	30,000
THOMAS	SCHOOL BUS	1981	81V049 000	9
ALFA ROMEO	SPIDER	1977-1979	80V164 000	6,412
FIAT	X1/9	1979	80V083 000	13,280
SUBARU	ALL MODELS	1977-1978	79V016 000	170,000
BMW	320i 320iA	1979	79V001 000	4,229
FORD	FAIRMONT ZEPHYR	1978	78V203 000	218,000
TOYOTA	CORONA	1978	78V200 000	5,700

Make	Model	Year	Recall #	# of Vehicles
AM GENERAL	DJ-5C DJ-5D LONE-4TH TON POSTAL VEHICLE	1974 1975 1976	78V147 000	19,607
SUZUKI	GS1000C GS1000EC	1978	78V087 000	7,450
AMERICAN MOTORS	CJ-5 CJ-6 CJ-7 CHEROKEE WAGONEER	1975 1976	78V065 000	102,398
BMW	320i	1977-1978	78V061 000	32,500
AMERICAN MOTORS	GREMLIN HORNET PACER MATADOR	1974 1975 1976 1976	78V048 000	411,333
CHRYSLER	FURY GRAN FURY CORONET CHARGER MONACO RYL MONACO CORDOBA	1975 1976-1977 1975 1976 1977 1977 1975-1977	78V020 000	370,000
SUBARU	SUBARU	1977-1978	78V016 000	170,000
FORD	FAIRMONT ZEPHYR	1978	78V004 000	185,000
CHRYSLER	VALIANT VOLARE ASPEN DART	1975-1977	77V242 000	1,300,000
CHRYSLER	FURY PLARA MONACO CHRYSLER	1972-1973 1972 1973 1972-1973	77V201 000	800,000
VOLKSWAGN	RABBIT SCIROCCO	1978	77V182 000	18,500
JAGUAR	XJ6L XJ6C	1975-1977	77V083 000	5,000

Make	Model	Year	Recall #	# of Vehicles
CHAMPION	CONCORD	1977	77V076 000	145
FORD	THUNDERBD CONTNENTAL CONTINENTAL- MARK IV	1975	74-0126	2,027
EXECUTIVE INDUSTRIES	25, 28, 29 FOOT MOTORHOME	1973	74-0020	124
FORD	LINCOLN	1974	73-0220	17,821
NISSAN	240Z	1973	73-0052	16,274
CHYRSLER	RM 300 RM 350 RM 400	1973	73-0203	31,412
TOYOTA	COROLLA 1200 & 1600	1971	72-0014	110,614
MERCEDEZ- BENZ	230 250S 230S	1968 1968 1968	68V027 000	2,404

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 Kellogg-Haves 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 70% 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 notions, 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 preventative. 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 *q. par 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. Bitten 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. Quadrajet-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 endorsed 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 Quadrajets Carburetor. The Government asserted that GM received reports of 947 to 1306 carburetor failures and at least 938 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 snags, 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.