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Motor Vehicle Safety — National Traffic and Motor Vehicle Safety Act — Definition of Safety — Related Defects Under Notice Provisions — Manufacturer's Obligations — United States v. General Motors Corp

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the seaman is permanently disabled. It appears that the *Cox* decision was correctly decided given the present case law. Implications in the concurring opinion in *Cox* suggest that the Supreme Court may be disposed to reach a different result with regard to payments to arrest deteriorating conditions. While this reading of high court precedents is subject to question, it does appear that a basis may exist to provide maintenance and cure in such cases. Expanding the scope of the maximum cure rule to allow for treatment of deteriorating disabilities and the institution of a federal seamen's compensation board would serve to transform maintenance and cure into a doctrine more equitable for the seaman and more understandable for all parties concerned.

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Motor Vehicle Safety—National Traffic and Motor Vehicle Safety Act—Definition of Safety-Related Defects under Notice Provisions—Manufacturer's Obligations—*United States v. General Motors Corp.*[1]—On September 4, 1968, the National Highway Safety Bureau (NHSB)[2] received a letter[3] which reported an injury-producing accident caused by the failure of a General Motors (GM) product known as the Kelsey-Hayes wheel[4] (Wheels) which had been installed on many GM pickup trucks. In response to the letter, and in view of the wide-spread use of the Wheels,[5] the NHSB initiated an investigation pursuant to section 113(e) of the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA)[6] to determine whether

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[1] 518 F.2d 420 (D.C. Cir. 1975).

[2] The NHSB is now the National Highway Traffic Safety Administration. *See id.* at 426 n.5 & 428.

[3] The letter was sent by consumer advocate Ralph Nader. *Id.* at 428.

[4] The three-piece 15 X 5.50 Kelsey-Hayes disc wheel was introduced by GM in the fall of 1959 as an option item. *Id.* at 427.

[5] A total of 810,000 Wheels were installed on approximately 200,000 of the 321,743 GM trucks manufactured during the 1960-65 model years. *Id.* at 427. It is estimated that 50,000 of these trucks have been equipped with campers or special bodies. *Id.* at 429.

[6] National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1970), *as amended,* 15 U.S.C. § 1391 *et seq.* (Supp. IV, 1974). Section 113(e), 15 U.S.C. § 1402(e) (1970), *as amended,* 15 U.S.C. § 1412 (Supp. IV, 1974), provides:

> (e) If through ... investigation ... the Secretary determines that any motor vehicle or item of motor vehicle equipment ... (2) contains a defect which relates to motor vehicle safety; then he shall immediately notify the manufacturer of such motor vehicle or item of motor vehicle equipment of such defect .... The Secretary shall afford such manufacturer an opportunity to present his views and evidence .... If after such presentation by the manufacturer the Secretary determines that such ... item of equipment ... contains a defect which relates to motor safety, the Secretary shall direct the manufacturer to furnish ... notification ... to the purchaser of such motor vehicle or item of motor vehicle equipment ....

the Wheels contained a safety-related defect.[7] Part I of the NHSB's investigation report (the Report), issued on April 2, 1969, concluded that safety-related defects existed and that the Wheels should be replaced as early as possible.[8] In answer to this report, GM contended in meetings with NHSB personnel that all failures were caused by overloading, and denied the existence of any defect.[9] Although GM maintained its position with respect to the existence of a defect, it agreed to notify each owner of the danger posed by overloading or overinflating tires.[10] On May 28, 1969, pursuant to this agreement, GM began to send notices to 280,000 truck owners.[11]

On August 12, 1969, Part II of the Report was issued and reaffirmed the NHSB's initial conclusion that the Wheels contained a safety-related defect.[12] The Report rejected GM's overloading theory on the ground that "96 percent of all known wheel failures have occurred under loads which are below the design wheel strength level specified [by GM in the owner's manual] . . . ."[13] The Report also concluded that GM's May 28th letter of notification was inadequate.[14] On August 22, 1969, pursuant to section 113(e) of the NTMVSA,[15] the Federal Highway Administrator informed GM that the existing evidence demonstrated a defect in the Wheels which related to motor vehicle safety.[16] GM submitted a proposed settlement which contained an offer to send a second notice reiterating its earlier warnings and to replace, at GM's expense, any Wheels installed on trucks equipped with special bodies or campers. On October 8, 1969, the NHSB accepted the proposal on the condition that the case could be reopened if necessary in the interest of safety.[17]

The investigation continued with respect to Wheels installed on those trucks which were not equipped with campers or special bodies (plain trucks).[18] Subsequently, Part III of the Report was issued and

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[7] 518 F.2d at 428.

[8] *Id.*, *quoting* NHSB, INVESTIGATION REPORT INVOLVING ALLEGED WHEEL FAILURES, CHEVROLET AND GMC TRUCKS, pt. I, at 5 (April 2, 1969) [hereinafter cited as REPORT].

[9] 518 F.2d at 428.

[10] *Id.* at 428-29.

[11] *Id.* at 429.

[12] *Id.*, *citing* REPORT, *supra* note 8, pt. II (August 12, 1969).

[13] *Id.*, *quoting* REPORT, *supra* note 8, pt. II, at 21-22 (August 12, 1969). NHSB used a wheel strength of 2369 lbs., derived from GM specification, and added an allowance of fifteen percent for reasonable overload. 518 F.2d at 429 n.22, *quoting* REPORT, *supra* note 8, pt. II, at 13 (August 12, 1969).

[14] *Id.*, *citing* REPORT, *supra* note 8, pt. II, at 2, 21-22 (August 12, 1969).

[15] 15 U.S.C. § 1402(e) (1970), *as amended*, 15 U.S.C. § 1412 (Supp. IV, 1974). Section 113(e) is quoted at note 6, *supra*.

[16] 518 F.2d at 429.

[17] *Id.* Since the October 8, 1969 settlement approximately 66,270 Wheels have been replaced. *Id.* GM has received 2,361 reports of actual failures. United States v. General Motors Corp., 377 F. Supp. 242, 251 (D.D.C. 1974).

[18] In an attempt to spur the investigation, a suit was filed by Ralph Nader. Nader v. Volpe, Civil No. 960-70 (D.D.C., filed Mar. 31, 1970). The case was remanded to the NHSB with an order to report to the court by September 17, 1970. 518 F.2d at 429-30.

revealed ninety-eight Wheel failures on plain trucks.[19] The NHSB concluded that a significant number of those failures had occurred on plain trucks at loads which were below the wheel strength level specified by GM.[20] In response, GM submitted a memorandum to the NHSB stating that both the data and the findings of manufacturing defects contained in the Report were inaccurate.[21] Nevertheless, on November 4, 1970, the Director of NHSB reiterated that a defect existed in the Wheels because they "are subject to sudden and catastrophic failures resulting in an unreasonable risk of accident, death, and injuries to persons using the highways."[22] Pursuant to sections 113(c) and 113(e) of the NTMVSA, the Director of the NHSB ordered GM to furnish defect notices to owners of the plain trucks.[23] GM, however, refused to comply with this order, maintaining that the Wheels contained no defects relating to motor vehicle safety and that any failures in performance of the Wheels were due to owner abuse.[24]

On November 6, 1970, the Government brought suit for the enforcement of its order in federal district court,[25] alleging that GM had failed to furnish notification of a defect relating to motor vehicle safety in violation of section 108(a)(4) of the NTMVSA.[26] The district court granted the Government's motion for summary judgment on the ground that a defect could be established merely by proving a large number of failures in performance.[27] The court expressly agreed with the Government's theory that the *cause* of such failures is irrelevant to the determination of the existence of a defect[28] because,

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[19] 518 F.2d at 430, *citing* REPORT, *supra* note 8, pt. III, at 3, 18 (Sept. 3, 1970).

[20] 518 F.2d at 430, *quoting* REPORT, *supra* note 8, pt. III, at 3, 18 (September 3, 1970). This 1960-65 owners' manuals specified GVW's (Gross Vehicle Weight, or maximum load capacity) for three different tube tires of 5500, 6000 and 6700 lbs. 518 F.2d at 427-28. It was not specified that any of these were the GVW's for Kelsey-Hayes Wheels. *Id.* at 428. The Wheels combined with these tires had tire-wheel capacities of 1520, 1800 and 2060 lbs., respectively. Thus, if an owner multiplied these last weights by four, an inaccurate, inflated GVW would result. In addition, GM permanently affixed a GVW plate which stated that the GVW was 7500 lbs. *Id.* at 445. Included in the Report were ten failures at less than 1520 lbs. and fifty-two failures at less than 2060 lbs. *Id.* at 420 n.29.

[21] 518 F.2d at 430.

[22] *Id.*

[23] *Id.* That same day GM filed suit for declaratory and injunctive relief in the United States District Court for the District of Delaware. General Motors v. Volpe, 321 F. Supp. 1112 (D. Del. 1970), *aff'd as modified,* 457 F.2d 922 (3d Cir. 1972). The district court refused to exercise its jurisdiction and GM was remitted to present its challenges as defenses in the Government enforcement action in the District of Columbia. 518 F.2d at 430.

[24] 518 F.2d at 430.

[25] *Id.*

[26] 15 U.S.C. § 1397(a)(4) (1970), *as amended,* 15 U.S.C. §§ 1397(a)(1)(D), 1411-16 (Supp. IV, 1974). Sections 1397 and 1402 of the 1966 statute have been amended with little substantive change except for the new requirement that the manufacturer remedy defects at no cost.

[27] United States v. General Motors Corp., 377 F. Supp. 242, 249 n.20 (D.D.C. 1974). The Government submitted 160 affidavits showing 436 failures. 518 F.2d at 430.

[28] 377 F. Supp. at 249 & n.20.

in the court's view, that theory was supported by the statutory language and purpose, and the administrative interpretation of the NHSB.[29] The court rejected GM's contention that Congress intended to adopt a common law definition of defect which allowed a defense of owner abuse.[30]

GM appealed the district court's conclusion to the United States Circuit Court for the District of Columbia, which reversed the district court and HELD: (1) a safety-related defect under section 113(e) of the NTMVSA is prima facie established if a significant number of failures resulting from actual operation are demonstrated,[31] and (2) the manufacturer may rebut such a prima facie case by proving that the failures were caused by gross and unforeseeable owner abuse or by unforeseeable neglect of vehicle maintenance.[32] The court reasoned that the inclusion of a gross abuse and unforeseeable neglect of maintenance defense was compelled by the "commonsense" balancing of safety and economic costs sought by Congress,[33] and by the administrative agency's recognition that the cause of failure is in fact relevant to the existence of a defect.[34] Since genuine issues of material fact concerning GM's affirmative defense existed on the record, the case was remanded to the district court.[35]

The significance of the *General Motors Corp.* decision was well stated by the court in the opening sentence of its opinion: "This case represents the first appellate examination of the defect notification provisions of the National Traffic and Motor Vehicle Safety Act of 1966."[36] This note will examine the *General Motors Corp.* decision by focusing on the factors relied upon by the court to support its holding. As part of this examination, the legislative history of the NTMVSA and the court's application of that history to the definition of a safety-related defect will be reviewed. In addition, the circuit court's analysis of the administrative interpretation of the NTMVSA will be examined for its effect upon the definition of a safety-related defect. It will be suggested that both the legislative history and administrative interpretation suggest a conclusion in contrast to that of the circuit court and that gross abuse should not be a defense to the defect notification requirement of the NTMVSA. The note will conclude by analyzing the standards established by the court for the definition and implementation of the gross abuse defense.

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[29] 377 F. Supp. at 248-50. In a Memorandum and Order, the court also ordered GM to pay $100,000 in civil penalties pursuant to 15 U.S.C. § 1398 (1970), *as amended*, 15 U.S.C. § 1398 (Supp. IV, 1974). United States v. General Motors Corp., 385 F. Supp. 598, 605 (D.D.C. 1974).

[30] 377 F. Supp. at 249.

[31] 518 F.2d at 427.

[32] *Id.*

[33] *Id.* at 435-36.

[34] *Id.* at 437.

[35] *Id.* at 427.

[36] *Id.* at 425.

Section 113 of the NTMVSA provides that a manufacturer of motor vehicles must notify purchasers of all *defects* relating to *motor vehicle safety.*[37] Defect, as defined in section 102(11), includes "any defect in performance, construction, components or materials in motor vehicles . . . ."[38] The Government argued that a defect could be established merely by proving a large number of failures in performance.[39] GM, on the other hand, contended that Congress intended to adopt the common law definition of defect which requires a showing that product failures were not caused by owner abuse.[40] Specifically, GM contended that unless the vehicle was being used in conformity with the manufacturer-provided owner's manual, any failures in performance did not constitute defects within the meaning of section 102(11).[41]

The district court adopted the definition urged by the Government, reasoning that the language of the NTMVSA notification provision, read in light of the definitional provision in section 102(11), is unambiguous.[42] In the district court's view, this language, coupled with the statutory purpose of reducing traffic accidents[43] forcefully demanded that notice be sent whenever a significant number of failures in performance occur, regardless of cause.[44]

The circuit court rejected both the Government's definition and GM's definition. The court first concluded that a failure in performance alone could establish a defect.[45] This conclusion gave rise to the core issue of whether the cause of the failure is relevant to the determination of whether a defect was established. The court found that neither the statutory language nor the legislative history of the NTMVSA answered this question.[46] Nonetheless, GM's contention that the common law definition of defect should be applied was rejected.[47] The court also rejected the Government's interpretation, which would have entirely eliminated cause as an element in the determination of a defect. Instead, the court found causation to be rel-

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[37] 15 U.S.C. § 1402(a) (1970), *as amended,* 15 U.S.C. § 1411 (Supp. IV, 1974), provides that a manufacturer must furnish notification of any defect which it determines in good faith relates to motor vehicle safety. 15 U.S.C. § 1402(b),(d) (1970), *as amended,* 15 U.S.C. §§ 1411, 1413 (Supp. IV, 1974), provides that the notice be sent within a reasonable time and that it contain a clear description of the defect and the measures necessary for repair. Under 15 U.S.C. § 1402 (e)(1970), *as amended,* 15 U.S.C. § 1412 (Supp. IV, 1974) (quoted at note 6 *supra*), the Secretary, after an investigation and presentation of evidence, may require that notice be sent.

[38] 15 U.SC. § 1391(11) (1970).

[39] 518 F.2d at 430.

[40] *Id.* at 431. *See, e.g.,* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 667-71 (4th ed. 1971).

[41] 518 F.2d at 434.

[42] 377 F. Supp. at 249.

[43] *See* 15 U.S.C. § 1381 (1970).

[44] 377 F. Supp. at 249 & n.20.

[45] 518 F.2d at 432.

[46] *Id.* at 432-33.

[47] *Id.* at 433-35.

evant in light of the subsequent legislative history and the administrative interpretation,[48] and concluded that a defense of *gross* abuse by the owner could negate the establishment of a defect. The court then established standards for proving a defect in performance, creating a rebuttable presumption when a significant number of failures have occurred and drawing a distinction between failures in parts designed to last the life of the car and failures in parts which are meant to be replaced.[49]

In rejecting the common law meaning of defect, the court reasoned that the statutory liabilities created by the NTMVSA were intended by Congress to be separate from and unaffected by the common law liabilities which previously existed.[50] Section 108(c) expressly provides that compliance with the NTMVSA does not exempt any person from liability under common law.[51] Remarks by Representative Dingell which noted that the NTMVSA preserved all common law remedies that exist against a manufacturer, were used as additional support for the court's differentiation between the common law and NTMVSA standards.[52] The court concluded that the NTMVSA was "supplementary of and in addition to the common law of negligence and product liability."[53] Thus, common law definitions could not be used to define a defect under the statute.

GM alternatively contended that defect should be given its "ordinary" meaning, and that given this meaning a defect could be found only where equipment fails to operate properly when used in accordance with applicable instructions and warnings.[54] The court rejected this contention on the ground that Congress, in enacting the NTMVSA, was concerned with the myriad conditions experienced by the public in the day-to-day use of their vehicles.[55] The narrow interpretation urged by GM—having at its foundation test data compiled by manufacturers on the manufacturers' proving grounds or performance specifications derived under laboratory conditions—was not consistent with this broad congressional concern.

To support this finding the court quoted many excerpts from contemporary congressional debates and hearings.[56] These quotations indicate that Congress intended that the NTMVSA provide protection through an added margin of safety, which would encompass the "owner who is lackadaisical, who neglects regular maintenance, and

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[48] *Id.* at 435-37.

[49] *Id.* at 437-39.

[50] *Id.*

[51] 15 U.S.C. § 1397(c) (1970), *as amended,* 15 U.S.C. § 1397(c) (Supp. IV, 1974).

[52] 518 F.2d at 434 n.61, *quoting* 112 Cong. Rec. 19663 (1966) (remarks of Representative Dingell).

[53] 518 F.2d at 434, *quoting* Larsen v. General Motors Corp., 391 F.2d 495, 506 (8th Cir. 1968) (dictum).

[54] 518 F.2d at 434.

[55] *Id.*

[56] *Id.* at 434 n.63.

doesn't switch his tires, doesn't keep them at proper pressure . . . ."[57] The court also rejected GM's theory on the basis of GM's own description of the manner in which purchasers normally operate their trucks. During the NHSB proceedings, GM's counsel had admitted: "We know, we always have known, everybody knows that trucks are overloaded on occasion."[58] The court also cited a 1969 letter by GM to the Federal Highway Administrator which stated that "[i]n the case of trucks . . . the applicable GVW can be exceeded easily and will be exceeded unless the operator takes precautions against so doing . . . . [O]wners have continued and will continue to exceed these limitations."[59] The court concluded that "[t]he reality of day-to-day operation embraces some to-be-expected overloading of the vehicle and overinflating of the tires, and this provides the proper context in which to evaluate vehicle performance."[60] Since the GM standard, based on "applicable instructions and warnings," did not embrace owner misconduct which was either commonplace or which could reasonably be anticipated, that standard was rejected for its overly-narrow outlook.

The court next rejected the definition urged by the Government—that a defect is established merely by proving a significant number of failures in performance, and that the cause of such failures is irrelevant.[61] This is the most important section of the court's opinion because it served as a basis for the court's final determination that the cause of a failure in performance does in fact have relevance in the determination of a defect. Three reasons were cited by the court for the rejection of the Government's definition: (1) the definition is inconsistent with the "commonsense" approach in interpreting the NTMVSA, (2) the definition is contrary to the legislative history of subsequent amendments to the NTMVSA, and (3) the definition is contrary to the "case by case" standard announced by the Secretary on several prior occasions.[62]

The scope of the NTMVSA is delimited by the definition of motor vehicle safety, which is defined in section 102(1) as the performance of motor vehicles in such a manner that the public is protected against unreasonable risk of death or injury in the event accidents occur.[63] The inclusion of the "unreasonable" qualification in the NTMVSA definition of motor vehicle safety was, the court reasoned,

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[57] *Hearings on Traffic Safety Before the Senate Commerce Comm.*, 89th Cong., 2d Sess. 160 (1966) (remarks by Senator Hartke) [hereinafter cited as *Traffic Safety Hearings*]. Senator Magnuson spoke of the need for protection for a driver whose conduct might be outside the law: "even if he was speeding, wasn't cautious . . . even people who are not cautious can be protected." *Id.* at 252.

[58] 518 F.2d at 434.

[59] Letter from J.C. Bates, Director, GM Service Section to Francis C. Turner, Federal Highway Administrator, Sept. 11, 1969, at 4-5, *quoted in* 518 F.2d at 434-35.

[60] 518 F.2d at 435.

[61] *Id.*

[62] *Id.* at 435-37.

[63] 15 U.S.C. § 1391(1) (1970). *See* S. REP. NO. 1301, 89th Cong., 2d Sess. 5 (1966).

indicative of a congressional intent that the NTMVSA be administered with a "commonsense" approach.[64] For example, manufacturers cannot be required to produce vehicles and parts which never wear out or never require maintenance: such parts as tires and lights cannot be termed defective if they fail due to age or wear. Similarly, a defect cannot be found when a wheel collapses under an unforeseeable overload.[65] The court thus concluded: "The District Court's decision that a large number of failures, regardless of cause, constituted irrebuttable proof of a 'defect,' ignores these commonsense limitations and must be rejected as incompatible with the discernible legislative intention."[66]

It is submitted that the circuit court's analysis of the commonsense approach omits an important distinction. The congressional discussion of the commonsense approach took place *before* the notification provision was included in the bill.[67] The court fails to recognize that with respect to this separately added and discussed provision, the commonsense approach was intended not to apply, and in fact has no legitimacy. The commonsense approach was intended to have effect in the determination of whether the manufacturer, in producing the vehicle at the outset, had the ability to avoid a failure.[68] Where a manufacturer could be said to have such an ability, it would clearly be required to recall and repair the defect, at its own expense. However legitimate the commonsense approach might be in determining whether a manufacturer is liable for *repairs,* it is submitted that the *notice* provision is not susceptible to the same approach. Once a significant number of failures has occurred, it is apparent that serious injury is or may be the result of a failure to notify immediately those who possess vehicles in which the failure exists. In the notice provision, the emphasis therefore should not be on the attribution of fault, but rather on the protection of all motor vehicle operators. For this reason, the "commonsense" approach should not operate in the notice provision. In view of the different times at which these provisions were discussed, it is unlikely that Congress intended such a result. Thus it appears that the commonsense approach, at least as defined by the court, should not have been applied in interpreting the notification provisions.

Additional evidence supporting the argument that the general commonsense approach has no application to the notice provision is that Congress has arguably provided another sort of commonsense approach for that provision: one section of the NTMVSA permits the

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[64] 518 F.2d at 435. *See Traffic Safety Hearings, supra* note 57, at 56.

[65] 518 F.2d at 435.

[66] *Id.* at 436.

[67] The word "unreasonable" as the embodiment of the commonsense approach was discussed by the Senate on March 16, 1966, *Traffic Safety Hearings, supra* note 57, at 56. The amendment requiring notification was introduced by Senator Mondale on April 18, 1966. 518 F.2d at 433.

[68] 518 F.2d at 435, *quoting* S. REP. NO. 1301, 89th Cong., 2d Sess. 6 (1966).

NHSB Administrator to use his discretion in exempting a manufacturer from either notice or remedy if a defect is inconsequential as it relates to safety.[69]

Moreover, even if the cost and feasibility limitations embodied in the commonsense approach are applied to the instant case they do not bar a requirement of notice. It is obviously economically feasible to provide wheels which do not collapse without incurring prohibitive costs, since GM has already done so.[70] Thus, it would seem that whether or not the commonsense approach as enunciated by the court applies to the notification provision, on these facts GM should have been required to extend notice to the affected Wheel owners under section 113(a).

The court further supported its conclusion that the cause of a failure is relevant by analyzing the legislative history of subsequent amendments to the NTMVSA.[71] The 1974 amendments[72] to the NTMVSA require manufacturers to remedy safety-related defects at their own expense.[73] The accompanying House Report, issued one

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[69] 15 U.S.C. § 1417 (Supp. IV, 1974).

[70] GM replaced 62,229 Wheels in accordance with the agreement of October 7, 1969. 377 F. Supp. at 246. GM has also provided a 16" wheel as a possible replacement which increases the rear wheel load-carrying ability by 20% within the same GVW. *Id.* at 245 n.7.

[71] 518 F.2d at 436. This discussion was qualified by the court's admonition that subsequent legislative history was pertinent but hazardous. *Id.* The circuit court cited several cases including one with a statutory change which paralleled the change in the instant case. United States v. Price, 361 U.S. 304 (1960). In *Price*, the Supreme Court discussed the unacceptability of drawing an inference that a change in one provision of a statute compels any change in interpreting other provisions. The Court stated that "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* at 313. *See also* United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1967); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 382 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1973); *cf.* Haynes v. United States, 390 U.S. 85, 87 n.4 (1967), where the Court stated that although "[t]he views of a subsequent Congress . . . provide no controlling basis from which to infer the purpose of an earlier Congress. . . . [n]onetheless, [those views are] pertinent . . . ." The *Haynes* case can be distinguished from the instant case because the subsequent history being used in *Haynes* was a discussion by a later Congress of what that Congress thought the congressional intent behind the original enactment was. *Id.* In the instant case, the subsequent history being used is in the form of amendments to the original Act.

Nonetheless, the court in the instant case appears to have ignored its own admonition by giving the subsequent history great weight. The court's analysis of contemporary legislative history concluded with a finding that such history offered no answer to the meaning of defect. The only evidence cited by the court in support of its holding that a gross abuse defense was allowed to a finding of a defect was the House Report issued in 1974. *See* H.R. REP. NO. 1191, 93d Cong., 2d Sess. (1974).

[72] Section 111(a)(1) of the NTMVSA provides: "If notification is required . . . then the manufacturer . . . shall cause such defect . . . to be remedied without charge." 15 U.S.C. § 1414(a)(1) (Supp. IV, 1974). Section 102(b) of the NTMVSA was also amended in 1974 and now provides: "(b) If . . . the Secretary determines that such vehicle or item of replacement equipment . . . contains a defect which relates to motor vehicle safety, the Secretary shall order the manufacturer (1) to furnish notification . . . and (2) to remedy such defect . . . ." 15 U.S.C. § 1412(b) (Supp. IV, 1974).

[73] 518 F.2d at 436.

month after the district court opinion, indicated that this remedy without charge requirement was not intended to operate where the manufacturer "can establish that the condition requiring correction results from the abuse of their products or the failure to adequately maintain them."[74] The fact that Congress permitted an abuse defense in the remedy without charge section was important to the court in answering the question of whether the defense should be included in the notice section, because "the contours of the defects the manufacturer must remedy fairly delineate the defects that must be notified."[75] The House Report, in the court's view, supported the conclusion that the contours of the notice and remedy provisions were coterminous.[76] Thus, the court adopted the somewhat simplistic reasoning that (1) if the manufacturer must remedy a defect and provide notice for a defect, and (2) if the defect which he must remedy is qualified by an abuse defense, then (3) the same qualification should apply to a defect for which the manufacturer must provide notice.

It is clear that the House Report relied upon by the court does not state or imply that abuse is a defense to notification. The Report says only that manufacturers need not *make corrections* if the cause of the defect is owner abuse.[77] For this reason, the court did not use the report directly to interpret the notification provision. Instead, the court used the report to interpret the word "defect" in the remedy provision; then, by reason of the claimed coterminous nature of the remedy and notice obligations, it applied this interpretation to the notification provision.[78] However, if Congress had intended this language to apply to the notice section it could easily have said so. Moreover, the House Report allows the abuse defense only to the remedy obligation and it does not discuss the interpretation which should be given to the term "defect."

It is also important to note that the House Report speaks only of an abuse defense to the remedy without charge requirement. The court not only extends this to the notice section but also *ipse dixit* qualifies the defense as a gross abuse defense instead of a mere abuse defense. Thus, the court defied its own finding of coterminous parameters for the notice and remedy provisions by allowing different standards of defense to notice and remedy.[79]

On close examination, it is doubtful that the notification and remedy without charge sections were intended to afford parallel protections. The court acknowledged one exception to the coterminous

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[74] H.R. REP. NO. 1191, 93d Cong., 2d Sess. 25 (1974).

[75] 518 F.2d at 437. The court stated that "Congress was making clear . . . that the defects required to be notified were defects that would have to be repaired at the expense of the manufacturer not at the expense of the consumer." *Id.* at 436-37.

[76] *Id.* at 437.

[77] H.R. REP. NO. 1191, 93d Cong., 2d Sess. 25 (1974).

[78] 518 F.2d at 437.

[79] The court may be requiring the more stringent defense to notice because of the added margin of safety discussed in the contemporary legislative history.

treatment, but dismissed it as having "no present consequence."[80] That exception removed the obligation to repair defects covered by notices issued eight years after the first purchase.[81] It is submitted, however, that the court either ignored or overlooked another "exception" to the coterminous treatment of the notice and repair provisions.[82] The court discussed the provision in a footnote in the following manner: "[this provision] . . . contains exceptions from *both* the notice and remedy obligations where the Secretary determines . . . [that the defect is inconsequential as it relates to motor vehicle safety]."[83] The import of this provision is that by its terms the Secretary has the discretion to treat notice and remedy obligations *separately*. Thus, it is questionable whether the Act contemplates a consistent treatment of notice and repair provisions in light of these rather significant exceptions.

The distinction between the notice and remedy without charge requirements is further supported in a section of the 1974 House Report not quoted by the court. That section specifies: "A court order is required . . . to remove the manufacturer's statutory obligation to remedy without charge *once notification is required* to be issued . . . ."[84] Thus, the removal of an obligation to repair does not automatically remove an obligation to notify.

The court found additional congressional recognition of the coterminous treatment to be accorded the notice and remedy provisions in a 1974 amendment which provided for provisional notification during litigation under the NTMVSA.[85] In the court's view, this amendment recognized the tension which would result from the competing considerations of litigating an abuse defense and the need for prompt notification. It is submitted, however, that the tension alluded to by Congress could arise whether or not an abuse defense was applicable to the notice provision. Any litigation would create a tension between the manufacturer's right to a hearing and the owner's need to be promptly notified. For example, GM could litigate the issue of whether a significant number of failures had actually occurred. Thus, although the provisional notice section is clearly a congressional recognition of some form of tension between competing claims, it does not follow that Congress specifically contemplated an abuse defense as one of those claims.

In conclusion, it appears that the subsequent legislative history does not support application of a causation requirement to a determination that notification of a defect must be sent. The congressional intent to impose such limitations has not been clearly demonstrated by reference to the House Report on the 1974 amendments, the eight

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[80] 518 F.2d at 437.
[81] 15 U.S.C. § 1414(b)(4) (Supp. IV, 1974).
[82] 15 U.S.C. § 1417 (Supp. IV, 1974).
[83] 518 F.2d at 436 n.72 (emphasis added).
[84] H.R. REP. No. 1191, *supra* note 77, at 25.
[85] 518 F.2d at 437.

year old vehicle exception, or the provisional notice section. Thus, neither the contemporary nor subsequent legislative history supports a reading of the NTMVSA as requiring a gross abuse defense—or, for that matter, *any* abuse defense—to notification of a safety related defect.

The court lastly supported its conclusion concerning the relevance of causation by reference to prior statements by the administrative agency concerning the definition of defect. The district court had concluded that the position asserted by the Government counsel at trial was the "administrative interpretation."[86] In considering this interpretation, the court followed the principle "that Courts should give weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."[87] The district court was criticized by the circuit court, however, for equating the position of Government counsel with the administrative interpretation of the NTMVSA.[88] Prior agency announcements were cited as inconsistent with the Government's present position. For example, the court pointed to the agency's announcement in the Federal Register refusing to adopt a definitional rule regarding defect determinations and stating that defect would be defined on a case by case basis.[89] The court also referred to a statement by Administrator Toms before the Senate Commerce Committee. In that statement, the Administrator said that section 113 of the NTMVSA does not extend to "safety problems such as worn brakes or tires that occur in any aging vehicle as a result of normal wear and tear."[90] On the basis of these pronouncements, the court concluded that the Government's present position was inconsistent with its prior position and that under its prior position the cause of a failure is relevant to the determination of a defect.[91]

It is submitted that the evidence adduced by the court relative to the administrative interpretation does not require a defense of gross abuse to the notice obligation. There is no conclusive evidence that the agency is in disagreement with government counsel in this litigation. During the agency's investigation, data was compiled without reference to the loading history of individual trucks equipped with Wheels.[92] Thus, the agency did not consider load history (cause) as relevant to the finding of a defect. Second, the court's apparent use of the agency's third investigative report as a statement of the adminis-

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[86] 377 F. Supp. at 250.

[87] 518 F.2d at 437, *citing* 377 F. Supp. at 250, *quoting* Investment Co. Instit. v. Camp, 401 U.S. 617, 626-27 (1970).

[88] 518 F.2d at 437.

[89] 38 Fed. Reg. 9509, 9510 (1973).

[90] *Hearings on Auto Safety Repairs at No Cost, Before the Senate Commerce Comm.*, 93d Cong., 1st Sess. 9 (1973) (statement of Douglas W. Toms, Administrator, National Highway Traffic Safety Administration).

[91] 518 F.2d at 437.

[92] See note 20 *supra*.

trative interpretation of the statute is a distortion due to the facts surrounding the production of that report. The report was produced in answer to a conditional settlement agreement.[93] GM had agreed to reiterate earlier warnings regarding overloading and overinflating and to replace at GM's expense any Wheels on trucks equipped with campers or special bodies.[94] The proposal was accepted on condition that the investigation could be reopened in the interest of safety. The agency subsequently determined that plain trucks were also experiencing failures.[95] Thus, the agency report referred only to failures occurring below the manufacturer-specified wheel strength levels,[96] first, because this was the class which had not yet received notification of safety-related defects and second, because the discovery of failures in this class was the condition for reopening the settlement agreement. The report was *not* meant to be an agency interpretation of the NTMVSA.

It also appears that the court's reliance on the statement of Administrator Toms to demonstrate the relevance of cause in the determination of a defect is similarly misplaced. While testifying at hearings on the 1974 amendments requiring remedy without charge, the Administrator suggested that safety problems of concern to section 113 of the NTMVSA did not include those relating to normal wear and tear found in any aging vehicle.[97] The circuit court conveniently ended its reference to the statement of the Administrator before his next remark that a reasonable cut off point for remedy without cost "would be vehicles that are more than six years old at the time of *notification*."[98] Thus, a reasonable construction of the Administrator's entire testimony is that the notification requirement continues despite the absence of the no-cost remedy. As noted earlier,[99] the lack of congruency in the two sections strengthens the argument that notification does not include an abuse defense.

Other agency announcements are consistent with the Government's position at the trial. During the course of the pre-trial investigations, the Administrator sent a letter to GM stating that a determination of a defect had been made and ordered that notification be sent to the owners of trucks equipped with Wheels.[100] The letter spoke only of the unreasonable risk of injury resulting from failure of the Wheels. Therefore, both the agency's interpretation of the statute and its conduct under these facts does not appear to permit any abuse

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[93] 518 F.2d at 429.

[94] *Id.*

[95] *Id.* at 429-30. See note 17 *supra* and accompanying text.

[96] *See* 518 F.2d at 430 n.29 and accompanying text.

[97] *Hearings on Auto Safety Repairs at No Cost, Before the Senate Commerce Comm.*, 93d Cong., 1st Sess. 9 (1973) (statement by Douglas W. Toms, Administrator, National Highway Traffic Safety Administration).

[98] *Id.* (emphasis added).

[99] See text at note 80 *supra*.

[100] See text at note 22 *supra*.

defense to the requirement of notification when failures involving an unreasonable risk of injury have been established. Thus, the agency's refusal to define defect, and the Administrator's statement before the Commerce Committee do not adequately support the court's conclusion that the NTMVSA requires a gross abuse defense to the requirement of notification of a safety-related defect.

Nonetheless, the court's holding that a gross abuse defense is applicable to the determination of a defect necessitates an examination of the standards established for proving the defense. In an enforcement proceeding under the NTMVSA, where the government proves the existence of a significant number of failures and negates age and wear and tear as causes, a presumption that the failures occurred under foreseeable conditions will arise. In any case where the relevant component is designed to function for the entire life of the vehicle, the government will discharge its burden of proof by showing a significant (non-*de minimus*) number of failures.[101] As an affirmative defense, the manufacturer may establish that "the failures were attributable to gross and unforeseeable owner abuse or unforeseeable neglect of vehicle maintenance."[102] However, proof of a significant number of failures on vehicles operated within the manufacturer's specifications, or within non-gross departures from those specifications, would avert trial on the issue of defect.[103]

In the court's view, this procedure will operate to effectuate the policy of creating a "practical and efficient" administration of the defect notification provision.[104] Although the court rejected GM's contention that manufacturer specifications were the limitation for protected owner usage, the court's standard for the gross abuse defense in fact relieves the manufacturer from the obligation to notify if owner usage significantly departs from those manufacturer specifications. The protection afforded by the notice provision therefore applies only to those drivers complying with the manufacturer's specifications plus those within a small margin of deviation from those specifications.

The court's holding will require the NHSB both to compile owner use data although a significant number of failures are reported and to support any finding of defect with evidence that failures occurred within manufacturer specifications or non-gross departures from those specifications. Under this holding, manufacturers can challenge an NHSB order to notify of failures on at least two grounds: (1) that a significant number of failures has not occurred, and (2) that

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[101] 518 F.2d at 438 & n.84. Factors to be considered in determining if a significant number of failures have occurred are the failure rate of the component in question, failure rates of comparable components and the importance of the component to the safe operation of the vehicle. The number need not be a substantial percentage of the total number of components produced in order to be considered significant. *Id.*

[102] *Id.* at 438.

[103] *Id.* at 439.

[104] *Id.*

NHSB evidence does not prove that a significant number of failures occurred within manufacturer specifications or a non-gross deviation therefrom, either because (a) load data collected is inadequate or (b) the NHSB's contention that any deviation was non-gross is unsupported by the evidence. It is doubtful that this scheme will lead to an efficient administration of the NTMVSA, since it appears more likely to lead to litigation based on manufacturer challenges to NHSB orders to notify of failures. These manufacturers might balance the cost of litigation against the cost of undermining their consumer relations, and opt for the former.

CONCLUSION

The circuit court in *General Motors Corp.* has misinterpreted the intended impact of the defect notification provision of the NTMVSA. There is no support in the contemporary or subsequent legislative history nor the administrative interpretation of the statute for the position that a gross abuse defense must be allowed once the Administrator has determined that a significant number of safety related defects exist. The statutory purpose of prompt notification vindicating the owner's right to know of the hazards involved in defective motor vehicles[105] cannot be fulfilled if a significant number of failures can occur without immediate provision of notice. The gross abuse defense also frustrates the broad statutory purpose of reducing motor vehicle accidents on the highways. Only by requiring that notice be provided in *all* cases where a significant number of failures in performance have been established, will these purposes for which the NTMVSA was enacted be effectuated.

JUDY L. CHESSER

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[105] During debate on the NTMVSA notice provision, Senator Mondale stated that, "drivers of . . . defective cars have a right to know they are riding around in booby traps. And to fail to warn them is to force them to play Russian roulette without their knowing so . . . . I do know something about the rights of consumers. Perhaps their most basic right is the right to know what hazards are associated with a particular product." 112 CONG. REC. 8216 (1966).