COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

JOSEPH IANNACCHINNO & others, Plaintiffs, v. FORD MOTOR COMPANY & another, Defendants.	CIVIL ACTION No. SJC-10059

BRIEF OF AMICUS CURIAE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States is the world's largest business federation. With a substantial membership in Massachusetts and the other forty-nine States, the Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector of business, and in every region of the country. The Chamber thus serves as the principal voice of the American business community, and regularly advocates the interests of its members in court on issues of national concern.

The Chamber has a profound interest in the issues presented in this appeal. Many members of the Chamber design, manufacture, or sell products, and allegations of product defects are routinely made against these products. In fact, the potential for defects to cause product malfunctions unrelated to safety exists with virtually all mechanical and electronic products, and for this reason many Chamber members issue express warranties promising to repair or replace a product if such a defect-related malfunction occurs. As discussed in more detail below, the Chamber is concerned that Plaintiffs' theories in this case, if

accepted, would expose its members to potentially unlimited class action claims for "diminution-in-value" damages on behalf of all product owners for every alleged "defect" which might require some products to be repaired or replaced under warranty.

In addition, many Chamber members design, manufacture, or sell products which by their very nature can cause personal injury, such as motor vehicles, heavy machinery, power tools, boats, lawn tractors, firearms, prescription and non-prescription drugs, and numerous other products. These Chamber members are routinely sued by plaintiffs who have been personally injured and who allege that the products were "defectively" designed. In the experience of Chamber members, it is not unusual for such claims to be brought, and for the plaintiffs occasionally to prevail, even where the product complies with on-point government regulations, where an agency of the federal government has specifically considered and rejected the claims made by the plaintiffs, or where other juries have considered and rejected those claims. As discussed in detail below, the Chamber is concerned that, if Plaintiffs' theories in this case are accepted, the type of debatable and unfounded theories

of design defect that are routinely asserted today in personal injury product liability litigation will be routinely asserted in a potentially unlimited number of class action claims brought on behalf of persons who are likely never to suffer personal injury.

Whether such class action claims implicate safety concerns or not, the potential exposure to Chamber members would be enormous and would dwarf the substantial exposure these members already face in personal injury and warranty litigation. Chamber members would be likely to prevail in most of these cases if they could afford to try them, but the risk of catastrophic judgment in any one of these cases would require an extraordinarily expensive defense in all of them. Many Chamber members could not survive the financial drain of defending "bet the company" cases on a routine basis, even if they prevailed in the vast majority of those cases. Further, that same potential for a catastrophic judgment in any one of these cases would ensure that many Chamber members could not afford to take the risk of trial and would in effect be compelled to settle all of these cases, regardless of the merits of any of them. Again, however, the extraordinary expense of routinely

settling countless cases, each brought on behalf of hundreds of thousands of uninjured owners, would threaten the very survival of many Chamber members.

STATEMENT OF THE ISSUE

May unrealized diminution-in-value damages allegedly attributable to a product defect be awarded under Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A ("Chapter 93A"), or for breach of the implied warranty of merchantability where (1) the alleged defect has not manifested itself, (2) Plaintiffs continue to use the product normally and without incident, (3) Plaintiffs have not incurred any expense to repair the product, and (4) Plaintiffs have not attempted unsuccessfully to sell the product, and have not sold the product at a loss.

STATEMENT OF THE CASE

The named plaintiffs purport to represent a class consisting of all current owners of all 1997-2000 Ford F-150s, Ford F-250s, and Ford Expeditions, whether purchased new or used. Plaintiffs allege that the outside door handle system on these vehicles is "unsafe" and "defective" because "in certain types of motor vehicle collisions" the doors "could" open and "could" result in serious injury or death. (A. 55-56,

¶ 16; A. 65, ¶ 50; A. 76, ¶ 99)(emphasis added). Of even more significance, however, is what Plaintiffs do not allege:

- Plaintiffs do not allege that they have ever been in a collision in their vehicles, that the doors on their vehicles ever opened in such a collision, or that they ever suffered any personal injury in such a collision.
- Although vehicles with the alleged defect have now been on the road for more than a decade, Plaintiffs do not allege that anyone has ever been injured in any of these vehicles as a result of doors opening in any type of collision.
- Plaintiffs do not allege that they have ceased using their vehicles, or that they have restricted their use of their vehicles in any fashion.
- Plaintiffs do not allege that they have made any attempt or incurred any expense to replace their door handle system with a system that would reduce or eliminate the risk that doors "could" open in "certain types of collisions." In fact, Plaintiffs do not allege that any such door handle system exists.

Plaintiffs also allege that the door handle system on their vehicles does not comply with Federal Motor Vehicle Safety Standard ("FMVSS") 206, or with the Canadian equivalent, Canadian Motor Vehicle Safety Standard ("CMVSS") 206. According to the Complaint, Ford certified compliance with these standards based on a "30 year-old methodology" rather than the "SAE J839 methodology," which they allege is "the preferred method utilized to establish FMVSS 206 compliance." (A. 69-70, ¶¶ 66, 69)(emphasis added.) They allege that, as a result, their vehicles are "worth less than their value were they to comply with all safety standards" (i.e., "diminution-in-value" damages). (A. 74, ¶ 90.)

Once again, what Plaintiffs do not allege is even more significant:

- Plaintiffs do not allege that they have sold their vehicles at a loss, or that they have tried unsuccessfully to sell their vehicles.
- Plaintiffs do not allege that the door handle system does not comply with FMVSS 206 or CMVSS 206 when evaluated pursuant to the "30 year-old methodology."

- Plaintiffs do not allege that door handle systems certified using the SAE J839 methodology eliminate the risk of doors opening in "certain types" of collisions.
- Plaintiffs do not allege that the National Highway Traffic Safety Administration ("NHTSA")or Transport Canada – the regulatory agencies that issued FMVSS 206 and CMVSS 206, respectively – have ever determined that the door handle system at issue is defective, that it does not comply with the regulation, or that the method used by Ford to certify compliance with the regulation was inappropriate.

In fact, Plaintiffs affirmatively allege that if NHTSA "determines that the vehicle is defective or noncompliant with the FMVSS, it will require the manufacturer" to recall the vehicle, but that "[t]o date . . . a recall has not been issued." (A. 64, ¶ 43; A. 71, ¶ 75)(emphasis added.) And, because it is a matter of public record ascertainable from reliable sources not reasonably subject to dispute, this Court may take judicial notice that even as of 2008, more than three years after Plaintiffs commenced this litigation with great public fanfare, NHTSA has not

ordered Ford to recall the door handles involved in this case. See, e.g., In re DeSaulnier, 360 Mass. 787, 791, 279 N.E.2d 296, 299 (1972)(taking judicial notice of public records); http://www-odi.nhtsa.dot.gov/recalls/recallsearch.cfm (link to NHTSA's searchable recall database).[1]

SUMMARY OF ARGUMENT

Plaintiffs in this case are asserting breach of implied warranty and Chapter 93A claims based on alleged defects in certain products, even though the alleged defect has never caused Plaintiffs any problem, even though the alleged defect is not likely to ever cause Plaintiffs any problem, even though Plaintiffs are continuing to use those allegedly

[1] In August and September 2004, well before they filed their Amended Complaint in April 2005, Plaintiffs' counsel issued two press releases in which they made their allegations publicly. More Pressure on Ford to Remedy Safety Defect, http://www.motleyrice.com/news/releases/2004/NewsRelease3.asp (September 7, 2004); Defective Door Latch Class Action Lawsuit Commenced [in Canada], http://www.motleyrice.com/news/releases/2004/NewsRelease5.asp (August 16, 2004). These press releases prompted numerous wire reports and newspaper articles, which also reported that NHTSA was investigating the issue. See, e.g., "Pressure Mounts for Ford Latch Recall," The Detroit News, September 21, 2004, p. 1A (reporting that NHTSA spokesman said the agency had met with Ford, planned to meet with Plaintiffs' attorneys, and was looking at the issue).

defective products normally and without incident, and even though Plaintiffs have incurred no expense as a result of the alleged defect. These claims are analytically indistinguishable from a virtually infinite number of claims that could be asserted on behalf of all other owners of all other products based on all alleged but unmanifested defects in those products. In addition, permitting such claims to be asserted on a classwide basis would ensure that the incentives to bring each and every one of these potential claims would exceed the incentives that currently exist to bring claims on behalf of consumers who have actually been injured by the alleged defects. If even a fraction of the claims that could be brought were brought, they would overwhelm the judicial system and divert resources away from litigating the claims of injured consumers to litigating the claims of consumers who have suffered no real injury at all.

Not surprisingly, therefore, almost every court to have considered such claims has rejected them, whether based on breach of the implied warranty of merchantability, consumer protection statutes like Chapter 93A, fraud, or other legal theories. As those courts have recognized, a properly performing product

that the plaintiff continues to use normally and without incident is not unmerchantable, and any damages for diminished value (or loss of resale value) would be speculative. Owners who use their products without incident for the product's entire useful life get exactly what they bargained for, and owners who sell their products are unlikely ever to realize an actual economic loss simply because non-frivolous but reasonably debatable allegations of product defect can be made, as they routinely are in personal injury product liability litigation. This Court's recent decisions applying Chapter 93A and the implied warranty of merchantability, while not dispositive, are consistent both with common sense and with the overwhelming weight of authority.

ARGUMENT

I. CLASS ACTION LITIGATION ON BEHALF OF UNINJURED PRODUCT OWNERS WOULD, IF ALLOWED, OVERWHELM MASSACHUSETTS COURTS.

Before turning to the legal flaws in the breach of warranty and Chapter 93A claims being asserted in this case, it is important for this Court to understand the practical implications of accepting Plaintiffs' arguments. Plaintiffs' claims in this case are analytically indistinguishable from other

claims that could be brought on behalf of all uninjured owners of all products based on all alleged but unmanifested defects in those products. The almost inevitable result of allowing such claims to be pursued on a classwide basis would be an explosion of "no injury" class actions that would be an extraordinary drain on private and judicial resources and benefit no one except the lawyers.

A. Plaintiffs' Claims Are Analytically Indistinguishable from Claims That Could Be Brought by All Uninjured Owners of All Products Based on All Alleged Defects

Plaintiffs in this case are asking this Court to hold (1) that every breach of the implied warranty of merchantability is a violation of Chapter 93A, (2) that the implied warranty of merchantability is breached whenever there is a risk that a "defect" in a product may cause economic or personal injury to some purchasers, and (3) that all purchasers of that product are entitled to recover diminution-in-value damages, even though that risk has not materialized and is likely never to materialize. The implications of Plaintiffs' argument are truly staggering.

If Plaintiffs are correct, every purchaser of every product could bring actions for breach of

implied warranty based on every defect that ever has been — or ever could be — alleged in a product liability case involving personal injury. For example, the products at issue in this case happen to be the Ford F-150, the Ford F-250, and the Ford Expedition, and the alleged defect happens to be a defect in the door handle system. But like all motor vehicles, the Ford vehicles at issue in this case are involved in numerous injury-producing accidents every year, and many of these result in personal injury litigation. Media reports of some of these cases are summarized in Exhibit A; in this limited sampling alone, plaintiffs in other cases have alleged that the same Ford vehicles involved in this case have defective fuel systems, rollover characteristics, torsion bars, tires, power windows, roofs, suspensions, window glass, restraint systems, and cruise control switches. Under Plaintiffs' theory, each one of these defect claims could be the basis of claims just like the ones made in this case.

But the Ford vehicles at issue here are not unique; all motor vehicles cause injuries and all motor vehicle manufacturers must defend personal injury litigation involving a host of alleged defects.

Exhibit B to this brief is a sampling of the product liability/personal injury cases reported on Westlaw just in November 2007. This small sampling reveals that in one month alone there were decisions reported on Westlaw involving brake light defects in 2004 Land Rover Discoveries, window glass in 2004 Chevrolet Tahoes, parking brakes in certain 1999-2005 GM trucks and SUVs, seat belts in 1999 Kia Sephias and 2005 Chevrolet Tahoes, visibility in 2001 Ford Expeditions, emergency jacks in 1999 Cadillac DeVilles, roofs on 1993 Ford Explorers, and more. Indeed, for every vehicle sold in the United States, a lengthy list of design defects alleged in personal injury litigation could easily be compiled. Every one of these alleged defects could be the basis for claims indistinguishable from the claims being asserted in this case.

Nor are motor vehicles unique in this regard. Virtually all products can and do cause injuries. Indeed, "over the next 13 years, we can expect more than a dozen deaths from ingested toothpicks." Corrosion Proof Fittings v. E.P.A., 947 F. 2d 1201, 1223 n.23 (5th Cir. 1991). These injuries result in thousands of personal injury cases based on alleged

design defects every year. In federal courts in 2006 alone, over 33,000 non-asbestos product liability cases alleging personal injury were filed.[2] This would almost certainly be dwarfed by the number of such cases filed in state courts. Indeed, as Exhibit B also shows, in just one month (November 2007) there were decisions reported in Westlaw involving defective lawn tractors (absence of no-mow-in-reverse safety feature), handguns (absence of magazine disconnect safety), pressure cookers (defective seals), basketball flooring material (holes that snagged athletic shoes), metal detectors (failed to detect metal in prison), welding rods (neurologically damaging fumes), snowmobiles (defective steering stop), and many more. Analytically, nothing distinguishes the defects alleged in these cases from the defects alleged in this case.

Thus, each and every design defect alleged to cause personal injury in each and every personal injury case involving each and every product could, if

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[2]See http://www.uscourts.gov/judicialfactsfigures/2006/Table404.pdf, U.S. Courts, 2006 Judicial Facts and Figures, Table 4.4, U.S. District Courts, Civil Cases Filed by Nature of Suit, Note: (3).

Plaintiffs' position were adopted, become the basis for breach of implied warranty and Chapter 93A actions brought by each and every owner of each and every one of those products. Moreover, Plaintiffs' theory is not limited to instances where some products in a product line actually have malfunctioned or caused injury and have, as a result, been the subject of personal injury litigation. Rather, Plaintiffs' theory extends to any plausible theory of defect that any plaintiff's lawyer or expert can develop based on any theoretical risk of injury, even a risk that has never materialized or caused injury to anyone. This case, in fact, appears to be of this nature; although some of the vehicles involved have been on the road for a decade, Plaintiffs' complaint does not allege that the alleged defect in the door handle system has ever resulted in injury to anyone.

But even this substantially understates the magnitude of the potential litigation, because Plaintiffs' theory is not limited to defects that can cause personal injury. Claims for breach of the implied warranty of merchantability lie whenever the product is not "merchantable," as defined in Mass. Gen. Laws. Ch. 106 § 2-314. Thus, for example, under

Plaintiffs' theory, all purchasers of 2005 Chevrolet Silverados could bring an action for breach of warranty because of the potential for snow and ice to accumulate on the door hinges, even if they never experienced such snow and ice accumulation. See Canale v. General Motors Co., 2007 WL 867046 (Mass. Super. 2007). All purchasers of certain properly functioning aluminum awnings could bring an action for breach of implied warranty because some awnings might collapse under accumulated ice and snow. See Villette v. Sheldorado Aluminum Products, Inc., 2001 WL 881055 (N.Y. Sup. 2001). All purchasers of certain properly operating refrigerators could bring an action for breach of implied warranty because some refrigerators might cease to operate after two or three years. Lupa v. Jock's, 131 Misc.2d 536, 500 N.Y.S.2d 962 (N.Y. City Ct. 1986). All purchasers of certain properly operating CB radios could bring an action for breach of implied warranty because some radios might not withstand certain shocks. Industrial Graphics, Inc. v. Asahi Corp., 485 F.Supp. 793 (D.C.Minn. 1980). And so on for all purchasers of all properly performing doors, bricks, shingles, carpets, caskets, coats, and every other product – except, of course, those perfect

products which are so well-designed they never experience any problems at all.[3]

B. Allowing Classwide "No Injury" Claims Would Encourage Claims on Behalf of Uninjured Consumers at the Expense of Injured Consumers.

In short, the number of potential claims analytically indistinguishable from the ones being asserted in this case is limited only by the number of products sold and the number of defects that can in good faith be alleged with respect to each of those products. This might not be a concern if this Court were willing assume that very few people would actually bring such claims. But if this Court were willing to recognize a right of recovery only on the assumption that such recovery will almost never be sought, the validity of the right itself would be suspect. In any event, however, such an assumption would almost certainly be wrong.

The real reason for bringing many class actions is "the quest for attorney's fees." Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 53 (2d Cir.

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[3] Exhibit C compiles some examples of breach of implied warranty claims unrelated to safety made in reported cases.

2000). If this Court squarely endorses Plaintiff's claims - and, by necessary implication, a virtually infinite number of analytically identical claims - and if all of those claims can appropriately be litigated on a classwide basis, the incentives to bring those claims will exceed the incentives that currently exist to bring claims on behalf of people who actually have been injured. This is so for two powerful reasons.

First, the potential recovery on behalf of thousands or millions of uninjured consumers (and therefore the potential attorneys' fees) can be orders of magnitude greater than the potential recovery in a case involving a single individual, even one involving severe personal injuries. Second, the risk of not recovering at all on such claims, even in cases of questionable merit, would be substantially less than in an individual action, because of the "unwarranted or hydraulic pressure to settle." Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F. 3d 154, 165 (3d Cir. 2001).

The Fifth Circuit has explained:

> Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found

> liable and results in significantly higher damage awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)(citations omitted). Indeed, an empirical study of one type of class actions (securities class actions) concluded that "there appears to be no appreciable risk of non-recovery" because "virtually all cases are settled." Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 52 (2d Cir. 2000), quoting Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L.Rev. 497, 578 (1991).

These risks may be acceptable where class actions are the superior method of vindicating the legitimate rights of consumers who have suffered real economic or personal injury. In these cases, the number of potential claims is by definition limited to the number of people who have suffered real injuries. But the type of claims being asserted here have no such

natural limitation. Moreover, the perverse effect of recognizing them is that courts and parties will be forced to spend enormous resources litigating claims brought on behalf of uninjured consumers — consumers who have perfectly performing products and who are therefore likely to be entirely uninterested in the litigation — while resources are drained from litigating the claims of injured consumers. Indeed, it is at least possible, and perhaps even likely, that the number of lawyers available to represent consumers who are actually experiencing problems with their products will be reduced as those lawyers are drawn to the more lucrative and less risky "no injury" class action arena.

In fact, if any members of the class actually suffer personal injury in the future as a result of the alleged defect, they will be barred from recovering for those injuries regardless of whether Plaintiffs in this case prevail on the issue of whether the vehicles are defective and unmerchantable. If Plaintiffs prevail on this question, and if each member of the class is provided funds for the purpose of having his vehicle "repaired," those members of the class who elect not to have their vehicles "repaired"

will have assumed the risk and will be barred from recovering in the event they are injured because a door actually opens in a collision. See, e.g., Haglund v. Philip Morris, Inc., 446 Mass. 741, 749, 847 N.E.2d 315, 323 (2006)("When the consumer's knowing use of a product in a dangerous and defective condition is unreasonable, the consumer's own conduct has become the proximate cause of his injuries, and he can recover nothing from the seller."). On the other hand, a finding in this case that the vehicles are not defective and not unmerchantable will collaterally estop injured class members from claiming to the contrary. See, e.g., Com. v. Cabrera, 449 Mass. 825, 829, 874 N.E.2d 654, 658 (2007)("Collateral estoppel guarantees that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'"); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874 (1984)("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. . . . A judgment in favor of either side is conclusive in a

subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.").

Thus, the only people who would truly benefit from this type of litigation would be lawyers:

> If Courts were to allow cases such as this to go forward, the costs of doing business would be so burdensome and so expensive that suppliers, manufacturers, and most consumers would suffer greatly. The only persons that would benefit by permitting cases such as this to go forward would be the lawyers handling the case and perhaps the few consumers directly involved in the litigation. It might well be that the increased cost of doing business would cost even those consumers directly involved in the litigation more than they could recover from such litigation.

Lee v. General Motors Corp., 950 F. Supp. 170, 175 (S.D. Miss. 1996).

II. VIRTUALLY ALL COURTS REJECT IMPLIED WARRANTY AND OTHER CLAIMS BROUGHT ON BEHALF OF OWNERS WHO CONTINUE TO USE PROPERLY FUNCTIONING PRODUCTS BECAUSE SUCH PRODUCTS ARE MERCHANTABLE AND THE CLAIMED DAMAGES ARE SPECULATIVE.

The litigation explosion on behalf of uninjured consumers that the analysis above would predict has not yet materialized, but only because no state court of last resort and no federal court of appeal has held both that claims like those asserted here are viable and that they can be asserted on a classwide basis.

Indeed, the vast majority of courts that have considered claims like those asserted here have rejected them for policy and legal reasons which are equally applicable in Massachusetts. See, e.g., In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1014-15, 1017 (7th Cir. 2002)("most states would not entertain the sort of theory that plaintiffs press," i.e., claims for diminution in value of properly performing products based on the risk of future failure.)[4]

Much of the analysis in these cases can be traced to the 1982 decision in Feinstein v. Firestone Tire and Rubber Co., 535 F. Supp. 595 (S.D.N.Y. 1982). In that purported class action, the plaintiffs alleged that Firestone breached the implied warranty of merchantability because defects in Firestone 500 tires, which Firestone had recalled, led to blowouts, tread separations, and other failures. While "an unusual and worrying number of Firestone tires failed," most did not. Id. at 604. In fact, most of the tires remained failure-free for their entire

[4] One possible exception is the decision in Lloyd v. General Motors Corp., 916 A. 2d 257 (Md. 2007), but whether such claims may be certified for classwide treatment in Maryland has not yet been decided.

useful lives. Id. at 601-02. Plaintiffs, nevertheless, contended that "all Firestone tires contained common defects" and that "the purchase of a defective tire, ipso facto, caused economic loss." Id. at 602. The court rejected this claim, finding that class members whose tires had always performed properly "have no legally recognizable claim" for two reasons. Id. at 603. First, "tire owners whose tires performed to their entire satisfaction cannot demonstrate, as a matter of law, the 'fact of damage' necessary to state a claim." Id. at 602 (discussing plaintiffs' Magnuson Moss warranty claim). Second, such owners could not demonstrate that their tires were unmerchantable:

> Tires which lived full, productive lives were, by demonstration and definition, "fit for the ordinary purposes" for which they were used; hence they were "merchantable" under U.C.C. s 2-314, and no cause of action for breach of an implied warranty can arise. This is quite basic . . . .
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> . . . .
>
> The majority of the tires sold to putative class members, by doing what they were supposed to do for as long as they were supposed to do it, clearly lived up to that "minimum level of quality" which is all U.C.C. s 2-314(2)(c) requires. Thus no claim for breach of an implied warranty is maintainable in respect of such tires. Plaintiffs' bald assertion that a "common"

> defect which never manifests itself "ipso facto caused economic loss" and breach of implied warranty is simply not the law.

Id. at 602 (footnote omitted).

In the decades that followed, numerous courts reached the same conclusion: properly performing products are not unmerchantable, and owners of such products who continue to use them normally have suffered no legally cognizable damages. For example, in In re General Motors Corp. Anti-Lock Brake Products Liab. Litig., 966 F. Supp. 1525 (E.D. Mo. 1997), aff'd sub nom. Briehl v. General Motors Corp., 172 F.3d 623 (8th Cir. 1999), the plaintiffs alleged that 1989-1996 GM vehicles contained a "dangerously defective anti-lock brake system" and brought an action against GM based on, among other theories, breach of the implied warranty of merchantability. 966 F. Supp at 1529. They sought to recover "economic loss caused by paying more for the vehicles than they were worth and for economic loss stemming from lost resale value." Id. at 1530. However, the plaintiffs did "not allege that the defect manifested itself in their vehicles," and it "appear[ed] no plaintiff has attempted to sell his or her vehicle." Under these circumstances, the district court held, "Plaintiffs cannot go forward

with such speculative claims." Id. The district court went further and held that dismissal was also required because plaintiffs' allegations did not show that the vehicle was unmerchantable:

> Plaintiffs' allegations do not show that the vehicles are unmerchantable because plaintiffs have not alleged a defect that makes the vehicles unfit for the ordinary purpose of providing transportation. Plaintiffs have not alleged brake failure or that they have stopped driving their vehicles because of the defects.

Id. at 1533. On appeal, the Eighth Circuit affirmed, holding that the damages claimed by the plaintiffs were too speculative to support recovery where "the Plaintiffs do not allege in the Original Complaint that any member of the purported class has actually sold a vehicle at a reduced value." Briehl v. General Motors Corp., 172 F.3d 623, 628-29 (8th Cir. 1999).

The vast majority of other decisions are in accord. For example, in Frank v. DaimlerChrysler Corp., 741 N.Y.S. 2d 9, 11, 17 (N.Y. App. 2002), uninjured owners of various 1993-1998 vehicles manufactured by Ford, GM and DaimlerChrysler alleged that those vehicles had defective seatbacks that were "unstable and susceptible to rearward collapse in the event of a rear-end collision"; the New York appellate

court held that claims based on the implied warranty of merchantability and New York's deceptive business practices act were properly dismissed for failure to plead any actual injury because there was no allegation that any seatback had failed or that any plaintiff had sold a vehicle at a financial loss. Similarly, in American Suzuki Motor Corp. v. Superior Court, 37 Cal. App. 4th 1291, 44 Cal. Rptr. 526 (1995), uninjured owners of 1986-1994 Suzuki Samurais claimed that these vehicles had an "'inherent defect' consisting of 'a roll-over propensity'"; the California Court of Appeal held that the vehicles were not unmerchantable because the "vast majority of the Samurais sold to the putative class 'did what they were supposed to do for as long as they were supposed to do it'" and the vehicles "remained fit for their ordinary purpose." 37 Cal. App. 4th at 1298-99, 44 Cal. Rptr. at 531(quoting Feinstein).[5]

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[5]Accord, e.g., Ford Motor Co. v. Rice, 726 So.2d 626 (Ala. 1998)(uninjured purchasers of SUVs could not recover in fraud for an alleged rollover defect in SUVs where there was no allegation that "the vehicles in question, which have been on the road from 8 to 15 years, have provided their owners with anything but satisfactory performance"); Wallis v. Ford Motor Co., 208 S.W.3d 153 (Ark. 2005)(uninjured purchasers of SUVs could not recover in fraud or under consumer (Footnote continued on next page.)

III. THE PRODUCTS HERE ARE MERCHANTABLE AND THE DAMAGES CLAIMED ARE SPECULATIVE

As the discussion above suggests, the decisions rejecting implied warranty and other claims where the product is functioning properly have a two-pronged rationale: a product that that has functioned perfectly without manifesting the alleged defect has provided everything the purchaser bargained for and is not unmerchantable, and damages for the alleged diminution in value caused by a defect that might cause a future failure or injury are too speculative to be recoverable. Because this case is typical of

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fraud statute for an alleged rollover defect where "there is no allegation in the complaint that the [SUV] has not, to date, been exactly what [plaintiff] bargained for"); Tietsworth v. Harley Davidson, Inc., 677 N.W.2d 233 (Wis. 2004)(uninjured purchasers of motorcycles could not recover in fraud for an alleged engine defect because "an allegation that a product is diminished in value because of an event or circumstance that might—or might not—occur is inherently conjectural"); Ziegelmann v. DaimlerChrysler Corp., 649 N.W.2d 556 (N.D. 2002)(uninjured purchasers of vehicles could not recover in fraud or negligence because plaintiff's claim based on "diminution in value of the vehicles caused by the alleged defect" was "simply too speculative"); Wilson v. Style Crest Products, Inc., 627 S.E. 2d 733 (S.C. 2006)(uninjured purchasers of mobile home anchor tie down systems could not recover for breach of implied warranty of merchantability because "[t]here is no evidence that the anchor systems have not, to date, been exactly what the [plaintiffs] bargained for").

such "no injury" claims, it well illustrates both of these points and how they are related.

Plaintiffs' fundamental position is both simple and simplistic: a defective product is worth less than a non-defective product; therefore, a finding by the jury that the products in this case are defective establishes that they are worth less than they would have been absent that defect. To the extent Plaintiffs' analysis applies to defects that do not relate to safety, it is flawed because virtually every product is "defective" in the sense that something can go wrong with it. Indeed, this is why most products are accompanied by a limited warranty promising to repair or replace products that malfunction because of such defects. Thus, if Plaintiffs are correct, every time a manufacturer repaired or replaced a malfunctioning product under warranty it would invite a class action claim brought on behalf of all other owners whose theoretically "defective" products have not malfunctioned. See Thiedemann v. Mercedes-Benz USA, LLC, 872 A. 2d 783, 794 (N.J. 2005)(effect of accepting plaintiffs' argument would be to "deter[]

any salutary efforts . . . to address voluntarily and responsibly defects that may arise post-sale").[6]

The inescapable reality that even merchantable products can be "defective" was recognized by both the trial court and the New Jersey Supreme Court in Thiedemann. In that case, implied warranty and other claims were made based on the potential for fuel gauges to malfunction and read full when the tank was empty. The claims were made by buyers who either had no problems with their gauges or had the gauges repaired under warranty, but who nevertheless claimed that because the gauges were defective they did not get the benefit of their bargain. The trial court, in an opinion quoted in full and with approval by the New Jersey Supreme Court, accurately summarized the true nature of such claims:

> Plaintiffs insist that they did not get what they bargained for and instead received an

---

[6]Indeed, every product covered by such a warranty will have a "number 1 warranty problem," along with a host of other, lesser warranty issues, all of which will be known to the manufacturer. Thus, even if it were possible to limit claims of this nature to instances where the manufacturer "knows" of the alleged defect - a limitation that does not apply in any other case alleging breach of the implied warranty of merchantability - it would not significantly reduce the staggering scope of Plaintiffs' theory.

> unsafe motor vehicle with a known fuel-reporting defect. Essentially, what plaintiffs urge here is that they are entitled to a Mercedes-Benz motor vehicle without any flaws or glitches, without any reasonably remediable problems, and without any of the ordinary tribulations of automobile ownership or lease; in other words, a perfect car unaffected by the laws of physics and common sense. Plaintiffs are not so entitled . . . .

Id. at 789. The New Jersey Supreme Court affirmed and reinforced the trial court's observations:

> Defects can, and do, arise with complex instrumentalities such as automobiles. The mere fact that an automobile defect arises does not establish, in and of itself, an actual and ascertainable loss to the vehicle purchaser. Indeed, the warranty provided as part of the contract of sale or lease is part of the benefit of the bargain between the parties.

Id. at 794.

In short, the existence of "defects" in a product line that might become manifest in some of those products and require repair under warranty is an inescapable fact of life and does not make the entire product line unmerchantable. Further, since such unmanifested defects exist in virtually every product, it is sheer speculation to assert that the mere existence of such defects affects the value of the entire product line, even products that are functioning properly.

Adding allegations that the alleged defect creates a safety hazard does not fundamentally change the analysis. As discussed above, all products, including toothpicks, have features (many of which might arguably be characterized as "defects") that create safety hazards under certain circumstances. Indeed, the plaintiffs in Thiedemann alleged that the defective fuel gauges created a risk of a "sudden, unexpected, and dangerous depletion of fuel." 872 A. 2d at 786. Even under the New Jersey Supreme Court's decision in that case, a person actually injured in an accident caused by such a sudden and unexpected depletion of fuel caused by a defective fuel gauge could recover, but the court nevertheless held that owners of vehicles with properly functioning gauges did not have an automatic right to recover.

Moreover, as this very case illustrates, claims predicated on allegations that a product is defective because it is unsafe or unreasonably dangerous add another layer of speculation to the claimed "diminution-in-value" damages. A door handle system is not necessarily "defective" or unmerchantable merely because it does not prevent doors from opening in all collisions. Rather, in a case involving a door

that actually opened, a jury would be instructed to consider various factors in determining whether the door handle system was "defective" or unmerchantable: the likelihood that the doors would come open in certain types of collision, the extent to which differently designed door latches and handles could reduce this likelihood, the effect of such differently designed latches and handles on the safety of the vehicle in other types of collisions, the financial cost of the differently designed latches and handles, and any other adverse consequences associated with the differently designed latches. See generally Back v. Wickes Corp., 375 Mass. 633, 642, 378 N.E. 2d 964, 970 (1978)(discussing relevant factors); Restatement (Third) of Torts: Products Liability § 2, comment f (same). Most of these factors cannot be known with precision. Moreover, the jury must weigh these competing factors in a balancing analysis for which there is no objective scale and which, in the end, requires an exercise of largely subjective judgment about how much safety is enough.

Thus, in the typical case, reasonable people can and do disagree about whether a design-related risk of harm renders a product defective or unmerchantable:

> The very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree. But because almost all agree that perfect safety cannot yet be our legal goal, design engineers simply must continue to make the best judgments that they can on the balance of trade-offs between safety, utility, and cost - the incommensurable components of "defectiveness."
>
> For [design] defect[s] . . . there probably cannot in the nature of things be a bright line separating good products from bad to guide the engineer or the judicial forum reviewing his work years hence.

David G. Owen, Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products, 49 U. Chi. L. Rev. 1, 37 (1982).

Nothing in Plaintiffs' complaint suggests that this is anything other than a typical case where reasonable people can reach different conclusions on the merits of Plaintiffs' claim. Indeed, the Complaint affirmatively alleges that Transport Canada knew that doors had opened in crash tests, and yet there is no suggestion that Transport Canada has concluded that the door handle system is defective for this reason. The Complaint also affirmatively alleges that if NHTSA finds that the door handle system is defective it "will" order a recall but that no such

recall has been ordered. And if this is indeed a typical case in which reasonable juries can reach different conclusions on the merits of Plaintiffs claims, verdicts rejecting Plaintiffs' claim can reasonably be expected, either before a verdict in this case or after.

It follows from this that whatever conclusion the jury in this particular case reaches on whether the vehicles are "defective" or "unmerchantable," it permits no conclusion whatsoever about the actual, intrinsic value of those vehicles at the time they were sold. A verdict by the jury in this case finding that the vehicles are defective would simply confirm that Plaintiffs had a claim sufficiently plausible that at least some jurors could find it persuasive, based on a mere preponderance of the evidence. It would not establish that other reasonable people, other reasonable jurors, the Canadian government, or the United States government could not reach the opposite conclusion. Thus, if a finding of defect by this one jury in this one case establishes that the plaintiffs were injured because they paid more than the vehicles were intrinsically worth, any buyer who purchases a product that some plaintiff can plausibly

claim was defective has been injured in exactly the same fashion - no matter what a jury in any particular case might find.

This same difficulty does not arise where plaintiffs claim that the alleged defect caused other types of damages and where causation and damages issues can be considered independently of the defect issue. For example, if a jury in a personal injury case finds by a preponderance of the evidence that the door latch system is defective, the causation issues are relatively straightforward: did the door come open, would the plaintiff have been injured if the door had not come open, and would an alternative design have prevented the door from coming open. Similarly, if a jury is persuaded that a defect exists in an antilock braking system, it can proceed to determine as a factual matter whether a plaintiff who sold a vehicle actually received less for it than he or she would have received absent the defect (based, for example, on evidence that the buyer negotiated a lower price because of the defect). And if the plaintiff claims economic damages because his or her fuel gauge is malfunctioning because of the alleged defect, the causation issue is simply whether the

defect (if found) was a cause of the malfunction in that particular case. In none of these examples does resolution of the factual issues relevant to causation and damages -- unlike the issue of the vehicle's intrinsic value at the time of sale - require consideration of the inherent uncertainty in the defect finding itself.

Even indulging the fiction that a finding of "defect" by one jury in one case permits a conclusion that the product was worth less than a "non-defective" product, it remains speculative whether this theoretical loss will ever be realized. This case, once again, provides an excellent example of why this is so. First, those buyers who have used or will use their vehicles safely and without incident for the entire useful lives of those vehicles have or will receive exactly what they bargained for and will never realize the purely theoretical loss. Moreover, buyers who sold their vehicles before August 2004, when Plaintiffs' counsel began an orchestrated media campaign to publicize their allegations, received full value both while they used their vehicles and when they sold them for prices that did not reflect any discount for the alleged defect. Even after August

2004, when Plaintiffs' orchestrated media campaign generated an unusual amount of publicity for this particular alleged defect, buyers of used vehicles who saw the publicity may well have dismissed it as simply more litigation of the type routinely filed against all products and against all motor vehicles in particular. If so, even sellers who sold after August 2004 sold for prices unreduced by any alleged defect and therefore realized no loss.

But assuming that Plaintiffs' 2004 media campaign did affect buyers of used vehicles, those buyers presumably negotiated the appropriate lower price for their vehicles based on the alleged defect and therefore suffered no harm when they purchased their vehicles. On the other hand, of course, Plaintiffs' counsel would have succeeded in creating a corresponding loss for the former owners of those vehicles. (Ironically, the clearly uninjured post-August 2004 buyers could be part of the class of current owners Plaintiffs purport to represent, while the potentially injured post-2004 sellers are not.)

Then, in March 2005, the United States District Court for the District of South Carolina squarely rejected Plaintiffs' claim and held as a matter of law

that the "30 year old methodology" used by Ford was a permissible method of certifying compliance with FMVSS 206. Strickland v. Ford Motor Co., No 4:00-1391-27 (D. S.C., decided March 6, 2005)(attached as Appendix D). If Plaintiffs' 2004 allegations caused a reduction in used-vehicle values, this 2005 holding presumably restored those values, providing a windfall to the buyers who negotiated a lower price based on Plaintiffs' rejected allegations and eliminating the unrealized loss "suffered" by people who held their vehicles and used them safely and without incident for the entire period.

There is no reason to expect the relevant circumstances to remain static. If additional personal injury cases are filed and tried, some judges or juries may find for plaintiffs only to be followed by other judges or juries who find for Ford. If buyers view such verdicts as routine and having no significant impact on vehicle values, owners who sell will never suffer any loss. But if buyers view such verdicts as significant, whether any particular owner suffers a loss or a windfall depends on when in the cycle he or she buys or sells.

Given all of these variables that can affect the resale values of the vehicles at issue - and countless other variables unrelated to the door handle system - it is sheer speculation to assume that any actual loss will ever be realized by any of the current owners in the purported class. Indeed, for directly analogous reasons, the United States Supreme Court has held that a claim of securities fraud cannot rest upon a mere allegation that the purchaser paid an inflated price for the security:

> [I]f, say, the purchaser sells the shares quickly before the relevant truth leaks out, the misrepresentation will not have lead to any loss. If the purchaser sells later after the truth makes its way into the marketplace, an initially inflated purchase price might mean a later loss. But that is far from inevitably so. When the purchaser subsequently sells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.
> . . . .
>
> Given the tangle of factors affecting price, the most logic alone permits us to say is that the higher purchase price will sometimes play a role in bringing about a future loss.

Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 342-43 (2005)(emphasis in original). These comments apply equally here, with the added complication that, as noted above, "the truth" of whether a product is defective is typically something that cannot be ascertained with certainty and about which reasonable people are likely to disagree.

The one relatively unusual feature of this case that is not present in most of the other cases addressing these issues - the allegation that the product does not comply with a federal safety standard - serves to highlight this problem and the speculative nature of any loss in this case. First, the interpretation of NHTSA's own regulation is at issue, and by Plaintiffs' own admission NHTSA "will" order a recall of vehicles that it finds do not comply with that regulation. But no recall has yet been ordered. This by itself demonstrates how speculative it is to claim that the value of the vehicles at issue, either at the time of sale or at any time thereafter, could be affected by the potential that a jury might find a violation of FMVSS 206 when NHTSA itself has not. Moreover, NHTSA could still take affirmative action on Plaintiffs' claims, and if it does it will negate any

claim of damage in this case regardless of what it does. If NHTSA accepts Plaintiffs' interpretation of FMVSS 206, it will order a repair at no cost to Plaintiffs, thereby bringing the vehicles into compliance and eliminating any possible diminution in value attributable to non-compliance. On the other hand, if NHTSA affirmatively rejects Plaintiffs' interpretation of FMVSS 206, the nature of Plaintiffs' diminution in value claim will be exposed - a claim that the vehicles are worth less simply because some juries might agree with them, without regard to what NHTSA, other juries, or anyone else might think.[7]

But an actual decision by NHTSA is not necessary to recognize that this is indeed the true nature of Plaintiffs' claim, here and in other "no injury" cases. The reasonable potential for NHTSA to disagree

[7] In fact, if Plaintiffs in this case were awarded cost-of-repair damages, there is no guarantee that those damages would actually be used to repair the door handle systems, and such an award would not preclude NHTSA itself from ordering Ford to pay those same amounts again to actually repair the door handle systems. Due process prohibits Massachusetts courts from entering a judgment that cannot protect Ford against such duplicative awards. See Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961)(a judgment which could not protect the defendant from having to pay the same obligation twice violated due process and could not stand).

with Plaintiffs - and the reasonable potential for other reasonable people, judges, and juries to disagree with Plaintiffs - is sufficient to demonstrate that any diminution in value attributable to the debatable defect they allege is at best speculative and unlikely ever to result in any actual economic harm.

IV. THIS COURT'S DECISIONS DO NOT PERMIT CLAIMS BY UNINJURED PERSONS

This Court's recent decisions, while not dispositive, are consistent with this analysis and with common sense. First, of course, in Hershenow v. Enterprise Rent-A-Car, Inc., 445 Mass. 790, 801, 840 N.E. 2d 526, 535 (2006), this Court recognized that a violation of the law was not sufficient to automatically constitute an "injury" under Chapter 93A where "the plaintiff cannot demonstrate that the [violation] . . . causes any loss."[8] In Aspinall v. Philip Morris Cos., 442 Mass. 381, 813 N.E. 2d 476 (2004), this Court also held that "benefit of the

[8] The Chamber agrees with Justice Cowin's concurring opinion in Hershenow explaining why the majority decision in Hershenow effectively overruled the decision in Leardi v. Brown, 394 Mass. 151, 474 N.E. 2d 1094 (1985). Hershenow, 445 Mass. at 802-07, 840 N.E. 2d at 536-39.

bargain damages" (i.e., the difference between the actual value of the product and its value had it been as represented) could be recovered, but it did so in a case where it was alleged that the product was not functioning as represented, i.e., where it was alleged that the "overwhelming majority" of people who bought "low tar and nicotine" cigarettes did not in fact receive "lower tar and nicotine" when smoking those cigarettes. 442 Mass. at 398 n.21, 813 N.E. 2d at 489 n.21. Nothing in Aspinall supports a claim that benefit of the bargain damages or diminution in value damages can properly be awarded where the product is in fact functioning properly and as represented. In fact, this Court expressly distinguished the facts of Aspinall from cases "where most consumers actually received the promised benefit, as may be ascertained by objective tests." 442 Mass. at 398 n.21, 813 N.E. 2d at 489 n.21.

Finally, the implied warranty claim asserted in Commonwealth v. Johnson Insulation, 425 Mass. 650, 682 N.E. 2d 1323 (1997), raised none of the concerns presented here. That case involved asbestos, widely used in building materials until the 1970s, "when it became evident that the material posed health

hazards." Id. at 651, 682 N.E. 2d at 1325. The owner of buildings with asbestos-containing materials began to incur costs to remove the asbestos, and it brought an action to recover these costs against the companies that had manufactured, sold, and installed the asbestos containing materials. It does not appear from this Court's opinion that the defendants in Johnson Insulation case even argued that they could not be held responsible because their products had not malfunctioned and had not caused an injury.

In any event, unlike the typical product liability allegations made in this case, asbestos litigation is anything but typical. As the United States Supreme Court has observed, "[t]he 'elephantine mass of asbestos cases' lodged in state and federal courts . . . 'defies customary judicial administration and calls for national legislation.'" Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 166 (2003).[9] Moreover, the plaintiff in Johnson Insulation took affirmative action consistent with its claim that the asbestos-containing materials were not merchantable -

[9] Indeed, unlike the typical product liability case, there is now no debate that some products containing asbestos are both defective and unmerchantable.

it took steps to remove the asbestos from its buildings. By contrast, Plaintiffs in this and similar litigation continue to use the product, making their conduct utterly inconsistent with their claim that the product is unmerchantable. Even further, unlike this case, the loss suffered by the plaintiff in Johnson Insulation was no longer speculative; rather the loss was real, because the plaintiff actually incurred expenses to repair the building. For purposes of assessing pre-judgment interest, this Court held that the loss theoretically occurred at the time the asbestos-containing products were installed in the building, but the fact remains that the losses were not actually realized until the plaintiff began incurring the expense of repair.

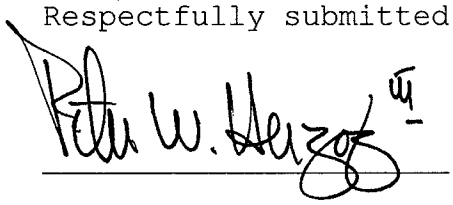
Thus, Johnson Insulation provides an example of an unusual case where recovery may be appropriate based on a product defect, even though the product has not malfunctioned or failed to perform properly, because the defect has nevertheless caused an actual, realized economic loss. This case, in contrast, provides a classic example of a more typical case where recovery is not appropriate based on an alleged defect in a properly performing product because (1)

the ability of a plaintiffs' lawyer to plausibly make a debatable defect claim that some juries might accept does not make the product unmerchantable, (2) such reasonably-debatable defects can be alleged with respect to virtually every product and therefore establish nothing about the intrinsic value of any product at the time of sale, and (3) even assuming a theoretical diminution in value at the time of sale attributable to such reasonably-debatable defects, no actual, realized loss is ever likely to occur.

CONCLUSION

Amicus curiae respectfully requests that this Court hold that Plaintiffs' allegations do not state a claim for breach of the implied warranty of merchantability or for violation of Chapter 93A.

Respectfully submitted,



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APPENDIX

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Exhibit A

ALLEGED OTHER DEFECTS LIST
FOR FORD F-150, F-250, F-150 SUPER
CREW AND EXPEDITION

News Article	**Vehicle**	**Alleged Defect**
2005 Risk Management Society Publishing, Inc. Risk Management, November 2005	Ford F-150	Faulty cruise control switch
Business Week, September 18, 2000	Ford F-150	Firestone Tires
Consumers Union of U.S., Inc. Consumer Reports, November, 2001	Ford F-150	Goodyear Tires
2005 Association of Trial Lawyers of America Trial, April 1, 2005	Ford F-150	Rocker or toggle switches for power windows
PRIMEDIA Business Magazines & Media, Inc., March 1, 2005	Ford F-150	Lamps/lights
2005 Knight Ridder/Tribune Business News The Monitor, October 6, 2005	Ford F-150	Roof crush
2001 Knight Ridder/Tribune News Service Detroit Free	2000 Ford Expedition	Suspension system

Press, October 30, 2001		
Corpus Christi Caller-Times (Texas) September 15, 2005, Thursday	2000 Ford Expedition	Tempered window glass
The Montgomery Advertiser December 5, 2004	2000 Ford Expedition	Unreasonably high center of gravity and narrow track width, which in combination, predispose the vehicle to instability and unreasonable risk of rollover.
Crain Communications Rubber & Plastics News May 21, 2007	2000 Ford Expedition	Roof, restraint system and windows
PR Newswire US June 3, 2005	2000 Ford Expedition	Cruise control deactivation switch
Knight Ridder Tribune Business News August 20, 2002	2000 Ford Expedition	Continental Tires (recalled)

EXHIBIT B

November 2007 Court Decisions Available on Westlaw
Referring to Allegations Of Product Design Defect

Case	Allegation of Design Defect
Townsend v. Sears, Roebuck and Co., --- N.E.2d ---, 2007 WL 4200826 (Ill. Nov. 29, 2007)	Defective lawn tractor that lacked no-mow-in-reverse safety feature to prevent back-over injuries
Normandeau v. Hanson Equipment, Inc., --- P.3d ---, 2007 WL 4198394 (Utah Ct. App. Nov. 29, 2007)	Defective spring-applied, hydraulically-released parking brake system in truck
Bakkie v. Union Carbide Corp., 2007 WL 4206739 (Cal. Ct. App. Nov. 29, 2007) (not reported)	Defective asbestos tape and rocket nozzles containing asbestos
Adames v. Sheahan, --- N.E.2d ---, 2007 WL 4232784 (Ill. Ct. App. Nov. 29, 2007)	Defective handgun that did not contain magazine disconnect safety
Speed v. Giddings & Lewis, LLC, 2007 WL 4245903 (D. Me. Nov. 29, 2007) (slip copy)	Defective control panel for spindle of boring mill
Stupak v. Hoffman-La Roche, Inc., 2007 WL 4218982 (M.D. Fla. Nov. 29, 2007) (slip copy)	Defective prescription drug for treating acne (Acutane) that was associated with psychiatric side effects
May's Distributing Co. Inc. v. Total Containment, Inc., --- F. Supp. 2d ---, 2007 WL 4180362 (M.D. Ala. Nov. 28, 2007)	Defective piping system for gasoline
Coles v. Nyko Technologies, Inc., --- F.R.D. ---, 2007 WL 4246090 (C.D. Cal. Nov. 27, 2007)	Defective cooling element for video game system

	(Xbox 360)
Romano v. Motorola, Inc., 2007 WL 4199781 (S.D. Fla. Nov. 26, 2007) (slip copy)	Defective "white" battery in cellular telephones
Call v. Banner Metals, Inc., --- N.Y.S.2d ---, 2007 WL 4144899 (N.Y. App. Div. Nov. 23, 2007)	Defective springing ramp in bakery truck
Yanovich v. Zimmer Austin, Inc., 2007 WL 4163860 (6th Cir. Nov. 21, 2007)	Defective artificial knee buttons failed to ensure uniformity in strength of product
Castaldi v. Land Rover North America, Inc., 2007 WL 4165283 (E.D.N.Y. Nov. 21, 2007) (slip copy)	Defective brake light switch and brake shift interlock system (2004 Land Rover Discovery Series II vehicle)
Stroklund v. Thompson/Center Arms Co., 2007 WL 4191740 (D.N.D. Nov. 21, 2007) (slip copy)	Defective barrel in muzzleloader rifle made of brittle steel with insufficient bore diameter and unable to withstand normal pressures
Nixon v. Norfolk Southern Corp., 2007 WL 4190705 (W.D. Pa. Nov. 21, 2007) (slip copy)	Defective handholds extending from exterior of railcars carrying coal
O'Hara v. General Motors Corp., --- F.3d ---, 2007 WL 4105758 (5th Cir. Nov. 20, 2007)	Defective tempered glass in car windows that failed to protect against passenger ejection (2004 Chevrolet Tahoe vehicle)
Higgins-Barber v. Raffles Int'l, --- N.Y.S.2d ---, 2007 WL 4111945 (N.Y. App. Div. Nov. 20, 2007)	Defective glass shower door that fell on plaintiff
Sciotti v. Saint Gobain Containers, 2007 WL 4180737 (W.D.N.Y. Nov. 20, 2007) (slip copy)	Defective glass bottle of iced tea that broke in plaintiff's hands

Tyson Foods, Inc. v. Dupps Co., 2007 WL 4166210 (W.D. Ark. Nov. 20, 2007) (slip copy)	Defective seals in pressure cooker for processing chickens that permitted emission of dangerous hydrogen sulfide gas
Hunter v. General Motors Corp., 2007 WL 4100084 (Cal. Ct. App. Nov. 19, 2007)	Defective drum-in-hat parking brake system that caused misalignment of brake pads and ultimate brake failure
Edwards v. Intergraph Services Co., --- So.2d ---, 2007 WL 3407626 (Ala. Civ. App. Nov. 16, 2007)	Defective basketball flooring material with triangular holes that snagged athletic shoes
Ex parte Duck Boo Int'l Co., Ltd., --- So.2d ---, 2007 WL 3409003 (Ala. Nov. 16, 2007)	Defective seat belt that failed to protect against passenger ejection (1999 Kia Sephia automobile)
Roberts v. Nasco Equipment Co., --- So.2d ---, 2007 WL 3409296 (Ala. Nov. 16, 2007)	Defective forklift with falling counterweight
Cummings v. Sunrise Medical HHG, Inc., 2007 WL 4116919 (E.D. Tex. Nov. 16, 2007) (slip copy)	Defective harness system for restraining disabled child in vehicle
Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc., 2007 WL 4118519 (E.D.N.C. Nov. 16, 2007) (slip copy)	Defective silage bags that ruptured during normal use in cattle farming
Wright v. Ford Motor Co., --- F.3d ---, 2007 WL 3379997 (5th Cir. Nov. 15, 2007)	Defective rear blind spot design in truck
Holland v. Hoffman-La Roche, Inc., 2007 WL 4042757 (N.D. Tex. Nov. 15, 2007) (slip copy)	Defective prescription drug for treating immune system disorder (CellCept) increased risk for developing other diseases

Powell v. Merck & Co., 2007 WL 4097397 (N.D. Miss. Nov. 15, 2007) (slip copy)	Defective prescription drug for treating arthritis (Vioxx) increased other health risks
Menz v. New Holland North America, Inc., --- F.3d ---, 2007 WL 3355409 (8th Cir. Nov. 14, 2007)	Defective tractor without roll-over protection system to control inherent instability
Magarrelle v. Garrett Electronics, Inc., 2007 WL 3360194 (Cal. Ct. App. Nov. 14, 2007) (not reported)	Defective metal detector that failed to detect metal weapons in prison
Rosen v. Regents of University of California, 2007 WL 3361312 (Cal. Ct. App. Nov. 14, 2007) (not reported)	Defective asbestos dental tape
Johnston v. Multidata Systems Int'l Corp., 2007 WL 3998804 (S.D. Tex. Nov. 14, 2007) (slip copy)	Defective radiation equipment that administered excessive doses of radiation to cancer patients
White v. Crown Equip. Corp., 2007 WL 3342798 (Ohio Ct. App. Nov. 13, 2007) (slip copy)	Defective braking system on forklift that failed to permit short stopping distances
Contois v. Able Industries Inc., 2007 WL 3355680 (D. Conn. Nov. 13, 2007) (slip copy)	Defective asbestos-insulated wires and cables and other asbestos products used on naval ships
Ward 5 Waterworks District No. 1 v. Layne Christensen Co., 2007 WL 3378222 (W.D. La. Nov. 13, 2007) (slip copy)	Defective water well, including pump, filtering system, and other equipment
Tamraz v. Lincoln Elec. Co., 2007 WL 3399721 (N.D. Ohio Nov. 13, 2007) (slip copy)	Defective welding rods that gave off neurologically damaging fumes
Magadan v. Interlake Packaging Corp.,	Defective adjustable

845 N.Y.S.2d 443 (N.Y. App. Div. 2007)	finger guard in book stitching machine
Liberty Mut. Ins. Co. v. Zurich American Ins. Co., 2007 WL 3487651 (E.D. La. Nov. 13, 2007) (slip copy)	Defective low-permeable insulation with moisture-trapping exterior cladding
Dambaugh v. Mylan Bertek Pharmaceuticals, Inc., 2007 WL 3495335 (W.D. Pa. Nov. 13, 2007) (slip copy)	Defective prescription drug
Vinci v. Ford Motor Co., --- N.Y.S.2d ---, 2007 WL 3342663 (N.Y. App. Div. Nov. 13, 2007)	Defective crash protection elements in vehicle (make and model year not identified)
Sapp v. Niagara Mach. & Tool Works, 845 N.Y.S.2d 626 (N.Y. App. Div. 2007)	Defective dual palm button device with faulty wiring or conductive debris that caused punch press machine to cycle unexpectedly
Gaeta v. Perrigo Pharmaceuticals Co., 2007 WL 3343043 (N.D. Cal. Nov. 9, 2007) (slip copy)	Defective drug (ibuprofen) that caused ibuprofen toxicity in child
Wells v. Portman Equipment Co., 2007 WL 3326084 (6th Cir. Nov. 8, 2007) (slip copy)	Defective electric aerial lift with exposed metal notch when stability outriggers were disabled
In re Vioxx Products Liability Litig., --- F. Supp. 2d ---, 2007 WL 3332708 (E.D. La. Nov. 8, 2007)	Defective pain medication (Vioxx) associated with increased risk of cardiovascular problems
Miller v. Cottrell, Inc., 2007 WL 3376731 (W.D. Mo. Nov. 8, 2007) (slip copy)	Defective ratchet tie down system on rig trailer that caused sudden release of chain while securing cargo
Ford Motor Co. v. Hall-Edwards, ---	Defective stability and

So.2d ---, 2007 WL 3274404 (Fla. Dist. Ct. App. Nov. 7, 2007)	handling system in vehicle
Steinman v. Spinal Concepts, Inc., 2007 WL 4198186 (W.D.N.Y. Nov. 7, 2007) (slip copy)	Defective cervical plate and four screws that fractured after implantation
Reed v. Smith & Nephew, Inc., 2007 WL 3357320 (W.D. Okla. Nov. 7, 2007) (slip copy)	Defective sintered coating/substrate interface in femoral implant that made it susceptible to fatigue cracking
Guerrero v. General Motors Corp., 2007 WL 3313201 (E.D. Cal. Nov. 6, 2007) (slip copy)	Defective seat belt that locked in place (2005 Chevrolet Tahoe vehicle)
Holtzman v. General Motors Corp., 2007 WL 4098913 (Mass. Super. Ct. Nov. 6, 2007)	Defective jacks for emergency tire changes that regularly failed in use, would not survive a roll-off, had open clevises, narrow channels, and light-gauge steel weakened by weight-reducing holes, and a design that failed to consider forces experienced in real-world conditions (1999 Cadillac DeVille Concours vehicle)
In re Seroquel Products Liability Litig., 2007 WL 4117201 (M.D. Fla. Nov. 6, 2007) (slip copy)	Defective prescription drug (Seroquel) that increased risk of developing hyperglycemic conditions
Wells v. Thompson Newspaper Holdings, Inc., 2007 WL 3306608 (S.D. Ohio Nov. 5, 2007) (slip copy)	Defective lithographic printing press lacked guard at "nip point" where ink form roller and plate cylinder come

	together
Giannini v. Ford Motor Co., 2007 WL 3253731 (D. Conn. Nov. 2, 2007) (slip copy)	Defective braking system and seat belt (vehicle make and model year not identified in opinion)
Dunton v. Arctic Cat, Inc., 2007 WL 3275145 (D. Me. Nov. 2, 2007) (slip copy)	Defective steering stop on snowmobile that locked skis at an extreme angle, causing it to spin uncontrollably
Woodard v. Fort Motor Co., 2007 WL 4125519 (N.D. Ga. Nov. 2, 2007) (slip copy)	Defective vehicle roof with insufficient crush resistance (1993 Ford Explorer vehicle)
In re Pirelli Tire, L.L.C., --- S.W.3d ---, 2007 WL 3230166 (Tex. Nov. 2, 2007)	Defective tire (Pirelli tire; unidentified model year GMC pickup vehicle)

EXHIBIT C

SAMPLE CASES WITH ALLEGATIONS THAT A PRODUCT BREACHES AN IMPLIED WARRANTY OF MERCHANTABILITY CAUSING ONLY ECONOMIC DAMAGE

Case	**Product**	**Alleged Defect/Non-Conformity**
Suminski v. Maine Appliance Warehouse, Inc., 602 A.2d 1173 (Me. 1992)	Television set	The set began to turn off by itself, although the picture would come on when the plaintiff turned the set off and on.
Mindell v. Raleigh Rug Co., 1974 WL 21750, 14 UCC Rep.Serv. 1124 (Mass.Housing.Ct. June 17, 1974)	Linoleum tile	Discoloration (yellowing condition)
Baker v. Burlington Coat Factory Warehouse, 175 Misc.2d 951, 673 N.Y.S.2d 281 (N.Y.City Ct. 1998)	Coat	"Fake Fur" coat shedded
Moss v. Batesville Casket Co., Inc., 935 So.2d 393 (Miss. 2006)	Caskets	Upon exhumation two and a half years after burial, visible cracks and separation were found in n the casket, and, as the casket was removed, it began to dismantle.
Fishbein v. Corel Corp., 1996 WL 895317, *3, 29 Pa. D. & C.4th 289 (Pa.Com.Pl.	Graphic design computer software	Failed to perform as expected

1996)		
Villette v. Sheldorado Aluminum Products, Inc., 2001 WL 881055, 45 UCC Rep.Serv.2d 470 (N.Y.Sup. 2001)	Aluminum awning	Collapsed on car because of accumulation of snow
Hollingsworth v. Queen Carpet, Inc., 827 S.W.2d 306 (Tenn. Ct. App. 1991)	Carpet	Top part of the carpet would start to unravel and continue to unravel from the backing
Frantz v. Cantrell, 711 N.E.2d 856 (Ind. Ct. App. 1999)	Asphalt roof shingles	Shingles curl up in cold weather
Industrial Graphics, Inc. v. Asahi Corp., 485 F.Supp. 793 (D.C.Minn. 1980)	Citizen Band radio units	Failure to withstand "normal" levels of shock and vibration
Zeidman v. Moyer, 1976 WL 23616, 19 UCC Rep.Serv. 476 (Pa.Com.Pl 1976)	Bricks	The bricks became raised or lowered from the surface of the patio and walkway, crumbled, cracked or became pitted
Gregory v. Atrium Door and Window Co., 415 S.E.2d 574 (N.C. Ct. App. 1992)	Doors in home	Doors did not function properly from the time of installation and that some of the doors were deteriorating.

Lupa v. Jock's, 131 Misc.2d 536, 500 N.Y.S.2d 962 (N.Y.City Ct. 1986)	Refrigerator	The refrigerator ceased to function within 2 1/2 years after purchase.
Carey v. Select Comfort Corp., No. 27CV 04-015451, 2006 WL 871619 (Minn. Dist. Ct. Jan. 30, 2006)	Bed	Select Comfort beds are uniquely susceptible to mold formation
Paquette v. Deere and Co., 168 Vt. 258, 259, 719 A.2d 410, 411 (Vt. 1998)	Motor Home	Electrical problems that could result in engine stalling and partial brake failure
Northern Ins. Co. of New York v. Baltimore Business Communications, Inc., 68 Fed.Appx. 414, *416, 2003 WL 21404703, 1 (4th Cir. 2003)	Cell Phones	cell phones emit dangerous levels of radiation.
Hicks v. Kaufman and Broad Home Corp., 89 Cal.App.4th 908, 912, 107 Cal.Rptr.2d 761, 764 (Cal. Ct. App.2001)	Concrete slab foundations under homes	concrete slab foundations under their homes are "inherently defective" because they were constructed with Fibermesh, a polypropylene product, instead of welded wire mesh.
Sanitarios Lamosa, S.A. de C.V. v. DBHL, Inc., No. Civ.A. H-04-22973, 2005 WL 2405923 (S.D.Tex. 2005)	Polypropylene ballcocks in toilets	polypropylene ballcocks in toilets experienced cracking at a significantly increased rate

Kingsford Fastener, Inc. v. Koki, No. 00 C 7395, 2002 WL 992610 (N.D.Ill. May 15, 2002)	Nails and nail gun	The Hitachi nail did not work with Hitachi nail guns (although all of Hitachi's competitor's nails did work)

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT33
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Zachary Strickland, Jerry I. Strickland and Marsha B. Strickland, Plaintiffs, v. Ford Motor Company and Fair Bluff Motos, Inc., Defendants.	Civil Action No.: 4:00-1391-27 **ORDER**

Pending before the Court is the defendants' motion for partial summary judgment concerning compliance with Federal Motor Vehicle Safety Standard ("FMVSS") 206. The motion was filed on March 2, 2005, along with a supporting memorandum. The plaintiffs filed a response in opposition to this motion on March 4, 2005.

I. Background Facts

This action arises from a vehicle collision near Aynor, South Carolina on May 9, 1997. On the day of the collision, Plaintiff Zachary Strickland was operating a 1997 Ford F-150 pickup truck, which allegedly went through a stop sign and collided with a 1994 GMC truck pulling a backhoe tractor. Plaintiff Zachary Strickland was ejected from the 1997 Ford F-150 and sustained severe injuries. On May 5, 2000, the plaintiffs filed this action alleging that the brakes, seat belt and door latches on the F-150 were defective and unsafe, and that the accident was caused by Ford's negligent, reckless, willful, and wanton conduct.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." Pulliam Inv. Co. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987). The Court recognizes that, as a motion for partial summary judgment, this motion does not fully dispose of the whole case, but only the issue of compliance with FMVSS 206. Fed. R. Civ. P. 56.

III. Discussion

Defendant Ford states that in 2000, nearly three (3) years after the accident in this case, it became concerned that door latch systems on some of the 1997-2000 Model F-150's might not comply with a provision of FMVSS 206, 49 C.F.R. § 571.206. Ford states that it opened an investigation, and ultimately concluded that the vehicles were safe and in compliance with FMVSS 206. In reaching this conclusion, Ford argues that it relied on the compliance method approved by the National Highway Traffic Safety Administration ("NHTSA") in response to a request made by General Motors in 1967 (the "GM method" or the "dynamic method"). Ford acknowledges that it had previously used another method, SAE Recommended Practice J839 (the "SAE method"), to show compliance with FMVSS 206.

As aforementioned, this motion for partial summary judgment concerning compliance with FMVSS 206 was filed on March 2, 2005. The plaintiffs object to this motion on the grounds that it is untimely, as it was filed after this Court's December 31, 2004 deadline for filing motions. However, the Court has decided that it will consider this motion because it overlaps significantly with another of the defendants' motions filed on December 30, 2004, dealing with exclusion of testimony of plaintiffs' expert, attorney Allan Kam, who is offered to testify on several issues surrounding FMVSS 206. In deciding to consider this motion, the Court has also taken into consideration the fact that plaintiffs' counsel filed a very significant motion on February 28, 2005, which also would be considered untimely, requesting the Court prohibit any evidence of comparative negligence from being introduced at trial, which the Court granted. Counsel for both parties have been tardy in adhering to deadlines set by the Court, but this Court has exercised great lenience to each side in an effort to address serious issues and streamline the trial of this case. The Court will rule on the present motion as follows:

A. The Court's Role in Determining Whether the GM Method is a Valid Testing Method.

The Court initially points to the fact both parties have stipulated to the proposition that it is the Court's duty to determine whether the GM method is an "approved test" procedure and therefore valid method for testing compliance with FMVSS 206. Defendants' Memorandum In support of Motion *In Limine* to Exclude Allan Kam, Mot.# 294, p. 3. ("[T]he issue of the validity of the GM method to demonstrate compliance with FMVSS 206 is purely a matter of law for the Court, not a fact issue for the jury."); Plaintiffs' Opposition to Motion In Limine to Exclude Allan Kam, Mot.# 294, p. 4. ("[T]he Court will ultimately rule on whether FMVSS 206 permits compliance by the GM method. . .").

Courts uniformly treat the interpretation of federal regulations as a question of law, and not fact. In Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898 (7th Cir. 1994), the Seventh Circuit Court

of Appeals found that the expert's testimony as to what in his opinion the regulation required should have been excluded and it was also error for the jury to determine the interpretation or meaning of a federal regulation. The Court stated that "[t]he meaning of federal regulations is not a question of fact, to be resolved by the jury after a battle of experts. It is a question of law to be resolved by the Court." Id at 900. In Contini v. Hyundai Motor Co., 876 F. Supp. 540, 542 (S.D.N.Y. 1995), the Court stated that "[t]he parties agree that the meaning of FMVSS 209 S4.1(b) -- is a matter of statutory construction -- is an issue for the Court and that, therefore, it should not be subject for expert testimony before the jury."

In this case, FMVSS 206 is the federal motor vehicle safety standard at issue. FMVSS 206 provides, in pertinent part, that door latches " shall not disengage from the fully latched position when a longitudinal or transverse inertia load of 30g is applied to the door latch system (including the latch and its actuating mechanism with the locking mechanism disengaged)." 49 C.F.R. § 571.206, S4.1.1.3. Also, Section S5.1.1.2. states that "[c]ompliance with S4.1.1.3. shall be demonstrated by **approved tests** or in accordance with paragraph 6 of the Society of Automotive Engineers Recommended Practice J839, Passenger Car Side Door Latch Systems, June 1991."

In a Notice of Proposed Rule Making ("NPRM") concerning FMVSS 206 published in the Federal Register on December 15, 2004, under the Section titled Current Requirements of FMVSS No. 206, NHTSA stated:

> FMVSS No. 206 provides that demonstration of compliance with this requirement is to be accomplished **either** by following an **agency-approved test procedure** or by completing a mathematical formula specified in SAE J839. While NHTSA approved an inertial loading test procedure submitted by General Motors (GM) in 1967, it has never adopted such a procedure into the standard and no other test procedures were approved.

69 Fed. Reg. 75020, 75023 (2004) (emphasis added).

Under the Section titled Proposed Improvements To FMVSS No. 206, NHTSA stated:

> Currently, the FMVSS 206 has a provision that manufacturers may certify to an agency-approved test procedure. **As discussed earlier, NHTSA approved a GM test in the 1960's. Since that time, no other requests have been approved.** Such an approach is inconsistent with the manner in which the agency has historically operated. Accordingly, we propose to replace the current "agency-approved" provision with the specified test procedure from the GTR that manufactures may use for certification.

69 Fed. Reg. 75020, 75026 (2004).

The defendants argue that this lengthy NPRM makes it clear that NHTSA never withdrew its approval of the GM method to show compliance with FMVSS 206 and therefore, this Court should find that the GM method is a valid testing method to show compliance with FMVSS 206.

In opposition to this motion for partial summary judgment, the plaintiffs argue that as a matter of law, the defendants should not be permitted to use the GM method to show compliance with FMVSS 206. First, the plaintiffs argue that at the time of manufacture and sale of the Strickland truck, Ford relied upon SAE J839 to demonstrate compliance with FMVSS 206 and not the GM method. SAE J839(Society of Automotive Engineers Recommended Procedure J839) is the other approved method mentioned in Section S5.1.1.2. They argue that Ford never relied on the GM method to test compliance with this particular vehicle until 2000. The plaintiffs state that except for the present vehicle, Ford has never used the GM method for compliance demonstration purposes in its history. Therefore, the plaintiffs argue that Ford cannot use the GM method to test compliance with FMVSS 206. The Court does not find this argument persuasive. The 1967 GM method existed prior to and at the time of the manufacture and sale of the Strickland vehicle. The fact that Ford used the SAE J839 method at that

time, instead of the 1967 GM method, has no bearing on whether it meets the requirements of FMVSS 206. The GM method would have been just as valid in 1997 as it would be in 2000. NHTSA made this determination. While plaintiffs may argue that the 1967 GM method is a poor standard or test to use to determine compliance with the requirements of FMVSS 206, as opposed to SAE J839, even if true, NHTSA made the determination that it was an agency-approved test alternative to SAE J839.

The plaintiffs also argue that Ford is not permitted to use the GM method to show compliance with FMVSS 206 because they failed to request or receive permission from NHTSA to use such. They state that compliance with FMVSS 206 must be shown either by the SAE J839 method or an agency approved test procedure **for that manufacturer**. The plaintiffs state in their memorandum in opposition to this motion that "[a] manufacturer seeking to use some method other than J839 must certify to an agency-approved test procedure. In other words, it must petition NHTSA for permission to use the alternate method and specify the method to be used. If NHTSA grants permission, the alternative method may be used." Plaintiffs also state that the NPRM suggests their position that the approved test only applies "for that manufacturer." Plaintiffs argue, in other words, that an agency approved test only applies to a specific manufacturer and other manufacturers cannot rely on it or use it to show compliance. The Court finds that the plaintiffs' argument is a misinterpretation of the regulation. In fact, the 206 standard only states: "[c]ompliance with S4.1.1.3 shall be demonstrated by **approved tests** or in accordance with paragraph 6 of Society of Automotive Engineers Recommended Practice J839, Passenger Car Side Door Latch Systems, June 1991." 49 C.F.R. § 571.206, S5.1.1.2. As aforementioned, the recent NPRM from NHTSA acknowledges its approval of the GM method in 1967. Nowhere in either of these publications does it state that Ford must first receive permission to use an approved test or that approved tests are only applicable to the manufacturer that requested

approval of a particular testing method. The plaintiffs' argument that Ford must first request or receive permission from NHTSA to use the GM method is simply a misreading of the regulation in the opinion of this Court.

In fact, the plaintiffs' own proffered expert, Mr. Allan Kam, a lawyer who worked with NHTSA for 25 years, has testified in his deposition that NHTSA's interpretations of its regulations, issued in the form of letters responding to inquiries from automobile manufacturers, represent the definitive view of the agency and may be relied upon by industry members in conducting their affairs. Kam Depo., p.10. It appears that the plaintiffs' own expert disagrees with their reading of the regulation's requirement. For the regulation to be interpreted as the plaintiff proposes would mean that there would be different safety regulation requirements for every single car manufacturer. For the above reasons, the Court finds this argument without merit.

The plaintiffs also argue that Ford should not be permitted to use the GM method to show compliance with FMVSS 206 because of a 1975 Mercedes Benz letter which they argue effectively rescinded the GM method. With regard to the Mercedes Benz letter, it appears that was a response directly to Mercedes Benz's request to perform another compliance test. Nowhere in that letter is there a specific mention of rescission of the 1967 GM approved method. In fact, it mistakenly says " NHTSA has consistently refused to approve or supervise the methods manufacturers use to test to the standards." This statement is itself incorrect, because all the parties agree that NHTSA had, in fact, previously approved the 1967 GM method. Although it could be argued the 1967 GM letter and the 1975 Mercedes Benz letter are inconsistent, once again, the 1975 letter to Mercedes Benz does not mention, as the plaintiff would like to argue, that the 1967 GM method has been rescinded or withdrawn. In fact, it is to be noted that the 2004 NPRM made no mention of the 1975 letter. However, as aforementioned,

in the 2004 NPRM, NHTSA expressly acknowledged its approval of the GM method in 1967 as a valid method of testing compliance with FMVSS 206.

This Court has a duty to interpret a federal regulation, when clear on its face, by its plain meaning. It is apparent from the aforementioned regulations and information submitted by the parties that the GM method is an agency "approved test" procedure and, therefore, a valid method for testing compliance with FMVSS 206. Although NHTSA may have itself **proposed** a change to such, that change has not yet been made. As such, the Court finds that the GM method is an agency "approved test" procedure for testing compliance with FMVSS 206.

B. Whether There is a Dispute that the Ford F-150 Passed the GM Method.

In their motion the defendants argue that there is no dispute from the plaintiffs' experts that the Ford F-150 passed the GM method of testing. To support that proposition, the defendants state that, while the plaintiffs' designated door latch witness, Dr. Benedict, testified at his deposition that the GM method is "not worth the paper it's printed on," he nonetheless did not contest that the subject vehicle passed the GM test. Benedict Depo., June 23, 2004, p. 72.

> Q. . . . Is it your testimony here today that Ford manipulated the GM pulse in some fashion to show the door stayed closed when Mr. Salmon or Dr. Salmon modeled it?
>
> A. No, what I said was he used the GM pulse. And the 182 Newton millimeters or whatever it was using that pulse -- backup. He used the GM pulse to show that the door handle would pass the test for the preload they had on the actual handle. That's what they did. He did not manipulate the curve. He actually used the GM curve, as I understand it.

Benedict Depo., June 23, 2004, pp. 121-122.

> Q. . . . [W]hen I deposed you in the Guzman case, you had no criticism of Dr. Salmon's work with the working model

software. You initially told me you had some concerns as to whether he actually captured the GM pulse. You later, I believe, said that he did capture the GM pulse with his software. Am I correct in my recollection?

A. Yes, that was before we ran it and generated it ourselves and checked it.

Q. Now that you've run it yourself and checked it, do you have any criticism of Dr. Salmon's use of the software?

A. The actual use of the working model?

Q. Yes.

A. No. It looks like he used it in accordance with what he put in. He put in what he put in and he got out what he got out and the program does what you tell it to do. . .

Q. Do you have any criticism of the data that he put in?

A. I don't know -- I don't really understand what you mean by criticism of the data.

Q. In other words, any criticism of the model of the latch system and the handle that he used?

A. You are talking about the geometry that he put in?

Q. Yes, sir.

A. I really had not looked at it in that regard.

Q. All right sir. So sitting here today, you don't have any criticism of it?

A. No, not as far as the dimensions and data that he put in as far as the geometry of the system, no.

. . .

Q. I know that you have a criticism of the use of the 32 G General Motors transient pulse. But do you have any criticism of -- putting aside the bigger picture, do you any criticism of the

mechanics of how Dr. Salmon went about his work?

A. I really don't know because I haven't looked at it from that standpoint.

Benedict Depo., June 24, 2004, pp. 246-247.

Another of the plaintiffs' experts, Mr. Allan J. Kam, testified in his deposition that "[t]o the best of my knowledge, there has never been an express withdrawal of the '67 letter, approval letter. . ." Kam Depo., p. 48. The defendants state that Mr. Kam also agrees that it is proper for Ford to use "computer simulations" and "engineering judgment" to demonstrate compliance with the FMVSS. Kam Depo., p. 103. The defendants also state that Mr. Kam agrees that NHTSA's interpretations of its regulations, issued in the form of letters responding to inquiries from auto manufacturers, represents the definitive view of the agency and may be relied upon by industry members in conducting their affairs. Kam Depo., p. 10. The defendants acknowledge that Mr. Kam's position is he would have done things differently than Ford if standing in the same shoes, however, they argue that the import of his testimony is that Ford's use of the GM method was proper.

In responding to this motion for partial summary judgment the plaintiffs attach a very recent affidavit of Andrew Gilberg, one of their door latch systems experts. In this affidavit, Mr. Gilberg now opines an additional opinion that Ford did not accurately perform the 1967 GM method. He further states that Ford did not perform any dynamic testing on the door latch system to show compliance but used a software model to try to simulate the testing required in the GM letter. Mr. Gilberg states that the computer model is not dynamic testing, and Ford did not get approval to vary the methodology. Therefore, the plaintiffs argue that even if Ford could have used the GM method to test compliance with FMVSS 206, they did not adhere to the requirements of the GM method as it was approved by NHTSA

in 1967. For this reason, the plaintiffs argue that there is a genuine issue of material fact as to whether Ford even passed the GM method.

The Court notes that the recent affidavit of Andrew Gilberg was signed on March 3, 2005, one day after the defendants' motion was filed. The Court was concerned whether Mr. Gilberg's opinion regarding the fact that the subject vehicle never actually passed the GM test was one which he has always had, or whether it has just developed. More importantly, the Court was concerned with whether this new opinion had ever been disclosed to the defendants. In other words, plaintiffs' expert has now moved from simply an opinion as to the validity of the GM method to show compliance with FMVSS 206 to also now claiming Ford did not even correctly perform the GM method or pass the GM method. The Court allowed plaintiffs' counsel an opportunity to provide the Court with any other deposition testimony or affidavits of Mr. Gilberg where he has stated that the vehicle in question did not pass the GM test because Ford did not properly perform the GM test. The additional materials presented to the Court do not support that this opinion was previously discussed, therefore the Court cannot consider it. They show that Mr. Gilberg does not agree that the GM method is a valid method for testing compliance with FMVSS 206, however, they do not show where Mr. Gilberg has ever stated that the test performed by Ford did not actually pass the GM method because it was not correctly performed by Ford. The Court has also reviewed the information submitted by plaintiffs regarding whether this "new" opinion was previously disclosed by the plaintiffs. It cannot be found, and the Court cannot allow it at this late date on the eve of trial. In contrast, the Court points to the above cited deposition testimony of Dr. Benedict, plaintiffs' engineering expert regarding FMVSS 206, where he does not find that Ford did not pass the GM test, rather he criticizes the fact that Ford used the GM test to determine compliance with FMVSS 206. For the aforementioned reasons, the Court finds that this new opinion

of Mr. Gilberg's that the Ford F-150 did not pass the GM test does not create material issue of fact. As such, the plaintiffs have shown no genuine issue of material fact that Ford did not pass the GM method when testing the subject vehicle.

Conclusion

_____There simply is no genuine issue of material fact as to whether the GM method is an agency "approved test" under FMVSS 206. This is a question of law for the Court, not for the jury. To allow testimony from attorney Kam, Benedict, or others as to whether it is, whether it should be or not be an approved testing method, is not only an improper usurpation of the Court's role, but certainly improper testimony in front of a jury. The prejudicial effect would far outweigh any probative value and would be confusing and misleading to the jury under Rule 403. While compliance or noncompliance of a regulation is usually a question of fact for a jury, that is not the issue at hand. The issue is simply whether the GM method was an agency "approved test" procedure, as contemplated by the clear language of FMVSS 206. It is without question an agency "approved test" procedure under Section S5.1.1.2 of 49 C.F.R. § 571.206, after reviewing not only the information and deposition testimony of plaintiffs' own witnesses Kam and Benedict, but also the most recent NPRM which still recognizes the GM method. While it is clear that the plaintiffs and their experts believe the SAE J839 method is a far superior, more accurate method of testing for compliance, and they may be entirely correct, that does not obviate the authority of NHTSA to indicate alternative methods, such as the GM method, to determine compliance. It is not this Court's duty to tell NHTSA what tests they may or may not use or authorize when instructing manufacturers.

_____As aforementioned, the Court finds as a matter of law that the GM method is a valid method for testing compliance with FMVSS 206. The Court also finds that there is no genuine issue of material

fact presented to dispute that the Ford F-150 in question passed the GM method or that Ford correctly performed the GM method. Therefore, the Court finds that there is no genuine issue of material fact remaining for a jury to consider as to whether the subject vehicle complied with FMVSS 206. For the reasons stated herein, the defendants' motion for partial summary judgment concerning compliance with FMVSS 206 is hereby **GRANTED**. However, the Court reminds the parties that 49 U.S.C. § 30103(e) provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law," and further that this ruling is not to be construed as a prohibition on the discussion of industry standards or Ford's own internal policies, procedures or standards which may be relevant in this case.

IT IS SO ORDERED.

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

Florence, South Carolina
March 6, 2005

CERTIFICATE OF SERVICE

I, Peter W. Herzog, attorney for the United States Chamber of Commerce hereby certify that I served the foregoing document BRIEF OF AMICUS CURIAE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA upon counsel for all parties by causing a true copy thereof to be delivered by first-class mail to:

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January 14, 2008