

MAY 22 1998

Thomas L. Saybolt, Esq.  
Assistant General Counsel  
Ford Motor Company  
Parklane Towers East, Suite 728  
One Parklane Boulevard  
Dearborn, MI 48126-2493

Re: Alleged Bronco II Rollover Propensity

Dear Mr. Saybolt:

This is to advise you that the National Highway Traffic Safety Administration (NHTSA) has decided to separate its decision-making on a petition from Edgar F. Heiskell, III, Esq., as well as earlier informal requests from Mr. Heiskell and from Debbie D. Branson, Esq., Frank L. Branson, Esq., and Randy Barnhart, Esq., asking NHTSA to reopen the Office of Defects Investigation's (ODI) investigation (EA 89-013) of alleged rollover propensity in Ford Motor Company (Ford) Bronco II vehicles, from its inquiry into Mr. Heiskell's allegations that Ford "fraudulently concealed" relevant testing reports and documentation from ODI during EA 89-013 and its predecessor inquiry (DP 88-020). This letter responds to the latter allegations.

In a December 6, 1996 response from counsel John L. Wanamaker to NHTSA Assistant Chief Counsel Kenneth Weinstein's October 9, 1996 letter seeking information from Ford regarding Mr. Heiskell's allegations, Ford stated that its responses to ODI's Information Requests (IR) in the Bronco II matter

... were consistent with the company's long-standing understanding about NHTSA's expectations in response to defect investigation information requests. Responsive documents pertaining to production configuration vehicles that are the subject of a pending investigation are routinely provided, while documents pertaining to experimental configuration vehicles that were never marketed or to prototypes that changed during the course of product development, are excluded, unless NHTSA specifically requested such information.

Ford also claimed that ODI's first Bronco II IR of September 14, 1988, defined the scope of the inquiry to include all Bronco II's sold in the U.S. since August 1, 1982, and that Requests Nos. 8

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and 13 in that IR "asked for information regarding changes . . . since August 1, 1982," again confirming the agency's general interest in designs that actually came to market," whereas, "[b]y contrast, in request No. 20, . . . NHTSA specifically asked whether Ford had ever considered, 'including preproduction,' certain glazing materials." Further, Ford stated that "[i]f Ford should have understood that all of the agency's questions were intended to include experimental or rejected prototype designs, than (sic) the specific request in Request No. 20 would not have been necessary."

NHTSA does not agree with Ford's limited construction of ODI information requests in the Bronco II investigation. We were surprised by the transcripts which Mr. Heiskell supplied to us of the evidentiary depositions of former Ford Automotive Safety Office officials Robert H. Munson and Wayne Kippola, which Ford referenced in its December October 6 letter, and which similarly contain statements that Ford only provided information about production vehicles in responding to ODI IRs (Munson deposition, Tr. 84; Kippola Deposition, Tr. 88) and that NHTSA never asks for pre-production information (Munson deposition, Tr. 87; Kippola deposition, Tr. 89.)

We understand Ford's present position to be that the company interprets the specifications of ODI information requests (in the Bronco II investigation and other matters) as limiting the applicability of those specifications to the "subject vehicle," as defined at the beginning of the IR. However, it is not appropriate for Ford to so restrict its response to questions that do not use the term "subject vehicle" and that on their face apply to a broader category of information.

For example, Question 6 of ODI's November 8, 1989 IR to Ford in EA 89-013 asked the company to:

. . . describe all tests and analyses at (1) Ford, (2) contractors, (3) suppliers, (4) other entities pertaining to (a) the subject alleged defects, (b) used to establish the handling or stability of the Bronco II, (c) the center of gravity and change of the center of gravity under various conditions, or (d) comparisons of the handling and stability characteristics between the Bronco II and other vehicles. Furnish copies of all reports, notes, tables, graphs, film, photographs, or similar documentation which were developed for each. Identify when each activity was initiated and concluded or whether it is still ongoing.

This request is framed very broadly, in the disjunctive, and is not limited to "production-configuration" vehicles or to vehicles sold since a particular date. A "plain English" reading of the

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request would construe it to include at least those tests of pre-production models "used to establish the handling or stability of the Bronco II." Even the request in subpart (a) to "describe all tests and analyses pertaining to the subject alleged defects" covers more than production models. Because the ordinary meaning of the phrase "pertaining to," like that of its synonym "relating to," is broad, the scope of this question is expansive. C.f. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992). Moreover, because subparts (a) through (d) of question 6 are stated in the disjunctive, it is not reasonable to construe the term "the subject alleged defects," used in subpart (a) of the question, as having the identical meaning to the phrase "the Bronco II," used in subparts (b) and (d).

Nevertheless, while we do not agree with Ford's construction of ODI's IRs, we have concluded that Mr. Heiskell's charge of "fraudulent concealment" of information lacks foundation. Although Ford did not furnish documentation of testing of pre-production Bronco II vehicles to ODI during its investigation, Ford did not "conceal" the fact that it was not providing this documentation in response to the IRs. Rather, various Ford responses during the course of EA 89-013 to questions requesting documentation of "any and all tests and analyses at (1) Ford, (2) contractors, (3) suppliers, or (4) other entities . . . ." plainly stated that Ford's submission was limited to documents in which ". . . characteristics of production configuration Bronco II vehicles were quantified or evaluated" and further stated that "information regarding Ford vehicles other than the production configuration Bronco II has been deleted" from the documents. See, e.g., Ford Response of February 20, 1989 to Questions 15 and 16 of ODI IR of September 14, 1988. Moreover, ODI did not follow up by requesting that Ford provide this information.

Therefore, upon review, we have decided against penalizing Ford, many years after the fact, for failing to supply complete answers to ODI's inquiries with respect to alleged rollover propensity in Bronco II vehicles.

We have recently requested that Ford construe ODI's information requests according to their "plain meaning," and that, when a request calls for the submission of "all documents," without qualification, Ford supply all relevant documents, likewise without qualification. If this includes information related to pre-production vehicles that, in Ford's view, differed significantly from the eventual production version of the vehicle, Ford may seek to limit the scope of the request by explaining the differences between the pre-production and the production vehicles and setting forth reasons why the information related to pre-production vehicles would not be relevant to ODI's investigation and thus should not be required to be submitted. ODI will consider such requests to limit the scope of an IR, but will not necessarily grant them.

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On a related issue, we were disappointed to learn that Ford outside products liability counsel have been characterizing ODI's decision to close the Bronco II investigation as a decision that the vehicles under investigation did not contain safety-related defects. As we have repeatedly emphasized to Ford and other manufacturers, ODI does not make "no-defect decisions." ODI specifically did not do so with respect to the Bronco II rollover investigation. Rather, the final paragraphs of the closing report for E889-013 reveal that ODI closed the investigation on the basis of prosecutorial discretion, after concluding that there "appears no reasonable expectation that further investigation would lead to a determination of the existence of a safety related defect" and that [f]urther expenditure of agency resources in this matter is not warranted."

I am aware that John Mellon, of Ford's Office of General Counsel has advised agency officials that Ford has notified its outside counsel in products liability cases that they should not characterize NHTSA decisions to close investigations as "no-defect" decisions. I request that Ford take appropriate steps to ensure that this advice is followed, including regularly monitoring the performance of outside products liability counsel on this subject, by reviewing transcripts or by other means.

I hope that our discussion of these issues has clarified Ford's obligations when responding to ODI IR's and will prevent any future problems in this regard.

Sincerely,

Original Sign By

John Womack  
Senior Assistant Chief Counsel

cc: Edgar F. Heiskell, III, Esq.  
Debbie D. Branson, Esq. and Frank L. Branson, Esq.  
W. Randolph Barnhart, Esq.  
Erika Z. Jones, Esq.

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