

Articles

Recall the Recall

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*At some point, the cost of additional safety improvements becomes so great that additional safety measures are not worthwhile.*¹

- W. Kip Viscusi, Harvard law professor

INTRODUCTION

The system governing automotive recalls in the United States has run amok. If “secret” recalls were part of the concern expressed in 1966 when Congress created what would later become the National Highway Traffic Safety Administration (NHTSA) to oversee the auto industry, by 2006 the pendulum has swung the other direction to over-recalling. The legal standard requiring automakers and others to conduct a recall in

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1. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 561 (2000).

cases where a defect presents an unreasonable risk to motor vehicle safety is now essentially meaningless because the agency, backed by the courts, has stripped out the unreasonable element.

As a result, now, automakers routinely have more annual recalls than annual sales. In 2004, for example, automakers conducted nearly 600 recalls covering more than 30 million vehicles, an increase of 57% from 2003.² Compared to the 17 million vehicles sold,³ that equates to nearly 1.75 recalled vehicles for every new vehicle sold. Fourteen percent of all vehicles on the road have been recalled at least once to correct a safety-related defect or failure to comply with an applicable safety standard.⁴ Another compelling fact is, not even 25% of those vehicles are brought in by owners for repair.⁵ Thus, over 750,000 vehicles that should have been repaired in 2004 are still on the roads – with an unfixed safety defect.

Lest one think that 2004 was an anomaly, the overall recall trend in the industry is *increasing*. In 1967, the first full year the government began tracking safety recalls, manufacturers conducted a total of fifty-seven recalls.⁶ By 2000, the number of safety recalls had increased to 663.⁷ The number of potentially affected vehicles has also increased. Leaving out 2004, between 1998 and 2005, recalls averaged more than 18 million vehicles per year, far more than the average new sales during that timeframe.⁸

The volume of recalls is not improving motor vehicle safety.⁹ In fact, when one considers the risks of crash posed by otherwise unnecessary trips to car dealerships to repair ‘safety defects,’ NHTSA’s recall program is probably exposing motorists to more hazards than it is correcting. The problematic effect of recalls on vehicle safety is highlighted by NHTSA’s consistent refusal to study the issue. Thirty years ago NHTSA’s own Advisory council concluded that: “The question naturally arises – do the

2. Kevin M. McDonald, *Shifting Out of Neutral: A New Approach to Global Road Safety*, 38 VAND.J. TRANSNAT’L L. 743, 787-88 (2005).

3. Greg Bowens and Lindsay Chappell, *Analysts: Sales will be flat – still fat – this year; The crystal ball consensus is a match of ‘04’s 16.8 million*, AUTO. NEWS, January 3, 2005, at 3.

4. See Yong-Kyun Bae & Hugo Benítez-Silva, *Do Vehicle Recalls Reduce the Number of Accidents? The Case of the U.S. Car Market*, Working Paper, SUNY-Stony Brook, Feb. 14, 2005, at 12, <http://www.sunysb.edu/economics/research/papers/2005/recall.pdf>.

5. See Associated Press, *Automobile Recalls Reach Record Highs*, MIAMI HERALD, Dec. 1, 2004, at 1A.

6. <http://www-odi.nhtsa.dot.gov/downloads/folders/> (follow “Recalls” hyperlink; then download and uncompress “FLAT_RCL.zip”).

7. *Id.*

8. In 2005, automakers conducted 557 safety recalls covering just over 18 million vehicles. See Jeff Plungis, *Industry Recalled Fewer Vehicles in 2005; Ford, GM Led the Way*, DET. NEWS, Jan. 5, 2006, at 1A. New vehicle sales for 2005 were just under 17 million. See Gina Chon, *GM and Ford Lose More Market Share*, WALL ST.J., January 5, 2006, at A3.

9. Bae & Benítez-Silva, *supra* at 4 at 12.

safety benefits of the [recall] program justify its cost? Curiously, no one knows. Indeed, the scarcity of hard facts and the abundance of unknown factors make any definitive evaluation of the defect-recall program very difficult.”¹⁰ Driven by dogma, NHTSA has nonetheless charged forward each year with its recall program. Driven by fear, reluctant auto companies have continually acquiesced. And so the viscous circle is complete: vehicles must constantly be recalled to fix the most inane ‘safety risks,’ such as a recent General Motors recall, strong-armed by NHTSA, of model year 1996-99 Chevrolet and GMC vans to “fix” the audible seat belt warning signal, which failed by a fraction to chime for the mandated 4-8 seconds when the seat belt wasn’t properly buckled.¹¹

Although the benefits of NHTSA’s recall program remain elusive, its costs are not. NHTSA estimates (rather conservatively) that safety recalls cost automakers about \$100 per vehicle per recall.¹² Not including the indirect costs caused by recalls (e.g., brand damage), that would mean that automakers spent around \$3 billion in 2004 to fix safety defects. That number does not take into account the numerous other field actions manufacturers undertake to correct ‘non-safety’ defects, such as emissions-related recalls, non-safety or non-emissions service actions, customer satisfaction campaigns, or extended warranties.

If one considers total warranty costs that fund all these actions, automakers spend nearly \$12 billion a year in the United States to fix vehicles, which can cut between 1 to 3% off revenues.¹³ Broken down by company, General Motors Corp.’s warranty costs worldwide are about 3.2% of automotive sales as of March 31, 2005; Ford’s are about 2.5%; DaimlerChrysler’s are about 5.2%; and Toyota’s are about 1.2%.¹⁴ Aside

10. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 189 (Harvard University Press 1990).

11. NAT’L HIGHWAY TRAFFIC ADMIN, NHTSA CAMPAIGN 01V123000 (Apr. 10, 2001), <http://www-odi.nhtsa.dot.gov/cars/problems/tsb/results.cfm> (follow “1999, GMC, M/L Van, Seat Belt”).

12. See Final Regulatory Evaluation, TREAD Act Early Warning Reporting Part 579, Office of Regulatory Analysis and Evaluation, NHTSA, July 2002, Docket # NHTSA-2001-8677-470, at 52.

13. Ed Garsten, *U.S. Auto Warranty Costs Soar*, DET. NEWS, Sept. 14, 2004, at 1A. In October 2005, Ford Motor Company disclosed that its quality-related costs during the first nine months of 2005 increased by \$500 million compared to the first nine months of 2004. In the third quarter of 2005 alone, the costs increased \$200 million compared to the third quarter of 2004. These increases would have been even higher if Ford had not received a \$240 million payment from Bridgestone Firestone North American Tire LLC to settle issues dating back to the recall of 20 million defective tires in 2000 and 2001. See Bryce G. Hoffman, *Quality Costs at Ford Rise \$500M*, DET. NEWS, Oct. 23, 2005, at 1A.

14. See Jeff Plungis & Christine Tierney, *Recalls Fall but Toyota Sees Increase*, DET. NEWS, Dec. 2, 2005, 1C (noting that the data is from the trade publication, *Warranty Week*, which “cautions that the figures might not be entirely comparable because of different accounting systems and currencies,” see also <http://warrantyweek.com/archive/ww20050524.html>).

from automakers, consumers are the main losers here, because automakers must divert resources away from developing better and safer vehicles that can prevent crashes from occurring at all.

In his 1965 bestseller, *Unsafe at Any Speed*, Ralph Nader wrote: "The regulation of the automobile must go through three stages – the stage of public awareness and demand for action, the stage of legislation, and the stage of continuing administration."¹⁵ Forty years later, the regulation of the automobile has traveled many times through each of these three stages.

My thesis is straightforward: the system governing automotive recalls is stuck in park and must be changed. The current system leads to the paradox of too many vehicle recalls with not enough owner participation. It is a failure on at least five levels.

First, automakers themselves bear part of the blame because they *over-recall*. Instead of protecting their shareholders' property interest, employees' reputations, brand image, and vehicles' integrity, automakers have acquiesced. Sure, they may have been brow-beaten into submission by trial lawyers, the self-appointed "consumer" lobby (funded by trial lawyers), government officials, and sensation-seeking journalists into appeasing bureaucrats, even when no objective safety defect exists, but it is time automakers defend themselves in a meaningful manner.

Second, NHTSA's hands-off approach to protecting its jurisdiction as the sole authority for overseeing recalls¹⁶ has actually encouraged trial lawyers to ask judges and juries to order recalls *themselves*, thereby creating the potential for a Balkanized recall system. Unfortunately, some myopic judges have failed to properly or sensibly interpret the statute governing recalls (the National Traffic & Motor Vehicle Safety Vehicle Act ("Safety Act"))¹⁷ and are happy to oblige such requests.¹⁸ The judiciary should, however, apply the doctrine of preemption to matters involving automotive recalls to ensure that NHTSA continues as the sole authority empowered to investigate defects and oversee automotive recalls.

Third, NHTSA continues to insist on outdated recall letters.¹⁹ Any recipient of a formal "RECALL LETTER" will tell you that the letter is

15. RALPH NADER, *UNSAFE AT ANY SPEED* 343 (Grossman Publishers) (1965).

16. National Highway Traffic Safety Administration, <http://www.nhtsa.dot.gov> hyperlink; (follow "Vehicles & Equipment" tab; then follow "Recalls/Defects" side tab; then follow "Motor Vehicle Defects and Recall Campaigns" hyperlink).

17. National Traffic and Motor Vehicle Safety Act, 49 U.S.C.S. §§ 30101-70 (2006).

18. See *Center for Auto Safety v. Nat'l. Highway Traffic Safety Admin.*, 452 F.3d 798, 800-01 (D.C. Cir. 2006).

19. See McDonald, *supra* note 2, at 786 (citing Defect and Noncompliance Notification Rule, 49 C.F.R. § 577.5(a) (2005)). The NHTSA prescribes the language without flexibility. This rule has been in place since 1976.

riddled with incomprehensible legal jargon. Far from just esoteric nit-picking, the content of this letter, together with the flood of recalls, can be causally linked to a low owner response rate.

Fourth, the legislatures have imposed no responsibility on owners to ensure that their vehicles are repaired. As a result, assuming that all affected vehicles pose a safety hazard, not only are those vehicles at risk, but the entire public is put at risk. Legislative changes could include requiring annual registrations of vehicles and denials to those who haven't tendered their vehicle for repair as well as sharing recall data with insurance companies so increased premiums can be charged to those who don't have their vehicles repaired. If recalls are to be taken seriously and should be effective, then the burden cannot be placed solely on the manufacturers. Other changes could include criminal or civil penalties to those drivers involved in a crash where the underlying causal factors are attributed to a failure to tender the vehicle for recall repair.

Fifth, large-scale changes to the Safety Act include reducing the burdens of TREAD and tackling the controversial issue of cost-benefit of recalls. NHTSA also needs to prioritize hazard levels and investigate only those defects that legitimately constitute "unreasonable" risks.

MANUFACTURERS: FIGHT FOR YOUR RIGHT!

As a general proposition, manufacturers don't beat NHTSA when fighting recall orders in court. So it's understandable that manufacturers don't fight recall orders. However, as discussed in my book *Shifting Out of Park: Shifting from Recalls to Reason*,²⁰ the most recent experience in court has been positive (e.g., *X-Cars*²¹ and the *Chrysler*²² noncompliance case). This experience suggests that, given the right circumstances, manufacturers can win. Of course, they have to be willing to sacrifice the product in the effort, because the media will cast the manufacturer as the recalcitrant greedy corporation that is unwilling to cooperate with the government.²³

With that in mind, though, it makes no sense to recall otherwise safe vehicles. By continuing to play along, manufacturers are part of the problem. Their recalls form a body of industry custom, such that when a similar issue arises later, enough "precedent" has been set by others in

20. KEVIN M. McDONALD, *SHIFTING OUT OF PARK: MOVING AUTO SAFETY FROM RECALLS TO REASON* (Lawyers & Judges Publishing 2006).

21. *U.S. v. General Motors Corp.*, 656 F.Supp. 1555 (D.C.Cir. 1987).

22. *U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998).

23. See Jim Mateja, *Hold Your Horses on Call for Engine Size Limits*, CHI. TRIB. June 12, 2005, at 7 (calling automaker "greedy" for building large engines). See also Editorials, *Letters to the Editor*, DALLAS MORNING NEWS, July 26, 2006, at 14A.

the industry to make it almost impossible for a manufacturer *not* to recall for the same or similar issue.

A recent example will prove my point. In October 2005, Toyota conducted a safety recall affecting around 71,000 Scion vehicles (model years 2005 and 2006).²⁴ What was the safety-related defect that posed an unreasonable risk of crash or injury? A defective glass wind deflector used in the “moonroof” that: (1) if impacted by a projectile, such as road debris (2) while driving at highway speeds with (3) the wind deflector in the upward-tilted position (4) could shatter and separate from the frame and (5) perhaps fall upon the vehicle occupants thereby causing (6) driver distraction or injury.²⁵ The fix was to install a plastic film to the inside surface of the wind deflector glass.²⁶

What happened here? Let one think that Toyota conducted this recall *sua sponte*, au contraire! Toyota conducted this recall in response to a NHTSA investigation.²⁷ Yes, NHTSA had opened both a preliminary evaluation and a subsequent engineering analysis into the issue. How big of a problem was this? In the closing resume of the engineering analysis file, NHTSA had received a total of seven complaints; Toyota had received one complaint.²⁸ In addition, Toyota reported 37 warranty claims out of a class of 71,400 vehicles, representing a failure rate of around 0.05%.²⁹ There were no reported injuries or crashes to Toyota as a result of this safety-related defect.

Toyota could have argued that, on the basis of *Wheels*,³⁰ no “defect” existed. *Wheels* required a “significant number” of performance failures, so long as the vehicle: (1) has been operated under conditions of specified use or (2) sustained the performance failures as a result of either (a) reasonably foreseeable abuse or (b) failure to maintain the vehicle, i.e., “ordinary abuse.”³¹ A “significant number” of performance failures means a number of failures that is “non-de *minimus* [sic].”³² To prove a “significant number” of performance failures, the government need not identify engineering, metallurgical, or manufacturing failures.³³ Rather, the gov-

24. NHTSA Office of Defects Investigation, *Campaign Number 05V483000*, 2006, <http://199.79.180.163/cars/problems/recalls/results.cfm>. See also *Some Scion Models Recalled by Toyota*, WALL ST J. Oct. 20, 2005, at D3.

25. *Id.*

26. *Id.*

27. *Id.* (follow “Document Search” then select #5, “Manufacture Notices”).

28. NHTSA Office of Defects Investigation, *ODI Resume for Toyota Scion TC*, <http://www-odi.nhtsa.dot.gov/cars/problems/defect/results.cfm> (follow drawbars for “2005,Toyota, Scion TC, Moonroof assembly.” Then follow “Document search,” select #2, “Opening Resume”).

29. *Id.*

30. U.S. v. General Motors Corp. (*Wheels*), 518 F.2d, 420 (D.C. Cir. 1975).

31. *Id.* at 447.

32. *Id.* at 438, n. 84.

33. *Id.*

ernment can prove a “significant number” of performance failures by relying “exclusively on the performance record of the vehicle or component.”³⁴ A 0.05% performance record is hardly a “significant number.”

Even if a “defect” existed, Toyota could have argued that the defect didn’t “relate to safety.” Recall the test for establishing a nexus to safety: to prove that a defect is “safety-related,” the government must show that the defect constitutes an unreasonable risk of accidents or injuries.”³⁵ The “reasonableness” of the risk to safety can be assessed, according to *X-Cars*, by analyzing the following three factors: “(1) the severity of the harm that the risk to safety threatens; (2) the frequency with which that harm occurs in the threatened population relative to its incidence in the general population; and (3) the economic, social, and safety consequences of reducing the risk to a so-called ‘reasonable’ level.”³⁶

Let’s look at each of those factors. First, the severity of the harm that, as identified by Toyota, is driver distraction or injury: If driver distraction is the standard for conducting a safety recall, we should recall all vehicles containing CD players or that are designed to carry passengers because both have been empirically shown to be highly distracting. If injury is the harm identified, it is worth nothing that the closing resume identified no injuries having occurred. Moreover, perhaps the glass is designed to break or shatter in a manner that would not cause any injury at all. Second, the frequency of the *harm* occurring is zero, based on the number of injuries. If one measures failures – and not harm – then the frequency is 0.05%. Third, the economic, social, and safety consequence of reducing this “risk” to a “reasonable” level presupposes the existence of a risk that is unreasonable. For the reasons discussed in this essay, I would challenge that conclusion. But even if one argues that such a risk is unreasonable here, what’s the cost of fixing it? Another trip to the dealership, which consumes fuel and time as well as exposing the driver and any occupant to the usual risk of crash one is exposed to whenever traveling the roads. On balance, I wouldn’t say that this “risk to safety” rose to the level requiring a safety recall.

If Toyota’s recall isn’t the poster child of ridiculous recall, then nothing is (except perhaps the GM recall to fix the audible seat belt buzzer for failing to chime with exact precision). Even if one agrees with NHTSA’s argument that the failure rate would increase over time as the population and on-road exposure of the subject vehicles increase, why not allow Toyota to handle the remedy the next time the customer happens to be in

34. *Id.* at 432.

35. *U.S. v. General Motors (X-Cars)*, 841 F.2d. 400, 409 (D.C. Cir. 1988).

36. *Id.* at 410.

the dealership? In other words, this problem, to the extent a problem really existed, could have been handled through a standard technical bulletin. Affected cars could have been repaired when they were brought in to the dealership for any reason. The cars are young and can be expected to visit a dealership at the latest during the next maintenance interval. Why should the customer be bothered with an extra trip to the dealership to fix something that could easily be fixed the next time the car is brought in?

Though understandable from a business perspective, by acquiescing, Toyota has made life more difficult in the future for it and the rest of the industry. Why? Because NHTSA now has another piece of precedent to point at when the next sunroof “defect” arises. The standard NHTSA response of “other manufacturers have conducted recalls for similar issues” can be expected now in the case of this type of “defect.” Already by the time the Toyota case emerged, NHTSA could point to a few recent examples when automakers conducted safety recalls for sunroof (or moonroof) ailments. For example, Nissan had recently conducted a safety recall on model year 2004 Nissan Maxima to fix a defectively built glass sunroof.³⁷ And Jaguar had also conducted a safety recall on XJ vehicles to fix an incorrectly assembled reinforcement bar that could shatter the glass in the sunroof.³⁸ But with Toyota’s recall, the bar has been set even lower, and the industry has hammered another nail in the coffin of recalling only “unreasonable” risks.

STOP THE NONSENSE – FOCUS ON THE DRIVER, NOT THE CAR

If automakers are too passive in defending the integrity of their products, they are often too aggressive in touting the latest gizmo as the next life-saving device. Automakers are often their own worst enemy. By overemphasizing vehicle features, automakers can leave the impression that the vehicle can take care of the driver, not vice versa. In some cases, it may be true that the vehicle can “take care” of the driver. For example, safety belts – when used properly – can save lives and reduce injuries. But drivers can avoid crashes from happening in the first place by not drinking alcohol and doing drugs, driving at excessive speeds, or talking on the cell phone while driving. Avoiding those behaviors will provide society with the greatest gains in auto safety. That’s the message automakers - and NHTSA - need to broadcast, not that latest and greatest gadget.

37. See 2004 Nissan Maxima Recalls, <http://www.automallusa.net/2004/nissan/maxima/recalss.html> (last visited Sept. 12, 2006).

38. Lemon Auto.com, Jaguar XJ Recall Information, http://www.lemonauto.com/complaints/jaguar/jaguar_xj.htm (last visited Sept. 12, 2006).

In February 2006, Lawrence Ulrich, a senior writer from *Money Magazine*, wrote an article entitled “Safety Gizmos That Aren’t Worth the Cost.”³⁹ He identified a number of “pricey gadgets” that were once “touted as ‘life saving’” but, in fact, “do little or nothing to protect human lives.”⁴⁰ These “gadgets” include: (1) adaptive headlamps, touted to pivot in the direction the driver turns the wheel but, for Mr. Ulrich at least, “do little or nothing to improve the nighttime view, even on dark and winding country roads where you’d most expect to see some difference”;⁴¹ (2) lane-departure warning systems, which alert the driver who’s strayed off the road through an audible chime and flashing warning lamp in the instrument cluster but, for Mr. Ulrich at least, “nagged” him when he “wasn’t asking for its help”;⁴² and (3) infrared night vision, which can display people or animals that are beyond the range of standard headlamps but, for Mr. Ulrich at least, distracted him from focusing on the road because these objects are displayed on a separate dashboard screen.⁴³ Ironically, the safety benefit of the latter two gadgets might be offset by the crashes or near crashes caused by the *distraction* those systems rely on to function, i.e., a warning chime and flasher as well as a separate dashboard monitor.

Mr. Ulrich is not alone. Other well-respected auto experts, such as Jim Hall, Vice President of AutoPacific, a company specializing in research and analysis of the auto industry, have also expressed reservations about these features.⁴⁴

The media, quick to pounce on automakers once a recall is announced, is often surprisingly *uncritical* when covering these stories. For example, covering the annual conference of the Society of Automotive Engineers in April 2006, the *Detroit News* ran a cover business story entitled “Smart Cars Could Save Lives,” in which it provided an uncritical account of a host of gizmos touted by companies at the conference, such as a 360-degree “protective bubble . . . that relays everything going on around the car on a 3-D video.”⁴⁵ Not a word was devoted, however, to the potential risk of driver distraction posed by this “life-saving” system.

In addition to the distraction problems some of these features cause, a larger problem is perhaps one of perception and credibility. If the auto

39. Lawrence Ulrich, *Safety Gizmos That Aren’t Worth the Cost*, Feb. 9, 2006, http://money.cnn.com/2006/02/09/Autos/tipsandadvice/bestcars_safety_wastes/index.htm.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Some of the New Technologies Coming In Cars*, Feb. 26, 2006, <http://www.autoline-detroit.tv/autoline/watch.php?stream=1009>.

45. Christine Tierney & David Shepardson, *Smart Cars Could Save Lives*, *DET. NEWS*, Apr. 6, 2006, at C1.

industry continues to tout features as life-saving that in fact aren't, it risks not being believed at some point in the future if it really *does* discover a life-saving feature. In the meantime, though, by emphasizing vehicle features over personal responsibility, the auto industry creates a situation that is difficult to defend when the driver comes to rely on the gadgets, not his own skill, to drive the vehicle. By declaring these gadgets "safety" features, any problems that arise will have to be remedied through a formal safety recall. After all, they're performing a safety function, the failure of which could result in a crash. Finally, if everyone in the industry buys into the "safety" function, one could argue that automakers have an affirmative duty to install these features as standard equipment on all vehicles and that failing to do so equates to negligent design.

I'm no psychiatrist, but the behavior of many automakers – shying away from defending their product yet aggressively touting the latest gizmo - is consistent with what I've read about passive-aggressive personality disorder. Here's how one psychiatry textbook describes the clinical features of the disorder:

PAPD patients characteristically procrastinate, resist demands for adequate performance, find excuses for delays, and find fault with those on whom they depend; yet they refuse to extricate themselves from the dependent relationships. They usually lack assertiveness and are not direct about their own needs and wishes. They fail to ask needed questions about what is expected of them and may become anxious when forced to succeed or when their usual defense of turning anger against themselves is removed.⁴⁶

My message to the marketers here is simple: stop the nonsense.

LET'S TALK ABOUT COST

Recalls are conducted to fix vehicles containing safety-related defects or noncompliance with safety standards. The point of recalls, of course, is to reduce the frequency of crashes or injuries (or both). Considering the significant amount of money and attention devoted to recalls, you might be surprised to learn that NHTSA has never studied the effect of recalls on vehicle safety. This oversight is baffling. After all, NHTSA knows exactly which vehicles subject to a safety recall have been repaired and which vehicles have not been repaired. Furthermore, NHTSA knows the subsequent vehicle crash histories of these vehicles. Yet NHTSA has never provided a quantitative analysis of this link. In laymen's terms, NHTSA hasn't measured the "benefits" of recalls. At least the agency is consistent, though, because it also hasn't effectively analyzed the "cost" of recalls, either. As a result, little is known – officially - about the "cost-benefit" of safety recalls. In my view, the second part of rethinking the

46. HAROLD I. KAPLAN & BENJAMIN J. SADDOCK, SYNOPSIS OF PSYCHIATRY 793 (1988).

concept of what should trigger a safety recall is thinking about cost-benefit.

I thus aim to frame some cost-benefit questions that *should* be asked of any regulatory program, including NHTSA's recall program. I realize, of course, that cost-benefit analysis has its enemies ("how can one ever place a 'value' on a human life?"), but I think the following types of questions are worth asking: how much does a proposed recall cost to administer? How much does a proposed recall cost to a company's reputation? What is the cost to society of a proposed recall, e.g. increased fuel consumption needed to drive to a dealership, increased exposure to crash just by adding the extra trip to a dealership, lost productivity, etc.? What specific benefits, in terms of lives saved or injuries mitigated, can be expected to flow from a proposed recall? Are other remedial actions available short of a formal recall, such as extended warranties or service actions?

THE NEED FOR COST-BENEFIT IN RECALLS

As a preliminary matter, a word is needed about the need for cost-benefit analysis in the context of recalls. Why should we even consider the cost of recalling x number of vehicles? After all, trial lawyers have demonized the use of cost-benefit analysis in the context of auto safety, chastising companies that use it.⁴⁷ For example, in a recent product liability case involving the design of a gas tank used on GM A-cars, plaintiffs' counsel – upon "discovering" that GM employed a cost-benefit analysis in its design - alleged "despicable" conduct by GM, which the attorneys accused of exhibiting a "conscious disregard for safety" and engaged in a "malicious" act by employing cost-benefit.⁴⁸

Plaintiffs' counsel should have known better. After all, California law (the case took place in California) *requires* juries to apply the same despicable cost-benefit analysis when deciding cases involving alleged design defects.⁴⁹ Specifically, juries must apply a risk-utility test to allegedly defective automobile fuel tank placement designs, "balanc[ing] and weigh[ing] . . . such competing design consideration as risk, benefit, feasibility, and cost."⁵⁰ This "careful assessment of feasibility, practicability, risk, and benefit"⁵¹ reflects the actions that any responsible automaker would undertake when exercising sound judgment in design.

In other words, auto safety necessarily entails consideration of cost-

47. Anderson et al. v. General Motors Corp., No. B135147 (Cal. App. Dec. 4, 2000)

48. *Id.* at 37.

49. Barker v. Lull Eng'g Co., Inc., 20 Cal.3d 413,430 (Cal.1978).

50. Soule v. General Motors Corp., 8 Cal.4th. 548, 571 (Cal.1994).

51. *Id.* at 562.

benefit trade-offs because, in the words of Supreme Court Justice Stephen Breyer, consumers won't pay huge premiums for only marginally safer automobiles.⁵² In his book *Breaking the Vicious Circle: Toward Effective Risk Regulation*, Justice Breyer uses the example of consumer spending on auto safety to demonstrate our natural risk-money trade-offs.⁵³ He asks if it is unreasonable to require a safety feature that costs \$10 billion per life saved?⁵⁴ Would consumers be willing to pay an extra \$48,077 for a car 5% safer than those we now drive?

As law professor W. Kip Viscusi observes, "[t]he fact that we do not all rush out to purchase marginally safer cars that are vastly more expensive reflects the limits we place on safety improvements."⁵⁵ Professor Viscusi has found that "the tradeoffs revealed by consumer purchases of used cars indicate that consumers are willing to pay approximately \$3 million for each statistical life saved by the decreased risk of death offered by the purchase of a safer used car."⁵⁶

Both Justice Breyer and Professor Viscusi have hit on something, which is that *some* product hazard will always exist, *regardless whether the consumer or the producer makes the safety decision*. That's because at some point, the cost of adding additional safety features or designed out certain risks is outweighed by the benefit of obtaining the car for a cheaper price.

Taking this thought a step further, Viscusi argues that our desire to limit our expenditures on product safety "could even stem from interest in other health-enhancing expenditures, . . . [such as buying] additional medical care, improved nutrition, or housing in a safer neighborhood."⁵⁷ In fact, we even hurt ourselves by spending inordinate amounts on one safety concern "instead of allocating our funds across different ways of enhancing safety based on the relative efficacy of those expenditures."⁵⁸

Acknowledging the role that cost-benefit tradeoff plays in auto *design*, we can now turn to auto recalls. In the specific context of auto recalls, I support using cost-benefit analysis for two reasons: (1) case law requires it, and (2) good regulatory analysis demands it.

First, case law precedent requires cost to be considered before judging a defect as one that "relates to safety." To prove that a defect is

52. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 13-14 (Harvard University Press) (1993).

53. *Id.*

54. *Id.*

55. Viscusi, *supra* note 1, at 661.

56. *Id.* (citing Mark K. Dreyfus & W. Kip Viscusi, *Rates of Time Preference and Consumer Valuations of Automobile Safety and Fuel Efficiency*, 38 J.L. & ECON. 79, 102 (1995)(finding implicit value of life estimates for automobile owners in the range of \$2.6 to \$3.7 million)).

57. *Id.* at 561.

58. *Id.* at 561-62.

“safety-related,” the government must show that the defect constitutes an “unreasonable risk of accidents or injuries.”⁵⁹ The “reasonableness” of the risk to safety should be assessed, according to *X-Cars*, by analyzing the following three factors: (1) how severe the harm and risk to safety are (“severity”);⁶⁰ (2) how often the harm occurs in the threatened population compared to the general population (“frequency”);⁶¹ and (3) what the economic, social, and safety consequences are of reducing the risk to a so-called “reasonable” level (“cost-benefit”).⁶² As the third factor implies, an analysis of the benefits and costs tied to reducing the identified risk to a “reasonable” level must be conducted before branding a defect “safety-related” and triggering the notification and remedy duty.

Second, evaluating the benefits and costs of a potential recall is, stated simply, part of good regulatory analysis. In its “best practices” guidance circular to the heads of all federal agencies, the Office of Management and Budget (OMB) advised that “good regulatory analysis” consists of three elements: “(1) a statement of the need for the proposed action; (2) an examination of alternative approaches; and (3) an evaluation of the benefits and costs – quantitative and qualitative – of the proposed action and the main alternatives identified by the analysis.”⁶³

In sum, as law professor Cass Sunstein has concluded, if a risk is very small – a so-called *de minimis* risk – then that risk shouldn’t be regulated.⁶⁴ By analogy, if a recall remedy can’t be shown to reduce risks by more than a *de minimis* amount, then that recall shouldn’t be conducted, much less mandated.

HOW TO CONDUCT A COST-BENEFIT ANALYSIS IN RECALLS

Assuming you support my argument that cost-benefit analysis has a role in auto recalls, just how should we conduct such an analysis? The OMB “best practices” document of 2003⁶⁵ is instructive in how to conduct a meaningful cost-benefit analysis.

At a high level, to evaluate correctly the benefits and costs of a proposed recall, the analysis must answer the following questions: how is the proposed recall expected to provide the anticipated benefits and costs, and what are the monetized values of the potential real incremental bene-

59. See *General Motors*, 841 F.2d at 409.

60. *Id.* at 410.

61. *Id.*

62. *Id.*

63. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, at 2 (Sept. 17, 2003), available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

64. CASS R. SUNSTEIN, COST BENEFIT DEFAULT PRINCIPLES 58 (2002).

65. See OFFICE OF MGMT. & BUDGET, *supra* note 63, at 1.

fits and costs to society?⁶⁶ To answer these questions, the analysis must in turn: (1) explain how the recall is “linked” to the expected benefits (e.g., show how the recall of defective parts will reduce safety risks); (2) identify a baseline, i.e., answer the question “what the world will be like if the [recall] is not adopted” and; (3) identify any undesirable side-effects and ancillary benefits of the proposed recall; these should be added to the direct benefits and costs as appropriate.⁶⁷

Concerning the second element (identifying a baseline), the baseline should be the “best assessment of the way the world would look absent the proposed action.”⁶⁸ An appropriate baseline might require considering the following factors: (1) evolution of the market; (2) changes in external factors affecting expected benefits and costs; (3) changes in regulations promulgated by the agency; and (4) the degree of compliance by regulated entities with other regulations.⁶⁹

APPLYING A COST-BENEFIT ANALYSIS: DIRECT COSTS

With these goals in mind, let’s get specific. Recall costs are either direct or indirect. Direct costs are those costs directly attributable to a recall. These costs can be divided into three areas: (1) pre-recall; (2) recall; and (3) post-recall. *Pre-recall* costs include legal counsel and management costs to cover in-house attorneys and company management who deal with outside counsel, insurance companies, and NHTSA.⁷⁰ Management costs include the time of the recall management person (or group) and of those executives at various levels who are involved in deciding how to frame and execute the recall.⁷¹ Other costs incurred during this period include quality assurance investigations and analyses, warranty reviews, and expert opinions.⁷² Note that many of these costs (e.g., legal counsel) continue throughout the recall and post-recall periods.

Recall costs are those costs central to the recall. Conceptually, the recall can be thought of in two ways: (1) notification and (2) remedy. The notification costs are the costs of notifying consumers, either directly through letters or also through other means, such as announcements in retail stores.⁷³ These costs also include notifying NHTSA, any distributors, and also dealers. The remedy costs are the cost of replacement parts

66. *Id.* at 18.

67. *Id.* at 2-3.

68. *Id.* at 15.

69. *Id.*

70. AM. SOC’Y FOR QUALITY, PROD. SAFETY AND LIAB. PREVENTION INTEREST GROUP, THE PRODUCT RECALL PLANNING GUIDE 13 (ASQ Quality Press 2nd ed. 1999).

71. *Id.*

72. *Id.*

73. *Id.*

and labor. Parts costs should include the price of the replacement part, shipment, and storage of the part.⁷⁴ Note that suppliers or contractors may need to work overtime on short notice, which could potentially raise recall costs significantly.⁷⁵ Labor costs include the both the cost of workers to produce the replacement part for the recall as well as the cost of dealership personnel to perform the repair (e.g., inspect and replace, using the replacement part).⁷⁶

Post-recall costs include the ongoing costs involved in monitoring the effectiveness of the recall. These include monitoring the response rates and providing quarterly reports on response rates to NHTSA. Other costs here include retaining all official documents, including warranty claims, mailing lists, drawings, owner's manuals, labels, supplier's documents (purchase orders, invoices, etc.), shipping documents, press releases, and correspondences. NHTSA's record retention period is five years.⁷⁷

NHTSA estimates (rather conservatively) that the direct costs of safety average \$100 per vehicle per recall.⁷⁸ Not including the indirect costs caused by recalls, that would mean that automakers spent around \$3 billion in 2004 to fix safety defects or noncompliant features.

At best, NHTSA's estimates are crude and way too low. They fail to consider any indirect costs (described immediately below), which often cost more than the direct costs. And they fail to consider the costs placed on consumers.

For example, here's a way to calculate the costs to consumers of safety recalls. Using 2004 recall data, let's assume that 30,000,000 vehicles are recalled in a given year. On average, let's say that consumers live 10 miles from their dealership. Assuming customers make a separate trip to their dealership to have their vehicles repaired, that means that consumers drive 300 million miles solely to repair safety-related defects.

Using the 2004 fatality rate per 100 million vehicle miles traveled (VMT) of 1.44,⁷⁹ just complying with all the recalls can be expected to kill 4.32 people. Considering the number of recalls conducted to fix questionable "safety" defects – think of the Scion moonroof recall or the GM

74. *Id.*

75. *Id.* at 52.

76. *Id.*

77. *Id.*

78. OFFICE OF REGULATORY ANALYSIS AND EVALUATION, NAT'L HIGHWAY TRANSP. SAFETY ADMIN., DOCKET # NHTSA-2001-8677-470 TREAD ACT EARLY WARNING REPORTING PART 579 at 52 (2002).

79. NATIONAL CENTER FOR STATISTICS AND ANALYSIS, NAT'L HIGHWAY TRANSP. SAFETY ADMIN., TRAFFIC SAFETY FACTS 2004 at 2 (2004) available at <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/TSFAnn/TSF2004.pdf>.

recall⁸⁰ to fix the audible safety belt warning chime – it is certainly worth asking whether, in the aggregate, more lives are put at risk by recalls than are saved by recalls.

Taking this analysis further, let's assume that the recalled class of vehicles, which includes trucks and cars, averages 22 miles per gallon. At that rate, it would take 13,636,364 gallons of fuel just to bring the vehicles to and from the dealership. If gas costs an average of \$2.25 per gallon, the cost to consumers for fuel alone is \$30,681,818. Other costs include the cumulative effect of depreciation affecting the recalled class of vehicles. Vehicles with more mileage are by and large worth less than vehicles with less mileage.

APPLYING A COST-BENEFIT ANALYSIS: INDIRECT COSTS

As we've seen, direct costs of a recall are the costs of notifying, inspecting, and remedying the defective vehicles. Direct costs increase with the number of vehicles subject to the recall. Indirect costs of a recall are loss in goodwill or reputation, also known as brand damage.

Nicholas G. Rupp, professor at the Department of Economics at East Carolina University, recently published a paper entitled "The Attributes of a Costly Recall: Evidence from the Automotive Industry."⁸¹ This paper is the first study that examines which particular aspects of a recall have the most influence on shareholder value.

Using safety recall data from 1973-1998, Professor Rupp attempted to isolate what particular aspects of safety recalls can cause "significant shareholder losses".⁸² In his words, here's how he did it: "After constructing an equally-weighted automotive market index to control for industry effects and adjusting abnormal returns for the degree of surprise in the *Wall Street Journal* announcements, the study estimate[d] the effect of recalls on both percentage and real dollar abnormal returns."⁸³ In plain English, he compared the stock prices of domestic automakers and American Depository Receipts (ADR) prices for Japanese companies on the day before and the day after a safety recall was announced in the *Wall Street Journal*.⁸⁴

Professor Ruff found that one of the factors having the most influence on shareholder losses was which defective component needed repair.⁸⁵ Recalls affecting airbags, exhaust systems, and steering were

80. NAT'L HIGHWAY TRAFFIC ADMIN, NHTSA CAMPAIGN 01V123000 (Apr. 10, 2001).

81. NICHOLAS G. RUPP, THE ATTRIBUTES OF A COSTLY RECALL: EVIDENCE FROM THE AUTOMOTIVE INDUSTRY (2004), available at <http://www.ecu.edu/econ/wp/03/ecu0304.pdf>.

82. *Id.* at 2.

83. *Id.* at 18.

84. European automakers were not studied. *Id.* at 10.

85. *Id.* at 18.

shown to be “significantly more costly” for automakers, whereas recalls affecting defective heaters, for example, are “significantly less costly.”⁸⁶ Professor Rupp explains the difference is due to the hazard, i.e. the typical heater defect poses less of a hazard to safety than a defect affecting airbags or exhaust systems.⁸⁷

Another factor found to negatively influence share price was the age of the affected vehicles.⁸⁸ Recalls affecting current-year model year and one-year-old model year vehicles have trigger smaller (albeit “marginally” smaller) shareholder losses than models that are two-year-old model year and older vehicles.⁸⁹ Professor Rupp points out that older model-year vehicles pose a greater liability threat for automakers “because these defects have had a longer time to cause consumer injuries.”⁹⁰ That may be true, but it is worth noting that 90% of safety recalls are issued within the first three model years of vehicle introduction,⁹¹ so the overwhelming majority of recalls will fall into the “marginally smaller” shareholder loss category.

Yet another factor found to have a negative effect on shareholder value is whether the recall is the first for the affected vehicles (initial recalls cost more).⁹² If so, then share prices can be expected to drop more than if the recall is the second, third, etc. for the model.

A last factor found to have a negative effect on shareholder value is whether the recalls affect companies with high financial stability (companies with the “highest financial stability” – as measured by Moody’s Bond Record for corporate bond ratings (e.g., AAA-, AAA, or AAA+) -suffer the greatest shareholder losses form auto recalls).⁹³ Stated differently, “companies in excellent financial shape (AAA bond rating) experience a loss of between -0.26 and -0.28 percent after a *Wall Street Journal* recall announcement, which is similar in magnitude to [an] initial recall.”⁹⁴ In terms of real adjusted abnormal dollar returns, companies with the highest bond ratings (AA) experienced a \$42.8 million average loss in shareholder value following a *Wall Street Journal* recall announcement.⁹⁵

Professor Rupp’s study assumes, of course, that the market hasn’t processed auto safety recall information until publication in the *Wall*

86. *Id.* at 3.

87. *Id.* at 15.

88. *Id.*

89. *Id.*

90. *Id.* at 15-16.

91. Bae & Benitez-Silva, *supra* note 4, at 10.

92. Rupp, *supra* note 82, at 15.

93. *Id.* at 3.

94. *Id.* at 15.

95. *Id.* at 17.

Street Journal.⁹⁶ Considering the speed and channels (e.g. Internet) at which information is transmitted, however, this assumption is a little shaky. That being said, his findings are a first of their kind.

An interesting observation of Professor Rupp is that there's "no evidence" that NHTSA-influenced recalls are more damaging to shareholders than recalls voluntarily undertaken by manufacturers, even those undertaken without any preliminary evaluation.⁹⁷ So, perhaps it is worth fighting NHTSA, at least at the administrative stages, i.e. *before* going to court.

In calculating costs, Professor Rupp found that "the indirect costs of automotive recalls are likely larger than the direct costs."⁹⁸ That sentence bears repeating: the indirect costs of recalls exceed the direct costs. Using the conservative NHTSA estimate would place the indirect costs at more than \$3 billion in 2004 alone, not including the costs to consumers. Therefore, the total recall costs in 2004 alone exceeded far more than \$6 billion, not including the costs to consumers.

To summarize, the costs of recalls are direct and indirect. Direct costs are those costs directly attributable to a recall. Indirect costs include costs to a manufacturer's reputation and share price. But the cost segment is only half of the analysis. The other side is benefits. As with cost, the OMB "best practices" document of 2003 is highly instructive in helping to measure benefits.⁹⁹

BENEFITS OF RECALLS

"In constructing measures of 'effectiveness,'" says the OMB, "final outcomes, such as lives saved or life-years saved, are preferred to measures of intermediate outputs, such as . . . crashes avoided."¹⁰⁰ Besides "lives saved," other, more comprehensive, "integrated" measures of effectiveness are the number of "equivalent lives" saved and the number of "quality-adjusted life years" (QALYs).¹⁰¹

According to the OMB, a chief advantage of the integrated measures of effectiveness "is that they account for a rule's impact on morbidity (nonfatal illness, injury, impairment and quality of life) as well as premature death."¹⁰² Including morbidity effects is needed because (1) "some illnesses (e.g., asthma) cause more instances of pain and suffering than

96. *Id.* at 3.

97. *Id.* at 17.

98. *Id.* at 19.

99. OFFICE OF MGMT. & BUDGET, *supra* note 63, at 2-3.

100. *Id.* at 12.

101. *Id.*

102. *Id.*

they do premature death;”¹⁰³ (2) “population groups are known to experience elevated rates of morbidity (e.g., the elderly and the poor) and thus have a strong interest in morbidity measures;”¹⁰⁴ and (3) “some regulatory alternatives may be more effective at preventing morbidity than premature death (e.g., some advanced airbag designs may diminish the nonfatal injuries caused by airbag inflation without changing the frequency of fatal injury prevented by airbags).”¹⁰⁵

Unfortunately, when it comes to auto recalls, very little research has been conducted on the quantitative effect of recalls on motor vehicle safety. In 2005, Yong-Kyun Bae and Hugo Benítez-Silva, both economics professors at the State University of New York (Stony Brook), published a paper entitled “Do Vehicle Recalls Reduce the Number of Accidents? The Case of the U.S. Car Market.”¹⁰⁶ Using a statistical method that groups individual drivers by types in order to produce synthetic panel data, the authors claim to be able to analyze the effect of recalls on accidental harm, which is measured by the number of crashes.¹⁰⁷

Their results purport to show that safety recalls reduce the number of crashes by “around 20%” for the recalled vehicles.¹⁰⁸ The drop in reduction differs by make for non-U.S. makes, the reduction is estimated at 21.1%,¹⁰⁹ for U.S. makes, the reduction is estimated at 16.5%.¹¹⁰

Furthermore, recalls the authors deemed “hazardous” are purportedly even “more effective” in reducing crashes.¹¹¹ These recalls can be expected to reduce crashes by 25%.¹¹² Again, the drop in reduction differs by make. For domestic vehicles, the drop is around 19.3%.¹¹³ For foreign vehicles, the drop is double that – almost 40%.¹¹⁴ The authors conclude that these numbers “seem to indicate that when foreign manufacturers (or the government) recall foreign cars these recalls are more effective in reducing [crashes], conditional on the same level of hazard of these recalls.”¹¹⁵

Finally, the authors claim that recalled vehicles with higher correction response rates have fewer crashes three years after the recall than

103. *Id.* at 12-13.

104. *Id.* at 13.

105. *Id.*

106. Bae & Benitez-Silva, *supra* note 4.

107. *Id.* at 3.

108. *Id.*

109. *Id.* at 18.

110. *Id.*

111. *Id.* at 3.

112. *Id.* at 19.

113. *Id.*

114. *Id.*

115. *Id.*

vehicles with lower correction response rates.¹¹⁶ They find that the higher correction rates of a recall are correlated with lower numbers of crashes of the recalled model in the three years following the recall.¹¹⁷ Additionally, they conclude that “recalls reduce accidents, and that correction rates do matter.”¹¹⁸

One weakness of the study, also acknowledged by the authors, is that they can’t rule out that the drop in crash rates isn’t due to changed driver habits.¹¹⁹ Perhaps motorists drive differently after having their vehicles repaired to correct a safety defect, and perhaps the change in driving behavior is what could explain the drop in the number of observed crashes. The authors can’t say for sure.¹²⁰ What they’ve observed is a correlation, not necessarily a causal relationship.

Another problem with this study is that, if recalls reduce vehicle crashes by 20%, we would expect some sort of drop in deaths or injuries. Yet the fatality numbers stay fairly constant - exceeding 42,000 every year.¹²¹

INCREASE THE RECALL RESPONSE RATES

Assuming a recall is needed, my second set of suggestions seeks to ensure the highest possible response rate. In 1974 Congress amended the Safety Act, in part to fix the low consumer response rate to recall announcements, which at the time was “only” 72%.¹²² The amendments required that manufacturers (1) pay for recall repairs and (2) send recall letters by first-class rather than certified mail.¹²³ More than thirty years these amendments have raised the response rate a whole 3%, to around 75%. It’s time to approach the recall response rate differently than it has been approached in the past.

A study entitled “Study to Determine Why Vehicle Owners Respond to or Ignore Recall Notifications” conducted for NHTSA by Market Facts, Inc. in July 1980 identified some of the reasons consumers did not tender their vehicles for repair.¹²⁴ These reasons were (1) they didn’t have time; (2) it was too inconvenient; (3) they were too lazy; (4) there

116. *Id.* at 3.

117. *Id.* at 21.

118. *Id.* at 22.

119. *Id.* at 20.

120. *Id.*

121. See NATIONAL CENTER FOR STATISTICS AND ANALYSIS, *supra* note 79, at 2.

122. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE SECRETARY OF TRANSPORTATION, GAO/CED-82-99, CHANGES TO THE MOTOR VEHICLE RECALL PROGRAM COULD REDUCE POTENTIAL SAFETY HAZARDS, 14 (Aug. 24, 1982).

123. *Id.*

124. HIGHWAY AND TRAFFIC SAFETY ADMIN., STUDY TO DETERMINE WHY VEHICLE OWNERS RESPOND TO OR IGNORE RECALL NOTIFICATIONS, (Market Facts, Inc.) (July 1980).

was no problem; and (5) they didn't think the recall was important.¹²⁵ A more recent study conducted in 2003 by XL Associates and Heiden Associates into CPSC recall response rates came to similar conclusions.¹²⁶

Increasing the response rate will reduce the occurrence of crashes in the recalled vehicles, at least within three years following the recall.¹²⁷ With this in mind, this section offers a number of recommendations that, if implemented, would sufficiently motivate consumers and increase response rates.

SPEAK (PLAIN) ENGLISH

Have you ever received a formal auto safety recall letter? You'll know if you have because the envelope probably arrived trimmed in red. That's supposed to convey a sufficient level of alarm in you so that you'll open it and read on. The letter is supposed to motivate you to drive to your dealer to get the car fixed. The problem is that much of the letter is inscrutable. And there isn't much the manufacturer can do to make it understandable, because most of the letter's substance is mandated by regulation, which means it's as clear as an IRS tax form. As we'll soon see, the NHTSA recall letters read at a grade level *higher* than the instruction for IRS Form 1040.

NHTSA recall regulations require defect recall letters to begin with the following paragraphs:

This notice is sent to you in accordance with the requirements of the National Traffic and Motor Vehicle Safety Act. (Manufacturer's name or division) has decided that a defect which relates to motor vehicle safety exists in (identified motor vehicles, in the case of notification sent by a motor vehicle manufacturer; identified replacement equipment in the case of notification sent by a replacement equipment manufacturer).¹²⁸

The regulations also require that the letters include the following, in any order:

- A description of the defect, including identifying the system or equipment affected; a description of the possible resulting malfunction; a statement of operating or other conditions that could cause the malfunction; and any precautions the owner should take

125. *Id.*

126. See U.S. CONSUMER PRODUCT SAFETY COMMISSION, RECALL EFFECTIVENESS RESEARCH: A REVIEW AND SUMMARY OF THE LITERATURE ON CONSUMER MOTIVATION AND BEHAVIOR, 25-26 (XL Associates and Heiden Associates) (July 2003) available at <http://www.cpsc.gov/LIBRARY/FOIA/FOIA03/os/RecallEffectivenss.pdf>.

127. Bae & Benitez-Silva, *supra* note 4, at 3.

128. Notification Pursuant to a Manufacturer's Decision, 49 C.F.R. § 577.5 (2005) (required language is slightly different in the case of a noncompliance with a safety standard).

before repair;¹²⁹

- An evaluation of the risk to motor vehicle safety, including (1) either a statement that a crash could occur without prior warning or a statement of what warning would occur (with a statement of what will occur if the warning is ignored) or (2) if a crash would not result, a statement of the type of injury that could result;¹³⁰
- The measures to be taken to remedy the defect, including (1) a statement that the manufacturer will remedy it without charge, if required, and whether the remedy is by repair, replacement, or refund; (2) the earliest date it will be remedied without charge; and (3) a general description of the repair work involved and an estimate of the time needed to do the repair;¹³¹
- A statement informing the owner of his or her right to reimbursement for certain out-of-pocket expenses incurred prior to announcement of the recall and the parameters for qualifying for reimbursement, including cut-off dates for submission;¹³²
- A statement informing the owner that he or she can contact NHTSA (address, telephone number, and website must be included) if the owner believes the vehicle wasn't remedied without charge or the manufacturer couldn't remedy it within 60 days.¹³³

Twenty-five years ago the U.S. General Accounting Office (GAO), in a report to the Secretary of Transportation, recommended ways to increase the recall response rate by simply improving the recall letter itself.¹³⁴ The GAO found that nearly all the recall letters it reviewed were written at too high a reading level and were difficult to understand.¹³⁵ It recommended lowering the reading level as a way to increase owner response rates.¹³⁶

At the time the study was conducted (November 1981), 54% of U.S. adults read at or below the 11th grade level.¹³⁷ Today about 50% of U.S. adults read at or below the 8th grade level.¹³⁸ The standard recall letter, whose content is largely prescribed by regulation, is written at a collegiate level, somewhere between a grade level of 12.4 years and 16.4 years (se-

129. 49 C.F.R. § 577.5.

130. *Id.*

131. *Id.*

132. 49 C.F.R. § 577.6.

133. 49 C.F.R. § 577.5.

134. U.S. GEN. ACCOUNTING OFFICE, *supra* note 123, at 24.

135. *Id.* at 14.

136. *Id.* at 28.

137. *Id.* at 14.

138. See *Consent Form Language Too Complex For Many*, <http://www.hopkinsmedicine.org/press/2003/FEBRUARY/030219.htm>.

nior year of college).¹³⁹ The recall letters are thus written at a reading level too high for most U.S. adults to understand. The solution to this problem is simple. As the GAO wrote:

If the recall letters are easier to understand, more owners would respond to recalls. Higher response rates in turn would mean less defective vehicles on the road and lower manufacturers' overall administrative costs, as fewer attempts would have to be made to locate owners who were unresponsive to the initial letter.¹⁴⁰

Rather than leave it there, however, the GAO hired an expert consultant to advise on exactly how a simplified letter should look.¹⁴¹ By reorganizing the letter to highlight the result of the defect earlier, at the beginning of the letter, and by underlining and using capital letters as well as, most importantly, rewriting much of the content, a revised letter containing the same information as an actual (and typical) letter was created that reads at a fifth grade level.¹⁴² Strunk & White would be proud, because the proposed letter heeds Rule 16 of their "Approach to Style" in *The Elements of Style*.¹⁴³ That rule states simply: "be clear" and "[c]larity, clarity, clarity."¹⁴⁴

The experts argued that letters written in plain English would improve response rates because consumers would be more likely to understand what automakers were telling them.¹⁴⁵ But the suggestions didn't go anywhere. NHTSA didn't adopt any of the changes because, according to the GAO report, NHTSA's Office of Chief Counsel "felt that any changes needed in letter format must be fully substantiated before they could be implemented."¹⁴⁶ So the letters today remain as inscrutable as they were thirty years ago. And the work of another expert commission was for naught.

That doesn't mean NHTSA shouldn't revisit its decision. On the contrary, it should. And it should adopt the revisions suggested by the expert panel. Considering that the average consumer reads at a third-grade level, requiring a letter written at the twelfth-grade level is not only illogical, but also dangerous because defective vehicles will not be repaired.

139. U.S. GEN. ACCOUNTING OFFICE, *supra* note 123, at 18.

140. *Id.*

141. *Id.* at 19.

142. *Id.* at 24.

143. WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE* 79 (Allyn & Bacon, 3d ed. 1979) (1935).

144. *Id.*

145. U.S. GEN. ACCOUNTING OFFICE REPORT, *supra* note 123, at 23-24.

146. *Id.*

HOLD OUT THE CASH CARROT

Ensuring the highest possible recall response rate presupposes that consumers are sufficiently motivated to tender their vehicles for repair. In this vein, the following recommendations presuppose that our nation's traffic safety is based not only on automakers correcting safety defects, but also on owners responding to defect letters. In a real sense, correcting safety defects is a two-way street involving manufacturers, their dealers, and vehicle owners. All must be held responsible to ensure their role is upheld in ensuring our roads are kept free of defective vehicles.

NHTSA can – and should – offer incentives to States that require vehicle owners to tender their vehicles for repair in response to a formal safety or noncompliance recall. The current response rate of about 75% hasn't improved in over forty years.¹⁴⁷ It's time to think differently.

NHTSA and, more importantly, the motoring public, have a vested interest in obtaining the highest possible recall response rates. Improving response rates will remove otherwise defective vehicles from the roads. Although NHTSA can't force owners to tender their vehicles for repair, the States – through their historic police powers¹⁴⁸ – can. So all NHTSA (or Congress) needs to do is provide sufficient incentives to the States.

NHTSA's approach to encouraging seat belt use serves as a model for how it could encourage States to get on board. Despite the wide reach of the federal government in matters affecting automotive safety, belt use remains regulated and enforced at the State and local levels because this matter falls within the historic police powers of the State protected by the U.S. Constitution.¹⁴⁹ Belt enforcement laws are either "primary" or "secondary." Under a "primary" belt use law, motorists can be stopped and ticketed simply for belt nonuse.¹⁵⁰ Under a "secondary" belt use law, motorists must be stopped for another infraction, such as exceeding the speed limit, to be ticketed for belt nonuse.¹⁵¹ In 2006, 24 States, Puerto Rico, and the District of Columbia, have primary laws, 25 States had secondary laws, and one State (New Hampshire) has no belt law.¹⁵²

In the event of a vehicle crash, properly used seat belts save lives and

147. *Id.* at ii-iii.

148. See Summary of Vehicle Occupant Protection Laws, Nat'l Highway Traffic Safety Admin. (7th ed., Dep't of Transp. Jan. 1, 2006) available at <http://www.nhtsa.dot.gov/portal/site/nhtsa/menuitem.ceb14f2494cdd3dd304a4c4446108a0c/>. See also U.S. CONST. art. IV.

149. See *id.* See also U.S. CONST. art. IV.

150. *Id.*

151. *Id.*

152. See *id.* at 3. The territories of American Samoa, Guam and the Commonwealth of Northern Mariana Islands all have primary laws. See *Tougher Safety Belt Laws Would Increase Use, Research Shows*, Highway & Vehicle Safety Rep. 1, 5 (Feb. 27, 2006). See also http://www.nhtsa.dot.gov/people/outreach/state_laws-belts04/safeylaws-states.htm.

reduce health care costs by reducing and even preventing injuries.¹⁵³ Available studies provide strong evidence that primary belt laws are more effective than secondary laws in increasing safety belt use and decreasing fatalities, perhaps because primary belt laws penalize the very act of not buckling up, but also because these laws enjoy public acceptance.¹⁵⁴ Convincing motorists to buckle up is a top priority of NHTSA as it seeks to reduce the 42,000 deaths and 3,000,000 injuries each year attributed to vehicle crashes.¹⁵⁵ According to NHTSA, more than half (55%) of those killed in car crashes were *not* wearing their safety belts at the time of the crash.¹⁵⁶

Although the federal government can't mandate primary belt laws, it can effectuate this desired policy of primary belt laws through its powerful purse. In fact, Congress loves the idea of incentives. When it passed the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), which President Bush signed into law on August 10, 2005, Congress spent \$286,000,000,000 to fund highways, highway safety, and public transportation between 2004 and 2009.¹⁵⁷ The fiscal year 2007 budget request from President Bush envisions a request for NHTSA of \$584,000,000 just for highway traffic safety grants, including almost \$498,000,000 worth of incentives for states and territories that enact primary safety belt usage laws.¹⁵⁸

Section 2005 of SAFETEA-LU establishes a one-time grant program to increase safety belt use.¹⁵⁹ The law accomplishes this goal by holding

153. Tho Bella Dinh-Zarr et al., *Reviews of Evidence Regarding Interventions to Increase the Use of Safety Belts*, 21 AM J. PREV. MED. 48 (Nov. 2001) (review existing studies), available at <http://www.sciencedirect.com> (search "Author" for "Dinh-Zarr; then follow "PDF" hyperlink under article title in article index).

154. *Id.*

155. See Symposium, *Reducing Highway Deaths and Disabilities with Automatic Wireless Transmission of Serious Injury Probability Ratings from Crash Recorders to Emergency Medical Services Providers*, International Symposium on Transportation Recorders (May 3-5, 1999), <http://www.nhtsa.dot.gov/Cars/problems/studies/acns/champion.htm>.

156. Transportation Secretary Mineta Calls Highway Fatalities National Tragedy, Says All Americans Can Do More To Improve Road Safety, National Highway Traffic Administration (April 20, 2006), available at <http://www.nhtsa.dot.gov> (select "Research" tab; follow "4/20/06: 2005 Preliminary Motor Vehicle Crash Fatalities and Injuries" hyperlink).

157. See SAFE, ACCOUNTABLE, FLEXIBLE, EFFICIENT TRANSPORTATION EQUITY ACT: A LEGACY FOR USERS: A SUMMARY OF HIGHWAY PROVISIONS IN SAFETEA-LU, FEDERAL HIGHWAY ADMINISTRATION, (Aug. 2005) (hereinafter SAFETEA-LU), available at <http://www.fhwa.dot.gov/safetealu/summary.htm>.

158. See Press Release, "New Data Show Rising Safety Belt Use Rates in Most States," (Dec 16, 2005), available at <http://www.nhtsa.dot.gov> (select "In The News" tab; select "2005" from the drop-down menu; follow "New Data Show Rising Safety Belt Use Rates in Most States" hyperlink).

159. See Incentive Grants to Support Increased Safety Belt Use Rates Section 406 Implementing Guidelines, 71 Fed. Reg. 4196, 4197 (Jan. 25, 2006) (codified at 23 U.S.C. 406) ("the Section 406 Program"). For purposes of the Section 406 Program, a "State" includes the 50

out a carrot to States that either (1) enact and enforce a primary safety belt use law or (2) achieve and maintain a safety belt use rate of 85% or higher in two consecutive years without such a law.¹⁶⁰ State recipients may use the federal funds to pay for a range of traffic safety programs. States satisfy the “enforcement” requirement of (1) by ensuring that citations can be issued solely for violating the belt usage law.¹⁶¹ Thus, “a primary safety belt use law that has a future effective date or that includes a provision limiting enforcement to only written warnings during a “grace period” after the law goes into effect would not be deemed in effect or “being enforced” until the effective date is reached or the grace period ends.”¹⁶²

The carrot amounts to a one-time payment drawing on the \$125,000,000 that is based largely (75%) on the ratio of the population each State bears to the total population of all States (as shown by the last census), but also partly (25%) on the ratio which the public road mileage in each State bears to the total public road mileage in all States.¹⁶³ Let’s take one state as an example: Minnesota, which does not currently have a primary belt use law. In contemplating whether to pass a primary belt use law, it would stand to receive \$15,000,000.¹⁶⁴ Other benefits would accrue, too, such as increasing the usage rate to about 93 percent.¹⁶⁵ “That would result in about 50 fewer people dying and 1,000 fewer serious injuries a year.”¹⁶⁶ “It also would mean an estimated \$113.6 million cost savings a year, including medical bills, lost wages, lost tax revenues, legal fees, and more.”¹⁶⁷

This safety belt carrot is working. Within a few months of passage, two states passed their own primary belt usage laws: Mississippi and Alaska.¹⁶⁸ That increased the total number of states with primary usage laws to 24 and covers more than 60% of the U.S. roads.¹⁶⁹ According to

States, the District of Columbia, Puerto Rico, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands. *See also* 23 U.S.C. 401 (2006) (defining “State”).

160. SAFETEA-LU, Pub .L. No.109-59, § 2005 (2005). *See also* Incentive Grants to Support Increased Safety Belt Use Rates Section 406 Implementing Guidelines, 71 Fed. Reg. at 4197.

161. *See* Incentive Grants to Support Increased Safety Belt Use Rates Section 406 Implementing Guidelines, 71 Fed. Reg. at 4197.

162. *Id.*

163. *See* 23 U.S.C. 402(c) (2006).

164. *See* “Message to Minnesota’s Legislators- Get ‘Er Done!”, <http://www.internetauto guide.com/auto-news/25-int/16024/>.

165. *Id.*

166. *Id.*

167. *Id.*

168. *See Incentive Grants Spark Primary Belt Law Activity in Numerous States*, Highway & Vehicle Safety Rep.at 3.

169. *Id.*

a recent study by researchers at the University of Missouri-Columbia, primary belt usage laws can be empirically shown to increase the belt usage rates.¹⁷⁰

AMEND THE NATIONAL DRIVER REGISTER

You might be surprised to find out that, before issuing or renewing a driver's license, the Department of Motor Vehicles (or their equivalent) runs what amounts to a background check on the applicant.¹⁷¹ Authorized by Congress as part of the National Driver Register Act of 1982¹⁷² to "assist State driver licensing officials in electronically exchanging information regarding the motor vehicle driving records of certain individuals,"¹⁷³ state participation is voluntary, though all 50 States and the District of Columbia currently participate.¹⁷⁴

The National Driver Register is a database housed with NHTSA. The database contains the following information: (1) names of those who've had their license denied by a participating State for cause; (2) names of those whose license has been revoked, suspended, canceled, or denied; and (3) names of those who have been convicted of serious traffic-related offenses, such as driving while under the influence of, or impaired by, alcohol or drugs.¹⁷⁵

If a State wishes to access this information, the Act requires that the State *provide* that information to NHTSA.¹⁷⁶ The Act also requires each State to first notify NHTSA whether it wishes to be bound by the Act and participate at all.¹⁷⁷ If so, then in addition to providing that information with NHTSA, the State must also comply with other regulatory requirements issued by NHTSA.¹⁷⁸ If NHTSA finds that a State complies, then NHTSA certifies the State as a participating State.¹⁷⁹

Once certified, the information is then shared with the DMV when it runs a background check on drivers who seek to obtain or renew a

170. See *Tougher Safety Belt Laws Would Increase Use, Research Shows*, Highway & Vehicle Safety Rep at 5.

171. See *Procedures for Participating in and Receiving Data From the National Driver Register Problem Driver Pointer System*, 70 Fed. Reg. 43,750, (July 29, 2005) (to be codified at 23 C.F.R. pt. 1327).

172. National Driver Act of 1982, Pub. L.No. 97,364 (1982) (codified 49 U.S.C. §§ 30301-30308 (2006)) (hereinafter NDR).

173. *Id.*

174. See *Procedures for Participating in and Receiving Data From the National Driver Register Problem Driver Pointer System*, 70 Fed. Reg. at 43751.

175. See 49 U.S.C. § 30304(a) (2006).

176. Nat'l Driver Registration Act, Pub. L. No. 97,364, 96 Stat. 1738 (1982) (codified at 49 U.S.C. § 30305 (2000)).

177. 49 U.S.C. § 30303 (2000).

178. See 23 C.F.R. § 1327.5 (2006).

179. 23 C.F.R. § 1327.4 (2006).

driver's license. Specifically, state DMVs query the database to determine if an individual's license or privilege has been withdrawn by any other State. The database uses a "pointer-record" to identify which states reported the information noted above, i.e., license withdrawals and convictions for serious traffic offenses.¹⁸⁰ For this reason, the Register is also known as the Problem Driver Pointer System.¹⁸¹

Considering that the Register is already up and running and, by all accounts, functioning fairly well (after all, every State and the District of Columbia participate), why not include recall information as well? Specifically, Congress, by amending the NDR Act, could expand the individuals covered to include the names of vehicle owners who have failed to have their vehicles repaired to fix an identified safety-related defect or noncompliance. This information could be obtained from the manufacturers, who already provide quarterly response rate information to NHTSA for each recall conducted.¹⁸² Manufacturers could be required to provide specific VIN information on those vehicles that have not been tendered for repair.

When seeking to renew a driver's license or registering the vehicle, the States would, of course, have to require the driver to prove that the recall was performed. Proof could come in the form of a simple repair order issued by the dealer who performed the repair. Failure to provide such proof should result in the denial of the operator's license.

Privacy advocates and those concerned about how this information is handled can take solace in the existing criminal penalty provision.¹⁸³ The NDR Act currently provides that disclosing the driver information is strictly prohibited, and willfully disclosing it can result in fines under federal law and up to a year of jail, or both.¹⁸⁴

The State of California proposed putting the recall notice directly on the DMV registration renewal form that every car owner receives once a year.¹⁸⁵ California already does this for emissions-related recalls and, according to State Senator Debra Bowen¹⁸⁶, it has "worked wonders" in

180. 23 C.F.R. § 1327.3 (2006).

181. *Id.*

182. 49 C.F.R. § 573.1 (2005).

183. 49 U.S.C. § 30307 (2000).

184. *Id.*

185. Steve Lawrence, *Recalls from the DMV?*, DET. NEWS, Mar. 16, 2005, available at <http://www.detnews.com/2005/autosinsider/0503/16/autos-119120.htm>; and see also Senate Bill No. 114 (Ca. 2005), available at <http://democrats.sen.ca.gov> (follow "Legislation" hyperlink; then enter bill no.) (An act to add Article 4 (commencing with Section 11920) to Chapter 4 of Division 5 of the Vehicle Code, relating to vehicles).

186. Senator Debra Bowen, *Op-Ed, A Record Number of Vehicles Are Being Recalled – Is Your Car or Truck Next?*, <http://democrats.sen.ca.gov/> (follow "Senators" hyperlink; then follow "Debra Bowen" hyperlink; then follow "Articles" hyperlink) (last visited September 17, 2006).

increasing response rates.¹⁸⁷ That's why she sponsored Senate Bill 114, which requires the DMV to do the same for all NHTSA recalls.¹⁸⁸ In a nutshell, for each safety recall automakers would forward a list of affected vehicles to the California DMV.¹⁸⁹ The DMV would include the recall notification information when it sends out registration renewal notices to the owners of vehicles on those lists, urging motorist to contact their authorized dealers about getting their free repairs.¹⁹⁰

Critics contend that including the recall information would contribute to information overload.¹⁹¹ But considering that each safety recall implies an unreasonable risk of crash or injury, what can it hurt to add a piece of paper reminding the owner of a recall; in many cases, the owner may not have received the original recall notice at all (e.g., if the owner is a second or third owner, moved locations, etc.). This approach makes sense not only for California, but all States. If it makes sense to conduct a safety recall, then it makes sense to ensure that as many affected vehicles get repaired. This common sense finds empirical support in a study for NHTSA by American Management Systems, Inc. *back in 1979* estimated that recall response rates would rise to 95% if states would just verify recall compliance during inspections and suspend vehicle registration for noncompliance.¹⁹²

The approach advocated in this section is not without precedent. For example, in the Australian Capital Territory, certain emissions-related defects affecting diesel engines must be fixed within 14 days of notice.¹⁹³ Failure to get the vehicle repaired can result in suspension and, ultimately, cancellation of the vehicle's registration.¹⁹⁴ Closer to home, in some areas of the United States, if a vehicle doesn't pass a scheduled emissions test, then the vehicle can't be registered for further use.¹⁹⁵

187. *Id.*

188. *Id.* and Senate Bill No. 114 (Ca. 2005), available at <http://democrats.sen.ca.gov> (follow "Legislation" hyperlink; then enter bill no.).

189. Senate Bill No. 114 (Ca. 2005), available at <http://democrats.sen.ca.gov> (follow "Legislation" hyperlink; then enter bill no.)

190. *Id.*

191. See Steve Lawrence, *Recalls from the DMV?*, DET. NEWS, Mar. 16, 2005, available at <http://www.detnews.com/2005/autosinsider/0503/16/autos-119120.htm> (quoting an opponent of the bill, State Senator Tom McClintock, Republican from Northridge, as saying the bill would just add to a "sea of information" delivered to motorists); and Senate Bill No. 114 (Ca. 2005), available at <http://democrats.sen.ca.gov> (follow "Legislation" hyperlink; then enter bill no.).

192. U.S. GEN. ACCOUNTING OFFICE REPORT, *supra* note 123, at 15-16.

193. See National Environment Protection Council Annual Report, Australian Capital Territory, 2001-2002, available at http://www.ephc.gov.au/pdf/annrep_01_02/259260_Jur_Rep_Diesel_ACT.pdf.

194. *Id.*

195. Nevada Emissions Control Program, available at <http://www.dmvnv.com/emission.htm> (last viewed Sept. 17, 2006); Utah DMV Safety Inspections, available at <http://dmv.utah.gov/registerinspections.html> (last viewed Sept. 17, 2006); Oregon Emissions Testing & DEQ Re-

That's because the Clean Air Act¹⁹⁶ provides for an inspection and maintenance program to help improve air quality by identifying high-emitting vehicles in need of repair.¹⁹⁷ This is done by visual inspection, emissions testing, or downloading of fault codes from a vehicle's onboard computer. If a problem is found, then the vehicle must be fixed before it can be registered within an identified high-pollution area.¹⁹⁸ The 1990 Amendments to the Clean Air Act made this test mandatory for several areas across the country, based upon various criteria, such as air quality classification, population, or geographic location.¹⁹⁹ Conceptually, if this approach works for ensuring a cleaner environment, why not use a similar approach to ensure a safer roadway?

DEAL WITH DEALERS

Many, if not all, automakers require their franchised dealers to always check a vehicle's repair history for an open recall. What this means is that whenever a vehicle comes into the dealership, say, for routine maintenance work or even a simple oil change, dealers will input that vehicle's identification number (VIN) into a computer system supported by the automaker. Based on warranty repair claims submitted by all other dealers, automakers know if a vehicle has been repaired. This data is shared with dealers through the computer system. So the computer will tell the dealer if that vehicle must be repaired. If so, dealers will as a matter of course repair the vehicle.

This process functions fairly well, but it doesn't cover vehicles outside the authorized dealership body. That's because automakers aren't required to, nor do they necessarily, share recall repair history with non-franchised dealers. So a vehicle pulling into a non-franchised dealership will not benefit from the routine open recall check.

Assuming one believes that consumers should be afforded an open recall check regardless of the repair shop they use, then we've just identified a possible problem, because consumers who choose to have their vehicles serviced by an independent repair shop are treated differently than those whose vehicles are serviced by a franchised dealer.

But is this different treatment really a problem? In the case of a safety recall, perhaps the authorized dealership is where consumers

quirements, *available at* <http://www.oregon.gov/ODOT/DMV/vehicle/emissions.shtml> (last viewed Sept. 17, 2006).

196. Clean Air Act, 42 U.S.C., Ch. 1-85, at § 7401 (2000).

197. United States E.P.A., Inspection & Maintenance, *available at* <http://www.epa.gov/oms/im.htm> (last viewed Sept. 18, 2006); *see also* 42 U.S.C. § 7542 (2000).

198. United States E.P.A., Inspection & Maintenance, *available at* <http://www.epa.gov/oms/im.htm> (last viewed Sept. 18, 2006).

199. *Id.*

should be encouraged to go, because those dealers are closer to the automaker that announced the recall. Can we assume that these dealers will have more qualified technicians, especially those trained in servicing the recalled vehicles? If so, then that's another reason to encourage consumers to get their work done at the authorized dealer. In addition, recall work is conducted at no charge to the consumer, so long as the consumer goes to the authorized dealer.²⁰⁰ This tie-in is consistent with warranty coverage in that consumers enjoy the protection only if they use authorized dealers. It's also consistent with NHTSA's requirement that manufacturers reimburse consumers for out-of-pocket expenses they incurred to have repairs done to correct the problem identified in a recall.²⁰¹

Dealers play an important role in ensuring the defective vehicles are repaired before returning to the roads. To this end, states interested in improving overall response rates should recognize this fact by requiring dealers to certify that all vehicles serviced or owned by them are in compliance with all safety recalls.

HOLD INSURERS ACCOUNTABLE

The Safety Act currently requires that lessors forward recall letters to lessees.²⁰² NHTSA implemented this statutory mandate by requiring “[a]ny lessor who receives a notification of a determination of a safety-related defect or noncompliance pertaining to any leased motor vehicle [to] send a copy of such notice to the lessee” by first-class mail within ten day's of the lessor's receipt of the notification.²⁰³ This requirement applies to both initial and follow-up notifications, but doesn't apply where the manufacturer has notified a lessor's lessee directly.²⁰⁴ Failure to comply with this regulation can subject the lessor to civil penalties of \$6,000 *per each non-forwarded letter*, with a maximum of \$16,375,000 for a related series of violations.²⁰⁵ To remind lessors of this legal obligation, the manufacturers routinely include such language in all recall letters, although neither the Safety Act nor any of NHTSA's recall regulations require such language. Including such language makes sense, though,

200. 49 U.S.C. § 30120 (2000).

201. *Id.*

202. *See* 49 U.S.C. § 30119(f) (2000).

203. *See* 49 C.F.R. 577.5 (h) (2005).

204. *Id.*

205. *See* 49 U.S.C. § 30165(a)(1) (2000); *see also* 49 C.F.R. pt. 578 (2006) (NHTSA is required by law to periodically raise the civil penalties to reflect the impact of inflation. Thus, although the statute provides a maximum penalty of \$15,000,000, because of inflation's impact over the years, NHTSA has raised the penalty to its current \$16,375,000. For additional background, *see generally* Civil Penalties, 71 Fed. Reg. 12,156 (Mar. 9, 2006) (to be codified at 49 C.F.R. pt. 578)).

because manufacturers want to obtain the highest possible response rate to their recall letters.

Lessors have a vested interest in ensuring the highest possible response rate because, in addition to the fines for failing to forward recall information, they can be held vicariously liable for failing to take enough measures to ensure that their insured vehicles are tendered for repair.²⁰⁶ Under vicarious liability, a person who is hurt in a crash with a leased or rented vehicle can sue and collect damages from the vehicle's leasing or rental company, not just from the other driver, for crashes those companies neither caused nor had the ability to prevent.²⁰⁷ Vicarious liability laws saddles lessors with liability solely because the lessor owns the vehicle. Lessors can't avoid liability by claiming that they were not in control of the vehicle or they were not negligent in the use or operation of the vehicle.

Sixteen states recognize some form of vicarious liability.²⁰⁸ New York has an especially tough vicarious liability statute.²⁰⁹ Under that law, which was passed in 1924, the owner of a motor vehicle is vicariously liable for *any damages* caused by the operator of the vehicle.²¹⁰ The intent of the 1924 law was to make the owners of vehicles liable for crashes in which their chauffeurs were at fault.²¹¹ Over the years, however, New York expanded the reach to include leasing and rental companies.²¹² For example, when a teenager sunbathing in her driveway was run over by her father, FORD Motor Credit Co. was sued for \$900,000, while the insurance company was sued for only \$100,000.²¹³

The threat of unlimited exposure forced FORD, General Motors, Chrysler, Porsche, and about 15 other car companies – as well as many banks and credit unions - to stop doing business in New York.²¹⁴ The companies that remained, such as Honda, required consumers to pay a

206. John Caher, *Trial Lawyers Urge Quick Action to Sue Lessors of Vehicles*, N.Y.L.J. 1, Col. 4, (2005).

207. *Id.* (For additional background of vicarious liability in the context of motor vehicles; see generally Thomas B. Hudson & Daniel J. Laudicina, *Recent Developments in Motor Vehicle Leasing and Litigation*, 59 BUS. LAW. 1145 (2004); and see generally Kenneth J. Rojc & Kathleen E. Stendahl, *Vicarious Liability of Motor Vehicle Lessors*, 59 BUS. LAW. 1161 (2004)).

208. See Harry Stoffer, *Feds Bar Vicarious Liability Lawsuits*, AUTO. NEWS, Aug. 8, 2005, at 4.

209. See N.Y. Veh. & Traf. Law § 388 (2005) and Harry Stoffer, *supra* note 210, at 4.

210. See N.Y. Veh. & Traf. Law § 388 (2005).

211. Editors at Edmunds.com, *Leasing OK In New York Again*, <http://www.edmunds.com/advce/leasing/articles/107264/article.html>, (last visited September 17, 2006).

212. See N.Y. Veh. & Traf. Law § 388 (2005).

213. See Editorial, *The Great New York Auto-Lease Ripoff*, N.Y. DAILY NEWS, Apr. 29, 2005, at 50.

214. See Caher, *supra* note 208, at 1.

higher acquisition fee.²¹⁵ Between January 1, 2000 and June 30, 2003, the Association of Consumer Vehicle Lessors member companies reported a total of 2,564 vicarious liability suits in New York, totaling more than \$6.5 billion dollars.²¹⁶

Under a federal highway bill signed into law in August 2005, however, vicarious liability lawsuits are greatly curtailed.²¹⁷

In a similar vain, NHTSA should provide that manufacturers forward recall response information to the insurers of motor vehicles. That way, insurance companies would have a stake in ensuring the highest possible response rate, too. And the companies could also charge higher premiums to those who fail to tender their vehicles for repair. SUNY economics professors Yong-Kyun Bae and Hugo Benítez-Silva argue that insurance companies “should consider taking into account the correction history of particular drivers and cars when pricing their insurance, and maybe even make coverage conditional on fixing major recalls.²¹⁸ If discounts are given to drivers that have fixed their cars, we are likely to see a decline in accidents and insurance costs, with the resulting welfare improving effects for society, derived from the reduction in the monetary costs and the costs of loss of life due to accidental harm.”²¹⁹ After all, if a recall is important enough to saddle the automakers with the cost and burden of remedying often millions of vehicles, then other stakeholders should also participate to make sure that each and every safety recall is effectuated to the best of society’s ability. To that end, auto companies should be required to make available the list of vehicles that haven’t yet had recall repair work done.

OTHER WAYS TO INCREASE RESPONSE RATES

Two other methods to increase response rates use technology. The first method uses e-mail. NHTSA should allow manufacturers to notify consumers of a safety recall also by e-mail. I say “also” because I’m not advocating replacing the current requirement of first-class mail. Rather, I’m advocating flexibility. If a customer would like to be notified by e-mail, why prevent it? It’s convenient and adds another channel of communication. Manufacturers have an interest in e-mail, too. In contrast to first-class mail, e-mail allows manufacturers to track that the message has been read, not just delivered (Of course, manufacturers can’t track *who* reads the message).

215. *Id.*

216. See Press Release, Ass’n. of Consumer Motor Vehicle Lessors, N.Y. Vicarious Liability Survey, Oct. 24, 2003.

217. See Stoffer, *supra* note 210.

218. Bae and Benítez-Silva, *supra* note 4, at 22.

219. *Id.*

NHTSA currently allows this alternative to owners of child seats.²²⁰ FMVSS 213, which governs child restraint systems, requires manufacturers to enclose a detachable, post-paid postcard with every new child seat.²²¹ The postcard, which comes preprinted with the restraint's model name or number and its date of manufacture (to assist in implementing recalls), must provide a space for consumers to record the owner's name and address.²²² Recognizing the growth of the Internet as a means to improve the number of people who register their seats, NHTSA amended the registration regulation in 2005 to allow owners to register their seats online and manufacturers to send recall notices via e-mail – in addition to first-class – which NHTSA expects to increase the recall response rate.²²³

This model could apply in the vehicle context, too. NHTSA should amend its notification requirements to permit vehicle and tire manufacturers to notify affected consumers also by e-mail. When buying a new car, consumers could be asked if they would also like to be informed by e-mail. Dealers could forward this simple information also by e-mail to manufacturers. This would be a good start. Eventually, NHTSA should allow manufacturers and consumers to dispense with the first-class notification requirement. If consumers agree to waive any liability for failure to have their product repaired as part of a safety recall in return for the ability to forego a hard-copy letter, why not permit manufacturers and consumers to communicate in the way they find most appropriate?

The second way to increase response rates through technology uses telematics. "Telematics" is a wireless communications system designed to collect and disseminate information; in the context of vehicles, it refers to electronic systems, vehicle tracking and positioning, on-line vehicle navigation, and information systems and emergency assistance.²²⁴ Perhaps the most popular example of telematics is General Motors' OnStar System. With the touch of a button, users can receive navigation assistance, vehicle tracking, and even the location of the nearest Chinese restaurant.²²⁵ This system can also be used to increase recall response rates. In fact, GM does this already. In September 2005, GM announced that its OnStar service will remind its subscribers of recall repairs 60 days after

220. See Federal Motor Vehicle Safety Standards; Child Restraint Systems; Child Restraint Systems Recordkeeping Requirements, 70 Fed. Reg. 53,569 at 53,570 (Sept. 9, 2005) (to be codified at 49 C.F.R. pts. 571, 588).

221. *Id.*

222. *Id.*

223. See *id.*

224. See What is Telematics? http://searchnetworking.techtarget.com/sDefinition/0,290660,sid7_gci517744,00.html (Last visited Sept. 25, 2006).

225. See Welcome Issue, ONSTAR MAGAZINE, 2006, available at http://www.onstar.com/us_english/jsp/explore/onstar_basics/onstar_magazine.jsp.

owners fail to tender their vehicles for service.²²⁶ To assist owners, On-Star can also connect drivers to a dealer to schedule repairs. GM added this reminder service in an effort to increase the recall completion rates.²²⁷ Others in the industry should follow GM's lead here. Telematics offers another channel to get out the recall message.

DEFEND THE TERRITORY

Frustration with the NHTSA's perceived mishandling of the Ford-Firestone matter has fueled the trend of trial lawyers asking state court judges, not agency experts, to order recalls of allegedly defective vehicles.²²⁸ State court judges are "not to decide merely according to the laws or constitution of the state, but according to the Constitution, laws and treaties of the United States – 'the supreme law of the land.'"²²⁹ Accordingly, judges must apply preemption principles where applicable and give effect to federal law when it applies, disregarding state law when a conflict exists.

Under any of the three preemption doctrines (express, implied, and conflict), state-law-based recalls are preempted by the Safety Act. In a nutshell, preemption is based on the following: (1) the text of the Safety Act, which includes a preemption clause and three saving clauses;²³⁰ (2) the purpose of the Safety Act, namely, promoting vehicle safety through a uniform recall process;²³¹ and (3) the sound policy reasons involved in avoiding undue confusion caused by potentially fifty different recall processes.²³²

NHTSA provides the superior forum to determine and to oversee an automotive recall.²³³ Although courts and juries may be the ideal vehicle for assigning responsibility after a crash, Congress has charged the NHTSA with investigating safety-related defects, ordering recalls, and overseeing a uniform recall implementation and response rate.²³⁴ Unlike NHTSA investigators and engineers, who have been in the driver's seat effectively overseeing recalls for several decades, the state court system has no experience in administering safety recalls, possessing neither the

226. See *General Motors' OnStar Service*, 32 HIGHWAY & VEHICLE SAFETY REP 1, 1 (2005).

227. See *id.*

228. See, e.g., *Mazeroles v. DaimlerChrysler Corp.*, No. 01 Civ. 581, 2002 WL 31367215, at *1 (Super. Ct. Me. 2002). See, also, *Quacchia v. DaimlerChrysler Corp.*, 19 Cal. Rptr., 3d 508 (2004).

229. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816).

230. See National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103 (1997).

231. See 49 U.S.C. § 30101 (2000).

232. See *id.*

233. See Kevin McDonald, *Federal Preemption of Automotive Recalls: A Case of Too Many Backseat Drivers?*, 71 TENN. L. REV. 471, 508 (2004).

234. *Id.*

resources nor the expertise to ensure either proper technical supervision of vehicle modifications or proper implementation of uniform recall procedures. Were the courts of fifty different states to enter the arena of automotive recalls, manufacturers would be forced to drive off a cliff into legal uncertainty the veering myriad requirements would destroy any semblance of national uniformity. For all these reasons, judges should yield the right-of-way to the NHTSA and put the brakes on lawsuits seeking recalls.

To further this end, NHTSA's Office of Chief Counsel should rescind its two earlier advisory opinions on preemption of recalls. The agency should also amend its recall regulations to preempt recalls from even arising in state courts. Ample precedent allows NHTSA to safeguard its domain, for it is well-settled law that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law."²³⁵ The Supreme Court has explained that "[t]he Supremacy Clause of the Constitution provides that 'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme Law of the Land,'"²³⁶ and "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization."²³⁷ Accordingly, "if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."²³⁸

Finally, rescission is consistent with Executive Order 13132, which states: "Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision *or there is some other clear evidence that the Congress intended preemption of State law.*"²³⁹ In the case of automotive recalls, the clear evidence is revealed upon examination of the text of the Safety Act, its implementing regulations, and the legislative intent behind the Act, all of which reveal that Congress wanted "to leave no room for supplementary" state recall actions. The Act provides in extraordinary detail the "who, what, when, where, why, and how" of recalls and recall

235. *City of New York v. F.C.C.*, 486 U.S. 47, 63 (1988) (quoting *La. Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

236. *Id.* at 63, (quoting U.S. CONST. art. VI, cl. 2).

237. *Id.*

238. *Id.* at 64, (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

239. Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43257§4(a) (August 4, 1999).

management-down to the very envelope. Regarding legislative intent, before Congress passed the Act, neither federal law nor state law provided a structure for issuing recalls. Aware of the absence of means by which to ensure “the speedy and efficient repair of [safety-related] defects,” Congress found it “essential” to establish “Federal oversight of defect notification, and correction.”²⁴⁰ To fill this absence, Congress created a federal agency that would later become the NHTSA and charged this agency with developing safety standards, requiring manufacturers to notify consumers of safety-related defects, and exercising “Federal oversight” to ensure “uniform” consumer notification.²⁴¹ Recognizing the uniform power it gave to this agency, Congress urged the NHTSA to exercise its oversight and recall powers with “extreme caution,” giving careful consideration to “the risks to traffic safety” and the need “to avoid premature publicity of unevaluated reports as to suspected defects” that could “cause undue public alarm” and could have “a damaging and unwarranted effect on vehicle sales” based on “suspicions [that] may ultimately prove to be without foundation.”²⁴²

When Congress amended the Safety Act in 1974 to mandate for manufacturers a remedy duty, it specifically did not adopt an amendment allowing for “citizen suits” that would have granted private parties the right to trigger immediate judicial intervention into the regulatory scheme.²⁴³ Instead, Congress chose administrative enforcement through the NHTSA, making available to any interested consumer a specified petition process.²⁴⁴ When the NHTSA (or a manufacturer) determines the existence of a safety-related defect or noncompliance, the manufacturer must “remedy the defect or noncompliance without charge when the vehicle . . . is presented for remedy.”²⁴⁵ The combined effect of the amendments to the Safety Act, the detailed implementing regulations, and the legislative intent behind the amendments all “make reasonable the inference that Congress left no room for the States to supplement it.”²⁴⁶ Therefore, rescission of the prior advisory opinions is well supported and consistent with Executive Order 13132.²⁴⁷

240. S. Rep. No. 89-1301, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2710.

241. *Id.* at 2716.

242. *Id.* at 8, 9, reprinted in 1966 U.S.C.C.A.N. at 2716, 2717.

243. *See, e.g.*, 120 Cong. Rec. 27,807-08 (Aug. 12, 1974) (statement of Rep. Eckhardt) (urging unsuccessfully for the adoption of a private right of action permitting any person to challenge NHTSA determinations), reprinted in IV Leg. Hist. at 174, 514.

244. *See* 49 U.S.C. § 30162(a) (2000).

245. National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30,120(a)(1) (2006).

246. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

247. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (August 4, 1999).

ALLOW FOR FLEXIBLE SOLUTIONS

EPA allows extended warranties to remedy emissions defects.²⁴⁸ NHTSA should allow extended warranties to remedy low hazard safety-defects and noncompliances. For example, if my seat belt alarm buzzer doesn't chime the full eight seconds and NHTSA believe this noncompliance must result in a recall, why not allow me the option to take the car in?

PLUGGING GAPS IN SAFETY ACT FOR USED CARS

Under pre-TREAD law, when a vehicle or parts manufacturer notified a dealer (including a retailer) that a new motor vehicle or new item of replacement equipment either did not comply with a safety standard or contained a safety-related defect, the dealer was not permitted to sell or lease the noncompliant or defective vehicle or equipment.²⁴⁹ However, prior to passage of the TREAD Act, this sale and lease prohibition did not apply to the sale or lease of *used* vehicles or *used* parts.²⁵⁰ During the Ford-Firestone congressional hearings, media reports indicated that some people were selling defective Firestone ATX or Wilderness AT tires that had been returned to dealers for replacement tires under the ongoing safety recall.²⁵¹

Based on those media reports, Congress amended the Safety Act to expressly prohibit such sales.²⁵² Section 8 of the TREAD Act added to 49 U.S.C. 30120 a new subsection (j), entitled "Prohibition on [s]ales of [r]eplaced [e]quipment," effective November 1, 2000.²⁵³ Basically, this subsection bans anyone from selling or leasing either a (new or used) vehicle or part (including a tire) that is the subject of a recall²⁵⁴ (some state laws already bans such sales).²⁵⁵ Though not mandated by TREAD,

248. See Clean Air Act, 40 C.F.R. § 85.2103 (2006).

249. See 49 U.S.C § 30,120(i) (2006).

250. See *id.* (applying only to sale or lease of new vehicles and new equipment).

251. See Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-Compliant Tires, 65 Fed. Reg. 81,409, 81,410 (Dec. 26, 2000) (codified at 49 C.F.R. § 573). See also Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. 19,693, 19,693-64 (Apr. 23, 2002) (codified at 49 C.F.R. § 573) (implementing final rule).

252. Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, § 8, 114 Stat. 1800, 1805 (2000) (codified at 49 U.S.C. § 30,120(j) (2000)) [HEREINAFTER, "TREAD ACT"].

253. *Id.*

254. See National Traffic and Motor Vehicle Safety Act 49 U.S.C § 30,120(j). Under section 30,120(j)(1) and (2), the ban does not apply if the defect or noncompliance is remedied as required under the Vehicle Safety Act or if the recall (or noncompliance) order is set aside in a civil action. See *id.*

255. For example, on May 15, 2002, Michigan Attorney General Jennifer M. Granholm filed a felony criminal charge against a man accused of reselling dangerously altered used Firestone

NHTSA conducted separate rulemaking implementing Section 8 of TREAD into the Code of Federal Regulations (CFR).²⁵⁶ The separate rulemaking purportedly offered two benefits: (1) reducing, if not eliminating, questions surrounding the meaning of the prohibitions and (2) providing consistency in the CFR.²⁵⁷

The rulemaking resulted in two additions to the CFR, namely, a new Section 573.11 and a new Section 573.12.²⁵⁸ Section 573.11 merely codifies the previously existing statutory language of 49 U.S.C. § 30120(i), which prohibits dealers from selling or leasing defective or noncompliant new vehicles or new parts.²⁵⁹ To trigger this prohibition, three elements must be met: (1) manufacturer must have provided a notification of a defect or noncompliance; (2) a dealer must have received notified of the defect or noncompliance; and (3) the dealer possess the vehicle or equipment.²⁶⁰

Section 573.12 codifies the TREAD Act's prohibition on the sale or lease of new *and used* defective and noncompliant parts.²⁶¹ In contrast to Section 573.11, the TREAD prohibition applies to *all* persons, not just

tires obtained as part of the Ford and Firestone tire replacement program. Press Release, Mich. Dep't Att'y Gen., Michigan Attorney General Granholm Warns Consumers and Announces Criminal Charges in Release of Tires (May 15, 2002) (on file with Michigan Department of Attorney General). Granholm charged the man with "... intentionally misrepresenting the quality or identity of a motor vehicle part with the intent of selling that part." *Id.* The violation is a felony under Michigan law, and holds a penalty of up to ten years in prison, a fine not to exceed \$20,000, or both. *Id.*

256. See Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-Compliant Tires, 65 Fed. Reg. at 81,409-10. See also Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,693-94 (implementing final rule).

257. Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,694.

258. *Id.* at 19,697-98.

259. See 49 C.F.R. § 573.11; 49 U.S.C § 30,120(i) (2006). Surprisingly, this prohibition was not part of the original Vehicle Safety Act of 1966. Rather, Congress wrote the prohibition into the Act in 1991 as part of the NHTSA Authorizations Act of 1991, which itself was part of the much larger Intermodal Surface Transportation Efficiency Act ("ISTEA"). See National Highway Traffic Safety Administration Authorization Act of 1991, Pub. L. No. 102-240, § 2504(b), 105 Stat. 1914, 2500-2504 (repealed and re-codified at 49 U.S.C. § 30,120(i) (2000)).

260. Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,695. The Vehicle Safety Act also provides for two exceptions that permit dealers to sell or lease defective or noncompliant vehicles or parts: (1) if the vehicle or part is remedied as required by § 30120 before delivery or (2) if enforcement of a recall order is set aside in a civil action. See 49 U.S.C. § 30,120(i)(1). Finally, the Act does not prohibit a dealer from merely offering the vehicle or part for sale or lease. See *id.* at 30,120(i)(2).

261. 49 C.F.R. § 573.12. The two exceptions applicable to the ban on selling defective new vehicles or parts also apply here. See also TREAD Act, Pub. L. No. 106-414, § 8, 114 Stat. 1800, 1805 (2000) (codified at 49 U.S.C. § 30,120(j) (2000)).

dealers, though the practical effect will be to apply only to dealers.²⁶² Although the title of the TREAD amendment reads “Sales of *Replaced Equipment*” (emphasis added), the actual language of the amendment reaches *all* parts that have been found to be either defective or noncompliant, regardless of whether the part is “original equipment” or “replacement equipment.”²⁶³ Accordingly, in writing section 573.12, NHTSA deferred to the language of the statute as opposed to the more limiting title.²⁶⁴

The following table reflects the Vehicle Safety Act’s prohibitions on selling or leasing defective or noncompliant (used or new) vehicles or parts.

VEHICLE SAFETY ACT SALES AND LEASING PROHIBITIONS

	New Parts	Used Parts	New Vehicles	Used Vehicles
Noncompliance with any FMVSS	ANY PERSON (§§ 30112; 30120(j)) DEALERS* (§ 30120(i))	ANY PERSON* (§ 30112; 30120(j))	ANY PERSON (§ 30112) DEALERS (§ 30120(i))	ANY PERSON (§ 30112)
Safety-related defects	ANY PERSON (§ 30120(j)) DEALERS* (§ 30120(i))	ANY PERSON* (§ 30120(j))	DEALERS (§ 30120(i))	

* Indicates separate reporting requirement affecting dealers (including retailers) only and covering only *tires*.

As indicated in the table, key gaps and inconsistencies remain in the Safety Act, despite the TREAD Act amendments. First, the ban on selling defective new vehicles covers only dealers, *not manufacturers*.²⁶⁵ Yet, dealers and manufacturers are prohibited from selling *noncompliant* new (and used) vehicles (and parts).²⁶⁶ The TREAD Act presented the perfect opportunity for Congress to correct this inconsistency by simply extending the prohibition. However, Congress never considered the issue,

262. See TREAD Act § 8. See also 67 Fed. Reg. at 19,695 (noting that the “the rule will apply to businesses and individuals that sell new or used automobile parts, including tires”). Consumer group Public Citizen would extend the scope here to include both rental car companies as well as “those who lease” vehicles (which would include finance companies). See *id.* at 19,697. However, only Congress has the authority to make such a change in the Vehicle Safety Act (a point understood by both NHTSA and Public Citizen). See *id.*

263. See TREAD Act § 8.

264. Motor Vehicle Safety; Prohibitions on Sale or Lease of Defective and Noncompliant Motor Vehicles and Items of Motor Vehicle Equipment, 67 Fed. Reg. at 19,695. The U.S. Supreme Court has long held that the title of a statutory provision cannot trump the plain and unambiguous meaning of the words used in the text of the statute. See *Knowlton v. Moore*, 178 U.S. 41 (1900).

265. See National Traffic and Motor Vehicle Safety Act 49 U.S.C. § 30,120(i).

266. See 49 U.S.C. §§ 30,112(a)(1) and 30,120(j).

so the inconsistency remains. Although not explicitly prohibited under federal law from selling defective vehicles (new or used), manufacturers are, of course, obligated (upon finding a defect or noncompliance) to notify customers and remedy defects.²⁶⁷ Failure to satisfy the “notification and remedy duty” violates not only the Act but also probably many state unfair or deceptive trade practices provisions.

Second, the Safety Act does not even deal with the sale or lease of defective *used* vehicles. The TREAD Act amended the Safety Act to ban the sale or lease of defective or noncompliant used parts, but stopped short of extending the ban to used vehicles. Consumer group Public Citizen recognized this shortcoming in its comments to NHTSA.²⁶⁸ However, NHTSA (and Public Citizen) also recognized that such a change must come from Congress, not NHTSA, because NHTSA does not have the authority to change the Safety Act.²⁶⁹ When Congress passed the Safety Act in 1966, it also considered having the Act reach used vehicles, but in the end Congress was afraid of encroaching on states rights.²⁷⁰ So NHTSA’s authority, except for the defect, compliance, and making inoperative provisions of the Safety Act, terminates upon the first retail sale of a vehicle. After that, the use of that product becomes a matter of state concern. States may impose their own requirements with regard to use, inspection, registration, and taxation.

The public policy reasons justifying the ban on the sale or lease of new defective or new noncompliant vehicles applies to *used* defective vehicles. In short, the policy arguments (as set forth in the Safety Act) are to “reduce traffic accidents and deaths and injuries resulting from traffic accidents.”²⁷¹ Clearly, this end could be further effectuated by explicitly banning the sale or lease of used defective or noncompliant vehicles, i.e., vehicles subject to a formal safety recall.

Third, as indicated in the table by the asterisks (*), the new reporting obligation is limited in scope to dealers only, and even then, only on tires (not other parts or vehicles themselves).²⁷² Combining the new reporting obligation with the new sales and lease ban results in the odd situation that the Safety Act prohibits *dealers* (including retailers) from selling or leasing any (i.e., new or used) defective or noncompliant part or vehicle, *yet if they do*, they must report the sale or lease to NHTSA if the sale or

267. See 49 U.S.C. §§ 30,118-20 (2006).

268. See 67 Fed. Reg. at 19,697 (NHTSA noting that the suggested amendments would broaden 49 U.S.C. 30120(i) to used motor vehicles and motor vehicle equipment).

269. See *id.*

270. See National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, § 108(b)(1), 80 Stat. 718, 722 (1966) (repealed and re-codified at 49 U.S.C. § 30,112(b) (2005)).

271. 49 U.S.C. § 30,101.

272. See 49 U.S.C. § 30,120(i).

lease involved a tire.²⁷³ Even NHTSA saw a certain absurdity in this new situation. As noted above, according to Ken Weinstein, then-NHTSA's Administrator for Safety Assurance, "[t]he TREAD Act makes it illegal to sell recalled products, and if you do, you have to report it to us . . . [t]his law was written by a lot of different people at a lot of different times."²⁷⁴

SUMMARY

My suggestions can be broken down into three groups: (1) rethinking the concept of what should trigger a recall by (a) returning to a reasonable risk analysis and (b) implementing a cost-benefit analysis; (2) assuming a recall is necessary, ensuring the highest possible recall response rate; and (3) other changes, including preemption and used cars. In sum, here's what should be done to improve the NHTSA recall program. First, vehicles should only be formally recalled when they contain safety-related defects, which means that the defect must truly present an *unreasonable* risk of vehicle crash or personal injury. By conducting recalls "only" in situations where a palpable risk exists, we can reduce the number of otherwise unneeded recalls and focus our attention to real problems. Second, by requiring recalls only for real risks, we have more legitimate grounds to enforce penalties for failure to respond to recall notices. As it currently stands, even if the laws were to be tightened for failure to respond, what legitimacy can there be when the underlying "safety defect" is a rare potential of the sunroof chipping or the seat belt buzzer chiming a fraction of a second shorter than it should? To be clear, I'm not proposing that manufacturers should not fix quality problems. They can always offer an extended warranty or even conduct some sort of service action. But I don't believe that these glitches should be considered "safety-related defects" and thus trigger the statutory requirement to "notify and remedy."

273. See 49 U.S.C. §§ 30,112(a)(1), 30,118-20.

274. Miles Moore, *TREAD Act Reality: NHTSA's Powers Now Greatly Expanded*, *TIRE BUS.*, Apr. 1, 2002, at 9. If quoted correctly, note that Mr. Weinstein overstated the actual reporting requirements of TREAD. He should have replaced "products" in the above quotation with "tires."