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## Production Liability After Unintended Acceleration: How Automotive Litigation Has Evolved

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# PRODUCT LIABILITY AFTER UNINTENDED ACCELERATION: HOW AUTOMOTIVE LITIGATION HAS EVOLVED

*Aaron Ezroj\**

## INTRODUCTION

The number of product liability lawsuits increased dramatically during the late 1960s and 1970s. These lawsuits grabbed the country's attention as they motivated important safety improvements in various industries including automobile manufacturing. These lawsuits also penalized culpable manufacturers and compensated consumers who suffered losses. During the 1980s and 1990s, however, the success rate of these lawsuits decreased sizably which led some to question their relevance in modern litigation.<sup>1</sup> In the past few years, some well-known scholars have even argued that in light of the growing influence of other actors, such as regulators, product liability lawsuits may be unnecessary.<sup>2</sup>

In July of 2013, however, a \$1.6 billion settlement was finalized between plaintiffs and Toyota Motor Corporation in the Toyota Multidistrict Litigation ("Toyota MDL").<sup>3</sup> This historic

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<sup>1</sup> Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 731 (1992).

<sup>2</sup> A Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1444 (2010) (insurance companies were cited as another actor arguably making product liability lawsuits unnecessary).

<sup>3</sup> *In Re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*,

settlement, which is the largest automotive defect settlement in United States history, has once again raised the public's attention of the field of product liability. The lawsuit demonstrated the inability of the primary regulatory agency, the National Highway Traffic Safety Administration ("NHTSA"), to independently motivate the adoption of state-of-the-art safety technology or adequately penalize manufacturers with fines limited in both scope and amount. The lawsuit also showed a shift in the legal strategy used by plaintiffs' counsel in arguing automotive defect lawsuits and how this shift is more likely to efficiently compensate plaintiffs than other approaches.

This article provides a comprehensive overview of important developments in automotive defect litigation. The article begins by providing an overview of the field of automobile law, explaining the role of NHTSA and key cases. Next, the article provides a detailed background on the Toyota MDL, discussing the congressional investigations and initial Toyota Motor Corp. recalls. Then, the article describes the development of the Toyota MDL in the Central District of California, in particular the structure of plaintiffs' lawsuits. Finally, before concluding, the article explains the impact of litigation as it relates to the adoption of automotive safety features, penalizing manufacturers, compensating consumers for pure economic loss and curbing false or otherwise misleading advertisements.

## I. AUTOMOBILE REGULATIONS AND LAWSUITS

### A. *Historical Perspective*

Driving an automobile is inherently dangerous and is typically the most dangerous activity in a person's daily routine. The statistics are scary. Every year, automobile accidents result in tens of thousands of deaths.<sup>4</sup> In addition to emotional losses which cannot be quantified, these accidents cost society hundreds of billions of dollars in terms of worker productivity, medical costs, insurance costs and other expenses.<sup>5</sup> For this reason, while the extent of the issue has not always been fully recognized, automobile safety has always been an issue since the introduction of the technology.

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<http://www.toyotaelsettlement.com/> (last visited Mar. 31, 2014).

<sup>4</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., MOTOR VEHICLE SAFETY DEFECTS AND RECALLS 1 (2011) [hereinafter DEFECTS AND RECALLS].

<sup>5</sup> *Id.*

Automobile lawsuits date as far back as the early 20th century when automobiles were first placed on the market. In *MacPherson v. Buick Motor Co.*, the court ruled in favor of a plaintiff when the wooden spokes of a 1920 Buick Runabout's wheel crumbled, causing the car to collapse and eject the plaintiff.<sup>6</sup> Judge Benjamin Cardozo explained in his ruling that, "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."<sup>7</sup>

Following World War II, the automobile became a cultural icon and driving to work became routine. Business boomed for the major United States automobile manufacturers; General Motors, Ford, and Chrysler.<sup>8</sup> While risks associated with driving were of course known, public attention was not focused on them. Moreover, while technology rapidly developed at this time, little effort was focused on incorporating safety technology into automobiles.<sup>9</sup>

In the mid-1960s, a period marked by challenging accepted cultural norms, members of the public began to challenge the widespread use of the automobile with what were believed to be its inherent risks. Consumer advocates alerted the public to manufacturers' lack of interest in incorporating safety features. One such consumer advocate, Ralph Nader, published his book "Unsafe at Any Speed" in 1965. In the book, Nader highlighted how automobile accidents led to a huge loss of life, serious and long lasting disabilities, and increased societal costs such as medical treatment.<sup>10</sup> He further portrayed manufacturers as applying cost benefit ratios in making design decisions affecting occupant safety.<sup>11</sup> He detailed the reluctance of vehicle manufacturers to install available safety features during the 1950s and 1960s because of the general unwillingness to accept additional costs.<sup>12</sup> Nader ex-

<sup>6</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 384-85 (1916).

<sup>7</sup> *Id.* at 389.

<sup>8</sup> These companies mass produced vehicles becoming known colloquially as the Big Three.

<sup>9</sup> RALPH NADER, *UNSAFE AT ANY SPEED*, v-vi (1966) (comparing the automobile and aviation industries).

<sup>10</sup> *Id.* at v-viii.

<sup>11</sup> *Id.* at 140-58.

<sup>12</sup> *Id.*

plained that the gap between existing design and attainable safety had widened enormously.<sup>13</sup>

During this same time, scientists also came forward with data precisely demonstrating the grave risks associated with driving. In 1966, the National Academy of Sciences published “Accidental Death and Disability – The Neglected Disease of Modern Society,” treated automobile accidents as an epidemic, and provided further scientific data supporting the risks associated with driving.<sup>14</sup> The report explained that in 1965, automobile accidents and other accidental injuries killed 107,000 people, temporarily disabled over 10 million, and permanently impaired 400,000 American citizens at a cost of approximately \$18 billion.<sup>15</sup> According to the report, “[t]his neglected epidemic of modern society [was] the nation’s most important environmental health problem.”<sup>16</sup>

With public opinion now focused on the issue of automobile safety, the automobile manufacturers responded by asserting that driver error was largely responsible for deaths and injuries.<sup>17</sup> Moreover, while certain safety features could be implemented, manufacturers asserted that consumers did not necessarily desire such features.<sup>18</sup> Despite pushback from manufacturers, in 1966, under increasing pressure to address the issue of automobile safety, the United States Congress held a series of high profile hearings on highway safety. Congress later that year passed the Highway Safety Act, providing federal guidance and funding to states for the creation of highway safety programs.<sup>19</sup> Also in 1966, Congress passed the National Traffic and Motor Vehicle Safety

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<sup>13</sup> *Id.*; Even as the technology to save lives became available, it was not being implemented. For instance, it was argued that mandating the installation of seat belts on all vehicles would save thousands of lives by reducing the severity of a “second collision” between the occupant and the interior of the vehicle or from being ejected through the vehicle’s windshield. See WENDY WATERS, ET. AL., A HALF CENTURY OF ATTEMPTS TO RE-SOLVE VEHICLE OCCUPANT SAFETY: UNDERSTANDING SEATBELT AND AIRBAG TECHNOLOGY 1337-38 (1998). However, while in the early 1960s seatbelts were generally available as an option on American vehicles, less than ten percent of vehicles had them. By mid-1960 the number had increased, but still only about thirty percent of vehicles on the road had them by 1966. *Id.* at 1338.

<sup>14</sup> NATIONAL ACADEMY OF SCIENCES, ACCIDENTAL DEATH AND DISABILITY – THE NEGLECTED DISEASE OF MODERN SOCIETY, 5 (1966).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> NADER, *supra* note 9, at 176.

<sup>18</sup> *Id.* at 140.

<sup>19</sup> 23 U.S.C.A. § 402 (West 2014).

Act in response to the “soaring rate of death and debilitation on the Nation’s highways.”<sup>20</sup> The National Traffic and Motor Vehicle Safety Act’s purpose has been to reduce traffic accidents, deaths, and injuries resulting from traffic accidents.<sup>21</sup>

*B. The National Highway Safety Administration*

The National Traffic and Motor Vehicle Safety Act created the predecessor to the Department of Transportation’s NHTSA which is overseen by the Secretary of Transportation. The National Traffic and Motor Vehicle Safety Act, now recodified as 49 U.S.C. Chapter 301, provides that NHTSA shall conduct necessary safety research<sup>22</sup> and prescribe motor vehicle and equipment safety standards.<sup>23</sup>

Section 49 U.S.C. 30111 articulates NHTSA’s ability to prescribe safety standards.<sup>24</sup> Each standard shall be “practicable, meet the need for motor vehicle safety, and be stated in objective terms.” When prescribing a motor vehicle and equipment safety standard, NHTSA must: (1) consider relevant available motor vehicle and equipment safety information; (2) consult with other appropriate State or interstate authorities; (3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or equipment; and (4) consider to what extent the standard will carry out the purpose of the

<sup>20</sup> S. REP. No. 89-1301, at 1 (1966).

<sup>21</sup> 49 U.S.C.A. § 30101 (West 2014).

<sup>22</sup> To evaluate these and related activities, the Motor Vehicle Safety Act requires that an annual report be delivered to the President to submit to Congress. First, the report shall include a thorough statistical compilation of accidents and injuries. Second, the report shall include current motor vehicles safety standards in effect and the degree of observance of these standards. Third, the report shall include a summary of current research grants and contracts and a description of the problems to be considered under the grants and contract. Fourth, the reports shall include an analysis and evaluation of research activities completed and technological progress achieved. Fifth, the report shall include information on undertaken enforcement actions. Sixth, the report shall include the extent to which technical information was given to the scientific community and consumer-oriented information was made available to the public. Finally, the report shall include recommendations for legislation needed to promote cooperation among the States in improving traffic safety and strengthening the national traffic safety program. The Department of Transportation has provided NHTSA, one of its agencies, with these responsibilities. 49 U.S.C.A. § 30169 (West 2014).

<sup>23</sup> 49 U.S.C.A. § 30101 (West 2014).

<sup>24</sup> The section empowers the Department of Transportation with these responsibilities which have been assigned to NHTSA.

National Traffic and Motor Vehicle Safety Act.<sup>25</sup>

NHTSA can independently move to require a particular safety standard. Any interested person may also file a petition with NHTSA requesting that NHTSA begin a proceeding to prescribe a specific safety standard.<sup>26</sup> The petition must state facts establishing that a safety standard is necessary.<sup>27</sup> Upon receipt of the petition, NHTSA may hold a public hearing or conduct an investigation or proceeding to determine whether to grant the petition.<sup>28</sup> When conducting an investigation, NHTSA may inspect records of a manufacturer, distributor or dealer and even temporarily impound a vehicle involved in an accident.<sup>29</sup> If based on the findings of any public hearing or any investigation, a petition is denied, NHTSA shall publish the reasons for the denial in the Federal Register.<sup>30</sup> If, however, the petition is granted, NHTSA will promptly initiate proceedings to prescribe the specific safety standards that have been evaluated.<sup>31</sup>

The adoption of a safety standard is a multistage process. First, NHTSA investigates the problem and possible countermeasures.<sup>32</sup> Second, NHTSA issues a Notice of Proposed Rulemaking in the Federal Register to garner feedback on the proposal from manufacturers, trade associations, insurers, consumer groups and private individuals.<sup>33</sup> Finally, after public review and comment, NHTSA may issue a final rule adopting or modifying the proposed standard.<sup>34</sup>

All new automobile vehicles or equipment sold in the United States must meet Federal motor vehicle safety standards. Companies are prohibited from manufacturing, selling and importing automobile vehicles and equipment manufactured on or after the date of an applicable safety standard.<sup>35</sup> Any safety standard set by NHTSA is only a minimum safety standard as motor vehicle safety standard means a “minimum standard for

<sup>25</sup> 49 U.S.C.A. § 30111 (West 2014).

<sup>26</sup> 49 U.S.C.A. § 30162 (West 2014).

<sup>27</sup> 49 U.S.C.A. § 30162 (West 2014).

<sup>28</sup> 49 U.S.C.A. § 30162 (West 2014).

<sup>29</sup> 49 U.S.C.A. § 30166 (West 2014).

<sup>30</sup> 49 U.S.C.A. § 30162 (West 2014).

<sup>31</sup> 49 U.S.C.A. § 30162 (West 2014).

<sup>32</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., THIS IS NHTSA 1 (2006) [hereinafter NHTSA].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 49 U.S.C.A. § 30112 (West 2014).

motor vehicle . . . performance.”<sup>36</sup> A manufacturer violation of these minimum standards can be penalized with civil penalties. Section 49 U.S.C. 30165 previously allowed for civil penalties of up to approximately \$16 million and currently allows for civil penalties of up to \$35 million for violations of the National Traffic and Motor Vehicle Safety Act.<sup>37</sup>

### C. Mandated Manufacturer Recalls

The National Traffic and Motor Vehicle Safety Act also provides NHTSA with the authority to require manufacturers to recall automobile vehicles and equipment when they do not meet a Federal safety standard or there is another safety-related defect.<sup>38</sup> The United States Code for Motor Vehicle Safety (Title 49, Chapter 301) defines a defect to include “any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.”<sup>39</sup> NHTSA has further explained that a safety defect is a problem that exists in a vehicle or item of equipment that poses a risk to motor vehicle safety, and may exist in a group of vehicles of the same design or manufacture, or items of equipment of the same type and manufacture.<sup>40</sup>

On its own NHTSA monitors automobile vehicles and equipment to ensure that they meet applicable standards or are not otherwise defective. Consumers and manufacturers also report potential safety defects to the agency. Every month consumers report several thousand potential safety problems through the Department of Transportation’s Vehicle Safety Hotline and NHTSA’s vehicle safety website.<sup>41</sup> Manufacturers are required to report safety defects pursuant to the Transportation Recall Enhancement, Accountability, and Documentation Act (“TREAD Act”).<sup>42</sup>

<sup>36</sup> 49 U.S.C.A. § 30102 (West 2014).

<sup>37</sup> Improvements in vehicle design quickly followed passage of the National Traffic and Motor Vehicle Safety Act, including mandating seat belts, shatter-resistant windshields and energy absorbing steering wheels. Safety Research for a Changing Highway Environment (Transportation Research Board 1990). These safety improvements have saved tens of thousands of lives. For instance, it has been estimated that making seatbelts mandatory on all vehicles has prevented tens of thousands of deaths annually. WATERS, *supra* note 13, at 1338.

<sup>38</sup> NHTSA, *supra* note 32, at 3.

<sup>39</sup> DEFECTS AND RECALLS, *supra* note 4, at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4-6.

<sup>42</sup> Adopted in 2000, the TREAD Act, has allowed NHTSA to develop an

NHTSA can open an investigation if the agency believes that a safety defect exists. NHTSA can also be petitioned to undertake an investigation into an alleged safety defect.<sup>43</sup> If a petition is denied, NHTSA will publish reasons for the denial in the Federal Register. If a petition is granted, NHTSA will open an investigation.<sup>44</sup> As with adopting a safety standard, an investigation is a multistage process. The process also can vary depending on the willingness of manufacturers to initiate a recall from the outset, during the investigation or only after significant pressure from NHTSA.<sup>45</sup>

First, a preliminary evaluation takes place for a particular automobile vehicle or equipment defect. NHTSA will analyze information obtained from the vehicle's manufacturer such as data on complaints, crashes, injuries and warranty claims.<sup>46</sup> During this preliminary evaluation, a manufacturer can also present its views on the alleged defect and prevent any further NHTSA action by independently initiating a recall.<sup>47</sup> After this preliminary evaluation, based on the agency's findings, NHTSA will either close the investigation or begin conducting a full engineering analysis.<sup>48</sup>

Second, if NHTSA moves forward with a full engineering analysis, the agency will gather from the manufacturer any necessary additional information about the alleged defect and will conduct any necessary inspections, tests, and surveys.<sup>49</sup> After

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Early Warning Reporting system. This Early Warning Reporting system requires vehicle manufacturers to notify NHTSA of fatalities, injuries, property damage claims, consumer complaints and safety campaigns that have to the manufacturer's attention. Transportation Recall Enhancement, Accountability, and Documentation Act of 2000, 49 U.S.C.A. §§ 30101-30183 (West 2014). The Act requires manufacturers to report "all incidents of which the manufacturer receives actual notice which involve fatalities or serious injuries which are alleged or proven to have been caused by possible defect" to the Secretary of Transportation who supervisors Department of Transportation's agencies, including NHTSA. 49 U.S.C.A. § 30166 (West 2014). Civil penalties are imposed of up to thirty-five million dollars for failing to provide the Secretary of Transportation with such information. 49 U.S.C.A. § 30165(a) (West 2014). Further, the Act imposes criminal liability for failing to provide the information. 49 U.S.C.A. § 30170 (West 2014).

<sup>43</sup> DEFECTS AND RECALLS, *supra* note 4, at 8.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 8-9.

<sup>46</sup> NHTSA, *supra* note 32, at 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> DEFECTS AND RECALLS, *supra* note 4, at 9.

gathering additional information and conducting inspections, tests, or surveys, if NHTSA does not discover a safety-related defect, it will close the investigation without further action.<sup>50</sup> If the manufacturer independently initiates a recall, the investigation will also be closed.<sup>51</sup> However, if at the conclusion of the full engineering analysis, NHTSA believes that a safety defect exists, the agency will internally brief a panel of experts on the discovered defect.<sup>52</sup> If the panel agrees that a safety defect exists and the manufacturer does not provide any analysis or data contradicting this finding,<sup>53</sup> NHTSA will send a "Recall Request Letter" asking the automobile vehicle or equipment manufacturer to fix the defect by conducting a recall.<sup>54</sup>

Third, if upon receiving a Recall Request Letter, an automobile vehicle or equipment manufacturer refuses to voluntarily initiate a recall, NHTSA will take steps to demonstrate that a recall is necessary and require such by law.<sup>55</sup> The agency may issue an initial decision that a safety defect exists.<sup>56</sup> Material from investigations into the defect will be provided to the automobile vehicle or equipment manufacturer and made available to the public in NHTSA's reading room.<sup>57</sup> NHTSA will then host a public meeting where all interested parties may present their views, including the manufacturer of the automobile vehicle or equipment being examined, other manufacturers, trade associations, public interest groups, and consumers.<sup>58</sup> A record of the investigation, including information submitted at the public hearing, is presented to the NHTSA Administrator.<sup>59</sup> Based on this information, the Administrator will decide whether to issue a final decision that safety defect exist and order a recall.<sup>60</sup> If, after the Administrator's decision, a manufacturer refuses to in initiate a recall, NHTSA can go to court to compel the manufacturer to comply with the decision.<sup>61</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> NHTSA, *supra* note 32, at 2.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> DEFECTS AND RECALLS, *supra* note 4, at 10.

<sup>59</sup> NHTSA, *supra* note 32, at 3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (Manufactures can challenge the recall order in a Federal District Court).

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When a recall takes place, NHTSA will supervise it to ensure that it is conducted properly. An automobile vehicle or equipment manufacturer is required to remedy safety defects by repairing, replacing or repurchasing vehicles, at no charge to owners.<sup>62</sup> An automobile vehicle or equipment manufacturer initially decides on the remedy for the safety defect.<sup>63</sup> If the manufacturer's remedy is not effective, however, NHTSA may require the manufacturer to adopt a new one. NHTSA maintains records for all safety recalls and makes sure that the completion rate is adequate.<sup>64</sup>

#### *D. Litigation Trends*

Following the adoption of the National Traffic and Motor Vehicle Safety Act, there has been a significant increase in the number of automotive defect lawsuits. Product liability lawsuits,

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* NHTSA recall requirements apply to vehicles and equipment up to 10 years old and to tires up to 5 years old. Further information on recalls and other safety issues can be found through NHTSA's safety website portal at [www.safercar.gov](http://www.safercar.gov). Since the enactment of the Motor Vehicle Safety Act, hundreds of millions of vehicles have been recalled to correct safety defects. DEFECTS AND RECALLS, *supra* note 4, at 1. The largest recalls in U.S. history have been for a range of failures for vehicle models produced by a number of manufacturers. The five largest recalls were 21 million Ford 1970-1980 model year vehicles being recalled for transmission that failed to engage park; 15 million Ford 1992-2003 model year vehicles being recalled for faulty cruise control systems; 7.9 million Ford 1988-1993 model year vehicles being recalled over ignition switch fires; 6.9 million Chevrolet 1965-1970 model year vehicles being recalled as a result of broken motor mounts; and, 5.8 million General Motors 1978-1981 model year vehicles for lower arm bolt failures leading to suspension collapse. *Top 10 Largest Car Recalls in American History*, CONSUMER REPORTS NEWS (Oct. 12, 2012), available at <http://www.consumerreports.org/cro/news/2012/10/top-10-largest-car-recalls-in-american-history/index.htm>; The sixth largest was for unintended acceleration risks associated with floor mats in certain Toyota Motor Corp.'s Toyota model vehicles. However, if the number of recalls for floor mats is combined with the number of recalls for accelerator pedals, then together they are one of the five largest recalls. James R. Healey, *Toyota Expands Floor Matt Recall; Supplier Redesigns Pedal*, USA TODAY (Jan. 28, 2010), [http://usatoday30.usatoday.com/money/autos/2010-01-26-toyota\\_N.htm](http://usatoday30.usatoday.com/money/autos/2010-01-26-toyota_N.htm); Other major recalls involved millions of Hondas and Volkswagens being recalled for faulty seat belt buckles and windshield wipers, respectively. *Top 10 Largest Car Recalls in American History*, CONSUMER REPORTS NEWS (Oct. 12, 2012), <http://www.consumerreports.org/cro/news/2012/10/top-10-largest-car-recalls-in-american-history/index.htm>.

including automotive defect lawsuits, are a mix of causes of action that are typically associated with tort and contract law. As explained by one leading scholar, “the foundation of products liability works on both contract and tort axes” where “claims for redress from product injuries may be phrased in contract or tort language.”<sup>65</sup> Along these lines, such lawsuits involve traditional tort law causes of action, including negligence and strict liability,<sup>66</sup> and causes of action typically associated with contract law, including breach of warranty.<sup>67</sup> Product liability lawsuits can also involve various consumer protection claims that are statutorily defined.<sup>68</sup>

Changes in the field of law that made it easier for plaintiffs to succeed using tort causes of action have been attributed with the increase of product liability lawsuits during the late 1960s and 1970s.<sup>69</sup> During this time, courts conferred on judges and jurors broad discretion to impose new responsibilities on companies<sup>70</sup> and limited the availability of defenses based on a plaintiff’s misuse of a product and assumption of risk.<sup>71</sup> Plaintiffs

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<sup>65</sup> Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533, 1543-44 (2009).

<sup>66</sup> A manufacturer is liable for harm caused by their defective product if a plaintiff can show negligence by the manufacturer failing to exercise reasonable care in the manufacturing of a product, thus creating an unreasonable risk of harm to those using it in a reasonably foreseeable manner. Gunther Kuhne, *Choice of Law in Products Liability*, 60 CAL. L. REV. 1, 2-3 (1972) available at <http://scholarship.law.berkeley.edu/californialawreview/vol60/iss1/1>. A plaintiff will succeed under a strict liability cause of action in certain jurisdictions by simply showing that he or she suffered injury due to the normal use of a product that was defective without showing any negligence on the part of the manufacturer. *Id.* at 3-4.

<sup>67</sup> A plaintiff will succeed in a breach of warranty cause of action when the manufacturer has advertised specific qualities of his or her product that were in fact not present. *Id.* at 3. Separate causes of action exist for both express and implied breach of warranty. *Id.*

<sup>68</sup> A plaintiff will succeed under various consumer protection claims if they meet the statutory requirements for the specific claim. *See generally* Kuhne, *supra* note 66, at 2-4.

<sup>69</sup> W. Kip Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury* 15 J. LEGAL STUD. 321, 321 (1986). At this time the economic incentives for safety also became a major influence on corporations and many companies established corporate product safety offices to into the design and manufacturing of safer products. *Id.*

<sup>70</sup> John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell* 123 HARV. L. REV. 1919, 1919 (2010).

<sup>71</sup> Viscusi, *supra* note 69, at 321.

succeeded on tort causes of action in the face of manufacturers arguing that either no regulatory requirement existed which could make them liable or compliance with a separate regulatory requirement protected them. Tort law has also allowed for the recovery of large punitive damages.

In the 1980s, however, there was much criticism of the increase in product liability lawsuits.<sup>72</sup> Courts became less receptive to tort law causes of action asserting that certain losses, such as a pure economic loss, could only be redressed under contract causes of action where there was privity of contract.<sup>73</sup> With changes in the legal field related to traditional tort causes of action and shifting judicial attitudes, some scholars have argued that in the 1980s there began a “Quiet Revolution in Products Liability.”<sup>74</sup> This quiet revolution involved a declining success rate among plaintiffs starting in the mid-1980s corresponding to the changing judicial attitudes.<sup>75</sup>

As a result of these changes in attitude toward tort law and the general declining success rate of plaintiffs in product liability lawsuits, plaintiffs in automotive defect litigation and other product liability lawsuits must increasingly rely on causes of action typically associated with contract law or defined under a consumer protection statute. While these causes of action may be limited to situations where there is privity of contract or require elements not otherwise required under traditional tort law, they also present the possibility for recovery for pure economic loss where such recovery may otherwise not be available.

### 1. Absence of a Regulation

Early automotive defect litigation survived arguments made regarding the absence of regulations clearly establishing liability. Automobile manufacturers have repeatedly argued that they could not be held liable for injuries due to a vehicle’s design where no laws specifically required safer vehicle construction. This argument was unsuccessful prior to the adoption of the National Traffic and Motor Vehicle Safety Act, when there was no regulatory framework in place for the automobile industry. The

<sup>72</sup> Kreitner, *supra* note 65, at 1545.

<sup>73</sup> *Id.* at 1545-56.

<sup>74</sup> Eisenberg & Henderson, *supra* note 1, at 733-34.

<sup>75</sup> *Id.*; Some courts have specifically stated that certain actions were best addressed through contract causes of action, where a contractual relationship existed, rather than a tort law cause of action.

argument has also been unsuccessful even after the National Traffic and Motor Vehicle Safety Act's implementation that put such a framework in place. Manufacturers were unsuccessful in making such an argument in both *Larsen v. Gen. Motors Corp.*<sup>76</sup> and *Dawson v. Chrysler Corp.*<sup>77</sup> As a result of these cases, it became clear that a manufacturer could not escape liability simply by abiding by the safety standards imposed by NHTSA.

In *Larsen*, a driver was injured when his head struck the steering wheel of his Chevy Corvair during a head-on collision.<sup>78</sup> The plaintiff alleged that the negligent design of the steering assembly contributed to the injury even though the alleged defect did not cause the accident.<sup>79</sup> The plaintiff's complaint alleged: (1) negligence in design of the steering assembly; (2) negligent failure to warn of the alleged latent or inherently dangerous condition to the user of the steering assembly placement; and (3) breach of express and implied warranties of merchantability of the vehicle's intended use.<sup>80</sup> General Motors argued that the law imposed no duty of care in the design of an automobile to make it safer to occupy in the event of a collision.<sup>81</sup> Moreover, according to General Motors, because the manufacturer did not have a duty of care there could be no actionable negligence on the manufacturer's part to either design a safer vehicle or to warn of any inherent or latent defects that might make its vehicles less safe than those sold by other manufacturers.<sup>82</sup>

The court explained that since *Macpherson v. Buick Motor Co.* courts have held that automobile manufacturers are under a duty to construct a vehicle that is free of latent and hidden defect.<sup>83</sup> The court then explained that while design defect not causing an accident would not subject a manufacturer to liability for the entire accident, the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.<sup>84</sup> Moreover, while General Motors argued that any safety standards in design should be imposed by the National Traffic

<sup>76</sup> *Larsen v. Gen. Motors Corp.*, 391 F.2d 495 (1968).

<sup>77</sup> *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980).

<sup>78</sup> *Larsen*, 391 F.2d at 496-97.

<sup>79</sup> *Id.* at 496.

<sup>80</sup> *Id.* at 497.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 503.

<sup>84</sup> *Id.*

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and Motor Vehicle Safety Act, the court explained that Section 108(c) of the Act, 15 U.S.C. § 1397(c), expressly negated any intention of Congress to acquire exclusive jurisdiction in this field and to instead left common liability in place.<sup>85</sup>

In *Dawson v. Chrysler Corp.*, a police officer driving a Dodge Manaco was paralyzed when he struck a pole in pursuit of a possible burglar.<sup>86</sup> The plaintiffs' claims were based on theories of strict product liability and breach of implied warranty of fitness.<sup>87</sup> Chrysler argued that it had no duty to produce a "crash-proof" vehicle and emphasized that the design of the vehicle complied with all of the standards authorized by Congress in the National Traffic and Motor Vehicle Safety Act and set forth in accompanying regulations.<sup>88</sup> As in *Larsen*, the court explained that compliance with safety standards promulgated pursuant to the National Traffic and Motor Vehicle Safety Act did not relieve Chrysler of liability.<sup>89</sup> The court similarly cited to 15 U.S.C. § 1397(c), explaining that in authorizing the Secretary of Transportation to enact safety standards, Congress explicitly provided that "[c]ompliance with the Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."<sup>90</sup>

## 2. Preemption

Automotive defect litigation has also generally survived arguments made regarding preemption. Similar to arguments made regarding the absence of regulation, manufacturers have argued, with mixed success, that they cannot be held liable when they comply with a law requiring a specific safety or selection of safety features. A notable example of where this argument arose is with the installation of airbags. In the 1980s, dozens of lawsuits alleged that vehicle manufacturers knew that the absence of airbags resulted in thousands of unnecessary deaths annually. Manufacturers defended such lawsuits by arguing that federal law preempted these common law lawsuits, seeking to defeat the lawsuits on motions for summary judgment before the plaintiff had a chance to litigate his or her case on its merits.<sup>91</sup>

<sup>85</sup> *Id.* at 506.

<sup>86</sup> *Dawson*, 630 F.2d at 953-54.

<sup>87</sup> *Id.* at 954.

<sup>88</sup> *Id.* at 957.

<sup>89</sup> *Id.* at 958.

<sup>90</sup> *Id.*

<sup>91</sup> Ellen L. Theroff, *Preemption of Airbag Litigation: Just a Lot of Hot*

At the time, the National Traffic and Motor Vehicle Safety Act had a specific framework for crash protection standards. NHTSA's Safety Standard 208, adopted as 49 C.F.R. § 571.208.S4.1.2.1, provided manufacturers with three compliance options.<sup>92</sup> These options included: (1) installing a passive restraint system, such as airbags, in conjunction with seatbelts; (2) installing a combination of passive restraints, detachable shoulder harnesses, lap belts and warning systems; or (3) installing a combination of lap belts, non-detachable shoulder harnesses, and warning systems.<sup>93</sup> In motions for summary judgment, manufacturers argued that so long as they complied with one of these options they were protected from tort liability as to any related claim.<sup>94</sup>

Manufacturers were successful in the majority of the lawsuits. For instance, in *Wood v. Gen. Motors Corp.*, the court recognized the savings clause articulated in 15 U.S.C. 1397(c) and said that Congress intended that federal safety standards would not interfere with ongoing litigation as they understood it.<sup>95</sup> However, after evaluating the legislative history for the National Traffic and Motor Vehicle Safety Act, the court determined that Congress did not foresee the possibility of litigation that would, in practical effect, impose new and conflicting state safety standards on national automobile manufacturers.<sup>96</sup> The court then concluded that the airbag claim, being in direct conflict with federal safety standards, was impliedly preempted by the National Traffic and Motor Vehicle Safety Act, and specifically stated that Section 15 U.S.C. 1397(c) did not evidence a contrary congressional intention.<sup>97</sup>

Other courts, however, sided with plaintiffs. These courts agreed that airbag litigation was not entirely preempted allowing common law tort lawsuits to survive summary judgment and proceed.<sup>98</sup> In these cases the courts tended to rely on a United

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*Air?*, 76 VA. L. REV. 577, 577-79 (1990).

<sup>92</sup> *Id.* at 584-85 (citing 49 C.F.R. § 571.208 (1989)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 577-78.

<sup>95</sup> *Wood v. Gen. Motors Corp.*, 865 F.2d 395, 401-02 (1st Cir. 1987).

<sup>96</sup> *Wood*, 865 F.2d at 402.

<sup>97</sup> *Id.* at 414.

<sup>98</sup> For examples of cases in which the plaintiff was not preempted by federal law, see Theroff, *supra* note 91, at 589-90 & n.59 (citing *Richart v. Ford Motor Co.*, 681 F.Supp. 1462 (D.N.M. 1988), *Garrett v. Ford Motor Co.*, 684 F.Supp. 407 (D.Md. 1987), *Wood v. Gen. Motors Corp.*, 673 F.Supp. 1108 (D.Mass. 1987), and *Murphy v. Nissan Motor Corp. in U.S.A.*, 650 F.Supp. 922

States Supreme Court decision unrelated to automotive liability, *Silkwood v. Kerr-McGee Corp.*, where the Supreme Court explained that notwithstanding the federal government's strong presence in a particular field, a jury award of punitive damages did not constitute a form of state regulation and was thus not preempted by federal laws prohibiting state regulation in that area.<sup>99</sup> These courts also tended to agree with plaintiffs, who typically relied on Section 15 U.S.C. § 1397(c), that the most reasonable way to reconcile the purpose behind and language of the National Motor Vehicle Traffic Safety Act was that it does not preempt plaintiffs' common law claims.<sup>100</sup>

### 3. Punitive Damages

The availability of punitive damages has been a major advantage to automotive defect litigation incorporating tort law causes of action. Punitive damages are generally reserved for instances where a defendant has intended to cause harm which can arise in automotive defect litigation. In particular, manufacturers have incurred large punitive damages where they have made cost benefit calculations when deciding whether to implement safety features. One of the most famous examples is a lawsuit involving the Ford Pinto. In the late 1960s, Ford began designing a new compact vehicle that eventually became its Pinto model. In designing the Pinto, Ford's objective was to construct an economy vehicle that could be sold at a cost of no more than \$2,000.<sup>101</sup> During the Pinto's development, prototypes were built and tested.<sup>102</sup> These tests revealed that the gas tank, which was behind the rear axle, would puncture during crash tests at speeds of as little as 21 miles per hour.<sup>103</sup> Additional safety features costing less than \$20, such as equipping the car with a reinforced rear structure, an improved bumper and additional crush space, would have made the fuel tank safe at speeds of up to 34-38 miles per hour.<sup>104</sup> Further safety efforts, such as relocating the tank over the rear axle, would have made the Pinto safe in rear impact

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(E.D.N.Y. 1987)).

<sup>99</sup> *Id.* at 591.

<sup>100</sup> *See, e.g.,* *Garrett v. Ford Motor Co.*, 684 F.Supp. 407 (D.Md. 1987).

<sup>101</sup> *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 774 (Cal. Ct. App. 1981).

<sup>102</sup> *Grimshaw*, 119 Cal. App. 3d at 774.

<sup>103</sup> *Id.* at 774-75.

<sup>104</sup> *Id.* at 776.



at 50 miles per hour or more.<sup>105</sup> However, Ford opted not to install these features.

In 1981, a former Ford engineer and executive in charge of the company's crash testing program testified in *Grimshaw v. Ford Motor Co.*<sup>106</sup> He stated that the highest level of Ford's management decided to continue with the Pinto's production despite knowing that the gas tank was vulnerable to puncture at low rear impact speeds which created a significant risk of death and injury.<sup>107</sup> Moreover, the Ford engineer testified that the highest level of Ford's management knew that safety features existed which would solve or otherwise ameliorate this vulnerability and these features were feasible at a nominal cost.<sup>108</sup> The Ford engineer explained that cost savings, from not making or delaying the incorporation of these features, motivated the decision to move forward with production of the vehicle without incorporating these safety features.<sup>109</sup> As a result of the Ford engineer's testimony and other evidence presented, the plaintiff was awarded \$125 million (later reduced) in punitive damages to victims of a 1972 Ford Pinto explosion where a victim's vehicle erupted into flames on a freeway after being rear-ended.<sup>110</sup>

In 1999, a Los Angeles jury awarded \$4.8 billion dollars (later reduced) in punitive damages to passengers who suffered severe burns in a 1979 Chevrolet Malibu.<sup>111</sup> The award, which was then the largest punitive damage award ever in a personal injury case, was due at least in part to General Motors specifically analyzing the types of fire risks and costs associated with incor-

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 777.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 771-72; Compare NADER, *supra* note 9 (alleging that manufacturers have deliberately decided to forgo important safety features that would impose only minimal costs), with W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550-51 (2000) (arguing that regardless of the costs a jury will find such a calculation despicable). Professor W. Kip Viscusi stated, "But what are these 'despicable acts?' In some cases, the alleged despicable act maybe the actual undertaking of a risk analysis itself rather than a failure to strike an appropriate risk-cost balance in its product safety or environmental risk choices." *Id.* at 551. "One would expect jurors to be more lenient if the company could justify its actions based on a benefit-cost analysis." Empirical studies however show that this is not the case. The character of the analysis that the company performs does not have a statistically significant effect as to whether punitive damages would be awarded. See *Id.* at 556-57.

<sup>111</sup> Viscusi, *supra* note 110, at 547.

porating safety features and decided not to incorporate these safety features.<sup>112</sup>

#### 4. Pure Economic Loss

The area of pure economic loss, however, has presented challenges for automotive defect litigation relying on tort law causes of action. In the 1980s, beyond simply limiting recovery in product liability lawsuits, courts in certain jurisdictions more broadly limited recovery under tort law where there was only pure economic loss. In tort law, injuries from defective product can be divided into claims for personal injury, property damage and economic loss. A personal injury occurs when a defective product causes injury to a person. Property damage occurs when a defective product causes injury to other property. Economic loss occurs when a defective product causes damage to itself. Economic loss is “the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.”<sup>113</sup> The majority rule in courts has become that recovery for economic loss under tort law is not allowed where there is no personal injury or property damage.<sup>114</sup>

Rules pertaining to economic loss have developed over the past century. Early in the 20th century, the court in *Ultramares Corporation v. Touche* articulated concerns regarding recovery

<sup>112</sup> Professor Viscusi has criticized juries for making such decisions explaining that such calculations have a societal benefit. According to Professor Viscusi, certain activities such as driving an automobile are inherently risky. *Id.* Professor Viscusi believes that manufacturers should not be faulted additionally for undertaking an erroneous analysis and that undertaking a risk analysis before marketing a risky product should not be viewed as reckless corporate behavior. Standard negligence principles call for risk balancing. Firms therefore should be encouraged to make such judgments explicitly. Professor Viscusi explained though that these legal ideals are, however, divorced.

<sup>113</sup> Cathy Bellehumeur, *Recovery for Economic Loss Under a Products Liability Theory: From the Beginning Through the Current Trend*, 70 MARQ. L. REV. 320, 321 (1987) available at <http://scholarship.law.marquette.edu/mulr/vol70/iss2/>. Economic loss is the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. *Id.* Economic loss, which includes the cost of repairs, cost of replacement and loss of profits, consists of both direct loss and consequential loss. Direct economic loss is the difference between the value of what is received and its value as represented. Consequential economic loss includes all indirect loss, such as the loss in profits resulting from the purchaser’s inability to use the defective profit. *Id.*

<sup>114</sup> *Id.* at 320.

for pure economic loss.<sup>115</sup> Here the court described the risks associated with granting economic loss on its own as, “liability in an indeterminate amount, for an indeterminate time, to an indeterminate class.”<sup>116</sup> The court in *Seely v. White Motor Co.* articulated the economic loss rule. The plaintiff purchased a truck to use in his business for heavy-duty hauling.<sup>117</sup> The plaintiff’s vehicle, however, bounced violently and the plaintiff discovered that the brakes did not work.<sup>118</sup> Therefore, the plaintiff brought an action against the dealership where the vehicle was purchased and the manufacturer for: (1) damages, related to the accident, for the repair of the truck; and (2) damages, unrelated to the accident, for the money he paid on the purchase price and for the profits lost in his business because he was unable to make normal use of the truck.<sup>119</sup> The court explained that “a consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market.”<sup>120</sup> He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.<sup>121</sup>

In the 1980s, restrictions on plaintiffs’ ability to recover for economic loss gained momentum. In 1985, in *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, the United States Supreme Court succinctly stated the economic loss rule, after which it was more broadly adopted throughout the country.<sup>122</sup> Here the Supreme Court said, “A manufacturer in a commercial relationship has no duty under either negligence or strict products-liability theory to prevent a product from injuring itself.”<sup>123</sup> Since this time, more jurisdictions have abided by this reasoning and the majority rule is that there should be no recovery under tort law where there is only pure economic loss.<sup>124</sup>

That being said, some courts have departed from the ma-

<sup>115</sup> *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

<sup>116</sup> *Id.*

<sup>117</sup> *Seely v. White Motor Co.*, 403 P.2d 145, 145-46 (Cal. 1965).

<sup>118</sup> *Seely*, 403 P.2d at 145-46. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 151.

<sup>121</sup> *Id.*

<sup>122</sup> *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986).

<sup>123</sup> *E. River S.S. Corp.*, 476 U.S. at 871.

<sup>124</sup> *Bellehumeur*, *supra* note 113, at 320.

jury to allow recovery of pure economic loss either as a form of property damage or allowed recovery of economic loss on its own. There is now a complicated framework where pure economic loss is recoverable under tort law in certain jurisdictions, but not others. A ruling in one of the more famous automobile disputes, that involved Ford Explorers equipped with Bridgestone/Firestone ("Firestone") tires, illustrated this framework. In *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, defendants brought a motion to dismiss arguing that plaintiffs' negligence claims were barred by the economic loss doctrine where plaintiffs asserted injuries in the form of one or more damaged tires after experiencing tread separation.<sup>125</sup> The court agreed with defendants that negligence claims were barred under Tennessee law, citing authority stating that, "Tennessee has joined those jurisdictions which hold that product liability claims resulting in pure economic loss can be better resolved on theories other than negligence."<sup>126</sup> Then the court cited *E. River S.S. Corp.*, explaining that damage to a defective product itself generally is treated as economic loss not recoverable in tort, but rather "most naturally understood as a warranty claim."<sup>127</sup> The court then dismissed the action against Firestone which was headquartered in Tennessee.<sup>128</sup> The court, however, then explained that that in the alternative, Michigan allows negligence claims to be pursued for pure economic loss and accordingly denied the motion to dismiss with respect to negligence claims against Ford which was headquartered in Michigan.<sup>129</sup>

With limitations placed on recovering for pure economic loss under tort law, plaintiffs have increasingly argued for the recovery of such losses under alternative legal theories.<sup>130</sup> In *Kwikset Corp. v. Superior Court*, a plaintiff filed a complaint alleging unfair competition and false advertising claims for a locket inaccurately labeled "Made in U.S.A."<sup>131</sup> The plaintiff then amended the complaint alleging that he purchased Kwikset's lockets and

<sup>125</sup> *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1104 (S.D. Ind. 2001).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1105.

<sup>129</sup> *Id.*

<sup>130</sup> See, e.g., Arnold Gene Rubin, *Products Liability: Expanding the Property Damage Exception in Pure Economic Loss Cases*, 54 CHI.-KENT L. REV. 963, 970 (1978) (discussing the expansion of property exception in pure economic loss cases).

<sup>131</sup> *Kwikset Corp. v Superior Court*, 51 Cal. 4th 310, 316 (2011).

would not have done so but for the “Made in U.S.A.” label.<sup>132</sup> The defendant tried to argue that the plaintiff had insufficient standing to sue.<sup>133</sup> The California Supreme Court, however, dismissed the argument that plaintiffs got the benefit of their bargain and therefore no money or property had been lost in the original transaction.<sup>134</sup> According to the Supreme Court, this reasoning was flawed.<sup>135</sup> It falsely assumed that plaintiff could turn around and sell the lockets to someone else for the same price, and that there would be no transaction costs involved in such a sale.<sup>136</sup> At the very least, sufficient standing to sue existed where plaintiff purchased a product and had in its place a product they valued at less than what they paid.<sup>137</sup> According to the Supreme Court, locks that were falsely advertised as made in the United States could be worthless to a consumer even if the locks were fully functional.<sup>138</sup>

#### *E. Landmark Safety Improvements*

A number of important safety requirements were enacted contemporaneously with the National Traffic and Motor Vehicle Safety Act. With the increased number of product liability lawsuits following the National Traffic and Motor Vehicle Safety Act’s implementation, however, certain safety defects have been heavily litigated. While it is not possible to state conclusively that this litigation directly resulted in the implementation of safety improvements to address these defects, often times important safety improvements have been adopted following such litigation. Along these lines, landmark safety improvements that have followed contested litigation include: (1) shielding gas tanks; (2) strengthening automobile frames; (3) requiring the installation of airbags; and (4) improving tire tread through more fastidious reporting requirements.

<sup>132</sup> *Kwikset Corp.*, 51 Cal. 4th at 316.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 332-34.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 335.

<sup>138</sup> *Id.* at 317-25; “[P]laintiffs who can truthfully allege they were deceived by a product’s label into spending money to purchase the product, and would not have purchased it otherwise, have ‘lost money or property’ within the meaning of Proposition 64 and have standing to sue.” *Id.* at 317.

### 1. Gas Tanks Located within Automobile Frames

Gas tanks originally had no location standards for their placement. Therefore, for various reasons which typically had to do with cost, some manufacturers installed gas tanks in areas of a vehicle that made them vulnerable to a puncture in a rear-end or side impact collision.<sup>139</sup> However, *Grimshaw v. Ford Motor Co.* and other lawsuits, such as those against General Motors for a “side saddle” gas tank, motivated the adoption of requirements for fuel tank performance during collisions.<sup>140</sup> Gas tanks are now universally located within a vehicle’s rigid frames.

### 2. Strengthening Frames

In addition to ensuring that vulnerable vehicle components, such as gas tanks, are sheltered within the frame of a vehicle, product liability litigation has resulted in the more sturdy design of frames altogether. Strengthened standards for roof strength show the impact of such litigation. As early as the 1960s, manufacturers have been sued over the inadequacy of vehicle roof strength.<sup>141</sup> After plaintiffs successfully brought a lawsuit against Buick when the roof of one such vehicle collapsed crushing a passenger, the court held that “it is the obligation of the automobile manufacturer to provide more than a movable platform capable of transporting passengers from one point to another.”<sup>142</sup> In 1971, following this and similar lawsuits, the National Highway Safety Bureau (the precursor to NHTSA) started developing its initial safety standards regulating roof strength to ensure that vehicles could withstand pressure on their roofs if they were forced to roll over during an accident.<sup>143</sup>

Recently, a passenger won one of the largest court judgments linking vehicle roof strength to a severe injury in a rollover accident. A Chevy Blazer passenger won a lawsuit for \$18.6 million against General Motors when her vehicle rolled over and its roof collapsed more than eight inches paralyzing her.<sup>144</sup> After her

<sup>139</sup> *Grimshaw*, 119 Cal. App. 3d at 757.

<sup>140</sup> *Id.* For an example of another case that motivated the adoption of requirements for fuel tanks see *Bloyed v. Gen. Motors Corp.*, 881 S.W.2d 422 (Tex. App. 1994).

<sup>141</sup> *Dyson v. Gen. Motors Corp.*, 298 F. Supp. 1064, 1073 (E.D. Pa. 1969).

<sup>142</sup> *Dyson*, 298 F. Supp. at 1073.

<sup>143</sup> 49 C.F.R. § 571.216 (2014).

<sup>144</sup> *Court Upholds Verdict in Roof Crush Case*, AUTOSAFETY.ORG, <http://www.autosafety.org/court-upholds-verdict-roof-crush-case-0> (last visited

victory in the lawsuit, the passenger said, "I hope my case will be reason for GM to improve the roofs of these vehicles so what happened to me doesn't continue to happen."<sup>145</sup>

In 2009, NHTSA approved a rule that imposed even stronger standards for roof strength. The rule, which has recently come into effect, imposes certain strength to weight standards, maximum intrusion limits and headroom requirements.<sup>146</sup> The new regulation doubles the current roof strength requirement for light weight vehicles, specifying that both the driver and passenger side of the roof must be capable of withstanding a force equal to three times the weight of the vehicle.<sup>147</sup> Heavier vehicles, which have never been regulated, must now be able to withstand weight equal to 1.5 times the weight of the vehicle on each side of the roof.<sup>148</sup> Upon announcement of the rule, the Secretary of Transportation stated, "Rollovers are the deadliest crashes on our highways and today's rule will help occupants survive these horrific events."<sup>149</sup>

### 3. Airbags

As previously discussed, the failure of vehicles to include airbags was a matter heavily litigated in accidents where evidence existed that the inclusion of an airbag could have prevented an injury or death. Vehicle manufacturers began developing airbag technology in the 1950s and started testing the technology in vehicles in the 1960s.<sup>150</sup> General Motors even offered airbags as an option in certain models by the mid-1970s.<sup>151</sup> By 1988, however, only 2% of new vehicles were equipped with airbags.<sup>152</sup>

While the majority of courts sided with manufacturers agreeing that such litigation was preempted by federal crash pro-

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Feb. 1, 2014).

<sup>145</sup> *Id.*

<sup>146</sup> NHTSA, Press Release, *U.S. DOT Doubles Roof Strength Standard for Light Vehicles* (Apr. 30, 2009), available at <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2009/U.S.+DOT+Doubles+Roof+Strength+Standard+for+Light+Vehicles,+Announces+First+Ever+Standards+for+Heavier+Vehicles>.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> AMERICAN ASSOCIATION FOR JUSTICE, *Driven to Safety: How Litigation Spurred Auto Safety Innovations* 8 (2010), available at [http://www.justice.org/cps/rde/xbcr/justice/Driven\\_to\\_Safety.pdf](http://www.justice.org/cps/rde/xbcr/justice/Driven_to_Safety.pdf).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

tection standards specifically addressing airbags and related safety technology, a minority of courts found in the opposite. These courts allowed plaintiffs to argue the merits of their lawsuits, in particular that vehicle manufacturers knew that the absence of airbags made vehicles less safe. As a result of these lawsuits and increased publicity surrounding the subject, NHTSA required all automotive vehicles sold in the United States to be equipped with either an airbag or automatic seat belts by 1990.<sup>153</sup> In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act providing that NHTSA require both driver and passenger airbags in all vehicles by 1998.<sup>154</sup> Vehicle manufacturers have since been installing airbags as a standard safety feature.

#### 4. Tires

Ford Explorers equipped with Firestone tires were blamed for dozens of deaths and hundreds of injuries.<sup>155</sup> It was alleged that the tread on tires would separate causing vehicles to rollover.<sup>156</sup> In 2000, as a result of this alleged defect, Ford faced hundreds of lawsuits seeking hundreds of millions of dollars.<sup>157</sup> Some of these lawsuits were unsuccessful, some settled out of court and a few earned favorable verdicts. In a Texas case, a plaintiff sought \$1 billion in damages after suffering permanent paralysis when a faulty tire caused her Ford Explorer to roll over.<sup>158</sup> The plaintiff ultimately settled for a reported \$7.5 million.<sup>159</sup>

With lawsuits pending and an increasing number of complaints being received through its channels, in May 2000, NHTSA issued a letter to Ford and Firestone requesting information on the high rate of tire failure on certain vehicle models such as Ford Explorers.<sup>160</sup> Ford investigated the matter and found that certain models of 15-inch Firestone tires had exceed-

<sup>153</sup> Theroff, *supra* note 91, at 619.

<sup>154</sup> *Id.*

<sup>155</sup> John Greenwald, *Inside the Ford/Firestone Fight*, TIME, May 29, 2001, <http://content.time.com/time/business/article/0,8599,128198,00.html>.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Robert Manor, *Firestone Settles Tire Suit in Texas*, CHICAGO TRIBUNE (Aug. 25, 2001), [http://articles.chicagotribune.com/2001-08-25/news/0108250169\\_1\\_bridgestone-marisa-rodriguez-firestone-tires](http://articles.chicagotribune.com/2001-08-25/news/0108250169_1_bridgestone-marisa-rodriguez-firestone-tires).

<sup>159</sup> *Id.*

<sup>160</sup> NHTSA, *Firestone Tire Recall*, available at <http://www.nhtsa.gov/PR/FirestoneRecall> (last visited Feb. 1, 2014).

ingly high failure rates, in particular with tread peeling off.<sup>161</sup> The problems were linked to particular plant in Illinois that ultimately closed.<sup>162</sup> In August 2000, Ford and Firestone announced jointly that Firestone would recall approximately 14.4 million tires that contained a safety-related defect of which it was estimated that 6.5 million of the tires were still on the road.<sup>163</sup> The recall involved replacing tires manufactured at the closed plant with similar tires manufactured at different plants, other Firestone models and competitor's tires.<sup>164</sup>

In addition to forcing Firestone to recall and replace millions of defective tires, investigations into Ford and Firestone have also been attributed with leading to the TREAD Act. In 2001, the United States Congress conducted a series of hearings into the matter.<sup>165</sup> At these hearings, it was asserted that Ford and Firestone had misrepresented important facts in reports related to the safety defect involved in the matter.<sup>166</sup> It was believed that laws sanctioning manufacturers misleading reports would help prevent NHTSA from receiving such reports in the future. The TREAD Act, which was then adopted, now provides criminal penalties for misleading the Secretary of Transportation with respect to safety defects.<sup>167</sup> While the TREAD Act did not apply retroactively to Ford and Firestone, a manufacturer of tires or other automotive parts will now be fined for behavior similar to that employed by Ford and Firestone.

## II. TOYOTA MDL CASE BACKGROUND

### A. *Previous Unintended Acceleration Lawsuits*

Prior to unintended acceleration being alleged in certain Toyota and Lexus model vehicles manufactured by Toyota Motor Corp., unintended acceleration had already been alleged in vehicles manufactured by other companies.<sup>168</sup> During the 1980s,

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Transportation Recall Enhancement, Accountability, and Documentation Act of 2000, 49 U.S.C.A §§ 30101-30183 (West 2014).

<sup>168</sup> John Holusha, *A Hard Sell for Audi*, N.Y. TIMES (Jul. 24, 1988), <http://www.nytimes.com/1988/07/24/business/a-hard-sell-for-audi.html?scp=14&sq=audi%20sudden%20acceleration&st=cse>.

NHTSA investigated reports of sudden surges of power in several dozen models manufactured by nearly two-dozen different companies.<sup>169</sup> While some of these alleged incidents were supported by reputable sources, one set of allegations had been highly criticized for its lack of scientific rigor and devastating impact on the manufacturer of the vehicles for which it was alleged.<sup>170</sup>

In November of 1986, *60 Minutes* aired a segment entitled “Out of Control,” featuring interviews with several individuals who were suing Audi for such surges.<sup>171</sup> The report featured footage of an Audi vehicle surging out of control while the brake pedal was depressed. It was later learned that producers of the *60 Minutes* segment had modified the vehicle by fitting a canister of compressed air on the passenger-side floor that was linked by a hose to a hole drilled into the transmission.<sup>172</sup>

NHTSA later determined that the majority of unintended acceleration reports, including those brought by the individuals interviewed in the *60 Minutes* segment were the result of driver error.<sup>173</sup> However, in what many have attributed to the negative publicity caused by the *60 Minutes* segment and other media, Audi’s United States’ sales, which had reached nearly 80,000 vehicles in 1985, dropped to below 13,000 vehicles in 1991 and remained at the level for several years.<sup>174</sup> This represented a decrease in sales by 69%.<sup>175</sup>

With the history of unintended acceleration allegations as a backdrop, it is understandable that manufacturers and regulators were originally skeptical of similar allegations when they first arose with Toyota Motor Corp.’s Toyota and Lexis model vehicles.

### B. *Toyota Motor Corporation Recalls*

The most high-profile Toyota Motor Corp. unintended acceleration occurred at the end of 2009. On August 28, 2009, an off-duty California Highway Patrol Officer Saylor lost control of

<sup>169</sup> *Id.*

<sup>170</sup> Andreas Cremer & Tom Lavell, *Audi 1980s Scare May Mean Lost Generation for Toyota Sales*, BLOOMBERG (Feb. 4, 2010, 8:02 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFAbB4LZ3h6A>.

<sup>171</sup> *Out of Control*, 60 MINUTES (CBS television broadcast Nov. 23, 1986).

<sup>172</sup> *Id.*

<sup>173</sup> Cremer, *supra* note 170.

<sup>174</sup> *Id.*

<sup>175</sup> Polinsky & Shavell, *supra* note 2, at 1444.

a Lexus he was driving and crashed with his whole family in the vehicle.<sup>176</sup> As the vehicle accelerated to over 100 miles per hour, the officer called 911 asserting that his vehicle was accelerating and could not be stopped.<sup>177</sup> In the call a passenger can be heard saying, “We’re in trouble. There’s no brakes.”<sup>178</sup> Immediately before the vehicle crashed, the officer stated, “We’re approaching the intersection. Hold on! Hold on and pray. Pray!” The vehicle then crashed killing the driver and passengers.<sup>179</sup>

NHTSA’s Office of Defects Investigation inspected the crash site on September 3, 2009. The vehicle was subsequently inspected by the NHTSA Vehicle Research and Test Center. NHTSA filed a report on September 30, 2009 where investigators explained the following. First, the vehicle was a loaned Lexus traveling at a very high rate of speed that failed to stop.<sup>180</sup> Second, the driver was a 19-year veteran of the California Highway Patrol.<sup>181</sup> Third, the cause of the crash was “very excessive speed.”<sup>182</sup> Finally, the customer who had previously used the same loaner vehicle reported an unwanted acceleration event of speeds in excess of eighty miles per hour.<sup>183</sup>

The San Diego County Sherriff’s Department also inspected the vehicle and saw evidence that “all-weather” heavy-duty rubber floor mats trapped the accelerator pedal.<sup>184</sup> According to the San Diego County Sherriff’s Department, it was apparent that the floor mats were not appropriate for the vehicle, had been stacked in the driver footwell and were unsecured.<sup>185</sup> Ultimately, the crash was blamed on the floor mats forcing the accelerator pedal down. The ability to perform tests on the vehicle, however, was limited because it had been completely destroyed.<sup>186</sup>

<sup>176</sup> *Victims’ Family’s Plea to Toyota*, CBS NEWS (Feb. 24, 2010, 7:36 AM), [http://www.cbsnews.com/2100-500202\\_162-6237847.html](http://www.cbsnews.com/2100-500202_162-6237847.html).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Chris Woodyard, *Toyota to Pay \$1.1B in ‘Unintended Acceleration’ Cases*, USA TODAY (Dec. 26, 2012, 8:27 PM), <http://www.usatoday.com/story/money/cars/2012/12/26/toyota-unintended-acceleration-runaway-cars/1792477/>; *Victims’ Family’s Plea to Toyota*, *supra* note 176.

<sup>184</sup> *Victims’ Family’s Plea to Toyota*, *supra* note 176.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

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At this time, other incidents where drivers experienced similar phenomenon were being reported and the issue of unintended acceleration quickly grabbed national headlines. Initially, Toyota Motor Corp. asserted that these events, including the Saylor crash could be attributed to floor mat entrapment that involved dislodged floor mats trapping accelerator pedals forcing vehicles to accelerate out of control. Toyota Motor Corp. and NHTSA warned drivers to remove all-weather heavy-duty rubber floor mats because of the possibility that the mats would depress accelerator pedals leading to unintended acceleration.<sup>187</sup> In November 2009, there was a recall to correct what was referred to as “pedal entrapment” whereby a floor mat would slip into the floor pedal well and apply pressure to the accelerator pedal.<sup>188</sup> This involved Toyota Motor Corp. issuing a floor mat recall affecting 4.2 million Toyota and Lexus model vehicles which was later expanded to include 5.3 million vehicles.<sup>189</sup> The recall involved replacing all-weather heavy-duty rubber floor mats with thinner mats.<sup>190</sup>

Even after floor mats were recalled, however, Toyota Motor Corp. continued to receive reports of unintended acceleration.<sup>191</sup> Following these reports, in January 2010, Toyota Motor Corp. informed NHTSA that there may also be a problem with sticking accelerator pedals.<sup>192</sup> As directed by NHTSA, Toyota Motor Corp. initiated a recall for sticking accelerator pedals affecting 2.3 million vehicles.<sup>193</sup> The recall involved shaving down the accelerator pedal to reduce the risk of floor mat entrapment.<sup>194</sup>

On February 16, 2010, the Department of Transportation

<sup>187</sup> Hibah Yousuf, *Toyota: 3.8 Million Cars with Risky Floor Mats*, CNN MONEY (Oct. 2, 2009, 3:05 PM), [http://money.cnn.com/2009/09/29/news/companies/toyota\\_lexus\\_floor\\_mats/](http://money.cnn.com/2009/09/29/news/companies/toyota_lexus_floor_mats/).

<sup>188</sup> Healey, *supra* note 64.

<sup>189</sup> *Id.*

<sup>190</sup> *Customer FAQs Regarding the Sticking Accelerator Pedal and Floor Mat Pedal Entrapment Recalls*, [http://pressroom.toyota.com/article\\_print.cfm?article\\_id=1861](http://pressroom.toyota.com/article_print.cfm?article_id=1861) (last visited Feb. 1, 2014).

<sup>191</sup> Healey, *supra* note 64.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Toyota Announces Details of Remedy to Address Potential Accelerator Pedal Entrapment*, <http://web.archive.org/web/20091221013729/http://pressroom.toyota.com/pr/tms/toyota/toyota-consumer-safety-advisory-102572.aspx> (last visited Feb. 1, 2014).

ordered Toyota Motor Corp. to turn over documents related to its recalls so that NHTSA could determine how long the company knew of safety defects before taking action.<sup>195</sup> In April of 2010, as a result of NHTSA's investigation into these documents and other sources, Toyota Motor Corp. agreed to pay the maximum penalty of approximately \$16 million for failure to notify NHTSA within five days of learning about its "sticky" accelerator pedal defect.<sup>196</sup> In December 2010, Toyota was fined another maximum of approximately \$16 million by the Department of Transportation for the manner in which the company handled its recalls related to floor mats that could trap accelerator pedals.<sup>197</sup>

### *C. Congressional Hearings*

On February 23, 2010, congressional hearings started where Toyota Motor Corp. executives appeared before Congress. The President and CEO of Toyota Motor Corp. testified before the Committee on Oversight and Government Reform of the United States House of Representatives.<sup>198</sup> The President and Chief Executive Officer of Toyota Motors North America testified in Senate Sub-Committee hearings.<sup>199</sup> Both apologized for the recent safety concerns and related recalls.<sup>200</sup>

The congressional hearings also included expert testimony from a consumer advocate, Sean Kane of Safety Research & Strategies. He presented findings based on his organization's February 2010 report, "Toyota Sudden Unintended Acceleration." The report explained that unintended acceleration had been a longstanding problem with Toyota Motor Corp. vehicles.<sup>201</sup> According to the report since 1999, over 2,000 Toyota and Lexus owners reported to NHTSA, the media, the courts and to

<sup>195</sup> Ben Rooney, *U.S. Demands Toyota Recall Documents*, CNN MONEY (Feb. 16, 2010, 3:27 PM), [http://money.cnn.com/2010/02/16/autos/Toyota\\_NHTSA/](http://money.cnn.com/2010/02/16/autos/Toyota_NHTSA/).

<sup>196</sup> NHTSA, Press Release, *Toyota Motor Corp. Will Pay \$32.425 Million in Civil Penalties as Result of Two Department of Transportation Investigations* (Dec. 20, 2010), <http://www.nhtsa.gov/PR/DOT-216-10>.

<sup>197</sup> *Id.*

<sup>198</sup> *Toyota President Testifies Before Congress*, CNN POLITICS (Feb. 24, 2010, 7:55 PM), <http://www.cnn.com/2010/POLITICS/02/24/toyota.hearing.updates/>.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Sean Kane et al., *Toyota Unintended Acceleration*, SAFETYRESEARCH.NET 1 (Feb. 5, 2010), available at <http://www.safetyresearch.net/Library/ToyotaSUA020510FINAL.pdf>.

Safety Research & Strategies that their vehicles have accelerated suddenly and unexpectedly.<sup>202</sup> Moreover, according to the report, these incidents had resulted in 815 crashes, 341 injuries and 19 deaths.<sup>203</sup> The report also cast doubt on Toyota Motor Corp.'s ability to properly identify the problems and fix them, explaining that nearly 1,000 reports came from drivers of vehicle models that were not recalled and that drivers reported unintended acceleration even when no all-weather floor mats were present in their vehicles.<sup>204</sup>

Further, a scientific expert presented at the congressional hearings. Professor David Gilbert of Southern Illinois University, who was also separately interviewed by ABC news, explained that he could induce sudden unintended acceleration in a Toyota Motor Corp. vehicle and the phenomenon would not even trigger an error code.<sup>205</sup> Dr. Gilbert explained that there was an electronic design flaw in Toyota Motor Corp.'s "Fail Safe" system.<sup>206</sup> Gilbert said the flaw prevents the car's onboard computer from detecting and stopping certain short circuits that can trigger sudden speed surges.<sup>207</sup> Because the computers would not record an error code in this situation, Dr. Gilbert said that they could not activate the fail safe system designed to shut down the power.<sup>208</sup> According to Dr. Gilbert, the flaw was related to Toyota Motor Corp.'s Electronic Throttle Control ("ETC"), a type of vehicle technology that relays electronic signals between the accelerator pedal to the throttle rather than having a mechanical linkage.<sup>209</sup> Dr. Gilbert's work was reviewed by other academics who viewed the research as "sensible" and "reasonable" starting point for investigations, although not necessarily conclusive.<sup>210</sup>

Around this time, the Wall Street Journal published an article explaining the difficulty in using Toyota Motor Corp.'s Event Data Recorders ("EDR"s) to evaluate allegations of unin-

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 2.

<sup>205</sup> Rep. Bart Stupak, *Update on Toyota and NHTSA's Response to the Problem of Sudden Unintended Acceleration*, ENERGY COMMERCE 1 (2010), <http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-OI-Toyota-NHTSA-Response-Sudden-Unintended-Acceleration-2010-5-20.pdf>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

tended acceleration. EDRs are devices installed in automobiles that record technical vehicle and occupant information for a brief time period before, during and after a crash.<sup>211</sup> EDRs may record such information as pre-crash vehicle dynamics and system status, driver inputs, vehicle crash signature, restraint usage/deployment status, and post-crash data such as the activation of an automatic collision notification system.<sup>212</sup> However, while U.S. automobile manufacturers have made their EDRs easily readable by third party devices, only one reader existed for Toyota Motor Corp. model vehicles and was located at Toyota Motor Corp.'s headquarters.<sup>213</sup> Toyota Motor Corp. insisted that the situation was temporary, as it was still working on its EDRs. Nonetheless, the inability to interpret EDR data hindered analysis of alleged unintended acceleration events.<sup>214</sup>

Allegations against Toyota Motor Corp. were especially damaging for the manufacturer because the company had built its reputation on safety. In the United States, Toyota Motor Corp. had aggressively marketed its vehicles as synonymous with safety, which helped it become one of the country's top selling automobile manufacturers.<sup>215</sup> Toyota Motor Corp. therefore hired a public relations firm to help it rebrand its image.<sup>216</sup> Polls conducted by the firm revealed that "debunking" the credibility of Dr. Gilbert's testing was critical for restoring confidence among educated consumers and reassuring audiences that ETC is in fact "NOT" an issue.<sup>217</sup>

Toyota Motor Corp. hired Exponent, a scientific consulting firm, to evaluate Dr. Gilbert's testing. On March 8, 2010, Toyota held a press conference to release a report, entitled "Evaluation of the Gilbert Demonstration" prepared by Exponent.<sup>218</sup>

<sup>211</sup> Dionne Searcey & Kate Linebaugh, *Toyota Woes Put Focus on Black Box*, WALL STREET JOURNAL (Feb. 14, 2010), <http://online.wsj.com/news/articles/SB10001424127887323375204578269181060493750>.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Chester Dawson, *Toyota Again World's Largest Auto Maker*, WALL ST. J., (Jan. 28, 2013, 7:16 PM), <http://online.wsj.com/news/articles/SB10001424127887323375204578269181060493750>.

<sup>216</sup> STUPAK, *supra* note 205, at 1-2.

<sup>217</sup> *Id.*

<sup>218</sup> See Evaluation of the Gilbert Demonstration, EXPONENT (2010), available at [http://pressroom.toyota.com/images/document/GILBERT-Evaluation\\_of\\_the\\_Gilbert\\_Demonstration\\_1\\_.pdf](http://pressroom.toyota.com/images/document/GILBERT-Evaluation_of_the_Gilbert_Demonstration_1_.pdf) (offering a detailed analysis

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At the press event, before Exponent presented its findings, a Toyota Motor Corp. spokesman attacked Dr. Gilbert's work for being, as the spokesman referred to it as, "paid for by an advocate for trial lawyers."<sup>219</sup> Exponent then defended Toyota Motor Corp.'s ETC systems and explained that it failed to reproduce unintended acceleration in any of its experimentation. Further, according to Exponent, which focused on duplicating the electronic interference induced by Dr. Gilbert, "for such an event to happen in the real world requires a sequence of faults that is extraordinarily unlikely."<sup>220</sup>

In addition to continuing to defend its ETC systems, Toyota Motor Corp. also refocused its safety campaigns. Rather than simply advertising its vehicles as safe or focusing on one safety feature in particular, Toyota Motor Corp. marketed itself as the only full-line manufacturer of vehicles with five safety features that it labeled its Star Safety System. The Star Safety System included: (1) vehicle stability control; (2) traction control; (3) antilock brakes; (4) electronic brake-force distribution; and (5) brake assist.<sup>221</sup>

#### D. NHTSA and NASA Study

After the congressional hearings, significant controversy existed as to whether all causes of unintended acceleration could be linked to the mechanical failures already identified by Toyota Motor Corp. or whether there were also electronic failures resulting in unintended acceleration. The United States Congress therefore requested that NHTSA and the National Aeronautics and Space Administration ("NASA") conduct a study evaluating possible causes of unintended acceleration.<sup>222</sup> Pursuant to this re-

of Dr. Gilbert's demonstration).

<sup>219</sup> STUPAK, *supra* note 205, at 2.

<sup>220</sup> EXPONENT, *supra* note 218, at vi-vii; Toyota asserted that the firm was an independent expert that evaluated the potential for unintended acceleration in its vehicles and found nothing supporting allegations of such. The media, however, criticized Exponent as being biased and the methodology used by the firm was also attacked. STUPAK, *supra* note 205, at 2. The Chairman of the Committee on Energy and Commerce said that "[t]he Exponent report on Dr. Gilbert's research was a hit job, not solid science." STUPAK, *supra* note 205, at 2.

<sup>221</sup> Dexter Ford, *What's So Special About Toyota's Star Safety System*, N.Y. TIMES (June 29, 2010), [http://wheels.blogs.nytimes.com/2010/06/29/whats-so-special-about-toyotas-star-safety-system/?\\_r=0](http://wheels.blogs.nytimes.com/2010/06/29/whats-so-special-about-toyotas-star-safety-system/?_r=0).

<sup>222</sup> NHTSA-NASA *Study of Unintended Acceleration in Toyota Vehicles*,

quest, NHTSA and NASA's conducted such a study over a period of ten months, analyzing several potential causes of unintended acceleration.<sup>223</sup>

A report summarizing NHTSA and NASA's findings was released to the public in February of 2011. The report revealed testing of both possible mechanical and electrical failures, including what was asserted as the most exacting study of motor vehicle ETC systems ever conducted by a government agency.<sup>224</sup> NHTSA asserted that it had identified two types of mechanical defects as causes of unintended acceleration, pedal entrapment and sticky pedal which had both already been addressed by Toyota Motor Corp.<sup>225</sup> No electronic defects, however, were identified.<sup>226</sup> Instead NASA found that many safety features were designed into Toyota Motor Corp.'s ETC systems to prevent unintended acceleration and, if faults are detected, safe modes are initiated which limit acceleration such as fuel cut strategies. NASA also did not find flaws in the software code controlling Toyota Motor Corp.'s ETC systems or that electromagnetic interference would result in unintended acceleration when it exposed vehicles to interference at above current certification standards.<sup>227</sup>

In conducting their investigations, NHTSA and NASA also reviewed consumer complaints. When the agencies made their report public, both agencies discussed the recent large increase in consumer complaints of unintended acceleration. According to NHTSA and NASA, publicity surrounding NHTSA's investigation was the major contributor to the large increase in complaints, related recalls and the congressional hearings.<sup>228</sup>

### III. TOYOTA MDL PROCEEDINGS

#### *A. Organizational Plan and Appointment of Counsel*

On March 5, 2010, approximately 150 lawyers assembled

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<http://www.nhtsa.gov/UA> (last visited Feb. 1, 2014).

<sup>223</sup> *Id.*

<sup>224</sup> NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, TECHNICAL ASSESSMENT OF TOYOTA ELECTRONIC THROTTLE CONTROL (ETC) SYSTEMS at vii (2011). *See also*, NHTSA-NASA *Study of Unintended Acceleration in Toyota Vehicles*, <http://www.nhtsa.gov/UA> (last visited Feb. 1, 2014).

<sup>225</sup> NHTSA, *supra* note 224, at vii.

<sup>226</sup> *Id.* at vii-viii.

<sup>227</sup> *Id.* at vii.

<sup>228</sup> *Id.* at viii.

in Chicago to discuss sharing experts and legal strategy in litigation against Toyota Motor Corp. for unintended acceleration, in what at that time included over 80 lawsuits.<sup>229</sup> Following the meeting and the fallout from the congressional hearings, the number of lawsuits continued to rise sharply.<sup>230</sup> On April 9, 2010, a U.S. Judicial Panel on Multidistrict Litigation decided that approximately 200 lawsuits against Toyota Motor Corp. for issues related to sudden unintended acceleration would be consolidated and heard in the United States District Court for the Central District of California.<sup>231</sup>

At the end of April, plaintiffs' attorneys began to apply to serve as lead counsel for the Toyota MDL that ultimately reached in excess of 50 applicants. On April 30, 2010, three plaintiffs' attorneys who were assigned as temporary lead counsel and Toyota Motor Corp.'s lead counsel filed a joint preliminary report outlining committees that should be established to manage the litigation.<sup>232</sup> Then, on May 14th, 2010, some of the county's most famous plaintiffs' attorneys appeared in the Central District of California before the presiding judge, Judge James Selna, to compete for selection of lead plaintiffs counsel in what was at that time a high profile and potentially lucrative case.<sup>233</sup>

Plaintiffs argued for a robust litigation committee structure which Judge Selna granted in his Order No. 2: Adoption of Organization Plan and Appointment of Counsel. First, Judge Selna appointed a liaison committee for personal injury/wrongful death cases, consisting of two co-lead counsel and seven additional members.<sup>234</sup> Second, Judge Selna appointed a lead counsel

<sup>229</sup> Amanda Bronstad, *Plaintiffs' Lawyers Jockey for Venue in Massive Toyota Litigation*, NATIONAL LAW JOURNAL (Mar. 10, 2010), <http://www.nationallawjournal.com/id=1202446045980>.

<sup>230</sup> Amanda Bronstad, *Toyota Litigation Consolidate Before Judge in Santa Ana, Calif.*, NATIONAL LAW JOURNAL, Apr. 9, 2010, <http://www.nationallawjournal.com/id=1202458960729>.

<sup>231</sup> *Id.*

<sup>232</sup> Amanda Bronstad, *Panel Suggests a Structure for Unwieldy Toyota Litigation*, NATIONAL LAW JOURNAL (May 3, 2010), <http://www.nationallawjournal.com/id=1202457606286>.

<sup>233</sup> Amanda Bronstad, *Judge Agrees to Expand Plaintiffs' Committees in Toyota MDL*, NATIONAL LAW JOURNAL (May 14, 2010), <http://www.nationallawjournal.com/id=1202458281456>.

<sup>234</sup> Order No. 2: Adoption of Organization Plan and Appointment of Counsel 2 (C.D. Cal. May 14, 2010); Appointments for plaintiffs' liaison committee for the personal injury/wrongful death cases included co-lead counsel Elizabeth J. Cabraser and Mark P. Robinson, Jr. Members included Lewis S. Eidson, W. Mark Lanier, Richard D. McCune, W. Daniel "Dee" Miles, Brian

for the economic loss cases, consisting of two co-leads who represent consumer plaintiffs, individual purchasers of vehicles, and one co-lead who represents non-consumer plaintiffs, such as dealerships. Six additional members were also appointed to economic loss cases.<sup>235</sup> Third, Judge Selna appointed a core discovery committee, consisting of the co-lead counsel for the personal injury/wrongful death cases and the co-lead counsel for the economic loss plaintiffs.<sup>236</sup> Fourth, recognizing that separate state and other federal litigation existed, Judge Selna appointed three liaison counsel to the state cases and other types of federal cases to coordinate between the core discovery committee and the state and other federal litigation.<sup>237</sup>

Although Judge Selna recognized that there were different personal injury/wrongful death plaintiffs and economic loss plaintiffs, Judge Selna did not see a conflict in counsel representing both personal injury/wrongful death plaintiffs and economic loss plaintiffs, nor in representing both consumer economic loss plaintiffs and non-consumer economic loss plaintiffs. Here Judge Selna reasoned that because of Toyota Motor Corp.'s depth of financial resources, plaintiffs were not for instance competing for a limited pool of resources to fund any judgment.<sup>238</sup> Judge Selna also stated that he had addressed part of the concern regarding potential conflict by appointing different counsel to leadership positions for each type of claimant.<sup>239</sup>

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Panish, Hunter J. Shkolnik and Donald H. Slavick. Order No. 2: Adoption of Organization Plan and Appointment of Counsel 6 (C.D. Cal. May 14, 2010).

<sup>235</sup> *Id.* at 2; Appointments for plaintiffs' lead counsel committee for economic loss class actions included co-lead counsel Steven W. Berman (consumer), Frank M. Pitre (non-consumer) and Marc M. Seltzer (consumer). Members included Richard J. Arsenault (non-consumer), Benjamin L. Bailey (consumer), Stanley M. Chesley (consumer), Jayne Conroy (consumer), Michael Louis Kelly (consumer) and Jerome L. Ringler (non-consumer). *Id.*

<sup>236</sup> *Id.* at 2.

<sup>237</sup> *Id.* at 6-7; Appointments for plaintiffs' liaison counsel to state and other types of federal cases included Wylie A. Aitken, Dawn M. Barrios and Gretchen M. Nelson. Order No. 2: Adoption of Organization Plan and Appointment of Counsel 6-7 (C.D. Cal. May 14, 2010); Other state litigation has included a case in the California state court. Other federal litigation has included a class action brought by owners of Toyota Motor Corp. stock. The Orange County District Attorney also brought a separate action.

<sup>238</sup> *Id.* at 4-5.

<sup>239</sup> *Id.* at 5.

*B. Plaintiffs' Claims*

## 1. Personal Injury/Wrongful Death

On May 24, 2011, counsel representing plaintiffs who suffered a personal injury or wrongful death filed a Complaint for Damages (hereinafter referred to as, "Personal Injury Complaint"). The Personal Injury Complaint advanced causes of action for: (1) Negligence; (2) Strict Products Liability: Design Defect; (3) Strict Products Liability: Failure to Warn; (4) Breach of Implied Warranty of Merchantability; and (5) Fraudulent Concealment.<sup>240</sup> While each cause of action required a showing of its own necessary elements, overall the Personal Injury Complaint generally sought to show that Toyota Motor Corp. vehicles were defective and that Toyota Motor Corp. was aware or should have been aware of this defect.

In arguing that a defect existed, counsel cited to the mechanical failures already recognized by Toyota Motor Corp. and electronic failures that the manufacturer did not acknowledge. According to the Personal Injury Complaint, Toyota Motor Corp.'s ETC systems are susceptible to malfunction and Toyota Motor Corp. did not include adequate safety technology if such a malfunction occurred.<sup>241</sup> As alleged in the Personal Injury Complaint, certain Toyota Motor Corp. models were defective because, among other allegations: (1) "the [ETC systems] and its components are highly susceptible to malfunction caused by various electronic failures;" and (2) they "lack a brake override system ["BOS"], meaning that the driver is unable to manually stop or slow the engine during [un unintended acceleration] incident by stepping on the breaks."<sup>242</sup>

To demonstrate Toyota Motor Corp. had knowledge of a defect, counsel argued that Toyota Motor Corp. officials had both actual and constructive knowledge of both mechanical and electronic defects. First, some internal reports showed that unintended acceleration was linked to mechanical defects and other reports indicated that electronic defects were at least a contributing factor.<sup>243</sup> Second, with respect to electronic defects, installing BOS had become standard in other manufacturer's vehicles with

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<sup>240</sup> Complaint for Damages at ii, *Spisto v. Toyota Motor North America et. al.*, No. CV11-04479 CBM (RZx) (C.D. Cal. May 24, 2011).

<sup>241</sup> *Id.* at 2-3.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 1-2.

ETC systems.<sup>244</sup> Similar to arguments that had swayed juries in past product liability lawsuits, plaintiffs' counsel also explained that corporate officials knew that installing BOS would prevent unintended acceleration, but nonetheless decided to forgo installing the technology on their vehicles.<sup>245</sup>

The Personal Injury Complaint also sought punitive damages. According to plaintiffs' counsel, Toyota Motor Corp. had allegedly been aware of the dangers associated with its ETC systems and tried to mask these dangers rather than take appropriate corrective actions.<sup>246</sup> Plaintiffs' counsel asserted that punitive damages would serve to further punish Toyota Motor Corp. and deter future wrongful conduct.<sup>247</sup>

## 2. Economic Loss

On October 27, 2010, counsel representing consumer and non-consumer plaintiffs filed an Amended Economic Master Consolidated Complaint (hereinafter referred to as, "Economic Loss Complaint"). The Economic Loss Complaint, filed before the Personal Injury Complaint, was filed as a class action representing a broad group of plaintiffs.<sup>248</sup> The Economic Loss Complaint further included numerous causes of action, such as Breach of Express Warranty, Breach of Implied Warranty of Merchantability, Revocation of Acceptance, Breach of Contract/Common Law Warranty, Fraud by Concealment and Unjust Enrichment. Among these numerous causes of action, were a myriad of consumer protection causes of action based on federal and state laws, such as Violations of Consumer Legal Remedies Act, Violation of the California Unfair Competition Law, and Violation of the California False Advertising Law.<sup>249</sup> Again, while each cause of action requires proving separate elements, in the Economic Loss

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<sup>244</sup> *Id.* at 3; According to plaintiffs' counsel, from at least 2002, Toyota Motor Corp. "knew or should have known that the state of the art in automotive industry for electronic throttle control systems included the installation of a brake override system." *Id.*

<sup>245</sup> *Id.*; In sum, "the absence of a fail-safe brake override system is particularly dangerous given the susceptibility of the [ETC systems] to malfunction in Toyota vehicles." *Id.* at 9.

<sup>246</sup> *Id.* at 47-48.

<sup>247</sup> *Id.* at 49.

<sup>248</sup> Amended Economic Loss Master Consolidated Complaint, In Re Toyota Motor Corp., No. 8:10ML2151 JVS (FMOx), ii, (C.D. Cal. Oct. 27, 2010).

<sup>249</sup> *Id.* at ii-xviii.

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Complaint counsel essentially argued that parties purchased vehicles that Toyota Motor Corp. advertised as being exceedingly safe but suffered an economic harm when incidents of unintended acceleration revealed that vehicles were not as safe as advertised.<sup>250</sup>

In arguing that Toyota Motor Corp. misrepresented the safety of its vehicles, the Economic Loss Complaint dedicated pages to describing Toyota Motor Corp.'s general assertions about the safety of its vehicles and specific assertions about the safety of its ETC technology.<sup>251</sup> According to plaintiffs' counsel, "Toyota has consistently marketed its vehicles as 'safe' and proclaimed that safety is one of its 'highest corporate priorities.'" Plaintiffs' counsel further alleged that Toyota Motor Corp. had promoted ETC systems as providing "stable vehicle control."<sup>252</sup> Excerpts from annual reports, press kits, brochures, press releases, warranty manuals, magazine advertisements, and commercials are provided to corroborate plaintiffs' assertions.<sup>253</sup>

In arguing that plaintiffs suffered a loss, counsel explained that all purchasers of defective Toyota Motor Corp. vehicles overpaid. As explained by counsel, "A car purchased or leased under the reasonable assumption that it is 'safe' as advertised is worth more than a care know to be subject to the risk of an uncontrollable and possibly life-threatening SUA event."<sup>254</sup> Counsel further provided data demonstrating that as incidents of unin-

<sup>250</sup> *Id.* at 40.

<sup>251</sup> *Id.* at 81.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 81-94; While critical to the Personal Injury Complaint's breach of warranty cause of action but not necessarily the traditional tort causes of action, plaintiffs' personal injury/ wrongful death counsel also explained that Toyota Motor Corp. had misrepresented the safety of its vehicles and these misrepresentations have contributed to a decrease in vehicle value following allegations of unintended acceleration. According to the Personal Injury Complaint, "[s]ince at least 1998, Toyota has continuously promised trust and safety to prospective purchasers and the American public." *Id.* at 8. "Toyota holds its brand out as synonymous with innovation, quality and reliability, claiming that safety and satisfaction are its top priorities." *Id.* The Personal Injury Complaint further asserted that magazines that evaluate vehicle value showed that Toyota Motor Corp. vehicles depreciated significantly when incidents of unintended acceleration were being reported. *Id.* at 17. For instance, following Toyota Motor Corp.'s recalls, Kelley Blue Book lowered its estimated price for recalled models by 2.5% to 3.5%, enough to lower the value of each vehicle by between \$250 and \$800. Chris Isidore, *Toyota's Next Problem: Lawsuits*, CNN MONEY (Feb. 10, 2010) [http://money.cnn.com/2010/02/09/news/companies/toyota\\_lawsuits/](http://money.cnn.com/2010/02/09/news/companies/toyota_lawsuits/).

<sup>254</sup> *Id.* at 184.



tended acceleration were made public, the value of Toyota Motor Corp. vehicles “materially diminished.”<sup>255</sup> In addition to showing marked economic loss in Toyota Motor Corp. vehicles, data also showed that Toyota Motor Corp. vehicles had depreciated at a considerably higher rate than vehicles produced by other manufacturers. For instance, during specific time periods, Camrys had lost more than 2.5 times the value lost by Nissan’s Altimas and Corollas had lost nearly 4 times the value lost by Nissan’s Sentras.<sup>256</sup>

### *C. Toyota Motor Corporation’s Defense*

Toyota Motor Corp.’s defense team was composed of inside and outside counsel. The in-house team was led by the General Counsel for Toyota Motors North America. According to interviews conducted and reported by Automotive News in the middle of 2012, the in-house team dictated the overall strategy for the defense and worked on settlement negotiations.<sup>257</sup> On the other hand, outside counsel, responded to plaintiffs’ pleadings.<sup>258</sup> In-house and outside counsel communicated daily.<sup>259</sup> While Toyota Motor Corp. was reluctant to reveal information on its costs, based on the size of the team, it was estimated that the defense could have cost Toyota Motor Corp. over \$1 million in attorney time alone.<sup>260</sup>

When pressed for their defense strategy by Automotive News, Toyota Motor Corp.’s team explained that in arguing the merits of a possible case it was planning to base its arguments largely on NHTSA and NASA’s scientific studies.<sup>261</sup> The General Counsel for Toyota Motors North America explained, “Factually, I don’t see too many issues we can’t get by.”<sup>262</sup> “If a bunch of rocket scientists couldn’t find anything wrong with our cars, I’m not too worried about plaintiff lawyers.”<sup>263</sup> The General Counsel

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 184-85.

<sup>257</sup> Mark Rehtin, *Toyota’s Towering Defense Task*, AUTOMOTIVE NEWS (June 25, 2012), <http://www.autonews.com/article/20120625/OEM01/306259968/1143#axzz2kx6ipywK>.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

for Toyota Motors North America further explained that Toyota Motor Corp. would not compromise Toyota Motor Corp.'s reputation for engineering and vehicle quality.<sup>264</sup> Toyota Motor Corp.'s team further insisted that it was willing to fight suits to the bitter end in order to protect the company's reputation.<sup>265</sup>

After plaintiffs filed the Economic Loss Complaint, Toyota Motor Corp. filed a motion to dismiss and motion to strike. On May 13, 2011, Judge Selna issued an Order Granting in Part and Denying in Part the Toyota Defendants' Motion to Dismiss Plaintiffs' Second Amended Economic Loss Master Consolidated Complaint and Order Granting in Part and Denying Part Motion to Strike. The order evaluated arguments made by Toyota Motor Corp. that sufficient standing did not exist for various claims made by plaintiffs and that certain statements were inaccurate and should therefore be stricken. As the orders' name indicates, the court granted and denied in part both Toyota Motor Corp.'s motions to dismiss and to strike.<sup>266</sup>

Notable among the arguments evaluated was whether plaintiffs had sufficient standing to sue. In its motion, Toyota Motor Corp. argued that certain plaintiffs offered only "bare and conclusory allegations of economic injury that do not constitute sufficient factual allegations as to their own economic loss" and should therefore be dismissed from the action.<sup>267</sup> Toyota Motor Corp. further explained that an injury resulting in loss or overpayment that is tied to a "market effect" must occur at the time of purchase, but plaintiffs "failed to provide any factual allegations as to how the general 'market effect' actually resulted in them overpaying for their vehicles."<sup>268</sup> Toyota Motor Corp. said that in some instances there was no proof that certain plaintiffs had sold their vehicles at a loss or even attempted to sell their vehicles.<sup>269</sup> Citing *Kwikset*, plaintiffs' counsel asserted that sufficient standing existed regardless of whether the sale of a vehicle had occurred or was anticipated. According to plaintiffs' counsel, a par-

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> Order Granting in Part and Denying in Part the Toyota Defendants' Motion to Dismiss Plaintiffs' Second Amended Economic Loss Master Consolidated Complaint; Order Granting in Part and Denying Part Motion to Strike 14-28 (C.D. Cal. May 13, 2011).

<sup>267</sup> *Id.* at 14; Article III of the United States constitution requires that a plaintiff has personally suffered some actual or threatened injury arising from a defendant's actions.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

ticular plaintiff “was personally exposed to advertisements that emphasized safety, explains that those motivated her to purchase her vehicle, and then concludes that she personally would not have purchased her vehicle or paid as much for it had she known the truth about the defects.”<sup>270</sup> The court decided that plaintiffs met the general standing burdens imposed by the United States Constitution, succinctly stating that “[a] vehicle with a defect is worth less than one without a defect.”<sup>271</sup> Moreover, the court recognized that cognizable economic loss existed at least pursuant to certain consumer protection causes of action<sup>272</sup> and refused to specifically dismiss consumer protection causes of action for lack of standing.<sup>273</sup>

#### *D. Discovery*

Discovery in the Toyota MDL was extensive. To manage plaintiffs’ efforts, as previously explained, Judge Selna appointed a core discovery committee consisting of co-lead counsel for the personal injury/wrongful death cases and the co-lead counsel for the economic loss plaintiffs. Responsibilities of members of the discovery committee and other plaintiffs’ counsel included tasks such as delegating and supervising document review.<sup>274</sup> While the number of documents produced by Toyota Motor Corp. is not readily available, the number was presumably enormous. Demonstrating the extent of the total number of documents, in a single order made in late May of 2010, Judge Selna required Toyota Motor Corp. to turn over tens of thousands of pages of internal documents that the manufacturer had previously provided to the United States Congress for Congress’ investigations into the vehicles.<sup>275</sup>

In addition to document review, plaintiffs’ counsel orga-

<sup>270</sup> *Id.* at 15-16.

<sup>271</sup> *Id.* at 17, 20.

<sup>272</sup> *Id.*; “Because Plaintiffs allege that they would have made a different purchasing decision but for Toyota’s misrepresentations, Plaintiffs have lost ‘money or property’ within the meaning of the [California Unfair Competition Law] and [California False Advertising Law].” *Id.* at 29-30.

<sup>273</sup> *Id.* at 27-28; The court also did not dismiss the implied warranty cause of action, but reasoned that plaintiffs’ counsel overreached on its express warranty cause of action. *Id.* at 41-49.

<sup>274</sup> Document review is a fundamental discovery task.

<sup>275</sup> Amanda Bronstad, *Judge Orders Toyota to Perform Document Dump*, NATIONAL LAW JOURNAL (May 28, 2010), <http://www.nationallawjournal.com/id=1202458960729>.

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nized dozens of depositions. By May 2012, plaintiffs had taken 60 depositions of Toyota Motor Corp. employees with many more planned.<sup>276</sup> Each deposition could take several days for plaintiffs to prepare questions and Toyota Motor Corp. to prepare its witnesses.<sup>277</sup> If a deposition was conducted in Japanese, the deposition itself could take as long as ten days because a translator would have to be obtained who can understand business and engineering terms in both English and Japanese.<sup>278</sup> Also, often times documents cited in depositions could be in Japanese and simply obtaining an English translation that all parties agreed on could take weeks.<sup>279</sup>

Toyota Motor Corp. was also entitled to depose the plaintiffs' experts. Toyota Motor Corp. requested to depose over 200 crash victims, but Judge Selna dismissed this request as too speculative of an undertaking.<sup>280</sup> Preparing for and conducting remaining depositions scheduled by Toyota Motor Corp. could be as time consuming as for those scheduled by plaintiffs.

In addition to the size of the Toyota MDL discovery and language barriers encountered throughout the process, discovery was further complicated by the varying rules governing each jurisdiction in and outside the United States. The different jurisdictions have different legal standards and sometimes they even conflict with one another. To evaluate and decide these matters, which can be time consuming, judges sometimes find themselves appointing special masters to decide on discovery disputes.<sup>281</sup> In

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<sup>276</sup> Mark Rehtin, *Toyota's Towering Defense Task*, AUTOMOTIVE NEWS (June 25, 2012), <http://www.autonews.com/article/20120625/OEM01/306259968/1143#axzz2kx6ipywK>.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*; In 2012, CNN leaked a Japanese engineering document that plaintiffs' counsel said demonstrated that Toyota Motor Corp. knew its vehicles accelerated out of control. *Id.* Under revised translation, however, the document simply detailed a routine quality check Toyota Motor Corp. conducts during vehicle development. The routine quality check deliberately attempts to make prototype vehicles perform improperly. *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Federal Rules of Civil Procedure section 53 provides authority for appointing special masters. Section 53 provides that a court may appoint a master to: (A) perform duties consented by the parties, (B) hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appoint is warranted by: (i) some exception condition; or (ii) the need to perform an accounting or resolved a difficult computation of damages; or (C) address pretrial and posttrial matters that cannot be effectively and timely ad-

July 2010, JAMS, a private provider of mediation and arbitration services announced that Judge Selna confirmed that two JAMS neutrals, Justice John K. Trotter (Retired) and Justice Steven Jo. Stone (Retired), would be Special Masters in the Toyota MDL.<sup>282</sup>

While the costs of discovery was expensive, the costs were only expected to increase with the Toyota MDL moving forward. An attorney representing Toyota personal injury/wrongful death plaintiffs explained that a large sum of money is expended to hire experts.<sup>283</sup> According to this attorney, once these and certain other pre-litigation costs are expended, parties may be forced to take the case to trial rather than reaching a settlement.<sup>284</sup>

### *E. Settlement*

In April 2012, Judge Selna appointed Patrick A. Junea as settlement special master.<sup>285</sup> As such Mr. Junea's responsibilities were to include administering, coordinating and presiding over settlement negotiations.<sup>286</sup> This specifically included the power to order parties and/or party representatives to attend settlement meetings.<sup>287</sup> On December 26, 2012, after years of litigation, Toyota Motor Corp. and plaintiffs' attorneys reached an agreement for a preliminary settlement for the Toyota MDL economic loss claim.<sup>288</sup>

Both plaintiffs and Toyota Motor Corp. praised the settlement. In a press release, the General Counsel for Toyota Motors North America said, "This agreement marks a significant step forward for our company, one that will enable us to put more of our energy, time and resources into Toyota Motor Corp.'s central focus: making the best vehicles we can for our customers and

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dressed by an available district judge or magistrate judge of the district. FED. R. CIV. P. 53.

<sup>282</sup> JAMS, The Resolution Experts (July 1, 2010), <http://www.jamsadr.com/jams-neutrals-justices-trotter-and-steven-stone-to-serve-as-special-masters-in-toyota-multi-district-litigation-07-01-2010/>.

<sup>283</sup> Rehtin, *supra* note 257.

<sup>284</sup> *Id.*

<sup>285</sup> Settlement Agreement 10 (C.D. Cal. Dec. 26, 2012) (order appointing the Settlement Master).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> Chris Woodyard, *Toyota to Pay \$1.1B in 'Unintended Acceleration' Cases*, USA TODAY (Dec. 26, 2012, 8:27PM), <http://www.usatoday.com/story/money/cars/2012/12/26/toyota-unintended-acceleration-runaway-cars/1792477/>.

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doing everything we can to meet their needs.”<sup>289</sup> “In keeping with our core principles, we have structured this agreement in ways that work to put our customers first and demonstrate that they can count on Toyota to stand behind our vehicles.”<sup>290</sup> The General Counsel for Toyota Motors North America further explained, “This was a difficult decision – especially since reliable scientific evidence and multiple independent evaluations have confirmed the safety of Toyota Motor Corp.’s electronic throttle control systems. However, we concluded that turning the page on this legacy legal issue through the positive steps we are taking is in the best interests of the company, our employees, our dealers and, most of all, our customers.”<sup>291</sup> One of the co-lead plaintiffs’ counsel said, “After two years of intense work, including deposing hundreds of engineers, pouring over thousands of documents and examining millions of lines of software code, we are pleased that Toyota has agreed to a settlement that was both extraordinarily hard fought and is exceptionally far-reaching.”<sup>292</sup>

Soon after, the settlement received preliminary approval from Judge Selna and was set for final approval in July 2013. In July 2013, final approval was granted for what ultimately totaled a \$1.6 billion settlement.<sup>293</sup> Pursuant to the settlement, which is the largest automotive defect settlement in U.S. history, Toyota Motor Corp. agreed to reimburse owners of certain Toyota and Lexus vehicle models for losses in resale value following reports of sudden unintended acceleration. Toyota Motor Corp. also agreed to install brake override software on certain Toyota and Lexus model vehicles.

Specifically, the Toyota Motor Corp. unintended acceleration settlement entitles class members to the following:

1. A cash payment for alleged loss upon certain disposition of a subject vehicle during the period from September 1, 2009 and December 31, 2010 or upon early lease

<sup>289</sup> *Toyota Announces Settlement of Economic Loss Litigation that Provides Value to Customers* (Dec. 26, 2012), <http://pressroom.toyota.com/releases/toyota+settlement+litigation+value+customers+dec26.htm>.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Toyota Agrees to Fund a Settlement of Unintended Acceleration Cases Worth Up to \$1.4 Billion* (Dec. 26, 2012), <http://www.hbsslaw.com/newsroom/Toyota-Agrees-to-Fund-a-Settlement-of-Unintended-Acceleration-Cases-Worth-Up-to-1-4-Billion>.

<sup>293</sup> *Id.*

termination following an alleged unintended acceleration event that was reported.

2. Installation of BOS in certain subject vehicles at no charge.
3. A cash payment if a subject vehicle is not a hybrid and is not eligible for a BOS.
4. Participation in a customer support program.
5. Other settlement benefits.<sup>294</sup>

The court awarded plaintiff attorney's fees of \$200 million, plus an additional \$27 million in costs and expenses.<sup>295</sup> Judge Selna found such fees and costs reasonable in light of work done on the case. In his June 2013 order, he said the "award of fees, costs, and compensation is fair, reasonable, and adequate."<sup>296</sup>

#### IV. TOYOTA MDL IMPACT

While NHTSA has achieved important safety gains over the last half century, the Toyota MDL has shown NHTSA's limi-

<sup>294</sup> See generally Toyota Economic Loss Settlement Website, <http://www.toyotaelsettlement.com/> (last visited Mar. 24, 2014).

<sup>295</sup> *Id.*

<sup>296</sup> Other Toyota Motor Corp. cases have also been resolved. A couple of months prior to Judge Selna finalizing the economic loss settlement, the Orange County District Attorney's Office reached a settlement for sixteen million dollars with the Toyota Motor Corp. Tony Rackauckas, the District Attorney, said "The possibility of experiencing an unintended acceleration event during Toyota's crisis clearly scared many consumers." "This settlement is an important step in holding Toyota accountable for the safety and security of their customers." The sixteen million dollars is to be used for various County public service efforts and the reimbursement of certain attorney's fees. *OCDA Rackauckas Announces Consumer Protection Settlement Over Unintended Acceleration* (April 5, 2013), [http://www.orangecountyda.com/home/index.asp?page=8&recordid=3466&returnurl=index.asp%3Fpage%3D8%26pagenumber%3D1%26pagesize%3D30000%26deptid%3D%26archive%3D0%26sl\\_month%3D12](http://www.orangecountyda.com/home/index.asp?page=8&recordid=3466&returnurl=index.asp%3Fpage%3D8%26pagenumber%3D1%26pagesize%3D30000%26deptid%3D%26archive%3D0%26sl_month%3D12); Also, while until recently no court has found Toyota responsible for unintended acceleration, after the economic loss settlement was finalized, an Oklahoma jury reached a three million dollar verdict for a Camry that allegedly accelerated killing one woman and injuring another. Ken Bensinger & Jerry Hirsch, *Toyota Hit with \$3-Million Verdict in Sudden Acceleration Death*, L.A. TIMES (Oct. 24, 2013), <http://articles.latimes.com/2013/oct/24/autos/la-fi-hy-toyota-sudden-acceleration-verdict-20131024>.

tations in effectively resolving automotive safety problems without the intervention of private litigants. Although recently criticized by scholars, the Toyota MDL has demonstrated that automotive defect litigation is still a necessary component of our legal system. First, such an action can motivate the adoption of important safety improvements. Second, it can penalize automobile manufacturers in amounts and for grounds beyond those available to the NHTSA. Third, such litigation can compensate consumers through relatively efficient settlements. Finally, it can curb potentially misleading advertising practices.

A. *Encouraging Implementation of Safety Improvements*

The Toyota MDL demonstrated that automotive defect litigation can still motivate important safety improvements. Even though NHTSA does not currently require the installation of BOS on vehicles, plaintiffs argued that a vehicle with an ETC is unsafe without BOS and Toyota Motor Corp.'s ETC was particularly susceptible to electronic failures. While it could be argued that it is unfair to hold a manufacturer at fault when the company abides by all of NHTSA's safety standards, decisions made by regulators are not always foolproof. Bureaucrats are rarely directly accountable to the public, can be susceptible to lobbying efforts, and often find themselves making a decisions that are a compromise rather than what is best for consumers.<sup>297</sup> Safety technology also develops rapidly and NHTSA rulemaking process is time consuming. Moreover, automobile manufacturers are sophisticated companies tracking the technology incorporated by their competitors and are therefore aware of what does and does not constitute state-of-the-art technology.

Making manufacturers liable in our legal system for including safety technology, even when not specifically required by NHTSA, motivates adoption of state-of-the-art technology as soon as incorporating the technology is feasible. While it is not necessarily possible to point specifically to the Toyota MDL and explain that safety features resulted from litigation rather than NHTSA's efforts, it is quite clear that important safety features have been adopted as a result of all parties efforts to combat unintended acceleration in Toyota Motor Corp. vehicles. As previously noted, NHTSA's investigations and Toyota Motor Corp.'s own voluntary actions as a manufacturer led to the removal of heavy-duty, all-weather floor mats and the shortening of acceler-

<sup>297</sup> Theroff, *supra* note 91, at 619.

ator pedals on certain Toyota Motor Corp. Toyota and Lexus model vehicles. However, as a result of or otherwise following the Toyota MDL, several other critical safety improvements have been made or are contemplated, including: (1) expanding the implementation of BOS; (2) reforming testing criteria for ETC systems; and (3) mandating the inclusion of readily readable event data recorders on all vehicles.

### 1. Brake Override Software

The Toyota MDL economic loss settlement specifically requires the installation of BOS on subject vehicles. Moreover, following the Toyota MDL, it is likely that in the near future all manufacturers will have to install BOS on their vehicles. On April 12, 2012, NHTSA released a proposed rule requiring the installation of brake override on all new vehicles. The rule refers specifically to the Saylor crash. Before explaining the necessary BOS requirement, the rule explains that heat-related destruction of some braking components revealed that Officer Saylor tried unsuccessfully to stop his Lexus model vehicle but failed without BOS.<sup>298</sup>

According to the proposed rule, NHTSA research now indicates that requiring BOS will help decrease the risk of unintended acceleration and crashes involving a stuck or trapped accelerator pedal by allowing the driver to maintain control over a vehicle through normal application of the brakes. NHTSA's Administrator explained, "We learned as part of the comprehensive NASA and NHTSA studies of high-speed acceleration that brake override systems could help drivers avoid crashes."<sup>299</sup> "While NHTSA defect investigation program will continue to monitor and consider consumer complaints of any potential vehicle safety issues, this proposal is one way the agency is helping keep drivers safe and continuing to work to reduce the risk of injury from

<sup>298</sup> National Highway Traffic Safety Administration (NHTSA), Accelerator Control Systems, 77 Fed. Reg., 22638, 22640 (proposed April 16, 2012) (to be codified at 49 C.F.R. pt. 571).

<sup>299</sup> *USDOT Proposes Updated Safety Standards to Prioritize Braking Control, Reduce Risk of High-Speed Unintended Acceleration for Nation's Cars* (April 12, 2012), <http://www.nhtsa.gov/About%2BNHTSA/Press%2BReleases/2012/USDOT%2BProposes%2BUUpdated%2BSafety%2BStandard%2Bto%2BPrioritize%2BBraking%2BControl,%2BReduce%2BRisk%2Bof%2BHigh-Speed%2BUnintended%2BAcceleration%2Bfor%2BNation's%2BCars>

sticky pedals or pedal entrapment issues.”<sup>300</sup>

In addition to requiring BOS on all new vehicles, NHTSA’s proposed rule also sets performance standards for BOS. The rule explains the driving speeds and inputs that should trigger the device.<sup>301</sup> The rule also proposes a performance test to evaluate the ability of BOS to stop vehicles at certain speeds.<sup>302</sup>

## 2. Electronic Throttle Control

Following the Toyota MDL, NHTSA is also considering implementing standards for and testing criteria specific to ETC systems despite NHTSA and NASA’s study not identifying any electronic failures in Toyota Motor Corp. vehicles. NHTSA released a proposed rule revising the Federal Motor Vehicle Safety Standard for accelerator control systems to more fully address the failure modes for ETC systems. The proposed rule emphasizes the importance of the ability of ETC systems to accurately relay signals. The accurate relaying of signals is critical in preventing incidents of unintended acceleration. According to the proposed rule, it may also be possible for ETC systems to identify when an accelerator pedal or other portion of the pedal assembly is malfunctioning. In such a circumstance, an ETC may be able to trigger a fail-safe action even without brake application through BOS. “For example, an ETC could override the accelerator pedal assembly if signals from the pedal position sensor exceed design limits.”<sup>303</sup>

To ensure quality performance of ETC systems, the rule proposes revised testing for verifying the appropriate functioning of ETC systems.<sup>304</sup> After ETC systems testing conducted by NHTSA and NASA, NHTSA recognizes that ETC systems perform differently than mechanical linkages. Therefore, older testing criteria based on the performance of mechanical linkages is outdated and so is any criteria analogizing to the performance of mechanical linkages. According to NHTSA, “regulating ETC systems by drawing analogies to mechanical systems has undesirable outcomes.”<sup>305</sup> For instance, “powertrain responses that can result from failures in electronic systems are much more varied than

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<sup>300</sup> *Id.*

<sup>301</sup> NHTSA, *supra* note 298 at 22644.

<sup>302</sup> *Id.* at 22648-49.

<sup>303</sup> *Id.* at 22642.

<sup>304</sup> *Id.* at 22657-58.

<sup>305</sup> *Id.* at 22643.



with mechanical systems.”<sup>306</sup>

### 3. Event Data Recorders

Following the Toyota MDL, NHTSA is now also going to require EDRs on all vehicles. A major difficulty in the Toyota MDL was the ability to assess real world data related to unintended acceleration incidents. In the Toyota MDL, Toyota Motor Corp. repeatedly asserted that an unintended acceleration event was not possible under real world conditions, but it was difficult or impossible to evaluate this assertion. While certain vehicles that allegedly experienced unintended acceleration were equipped with EDRs, they could not be read by third party devices. Only one device capable of reviewing EDRs existed in the United States and was under the control of Toyota Motor Corp.

For over a decade, NHTSA has been under increased pressure to require vehicles to install EDRs that are readable on third party devices. On November 9, 1998, in 63 F.R. 60270, and then on June 2, 1999, in 64 F.R. 29616, NHTSA denied petition for rulemaking asking to require installation of EDRs in all new automobiles.<sup>307</sup> In responding to these petitions, NHTSA said EDRs could provide valuable information to understanding crashes and could be used in a variety of ways to improve automobile safety.<sup>308</sup> NHTSA, however, said that it denied the petitions because the automobile industry was already voluntarily moving in the direction recommended by the petitioners, and because NHTSA believed “this area presents some issues that are, at least for the present time, best addressed in a non-regulatory context.”<sup>309</sup>

NHTSA later became more receptive to requiring EDRs. On October 11, 2002, after receiving a third petition asking it to require the installation of EDRs in new automobiles, in 67 F.R. 63493, NHTSA responded with a Request for Comments. On June 14, 2004, in 69 F.R. 32932, NHTSA issued Notice of Proposed Rulemaking.<sup>310</sup> NHTSA received over 100 submissions

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<sup>306</sup> *Id.*

<sup>307</sup> Welcome to NHTSA Event Data Recorder Research Web Site, [http://www.nhtsa.gov/Research/Event+Data+Recorder+\(EDR\)/Welcome+to+the+NHTSA+Event+Data+Recorder+Research+Web+site](http://www.nhtsa.gov/Research/Event+Data+Recorder+(EDR)/Welcome+to+the+NHTSA+Event+Data+Recorder+Research+Web+site) (last visited Mar. 25, 2014).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> 49 C.F.R. § 563 (2014).

that the agency reviewed.<sup>311</sup>

Only after the Toyota MDL, however, did NHTSA seriously pursue action on the matter. NHTSA has finally made EDRs a requirement on all new vehicles sold and set standards for these devices.<sup>312</sup> As of September 1, 2014, all automobiles sold in the United States must be equipped with EDRs in accordance with 49 C.F.R. § 563.<sup>313</sup>

According to the regulation on point, requiring these devices will ensure the recording “in a readily usable manner, data valuable for effective crash investigations and for analysis of safety equipment performance . . . data will help provide a better understanding of the circumstances in which crashes and injuries occur and will lead to safer vehicle designs.”<sup>314</sup>

Each EDR must be capable of recording certain specified data, such as the speed of the vehicle and whether a brake was being depressed.<sup>315</sup> There are requirements for the amount of time that needs to be recorded which must be obtained for certain time intervals in relation to an incident causing a crash.<sup>316</sup> There must be two sources of data that can be used to prove or disprove an instance of sudden unintended acceleration.<sup>317</sup> Data must be able to survive a crash.<sup>318</sup> Moreover, each EDR must be readable by a third party device within 90 days of the initial sale of a model.<sup>319</sup>

### *B. Penalizing Toyota Motor Corporation*

The Toyota MDL demonstrated that automotive defect litigation can severely penalize a manufacturer even without the award of punitive damages afforded under tort law. Events surrounding the Toyota MDL showed how the fines imposed by NHTSA are too narrow in scope. NHTSA fined Toyota Motor Corp. for the manner in which it reported safety related data and in which it conducted recalls. Toyota Motor Corp., however, was

<sup>311</sup> On June 14, 2004, NHTSA issued a Notice of Proposed Rulemaking in 69 F.R. 32932. Submissions received by NHTSA are available for review in NHTSA, Event Data Recorder, 69 Fed. Reg. 32932 (proposed June 14, 2004) (to be codified at 49 C.F.R. pt. 563); Healy *supra* note 64.

<sup>312</sup> 49 C.F.R. §§ 563 *et seq.* (2014).

<sup>313</sup> 49 C.F.R. § 563 (2014).

<sup>314</sup> 49 C.F.R. § 563.2 (2014).

<sup>315</sup> 49 C.F.R. § 563.7 (2014).

<sup>316</sup> 49 C.F.R. § 563.7 (2014).

<sup>317</sup> 49 C.F.R. § 563.9 (2014).

<sup>318</sup> 49 C.F.R. § 563.10 (2014).

<sup>319</sup> 49 C.F.R. § 563.12 (2014).

arguably responsible for more than simply these mishaps. Moreover, even if information was accurately reported and recalls were conducted appropriately, consumers would have suffered significant economic loss.

In addition, events surrounding the Toyota MDL showed how fines imposed by NHTSA are entirely too small in light of the enormous resources of large automobile manufacturers. NHTSA's maximum penalty, which was recently increased to \$35 million, may be an effective deterrent to manufacturers of certain smaller automobile devices. However, such a penalty even if applied more than once will have only a minimal effect on a major automobile manufacturer, such as a Toyota Motor Corp. Toyota Motor Corp. sells nearly 10 million vehicles a year,<sup>320</sup> had \$200 billion in revenue in 2009 and an annual profit of approximately \$2.2 billion for the fiscal year ending in March 31, 2010.<sup>321</sup> On the other hand, awards attainable in a major class action lawsuit such as the Toyota MDL are capable of reaching at least half of the annual profit of a major automobile manufacturer's profit. A settlement of \$1.6 billion is more than two-thirds of Toyota Motor Corp.'s annual profit in 2010.<sup>322</sup>

It is also possible that a legal action brought on causes of action for breach of warranty or consumer protection is less likely to be overturned on appeal than an action brought on causes of action for negligence or strict liability. Actions brought on the latter causes of action have in some circumstances resulted in punitive damages where manufacturers deliberately decided to forgo specific safety features to save costs. Courts, however, have reduced these decisions on appeal. In the Toyota MDL, similar logical arguments were at least inferred, in so much that Toyota Motor Corp. deliberately decided not to incorporate BOS, which it

<sup>320</sup> *TMC Announces Global Sales Results for December 2012 and CY2012*, USA NEWSROOM (Jan. 28, 2013), [http://pressroom.toyota.com/article\\_display.cfm?article\\_id=3773](http://pressroom.toyota.com/article_display.cfm?article_id=3773).

<sup>321</sup> Hiroko Tabuchi, *Toyota Posts \$2.2 Billion Annual Profit*, THE GAINESVILLE SUN (May 12, 2010, 8:38AM), <http://www.gainesville.com/article/20100512/znyt01/5123001>.

<sup>322</sup> Toyota Motor Corp. recently reached an unprecedented \$1.2 billion settlement with the United States Department of Justice, but the Department of Justice's willingness to take on similar future cases remains unclear. Danielle Douglas & Michael A. Fletcher, *Toyota Reaches \$1.2 Billion Settlement to End Probe of Accelerator Problems*, THE WASHINGTON POST (March 19, 2014), [http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572\\_story.html](http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html).

knew could save lives. Nonetheless, the settlement was viewed as appropriate by the court. Even if decided by a jury, calculations aggregating economic loss may be more defensible than punitive damages. Here calculations are grounded in sales figures and trade publications rather than punitive damages that could be viewed more of as an emotional reaction.

In addition to settlement payments and even beyond money expended on attorney's fees, fines and recalls, the Toyota MDL has also forced Toyota Motor Corp. to suffer significant reputational harms. While it is difficult to attribute how much the publicity surrounding the Toyota MDL has contributed to declining sale as opposed to publicity surrounding Congressional hearings and NHTSA investigations, the manufacturer's sales were flat in 2010 while nearly every other major manufacturer reported gains.<sup>323</sup>

### C. *Efficiently Compensating Plaintiffs*

The Toyota MDL demonstrated that automotive defect litigation, in particular a large class action lawsuit, can efficiently compensate plaintiffs. Recently some American courts have withdrawn from class actions because of their reluctance to decide important issues collectively.<sup>324</sup> There have also been criticisms that class action attorney's fees are too high.<sup>325</sup> However, while the Toyota MDL case resulted in the largest automotive defect settlement in United States history, fees for plaintiffs' attorneys were praised as reasonable by the judge overseeing the case, representing only a fraction of the award.

<sup>323</sup> This ended a thirty year unbroken run of market-share increase in the United States. Mike Ramsey, *Toyota in \$1.1 Billion Gas-Pedal Settlement*, WALL STREET JOURNAL, (Dec. 27, 2012), <http://online.wsj.com/news/articles/SB10001424127887324669104578203440990704994>; Toyota Motor Corp. also fell behind General Motors Co. in sales to become only the world's second largest manufacturer, before later rebounding. Chester Dawson, *Toyota Again World's Largest Auto Maker*, WALL STREET JOURNAL (Jan. 28, 2013), <http://online.wsj.com/news/articles/SB10001424127887323375204578269181060493750>.

<sup>324</sup> Elizabeth Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1479 (2005).

<sup>325</sup> *Id.* at 1477 (summarizing arguments used against class actions lawsuits which she later rebuffs); Legal scholars recently argued that product liability lawsuits did not effectively compensate victims of automobile accidents, but its analysis was based on situations where insurance was an important factor in providing compensation. Polinsky & Shavell, *supra* note 2 at 1469.

This efficiency was due in part to the ability of plaintiffs' counsel to pull resources reducing costs through economies of scale. While the Toyota MDL involved significant discovery responsibilities and costs, these responsibilities and costs were shared among law firms. In identifying and analyzing important information, attorneys at these law firms were also presumably able to rely on one another's expertise and share important findings. In developing case strategy, plaintiffs' counsel was presumably able to do the same.

It is unclear what costs would be if more cases were litigated independently rather than as a class. Empirical evidence, however, has found that court-awarded fees in class actions are significantly lower as a percentage of dollars recovered than private contingent fee arrangements, especially in more risky cases where a higher percentage fee is generally charged.<sup>326</sup> Because of the novel nature of various aspects of the lawsuit and demands presented by discovery, it is reasonable to assume that litigating more cases separately would have significantly decreased the efficiency of any resolution.

Efficiency was also due in part to plaintiffs' counsel's ability to reach an early settlement. At a minimum, a settlement reduces this high transaction cost involved in compensating victims.<sup>327</sup> For this and other reasons, it is a fundamental principle of law that settlements and compromise are favored.<sup>328</sup> American courts invoke this policy to enforce past settlements, approve tentative settlements and even pressure parties uninterested in settling to at least discuss the possibility.<sup>329</sup> Litigation is expensive and in some cases two-thirds or three-quarters of every dollar spent can go to litigation rather than compensating victims.<sup>330</sup> While the Toyota MDL involved significant discovery expenses, the dispute was decided without a trial and without significant monies spent on some of the more costly pretrial matters such as obtaining and prepping expert witnesses.

Plaintiffs' counsel's ability to reach an early settlement agreement with Toyota Motor Corp. is arguably attributable to the manner in which plaintiffs' counsel argued the Economic

<sup>326</sup> Cabraser, *supra* note 324 at 1477.

<sup>327</sup> Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1258 (1995).

<sup>328</sup> Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS. L. J. 1, 3 (1992).

<sup>329</sup> *Id.*

<sup>330</sup> Hazard, *supra* note 327 at 1258.

Loss Complaint. Toyota Motor Corp., which once pledged to fight unintended acceleration allegations indefinitely, may have been more willing to settle claims based on a breach of warranty or consumer protection causes of action rather than a claim based on negligence or strict liability causes of action. While a settlement agreement often states that a settling manufacturer is not at fault for certain damages, public opinion still will attribute some degree of fault to a settling party. Along these lines, it is easier for a manufacturer to justify to its consumers that it is reaching a settlement where the manufacturer is essentially just admitting that the value of their vehicles have decreased due to market forces, than a claim brought under a negligence or strict liability causes of action where they are essentially de facto admitting that their vehicles are defective. Moreover, here the settlement demonstrated that a plaintiff can succeed in gaining an extremely large award without showing the necessary intent typically associated with punitive damages or a serious physical injury to a plaintiff.

The settlement is likely to influence actions of other vehicle and product manufacturers. Currently, Audi is being sued for economic loss of its vehicles due to allegations of unintended acceleration.<sup>331</sup> Ford and Firestone are also being sued for economic loss of its tires for defect allegations. Approximately 3.5 million of these lawsuits were given class-action status.<sup>332</sup> If Toyota Motor Corp. is able to successfully market its Toyota MDL settlement, then Audi, Ford and Firestone may reach similar settlement agreements with plaintiffs pursuing actions against them.

#### *D. Curbing Misleading Advertisements*

The Toyota MDL demonstrated that automotive defect litigation can curb misleading advertisements. With a shifting focus to breach of warranty or consumer protection causes of action, increased attention will be placed on manufacturer statements. A plaintiff in a breach of warranty claim will attempt to demonstrate that a manufacturer has advertised specific qualities of his or her product that were in fact not present. A plaintiff pursuing various consumer protections claims will attempt to make a

<sup>331</sup> Andreas Cremer & Tom Lavell, *Audi 1980s Scare May Mean Lost Generation for Toyota*, BUSINESS WEEK, Feb. 4, 2010, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFAbB4LZ3h6A>.

<sup>332</sup> David Kiley, *Judge Expands Lawsuit vs. Ford, Firestone*, USA TODAY, Nov. 29, 2001, <http://usatoday30.usatoday.com/money/autos/2001/11/28/tire-suits-class.htm>.

similar showing. In particular of those claims made by plaintiffs in the Toyota Economic Loss Complaint, plaintiffs will desire to make such a showing for the following causes of action: Violations of Consumer Legal Remedies Act, Violation of the California Unfair Competition Law, and Violation of the California False Advertising Law.<sup>333</sup>

While Toyota Motor Corp.'s marketing motivations are not entirely public, it can be argued that Toyota Motor Corp.'s has refocused its advertisement efforts with breach of warranty and consumer protection causes of action in mind. Toyota's Star Safety System was popularly advertised after allegations of unintended acceleration in 2010. Rather than simply advertising Toyota Motor Corp.'s vehicles as safe or promoting a single safety feature that has been criticized by certain consumer advocates, the Star Safety System promotes five safety features that are generally accepted as reliable within the automobile industry. The five safety features include: (1) vehicle stability control; (2) traction control; (3) antilock brakes; (4) electronic brake-force distribution; and (5) brake assist.<sup>334</sup>

As with Toyota Motor Corp., prior to allegations of unintended acceleration, other manufacturers may find it easier to market their vehicles as simply safe. Or, they may try to obtain an advantage over their competitors by arguing that they are first to incorporate a novel technological feature. If lawsuits arguing breach of warranty and consumer protection causes of action, however, continue to gain momentum, other manufacturers may take note of Toyota Motor Corp.'s refocused advertisement efforts and focus their advertisements on concrete safety features that are generally accepted within the automobile industry.

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<sup>333</sup> Order Granting in Part and Denying in Part *supra* note 266 at 29.; *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1168 (C.D. Cal. 2011) (citing *Van Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1078 (E.D. Cal. 2010).

<sup>334</sup> Dexter Ford, *What's So Special About Toyota's Star Safety System*, N.Y. TIMES (JUNE 29, 2010, 7:30 AM), [http://wheels.blogs.nytimes.com/2010/06/29/whats-so-special-about-toyotas-star-safety-system/?\\_r=0](http://wheels.blogs.nytimes.com/2010/06/29/whats-so-special-about-toyotas-star-safety-system/?_r=0); Plaintiffs also attacked Toyota Motor Corp. for this advertising campaign as well. Nonetheless, advertising specific safety features that are generally accepted in the automobile industry still is arguably a more prudent approach than that taken in previous Toyota Motor Corp. marketing campaigns. Amended Economic Loss Master Consolidated Complaint 92-93 (C.D. Cal. Oct. 27, 2010).

## CONCLUSION

Automotive defect litigation has evolved in the face of less friendly tort law environment. Rather than relying on traditional tort law causes of action for negligence or strict liability, plaintiffs are finding that they must rely on causes of action typically associated with contract law or a violation of various consumer protection laws. Nonetheless, the Toyota MDL demonstrated that such an approach can still be effective in addressing social ills. There may in fact even be distinct advantages to such an approach. Therefore, for the foreseeable future, automotive defect litigation is likely to remain a necessary component of our legal system and may even increase in importance.