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The Role of Private Litigation in the Automotive Recall Process

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I. INTRODUCTION

On the night of March 10, 2010, Brooke Melton was driving her 2005 Chevrolet Cobalt northbound on Georgia Highway 9, 30 miles outside of Atlanta.[1] Melton, a pediatric nurse, was heading to her boyfriend's residence to celebrate her 29th birthday.[2] Without warning, the Cobalt fishtailed, skidding across the wet pavement, over the centerline, and into oncoming traffic.[3] A car driving in the southbound lane slammed into the passenger side of Melton's car, sending it spinning off the highway and down a 15-foot hill into a creek.[4] Melton was rushed to a nearby hospital, where she succumbed to a fatal brain injury.[5]

Melton's death was just one of more than 32,000 that occur as the result of motor vehicle accidents every

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[1] Complaint at 4-5, Melton v. General Motors LLC, No. 1:14-cv-01815, 2014 WL 3565682 (N.D. Ga. 2014); Adam L. Penenberg, *GM's Hit and Run: How a Lawyer, Mechanic, and Engineer Blew Open the Worst Auto Scandal in History*, PANDODAILY (Oct. 18, 2014), http://pando.com/2014/10/18/gms-hit-and-run-how-a-lawyer-mechanic-and-engineer-blew-the-lid-off-the-worst-auto-scandal-in-history/.

[2] Penenberg, *supra* note 1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

year.[6] Such accidents are the leading cause of death for Americans in Melton's 5-34 age bracket.[7] In one way, however, Melton's death was more than just another statistic. Melton's parents filed a wrongful death suit against the maker of Brooke's car, General Motors. That suit uncovered an ignition switch defect present in millions of automobiles, and sparked one of the largest automotive recalls ever.[8]

Is that story, of a private lawsuit initiating an automotive recall, unique? Or, like Brooke Melton's death, is it a fundamental part of a society that revolves around the automobile? These questions are important because they explore both the value of private litigation as well as the effectiveness of federal automotive safety regulations. The purpose of this paper is to shed new, empirically grounded light on these questions.

In Section I, I provide a brief history of the American automotive recall process, beginning with the creation of the federal agency responsible for handling such recalls, the National Highway Traffic Safety Administration (NHTSA). I also detail the contemporary automotive recall process, examining the administrative apparatus within NHTSA that investigates and orders recalls. In Section II, I describe the traditional view of private litigation's role in the automotive recall process, which sees private litigation's only role in the initiation of automotive recalls as creating the specter of *post hoc* liability for defect-related injuries. In Section III, I test this view by generating a dataset containing automotive recalls issued in 2014. I then code each recall for the presence of defect-related litigation filed *before* the recall was initiated. In Section IV, I present the aggregate data from the dataset alongside narratives of each recall that coded positively for pre-recall litigation. I find that the majority of vehicles recalled were

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[6] Nat'l Highway Traffic Safety Admin., TRAFFIC SAFETY FACTS 2013, U.S. Dep't of Transp., http://www-nrd.nhtsa.dot.gov/Pubs/812139.pdf [hereinafter NHTSA].

[7] *Leading Causes of Death Reports, National and Regional, 1999-2014*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/leadcaus10_us.html (last updated June 24, 2015).

[8] *See infra* at Section IV, Part B, Subpart 1.

preceded by defect-related litigation. In Section V, I discuss how the data suggests an alternative view of private litigation's role in the automotive recall process, one that asserts the existence of a more direct, investigatory role for private litigators in initiating recalls. I also suggest some normative implications of the alternative view for tort reform legislation, federal auto safety regulations, products liability law, and the use of suppression orders by courts. I conclude with commentary on further avenues for research and how this paper fits into the broader literature regarding the value of work done by plaintiffs' lawyers.

II. THE AUTOMOTIVE RECALL PROCESS

The concept of the automotive recall arose in the United States in 1966 as a result of the passage of the National Traffic and Motor Vehicle Safety Act (the Safety Act), the bedrock of the auto safety regulatory regime.[9] The Safety Act was a "dramatic attempt at legal transformation," a shift from regulating *people* to regulating their *environment*; that is, regulating *motor vehicles* instead of *motorists*.[10] The Safety Act created NHTSA to enforce its provisions.[11] At its genesis, NHTSA's focus was on the development of mandatory minimum safety requirements for automobiles.[12] It achieved that goal with celerity, issuing 43 safety standards in its first six years of existence.[13]

By 1974, however, this rulemaking deluge had slowed to a drip in the wake of *Chrysler Corp. v. Department of Transportation*, which banned rules that failed

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[9] National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 [hereinafter Safety Act].

[10] *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990) [hereinafter MASHAW & HARFST, STRUGGLE FOR AUTO SAFETY]; *see also* Jerry L. Mashaw, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987) [hereinafter Mashaw, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*].

[11] *See* Safety Act, *supra* note 9, Sec. 115.

[12] MASHAW & HARFST, STRUGGLE FOR AUTO SAFETY, *supra* note 10, at 69.

[13] *Id.*

to have adequately "objective" performance criteria.[14] Subsequent hearings on NHTSA's effectiveness led to the Safety Act being amended to set the agency on a new path, empowering it to combat automobile defects using new subpoena powers, the ability to inspect manufacturing facilities, and expanded abilities to push automakers to recall defective vehicles.[15] The 1974 amendments changed NHTSA from a "proactive, technology forcing regulatory agency" to a "complaints bureau and prosecutor's office."[16]

Automotive recalls continue to be a critical part of NHTSA's operations. A top NHTSA official said in 2014 the agency's recall powers were "its greatest strength."[17] That sentiment has been reflected in the growing number of recalls that involve agency investigations every year. Between 1966 and 1972, there were 195 recalls.[18] That number has risen in almost every subsequent seven-year period, reaching 1,201 recalls between 2008 and 2014.[19] NHTSA describes every recall initiated as either being "influenced" or "not influenced" by the agency. Any recall that is preceded by a NHTSA investigation is deemed to be "influenced," while any recall that is initiated independently by a manufacturer is classified as "not influenced."[20] Historically, NHTSA has influenced less than a quarter of all recalls.[21] However, NHTSA has had a larger influence on recalls as calculated by total recalled vehicle volume. Of the vehicles that were recalled between 1966 and 2014, more than half were influenced by NHTSA.[22]

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[14] *Id.* at 71 (citing Chrysler Corp. v. Dep't of Transp., 515 F.2d 1053 (6th Cir. 1975)).

[15] *Id.* at 110.

[16] *Id.* at 111.

[17] *The GM Ignition Switch Recall: Why Did It Take So Long?: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy And Commerce*, 113th Cong. (2014) (statement of David Friedman, Acting Admin. NHTSA) *available as a download from* www.nhtsa.gov.

[18] NHTSA, *Office of Defects Invest., Recalls Database* (Mar. 15, 2015), http://www.nhtsa.gov/Data/DataMod/DataMod.

[19] *Id.*

[20] Friedman, *supra* note 17, at 7.

[21] *See* NHTSA, *supra* note 18.

[22] *See infra* Appendix I: Figure 1, Figure 2.

Defect investigation is managed by two offices in NHTSA. One is the Office of Vehicle Safety Compliance, which tests new vehicles to determine if they meet Federal Motor Vehicle Safety Standards.[23] The other is the Office of Defects Investigations (ODI), whose 50 staff members initiate the majority of recalls for NHTSA.[24] ODI spends much of its time searching for potential defects by trawling through two sources. The first is data from manufacturers' "early warning reporting" (EWR) systems, mandated by the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act of 2000.[25] These data include "property damage claims, consumer complaints, warranty claims, and field reports from incidents involving certain vehicle components and conditions defined in NHTSA regulations."[26] The second source ODI looks to for information on potential safety defects is the 40 to 50 thousand consumer complaints it receives annually.[27]

When a possible safety defect is detected, ODI opens an investigation called a "preliminary evaluation" and notifies the manufacturer as well as the public.[28] ODI opens between 80 and 100 of these preliminary evaluations on an annual basis.[29] If a preliminary evaluation discovers a defect trend, the investigation is elevated to an "engineering analysis," where ODI uses "inspections, surveys, tests, and efforts to obtain additional information from the manufacturer" to analyze the potential defect.[30] If the engineering analysis generates further evidence of a defect, NHTSA convenes an

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[23] Friedman, *supra* note 17, at 4.

[24] *Id.*

[25] Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, 49 U.S.C. § 30101 (2000).

[26] NHTSA, OFFICE OF INSPECTOR GENERAL, NO. ST-2015-063, INADEQUATE DATA AND ANALYSIS UNDERMINE NHTSA'S EFFORTS TO IDENTIFY AND INVESTIGATE VEHICLE SAFETY CONCERNS, 4 (2015) (citing 49 C.F.R. Part 579).

[27] U.S. GEN. ACCOUNT. OFFICE, GAO-01-225, MOTOR VEHICLE SAFETY: NHTSA'S ABILITY TO DETECT AND RECALL DEFECTIVE REPLACEMENT CRASH PARTS IS LIMITED, 8 (2001).

[28] *Id.*

[29] *Id.*

[30] *Id.*

investigation review panel.[31] If the panel determines that a defect is present, NHTSA sends a formal recall request letter to the manufacturer.[32] In virtually every case, the manufacturer complies with the request.[33] Most investigations never reach the panel stage because manufacturers will initiate a recall themselves earlier in the process.[34] Recalls are formally initiated when a manufacturer files a Defect and Noncompliance Report (informally known as a "573 report") with NHTSA.[35] A 573 report lists information on the kind and number of vehicles affected, the estimated percentage of vehicles recalled that have the defect, the description of the defect, and a description of the proposed remedy.[36]

III. THE TRADITIONAL VIEW OF PRIVATE LITIGATION'S ROLE IN THE AUTOMOTIVE RECALL PROCESS

The traditional view of how private litigation[37]

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[31] *Id.* at 9.

[32] *Id.*

[33] Ryan Beene, *When Recalls go to Court, NHTSA Tends to Win*, AUTO. NEWS, (Dec. 22, 2014,12:01AM), http://www.autonews.com/article/20141222/OEM11/312229981/when-recalls-go-to-court-nhtsa-tends-to-win.

[34] *See, e.g.*, CHRYSLER, 573 REPORT FOR RECALL, 14V-373 (June 25, 2016), available at http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM457640/RCDNN-14V373-3445P.pdf.

[35] *See* 49 C.F.R § 573.6 (2014).

[36] *Id.*

[37] This view can be gleaned from a review of scholarly literature as well as statements of key players in government and industry. *See*, e.g., Nicholas G. Rupp & Curtis R. Taylor, *Who Initiates Recalls and Who Cares? Evidence from the Automobile Industry*, 50 J. OF INDUST. ECON., 123 (2002) (finding that the government initiates larger & less hazardous recalls, while inexpensive & more hazardous recalls are initiated by manufacturers); Nicholas G. Rupp, *The Attributes of a Costly Recall: Evidence from the Automotive Industry*, 25 REV. OF INDUS. ORG. INQUIRY 21-44, 23 (2004); John D. Graham, *Product Liability and Motor Vehicle Safety, in* THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 120 (Peter W. Huber & Robert E. Litan eds., 1991); Kamrul Ahsan, *Trend Analysis of Car Recalls: Evidence from The U.S. Market*, 4 INT'L. J. OF MANAGING VALUE & SUPPLY CHAINS 1 (2013).

plays a role in the automotive recall process sees automakers as akin to drivers on a highway in that both groups modify their behavior to accommodate the threat of costly sanctions.[38]

Drivers tend to keep their speed within a certain range to avoid getting pulled over and ticketed by the police (and, with a more optimistic view of human nature, to avoid causing a life-threatening accident). Likewise, automakers tend to keep their manufacturing process free of defects to avoid a recall and civil liability (and, on a more optimistic view of corporate nature, to avoid getting customers involved in life-threatening accidents).

The traditional view sees private litigation as playing two roles in the automotive recall process. First, private litigation "impos[es] financial burdens on manufacturers that sell unsafe vehicle designs," including direct costs like lawyers' fees, settlements, jury awards, and punitive damages, as well as indirect costs like reputational damage through the adverse publicity of a high-profile trial.[39] The second role private litigation plays was scripted by Justice Traynor's *Greenman v. Yuba Power Prods.* opinion, the progenitor of the modern products liability regime.[40] In this role, litigation creates the specter of *post hoc* liability, which puts a thumb on the "cost" side of manufacturer's cost-benefit analysis regarding a potential safety enhancement.[41] The increased threat of liability raises the chances that a manufacturer will produce a safer product in order to avoid a defect, injuries, and a costly recall. Of course, the specter will not force manufacturers to use a welfare-maximizing strategy in decisions about

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[38] *See* Brad M. Barber & Masako N. Darrough, *Product Reliability and Firm Value: The Experience of American and Japanese Automakers, 1973-1992*, 104 J. OF POL. ECON. 1984 (1996).

[39] *See* Graham, *supra* note 37, at 125-26.

[40] Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963).

[41] Steven Shavell, *Liability and the Incentive to Obtain Information About Risk*, 21 J. LEGAL STUD. 259 (1992); *see infra* Appendix I: Figure 3.

safety measures.[42] Automakers facing this specter have shown a willingness to protect the bottom line by covering up internal tests that reveal defects,[43] lying to victims and regulators about internal defect determinations,[44] refusing to take notes or individual responsibility in meetings regarding safety design choices to avoid liability,[45] and misleading regulators by procuring intentionally inaccurate accident data.[46]

The specter also affects cost-benefit analyses conducted after a manufacturer has discovered a defect.[47] The costs of recalling the vehicle include admitting that a defect existed, which is writing a check to a host of plaintiffs who can prove a link between their injury and the defective vehicle.[48] The costs of *not* recalling the vehicle include settling suits that will inevitably result from injuries that could have been avoided through a recall.[49] Thus, a decision to initiate a recall reflects a willingness to pay the costs of past defect-related injuries in order to prevent the costs of future defect-related injuries.

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[42] *See* George Priest, *Economics of Civil Justice Reform Proposals*, 9 KAN. J. L. & PUB. POL'Y 401, 402-04 (2000).

[43] *See, e.g.*, Hiroko Tabuchi, *Takata Saw and Hid Risk in Airbags in 2004, Former Workers Say*, N.Y. TIMES, (Nov. 6, 2014), available at http://www.nytimes.com/2014/11/07/business/airbag-maker-takata-is-said-to-have-conducted-secret-tests.html.

[44] *See, e.g.*, Rebecca R. Ruiz & Danielle Ivory, *Documents Show General Motors Kept Silent on Fatal Crashes*, N.Y. TIMES, (July 15, 2014), http://www.nytimes.com/2014/07/16/business/documents-show-general-motors-kept-silent-on-fatal-crashes.html; Matthew L. Wald, *Tread Failures Lead to Recall of 6.5 Million Firestone Tires*, N.Y. TIMES, (Aug. 10, 2000), http://www.nytimes.com/2000/08/10/business/tread-failures-lead-to-recall-of-6.5-million-firestone-tires.html.

[45] *See, e.g.*, Mike Colias, *"The GM nod," "The GM salute," and a clash of cultures: Safety, cost-containment and impenetrable decision-making*, AUTOMOTIVE NEWS, (June 5, 2014, 4:38 pm), http://www.autonews.com/article/20140605/OEM11/140609883/the-gm-nod-the-gm-salute-and-a-clash-of-cultures.

[46] *See, e.g.*, NHTSA, *supra* note 26.

[47] David L. Ramp, *The Impact of Recall Campaigns on Products Liability*, 44 INS. COUNSEL J. 83, 84 (1977).

[48] *Id.*

[49] *Id.*

The traditional view does not see litigation as able to influence a recall other than through the specter of liability's impact on corporate decision making. The view identifies only two actors that can initiate a recall, neither of which are litigators. The first is the manufacturer, who is usually alerted to the need for a recall by consumer-notification or internal testing, and responds by voluntarily recalling the affected product.[50] The second is the manufacturer, who either by the consumer-notification process described above or through its own internal testing and awareness system identifies a defect and initiates a recall. The third actor is NHTSA, which can either launch an investigation or lawsuit that initiates a recall. The traditional view asserts that NHTSA tends to initiate larger recalls while manufacturers tend to initiate smaller recalls.[51]

If the traditional view is both complete and correct, then a review of historical automotive recalls should confirm three descriptive claims entailed by the view. First, there should be little presence of defect-related litigation before a recall is issued. The view will not necessarily be undermined by a single showing of such pre-recall litigation, particularly if that litigation is associated with a recall that impacts a small number of vehicles. Second, recalls initiated by NHTSA should be larger than those initiated by manufacturers.[52] Third, recalls initiated by NHTSA should be less hazardous than those initiated by manufacturers.[53]

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[50] Members of the public may directly petition NHTSA to investigate an alleged safety defect. ODI is required to review the petition, and must either conduct an investigation or publicize its justification for failing to do so in the Federal Register. *See* Nat'l Highway Traffic Safety Admin., MOTOR VEHICLE DEFECTS AND SAFETY RECALLS: WHAT EVERY VEHICLE OWNER SHOULD KNOW (2011), http://www-odi.nhtsa.dot.gov/recalls/documents/MVDefectsandRecalls.pdf.

[51] Rupp & Taylor, *Who Initiates Recalls and Who Cares? Evidence from Automobile Industry*, *supra* note 37; Rupp, *Attributes of a Costly Recall: Evidence from the Automobile Industry*, *supra* note 37.

[52] Rupp & Taylor, *Who Initiates Recalls and Who Cares? Evidence from Automobile Industry*, *supra* note 37; Rupp, *Attributes of a Costly Recall: Evidence from the Automobile Industry*, *supra* note 37.

[53] Rupp & Taylor, *Who Initiates Recalls and Who Cares? Evidence*

IV. METHOD

At the heart of the traditional view is the assumption that private litigation cannot initiate an automotive recall. To challenge this assumption, I investigate the link between automotive recalls and private litigation empirically. I begin by creating a sample of recalls using information from the NHTSA ODI Recalls Database ("Recalls Database").[54] I use that sample to create a new dataset (the "Pre-Recall Litigation Dataset," or "the Dataset"), coding each recall for a number of variables, including the existence of pre-recall litigation related to a given defect. This section describes the methodology behind the construction of the Dataset.

A. Sample

The Pre-Recall Litigation Dataset is composed of 70 recalls issued in 2014, which cumulatively affected a total of 46.9 million vehicles.[55] The Dataset's recalls represent a fraction of the 18,000 in the Recalls Database (803 of which occurred in 2014), which cumulatively affected a total of 804.6 million vehicles.[56] The Dataset is composed of recalls from eight manufacturers. Twenty-one recalls were from General Motors, 13 were from Chrysler, 12 were from Ford, eight were from Toyota, six were from Honda, four were from Nissan, three were from Hyundai, and three were from Kia. Sixteen different component categories were covered by the recalls. Seventeen recalls covered air bags, 15 covered electrical systems, six covered power trains, five covered seats and seat belts, five covered fuel systems, four covered steering systems, three covered exterior lighting, three covered service brakes, and the remaining 12 covered components ranging from engines to

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from Automobile Industry, *supra* note 37; Rupp, *Attributes of a Costly Recall: Evidence from the Automobile Industry*, *supra* note 37.

[54] NHTSA, *supra* note 26.

[55] *See infra* Appendix II: The Pre-Recall Dataset.

[56] *Id.*

suspension systems. The size of the recalls in the Dataset varied considerably, with the smallest affecting 11,961 vehicles and the largest affecting 5,877,718 vehicles.

The Dataset was derived from the Recalls Database using three parameters to produce a sample that was both meaningful and manageable. The first limited the sample to recalls issued in 2014, recalls that were the most likely to have easily discoverable data about defect-related litigation. The second parameter limited the Dataset to recalls issued by the eight largest automakers by market share in 2014: General Motors, Ford, Toyota, Chrysler, Honda, Nissan, Hyundai, and Kia.[57] The final parameter limited the Dataset to recalls that exceeded one percent of a manufacturer's 2014 car and light truck unit sales.[58] This limit "prevent[s] an over weighting of recalls from the largest manufacturers and due to an overwhelming number of small recalls."[59]

These parameters may cause the Dataset to oversample for recalls affected by pre-recall litigation for a number of reasons. If private litigators focus on defects that lead to larger recalls, then limiting the sample to a year that the *New York Times* labeled a "Record Year of Recalls" could overestimate the presence of pre-recall

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[57] In 2014, General Motors had a 17.6% market share, Ford had a 15.5% share, Chrysler/Fiat had a 12.6% share, Toyota had a 14.3% share, Honda had a 9.1% share, Nissan had an 8.8% share, Hyundai had a 4.4% share, and Kia had a 3.7% share. *See Market Data Center: Auto Sales,* WALL ST. J. (June 2, 2015), http://online.wsj.com/mdc/public/page/2_3022-autosales.html. This parameter aligns the Dataset with sampling restrictions of previous automotive recall studies, *see* Rupp & Taylor, *Who Initiates Recalls and Who Cares? Evidence from Automobile Industry, supra* note 37.

[58] For General Motors, this number was 2,935,008; for Ford, 2,480,942; for Toyota, 2,373,771; for Chrysler, 2,090,639; for Honda, 1,540,872; for Nissan, 1,386,895; for Hyundai, 725,718; for Kia, 580,234. *See* Todd Lassa, *New Car Sales Hit 16.4 Million in 2014,* AUTO. MAG. (Jan. 6, 2015) http://www.automobilemag.com/features/columns/1501-new-car-sales-hit-16-4-million-in-2014/.

[59] *See* Rupp & Taylor, *Who Initiates Recalls and Who Cares? Evidence from Automobile Industry, supra* note 37 at 127.

litigation in the recall process.[60] The exclusion of recalls from smaller automakers may exacerbate this overinclusiveness. Those manufacturers' lower revenues may provide weaker incentives for litigators to pursue claims against them. These concerns, while notable, may be offset by underinclusiveness stemming from the flaws in the coding procedure described below.

B. Variables

The Pre-Recall Litigation Dataset codes each recall for nine variables: *NHTSA Recall Campaign Number, Date of Recall, Manufacturer, Defective Component, Units Affected, NHTSA Influence, Pre-Recall Litigation, Risk of Injury,* and *Risk of Crash/Fire.* The data for the variables *NHTSA Recall Campaign Number, Date of Recall, Manufacturer, Units Affected,* and *NHTSA Influence* were obtained, with small modification, from the Recalls Database.[61] Data for the *Defective Component* variable were also obtained from the Recalls Database, with certain component categories modified for clarity.[62]

The *Pre-Recall Litigation* variable codes for the existence of any litigation initiated prior to a recall that includes a well-specified claim related to the defect at issue. The "well-specified" qualification is aimed at excluding numerous claims brought under state lemon

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[60] Christopher Jensen, *A Record Year of Recalls: Nearly 64 Million Vehicles,* N.Y. TIMES (Feb. 12, 2015), http://www.nytimes.com/2015/02/13/business/auto-safety-recalls-set-record-of-nearly-64-million-vehicles-in-2014.html. While the average year has a vehicle-to-recall ratio of 43,362:1, 2014 has a ratio nearly twice that size, at 79,577:1 - the second-largest such ratio since 1966. *See* NHTSA, *supra* note 18.

[61] NHTSA, *Recall Search Tool,* SAFERCAR.GOV, http://www-odi.nhtsa.dot.gov/owners/SearchSafetyIssues. In the Recalls Database, these variables are listed as "CAMPNO," "RCDATE," "MFGNAME," "POTAFF," and "INFLUENCED_BY," respectively. Unlike the Recalls Database, the Dataset does not differentiate between recalls influenced by OVSC or ODI.

[62] *Recall Search Tool, supra* note 61. In the Recalls Database, this variable is listed as "COMPNAME."

laws and the warranty protection provisions of the Magnuson-Moss Act.[63] This may seem at odds with the purpose of this project, considering that lemon laws are written to provide consumers with an avenue for obtaining remedies related to defective products.[64] But these cases, which include the broadest allegations of defect, likely do not initiate automotive recalls.[65] Still, their exclusion means that the data may be underinclusive in terms of capturing recalls that have related pre-recall litigation.

A recall coded positively for *Risk of Injury* when NHTSA described it as pertaining to a defect that could cause an injury.[66] A recall coded positively for *Risk of Crash/Fire* when NHTSA described it as pertaining to a defect that could increase the risk of a crash or fire.[67] These variables are intended, in part, to replace the hazard rating that NHTSA assigned to every crash until 2002. [68]

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[63] Pub. L. No. 93-637, 88 Stat. 2183-2193 (codified at 15 U.S.C. §§ 2301-2312 (1982)).

[64] *See* Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon Law*, 46 LAW & SOC. REV. 463 (2012).

[65] In these suits, plaintiffs describe general faults with their cars and assert that the vehicle was "defective or had defective components." Combined with low statutory caps on recovery, plaintiffs have little incentive to investigate the specific defect at issue in their case. *Id.;* Carl S. Nance, *Virginia's Lemon Law: The Best Treatment For Car Owner's Canker*, 19 U. RICH. L. REV. 405 (1985).

[66] *Recall Search Tool, supra* note 61. This is when the "CONSEQUENCE_DEFECT" field in a Recalls Database entry includes any form of the word "injury."

[67] *Recall Search Tool, supra* note 61. This is when the "CONSEQUENCE_DEFECT" field in a Recalls Database entry includes any form of the word "fire," the phrase "risk of vehicle crash," the phrase "risk of crash," or the phrase "risk of accident."

[68] It is unclear why NHTSA decided to do away with hazard ratings, which were utilized by previous researchers. *See, e.g.*, Yong-Kyun Bae & Hugo Benitez-Silva, *Do Vehicle Recalls Reduce the Number of Accidents? The Case of the U.S. Car Market*, 30 J. OF POL'Y ANALYSIS & MGMT. 821, 853 (2011).

C. Procedure

Most of the variables in the Pre-Recall Dataset were coded by extracting and manipulating data from the Recalls Database. However, the Recalls Database included no information relevant to the *Pre-Recall Litigation* variable, which as a consequence was coded for using alternative sources. The first source was the 573 reports that are required to include "a chronology of all principal events that were the basis for the determination that the defect-related to automotive safety, including a summary of all warranty claims, field or service reports, and other information, with their dates of receipt."[69] None of the 573 reports examined mentioned discovery, settlements, or any other information relating to pre-recall litigation.

Other sources used to code for the *Pre-Recall Litigation* variable include legal and news databases, including the Public Access to Court Electronic Records System (PACER), Bloomberg Law, Nexis News, Google, and a host of state and local court docket databases. Each of these databases is flawed in regards to generating relevant data. PACER grants the greatest access to court records, but fails to include a document search function, and is limited to federal cases. Bloomberg Law has a powerful document search function, and covers a number of state dockets, but fails to be comprehensive. State and local docket databases range wildly in terms of quality and access. Even used in conjunction with one another, these databases likely omitted instances of pre-recall litigation, leaving the resulting Dataset underinclusive.

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[69] *Recall Search Tool*, *supra* note 61.

V. RESULTS

A. Aggregate Data

1. Data regarding recalls with pre-recall litigation

29% of the recalls in the Dataset coded positively for the *Pre-Recall Litigation* variable. Those recalls covered a range of components, most of which are critical to occupant safety: airbags, service brakes, electrical and steering systems. Recalls coding positively for the *Pre-Recall Litigation* variable affected an outsized number of vehicles. Despite representing less than 30% of the recall sample, variable-positive recalls affected roughly 60% of the vehicles in the sample. Variable-positive recalls also tended to be larger than non-variable-positive recalls. On average, a variable-positive recall affected 1.46 million vehicles, more than four times the 0.37 million vehicles affected on average by a non-variable-positive recall.

Pre-recall litigation also correlates with recalls of products with more hazardous defects. Of the vehicles affected by recalls that coded positively for the *Pre-Recall Litigation* variable, 84% belonged to recalls that coded positively for the *Explicit Injury Potential* variable. Just 31% of the recalls that coded negatively for the *Pre-Recall Litigation* variable coded positively for the *Explicit Injury Potential* variable. Of the vehicles in the Dataset that coded positively for the *Explicit Injury Potential* variable, 72% belonged to recalls that coded positively for the *Pre-Recall Litigation* variable.

Pre-recall litigation is less likely to be involved in recalls of products with defects that increase the risk of crash or fire. Of the recalls that coded positively for the *Pre-Recall Litigation* variable, just 35% also coded positively for the *Explicit Risk of Crash or Fire* variable. Of the recalls that coded negatively for the *Pre-Recall Litigation* variable, 67% also coded positively for the *Explicit Risk of Crash or Fire* variable. Of the vehicles in the Dataset that coded positively for the *Explicit Risk of Crash or Fire* variable, 56% also belonged to recalls that coded negatively for the *Pre-Recall Litigation* variable.

2. Data regarding NHTSA-influenced recalls

NHTSA appears to influence larger-than-average recalls, and, correspondingly, manufacturers appear to initiate smaller-than-average recalls without NHTSA assistance. The recalls influenced by NHTSA affected, on average, 1.18 million vehicles each. The recalls not influenced by NHTSA affected, on average, 0.53 million recalls. This effect may be related to the relationship between NHTSA investigations and pre-recall litigation. Removing all recalls that also coded positively for the *Pre-Recall Litigation* variable, the average recall volume for an NHTSA-influenced recall drops to 0.54 million vehicles.

There is a positive relationship between NHTSA defect investigations and the existence of pre-recall litigation. 50% of recalls that coded positively for pre-recall litigation also involved an investigation by NHTSA. Less than 10% of recalls that did not code positively for pre-recall litigation involved an investigation by NHTSA. While recalls initiated by NHTSA tended to be larger than those not initiated by NHTSA, they were about 20% smaller on average than recalls involving pre-recall litigation.

There is a small relationship between the *NHTSA-Influenced Recalls* variable and both the *Explicit Injury Potential* variable and the *Explicit Risk of Crash or Fire* variable. While over 80% of recalls that coded positively for pre-recall litigation also coded positively for explicit injury potential, just 53% of NHTSA-initiated recalls shared the same attribute, which in turn was slightly above the 45% figure for non-NHTSA-initiated recalls. 46% of all NHTSA-influenced recalls explicitly noted a risk of crash or fire, below the 62% in the total sample that did so.

B. Recall Narratives

The 20 recalls that coded positively for the *Pre-Recall Litigation* variable can be grouped into six distinct narratives that describe the link between a defect, a lawsuit, and a recall.

1. General Motors/Chrysler Ignition Switch Recalls

Four years before the crash that took Brooke Melton's life, an ODI panel was considering an internal recommendation to open an evaluation into air bag non-deployments in Chevy Cobalts and Saturn Ions.[70] That recommendation was based on two separate crash investigations of an incident in Wisconsin, as well as EWR data from General Motors.[71] Years later, this information was determined to have been enough to identify the ignition switch defect.[72] Nevertheless, the panel rejected the recommendation.[73] Furthermore, NHTSA staffers were "not asked to go out and look for new information or to reevaluate existing data."[74] In the following years, NHTSA continued to monitor the issue, but, despite a growing body of supporting evidence and continuing recommendations to open investigations, failed to take action until 2014.[75]

In February 2011, Brooke Melton's parents approached Lance Cooper, a solo practitioner from Marietta, Georgia, to defend them from a potential suit by the driver of the car that struck their daughter's 2005 Chevrolet Cobalt.[76] The Meltons were convinced that their daughter was too cautious a driver to be the cause of the accident, and told Cooper that Brooke's Cobalt had been subject to a steering-related recall after her crash.[77] Cooper noticed service bulletins sent to dealerships by General Motors in 2005 and 2006 that described how drivers could "inadvertently turn off the ignition" in some of its cars.[78] Convinced he had a case,

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[70] *See* Comm. on Energy and Commerce, 113th Cong., STAFF REPORT ON THE GM IGNITION SWITCH RECALL: REVIEW OF NHTSA 20 (2014).

[71] *Id.* at 19.

[72] *Id.* at 3.

[73] *Id.* at 22.

[74] *Id.*

[75] *Id.* at 23-31.

[76] *See* Penenberg, *supra* note 1.

[77] *Id.*

[78] Patrick G. Lee & Jeff Plungis, *GM Plagued as Georgia Lawyer Presses Regulators on Deaths*, BLOOMBERG (Mar. 17, 2014, 10:29 AM), http://www.bloomberg.com/news/articles/2014-03-17/gm-plagued-as-georgia-lawyer-presses-regulators-on-deaths.

Cooper filed a wrongful death suit against General Motors in June 2011.[79]

Cooper hired a forensic engineer to study Brooke's Cobalt.[80] The engineer's analysis discovered that the powertrain control module had lost power in the seconds before the crash.[81] The engineer suspected that a defect in the switch was to blame, and began testing 2005 Cobalt ignition switches from scrapyards and General Motors dealerships.[82] The engineer confirmed that many of the ignition switches needed an unusually small amount of force in order to shut off - no more than that of a knee bumping the steering column.[83] The engineer also noticed a discrepancy between older and newer ignition switches, with the older switches requiring half as much torque in order to be switched off.[84] There was no indication the new and old switches were engineered differently - indeed, General Motors had stamped both sets of switches with the same part number.[85] Cooper hired a second engineer who helped confirm that ignition switches manufactured after 2008 had been quietly re-engineered to resist being easily switched off.[86]

Cooper then requested thousands of documents through discovery, and dozens of people with knowledge of the defect, including 12 engineers from General Motors.[87] Cooper elicited testimony from the 2005 Cobalt's head engineer, Raymond DeGiorgio, that he "recognized differences between the original and replacement switches but couldn't explain why it had been changed without GM or Delphi, the parts maker,

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[79] Order on Motion to Remand to State Court at 26, Melton v. General Motors LLC, No. 1:14-cv-01815, 2014 WL 3565682 (N.D. Ga. 2014).

[80] Penenberg, *supra* note 1; Ben Klayman, Marilyn Thompson & Julia Edwards, *GM's New Recall Risk - The Spare Parts Market*, REUTERS (Mar. 26, 2014, 4:19 PM), http://www.reuters.com/article/us-gm-recall-aftermarket-idUSBREA2P21620140326.

[81] Penenberg, *supra* note 1.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Lee & Plungis, *supra* note 78.

modifying the identification number."[88] Cooper got one engineer to testify that he had experienced an ignition-caused shutdown during a test drive in 2004.[89] When asked by Cooper if General Motors had made a "business decision not to fix this problem" before selling a defective vehicle to Brooke Melton, the program engineering manager for the Cobalt in 2004 and 2005 testified, "That is what happened, yes."[90]

In September 2013, General Motors reached a settlement with the Meltons for a reported $5 million.[91] In February 2014, General Motors issued a recall for 619,122 model year 2005-2007 Chevrolet Cobalt and 2007 Pontiac G5 vehicles.[92] One auto-safety analyst said that Cooper "single-handedly set the stage" for the recall.[93] In the relevant 573 report the company filed with NHTSA, General Motors made no mention of the Meltons' lawsuit or the investigatory efforts by Cooper and his team.[94] Instead, the company traced the initiation of the recall back to a meeting held in July 2011 to investigate crashes in model year 2005-2007 Cobalt and 2007 Pontiac G5 vehicles.[95] The report does not mention that this meeting was held one month after the Meltons filed their initial lawsuit against the company.[96]

Cooper, angry at the small size of the recall, wrote

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[88] Penenberg, *supra* note 1.

[89] *Id.*

[90] *Id.*

[91] *Id.*; Tom Krisher, *If Reopened, Suit Versus GM Could Upend Its Legal Strategy*, BOSTON GLOBE (July 2, 2014), https://www.bostonglobe.com/business/2014/07/01/georgia-lawsuit-still-causing-trouble-for/ZWxKETTfSZ1tyrJm0awRpN/story.html.

[92] General Motors LLC, *573 Report for Recall 14V-047*, Feb. 7, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM450012/RCDNN-14V047-1347P.pdf.

[93] Jeff Bennett, *Lawyer Seeks to Reopen Suit Central to GM Recall: GM Concealed Key Facts, Suit Claims*, WALL ST. J., (May 12, 2014) http://www.wsj.com/articles/SB10001424052702303851804579558303317864262.

[94] General Motors LLC, *Supplement to 573 Report for Recall 14V-047*, Feb. 24, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM450663/RCDNN-14V047-3409.pdf.

[95] *Id.*

[96] *Id.*

a letter to NHTSA stating that General Motors had failed to "include all defective vehicles in the recall."[97] A week later, the company expanded the recall to include an additional 748,024 Chevrolet, Pontiac, and Saturn vehicles.[98] In March 2014, General Motors expanded the recall a third time to cover an additional 823,788 Chevrolet, Pontiac, and Saturn vehicles.[99] General Motors subsequently undertook an internal review of ignition switches on all of its vehicles, which led to a spate of further recalls through August 2014 that covered more than 9 million vehicles.[100] In total, General Motors recalled over 11.4 million vehicles in 2014 as a result of the ignition switch defect.

In spring 2014, ODI began an outreach campaign to other auto manufacturers "regarding ignition key position and its effect on air bag system availability . . . in connection with" the General Motors ignition switch recalls.[101] In June 2014, following an internal investigation at the behest of NHTSA, Chrysler issued a recall for

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[97] Letter from Lance Cooper to General Motors (Feb. 20, 2014) (available at http://www.law360.com/articles/511736/attachments/0).

[98] General Motors LLC, *Amended 573 Report for Recall 14V-047*, Feb. 25, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM450732/RCDNN-14V047-7510.pdf.

[99] General Motors LLC, *Amended 573 Report for Recall 14V-047*, Mar. 28, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM452913/RCDNN-14V047-8089.pdf.

[100] *See* Anton R. Valukas, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls*, May 29, 2014, https://s3.amazonaws.com/s3.documentcloud.org/documents/1183506/valukas-report-from-gm-redacted.pdf; General Motors LLC, *Amended 573 Report for Recall 14V-335*, June 11, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM458044/RC DNN-14V355-3393.pdf; General Motors LLC, *Amended 573 Report for Recall 14V-400*, July 2, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM469452/RCLRPT-14V400-7499.PDF; General Motors LLC, *573 Report for Recall 14V-490*, Aug. 7, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs /download/doc/UCM459852/RCDNN-14V490-2121P.pdf.

[101] General Motors Reports for Recalls, *supra* note 100.

525,206 Dodge and Chrysler vehicles with similarly defective ignition switches.[102] ODI's investigation also spurred a July 2014 recall of 643,618 more Chrysler vehicles.[103] Finally, Chrysler initiated a recall in September 2014 of 291,703 vehicles in response to information uncovered in its own parallel investigation.[104] In total, Chrysler recalled over 1.4 million vehicles as an indirect result of the ignition switch defect.

2. Takata Airbag Recalls

On June 4, 2007, a customer filed a complaint with Honda alleging that a safety defect caused the unusual deployment of the airbags in either their 2001 Honda Accord or Civic.[105] The airbag inflator model apparently shot metal fragments from its outer shell through the airbag fabric upon deployment.[106] Two days after that complaint was filed, an unidentified party filed a lawsuit against Honda alleging that a similar defect existed in their 2001 Honda Accord or Civic.[107] After

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[102] Chrysler, *573 Report for Recall 14V-373*, June 25, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM457640/RCDNN-14V373-3445P.pdf.

[103] Chrysler, *573 Report for Recall 14V-438*, July 18, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM458610/RCDNN-14V438-4259P.pdf.

[104] Chrysler, *573 Report for Recall 14V-567*, Sept. 14, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM462724/RCDNN-14V567-8193.pdf.

[105] Honda has not disclosed whether the model of car at issue in the complaint was an Accord or a Civic. *See generally* Letter from William R. Willen, Managing Counsel, Product Regulatory Office, American Honda Motor Co., Inc., to George Person, Chief, Recall Management Division, Office of Defects Investigation, National Highway Traffic Safety Administration (Sept. 16, 2009) (*available at* http://www.autosafety.org/sites/default/files/imce_staff_uploads/09V259%20Why%20Not%20in%2008V593%20Response%209-16-09.pdf).

[106] *Id.*

[107] Willen, *supra* note 105. While Honda has never identified the party who filed the case, docket searches indicate that three claims were filed against them on July 6th, 2007; of those claims, one was not related to motor vehicles and another was related to a 2005 Honda Odyssey that was not subject to any Takata-related recalls. *See* Rosa v. DeVilbiss Air Power Co., No. 1:07-cv-11234 (D. Mass.

more than a year of investigating, Honda determined that a defect existed in some of its 2001 Civic and Accord vehicles equipped with airbag inflators produced by Takata Corporation.[108] In November 2008, Honda issued its first recall related to defective Takata airbags in its vehicles, affecting 3,940 model year 2001 Civic and Accord vehicles.[109] Eight months later, Honda issued a second recall of over 440,000 additional vehicles equipped with Takata airbags.[110] By mid-2013, Honda had issued recalls for more than 2.5 million vehicles that had defective Takata airbags.[111] Finally, in 2014, Chrysler, Ford, Honda, Nissan, and Toyota all issued recalls affecting a total of over 10.9 million vehicles equipped with Takata airbags. Honda's competitors

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July 6, 2007); Carlos Marquez v. American Honda Motor C., No. BC373953 (Cal. Super. Ct. July 6, 2007) The third case has the entirety of its docket under seal, and was settled in 2008. Jason Mogera v. American Honda Motor Company Inc., No. KC050947(Cal. Super. Ct. July 6, 2007).

[108] *Rosa*, No. 1:07-cv-11234, *Marquez*, No. BC373953, and *Mogera*, No. KC050947; Honda, *573 Report for Recall 08V-593*, Nov. 11 2008, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/ACM10641506/RCDNN-08V593-1511.pdf.

[109] *Honda Recall Report*, Nov. 11, 2008, *supra* note 108.

[110] Honda, *Amended 573 Report for Recall 09V-259*, July 29, 2009, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/ACM12254242/RCDNN-09V259-6845.pdf

[111] Honda, *573 Report for Recall 10V-041*, Feb. 9, 2010, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/ACM13292161/RCDNN-10V041-0123.pdf; Honda, *573 Report for Recall 11V-260*, April 27, 2011, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/ACM16947967/RCDNN-11V260-6929.pdf; Honda, *Amended 573 Report for Recall 11V-260*, Dec. 1, 2011, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/ACM19786131/RCDNN-11V260-5849.pdf; Honda, *Amended 573 Report for Recall 11V-260*, Dec. 14, 2011, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM437303/RCDNN-11V260-4934.pdf; Honda, *Amended 573 Report for Recall 11V-260*, Jan. 25, 2012, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM360787/RCDNN-11V260-8822.pdf; Honda, *573 Report for Recall 13V-132*, April 10, 2013, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM436448/RCDNN-13V132-7704.pdf.

said they issued the recalls because of the growing evidence that Takata-made airbags could rupture and injure vehicle occupants, which at the time were known to be responsible for two deaths and dozens of injuries.[112]

3. Chrysler Dodge Charger Headlamp Recall

In February 2012, Chrysler issued a recall for roughly 10,000 model year 2011-2012 Dodge Chargers sold to police forces, which explicitly did *not* cover models sold to the general public.[113] The recall sought to remedy defective headlamp electrical systems that could overheat and melt the low beam harnesses, leading to a loss of low beam operation or loss of ABS/ESC system function.[114] In September 2013, the low beam headlights on Kiwanna Gathron's non-police force 2011 Dodge Charger began malfunctioning.[115] After repeated attempts at self-repair of the problem, Gathron's boyfriend noticed that the car's low-beam headlight harness "appeared melted."[116] Gathron took her vehicle to a Chrysler dealership, where she was informed that her car was out of warranty, and therefore the repair would cost her $1,400 plus a service charge.[117] The mechanics at the dealership told Gathron that they had "inspected other vehicles with the same problem."[118] In subsequent discussions with Chrysler, Gathron was informed that her vehicle was not defective or subject to the earlier recall of Dodge Chargers.[119]

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[112] Hiroko Tabuchi & Christopher Jensen, *Now the Airbags Are Faulty, Too,* N.Y. TIMES, June 23, 2014, at B1.

[113] David D. Dillon, *Chrysler, Defect and Noncompliance Report 12V-042* (2014), http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM416103/RCDNN-12V042-1893.pdf; Chrysler, *Owner Notification Letter for Recall 12V-042* (2012), http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM418951/RCONL-12V042-0123.pdf.

[114] Dillon, Chrysler, *supra* note 113; Chrysler, *supra* note 113.

[115] Dillon, Chrysler, *supra* note 113; Chrysler, *supra* note 113.

[116] Dillon, Chrysler, *supra* note 113; Chrysler, *supra* note 113.

[117] Dillon, Chrysler, *supra* note 113; Chrysler, *supra* note 113.

[118] Dillon, Chrysler, *supra* note 113; Chrysler, *supra* note 113.

[119] Dillon, Chrysler, *supra* note 113; Chrysler, *supra* note 113.

Months later, Kiwanna Gathron brought a class action lawsuit against Chrysler, alleging violations of the California Consumers Legal Remedies Act and the California Unfair Competition Law.[120] Gathron alleged that Chrysler "actively concealed the headlight harness defect" in civilian cars, and "refuse[d] to recall the Chargers sold to civilians."[121] Gathron was the owner of a 2011 Dodge Charger that was not equipped with a "Police Group package."[122] On February 19, 2014, Chrysler issued a motion to dismiss Gathron's case.[123] Chrysler claimed that Gathron had failed to establish the existence of a defect in her car, or that Chrysler knew of any such defect when it sold the car to her.[124] Chrysler characterized Gathron's allegation that her Charger had the same headlamp defect at issue in the "Police Group" Chargers as "conclusory."[125] One week after moving to dismiss Gathron's allegations as meritless, Chrysler informed Gathron's attorney that, on the day before, it "made the decision to recall all model-year 2011 and 2012 Dodge Charger non-police vehicles . . . to replace the headlamp jumper harnesses and bulbs, or headlamp assemblies if needed," and that Gathron's car was "subject to the recall."[126] Chrysler and Gathron agreed to extend relevant filling deadlines in light of the recall.[127] In August 2014, Gathron and Chrysler agreed to settle and dismiss the case.[128]

In the relevant 573 report Chrysler filed with NHTSA, the company made no mention of the Gathron

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[120] Complaint, Gathron v. Chrysler, No. 3:13-cv-05922 (N.D. Cal. Dec. 20, 2013).

[121] *Id.* at 7.

[122] *Id.* at 8.

[123] Defendant's Motion to Dismiss, Gathron v. Chrysler, No. 3:13-cv-05922 (N.D. Cal. Feb. 19, 2014).

[124] *Id.* at 9.

[125] *Id.* at 3.

[126] Stipulation Extending Time for Plaintiff to Respond, Gathron v. Chrysler Group LLC, No. 3:13-cv-05922 (N.D. Cal. Feb. 28, 2014).

[127] *Id.*

[128] Stipulation of Voluntary Dismissal at 3, Gathron v. Chrysler Group LLC, No. 3:13-cv-05922 (N.D. Cal. Aug. 22, 2014), 2014 WL 4828384 at *1; Joint Case Management Conference Statement, Gathron v. Chrysler Group LLC, No. 3:13-cv-05922 (N.D. Cal. 2014).

case.[129] Chrysler claimed that the recall was initiated after the company opened an internal investigation "as a result of increased field reports for non-Police vehicles" in November 2013.[130] The 573 report does not state when or why the investigation closed, only that "[i]t was later discovered the non-Police field data indicated trends similar to the Police vehicle field data."[131]

4. Toyota Avalon Airbag Recall

In May 2012, Thomas Hjellming was driving his 2003 Toyota Avalon through his hometown of Wheaton, Illinois.[132] His wife, Rebecca, was sitting in the car's passenger seat.[133] As they drove past a side street, a 2007 Audi Q7 driven by Monica Domzalski slammed into the front passenger's side of the Hjellming car.[134] Rebecca was wearing her seatbelt properly at the time of the crash.[135] Nevertheless, the crash left Rebecca severely injured and permanently disfigured.[136] In July 2013, the Hjellmings sued Toyota for negligence, loss of consortium, and strict products liability.[137] They alleged that the "untimely and unsafe" deployment of the Avalon's front passenger airbag caused Rebecca's injuries.[138] The court granted the Hjellmings' request to begin discovery in the case on October 3, 2013.[139] Toyota was granted its request to begin discovery on January 15, 2014.[140]

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[129] Chrysler, *573 Report for Recall 14V-101*, Mar. 4, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM451232/RCDNN-14V101-2793P.pdf.

[130] *Id.* at 1-2.

[131] *Id.*

[132] Complaint at 1, Hjellming v. Toyota Motor Corporation, No. 13-L-007506 (Ill. Cir. Ct. 2013).

[133] *Id.* at 1-3.

[134] *Id.*

[135] *Id.* at 4.

[136] *Id.* at 5.

[137] *Id.* at 4-8.

[138] *Id.* at 5.

[139] Case Docket, Hjellming v. Toyota Motor Corp., No. 13-L-007506 (Ill. Cir. Ct. 2013).

[140] *Id.*

Two months after the court granted Toyota's request to begin discovery in the Hjellming case, the company issued a recall for 291,703 model year 2003-2004 Toyota Avalon vehicles.[141] The defect the recall sought to remedy was a supplemental restraint system (SRS) that had circuits susceptible to shorting.[142] According to Toyota, this defect could lead to circuits being damaged in the SRS which, in turn, could lead to either of the front airbags "inadvertently deploy[ing]."[143] Such deployment could "increase the risk of minor injury and the possibility of a crash."[144]

In the relevant 573 report Toyota filed with NHTSA, the company made no mention of the Hjellmings' case. Toyota claims that the events leading to the recall began in January 2013, when it issued a voluntary recall of 2003-2004 Toyota Corollas that had a defective airbag control module.[145] At the time of the recall, Toyota "received a few field technical reports" about inadvertent airbag deployments on Toyota Avalons with the same airbag control module present in the recalled Corollas, and soon began an investigation into the issue.[146] Throughout 2013, Toyota received three additional field reports relating to inadvertent airbag deployments in 2003-2004 Toyota Avalons.[147] One of these reports led to the recovery of an airbag control module which, when analyzed by Toyota between December 2013 and late March 2014, was discovered to have the SRS defect described above.[148] Toyota claims to have issued the recall immediately after this analysis was completed.[149]

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[141] Toyota, *573 Report for Recall 14V-147*, Mar. 27, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM452859/RCDNN-14V147-2371P.pdf.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

5. General Motors Chevrolet Malibu Body Control Module Recall

In February 2013, high school sophomore Julius Perkins was driving his mother's 2005 Chevrolet Malibu on Lake Houston Parkway in Houston, Texas.[150] Five of Perkins' friends, including fellow sophomore Daquan Minor, were also in the car.[151] As Perkins sped along the rain-slicked parkway, the Malibu began to hydroplane.[152] Police reports state that Perkins "lost control of the vehicle while speeding, causing it to flip four times" over the parkway's median.[153] Minor was wearing his seatbelt at the time of the accident.[154] Still, the crash injured him so severely that he was left "without feeling from his midsection to his feet."[155] As a result, he could only walk short distances, and was forced to use a wheelchair for daily activities.[156]

Two months later, Minor brought suit against General Motors, the manufacturer of Perkins' Malibu, on strict liability and negligence theories.[157] Minor alleged a "non-exhaustive list of defects" that were present in the Malibu, including defective restraint systems, roof structures, and other vehicle safety systems. Minor and General Motors entered into a joint discovery plan that June, agreeing to complete all discovery by May 2, 2014; the court would later change this date to February

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[150] Complaint at 2, Branon v. General Motors LLC, No. 4:13-cv-01102 (S. D. Tex. Apr. 18, 2013); Complaint at 1, Atkinson v. Perkins, No.2013-50125 (Tex. Dist. Ct. June 26, 2014).

[151] Regine Murray, *Minor Finds Escape in Wheelchair Basketball, in* HOMER L. HALL, AARON MANFULL & MEGAN FROMM, STUDENT JOURNALISM AND MEDIA LITERACY 40-41 (1st ed. Rosen Young Adult 2015).

[152] Clauida Feldman, *Hotwheels Wheelchair Athletes Head to Championship Tournament*, HOUS. CHRON. (Apr. 15, 2015), http://www.chron.com/news/houston-texas/houston/article/Hotwheels-wheelchair-athletes-head-to-6202850.php.

[153] *Id.*

[154] *Branon*, at 2, *supra* note 150.

[155] Feldman, *supra* note 152.

[156] *Id.*

[157] *Branon*, at 2-3, *supra* note 150; *Atkinson*, at 1, *supra* note 150.

28, 2014.[158] In August 2014, the parties agreed to a protective order that prohibited Minor from disclosing any confidential information produced in discovery because such disclosure "could severely injure or damage the [disclosing] party."[159] Settlement hearings occurred throughout 2014, with a final hearing being scheduled for early May that was eventually pushed back until June.[160] The parties entered into a confidential settlement that month, and all documents related to discovery were sealed.[161]

Three months after it completed discovery in the Minor case, General Motors issued a recall for 2,440,524 cars including model year 2004-2012 Chevrolet Malibu vehicles.[162] The defect the recall sought to remedy was a faulty Body Control Module connection system.[163] That defect could cause the disablement of traction control, electronic stability control, panic braking assist features, cruise control, and service brake lamps.[164] Any of these conditions "may increase the risk of a crash."[165]

In the relevant 573 report General Motors filed with NHTSA, the company made no mention of the Minor case. General Motors claims that the events leading to the recall began in 2008, when NHTSA opened a preliminary investigation into 2005-2007 Pontiac G6 vehicles that allegedly had defective brake lamps.[166] The

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[158] Joint Discovery/Case Management Plan at 1-5, Branon v. General Motors LLC, No. 4:13-cv-001102, (S.D. Tex. June, 2013); Order at 1, Branon v. General Motors LLC, No. 4:13-cv-001102, (S.D. Tex. 2013).

[159] Agreed Protective Order at 1, Branon v. General Motors LLC, No. 4:13-cv-001102, (S.D. Tex. Aug. 28, 2013)

[160] Case Docket, Branon v. General Motors LLC, No. 4:13-cv-001102, (*last accessed* Sept. 26, 2014) (PACER).

[161] *Id.*

[162] General Motors LLC, *573 Report for Recall 14V-252*, May 14, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM455524/RCDNN-14V252-1248P.pdf.

[163] *Id.* at 1.

[164] *Id.*

[165] *Id.*

[166] General Motors LLC, *Chronology Supplement to 573 Report for Recall 14V-252*, May 14, 2014, http://www-

next year, General Motors initiated a voluntary recall of those vehicles, and NHTSA closed its investigation.[167] Four years later, in February 2013, NHTSA opened a recall query regarding complaints about defective brake lamps in a wider range of vehicles, including 2004-2011 Chevrolet Malibu vehicles.[168] In November 2013, NHTSA requested an engineering analysis from General Motors regarding the ability of the defect to cause the disablement of traction control, electronic stability control, panic braking assist features, cruise control, and service brake lamps.[169] GM conducted that analysis through the end of January 2014.[170] In March 2014, GM began further engineering analysis regarding the alleged defect; two months after this analysis began, GM issued a recall.[171]

6. General Motors Chevrolet Malibu Power Steering System Recall

In October 2010, Andrew Moss was driving his mother's 2005 Chevrolet Malibu Maxx on Interstate 55 just outside of Blytheville, Arkansas.[172] As Moss approached a bridge, the Malibu's steering system allegedly "locked up," preventing Moss from steering the vehicle.[173] The car struck a guardrail, crossed back over the interstate, and slammed into a concrete barricade before coming to a stop, leaving a trail of skid marks the length of a football field.[174] Moss suffered injuries so serious that he had to be airlifted to a hospital in

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odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM456297/RCDNN-14V252-4539.pdf.

[167] *Id.*

[168] *Id.* at 3.

[169] *Id.*

[170] *Id.* at 4.

[171] *Id.*

[172] Complaint at 2-3, Moss v. General Motors LLC, No. 3:13-cv-00128 (E.D. Ark May 20, 2014); Memorandum of Law of Defendant General Motors LLC in Support of Its Motion to Compel Discovery at 3-4, Moss v. General Motors LLC, No. 3:13-cv-00128 (E.D. Ark. May 21, 2014); Google Maps Search, June 1, 2015.

[173] Complaint, *Moss*, *supra* note 172.

[174] *Id.*

Memphis, Tennessee.[175]

Moss filed a lawsuit against General Motors in May 2013 seeking damages on strict liability and failure to warn theories.[176] Moss alleged that the primary cause of his accident was a defect in the Malibu's steering system.[177] Moss also claimed that the steering had similarly "locked up" on a number of occasions prior to the accident, and that he had a witness to testify to this fact.[178] General Motors issued a series of interrogatories to Moss and his attorney, which were replied to on February 5, 2014.[179] General Motors complained to the court that the reply was both "incomplete" and "untimely," citing a number of questions Moss had failed to answer.[180] Moss's attorney had also failed to respond to requests by General Motors to inspect Moss's vehicle.[181]

In March 2014, seven weeks after receiving Moss's responses to its interrogatories, General Motors announced a recall for 1,373,177 cars including 2004-2006 Malibu Maxx vehicles.[182] The recall sought to remedy defective power steering components that could cause "a sudden loss of power steering assists that occur at any time while driving."[183] This would cause the vehicle to "revert to a manual steering mode, but would demand greater driver effort at low vehicle speeds, which could result in an increased risk of a crash."[184]

In June 2014, Moss asked for his case to be dismissed without prejudice, citing "extensive discovery requests" by General Motors that rendered him unable

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[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] Memorandum in Support of Motion to Compel at 4-5, *Moss*, *supra* note 172.

[179] *Id.* at 3-4.

[180] *Id.* at 5-7.

[181] *Id.* at 7-8.

[182] Memorandum from M. Carmen Benavides, Dir. Prod. Investigations and Safety Regulations, to Nancy Lewis, Assoc. Adm'r for Enforcement, NHTSA 14V-153, (Mar. 31, 2014) (on file with NHTSA), *available at* http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM452932/RCDNN-14V153-7510.pdf.

[183] *Id.*

[184] *Id.*

to comply with discovery in a timely manner.[185] Moss's filing suggested that he would re-litigate the case after he collected more information.[186] The court granted Moss's motion to dismiss, and Moss does not appear to have re-filed the case.[187]

In the relevant 573 report General Motors filed with NHTSA, the company made no mention of the Moss case. General Motors claims that the events leading to the recall began in 2004, when NHTSA opened a preliminary evaluation of 2004 Chevrolet Malibu vehicles that allegedly had an electric power steering defect.[188] After that investigation, General Motors spent a decade "gather[ing] and reviewing data with regard to [electric power steering] issues," data that came from customer complaints, and internal investigations on related vehicles, and a NHTSA investigation into the electric power steering systems in 2004-2007 Saturn Ion vehicles.[189] The company claims to have made the decision to recall after it created a "collaboration room to review data" on March 19, 2014.[190]

VI. Discussion

A. Support for the Traditional View

The aggregate data provides some support for the claims entailed by the traditional view. First, the data confirm that the recalls NHTSA influenced are larger than those it does not. However, the meaning of this finding is unclear. NHTSA may interpret it as showing the agency to be focused on uncovering the most widespread defects. But the data also show that the size gap

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[185] Motion to Dismiss without Prejudice, Moss v. General Motors LLC, No. 3:13-cv-00128 (E.D. Ark. June 12, 2014).

[186] *Id.*

[187] Case Docket, Moss v. General Motors LLC, No. 3:13-cv-00128-JM (E.D. Ark 2014).

[188] General Motors LLC, *Supplemental Chronology for 573 Report for Recall 14V-153* at 3, Mar. 31, 2014, http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM455144/RCDNN-14V153-3310.pdf.

[189] *Id.* at 4-6.

[190] *Id.*

between NHTSA-initiated and non-NHTSA-initiated recalls disappears when recalls involving pre-recall litigation are removed from the sample. Thus, the link between recall size and NHTSA involvement may be the result of the agency being a "Johnny-come-lately" in recalls where private litigators uncover defects.

The data also reveal a small link between NHTSA investigations and recalls of more dangerous defects. NHTSA-initiated recalls are, in a small but significant way, more likely to involve recalls of defects that explicitly could cause injury. There is a similarly small but significant *negative* relationship between NHTSA investigations and recalls of defects that could increase the risk of a crash or fire. This data provides support of the traditional view's claim that the recalls NHTSA influenced are of products with more dangerous defects than those it does not.

B. Support for an Alternative View

While the Dataset gives limited support to the descriptive claims entailed by the traditional view, it provides no support for the traditional view's claim that lawsuits only contribute to recalls by hanging the specter of *post hoc* litigation over manufacturers' heads. Instead, the data in aggregate establish that pre-recall litigation has a substantial presence in the overall recall picture, particularly when recalls are for defects branded as particularly dangerous. Furthermore, the recall narratives suggest that pre-recall litigation can initiate automotive recalls by uncovering defects whose existence or extent was previously unknown to manufacturers, regulators, and the public.

This finding suggests an alternative view that sees plaintiffs' lawyers as being able to use pre-trial discovery to investigate and uncover new information about a defect.[191] In this view's view, private litigators' powers to take depositions, hire expert witnesses, examine vehicle components, and procure documents,

[191] I am indebted to the work of Jon S. Vernick for providing the outline of this view in his work on the role of litigation in preventing product related injuries. *See* Jon S. Vernick, *How Litigation Can Promote Product Safety*, 32 J. LAW MED. ETHICS 551 (2004).

combined with the incentive to win recovery for their clients, make them a force for the discovery of defective automobiles. Even if an automaker already knows about the *existence* of a defect, the mere filing of a claim can help reveal information about that defect's *scope* and *seriousness,* altering the calculus behind the decision to issue a recall.

While the Dataset strongly supports the existence of this investigatory role for the plaintiffs' bar, it is less certain about how often lawyers play that role. While each of the recall narratives suggests that pre-recall litigation plays a causal role in the initiation of recalls, the strength of those suggestions varies widely, and is further qualified by the Dataset's methodological limitations. The figures indicating that pre-recall litigation affected 60% of the vehicles in the Dataset speak to the *importance* of the investigatory role rather than its pervasiveness. The data show that recalls that occur in the wake of litigation are, on average, four times larger than other recalls. The vast majority of these recalls involve vehicles with defects that are more dangerous than those in other recalls, and involve components that are more likely to be critical to occupant safety.

The alternative view also asserts that the traditional view's story of how NHTSA initiates recalls is incomplete. The Dataset supports the traditional view's assertion that recalls initiated by NHTSA tend to be larger than those initiated by manufacturers.[192] However, the correlation between pre-recall litigation and subsequent NHTSA defect investigations shown in the Dataset suggests that private litigation plays a role in spurring regulatory investigations. Furthermore, litigators initiate recalls with defects that are more dangerous than those initiated by NHTSA.

The alternative view proposes a new investigatory role for private litigation in the automotive recall process that allows litigators to initiate recalls. Further, the view hints that the scope of that role is both large and apt in uncovering particularly dangerous defects.

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[192] *See* Rupp & Taylor, *Who Initiates Recalls and Who Cares? Evidence from Automobile Industry, supra* note 37.

The alternative view also sees NHTSA as initiating relatively smaller recalls that are focused on less dangerous defects. Placed in the context of growing concern about auto safety defects, these findings have important normative implications.

C. Normative Implications: Removing Barriers to Auto Safety

The death toll resulting from the General Motors/ Chrysler ignition switch defect, the Takata airbag defect, and other defects indicates that more timely and effective investigation of auto safety defects is imperative for consumer safety. The main task of investigators, be they in a police department or a law firm, is to extract and analyze meaningful information from disparate data.[193] Thus, effective investigators require three attributes: *access* to sources of raw data, the *capacity* in order to understand such data, and the *incentives* to drive those collection and interpretation activities toward conclusive action (i.e., arrests, lawsuits, or recalls).

Of the players in the automotive recall game, none possess the requisite traits to be effective investigators of auto safety defects. Manufacturers have access to relevant data on potential defects (or, at least, have the ability to create such access), and have the technical capacity to interpret that data in a way that can identify defects. But, as described above, manufacturers have incentives to *ignore* data that could indicate defects.[194]

Regulators have enormous *potential* access to raw data, but have squandered this ability by failing to compel manufacturers to deliver comprehensive reports on potential defects. In June 2015, NHTSA's Office of Inspector General (OIG) released a report stating that "ODI's processes for collecting vehicle safety data are insufficient to ensure complete and accurate data."[195]

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[193] For more on the relationship between data and information in criminal investigations, see W. B. SANDERS, DETECTIVE WORK: A STUDY OF CRIMINAL INVESTIGATIONS (1977).

[194] *See supra* text accompanying notes 100-03.

[195] NHTSA, *supra* note 26, at 6.

ODI's EWR system data was found to be "ultimately of little use due to the inconsistencies in manufacturers' categorizations of safety incidents."[196] NHTSA also fails to be an effective investigator because it does not have the capacity to understand the data it does collect. The same OIG report found that just one employee at ODI reviews 90% of the roughly 330 consumer complaints the office receives every day.[197] The report also found that "ODI staff charged with interpreting statistical test results for early warning reporting data" had "no training or background in statistics."[198]

NHTSA's capacity issues stem not only from personnel problems, but from regulatory capture and budgetary restraints. Top NHTSA officials "go on to serve as consultants, lawyers, and expert witnesses for the industry," while ex-industry employees are appointed to top agency posts.[199] Finally, NHTSA has "rather strong" budgetary incentives to avoid posing large costs and fines on the industry.[200] The current director of ODI summed up the problems with NHTSA's investigatory culture unwittingly when he said the agency does "not like to be in a cat and mouse enforcement posture with industry. . .[firms] that communicate with us early and often are likely to stay out of trouble."[201]

While there are proposals to transform NHTSA into an effective investigatory body, it is doubtful that change is on the horizon. The 2015 OIG report closed with 17 suggestions to fix ODI's failures, ranging from

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[196] *Id.* at 7.

[197] *Id.* at 15-16.

[198] *Id.* at 17.

[199] *See, e.g.*, Jeff Gelles, *Defects at the Agency that Regulates Car Safety*, PHILA. INQUIRER, June 5, 2015, http://www.philly.com/philly/business/consumer_news/20150705_Defects_at_the_agency_that_regulates_car_safety.html.

[200] PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 132-33 (2nd ed. Princeton Univ. Press 2014).

[201] Partnership for Public Service, *Frank S. Borris II: Protecting Drivers and Passengers from Vehicle Safety Defects*, WASH. POST, Mar. 10, 2015, http://www.washingtonpost.com/politics/federal_government/frank-s-borris-ii-protecting-drivers-and-passengers-from-vehicle-safety-defects/2015/03/10/f52507fe-c736-11e4-aa1a-86135599fb0f_story.html.

"[d]evelop[ing] and implement[ing] a method for assessing and improving the quality of early warning reporting data" to "[r]equir[ing] manufacturers to develop and adhere to procedures for complying with early warning reporting requirements."[202] While NHTSA can implement some of these suggestions by reallocating resources, the reforms that would truly improve ODI (i.e., vastly expanding review of complaints and manufacturer data verification) demand substantial increases to NHTSA's budget. NHTSA's own plan to remedy its defects investigation procedures hinges on a large boost to its staff and budget.[203] Such an increase, while proposed by the Obama Administration,[204] is unlikely to materialize due to Congressional gridlock.[205]

In the face of a recalcitrant industry and an ossified regulator, private litigators may be a viable alternative in the quest for increased auto safety. The plaintiffs' bar has a large capacity to make use of data related to potential defects, with individual lawyers having the ability to spend years and substantial monetary resources investigating a single case. However, plaintiffs' lawyers may not be as overly "aggressive in finding defective products" as advocates of tort reform claim.[206] Below I outline four barriers that block litigators' access

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[202] NHTSA, *supra* note 26, at 26-27.

[203] *See* Todd Spangler & Alisa Priddle, *NHTSA Promises Changes in Wake of GM Failures*, DETROIT FREE PRESS, June 5, 2015, http://www.freep.com/story/money/cars/2015/06/05/nhtsa-safety-team-internal-reportgm-ignition-switch/28536737/ (noting that NHTSA is asking for "380 new employees and nearly $90 million in additional spending" to achieve its reform plan).

[204] *See* Aaron M. Kessler, *Obama's Budget Call for Increased Funding for NHTSA Faces Uncertainty*, N.Y. TIMES, Feb. 5, 2015, http://www.nytimes.com/2015/02/06/business/obama-budgets-call-for-increased-funding-for-nhtsa-faces-uncertainty.html.

[205] *See* Stephen Elmer, *NHTSA Budget Boost Shot Down by House Panel*, AUTOGUIDE.COM (May 6, 2015), http://www.autoguide.com/auto-news/2015/05/nhtsa-budget-boost-shot-down-by-house-panel.html.

[206] *See* Barry Meier & Hilary Stout, *Victims of G. M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES, Dec. 29, 2014, http://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html?_r=0 (quoting an executive of the American Tort Reform Association).

to data on potential defects and weaken their incentives to bring litigation that could uncover defects, and I suggest ways to dismantle those barriers.

Barrier 1: Capped awards for noneconomic damages

Caps on awards for noneconomic damages may diminish incentives for litigators to invest resources in investigating potential auto safety defects. One prominent plaintiffs' lawyer involved in the General Motors ignition switch cases said that these caps have made it so that litigators "cannot afford to take an auto products case unless there is a death or serious injury."[207] This common complaint of the plaintiffs' bar is supported by studies that find a causal link between noneconomic damage caps and reductions in court filings.[208] Products liability filings are particularly prone to such reduction because they entail the costs of intensive discovery,[209] especially in states that mandate the creation of a "reasonable alternative design" (RAD) to prove design defect.[210]

The recall narratives above also support this claim about the negative relationship between damage caps and defect uncovering litigation. In 2006, a Wisconsin state trooper linked a Chevy Cobalt crash that killed two teens to a potentially defective ignition switch.[211] The families of the teens wanted to sue, but

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[207] *Id.*

[208] *See* Mark J. Browne & Robert Puelz, *The Effect of Legal Rules on the Value of Economic and Non-Economic Damages and the Decision to File*, 18 J. OF RISK & UNCERTAINTY 189 (1999); Mark J. Browne & Joan T. Schmit, *Litigation Patterns in Automobile Bodily Injury Claims 1977-1997: Effects of Time and Tort Reforms*, 75 J. OF RISK & INSUR. 83 (2008).

[209] *See* Francis H. Hare, Jr. & James L. Gilbert, *Discovery in Products Liability Cases: The Plaintiff's Plea for Judicial Understanding*, 12 AM. J. TRIAL ADVOC. 413 (1989); Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B. C. L. REV. 785, 792 (1997).

[210] *See* Frank J. Vandall, *Constructing Products Liability: Reforms in Theory and Procedure*, 48 VILL. L. REV. 843, 851 (2003) (estimating the cost of reasonable alternative design construction to be $25,000 per case).

[211] Meier, *supra* note 206.

could not find a plaintiffs' lawyer willing to represent them.[212] One lawyer justified his position by citing "the $350,000 maximum recovery for loss of society in Wisconsin and the extreme expense of litigating the case against General Motors."[213] When the Meltons filed the case that would finally uncover the ignition switch defect, they did so in Georgia, which has no caps on noneconomic damages in products liability cases.[214] The other suits profiled in the recall narratives were also filed in states that do not cap noneconomic damages.[215]

Caps on noneconomic damages can also limit litigators' ability to uncover automotive defects that disproportionately harm the elderly, women, and children. These groups may suffer "little economic loss when injured by defective products" because of their lower wage earning potential and, in the case of the elderly, lower future medical costs due to lower life expectancy.[216] Caps on noneconomic losses serve to diminish the potential award for injured plaintiffs suing manufacturers, reducing the incentives for litigators to represent them. For example, imagine the Volkswagen New Beetle, whose ownership is composed of about 60% women,[217] has a fatal defect in its brake system. The majority of parties injured by the defect would be women, reducing the potential economic damages in subsequent suits against Volkswagen. In states with caps on noneconomic damages, there would be a lower ceiling on recovery, and a subsequently smaller likelihood of a litigator taking a case and uncovering the defect.

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[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *See* AM. TORT REFORM ASS'N, *Noneconomic Damages Reform*, (last visited July 15, 2015) http://www.atra.org/issues/noneconomic-damages-reform. Illinois had a $500,000 cap on noneconomic damages in the mid-1990's before it was ruled unconstitutional by the state supreme court in *Best v. Taylor Machine Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997).

[216] Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*. 53 EMORY L. J. 1263, 1281 (2004).

[217] *See* Jonathan Welsh, *What Men Want: A Volkswagen Beetle?*, WALL ST. J. (Sept. 19, 2011), http://blogs.wsj.com/drivers-seat/2011/09/19/what-men-want-a-volkswagen-beetle/.

There is a substantial literature that gives convincing reasons to remove caps on noneconomic damages. Such caps erect practical barriers to the civil justice system for the injured,[218] undermine constitutional rights to due process,[219] and reduce the incentives of tortfeasors to internalize externalities.[220] This paper adds to this literature by finding that noneconomic damage caps decrease incentives for lawyers to play the investigatory role outlined in the alternative view.[221]

Barrier 2: Lack of public access to early warning system data from manufacturers

Unlike manufacturers, litigators don't have instant access to aggregate data that could indicate potential safety defects. And unlike regulators, litigators don't have the authority to compel the release of that data on a regular basis. While pre-trial discovery grants litigators access to that information sporadically, that access is limited by the constricted focus of discovery requests and the ability of manufacturers' counsel to narrowly construct demands for documents.[222] More importantly, discovery occurs *after* a litigator has decided

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[218] *See* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link between Damage Caps and Access to the Civil Justice System*, *55* DEPAUL L. REV. 635 (2005).

[219] *See* Kathryn L. Vezina, *Constitutional Challenges to Caps on Tort Damages: Is Tort Reform the Dragon Slayer or Is It the Dragon*, 42 ME. L. REV. 219 (1990); *but see* Matthew W. Light, *Who's the Boss: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315 (2001) (arguing that decisions upholding damages caps as constitutional are better-reasoned than those that strike them down).

[220] *See* Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28, 31-34 (2011).

[221] Such a change would be substantial, considering that the states with noneconomic damages caps include: Alaska, Colorado, Hawaii, Iowa, Idaho, Kansas, Maryland, Michigan, Minnesota, Missouri, Mississippi, Ohio, and Oklahoma, and do not count states that have a noneconomic damages cap limited to medical malpractice cases. *See* AM. TORT REFORM ASS'N, *supra* note 215.

[222] Geoffrey C. Hazard Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237-39 (1988).

to take a client's case. To encourage the investigative role of private litigation in the automotive recall process, trial lawyers need expanded access to relevant data both before *and* after they decide to litigate.

Such encouragement could come from small changes in how the NHTSA collects and handles data it receives from manufacturers' EWR systems. All defect-related data collected by NHTSA is stored in a database called ARTEMIS.[223] NHTSA makes some ARTEMIS data public through its website, including most information on recalls, investigations, service bulletins, and consumer complaints.[224] This includes disaggregate data from EWR systems on injury/death incidents, including the model of the vehicle, date of the accident, number of injuries, state in which the accident occurred, and components reportedly involved.[225] Left inaccessible is the aggregate data from EWR systems relating to death and injury reports.[226] This leaves litigators unable to gain pertinent information about the nature of potential defects (e.g., how many ignition-related accidents the 2006-2010 Chevy Cobalt was involved in). Also left inaccessible are the aggregate and case-specific data on consumer complaints, as well as any data regarding warranty claims or non-dealer field reports.[227] The lack of access to non-dealer field reports is particularly harmful to litigators because that data are considered to be the "most important source of early warning data" that provides "specific, technical" information regarding accidents, including analysis of a vehicle failure's root cause.[228]

To increase litigators' access to data regarding potential auto safety defects, NHTSA should reverse prior rulemaking to make as much aggregate and disaggregate information received through ARTEMIS public as possible. A 2007 NHTSA rule, opposed by public

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[223] NHTSA, PRIVACY IMPACT ASSESSMENT: ARTEMIS (Updated 2015), http://www.transportation.gov/individuals/privacy/pia-artemis.

[224] *See Recall search tool*, *supra* note 61.

[225] *See Recall search tool*, *supra* note 61.

[226] *Id.*

[227] *Id.*

[228] *See* NHTSA, *supra* note 26, at 7.

interest and trial lawyer groups and supported by manufacturers, barred release of most EWR system data. [229] The rule claimed that publication of the information could cause "substantial harm to the competitive position of the manufacturer submitting the information and is likely to impair the government's ability to obtain necessary information in the future."[230] NHTSA made the claim that consumer complaint data does not involve safety concerns because "consumer complaint data are not indicative of defect trends."[231] This claim is ironic because NHTSA also identifies consumer complaints as its "primary source for identifying safety concerns."[232]

Barrier 3: The *Restatement (Second)* definition of design defect

The application of products liability law may also be undermining the ability of litigators to play the investigatory role outlined in the alternative view. Consumers injured in car accidents usually bring claims against manufacturers on theories of products liability. These claims can be grouped into three major categories of theories: manufacturing defects, failures to warn, and design defects.[233] Manufacturing defects are those that occur when a product "departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[234] Failure to warn claims allege that "foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings."[235] There are two competing definitions of design defect.[236] The first is drawn from

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[229] Confidential Business Information, 72 Fed. Reg. 58434, 59437 (Oct. 19, 2007) (codified at 49 C.F.R. pt. 512).

[230] *Id.*

[231] *Id.* at 59448.

[232] *See* NHTSA *supra* note 26, at 2.

[233] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §§ 1-2 (Am. Law INST. 1998).

[234] *Id.*

[235] *Id.*

[236] Douglas A. Kysar, *The Expectations of Consumers*, 103

section 402A of the *Restatement (Second) of Torts*, which states that a product has a design defect if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." [237] The competing definition is that of the *Restatement (Third) of Torts*, which states that a design defect exists "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."[238] While an explicit judicial consensus regarding a definition of design defect has not been achieved,[239] courts that claim to use the *Restatement (Second)* definition often "fail in practice to articulate and apply anything other than" *Restatement (Third)* definition.[240]

Courts that adhere to the definition laid out in the *Second Restatement* have the option of using a consumer expectations test to determine the existence of a design defect, while courts using a *Restatement (Third)* definition only use a risk-utility balancing approach.[241] Supporters of the *Third Restatement* definition claim that the consumer expectations test, as used by most courts,[242] is an "intellectually bankrupt approach"

COLUM. L. REV. 1700, 1702-03 (2003).

[237] *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. LAW INST. 1965).

[238] *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. §2 (b) (AM. LAW INST. 1998).

[239] Mike McWilliams & Margaret Smith, *An Overview of the Legal Standard Regarding Product Liability Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction*, 82 DEF. COUNS. J. 80, 83 (2015).

[240] Kysar, *supra* note 236, at 1703 (citing James A. Henderson, Jr. & Aaron D. Twerski, *The Products Liability Restatement in the Courts: An Initial Assessment*, 27 WM. MITCHELL L. REV. 7, 21 (2000); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1528 (1992)).

[241] *Id.*

[242] As opposed to the to-be-adopted formulation within Kysar's "twin-test" proposal in which juries "take[e] into account the types of factors that cognition psychologists and other observers of human judgment and decisionmaking have identified as pertinent to

whose reliance on the vague concept of consumer expectations allows unprincipled jurists to impose "unrestricted liability" on helpless manufacturers.[243] Supporters of the *Second Restatement* definition claim that a risk-utility balancing approach will deter worthy plaintiffs from filing suit because of the "enormous costs involved in obtaining expert testimony."[244] Such commentators might claim that the requirement of a RAD undermines the investigatory role of private litigation because "plaintiffs rarely, if *ever*, reach the jury in a classic design case" without a RAD.[245]

But there is good reason to think that the use of the *Third Restatement* definition of design defect actually *promotes* the investigatory role of private litigators in the automotive recall process. While construction of RADs may be expensive, they are not the kind of prohibitive barrier they are made out to be by the plaintiffs' bar. There are myriad examples of plaintiffs prevailing at trial after constructing a RAD.[246] RADs also give litigators more incentive to directly investigate the nature of the defects that harmed their clients. Using a traditional consumer expectations test, plaintiffs can potentially reach a jury by focusing on the public's abstract perceptions of a product's safety, rather than the

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public understanding and beliefs about risk." Kysar, *supra* note 236 at 1704-05, 1773-74.

[243] James A. Henderson Jr. & Aaron D. Twerski, *Consumer Expectations' Last Hope: A Response to Professor Kysar*, 103 COLUM. L. REV. 1791, 1802 (2003); *See also, e.g.*, Aaron D. Twerski & James A. Henderson Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1067 note 34 (2009).

[244] Cami Perkins, Note, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. LJ 609, 613 (2003).

[245] *See* Twerski & Henderson, *Manufacturers' Liability*, *supra* note 243, at 1072.

[246] *See* Perkins, *supra* note 244, at 614 (citing James A. Henderson & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 914-17 (1998)); *see also* Victor E. Schwartz, *The Role of the Restatement in the Tort Reform Movement: The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance*, 10 KAN. J. L. & PUB. POL'Y 41, 44 (2000).

specifics of an alleged defect.[247] With a RAD requirement, this avenue is closed; plaintiffs must expend resources to conduct a closer examination of the existing design, usually by hiring an engineer or other expert.[248] These efforts may lead litigators to uncover the particulars of an alleged defect, the kind of information necessary to help regulators initiate a recall.

The recall narratives support the notion that the *Restatement (Third)* definition promotes auto safety, with particular support coming from the General Motors/Chrysler ignition switch recall. There, a lawyer filed a design defect claim in a state using the *Restatement (Third)* definition of design defect, hired an engineer to construct a RAD, and uncovered a specific product defect. The majority of the lawsuits profiled in the recall narratives that alleged product liability claims were filed in jurisdictions that require plaintiffs to construct a RAD.[249] Only one case was not in such a jurisdiction.[250]

Barrier 4: The use of suppression orders by courts and private parties

The recall narratives demonstrate that lawyers may uncover defects through litigation far before the public discovers them because of private and court-enforced suppression orders. The logic here is straightforward: "[s]uppressing information about the dangers inherent in corporate behavior and consumer products

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[247] *See* Aaron D. Twerski, *The Role of the Judge in Tort Law: From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861, 902-04 (1983).

[248] *See* Vandall, *supra* note 210.

[249] These jurisdictions include Arkansas (*see* Dancy v. Hyster Co., 127 F.3d 649 (8th Cir. 1997)), Georgia (*see* Jones v. NordicTrack, Inc., 550 S.E.2d 101, 103-04 (Ga. 2001)), and Texas (*see* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328 (Tex. 1998)).

[250] This jurisdiction was Illinois (*see* Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329, 347 (Ill. 2008)). While Gathron's case was filed in California, a *Restatement (Second)* jurisdiction (*see* Perez v. VAS S.p.A., 188 Cal. App. 4th 658, 677-78 (Cal. Ct. App. 2010)), Gathron did not file a products liability claim.

deprives regulators, litigants, and consumers of knowledge relating to safety."[251] The story of the Takata airbag recall is representative of this phenomenon. Many victims of faulty airbags hired lawyers but rarely filed suit against either Honda or Takata.[252] Lawyers of injured plaintiffs who settled with Honda say that news of the recall failed to reach the public earlier because "the few lawsuits filed were generally settled quickly, before plaintiffs' lawyers could seek internal documents from auto companies during pretrial discovery."[253] As the lawyer for one victim stated, "They wanted to resolve this immediately . . . It almost seemed like they were going to pay us off to shut us up."[254] Some scholars claim that suppression orders do not seriously harm the public interest.[255] However, there is a strong body of literature confirming that these orders pose a significant threat to public safety, even if that threat cannot be easily quantified.[256]

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[251] Daniel J. Givelber & Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 68 LAW & CONTEMP. PROBS. 131, 135 (2006).

[252] *See* Jeff Green & Margaret Cronin Fisk, *Air-Bag Settlements Keep Details From Other Victims*, BLOOMBERG (Nov. 17, 2014), http://www.bloomberg.com/news/articles/2014-11-17/air-bag-settlements-keep-details-from-other-victims.

[253] Jeff Green, *Warning: This Air Bag May Contain Shrapnel*, BLOOMBERG (Oct. 30, 2014), http://www.bloomberg.com/news/articles/2014-10-30/driver-deaths-and-air-bag-recalls-put-takata-under-scrutiny.

[254] *Id.*

[255] *See, e.g.*, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 480 (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 464 (1991); Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 BAYLOR L. REV. 163, 175-76 (1996).

[256] Laurie K. Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 331 (1999); Dru Stevenson, *Against Confidentiality*, U.C. DAVIS L. REV. 337 (2014); Heather Waldbeser & Heather DeGrave, *A Plaintiff's Lawyer's Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815 (2003); Charles J. Reed, *Confidentiality and the Courts: Secrecy's Threat to Public Safety*, 76 JUDICATURE 308 (1993). *See also* Henry J. Reske, *Secrecy Orders at Issue*, A.B.A. J., Aug. 1994, at 32, 33 (stating that court secrecy is a

One way to prevent suppression orders from inhibiting auto safety would be to pass legislation forcing judges to "refuse to enter [or enforce] protective orders calling for secrecy relating to materials divulged during pretrial discovery or settlement agreement . . . in derogation of public health or safety."[257] This approach neuters confidentiality agreements by refusing to imbue them with judicial enforceability. However, attempts to pass such measures have been aborted due to lobbying from the American Bar Association, which argues that such laws "increase the burdens of litigation in terms of both time and expense."[258]

Even if legislative remedies are unavailable due to interest group pressure, there are other avenues to reform. One is to amend the ethics codes that govern the legal profession to bar lawyers from "offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety or to the health or safety of any particular individual."[259] Such an amendment would compel both plaintiffs' and manufacturers' lawyers to refuse to create or accept any confidentiality agreement that could reasonably be seen as suppressing information that "concerns a substantial danger to the public health."[260] A more limited reform would be to lobby the Supreme Court to amend the Federal Rules of Civil Procedure to prevent any court record or settlement

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"serious problem for the health and safety of our population"); James L. Gilbert et al., *The Price of Silence*, 30 TRIAL, June 1994, at 16, 17 (stating that "[d]eadly secrets lie sealed on the shelves of courtrooms across America").

[257] Givelber & Robbins, *supra* note 251, at 137.

[258] The ABA's claims that such laws pose an "impossible burden" on courts is dubious, considering that similar laws have been passed in Florida and four other states. *See* Katherine Sullivan, *Letting the Sunshine in: Ethical Implications of the Sunshine in Litigation Act*, 23 GEO. J. LEGAL ETHICS 923, 923-24 (2010) (quoting FLA. STAT. § 69.081 (2009)).

[259] Richard A. Zitrin, *The Case Against Secret Settlements (Or What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 116 (1999).

[260] *Id.*

from being sealed if it "includes information that (1) reveals liability for a prior and substantial physical or financial injury or (2) reveals a substantial risk of physical or financial injury to any person."[261] Even if the Supreme Court refuses to make such an amendment, federal district courts could be persuaded to adopt the amendment as a local rule of procedure, as was done in South Carolina.[262] Such amendments have the benefit of being easier to enforce than ethical guidelines, but would fail to cover out-of-court settlements.

Opponents to approaches such as these claim that such rules would force lawyers to put the public interest ahead of those of their clients.[263] However, lawyers are already compelled to disclose confidential information in certain circumstances where the public interest collides with that of their clients or their peers. Under the ABA Model Rules of Professional Conduct, which serve as a prototype for state ethics guidelines, lawyers must disclose non-confidential data when doing otherwise would perpetuate a crime or fraud,[264] disclose or take "reasonable remedial measures" when a client is engaging in a criminal act or fraud related to an adjudicative proceeding,[265] and inform authorities when fellow lawyers or judges are engaging in serious misconduct.[266] Twelve states go further, requiring disclosure to prevent bodily crime, and five states mandate disclosure to prevent non-criminal fraud.[267] If these rules can be enforced without destroying lawyers' ability to practice, then there is no reason to fear that bans on suppression orders will have similarly catastrophic outcomes.

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[261] David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L. J. 807, 828 (2003).

[262] *Id.* at 829 (citing S.C. LOC. R. 5.03(C)).

[263] *See* Givelber & Robbins, *supra note* 251, at 137.

[264] MODEL RULES OF PROF'L CONDUCT r. 4.1. (2010) [hereinafter MODEL RULES].

[265] MODEL RULES r. 3.3.

[266] MODEL RULES r. 8.3.

[267] *See* John S. Dzienkowski, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES 112-19 (2013).

VII. Conclusion

This paper demonstrates that the story of private litigation initiating an automotive recall is not unique. This discovery suggests a rejection of the traditional view of the role of private litigation in the initiation of automotive recalls and the embrace of an alternative view that incorporates the Dataset's findings, including that private litigation may initiate recalls that target more vehicles as well as vehicles with more dangerous defects. The alternative view has normative implications, including suggestions for legislatures to remove caps on noneconomic damages, NHTSA to change its reporting regulations regarding safety data, courts to use the *Third Restatement* definition of design defect, and overseers of rules for the legal profession to restrict the use of suppression orders.

This paper's suggestions about the details of the alternative view demand confirmation. Such corroboration could come from a range of projects, the most straightforward of which would be to expand the Dataset to include recalls from years beyond 2014. A more robust Dataset would better define the scope of private litigation's investigatory role. Another corroborating project would be to expand the existing recall narratives to include input from the litigators and regulators featured in them, adding to the descriptive thickness of the alternative view. Finally, future researchers should explore the role of private litigation in the recalls of other products, including those managed by the Consumer Product Safety Commission and the Food and Drug Administration.

The importance of these findings goes beyond the significance of an increased understanding of the automotive recall process. A claim that private litigation plays a substantive role in the automotive recall process is a claim about the value of the work done by plaintiffs' lawyers. That work is frequently character-

ized by scholars, particularly by advocates of tort reform, as parasitic,[268] unethical, [269] inefficient,[270] and abusive.[271] On the other hand, some scholars view the plaintiffs' bar in a more positive light, as an enforcer of externality internalization,[272] channel for civil recourse,[273] and provider of corrective justice.[274] While many scholars view regulation and litigation as "substitutes in the task of *deterring* potentially harmful conduct,"[275] there is little academic literature that views litigation as being a substitute for regulators in terms of *uncovering* broad public harms.[276] This paper strengthens this rarely defended view of private litigation, and its normative suggestions assume that such a role is, in light of a weak auto safety regulator, a necessary one. But whether or not we should rely on private litigators

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[268] *See, e.g.*, A. G. Harmon, *Interested, but not Injured: The Compromised Status of Qui Tam Plaintiffs Under the Amended False Claims Act and the Return of the Citizen Suit*, A.B.A. (2014) (discussing the "compromised" status of "parasitic" plaintiffs in qui tam actions).

[269] *See, e.g.*, James P. McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L. J. 507 (2008) (alleging that plaintiffs' lawyers regularly breach their fiduciary duties to clients).

[270] *See, e.g.*, Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, 51 N. Y. L. SCH. L. REV. 345, 349 (2006) (describing plaintiffs' lawyers as being barriers to efficient recovery who "pocket their contingent fees while paraprofessional employees do much of the work").

[271] *See, e.g.*, Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 MO. L. REV. 207 (2010) (noting discussion of "rampant abuse" of the court system by plaintiffs' lawyers who provide "negligible relief" to their clients).

[272] *See, e.g.*, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961).

[273] *See, e.g.*, Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

[274] *See, e.g.*, Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L. J. 349 (1992).

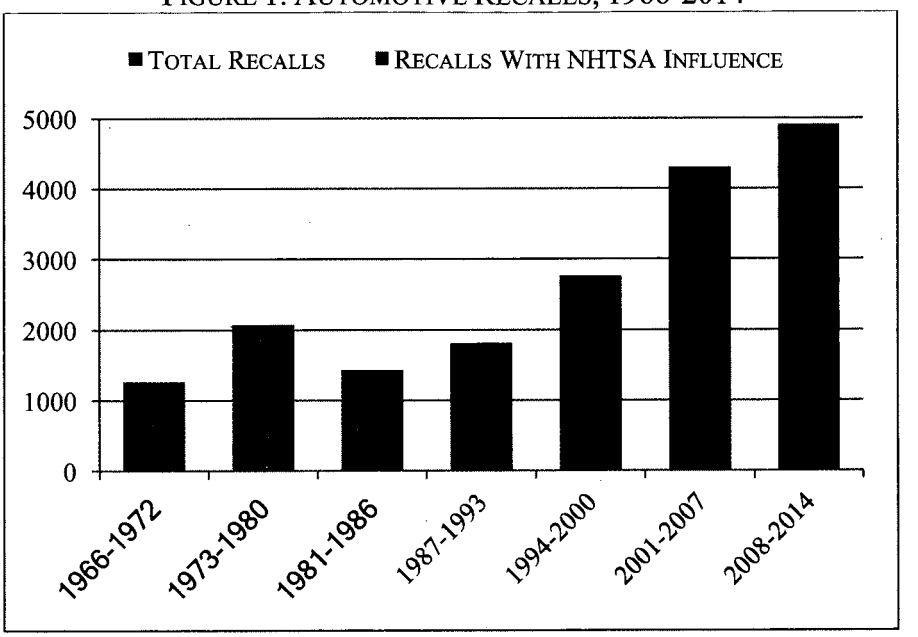
[275] Eric Helland & Jonathan Klick, *The Tradeoffs Between Regulation and Litigation: Evidence from Insurance Class Actions*, 1 J. TORT L., 2 (2006).

[276] *See, e.g.*, THOMAS KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW (NYU Press 2003).

to uncover threats to public safety is another question, one that is both beyond the scope of this paper and in need of an answer.

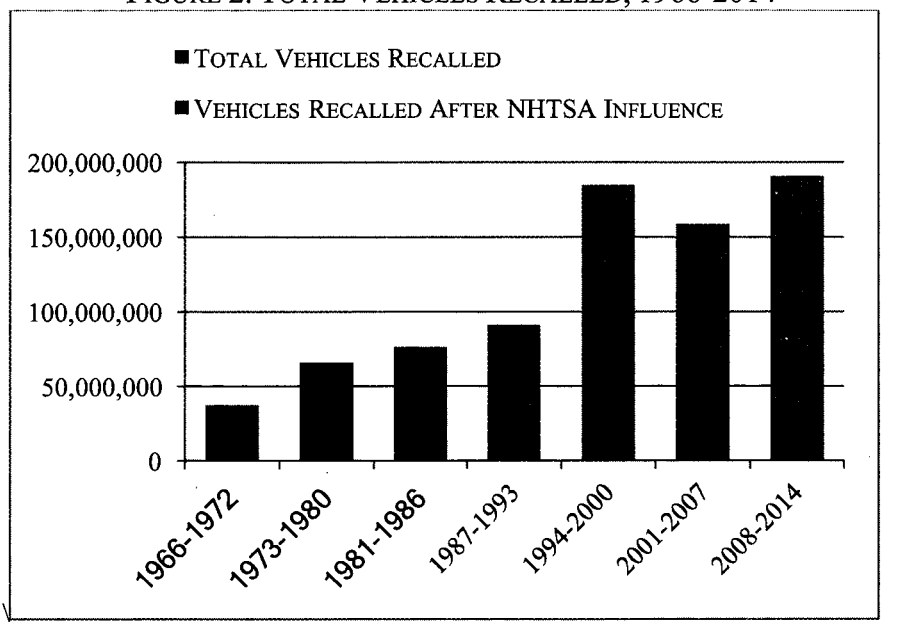
APPENDIX: FIGURES

FIGURE 1. AUTOMOTIVE RECALLS, 1966-2014



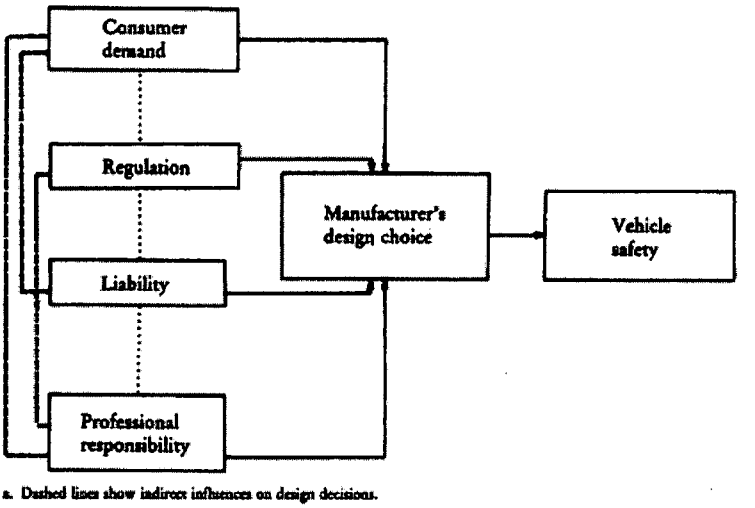
SOURCE: NAT'L HIGHWAY TRAFFIC SAFETY ADMIN, *supra* note 26.

FIGURE 2. TOTAL VEHICLES RECALLED, 1966-2014



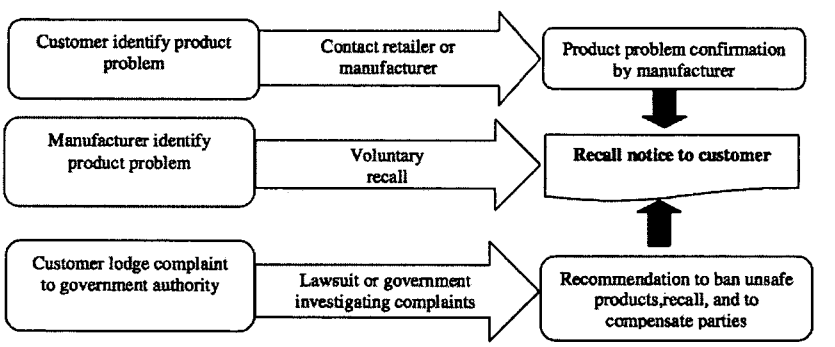
Source: NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. *supra* note 26.

FIGURE 3. TRADITIONAL VIEW VIEW OF VEHICLE DESIGN



Source: Graham, *supra* note 37.

FIGURE 4. TRADITIONAL VIEW OF RECALL INITIATION



Source: Ahsan, *supra* note 37, at 14. Note that the term "lawsuit" in the bottom arrow refers to government litigation on behalf of consumers, as opposed to a private suit.