

AUTOMOTIVE

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NEWS IN BRIEF

UNINTENDED ACCELERATION

S.C. high court overturns \$18 million rollover verdict against Ford

Finding that the trial judge should have disallowed certain of the plaintiffs' expert testimony and evidence of similar incidents in a rollover case, South Carolina's highest court has overturned an \$18 million verdict against Ford and ordered a new trial.

Watson et al. v. Ford Motor Co. et al., No. 26786, 2010 WL 916109 (S.C. Mar. 15, 2010).

In so doing the Supreme Court explained that before allowing a jury to hear such evidence, a trial court must make "threshold admissibility" determinations on experts' qualifications, the

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REUTERS/Mike Blake

COMMENTARY

No sudden legislation

Attorney Daniel P. Malone of Dykema says Congress should not rush any new legislation or regulation in response to Toyota's unintended-acceleration problem.

In 1966 U.S. roads were considered to be the safest in the world based on fatalities per mile driven.¹ That year Congress enacted the comprehensive National Traffic and Motor Vehicle Safety Act, which, among other things, created the National Highway Traffic Safety Administration.² That act also gave rise to recalls: the practice of manufacturers repairing or replacing — free of charge — vehicles or components that contain a safety-related defect or fail to comply with applicable safety regulations.³

Since then so much safety-related legislation, standards and regulations have followed that

the United States has become the most heavily regulated automotive market in the world. Yet, by as early as 2002, according to one authority, U.S. road safety had dropped to 10th place.⁴

Ten years ago Congress held highly publicized public hearings on the Ford Explorer and the Firestone tires designed for that vehicle. As a direct result of those hearings and federal committees' findings involving two companies, Congress enacted the Transportation Recall Enhancement, Accountability and Documentation Act,⁵ which requires all manufacturers to report to NHTSA certain information on a periodic basis.

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The legislative process for TREAD was emotional and incredibly accelerated. It passed both houses of Congress in less than 12 hours, which is almost unheard of in our political system.

Since 1966 NHTSA has maintained considerable investigative powers. When a problem arose, for example, NHTSA had the power to order a company to produce virtually whatever the agency needed to conduct as thorough and necessary an investigation as it deemed appropriate.⁶ In effect, when a “needle” of a problem was suspected, NHTSA had the power and the ability to ferret it out, which it did on several occasions. Subsequent to TREAD, however, rather than “finding needles” as matters arise, NHTSA has essentially compiled the haystack itself.

The TREAD Act is brief. NHTSA then spent several years developing rules to comply with congressional directives. For example, as initially proposed, TREAD’s “early warning reporting system” would have saddled virtually all manufacturers (*i.e.*, vehicle and component alike) with considerable reporting obligations. Indeed, if adopted, it literally would have created the largest database in the world (ARTEMIS, the Assessment and Reliability of Transport Emission Models and Inventory Systems).

But through the rulemaking comment period, NHTSA considered various comments and wisely decided to divide the industry into two groups for early-warning purposes and to limit the heavy lifting to the much smaller TREAD Act Group 1, which is limited to OEMs, tire manufacturers and makers of child safety restraint systems. Since then, a proliferation of recalls has resulted.⁷

Last month Congress conducted highly publicized hearings on certain aspects of Toyota’s recent recalls. In light of NHTSA’s findings against Toyota, it appears that Congress may consider whether more legislation, presumably on an industry-wide basis, is warranted (*e.g.*, TREAD II). Members of Congress, some lawyers and safety advocates already seem focused on what those reforms should be. In light of the totality of the circumstances, however, several critical threshold issues exist that should be vigorously debated and resolved before considering any reforms.

The United States is the most heavily regulated automotive market in the world, but by 2002 it had dropped to 10th place in road safety.

This commentary focuses only on the threshold question whether any more legislation is necessary at this juncture. Notwithstanding the unfortunate and highly publicized Toyota experiences, several reasons suggest that it is not.

MORE REGULATION = MORE SAFETY?

Does the automotive industry and our nation need more regulation in this area? Would it make our highways safer or just add considerably more costs?

Our nation, and in particular this industry, is awash with recalls and reporting requirements. For many years car manufacturers’ annual recalls have exceeded annual sales. Moreover, less than 75 percent of owners notified of a recall actually bring recalled vehicles in for repairs. As a result, over the past decade alone roughly 1 million vehicles whose owners were contacted to bring cars in for repair remain on our highways “unfixed.”⁸

Does the industry and our nation need more regulation? Would it make our highways safer or just add considerably more costs?

Even in light of so much regulation, until last year’s economic meltdown, annual fatalities on our highways consistently exceeded 40,000. To be sure, all involved are deeply committed to reducing that number. But in this situation and on these facts, is more industry-wide regulation — possibly involving even more reporting, considerably more cost, and likely public apathy — the remedy?⁹

IS PROOF OF A DEFECT SCIENCE-BASED?

The experiences reported by numerous Toyota owners is most troubling, and the

understandable reaction is to quickly respond with industry changes. But are more rules the answer? Notwithstanding best efforts by Toyota, our government and many others, no one has clearly identified and demonstrated in a science-based way, a safety defect. That lack of proof is especially troubling if new, potentially industry-wide legislation is being considered.

Well-intentioned legal reaction to a scientifically unexplained problem can lead to unintended and unfortunate consequences. Just ask Audi. In the mid-1980s the company endured a wave of criticism for alleged sudden acceleration in its 5000 model. After severe damage to the vehicle’s sales and reputation, a 1989 study sponsored by the U.S. government concluded that the sudden acceleration in Audis was largely the result of driver error and not mechanical issues.¹⁰

During the past six months alone Toyota has recalled more than 8 million vehicles globally. The record fine that NHTSA announced against Toyota in April stemmed in part from the manufacturer’s failure to disclose information to the agency within an aggressive, five-day window of time once Toyota had determined that a safety-related problem existed overseas involving vehicles that were identical to or substantially similar to those it sells in the United States.

Pursuant to existing rules and regulations, NHTSA examined the situation, found a willful and deliberate violation, and ruled accordingly by assessing the maximum fine possible (*i.e.*, the system worked). The fine itself is only one aspect of the overall penalty Toyota will suffer.

WHAT SHOULD BE THE SCOPE OF THE DISCUSSION?

Clearly, the overriding goal should be safer highways for all. That concept is an express legislative directive set forth in the 1966 Vehicle Safety Act. Part of any automotive reform legislation process, therefore, should include the broader issue of what, in fact, causes traffic accidents.

To be sure, safety-related defects can

If Congress chooses to proceed on more safety-related legislation, it should do so deliberately.

and do cause traffic accidents. So, too, do driver behavior, road construction and maintenance, and *numerous* other causes. We as a nation know so much about the causes of traffic fatalities. Any contemplated reform efforts in this regard should be undertaken with a more holistic approach than more mandates — which would impose ever more costly reporting requirements or sanctions against manufacturers. Moreover, the process should examine whether new regulations are warranted or whether the regulations that exist are adequate and were, in some way, not followed.

WHO SHOULD PARTICIPATE IN THIS PROCESS?

Congress initially intended NHTSA to be a proactive change agent for improving vehicle safety and design, and the environment. A fundamental issue in the current discussion is whether Congress wants NHTSA to be an industry facilitator of constructive change or a watchdog.¹¹ Undeniably, as evidenced by the proliferation of voluntary recalls, the industry largely polices itself. Indeed, by working with NHTSA, matrices are in place that provide manufacturers early warning about potential safety-related problems. NHTSA and the industry should build on that reality.

For example, virtually all the tens of millions of cars recalled over the past decade are from recalls voluntarily undertaken by manufacturers. They have responded to that information as evidenced by, for example, the proliferation of recalls that have occurred during the past decade. President Obama's new budget calls for 66 more positions at NHTSA. That expansion provides a golden opportunity to enhance the agency's role in the industry as a positive change agent.

DON'T RUSH LEGISLATION

Well-publicized crises understandably create an urgency to take action. But, meaningful, constructive reform requires a deliberative process that allows for all views to be considered. Given the crucial role that the automotive industry plays in our nation and the enormous contributions it makes in shaping our economy, if Congress chooses to proceed on more safety-related legislation, it should do so deliberately. This process should include considering whether any additional reform is even necessary.

Safety should be (and is) paramount to all interested parties: regulators, manufacturers, suppliers, academia and the public alike. As demonstrated over the past decade though, more regulations, more reporting and more, very considerable spending does not necessarily mean enhanced safety. The ongoing collaborative Toyota investigation has yet to reveal a scientifically explainable cause to a most troubling, allegedly recurring phenomenon.

Is there a clear nexus between even more, very costly reporting (for the sheer purpose of reporting) and safer highways? No. Clearly, additional reporting does not equate to safer roads. Should an investigation involving one company result in industry-wide reforms, especially in a situation where regulators, the manufacturer and many others continue to struggle for answers? One would hope not. **WJ**

NOTES

¹ See LEONARD EVANS, *TRAFFIC SAFETY* xiii (Science Serving Society 2004).

² See 49 U.S.C. § 30101-30169. President Johnson signed this act into law Sept. 9, 1966. See DAVID L. HARFST & JERRY L. MASHAW, *THE STRUGGLE FOR AUTO SAFETY* (Harv. Univ. Press 1990). A core purpose of the act is to reduce traffic accidents and highway fatalities and injuries.

³ "Since 1966 (the year recalls were first documented and the year the first recall was officially conducted) NHTSA has overseen nearly 10,000 vehicle recalls covering over 365 million vehicles, over 1,000 recalls covering 65 million equipment parts, 140 recalls covering over 40 million child safety seats and over 500 recalls covering 45 million

tires (NHTSA, updated Nov. 23, 2005)." See KEVIN M. McDONALD, *SHIFTING OUT OF PARK 297* (Lawyers & Judges Publ'g Co. 2006). Imagine what's happened to these numbers since 2006!

⁴ Evans, *supra* note 1. By that same year, it had fallen to 16th place in deaths per registered vehicle.

⁵ Pub. L. No. 106-414, Nov. 1, 2000, amending certain sections of 49 U.S.C. § 30101.

⁶ NHTSA's Office of Defects Investigation oversees a several-step investigative process that can include a preliminary evaluation, engineering analysis and management of a recall. The Safety Act grants it broad investigative powers.

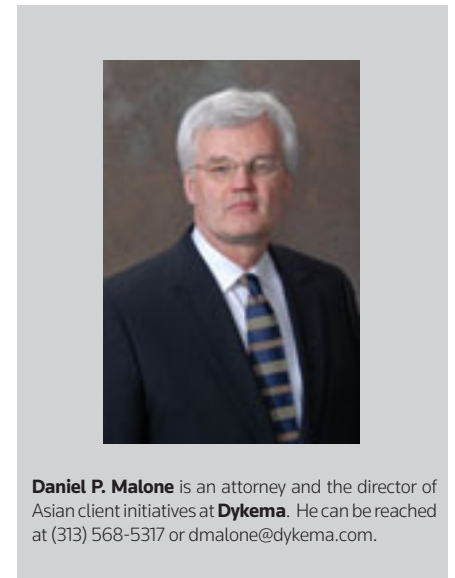
⁷ There is insufficient empirical support for the proposition that recalls per se result in safer highways. See, e.g., Yong-Kyun Bae & Hugo Benitez-Silva, *Do Vehicle Recalls Reduce the Number of Accidents? The Case of the U.S. Car Market*, SUNY-Stony Brook (Feb. 14, 2005), available at www.sunysbedu/economics/research/papers/2005/recall.pdf.

⁸ See McDonald, *supra* note 3.

⁹ See, e.g., Rip Watson, *Rising Auto Recalls Eat Profits*, BLOOMBERG NEWS, July 8, 2004; Jeff Plungis, *Carmakers Staggered By Record '04 Recalls*, DETROIT NEWS, Jan. 4, 2005.

¹⁰ See, e.g., Joseph B. White & Dionne Searcey, *Audi Case Set Template for Toyota's Troubles*, WALL ST. J., Mar. 12, 2010.

¹¹ See Harfst & Mashaw, *supra* note 2.



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