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## How Soon We Forget

One year after the Toyota calamity, little has been done to fix the nation's vehicle recall program. By **Jonathan Michaels** of Michaels Law Group

On the one year anniversary of the \$16 million fine imposed against Toyota — the largest fine ever levied by the National Highway Traffic and Safety Administration (NHTSA) against an automobile manufacturer — little has been done to change the system that allowed the problem to exist in the first place. Students of history will recall that the Toyota calamity was notable for two significant reasons: NHTSA's \$16 million fine was the largest in the agency's 24-year history; and the fine represented a mere fraction of Toyota's \$1.2 billion profit it earned in just the first quarter of 2010.

Initiated in 1966 under what has become known as the National Traffic and Motor Vehicle Safety Act, NHTSA is the agency responsible for policing vehicle safety in the United States. And, while NHTSA has countless regulations on vehicle safety, its ability to penalize those who fail to comply has become largely symbolic.

To put the issue in perspective, consider that a modern automobile has some 10,000 moving parts, and more electronics and microprocessors than were present on the shuttle that embarked on the first lunar mission. Now consider that automobile manufacturers place about 15 million of these vehicles in the hands of U.S. consumers each year, and that an average automobile will remain on U.S. highways for about 12 years.

Despite everyone's best efforts, things will go wrong. The modern day automobile has become far too complex for anyone to believe that parts won't fail, and that manufacturing processes won't be flawed. This increase in complexity is reflected in the steady rise of vehicle recalls year-over-year. For instance, when the vehicle recall system was instituted in 1966, NHTSA

processed less than 100 recalls per year. The current automobile, however, generates about 800 recalls in the United States annually, and there is no indicating that this number will not continue to grow.

Under our current vehicle recall system, the responsibility for initiating and administering recalls is left largely to the automobile manufacturers. Pursuant to 49 U.S.C. Section 30118, manufacturers must report a safety defect to NHTSA within five working days of discovery, even if the cause of the defect is unknown. The prob-

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lem comes in when manufacturers fail to comply, as NHTSA is limited in its policing authority.

It would be naïve to believe that manufacturers do not consider the economic impact of issuing a recall before acting, and some may say that the direction they take is largely governed by the strength of their moral compass. We have seen what happens when manufacturers put economics ahead of the loss of life. The Toyota gas pedal recall is the most recent example, but it is far from the only one. Those who were present in the 1970s will recall Ford's decision to not recall the Pinto, despite knowing that its gas tank was prone to exploding upon rear impact.

It often times takes national events to expose the misgivings of those in command. For Toyota, it was the horrid 911 call by the CHP officer who was in the run-away Lexus, made just moments before he and his family were killed. For Ford, it was the internal memo to its upper management, demonstrating that it would be more cost effective to deal with the litigation arising out of Pinto-related deaths than to issue a recall.

While these companies ultimately paid the price — in the poll of public opinion, if nothing else — the fact that they were able to take this direction in the first place is troubling. Driven by the allure of the almighty dollar, and enjoying the practical reality of corporate immunity, the execu-

tives determined that they would be better off to allow a dangerous instrumentality to remain on the highways than to correct the known problem.

Legislation was introduced last year that would have changed all this. Under HR 5381, coined the Motor Vehicle Safety Act of 2010, the nation's vehicle recall program would have undergone a much-needed overhaul. Under the bill, the cap on civil penalties for manufacturers who fail to report, or who provide false, misleading or incomplete information to NHTSA, would

have increased from \$16 million for each instance to \$300 million.

But, perhaps the most important aspect of the proposed legislation is the impact it would have had on manufacturer executives.

Under Section 307 of the bill, the principal officer of a manufacturer would be required to certify that all information supplied to NHTSA is accurate and does not omit a material fact. Those who fail to comply would be subjected to stiff civil and criminal penalties. The bill would have also required all vehicles to contain a data recorder starting in 2015, set a standard on start-stop buttons so that consumers would have a consistent method of turning off a vehicle, and protected whistle-blowers from manufacturer retaliation.

In the early 2000s, our nation witnessed countless individuals lose their personal fortunes when the Enron and WorldCom scandals revealed that the company executives had knowingly misstated financial information in their reporting to the Security and Exchange Commission. We responded by enacting the Sarbanes-Oxley Act of 2002, which required certification by top level executives as to the accuracy of their reporting.

Corresponding legislation in the automotive industry, as it relates to vehicle recalls, is not only appropriate, it is necessary. The proposed HR 5381 did not pass, but it needs to. We have witnessed too many acts of self-interest to believe that the situation will not reoccur. As George Santayana famously said, "Those who do not learn from history are doomed to repeat it."



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