Warranty, Recall, & Product Liability Update
Toyota Recall - Recap
Potential for an unsecured or incompatible driver’s floor mat to interfere with the accelerator pedal and cause it to get stuck in the wide open position.
Potential Floor Mat Entrapment: Remedy

- Vehicles with any genuine all-weather floor mat will be provided with newly-designed replacement floor mats.

- Certain vehicles:
  - Accelerator pedals replaced.
  - Modifications made to floor surface to improve clearance.
  - Use proper retention devices (clips) to secure mats.
Toyota Initially responded by recalling 4.2 million* vehicles due to floor mat and recalling 2.3 million* vehicles due to accelerator pedal issues totaling 8.5 million global recalled vehicles.

*US Alone

Toyota denied alleged defect. NHTSA, with the help of NASA engineers conducted an investigation into the alleged defect, but were unable to find any defect.
## Unintended Acceleration Claims: Then-Now

<table>
<thead>
<tr>
<th>Pre-Toyota</th>
<th>Toyota Issue Today</th>
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<tr>
<td><strong>Claim:</strong> Vehicle suddenly accelerates from a stopped or slow position.</td>
<td><strong>Claim:</strong> Vehicle surges while in motion.</td>
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<td><strong>Consensus Response:</strong></td>
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<td>• No Defect</td>
<td>• Toyota denied, &amp; NHTSA was unable to prove a defect.</td>
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<td>• Primary Defense: Driver Error</td>
<td>• NASA conclusions</td>
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*Image Credit to bsp Bush Seyferth Paige Law Offices*
To conclude the investigation into claims that Toyota concealed information from the government regarding the unintended acceleration defect, Toyota and the Justice Department announced a settlement of $1.2 billion.
GM Recall
GM allegedly hid information concerning the ignition switch defect since it learned about the problem as early as 2004. GM silently repaired affected vehicles when serviced at dealerships.
Allegedly, defects in the ignition switch of affected vehicles can cause the vehicle to stall during transit, cutting power to valuable safety features such as: power steering, power/anti-lock brakes, and air bags.
12 deaths and 31 crashes have allegedly been linked to the defective ignition switches. Many of these incidents have resulted in lawsuits against GM.
GM Recall

U.S. eyes bankruptcy link in GM ignition defect probe: report
Sat, Mar 22 2014

WASHINGTON (Reuters) - Federal authorities are investigating whether General Motors hid an ignition switch defect when it filed for bankruptcy in 2009, The New York Times reported on Saturday.
The Justice Department's investigation of the automaker includes a probe of whether GM committed bankruptcy fraud by not disclosing the ignition problem, a person briefed on the inquiry told the Times on Friday, the paper said.
Authorities are also investigating whether GM understated the defect to federal safety regulators, the Times said.
The ignition switch problems led to the recall of 1.6 million vehicles last month.
GM has handed over documents to federal investigators in New York, the person, who was not identified, told the Times.

Claims by plaintiff lawyers and “safety advocates”: GM “concealed” the recall condition from the federal government during GM’s bankruptcy proceedings (plaintiff’s argument -- GM’s bankruptcy protection should be removed).
GM recently responded by offering loaner vehicles and a $500 discount off the purchase of a new vehicle. In unprecedented fashion, GM’s new CEO, Mary Barra, offered a video statement apologizing for the recall and assuming responsibility.
Figure 1: The Role of Stakeholders in the Auto Safety Defect Recall Process

**Auto manufacturers**
- Investigates potential safety defects based on data related to fatalities, injuries, warranty claims, property damage claims, consumer complaints, and other sources
- Determines defect creates unreasonable safety risk; plans recall campaign to remedy it
- Sends repair guidance to franchised dealerships; drafts recall notification letters for vehicle owners
- Sends notices to vehicle owners via first-class mail
- Franchised dealerships perform recall remedy; submit claims to manufacturer for reimbursement of recall remedy work
- Monitors effectiveness of recall campaign; responsible for sending follow-up notifications

**NHTSA**
- Investigates potential safety defects based on manufacturer data, complaints to the agency, and reports of recalls in foreign countries, among other sources
- Requests that manufacturer conduct recall or, if necessary, orders recall
- Provides notification of defect and recall plan
- Provides copies of notices for franchised dealerships and vehicle owners
- Approves or requests changes to recall notification letters
- Reviews recall notices for owners for compliance with regulations
- Monitors effectiveness of recall campaign

Source: GAO analysis of NHTSA documents and interviews with agency officials, auto manufacturers, and industry organizations.
As a result of the recall, NHTSA is facing scrutiny and criticism for failing to recall the affected vehicles despite knowing about the defect as early as 2007.
NHTSA on the Hot Seat Again?

• During the Toyota unintended acceleration investigation, former NHTSA administrator Joan Claybrook called the agency “the poor stepchild” of the Department of Transportation and said Toyota has treated it “with contempt.”

• NHTSA is facing a similar scenario for its role in the GM ignition switch investigation.
Recently, GM and other OEMs, such as Nissan, have announced large scale recalls.
The Department of Justice has now opened an investigation into the timing of GM’s knowledge of the defect and recall of the affected vehicles.
Many safety advocates, including U.S. Senator Richard Blumenthal of Connecticut, have demanded that GM establish a compensation fund for individuals harmed by the recall condition.
The Supplier Playbook for Minimizing Exposure in Recall Situations
Why is Warranty Important?
Government Accountability Office (GAO) Recommendations Regarding Recall

- Modify the requirements for defect notification letters to include additional information such as (1) the word “urgent” in large type to obtain readers’ attention, and (2) the VIN of the recalled vehicle so it is clear that the letter pertains to the owner’s current vehicle.

- Create a VIN search function on www.safercar.gov and publicize the Web site to vehicle owners and the public.

- Develop a plan to use the data it collects on recall campaigns to analyze particular patterns or trends that may characterize successful recalls and determine whether these represent best practices that could be used in other recall campaigns.

- Seek legislative authority to ensure that potential buyers of used cars are notified of any outstanding recalls prior to sale.
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**Sharing Information**
- Third-party data provider identifies owner addresses or manufacturer uses internal data

Source: GAO analysis of NHTSA documents and interviews with agency officials, auto manufacturers, and industry organizations.
• Know how your product is being described
  – Owner manual (push button ignition)

• Know who is responsible for what
  – e.g. system integrator

• Quality product development/engineering
  – DFMEA: Design Failure Mode Effects Analysis
  – DVP&R: Design Validation Plan and Report
  – PPAP: Production Part Approval Process
  – Design/Compliance of Parts(s)
When is a recall necessary?

Federal Motor Vehicle Safety Standards set minimum performance requirements for those parts of the vehicle that most affect its safe operation (brakes, tires, lighting) or that protect drivers and passengers from death or serious injury in the event of a crash (air bags, safety belts, child restraints, energy absorbing steering columns, motorcycle helmets). These Federal Standards are applicable to all vehicles and vehicle-related equipment manufactured or imported for sale in the United States (including U.S. territories) and certified for use on public roads and highways.
Examples of defects considered safety-related

- Steering components that break suddenly causing partial or complete loss of vehicle control.
- Problems with fuel system components, particularly in their susceptibility to crash damage, that result in leakage of fuel and possibly cause vehicle fires.
- Accelerator controls that may break or stick.
- Wheels that crack or break, resulting in loss of vehicle control.
- Engine cooling fan blades that break unexpectedly causing injury to persons working on a vehicle.
- Windshield wiper assemblies that fail to operate properly.
- Seats and/or seat backs that fail unexpectedly during normal use.
- Critical vehicle components that break, fall apart, or separate from the vehicle, causing potential loss of vehicle control or injury to persons inside or outside the vehicle.
- Wiring system problems that result in a fire or loss of lighting.
- Car ramps or jacks that may collapse and cause injury to someone working on a vehicle.
- Airbags that deploy under conditions for which they are not intended to deploy.
- Child safety seats that contain defective safety belts, buckles, or components that create a risk of injury, not only in a vehicle crash but also in non-operational safety of a motor vehicle.

Source: NHTSA Motor Vehicle Safety Defects and Recalls
Group 2 - Group 2 manufacturers include approximately 23,500 suppliers to the automotive industry, including manufacturers of fewer than 500 vehicles, manufacturers of original equipment, and manufacturers of replacement equipment other than child restraint systems and tires. These manufacturers are required to report information if they receive a claim or notice about an incident involving a death in the United States or a foreign country, alleging that the death was caused by a possible defect in the manufacturer’s product. The first reports for Group 2 manufacturers are also due by December 1, 2003.
Examples of defects NOT considered safety-related:

• Air conditioners and radios that do not operate properly.
• Ordinary wear of equipment that has to be inspected, maintained and replaced periodically. Such equipment includes shock absorbers, batteries, brake pads and shoes, and exhaust systems.
• Nonstructural or body panel rust.
• Quality of paint or cosmetic blemishes.
• Excessive oil consumption

Source: NHTSA Motor Vehicle Safety Defects and Recalls
Legal stakes are high for failing to meet NHTSA and/or TREAD Act reporting requirements

**TREAD:** Individuals who intentionally mislead federal regulators about safety defects subject to possible fines/prison

**NHTSA** investigating timeliness of GM’s concealment and reporting of ignition switch defects
Investigation
Recall Investigation Strategy - Have One

**Internal Strategy**
- Get in front of the issues
- Carefully draft e-mails
- Take complaints about safety seriously
- Close loops
- Social media
  - Know what people are saying about your company
Monitor data at all stages during and after product launch.

Typically, all parties should participate in the root-cause analysis ("RCA").

- RCA should be conducted in accordance with sound engineering principles—A poor RCA will only compound the problem.
- Consider performing an independent RCA as well.

Parties that are fully engaged at the beginning will reduce damages at the end.
Communication
Parties should work together

- Root Cause
- Proper Solution
- Economic Responsibility
When Dividing Responsibility: Know Your Obligations

- Warranty
- Cooperate In Investigations Of Defects
- Recall Strategy
- Indemnity
- Identify Applicable Specifications
Documentation
To Be Most Effective, Written Documents Should Be Clear And Concise

- Clearly delineate subjects either in separate documents, or clearly title separate issues in a single document.

- Documents, including e-mail messages, should be written with the assumption that the sender or recipient will not be around in six months to explain any oral or unwritten understandings to his or her colleagues or a court.
The Other Side of the Coin

If it’s not in writing….

It never happened.
Litigation Manager at XYZ Supplier: This written notice is to ensure that all relevant documents have been searched for and collected.

We have an obligation to maintain all documents and records, including electronic information, such as e-mail files, relating to the lawsuit. Please, therefore, locate and retain all records and files and documents that relate to the lawsuit and/or the incident and/or the transaction, etc.
Always Assume Emails, Letters or Other Documents Will Be “Exhibit A” At Trial

- Employees Should Be Careful To Only Include Necessary Recipients On Documents
- Copying unnecessary recipients can lead to unnecessary depositions
- As people move on and off of a project, be sure to update the document circulation lists accordingly
- Documents should be clear and concise
- Avoid humor and sarcasm
- Follow up to written communications in writing
Litigation & Damages
Practical Considerations
Proving/Defending Liability

What theories of liability are applicable?

Are witnesses still available?

Are the documents available?

What do the documents say?

What does the testing show?

Do you need an expert witness?

What is the regulatory history and documentation?
• What are the categories of recoverable damages based upon the legal theories alleged?
• What kind of information is needed to support the damages claim?
• What is the integrity of the damage data collected and the systems used to analyze the data?
• What damages could have been avoided?
• Do you need an expert witness?
A personal injury product liability case is filed against OEM and supplier.

Lydia Johnson vs. Robert Bosch LLC (AZ) a wrongful death case.

Adam Jennings vs. Delphi (CA) a personal injury product liability case claiming severe brain injury to a 17 year old young man.

Nikomi Menchaca vs. IEE (CA) a personal injury product liability case claiming severe head and neck injuries to a 19 year old young woman.

Scott Symons vs. Key Safety Systems, INC. (AR) a wrongful death case of a 16 year old girl.
The plaintiff contended that the OEM and Supplier defendants failed to warn of known danger and the vehicle was defectively designed, assembled and distributed. Plaintiff’s were awarded $8.5 million at trial.

A Vermont jury recently hit a Supplier with a $43 million verdict in a lawsuit filed by a woman who became quadriplegic after the seat back in her car allegedly failed when she was rear-ended sitting at a stop light.

Plaintiff’s verdict entered against a Supplier with damages of $41.8 million in a case involving a vehicle rollover with a Ford F-150.