REARRANGING DECK CHAIRS ON THE TITANIC:* WILL THE EARLY WARNING REPORTING REQUIRED BY THE TREAD ACT UNCOVER DEADLY DEFECTS SOON ENOUGH?

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I. INTRODUCTION

On August 9, 2000, Ford Motor Company (Ford) and Bridgestone-Firestone, Inc. (Firestone) launched a massive recall of defective tires on Ford Explorers.[1] Within days, Ford and Firestone began a fingerpointing campaign, each blaming the other's product, which quickly spiraled into "one of the biggest corporate brawls in recent memory."[2] The public was appalled to learn that, since Ford Explorers had gone on sale in 1990,[3] more than 100 people had been injured

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* From a comment by Clive Chajet on the legal strategy used in the first Firestone product liability trial. *See* discussion *infra* note 79. Phrase originally attributed to Rogers Morton, campaign manager for Gerald Ford, on May 16, 1976, "I'm not going to rearrange the furniture on the deck of the Titanic." The Phrase Finder, *at* http://phrases.shu.ac.uk/bulletin_board/11/messages/667.html (last visited Feb. 8, 2002).

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1. Keith Bradsher, *Tire Complaints Began to Snowball in 1997, Firestone Didn't Reveal Its Problems, Ford Says*, SAN DIEGO UNION-TRIB., Aug. 14, 2000, at A2, *available at* 2000 WL 13980246.

2. *Firestone Refuses to Recall More Tires*, ARIZ. DAILY STAR, July 20, 2001, *available at* http://www.azstarnet.com/star/today/10720Ntirerecall.html (last visited July 20, 2001) [hereinafter *Firestone Refuses*]; *see also* Bradsher, *supra* note 1, at A2; Keith Bradsher, *Ford Steps Up Criticism of Tires Made by Firestone*, N.Y. TIMES, June 15, 2001, at C4 [hereinafter Bradsher, *Ford Steps Up Criticism*].

3. Keith Bradsher, *Federal Officials Say They Will Toughen Standards for Tires*, N.Y. TIMES, Aug. 17, 2000, at C1.

and sixty-two killed in Explorer rollovers following Firestone tire failures.[4] In the two years preceding the August 2000 recall, Ford had replaced Explorer tires in three foreign countries, but was not required to report this to federal regulators, even though the same vehicle and tire combinations were sold in the United States.[5] Ford and Firestone claimed that they did not have to report the tread separation and rollover problems because they had not determined that the problems constituted a safety-related defect.[6] They did not report the problems until after the National Highway Traffic Safety Administration (NHTSA) launched a formal investigation in May 2000.[7] Attorneys representing plaintiffs in the sixty-six tire-failure lawsuits that had been filed against Ford and Firestone since 1993 also came under public scrutiny for not contacting federal regulators, although several of them had recognized a pattern of tire failures indicating a widespread defect as early as 1996.[8]

Upon learning of the recall, Congress immediately conducted hearings and determined that NHTSA had not received adequate information about the tire failures.[9] Congress then moved to ensure that regulators would receive appropriate data in a timely fashion by passing the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act in October 2000.[10] The TREAD Act required NHTSA to draft regulations mandating more stringent early warning reporting of possible defects by motor vehicle manufacturers.[11] NHTSA issued

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4. *Id.* These numbers would later climb to 271 fatalities and more than 700 injuries and result in a recall of more than 10 million tires. *See also Bridgestone/Firestone Recalling 3.5M More Tires*, ARIZ. DAILY STAR, Oct. 5, 2001, *available at* http://www.azstarnet.com/today/11005nTireDeaths.html (last visited Oct. 5, 2001); Karin Miller, *Bridgestone May Have Hit Rock Bottom*, ARIZ. DAILY STAR, Oct. 5, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Oct. 5, 2001) [hereinafter Miller, *Rock Bottom*].

5. Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 6532, 6533 (Jan. 22, 2001) (proposed regulations implementing 49 U.S.C. § 30166(m) (2000)); *see also* Bradsher, *supra* note 3, at C1.

6. National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30101 (1994) (formerly 15 U.S.C. § 1381); 49 C.F.R. pt. 573 (2001).

7. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34.

8. *Id.*; Bradsher, *supra* note 3, at C1; Keith Bradsher, *S.U.V. Tire Defects Were Known in '96 but Not Reported*, N.Y. TIMES, June 24, 2001, § 1, at 1 [hereinafter Bradsher, *S.U.V. Tire Defects*]; Keith Bradsher, *Documents Portray Tire Debacle as a Story of Lost Opportunities*, N.Y. TIMES, Sept. 11, 2000, at A1 [hereinafter Bradsher, *Documents Portray Tire Debacle*].

9. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6534; *see also Firestone Tire Recall: Hearing Before the Subcomm. on Telecomm. Trade & Consumer Prot. and the Subcomm. on Oversight & Investigations of the House Comm. on Commerce*, 106th Congress (as yet unpublished) (Sept. 6, 2000), *cited in* Reporting of Information and Documents About Potential Defects, Retention of Records That Could Indicate Defects, 66 Fed. Reg. 66190, 66202 (proposed Dec. 21, 2001).

10. Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000); 49 U.S.C. § 30101 (2000); Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6534.

11. TREAD Act, 114 Stat. 1800; 49 U.S.C. § 30101; Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6534; Nicholas J. Wittner, *TREAD: The Long Road Ahead*, 19 NO. 12 PROD. LIAB. L. & STRATEGY, June 2001, at 6 (2001).

those regulations in July 2002.[12] The regulations apply to manufacturers of motor vehicles and their equipment,[13] and, to a limited extent, to attorneys who represent manufacturers, either as corporate counsel or in defending personal injury or product liability lawsuits.[14] While NHTSA has specified the types of lawsuit-related information it requires, it has not indicated that any data will have to be provided by plaintiffs' attorneys.[15]

Congress was not the only rulemaking body to respond to the recall. In August 2001, the American Bar Association relaxed its model ethical rule governing the lawyer's duty regarding client confidences to allow lawyers to disclose client confidences in order to prevent "reasonably certain death or substantial bodily harm."[16] This change, at least in part a response to the Ford-Firestone non-reporting, was applauded as vital in a "world of dangerous products, where you have exploding tires and cars that overturn."[17] The modification, however, may not sufficiently address the dilemma faced by the attorney representing a plaintiff in a tort action, who must weigh his duty to diligently represent his client's interests against an obligation to report a dangerous product to NHTSA. Plaintiffs' attorneys are hesitant to make such a disclosure because it risks a finding of "no defect," which could seriously impair a client's likelihood of success.[18]

The regulatory fallout from the Ford-Firestone tire recall illustrates some of the approaches the legal community is developing to address the question of who has—or should have—a duty to inform governmental regulators of defective, potentially dangerous products. Part II of this Note summarizes the history of the Ford-Firestone recall and discusses vehicle manufacturers' prior duty to report a defect to regulators. Part III looks at the TREAD Act's changes to the reporting duty of manufacturers and their legal counsel. Part IV examines the parameters of lawyers' reporting duty and considers limitations on that duty. Part V offers some concluding remarks and suggests that Congress should extend the duty to report to explicitly include attorneys representing tort plaintiffs.

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12. Reporting of Information and Documents About Potential Defects; Retention of Records That Could Indicate Defects, 67 Fed. Reg. 45822 (July 10, 2002) (to be codified at 49 C.F.R. Parts 573, 574, 576, 579).

13. TREAD Act, 114 Stat. 1800; 49 U.S.C. § 30101; Reporting of Information and Documents About Potential Defects, 67 Fed. Reg. at 45822.

14. Reporting of Information and Documents About Potential Defects, 67 Fed. Reg. at 45830.

15. *Id.*

16. Conference Report, ABA Annual Meeting, *Model Rules: ABA Stands Firm on Client Confidentiality, Rejects "Screening" for Conflicts of Interest*, 17 Laws. Man. on Prof. Conduct (ABA/BNA) 492, 492 (Aug. 15, 2001) [hereinafter *ABA Stands Firm*].

17. Jonathan D. Glater, *Lawyers May Reveal Secrets of Clients, Bar Group Rules*, N.Y. TIMES, Aug. 8, 2001, at A12 (quoting legal ethicist Stephen Gillers).

18. Bradsher, *Documents Portray Tire Debacle*, *supra* note 8, at A1; Bradsher, *S.U.V. Tire Defects*, *supra* note 8, at 1.

II. MANUFACTURERS' DUTY TO REPORT TO REGULATORS

A. Prior Duty Was Statutory, Fairly Circumscribed, and Subject to Limited Enforcement Powers

The duty to report motor vehicle defects to regulators is currently in transition. From 1966 until the adoption of the TREAD Act in November 2000, NHTSA administered the reporting standards through the Vehicle Safety Act.[19] The Vehicle Safety Act required manufacturers of motor vehicles or motor vehicle equipment to notify NHTSA upon learning that a vehicle or item of equipment contained a defect and believing in good faith that the defect related to motor vehicle safety.[20] Under the statute, manufacturers had to give NHTSA "a copy of each communication to the manufacturer's dealers or to owners or purchasers of a motor vehicle or replacement equipment produced by the manufacturer about a defect . . . in a vehicle or equipment that is sold or serviced."[21] The corresponding regulation was somewhat broader, requiring that manufacturers give NHTSA a copy of all communications sent to more than one "manufacturer, distributor, dealer, lessor, lessee, or purchaser, regarding any defect in its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or flaw or unintended deviation from design specifications), whether or not such defect was safety related."[22]

Prior to the TREAD Act, the regulations accompanying the Vehicle Safety Act applied only to actions occurring within the United States.[23] NHTSA determined in the 1980s that an "extraterritoriality exemption" implicit in the Vehicle Safety Act prohibited it from gathering data on overseas recalls involving

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19. National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30101; Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000); Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 6532, 6533–34 (Jan. 22, 2001).

20. 49 U.S.C. § 30118(c)(1) (1994); Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34; *see also* United States v. General Motors Corp. (X-Cars), 656 F. Supp. 1555, 1559 n.5 (D.D.C. 1987), *aff'd*, 841 F.2d 400 (D.C. Cir. 1988) (manufacturer incurs duties to notify NHTSA and remedy defect whether it actually determined, or should have determined, that its vehicles are defective and the defect is safety related). The Act defines a defect as "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment." 49 U.S.C. § 30102(a)(2) (1994). The United States Court of Appeals for the District of Columbia clarified the term "defect" in *X-Cars*, 841 F.2d at 404, to mean that a vehicle or component contains a defect when subject to a significant number of failures (i.e., non-*de minimis*) in normal operation.

21. 49 U.S.C. § 30166(f) (1994). Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34.

22. 49 C.F.R. § 573.8 (2001); *see also* Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34.

23. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34.

vehicles and equipment also sold in the United States. As a result, manufacturers stopped voluntarily reporting overseas recalls around 1990.[24]

NHTSA stopped collecting data on safety defects directly from repair shops during the 1980s,[25] but it did maintain a database of consumer complaints.[26] In addition, the Vehicle Safety Act authorized NHTSA to request or compel additional information from manufacturers and conduct inspections as part of a defect investigation.[27]

Thus, under the Vehicle Safety Act, manufacturers of motor vehicles and motor vehicle equipment had an affirmative duty to report defects in vehicles sold in the United States and were required to provide additional information to regulators upon request. A manufacturer was prohibited from evading these obligations "by the expedient of declining . . . to reach its own conclusion as to the relationship between a defect in its vehicles and . . . safety."[28] These duties specifically applied to vehicle and equipment manufacturers, importers, and brand name and trademark owners.[29]

While consumers had an avenue available to report problems with their vehicles to NHTSA under the existing law, there was no statutory requirement that they do so. Nor was there an express statutory provision for mandatory reporting by distributors or dealers, warranty or repair facilities, line employees of manufacturers, insurers, or lawyers.[30] Case law interpreting the Vehicle Safety Act was sparse, with the courts generally following the plain meaning of the statute.[31]

The Vehicle Safety Act contained a single enforcement provision: for failure or refusal to comply, NHTSA could levy a penalty of $1,100 per violation

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24. *See* Bradsher, *supra* note 3, at C1.

25. *Id.*

26. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533.

27. 49 U.S.C. § 30166(b); United States v. Firestone Tire & Rubber Co., 455 F. Supp. 1072 (D.D.C. 1978) (holding that NHTSA has authority to compel manufacturer to produce documents in connection with investigation into extent to which certain tires were dangerously defective); Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34.

28. *X-Cars*, 656 F. Supp. at 1559 n.5 (quoting United States v. General Motors Corp., 574 F. Supp. 1047, 1050 (D.D.C. 1983)); *see also* Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533–34.

29. 49 C.F.R. § 573.3 (2001).

30. In the case of the Ford-Firestone recall, the NHTSA consumer complaint database received forty-six complaints about the tires between March 1990 and February 2000, and, in July 1998, State Farm Insurance Company advised NHTSA that since 1992 it had received twenty-one insurance claims relating to Firestone tire failures. NHTSA launched its investigation as a result of an increase in consumer complaints following a program on the tires broadcast by a Texas television station which, by the time a formal investigation began in May 2000, had reached ninety complaints involving four deaths. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533; Bradsher, *supra* note 3, at C1.

31. The legal framework for construing the Motor Vehicle Act is described in *X-Cars*, 841 F.2d at 403–04; *see also* United States v. General Motors Corp. (Pitman Arms), 561 F.2d 923 (D.C. Cir. 1977); United States v. General Motors Corp. (Wheels), 518 F.2d 420 (D.C. Cir. 1975).

per day with a maximum penalty of $925,000 for all related violations.[32] The maximum penalty was significantly less than the $1.5 million maximum penalty provided by an analogous federal product liability statute, the Consumer Product Safety Act.[33] Unlike the Consumer Product Safety Act, the Vehicle Safety Act did not provide for criminal penalties or a private cause of action against a manufacturer for failure to comply.[34]

B. While Ford and Firestone Complied with the Letter of the Law and Avoided Civil Penalties, the Consequences of Their Non-Reporting Have Been Severe

Ford Explorers first hit the market in 1990.[35] As early as 1993, a handful of lawsuits alleged that injuries and property damage had been caused by rollovers resulting from Firestone tire failures on Ford Explorers.[36] In July 1996, when an Arizona official notified Firestone that the Arizona Game and Fish Department was having trouble with tire tread separations in hot weather, Firestone's experts examined the tires and concluded that they had been improperly maintained.[37] Firestone did not report its investigation to NHTSA or Ford.[38] By 1997, Firestone had begun receiving an increasing number of requests to replace tires under warranty and legal claims.[39] Firestone did not, however, inform NHTSA or Ford of the elevated claims rates at that time.[40] Also in 1997, State Farm began to collect money from Firestone, contending that manufacturing defects made Firestone, not State Farm, responsible for covering the cost of claims.[41] While State Farm reported the claims to NHTSA in July 1998, Firestone never did.[42]

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32. 49 U.S.C. § 30165(a) (1994); 49 C.F.R. § 578.6(a) (2000).

33. 15 U.S.C. § 2051 (2000); 15 U.S.C. § 2069 (2000); *see generally* Cassie Orban, Note, *The Product Recall Process: Mechanics and Shortcomings*, 12 LOY. CONSUMER L. REV. 311, 317 (2000).

34. 15 U.S.C. § 2070 (2000) (criminal penalties). The Consumer Product Safety Act creates a private cause of action when a manufacturer fails to comply with a product safety standard implemented by the Consumer Product Safety Commission. 15 U.S.C. § 2072(a) (2000); Mark W. Schroeder, *Private Causes of Action for a Manufacturer's Failure to Report Substantial Product Hazards: Causation Analysis and* Zepik v. Tidewater Midwest, Inc., 75 IOWA L. REV. 567, 576 (1990). For a discussion of the developing private cause of action for a manufacturer's failure to report possible dangerous defects to the Consumer Product Safety Commission, refer to *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 942 (7th Cir. 1988) (holding Consumer Product Safety Act does not authorize private actions based on violations of reporting requirements); William R. Goetz, *Private Causes of Action Under the Reporting Rules of the Consumer Product Safety Act*, 70 MINN. L. REV. 955, 962–66 (1986); Schroeder, *supra* note 34.

35. Bradsher, *supra* note 3, at C1.

36. *Id.*

37. Keith Bradsher, *State Alerted Firestone to Failures*, ARIZONA REPUBLIC, Sept. 11, 2000, at A1, *available at* 2000 WL 8064106 [hereinafter Bradsher, *State Alerted Firestone*]; Bradsher, *Documents Portray Tire Debacle*, *supra* note 8, at A1.

38. Bradsher, *State Alerted Firestone*, supra note 37, at A1.

39. Warranty and legal claims would eventually total 1,500. Bradsher, *supra* note 1, at A2; Bradsher, *Documents Portray Tire Debacle*, *supra* note 8, at A1.

40. Bradsher, *supra* note 1, at A2.

41. Bradsher, *supra* note 3, at C1.

42. *Id.*

Ford claims that it first became aware of problems with Firestone tires in October 1998 when it asked Firestone why it was receiving reports of tire failures on Explorers in Venezuela.[43] Over the next year, Firestone assured Ford at least four times that the tires did not pose a problem and that some tires inevitably fail, usually because of customers improperly inflating the tires or overloading the vehicles.[44] In March 1999, Ford and Firestone worried that advising Explorer owners in Saudi Arabia to replace their Firestone tires would require notification to NHTSA because the same product was sold in the United States.[45] Ford went ahead with the replacement program after Firestone refused to participate on the ground that the tires failed because of customer misuse.[46] Neither company advised NHTSA of these actions.[47]

Firestone's January 2000 financial statement showed that $2.88 million in legal claims had been made for tire tread separations.[48] Within a month, the annual sales staff meeting included a presentation on the high rate of claims for tread separations.[49] Firestone did not discuss this data with Ford or federal regulators.[50]

At about the same time, in February 2000, a Houston television station reported on the Explorer tire failures. As a direct result of the report, complaints by Texas consumers to NHTSA increased sharply.[51] In March 2000, NHTSA began an initial evaluation to determine whether to open a defect investigation.[52] Meanwhile, Ford replaced the Firestone tires on its Explorers in Venezuela, Malaysia, and Thailand.[53] Ford did not notify NHTSA of these actions.[54]

On May 2, 2000, NHTSA launched a formal defect investigation of what would eventually total 55 million Firestone tires.[55] It had accumulated ninety consumer complaints about Ford Explorers with Firestone tires, including four fatalities.[56] The investigation made little progress until regulators convinced a safety consultant to persuade plaintiffs' lawyers to share information about the tire

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43. Keith Bradsher, *Ford Zips Lips on Tire Woes*, DESERET NEWS, Aug. 30, 2000, at C01, *available at* 2000 WL 25622716.

44. *Id.*; Bradsher, *Documents Portray Tire Debacle*, *supra* note 8, at A1.

45. Keith Bradsher & Matthew L. Wald, *Firestone Knew of Faults But Kept Silent*, MILWAUKEE J. SENTINEL, Sept. 7, 2000, at 015A, *available at* 2000 WL 26082519.

46. *Id.*

47. *Id.*

48. *Id.*

49. Keith Bradsher, *Firestone Withheld Troubling Tire Data*, THE PLAIN DEALER (Cleveland), Sept. 8, 2000, at 1C, *available at* 2000 WL 5164652.

50. Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 6532, 6533 (Jan. 22, 2001); Bradsher, *supra* note 49, at 1C.

51. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533; Bradsher, *supra* note 3, at C1; Bradsher, *S.U.V. Tire Defects*, *supra* note 8, at 1.

52. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533.

53. *Id.*; Bradsher, *supra* note 43, at C01.

54. *See* Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533.

55. *Id.*

56. *Id.*; Nedra Pickler, *Firestone Says No Recall Necessary*, ARIZ. DAILY STAR, July 19, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited July 19, 2001).

failures.[57] Three months into the investigation, Ford and Firestone announced a recall of 6.5 million tires.[58] Firestone finally filed a formal defect report with NHTSA in mid-August.[59] By that time, complaints to NHTSA totaled 750, with more than 100 injuries and 62 fatalities.[60] As of October 2001, more than 700 injuries had been reported and the fatalities total had reached 271.[61]

Congressional hearings and newspaper reports following the recall revealed that Ford and Firestone likely had sufficient information to make a determination that the tire and vehicle combination involved a safety-related defect which should have been reported to federal regulators as early as January 2000, and possibly much earlier.[62] Despite these allegations, NHTSA cited several reasons why Ford and Firestone were exempt from the statutory reporting duty. NHTSA asserted that, although Firestone had received 193 personal injury claims, 2,288 property damage claims, and was defending 66 lawsuits by February 2000, it was not required to provide the information to NHTSA in the absence of a specific request, presumably because Firestone had not yet determined there was a safety defect.[63] Moreover, NHTSA said that while Ford had taken actions overseas to remedy safety problems with the same tire and vehicle combination, there was no statutory requirement for Ford to report such actions taken outside the United States.[64] Ford added that, while it voluntarily informs federal regulators of recalls abroad when it has reason to believe a vehicle has a safety defect, Firestone had repeatedly assured it that the tire failures outside the United States were due to improper repairs and severe underinflation, not a safety defect.[65] According to Ford and Firestone, they did not become aware of the high rate of claims until Ford began analyzing Firestone's claims data two weeks before they launched the recall.[66]

The series of miscommunications, non-communications, or concealments which led to the recall may never be completely clear—one news report referred to

57. Bradsher, *S.U.V. Tire Defects*, *supra* note 8, at 1.

58. *Id.*; *Ford Motor Company Statement in Response to Firestone Tire Recall*, PR NEWSWIRE, Aug. 9, 2000, *available at* LEXIS, News Group File, Most Recent Two Years; Christine Karbowiak, Moderator, *Press Conference with Representatives of Firestone-Bridgestone*, FEDERAL NEWS SERVICE, Aug. 9, 2000, *available at* LEXIS, News Group File, Most Recent Two Years; Calvin Sims, *A Takeover with Problems for Japanese Tire Maker*, N.Y. TIMES, Aug. 10, 2000, at C4; *Helen Petrauskas, Ford Motor Company, Discusses Firestone Tire Recall*, NBC NEWS TRANSCRIPTS, Aug. 10, 2000, *available at* LEXIS, News Group File, Most Recent Two Years [hereinafter *Petrauskas*].

59. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533.

60. Bradsher, *supra* note 3, at C1.

61. *Firestone Refuses*, *supra* note 2; Miller, *Bridgestone May Have Hit Rock Bottom*, *supra* note 4.

62. Bradsher and Wald, *supra* note 45, at 015A; Bradsher, *supra* note 49, at 1C; *Tires: Congress to Expedite Passage of TREAD Bill to Enhance NHTSA Power, Consumer Safety*, BNA PRODUCT LIABILITY DAILY, Sept. 15, 2000, at D2.

63. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533.

64. *Id.*

65. Matthew L. Wald and Keith Bradsher, *Questions on Tire-Defect Data Arise as Hearings Draw Near*, N.Y. TIMES, Sept. 6, 2000, at C1.

66. Bradsher, *supra* note 1, at A2; Karbowiak, *supra* note 58; *Petrauskas*, *supra* note 58.

it as "a story of lost opportunities"[67]—and NHTSA appears to have exonerated both manufacturers of any failure to comply with the duty to report the defects under the Motor Vehicle Act.[68] In fact, the defect itself has not yet been conclusively pinpointed. Ford and Firestone have hotly debated which product design, the vehicle or the tires, caused the rollovers.[69] Auto safety experts argue, rather, that there is a "cocktail of blame" involved in the accidents.[70] There is no doubt that the events leading to the recall, and the antagonistic posture Ford and Firestone have taken since, resulted in the breakup of their century-long relationship. In May 2001, Ford decided to replace an additional 13 million Firestone tires and, shortly thereafter, Firestone requested that NHTSA investigate the safety of the Ford Explorer.[71]

In October 2001, NHTSA closed its investigation into the Firestone tire separations when, after initially refusing, Firestone agreed to recall an additional 3.5 million tires.[72] NHTSA's engineering analysis had determined that the

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67. Bradsher, *Documents Portray Tire Debacle*, *supra* note 8, at A1.

68. Standards Enforcement and Defect Investigation, 66 Fed. Reg. at 6533.

69. Keith Bradsher, *Firestone Assigns Blame for Tire Flaws*, DESERET NEWS, Dec. 19, 2000, at D06, *available at* 2000 WL 30715928; Keith Bradsher, *Expert Says Car Weight Was Key in Tire Failures*, N.Y. TIMES, Feb. 3, 2001, at C2; Keith Bradsher, *Ford Concludes Tires at Fault in Rollovers*, N.Y. TIMES, Apr. 20, 2001, at C2.

70. Keith Bradsher, *Haunted by a Crucial Flaw: The Roots of that Problem Lie in Ford's Original Design Decision to Build the New Sport Utility on the Bones of a Pickup Truck, Instead of All in One Piece, Like a Car*, GRAND RAPIDS PRESS, Dec. 24, 2000, at B4, *available at* 2000 WL 29135345.

71. Keith Bradsher, *Ford Intends to Replace 13 Million Firestone Wilderness Tires*, N.Y. TIMES, May 23, 2001, at C1 [hereinafter Bradsher, *Ford Intends to Replace*]; *Rhetoric Heats Up Over Ford Explorer: Tire-Maker Seeks Federal Probe into the SUV's Safety*, ARIZ. DAILY STAR, June 1, 2001, *available at* http://www.azstarnet.com/star/today/10601Firestone-Ford.html (last visited June 1, 2001); *Lawyers Ask for Ford Recall*, ARIZ. DAILY STAR, June 2, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited June 2, 2001); Bradsher, *Ford Steps Up Criticism*, *supra* note 2, at C4; Ed Garsten, *Ford CEO Defends Actions*, ARIZ. DAILY STAR, Aug. 30, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Aug. 30, 2001).

72. Nedra Pickler, *Feds Pushing for More Tire Recalls*, ARIZ. DAILY STAR, July 19, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited July 19, 2001); Pickler, *supra* note 56; Nedra Pickler, *Firestone Won't Expand Tire Recall*, ARIZ. DAILY STAR, July 20, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited July 20, 2001); *Firestone Refuses*, *supra* note 2; Karin Miller, *Firestone May Face New Tire Recall*, ARIZ. DAILY STAR, Aug. 9, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Aug. 10, 2001) [hereinafter Miller, *Firestone May Face*]; *Bridgestone/Firestone Recalling 3.5M More Tires*, *supra* note 4; Miller, *supra* note 4; Kenneth N. Gilpin, *Firestone Will Recall an Additional 3.5 Million Tires*, N.Y. TIMES, Oct. 5, 2001, at C3; *Bridgestone Will Take Loss for Recall*, N.Y. TIMES, Oct. 5, 2001, *available at* http://www.nytimes.com/aponline/business/AP-Bridgestone.html (last visited Oct. 5, 2001); *Old Ally Helping States Look Into Ford: Bridgestone Says Explorers Roll Too Easily*, ARIZ. DAILY STAR, Nov. 9, 2001, *available at* http://www.azstarnet.com/star/today/11109TireDeaths.html (last visited Nov. 9, 2001) [hereinafter *Old Ally Helping States*].

Firestone tires were defective.[73] NHTSA continued to investigate the safety of the Ford Explorer, and, after an "extensive analysis of agency data and information provided by Firestone and Ford," declined to launch a formal defect investigation in February 2002.[74]

While NHSTA has, by all indications, decided against seeking the imposition of civil penalties on Ford and Firestone as authorized by the Motor Vehicle Act, both companies have sustained significant financial losses as a result of their non-reporting. As of October 2001, Ford had paid an estimated $3 billion to voluntarily replace 13 million defective tires and undisclosed amounts on hundreds of lawsuits for injuries sustained in accidents involving Ford Explorers with Firestone tires.[75] Firestone has paid approximately $1.3 billion for the August 2001 recall of 6.5 million tires, and was expected to pay an additional $30 million for the recall of 3.5 million more tires in October 2001.[76] Firestone has also agreed to pay a $41.5 million settlement to several states to head off lawsuits based on state attorney general investigations into whether it was aware of its tire problems long before the August 2001 recall.[77] According to one source, Firestone has paid out $1 billion on lawsuits by accident victims, tire replacements, and the "Making It Right" advertising campaign aimed at restoring consumer confidence.[78] As of August 2001, Firestone had reportedly settled more than 200 lawsuits by accident victims, with at least 400 lawsuits still pending.[79] Without even considering the

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73. Gilpin, *supra* note 72, at C3; NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, ENGINEERING ANALYSIS REPORT AND INITIAL DECISION REGARDING EA00-023: FIRESTONE WILDERNESS AT TIRES, EXECUTIVE SUMMARY, Nov. 17, 2001, *at* http://www.nhtsa.dot.gov/hot/Firestone/firestonesummary.html (last visited Sept. 21, 2002).

74. Ed Garsten, *NHTSA Denies Tire Maker's Request*, ARIZ. DAILY STAR, Feb. 12, 2002, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Feb. 12, 2002).

75. Bradsher, *Ford Intends to Replace*, *supra* note 71, at C1; David Kravets, *Ford Suffers Setback in Settlement*, ARIZ. DAILY STAR, Oct. 26, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Oct. 26, 2001); Ed Garsten, *Ford Jr. to Replace Nasser at Ford*, ARIZ. DAILY STAR, Oct. 30, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Oct. 30, 2001).

76. Gilpin, *supra* note 72, at C3; *Bridgestone Will Take Loss for Recall*, *supra* note 72.

77. The settlement did not end the states' investigations of Ford. *Bridgestone/Firestone to Pay $41.5 Million Settlement*, N.Y. TIMES, Nov. 7, 2001, *available at* http://www.nytimes.com/aponline/national/AP-Tire-Deaths.html (last visited Nov. 7, 2001); Nedra Pickler, *Bridgestone/Firestone to Pay $41.5M*, ARIZ. DAILY STAR, Nov. 7, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Nov. 7, 2001); *Old Ally Helping States*, *supra* note 72.

78. Miller, *Firestone May Face*, *supra* note 72; Miller, *Rock Bottom*, *supra* note 4.

79. Karin Miller, *Firestone Gambles in Texas Trial*, ARIZ. DAILY STAR, Aug. 22, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Aug. 23, 2001). The first Firestone lawsuit went to trial in McAllen, Texas in August 2001. The victim's family had already settled with Ford for $6 million. Firestone argued that it was Ford's defective vehicle which caused the rollover. Corporate image consultant Clive Chajet commented on the strategy, "It doesn't hurt Firestone for a jury to say Ford is equally to blame, but from my perspective, it's rearranging the deck chairs on the Titanic. The damage is so profound for this product." *Id.* The parties reached a reported $7.5

decline in sales due to loss of consumer confidence, these financial outlays far exceed the $925,000 maximum civil penalty which the government could have levied under the Motor Vehicle Act.[80]

Moreover, whether or not Ford and Firestone acted within the law, the delay in recalling the defective vehicle and tire combination—resulting in 271 deaths and more than 700 injuries[81]—was so egregious that both manufacturers were pilloried by the press for nearly two years, Congress moved to enact a stricter reporting law, NHTSA drafted more stringent reporting regulations, and the American Bar Association amended its model attorney confidentiality rule. The conduct of Ford and Firestone, whether intentional or not, has significantly impacted all vehicle and tire manufacturers. The heightened reporting requirements will necessarily involve increasingly complex and expensive recordkeeping, tracking, and reporting of potential defects. In addition, the heightened requirements will increase the number of NHTSA investigations and recalls.[82] Ultimately, consumers may travel more safely, but will no doubt face higher price tags for the increased vigilance. Vehicle prices will rise with the additional costs of increased reporting, investigations, and, quite possibly, expensive design changes aimed at preventing or remedying previously undiscovered safety defects.

III. MODIFICATIONS TO MANUFACTURERS' REPORTING DUTY

The TREAD Act, enacted in November 2000, made a number of significant changes to the manufacturer reporting duty established by the Motor Vehicle Act.[83] Congress set an accelerated schedule for NHTSA to create regulations implementing the modified reporting requirements, and NHTSA is

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million settlement during the jury's fourth day of deliberation. Jim Vertuno, *Firestone Settles with Texas Family*, ARIZ. DAILY STAR, Aug. 24, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Aug. 24, 2001). Trial testimony showed that Firestone had paid $10.5 million for a report to bolster the argument that the Ford Explorer was defective. Lynn Brezosky, *Firestone Settles with Texas Family*, ARIZ. DAILY STAR, Aug. 25, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Aug. 25, 2001).

80. 49 U.S.C. § 30165 (2000).

81. *See* discussion at *supra* note 4.

82. *Office of Regulatory Analysis and Evaluation—Preliminary Regulatory Evaluation: TREAD Act Early Warning Reporting System Part 579*, NHTSA-2001-8677-64, Dec. 20, 2001, at 59, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002).

83. 49 U.S.C. § 30166(*l*)–(m) (2000); Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000); Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 6532, 6533 (Jan. 22, 2001). For an examination of the TREAD Act's "massive impact" on the Motor Vehicle Safety Act," including a history of the Motor Vehicle Safety Act, Ford-Firestone recall events, and the anticipated impact of the TREAD Act, see Kevin M. McDonald, *Don't Tread On Me: Faster Than A Tire Blowout, Congress Passes Wide-Sweeping Legislation That Treads On the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1164 (2001).

complying.[84] NHTSA set out proposed regulations for the early warning reporting in December 2001, which had to be finalized by June 30, 2002.[85] During 2001, NHTSA also proposed regulations on foreign safety recall reporting, promulgated final rules for significantly increased civil penalties, established criminal penalties under certain circumstances, and issued a final rule requiring the reporting of any sale or lease of a defective tire.[86] In addition, NHTSA conducted a study as directed by the TREAD Act to determine the feasibility and utility of obtaining private automobile accident insurance claims information from insurers.[87]

The rule modifications are intended to further the Motor Vehicle Act's purpose of reducing "traffic accidents and deaths and injuries resulting from traffic accidents."[88] That goal of ensuring the safest possible vehicles on the road must, however, be balanced against NHTSA's goal of promulgating regulations that are "reasonable for automobile manufacturer compliance."[89]

A. The Statutory Early Warning Reporting Requirement

The early warning reporting requirement is considered to be the heart of the TREAD Act. It includes three elements which cannot be unduly burdensome to manufacturers, taking into account the manufacturers' compliance costs and NHTSA's ability to use the information to identify safety defects.[90] The three elements are the reporting of: (1) warranty and claims data; (2) other data; and (3) possible defects.[91]

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84. 49 U.S.C. § 30166(*l*)(3), (m)(1), (n)(1) (2000); 49 U.S.C. § 30170(a)(2)(B) (2000).

85. 49 U.S.C. § 30166(m)(2); Reporting of Information and Documents About Potential Defects, Retention of Records That Could Indicate Defects, 66 Fed. Reg. 66190 (proposed Dec. 21, 2001).

86. For foreign safety recall reporting, see Reporting of Information About Foreign Safety Recall and Campaigns Related to Potential Defects, 66 Fed. Reg. 51907 (proposed Oct. 22, 2001); Nicholas J. Wittner, *Foreign Recalls and Other Safety-Campaigns—A Sweeping New NPRM*, 20 NO. 6 PROD. LIAB. L. & STRATEGY, Dec. 2001, at 6 (2001). For increased civil penalties, see 49 U.S.C. § 30165(a) (2000); 49 C.F.R. §§ 578.6(a)(1) and (a)(2) (2001). For criminal penalties, see 49 U.S.C. § 30170(a)(1) (2000); 49 C.F.R. § 578.7(a)(1) (2001). For sale or lease of defective tire reporting, see 49 U.S.C. § 30166(n); 49 C.F.R. § 573.10 (2001); *TREAD: Insurer Claims Data Could Help Disclose Vehicle Safety Defects, NHTSA Study Shows*, PRODUCT LIABILITY DAILY, Mar. 19, 2001, at D5 [hereinafter *TREAD: Insurer Claims Data*].

87. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, TREAD ACT SECTION 3(D) INSURANCE STUDY, Mar. 5, 2001, *at* http://www.nhtsa.dot.gov/cars/problems/studies/insurance/insreport4final.htm; *TREAD: Insurer Claims Data*, *supra* note 86, at D5.

88. 49 U.S.C. § 30101 (2000).

89. *Motor Vehicles: Runge Declares NHTSA's Key Goals: Ensure Safest Vehicles, Reduce Deaths*, PRODUCT LIABILITY DAILY, Aug. 29, 2001, at D2.

90. Wittner, *supra* note 11, at 6; 49 U.S.C. § 30166(m)(3), (m)(4)(D) (2000) (evaluation of burdensomeness takes into account the manufacturer's cost of complying with reporting requirements and NHTSA's ability to use the information sought in a meaningful manner to assist in the identification of safety defects).

91. 49 U.S.C. § 30166(m)(3).

1. Warranty and Claims Data

Manufacturers of motor vehicles and motor vehicle equipment must report, periodically or upon request by NHTSA, warranty and claims data. This includes any information they have received from foreign or domestic sources that may assist in the identification of safety defects.[92] This information may take the form of "data on claims submitted to the manufacturer for serious injuries (including death) and aggregate statistical data on property damage from alleged defects in a motor vehicle or in motor vehicle equipment." It may also include "customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement of motor vehicles or items of motor vehicle equipment."[93]

2. Other Data

NHTSA has the authority to require manufacturers to report any type of information which may assist in the identification of safety defects, either periodically or upon request.[94] NHTSA ultimately proposed that the following types of information be reported under this provision: (1) incidents resulting in any kind of injury, rather than the more limited "serious injuries" designated by the "Possible Defects" category; (2) consumer complaints; (3) warranty claims; and (4) field reports.[95]

3. Possible Defects

Manufacturers must report "all incidents of which the manufacturer receives actual notice which involve fatalities or serious injuries which are alleged or proven to have been caused by a possible defect in such manufacturer's motor vehicle or motor vehicle equipment."[96] This includes all incidents which occur in the United States. However, an incident in a foreign country must be reported only when the possible defect is in a motor vehicle or equipment that is identical or substantially similar to that sold in the United States.

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92. *Id.* § 30166(m)(3)(A); NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, TREAD MILESTONES, Aug. 6, 2001, *at* http://www.nhtsa.dot.gov/cars/rules/rulings/tread/index.html.

93. 49 U.S.C. §§ 30166(m)(3)(A)(i)–(ii) (2000).

94. *Id.* § 30166(m)(3)(B).

95. Reporting of Information and Documents About Potential Defects, Retention of Records That Could Indicate Defects, 66 Fed. Reg. 66190, 66198, 66201, 66203, 66205 (proposed Dec. 21, 2001).

96. 49 U.S.C. § 30166(m)(3)(C).

B. Development of the Early Warning Reporting Rules

1. NHTSA's First Formulation of the Rules

In January 2001, NHTSA issued an Advance Notice of Proposed Rulemaking (ANPRM) on the early warning reporting rules.[97] The ANPRM generally discussed key terminology, who should be covered by the new reporting requirements, what information should be reported, potential reporting timelines and methods, and the prohibition against burdensome reporting requirements.[98] The ANPRM posed a number of questions to be answered during the rulemaking process and invited the public to submit comments.[99] NHTSA did not, however, identify more than a few specific items that it might ultimately propose.[100]

2. The Motor Vehicle Industry's Response

The early warning reporting ANPRM sparked a great deal of debate within the motor vehicle industry. Manufacturers and trade associations submitted more than fifty formal comments to NHTSA.[101] Their primary concern was the potential burdens of the proposed reporting requirements, both for manufacturers and for NHTSA.[102] Upon being interviewed by a product liability newspaper, the assistant general counsel for Nissan North America summed up the automotive industry's reaction: "My biggest concern is that the early-reporting requirement will result in an avalanche of information for the agency and overwhelm it, which might be a step backward. There might be so many documents that any real issues might get buried."[103]

The concern is a valid one. The Rubber Manufacturers Association, the primary United States tire and rubber industry trade association, estimated the total cost impact of the new early warning reporting regulations on the automotive industry at more than $100 million.[104] This estimate was based on the 16,924 separate passenger car tire makes and models, 5,353 light truck tire makes and models, and 2,185 commercial heavy truck and bus tire makes and models currently manufactured in the United States.[105] According to NHTSA, if the early warning reporting rules require individual reporting on each of these tire lines, tire

97. Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, 66 Fed. Reg. 6532, 6532 (Jan. 22, 2001).

98. *See id.* at 6534 (key terminology); *id.* at 6534–37 (who is covered); *id.* at 6537–41 (information to be reported); *id.* at 6542–43 (burdensomeness prohibition).

99. *Id.* at 6532, 6545.

100. *Id.* at 6544.

101. NHTSA-2001-8677-4 through NHTSA-2001-8677-63, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002).

102. *Id.*

103. *Motor Vehicles: NHTSA Proposes Early Reporting, Seeks Input on TREAD Act Vehicle Safety Rules*, BNA PRODUCT LIABILITY DAILY, Jan. 29, 2001, at D2.

104. *Rubber Manufacturers Association—Supplemental Comments*, NHTSA-2001-8677-63, Sep. 27, 2001, at 5, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002). Bridgestone is a member of this association and has adopted its Comments.

105. *Id.* at 4.

manufacturers would have to provide a total of 24,462 separate lines of information.[106]

The Alliance of Automobile Manufacturers is a coalition of thirteen major motor vehicle manufacturers, including Ford. In response to the ANPRM, it provided NHTSA with statistics on information its members had received in several of the proposed early warning categories.[107] During 2000, Alliance members received 9,200 claims or lawsuits alleging an injury or fatality, 12.7 million customer contacts, 99.9 million warranty claims, 8,200 property damage claims, and conducted 125 customer satisfaction campaigns.[108]

Consumer protection advocates frame the issue somewhat differently. The safety group Public Citizen commented:

> As to the organizational scheme, we recognize that a potentially valid concern on the part of the agency is that it could be overwhelmed by the sheer number of records to be provided by the manufacturers. It is certainly clear from the history of defect-related litigation that a time-honored tactic is both to over-supply information, thus drowning one's opponent in massive amounts of worthless data, and to under-supply information, through careful omission of certain documents.[109]

There is one objective upon which NHTSA, manufacturers, and consumer protection organizations agree. Ford stated it most succinctly: "Ford believes that the goal of this rulemaking process is the development of a final rule that achieves an optimum balance between the early warning value of information collected by the Agency, the manufacturer's burden of providing it, and the Agency's burden of analyzing and utilizing it in a 'meaningful manner.'"[110]

3. The Early Warning Reporting Rules

NHTSA evaluated the industry's comments and published its Notice of Proposed Rulemaking (NPRM) in December 2001.[111] After a public comment period during which NHTSA received over 400 comments from manufacturers and

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106. *U.S. DOT/NHTSA—Ex Parte Memorandum re: Collection of Information Requirement Under the TREAD Act Through An Early Warning System*, NHTSA-2001-8677-62, Aug. 27, 2001, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002).

107. *Alliance of Automobile Manufacturers—Comments*, NHTSA-2001-8677-59, July 16, 2001, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002). The Alliance lists its members as BMW Group, DaimlerChrysler, Fiat, Ford Motor Company, General Motors, Isuzu, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, Volkswagen, and Volvo.

108. *Id.*

109. *Joan Claybrook—Comments*, NHTSA-2001-8677-56, Apr. 30, 2001, at Introduction, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002).

110. *Ford Motor Company—Comments*, NHTSA-2001-8677-44, Mar. 23, 2001, at 9, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002).

111. Reporting of Information and Documents About Potential Defects, Retention of Records That Could Indicate Defects, 66 Fed. Reg. 66190 (proposed Dec. 21, 2001).

industry groups, NHTSA promulgated the final rulemaking on July 10, 2002.[112] NHTSA will phase in the early warning reporting requirements by dividing manufacturers into two groups and assigning each group different responsibilities for reporting potential safety-related defects. The early warning reporting requirements will initially focus on larger volume manufacturers and activities within the United States.[113]

The first group, manufacturers of more than 500 vehicles and all child restraint system and tire manufacturers, will have to submit several different quarterly reports on four separate categories of vehicles.[114] The mandatory reports include: (1) notices or claims of U.S. and foreign deaths caused by alleged or proven defects in the manufacturer's product; (2) claims and notices of injuries alleged to have been caused by a defect in the manufacturer's product; (3) total numbers of claims for property damage involving certain components and systems designated by NHTSA (child restraint manufacturers exempted); (4) the total numbers of consumer complaints (except tire manufacturers), warranty claims, and field reports involving certain components or systems designated by NHTSA; and (5) vehicle and equipment production information.[115]

The second group, manufacturers of fewer than 500 vehicles, manufacturers of original equipment, and manufacturers of replacement equipment other than child restraint systems and tires, are required to report only notices or claims of U.S. and foreign deaths caused by alleged or proven defects in the manufacturer's product.[116] Both groups are required to provide copies of all documents provided to more than one dealer, distributor, or owner in the United States relating to consumer satisfaction campaigns and advisories, recalls, or equipment repair or replacement.[117]

The final rulemaking expressly addresses the industry's concern that the reporting requirements will be overly burdensome. NHTSA states that manufacturers already have in their possession the information that early warning reporting requires, and the financial burden will depend on how extensively manufacturers will have to revise or supplement their information management and retention systems.[118] NHTSA anticipates a much less significant cost impact on the industry than the $100 million total estimated by the Rubber Manufacturers Association.[119] NHTSA calculates that, while manufacturers' reporting startup

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112. *Comments*, NHTSA-2001-8677-64 through NHTSA-2001-8677-492, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002); Reporting of Information and Documents About Potential Defects, 67 Fed. Reg. at 45822.

113. Reporting of Information and Documents About Potential Defects, 67 Fed. Reg. at 45822.

114. The four vehicle categories are light vehicles, medium-heavy vehicles (including buses), trailers, and motorcycles. *Id.* Reporting is set to begin in the second quarter of calendar year 2003. *Id.* at 45823.

115. *Id.* The "certain components and systems designated by NHTSA" are those whose failures NHTSA considers to be most likely to lead to safety recalls. *Id.* at 45858.

116. *Id.* at 45823.

117. *Id.*

118. *Id.* at 45866, *discussing* 49 C.F.R. pt. 576.

119. *See* discussion *supra* Part III.B.2.

costs will total about $70 million and annual costs will run about $1.72 million, manufacturers can expect to gain $9 million annually in economic benefits, primarily in earlier—therefore lower—recall costs.[120]

NHTSA expects no difficulty in processing and evaluating the early warning reporting data for two reasons. First, it believes that the industry has overestimated its burden, noting that in 2000, only 9,200 claims alleging death or injury were filed with members of the Alliance of Automobile Manufacturers.[121] Of these claims, only a limited amount of information on each incident would had to have been provided to NHTSA.[122] Second, NHTSA expects no serious difficulty in handling the reporting data because it is in the process of developing what it refers to as "an enhanced data warehouse and data processing system called ARTEMIS—Advanced Retrieval (Tire, Equipment, Motor vehicles) Information System," which it expects to be fully functional by fall 2002.[123]

This rather blithe description of NHTSA's new $5 million computer system belies the fact that, in a recent audit of NHTSA's Office of Defects Investigation (ODI Audit), the Department of Transportation's Inspector General strongly criticized NHTSA's current methods of assessing potential defects and opening investigations, as well as its development of the new information system.[124] The Audit also noted that the TREAD Act does not require that NHTSA receive or solicit information from sources other than manufacturers, such as plaintiffs' attorneys and insurance companies. The Audit recommended that, "rather than relying on consumer complaints and, in the future, manufacturer data, ODI needs to develop innovative techniques to collect and analyze information

120. Reporting of Information and Documents About Potential Defects, 67 Fed. Reg. at 45867. For a detailed analysis of the anticipated costs and benefits of early warning reporting, see *Office of Regulatory Analysis and Evaluation—Preliminary Regulatory Evaluation: TREAD Act Early Warning Reporting System Part 579*, NHTSA-2001-8677-64, Dec. 20, 2001, at 59, *at* http://dms.dot.gov/reports/topdock_rpt.htm (last visited Sept. 21, 2002).

121. *See* discussion *supra* Part III.B.2.

122. Reporting of Information and Documents About Potential Defects, 67 Fed. Reg. at 45835.

123. *Id.* at 45865.

124. *Office of Regulatory Analysis and Evaluation—Preliminary Regulatory Evaluation: TREAD Act Early Warning Reporting System Part 579*, NHTSA-2001-8677-64, at 58; DEP'T OF TRANSP., OFFICE OF INSPECTOR GEN., REVIEW OF THE OFFICE OF DEFECTS INVESTIGATION, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, REPORT NO. MH-2002-071, Jan. 3, 2002, at 5, 10–12, *at* http://www.oig.dot.gov [hereinafter ODI AUDIT]. The ODI Audit was performed at the request of Senator John McCain, Ranking Minority Member, Senate Committee on Commerce, Science, and Transportation, after a Committee hearing to determine why NHTSA, Ford, and Firestone did not identify the tread separations sooner. The Committee noted that NHTSA, while lacking data, did not use the data it possessed to spot trends in the tire failures. The Committee also questioned NHTSA's preparedness for handling information that might contain early warning signs of product defects. *Id.* at i.

from a wider range of sources to help identify potential trends sooner."[125] NHTSA concurred with that recommendation.[126]

IV. THE LAWYER'S DUTY TO INFORM FEDERAL REGULATORS OF POTENTIAL SAFETY DEFECTS

A. Early Warning Reporting Does Not Impose on Lawyers a Statutory Duty to Report Directly to NHTSA

While the early warning reporting rulemaking explains the reporting duty of the manufacturer's lawyer, it is silent on the duty of the plaintiff's lawyer.[127] The proposed rulemaking was very clear about the duty of the manufacturer's lawyer:

> Most of the information covered by this rule would be provided directly to the entity (usually a corporation) that assembles or imports vehicles or equipment. However, some information might be initially received by affiliates or other representatives of manufacturers, such as their registered agents and outside counsel. Consistent with the thrust of the early warning statutory provisions, we are proposing to deem information received by these entities to be in the possession of the manufacturer, and thus to require each manufacturer to ensure that entities that it has the ability to control furnish it with relevant early warning information so that the manufacturer may make a full and timely report to NHTSA. However, we are not proposing to require such an affiliate or representative to report directly to NHTSA.[128]

Thus, under the proposed regulations, reporting information held by outside counsel would have been deemed to be in the possession of the manufacturer, and the manufacturer would have been charged with obtaining that information and passing it along to NHTSA.

The final rulemaking, however, does not reiterate this position and does not indicate that reporting information received by a manufacturer's outside counsel is deemed to be in the possession of the manufacturer.[129] Rather, the final regulation says that to report claims, "manufacturers will need information necessary to satisfy our 'minimum specificity' requirement, such as the model year of the vehicle involved in a claim. Manufacturers may need to obtain this factual information from their outside counsel after those counsel receive that information."[130] When outside counsel is handling a claim for death or injury and

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125. ODI AUDIT, *supra* note 124, at 13.

126. *Id.* at 37.

127. Reporting of Information and Documents About Potential Defects, Retention of Records That Could Indicate Defects, 66 Fed. Reg. 66190, 66194 (proposed Dec. 21, 2001).

128. *Id.* at 66194.

129. Reporting of Information and Documents About Potential Safety Defects, 67 Fed. Reg. at 45830.

130. *Id.*

the manufacturer does not have sufficient information to make a proper report, the manufacturer "must attempt" to obtain that information and pass it along to NHTSA.[131]

In response to the proposed rulemaking, many manufacturers had objected to any inclusion of their legal counsel in the reporting requirements.[132] They argued that including legal counsel was unnecessary because lawyers always provide their manufacturer-clients with basic relevant information and requiring lawyers to periodically search their records would be unduly burdensome.[133] They also argued that the requirement to divulge such information would pose ethical problems, conflicts of interests, and might violate the proscriptions against divulging privileged information or disclosing attorney work product.[134] In fact, Ford argued that documents contained in litigation files should be entirely excluded.[135] In response, NHTSA took pains to clarify that "the provision of this type of fundamental information would not violate the attorney-client privilege or present other ethical dilemmas to outside counsel. We are seeking only basic factual allegations."[136] NHTSA also removed explicit reference to outside counsel from its final definition of "manufacturer."[137]

NHTSA also made progress in responding to manufacturers' confidentiality concerns. In April 2002, NHTSA issued proposed regulations that clarify how the agency plans to classify confidential business information, and specifically discussed how it will handle information submitted pursuant to the early warning reporting requirements.[138] NHTSA will use the newly developed common law standard of review to determine whether information is confidential: voluntarily submitted information will be treated as confidential if it is "the kind of information that is not customarily released to the public by the submitter."[139] NHTSA will also establish classes of information which are presumptively non-confidential.[140] These proposed classes include early warning reporting information on consumer complaints, property damage claims, and warranty claims data.[141]

While the final early warning reporting rulemaking retreats from the proposal that manufacturers be deemed to possess, and therefore required to report, the information held by their legal counsel, it nevertheless clearly includes manufacturers' legal counsel in the early warning reporting framework. There is,

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131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. Confidential Business Information, 67 Fed. Reg. 21198 (proposed Apr. 30, 2002).
139. *Id.* at 21199 (citing Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992)).
140. *Id.* at 21200.
141. *Id.* at 21206.

however, no indication that NHTSA intends to impose any reporting duty on legal counsel who do not represent manufacturers, such as plaintiffs' attorneys.

B. There is No Recognized Duty Requiring Plaintiffs' Attorneys to Inform Federal Regulators of Potential Safety Defects

The ODI Audit raises an interesting issue. It notes that plaintiffs' attorneys in the Ford-Firestone cases had information of which NHTSA was not aware until after it opened its investigation and made specific requests for information.[142] The Audit also comments that NHTSA's written procedures direct product defects analysts to request information from outside sources only "in rare cases."[143] Furthermore, the Audit quotes a NHTSA statement that, while analysts are encouraged to seek information from outside sources (an apparent contradiction with written procedures), "staff must balance the need for further information with the possible premature negative publicity."[144] So, plaintiffs' attorneys are neither required by statute nor, apparently, requested by NHTSA to provide early warning information which could ultimately save lives.

Interestingly, the ODI Audit recommended that NHTSA adopt several practices currently followed by the Consumer Product Safety Commission (CPSC), because CPSC's regulatory authority most closely parallels NHTSA's.[145] One of the recommended practices is to use a variety of sources to detect safety-related problems, including data from product liability lawsuits.[146] This recommendation implicitly includes plaintiffs' attorneys, who often have information which is crucial to the early detection of safety defects. The information held by plaintiffs' attorneys becomes particularly important when considered in light of the past conduct of manufacturers like Firestone, which, although defending at least sixty-six lawsuits, did not report the tire safety problems to NHTSA until after plaintiffs' attorneys did.[147]

Additionally, the information held by plaintiffs' attorneys can be vital for regulators. Plaintiffs' attorneys, particularly those suing large corporations, are increasingly forming alliances to share information and litigation strategies.[148] These alliances often include information repositories which contain corporate documents, technical literature, and court papers.[149] The American Trial Lawyers Association (ATLA) and the Attorneys Information Exchange Group (AIEG), both plaintiffs' organizations, administer the two largest information databases containing information related to potential motor vehicle defects.[150] According to

142. ODI AUDIT, *supra* note 124, at 12–13.
143. *Id.*
144. *Id.*
145. *Id.* at 20.
146. *Id.*
147. *See* discussion *supra* at Part II.B.
148. Mike France, *The Litigation Machine*, BUS. WEEK, Jan. 29, 2001, at 115–20.
149. *Id.*
150. *Id.*

The AIEG is founded on a simple principle: Every time one of the group's 600 members unearths interesting corporate documents in a lawsuit, they should all be forwarded to a central repository to be shared

one source, by the time Congress held hearings on the Ford-Firestone recall, AIEG had accumulated 400,000 pages of material on the subject:

> In early September [2000], as the story was exploding nationally, AIEG tire subgroup Chairman Tab Turner was able to swiftly pull together more than 70 internal Ford and Firestone documents dating back to 1987 and create a chronological history of the companies' alleged awareness of the alleged defect. Listing e-mails, memos, test reports, customer complaints, and correspondence between the companies, the chronology was given to auto-safety advocate Joan Claybrook, who delivered it to the Senate Commerce Committee on Sept. 12. Almost every media story about allegedly smoking-gun documents during that period was based on documents that had been available to AIEG members for months.[151]

Further, plaintiffs' attorneys identified a pattern of failures in the Ford-Firestone tires in 1996, but repeatedly decided not to tell NHTSA—and were "disappointed" when NHTSA began investigating Firestone tires in 2000—because they distrusted the agency after it had closed several investigations of tires and sport utility vehicles with no findings of defects in the early 1990s.[152] The no-defect findings persuaded judges to dismiss numerous lawsuits against auto and tire manufacturers.[153] This rationale, combined with the belief that their "first duty" is to win as much money as possible for their clients, was apparently sufficient to convince plaintiffs' attorneys that they had no obligation to alert NHTSA.[154]

Legal ethicists saw the non-reporting as a non-issue. Legal ethicist Geoffrey C. Hazard, Jr., said that the plaintiffs' attorneys had not violated any laws or ethical codes.[155] According to Professor Hazard, "They had a civic responsibility the same as you or I do, but they didn't have a legal duty" to report the potential defects to NHTSA.[156] Ethics expert Stephen Gillers took a similar position:

> For everyday citizens, the moral thing to do upon learning that others are in danger is to warn them. But confidentiality rules for lawyers often prohibit them from warning of dangers they learn about while representing a client. Ethics rules in nearly all 50 states would have forbidden the personal injury lawyers from revealing information about

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> with other lawyers.... One weapon companies often deploy to discourage the dissemination of sensitive documents they hand out in litigation is the protective order. But AIEG manages to get around that problem, in many cases, by asking members to negotiate for protective orders that give them the right to share documents with other plaintiffs' attorneys. As a result, the AIEG database has vast quantities of information that ordinary civilians, *and even government regulators*, never see.

Id. (emphasis added).

151. *Id.*
152. Bradsher, *S.U.V. Tire Defects*, *supra* note 8, at 1.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*

> the tires without client permission if doing so could have jeopardized their clients' cases.[157]

Professor Gillers did point out that the plaintiffs' attorneys would have been free to advise NHTSA if they had obtained their clients' consent. Apparently, no one has raised the issue that the keepers of information repositories such as AIEG might have a duty to report to regulators, particularly because they are not constrained by attorney-client confidentiality rules.

C. Potential Theories Under Which a Duty Might Be Found

Although NHTSA has made no indication that early warning reporting includes a reporting duty for plaintiffs' attorneys and current ethical standards do not appear to require such a duty, the issue should not be considered resolved as long as NHTSA endeavors to develop new reporting requirements and the American Bar Association continues to discuss amendments to its Model Rules of Professional Conduct. Three potential theories which merit consideration are the *Tarasoff* duty to warn, the recent amendment to ABA Model Rule 1.6, and the position taken by the Restatement of Law Governing Lawyers.

1. Tarasoff *Duty to Warn Probably Does Not Apply to Plaintiffs' Attorneys.*

The landmark case *Tarasoff v. Regents of the University of California*, created a tort duty for mental health professionals who fail to warn potential victims of danger threatened by their patients.[158] In this case, a patient confided to his psychologist that he intended to kill the victim. The psychologist alerted the police, who briefly detained the patient, but released him because he appeared rational. No further action was taken to confine or commit the patient, and no one warned the victim or her parents of the threat. Two months later, the patient murdered the victim. The parents sued the patient's therapists for, among other things, failing to warn the victim's parents of the impending danger.[159] The California Supreme Court held that "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[160]

It may be tempting to try to use the *Tarasoff* analysis to impose on the plaintiff's lawyer a duty to inform federal regulators of a potential safety defect and thus avoid harm to consumers, but there are major hurdles to consider. Foremost is the fact that there is probably no duty under common law:

> Although . . . under the common law, as a general rule, one person owed no duty to control the conduct of another, nor to warn those endangered by such conduct, the courts have carved out an

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157. Stephen Gillers, *Ask the Ethicist*, JD JUNGLE, Sept. 2001, at 30.
158. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976).
159. *Id.* at 339–40.
160. *Id.* at 340.

> exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct.[161]

Common law does not create a duty to warn for the plaintiff's attorney because there is no special, i.e., attorney-client, relationship between the plaintiff's attorney and the manufacturer which would impose a duty on the plaintiff's attorney to control the manufacturer's conduct by reporting the safety defect to NHTSA. Nor is there a special relationship between the attorney and consumers as "foreseeable victims."

Although NHTSA provides a ready and efficient conduit to warn the public of potential danger, the fact that such a warning method exists does not necessarily establish a duty to use it. According to *Tarasoff*, the most important consideration in establishing a duty is foreseeability. The foreseeable victim of a patient's violence is—depending on the facts of each case—generally an identifiable individual.[162] The "foreseeable victim" of a defective motor vehicle would be the public or consumers, both of which are large and amorphous groups. To find a duty to warn such a broad population cannot be seriously argued as fitting within the bounds of reasonable care as required by *Tarasoff*:

> [O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger. While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances.[163]

There are two reasons a tort claim based on the *Tarasoff* duty to warn will probably fail against a plaintiff's attorney who does not report a potential safety defect. First, a victim probably cannot establish that there exists a special relationship between the plaintiff's attorney and either the manufacturer or the public. Second, it is unlikely that the exercise of reasonable care would extend to warning the entire car-buying public of a potential safety defect. There may, however, be a viable claim against attorneys who represent manufacturers, because their attorney-client relationship could impose a duty to control their clients' conduct by reporting potential safety defects to NHTSA. At the time of this writing, the *Tarasoff* duty has not been extended to apply to lawyers in any context.

2. Model Rules of Professional Conduct Have Limited Application

In August 2001, the American Bar Association (ABA) modified Model Rule 1.6 to allow lawyers to disclose client confidences in order to prevent

161. *Id.* at 343 (citations omitted).
162. *Id.* at 342, 346 n.11.
163. *Id.* at 345 (footnote omitted).

"reasonably certain death or substantial bodily harm."[164] This amendment resulted in extensive press coverage and was applauded as vital in a "world of dangerous products, where you have exploding tires and cars that overturn."[165] However, after the initial hoopla, the rule change has come to appear primarily ceremonial.

The ABA's Model Rules of Professional Conduct, when adopted by individual states, establish standards governing lawyers' ethical behavior. The violation of a Model Rule may lead to disciplinary sanctions, but it does not create a presumption that a legal duty has been breached or establish any civil liability on the part of a lawyer.[166] As such, the recent amendment to Model Rule 1.6 is of limited effectiveness.

Moreover, while the amendment loosens the restriction on an attorney's ability to reveal a client's confidence in order to further the public interest, the lawyer must weigh disclosure against his duty to diligently represent his client's interests.[167] The opponent/manufacturer's statutory duty to report to regulators the same potential defect of which the plaintiff's lawyer is aware may tip the scale against disclosure by the plaintiff's lawyer. In any event, disclosure under amended Rule 1.6 would be "an option, not an obligation,"[168] so that lawyers would not be transformed into "whistleblowers."[169] Failure to report would not create a presumption that a legal duty had been breached or establish any civil liability on the part of the lawyer.[170]

Current ethics rules support disciplinary action against attorneys whose clients have a statutory duty to report to regulators and who help those clients conceal rather than report. This was extensively discussed during the early 1990s when the prestigious law firm Kaye, Scholer, Fierman, Hays & Handler (Kaye Scholer) paid a $41 million settlement for, among other things, improperly withholding damaging information about its client, Lincoln Savings & Loan, from federal banking regulators.[171] Although the regulatory agency could not cite to a statute or regulation requiring Kaye Scholer to disclose information to regulators,

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164. *ABA Stands Firm*, *supra* note 16, at 492.

165. Glater, *supra* note 17, at A12; *see also Draft ABA Rules Would Relax Attorney-Client Confidentiality*, ARIZ. DAILY STAR, Aug. 1, 2001, *available at* http://www.azstarnet.com/today/10801nLegalEthics.html (last visited Aug. 1, 2001); Anne Gearan, *ABA in for Ethics Overhaul Fight*, ARIZ. DAILY STAR, Aug. 6, 2001, *available at* http://www.wire.ap.org/APnews/center_package.html (last visited Aug. 6, 2001); *Lawyers Get More Leeway to Disclose Confidences*, ARIZ. DAILY STAR, Aug. 6, 2001, *available at* http://www.wire.ap.org/ APnews/center_package.html (last visited Aug. 6, 2001).

166. MODEL RULES OF PROF'L CONDUCT, *Scope*, at [5]–[6] (2001) (noting that nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or extra-disciplinary consequences of violating such duty).

167. MODEL RULES OF PROF'L CONDUCT R. 1.3 (2001); ETHICS 2000 COMMISSION ON THE EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, NOVEMBER 2000 REPORT, R. 1.6 (2000); *ABA Stands Firm*, *supra* note 16, at 492.

168. *ABA Stands Firm*, *supra* note 16, at 493.

169. *Id.*

170. MODEL RULES OF PROF'L CONDUCT, *Scope*, at [5]–[6].

171. Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings After the Kay Scholer Settlement*, 25 ARIZ. ST. L.J. 487, 488–89 (1993).

it used the ethics code to establish that Kaye Scholer did not have the right to assist its client in evading the client's reporting obligations.[172] The Kaye Scholer case is an extreme example because it involved a law firm interposing itself between its client and federal regulators, treating regulators as adversaries, and requiring regulators to communicate with its client through the law firm. If motor vehicle manufacturers' counsel assist their clients in concealing information required by NHTSA regulations, they could face penalties similar to Kaye Scholer's. Even in the Kaye Scholer case, though, there was no claim that lawyers had a duty to report directly to regulators.[173]

There is little tradition of state lawyer disciplinary boards enforcing disciplinary rules against corporate attorneys, and no disciplinary action was taken even in the Kaye Scholer case.[174] It has been argued, however, that the Kaye Scholer case portended the development of a "corporatist regime," in which the bar would work in tandem with federal regulators to replace lawyer self-regulation with statutory protocols.[175] This could be a viable method of addressing the lawyer's reporting duty in the motor vehicle safety regulation arena, but there has been no indication that NHTSA and the ABA have considered such a partnership. The objection to such a regime is that attorneys would be drafted into being watchdogs for the government. The primary public policy reason in support of such a regime would be, of course, the vital importance of consumer safety.

3. Restatement of Law Governing Lawyers Provides Lawyers Wide Discretion in Deciding Whether to Disclose

Section 66 of the Restatement of Law Governing Lawyers sets forth an exception to the general duty of confidentiality which allows a lawyer to disclose confidential client information when the lawyer reasonably believes that the disclosure will prevent reasonably certain death or serious bodily harm.[176] The Restatement emphasizes, however, that the disclosure is discretionary, not mandatory.[177] The Restatement also acknowledges that no ethics code explicitly permits such broad disclosure and that there are no reported judicial decisions on the issue.[178] Moreover, the Restatement declines to deem what it terms "remedial action" to be a duty and comments that, "[A] lawyer who takes action or decides not to take action in [such a] situation . . . is not, by reason of such action or inaction alone, liable for professional discipline or liable for damages to the client or any third person injured by the client's action."[179] Permitted disclosure is not limited to the client's acts, [180] so a plaintiff's attorney could conceivably disclose a safety defect discovered as part of a personal injury lawsuit. Prior to making any

172. *Id.* at 497.
173. *Id.*
174. Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 664–65 (1994).
175. *Id.* at 674–75.
176. RESTATEMENT OF LAW GOVERNING LAWYERS § 66 (2000).
177. *Id.* at cmts. a, g.
178. *Id.* at cmt. b.
179. *Id.* at cmt. g.
180. *Id.* at cmt. c.

disclosure, however, the lawyer would have to advise his client of the lawyer's ability to use the information and potential consequences.[181]

The Restatement's exception to the duty of confidentiality includes regulatory agency reporting, but its potential effectiveness is blunted by its limited, discretionary nature.[182] A lawyer who knows of a potential safety defect has complete discretion to decide whether or not to report that defect to NHTSA. A lawyer may decide that his disclosure is not reasonably necessary to prevent reasonably certain death or serious bodily harm when it is likely that "other actors know about and will eliminate the risk."[183] A plaintiff's lawyer, then, is particularly susceptible to deciding that disclosure is not reasonably necessary because the opposing party is already subject to mandatory reporting.

Finally, the Restatement points out that the lawyer's disclosure under this exception should be considered a "last resort when no other available action is reasonably likely to prevent the threatened death or serious bodily harm." The Restatement also states that after such a disclosure is made, unless the client gives informed consent, the lawyer should withdraw from further representation.[184] The potential for withdrawal from representation would no doubt be a significant consideration for plaintiffs' attorneys, who typically provide representation on the basis of contingent fee agreements and, by making a disclosure, would almost certainly face the loss of part or all of their fees.

V. CONCLUSION

With NHTSA's implementation of the TREAD Act, there appears to be less danger of motor vehicle manufacturers' delayed reporting and non-reporting of potential safety defects. Therefore, the reporting responsibilities of manufacturers' and plaintiffs' attorneys may raise less of an issue than they did before the TREAD Act. It is clear that manufacturers' attorneys are subject to the TREAD early warning reporting requirements through their clients, and non-reporting will subject manufacturers to potential civil and criminal penalties, as well as potential tort liability and disciplinary sanctions. For plaintiffs' attorneys, however, there is no statutory duty to inform regulators of potential safety defects. Currently, the tort duty to warn does not appear to be a viable vehicle for requiring plaintiffs' attorneys to report potential safety defects to federal regulators. The American Bar Association's Model Rules of Conduct and the Restatement of Law Governing Lawyers also do not establish a clear-cut duty and it is doubtful whether they would provide sufficient enforcement leverage even if they did.

If the purpose of the TREAD Act's early warning reporting is to open investigations sooner, initiate recalls earlier, and reduce consumer injuries and fatalities,[185] then Congress and NHTSA should consider creating an explicit

181. *Id.* at cmt. e.
182. *Id.* at cmt. f.
183. *Id.* at cmt. c, illus. 3; *see also id.* at cmt. d.
184. *Id.* at cmt. f.
185. *Office of Regulatory Analysis and Evaluation—Preliminary Regulatory Evaluation: TREAD Act Early Warning Reporting System Part 579*, NHTSA-2001-8677-64,

statutory reporting duty for plaintiffs' attorneys as they have for motor vehicle manufacturers and their counsel. Requiring plaintiffs' counsel to provide potential safety defect information may be the final piece of the motor vehicle safety monitoring puzzle. Should a manufacturer breach its duty to promptly report a safety defect, the plaintiff's attorney—often in the unique position of having as much or more information about the defect than the manufacturer—may be the only other source of information available to federal regulators. If a plaintiff's attorney fails to report the defect, then his silence has the same effect as the non-reporting manufacturer's: it perpetuates the succession of injuries and deaths caused by the defect. While Congress and NHTSA have made significant progress, until plaintiffs' counsel are subject to a reporting duty at least as stringent as that of manufacturers and their counsel, the potential looms for another titanic non-reporting debacle in the grand style of Ford and Firestone.

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at 59. It is chilling to note that, in expressing this purpose, NHTSA calculates that if the Ford-Firestone recall had been announced two years earlier, 143 lives would have been saved. *Id.*

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