

TREAD Act Update—2005



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Panel Participants

- **Stephen Selander**, Senior Counsel, Automotive Industry Practice Group, **Warner Norcross & Judd, LLP**; Chairman of the AIAG TREAD Act Work Group
- **Robert Norton**, Senior Staff Counsel, **DaimlerChrysler Corporation**
- **Michael McKale**, Manager of Product Regulatory Affairs, **Delphi Corporation**

Plan for the Session

- TREAD Early Warning and other Issues Update-
-Stephen Selander
- DaimlerChrysler Experience-Bob Norton
- Delphi Experience-Michael McKale
- Roundtable Discussion and Q and A

Update

- In terms of substantive issues, there has not been much new from NHTSA in the past year.

Sanctions

- Still **no sanctions** for violation of the Early Warning Reporting Requirements

Interpretations

- Three interpretations not on EW Website, but only one in the past year
 - Specialized cranes and loaders used for logging are not motor vehicles and therefore not subject to NHTSA regulations including Early Warning Regulations. Interpretation 11/05/04

Interpretation - 04/13/04

- For child restraint manufacturer, if customer complaint erroneously identifies the wrong model year, manufacturer should use 9999 as the model year.
- Consumer complaints include complaints about failure of a recall remedy, but not general communications between a customer and manufacturer related to the recall.

Interpretation - 3/26/04

- Rule requires reporting of a claim or notice which alleges that “the death was caused by possible defect in the manufacturer’s vehicle or equipment.” §579.27(b)
- NHTSA states:
 - EWR Rule requires the reporting of a death or injury, even if the claim **does not involve the direct operation of the vehicle** itself.
 - Therefore, **must report a death caused by a pump or other items of equipment on a fire truck.**

Reasons for Little New Early Warning Activity from NHTSA Since Last Auto-Tech

- Personnel changes?
- Massive quantities of data, but not very useful?
- Industry was doing a better job of detecting safety related defects than Congress/NHTSA realized?

Personnel Changes

- **Taylor Vincent** retired.
- **Jonathan White**, Chief of the Early Warning Division of ODI--killed in an automobile accident.
 - **Christina Morgan** is now the Chief of the Early Warning Division of ODI. Previously served at NHTSA in the Evaluation Division of the Office of Planning Evaluation and Budget
- **Kenneth Weinstein** left as head of Enforcement
 - Not yet replaced
- **Dr. Jeffrey Runge** is leaving as Administrator
- **Jacqueline Glassman**, formerly the General Counsel of NHTSA, has been appointed Deputy Administrator
- General Counsel's position is currently open.

Who Is Left?

- Kathy DeMeter, Director of ODI
- Lloyd Guerci, Asst. Chief Counsel for Litigation
- Andrew DiMarsico, Trial Attorney

- It seems clear that personnel changes have temporarily hampered NHTSA's ability to vigorously enforce the TREAD Act Early Warning Requirements.

Massive Quantity of Data, But Not Very Useful?

- Level of information not sufficient to show defect trends?
- So much data, its like looking for a needle in a haystack?

Warranty Data

- Voluminous enough to suggest trends, but not detailed enough to discover the condition that led to the warranty repair.
- Part of the issue is the broad categories used in the Early Warning rule.
- Of greater import, however, is the quality of the underlying data for purposes of discovering a defect
 - Warranty data designed to allow dealers to get paid for warranty claims.

Incidents Involving Deaths and Injuries

- Too few deaths in any single category to show any kind of trend.

AIAG Early Warning Standards Workgroup

- AIAG Early Warning Standards Workgroup has been formed to attempt to reduce warranty costs and recall exposure by standardization of best practices in the Auto Industry.
- Workgroup is beginning by looking at the warranty processes.
- NHTSA's Early Warning Regulation was one of the factors that gave impetus to the formation of this group.

Industry Was Doing A Better Job Of Detecting Safety Related Defects Than Congress/NHTSA Realized?

- Manufacturers did have the early warning data at their disposal, prior to the TREAD EWR requirements.
 - Most safety recalls in the past have been voluntary recalls.
 - Some have been NHTSA influenced.

Number of Vehicles Recalled Has Increased Substantially Since Early Warning Rule Was Issued

- Approximately 30 million vehicles recalled in 2004.

Better Data Review?

- To date, NHTSA has only indicated that one tire recall was a direct result of the early warning information.
- However, NHTSA believes the increased number of vehicles recalled resulted in some part from manufacturers doing a better analysis of their data because they know that NHTSA will be reviewing much of the same data.

Other Potential Reasons More Vehicles Recalled Since Early Warning Rule

- Most manufacturers indicate that the Early Warning Regulations have not caused significant changes in their processes or analyses related to decisions on recalls.
- I believe that increased number of vehicles recalled is significantly caused by:
 - Increased commonality, which means that if a part is defective, it is likely that more vehicles are affected by it.
 - Increased number and complexity of electrical systems on vehicles

Update on §512 Rule on Confidential Information

- Rule and Status
- Lawsuit
 - Parties
 - Issues
 - Status

Appendix C- Early Warning Class Determinations

- a) Reports and data related to:
 - Warranty claim information
 - Field reports, including dealer reports and hard copy reports
 - Consumer complaints
 - Lists of common green tires
- b) Production numbers for child restraint systems tires, and vehicles other than light vehicles
- c) Disclosure of the last six characters of the VIN.

EWR Information Not Confidential--Absent a Separate Finding by NHTSA

- Information on fatality claims or notices
- Information on injury claims or notices
- Number of property damage claims
- Production figures for light vehicle manufacturers

Due to Litigation Over the Rule, NHTSA Has Stayed the Release of Early Warning Data

- **October 4, 2004 e-mail from Jonathan White:**
 - “This advises that, until further notice, you should not request confidential treatment of early warning reporting (EWR) information from the Chief Counsel of NHTSA....[T]he agency has decided not to disclose EWR information until matters in litigation are resolved.”
 - E-mail was notice to manufacturers in general of decision by the Chief Counsel in response to a request for confidential treatment of early warning information.

Parties

- Public Citizen, Plaintiff
- Norman Mineta, as Secretary of DOT, Defendant
- Alliance of Automobile Manufacturers (AAM), Intervenor
- Rubber Manufacturers Association (RMA), Intervenor and Cross Complainant
- TMA amicus

Public Citizen Issues

- Regulations invalid because they are arbitrary and capricious
 - Congress provided no categorical exemption authority
 - Information not entitled to an exemption under 552(b)(4).
- Regulations invalid because they violate **FOIA**
- Regulations invalid because they were promulgated without providing adequate notice under the **APA**.
 - NPRM did not provide appropriate notice of the intent to provide categorical exemptions.

RMA Issues

- Supports NHTSA positions against Public Citizen
- However, cross-complains against NHTSA seeking to have all Early Warning information granted confidential treatment.
 - **TREAD Act** provides for confidential treatment for all early warning information
 - **Data Quality Act** prohibits the release of early warning information, because does not meet OMB guidelines of being presented in an accurate, clear, complete and unbiased manner and “within the proper context.”

Status

- Motions for Summary Judgment filed by Public Citizen, NHTSA, and the RMA
- The Briefing Schedule has been pushed back
- The earliest arguments on the motions would take place would be the end of this year, but may not happen until early next year.

What Will Happen?

- I think NHTSA has the better of the arguments with respect to the Public Citizen Complaint.
- The RMA complaint raises interesting legal questions.
- It would be ironic if the Public Citizen Complaint triggered the RMA complaint and resulted in more protection for confidential documents produced in response to the early warning regulations.

Other TREAD Issues

- Confidentiality of AI and DI information
- Reporting under 579.5
- NHTSA interpretation involving foreign recalls and claims

AI and DI Information

- Although at one time NHTSA stated that all deaths would be investigated, NHTSA now is not investigating all deaths.
- NHTSA does not consider AI or DI investigations part of the Early Warning process.
- NHTSA will not grant confidential treatment to information provided in response to AI's and DI's under Appendix C, discussed above.
- If you want to receive confidential treatment for AI or DI information, must request confidential treatment based on other parts of §512. You must make a request for confidential treatment when responding to the AI or DI.

Reporting Under 579.5

- Communication to more than one manufacturer, distributor, dealer, lessor, lessee, owner, or purchaser
 - In the United States
 - Regarding a defect
 - Whether or not safety related
- This section was to require manufacturers to provide NHTSA with copies of notices to more than one customer.
- My interpretation is that this section does not require communications to more than one tier in the supply chain, unless that tier contains more than one customer that has been sent the notice by its supplier.

NHTSA Interpretation

December 8, 2003

- Supplier C manufactures part X for automaker A and B. OEM A received a claim overseas of a fatal accident in relation to a possible defect on X and recalled foreign vehicles with X. OEM A does **not sell cars in the U.S.**, so they did not report to NHTSA on the claim and subsequent recall. **OEM B sells cars with X in the US**, but has not received claims on X.

Foreign Recall Reporting

- A supplier of motor vehicle equipment **does not have to report** a recall campaign that is conducted by a vehicle manufacturer that does not sell vehicles in the United States, since OEM A and not supplier C, determined that a safety-related defect existed in part X. **Foreign recall reporting obligations relate only to the manufacturers that made the decision or were ordered to conduct the recall or other safety campaign.**

Claims for Death

- Supplier C **does not have to report** the claimed fatality, because claim is made to vehicle manufacturer; supplier has notice of foreign claim, but no claim against it. **With respect to death incidents in a foreign country, only claims need to be reported and only by the manufacturer against whom the claim was made.**

NHTSA Reexamination of Early Warning

- Periodic Review required by the TREAD Act—
but timing not specified
- NHTSA planned to review the rule within two
years after the initial reports are received.

Areas of Potential Review Mentioned in the EWR Rule

- Reporting requirements for manufacturers of **replacement** equipment
- Review of the number of manufacturers that are small businesses but that are required by the final rule to report in full—threshold of 500 will be reviewed.

Status of Periodic Review

- NHTSA is waiting for the two full years of information before they begin to conduct their periodic review.
- NHTSA has not yet decided what the exact form of the review will take or what degree of public participation will be solicited in the review.

April NHTSA Request to OMB for Approval Pursuant to the Paperwork Reduction Act of Collection of Early Warning Information

- Alliance, TMA and NTEA all filed comments raising the burden issue.
- Christina Morgan has been visiting manufacturers to look at the burden issue.
- TMA proposed reducing burden by increasing threshold for small manufacturer to 2,500 for any individual business unit.
- Alliance stressed burden, and volunteered to assist NHTSA in its periodic review.

November 2002 Comments on Petitions for Reconsideration

- In November, 2002, I filed comments on the Petitions for Reconsideration of the Early Warning Rule suggesting that NHTSA:
 - Increase the threshold of small manufacturers to 5000 vehicles
 - Eliminate the reporting requirements for original equipment suppliers
- Although it would have avoided the start-up costs for those manufacturers if NHTSA had granted my Petition at that time, I believe this still would be a good idea.

Conclusions

- If you believe that parts of the Early Warning Rule are adding to your costs with marginal safety benefits, **now is a good time to get active and attempt to change them.** .
- If you have a real interest in changing some aspect of the EWR Rule as it applies to you, keep in contact with NHTSA and get involved to the greatest extent possible in the periodic evaluation of the EWR Rule that will be occurring at the end of this year.
 - **AIAG TREAD Act Work Group is one vehicle to do this**

Conclusions

- If you have an interest in improving the use of warranty data and processes in the automobile industry in attempting to reduce warranty costs and recall exposure, **get involved in the AIAG Early Warning Standards Work Group.**

Thank You

For any further questions, I can be reached at:



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