

COMMENT

THE EXPLOSIVE RECALL: PROPOSING SOLUTIONS TO HANDLE THE VOID LEFT BY THE TAKATA BANKRUPTCY

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Since 2004, Takata Corporation knowingly manufactured defective airbags capable of causing death. In 2008, Honda recalled the first 4,000 cars with Takata airbags. Since then the Takata recall has grown to the largest automobile recall in history. However, in June of 2017, Takata declared bankruptcy which has limited the recovery of injured owners and passengers. The recent bankruptcy has renewed the focus on notifying consumers of the harm these airbags present and ensuring recovery in the event of injury.

This Comment provides multiple solutions to attempt to curb the harm that owners and passengers of these defective vehicles face. One such solution involves the affixture of warning labels to all affected airbags in order to provide information to occupants about the risks of the vehicle. After noting the limitation of recovery available for injured occupants, this Comment instead argues that an insurance rider specific to the recall is necessary to both provide recovery and incentivize action. While focusing mainly on the occupants of these vehicles, this Comment also analyzes the impact on other market participants.

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INTRODUCTION

As of January 9, 2018, over 72 million cars produced with airbags manufactured by Takata Corporation¹ have been recalled.² The reason? A design flaw that causes a metal component within the airbag to degrade as a result of long-term exposure to humidity.³ Such degradation creates metal fragments that have the potential to explode in the direction of the occupant when the airbag deploys. Such fragments have caused serious injuries including death.⁴ As of December 2017, 20 deaths⁵ and more than 100 injuries have been

1. Japan. *Takata Corporation (7312)*, 4-TRADERS, [https://perma.cc/5KKJ-7XBF]. Takata Corp. is a company that:

[E]ngages in the manufacture, development, and sale of automotive safety parts. Its products include seat belts, airbag systems, steering wheels, interior trims, child restraint systems, and electronic devices. It operates through the following geographical segments: Japan, The Americas, Europe & Africa, and Asia. The company was founded by Takezo Takada in 1933 and is headquartered in Tokyo, Japan. *Id.*

2. Regulators in May of 2016 recalled an additional 35 million airbags. This addition in combination with the number of recalled cars at the time amounted to “at least” 63 million vehicles. This number represents nearly one in four vehicles on the road in the United States. Hiroko Tabuchi, *Takata Airbag Recall is Said to Grow by 35 Million*, N.Y. TIMES (May 3, 2016), <http://www.nytimes.com/2016/05/04/business/takata-airbag-recall.html>. This number has been added to by additional recalls since. *Takata Airbag Recall – Everything You Need to Know: What This Recall Means to You and What Actions You Should Take*, CONSUMER REP. (Jan. 19, 2018, 1:45 PM) [hereinafter *Takata Airbag Recall*, CONSUMER REP.], [https://perma.cc/Q56H-M4UC].

3. *Takata Airbag Recall*, CONSUMER REP., *supra* note 2. The cause of the defect results from ammonium nitrate which becomes unstable over time when exposed to moisture. *Id.* However, ammonium nitrate was not known to be the cause of the defect until recently. See Hiroko Tabuchi & Danielle Ivory, *Takata Airbag Flaw Linked to 10th Death; 5 Million More Vehicles Recalled*, N.Y. TIMES (Jan. 22, 2016), <http://www.nytimes.com/2016/01/23/business/takata-airbag-death-recall.html>.

4. See, e.g., Patrick George, *Police Thought Woman's Takata Death Was a Homicide*, JALOPNIK (Oct. 21, 2014, 11:15 AM), [https://web.archive.org/web/20180320195038/https://jalopnik.com/police-thought-womans-takata-airbag-death-was-a-homicid-1648872516] (noting that the injuries are so severe that they do not look like they could be caused by an accident).

5. Associated Press, *Honda Reports 20th Death from Exploding Takata Airbag*, L.A. TIMES (Dec. 19, 2017, 4:55 PM), [https://web.archive.org/web/20180320202900/http://www.latimes.com/business/autos/la-fi-honda-takata-air-bag-20171219-story.html].

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attributed to this defect.⁶ While much attention has focused on Takata's liability in the media,⁷ their recent bankruptcy has sparked a need to revisit the protection of consumers and availability of recovery.⁸

Because the airbag recall did not begin until two years after manufacture,⁹ most affected cars reside with consumers. Due to the sheer size of the recall, airbag manufacturers have been unable to fulfill the demand for replacement parts repairing only 7.5 million vehicles as of April 2016.¹⁰ The over 70 million vehicles potentially waiting for replacement parts represent the largest unfulfilled recall in history.¹¹ With such a large portion of vehicles being classified as defective, consumers and other actors must find a solution to resolve the current unknowns with regards to liability and recovery.

On June 25, 2017, the Takata bankruptcy announced a limitation to any damages available to harmed individuals after this date.¹² Thus,

6. Takata Airbag Recall, CONSUMER REP., *supra*, note 2.

7. Based on a report in 2004 that an airbag had ruptured and shot metal debris into the car of an Alabama man, Takata began testing the airbags of fifty cars from scrapyards. Tests from two cars revealed cracks in the steel airbag inflators which could eventually result in fatal conditions. Takata used this information to design solutions to the issue by working in secret on weekends and holidays. By doing so in secret, Takata failed to disclose to federal regulators their initial suspicions until four years later. For its part, Takata agreed to plead guilty and settle claims for \$1 billion. \$25 million of the money will go to the U.S. while the other \$975 million will be used to compensate car manufacturers as well as the individuals injured as a result of the defect. Margaret Cronin Fisk & Jamie Butters, *Takata to Pay \$1 Billion, Plead Guilty in U.S. Air Bag Probe*, BLOOMBERG (Jan. 13, 2017, 3:12 PM CST), [<https://web.archive.org/web/20170201111634/https://www.bloomberg.com/news/articles/2017-01-13/takata-to-pay-1-billion-plead-guilty-in-u-s-air-bag-probe>]; Hiro Tabuchi, *Takata Saw and Hid the Risk in Airbags in 2004, Former Workers Say*, N.Y. TIMES (Nov. 6, 2014), http://www.nytimes.com/2014/11/07/business/airbag-maker-takata-is-said-to-have-conducted-secret-tests.html?_r=1.

8. Naomi Tajitsu, *Japanese Airbag Maker Takata Files for Bankruptcy, Gets Chinese Backing*, REUTERS (June 25, 2017, 6:21 PM), [<https://perma.cc/VND2-SVZ7>].

9. "The vehicles are legal to sell but must be recalled by 2018." David Shepardson, *Toyota Tells U.S. Dealers to Disclose Future Takata Recalls*, AUTOMOTIVE NEWS (June 10, 2016, 11:42 AM), [<https://perma.cc/3DZL-72PG>].

10. Takata Airbag Recall, CONSUMER REP., *supra* note 2.

11. According to U.S. News and World Report, after the Takata airbag recall, the next largest recall occurred in 1981. This recall occurred due to a defective Ford Powerdrive. The recall affected roughly 21 million Ford, Mercury, and Lincoln brand vehicles. Even if all cars were recalled at the same time, there still exists almost a 34 million vehicle gap in unfulfilled recall repair orders. Jaclyn Trop, *The Biggest Car Recalls in History*, U.S. NEWS & WORLD REP. (Aug. 22, 2016), [<https://web.archive.org/web/20180321144541/https://cars.usnews.com/cars-trucks/biggest-car-recalls>].

12. Tajitsu, *supra* note 8.

what once offered recovery from a company with substantial assets,¹³ has shifted recovery for harmed parties to the manufacturers and dealers of these vehicles. Current automotive liability law places a need for dealers or manufacturers to fix or warn an individual of any known defects.¹⁴ This is being met as of now by the notification from manufacturers to owners about the airbag defect.¹⁵ However, with the limited supply of parts, a substantial number of actual fixes have yet to be made.¹⁶ Thus, the current framework has not gone to great enough lengths to ensure that manufacturers and airbag producers increase production. Further, the current notification process fails to address one of the groups of people most likely to be harmed by these defects—passengers.

Between the Takata bankruptcy and the current pace of replacing the defective airbags, changes must be made. Any change must ensure that two goals are being met. First, that consumers are provided with more information regarding the impact of the deadly defect sitting in their car. Second, that there is adequate compensation available to injured owners and third parties rather than limiting liability for those who perpetuated this disaster. Focusing on these two goals will affect change at both the front and back ends of the issue. As consumers become more aware of the prevalence and risks these defects pose to occupants of cars, they can make better decisions regarding the use of these vehicles. With protection provided to injured consumers, harmed parties will not go uncompensated and liable parties will be incentivized to speed the recovery.

This Comment argues that legislatures should require affected vehicles to be covered by an insurance policy rider that applies in the event of injury resulting from a defective airbag. Part I of this Comment provides background information on Takata, the recall, manufacturers and insurance practices. Part II presents two potential solutions available to protect owners and third parties from these defects. Part III of this Comment concludes that while a warning label affixed to defective airbags provides the lowest-cost option to market participants, the proposed insurance rider better achieves the goals of protecting consumers and accelerating a solution to the issue.

13. *Takata Corporation: Market Capitalization*, TRADING ECON., [https://perma.cc/5BTS-DDQF?type=image].

14. *Kothe v. Tysdale*, 46 N.W.2d. 233, 236 (Minn. 1951); *Barni v. Kutner*, 76 A.2d 801, 805 (Del. Super. Ct. 1950).

15. See, e.g., *Takata Airbag Inflator Recall Fact Sheet*, HONDA & ACURA AIRBAG INFLATOR RECALL CTR. (Mar. 16, 2018), [https://perma.cc/522V-JCRC] (explaining the information behind the recall and the recall process).

16. Takata Airbag Recall, CONSUMER REP., *supra* note 2.

I. THE LARGEST RECALL IN HISTORY

In November 2008, Honda initiated the first recall of Takata airbags issuing a recall notice for 4,000 vehicles.¹⁷ The notice indicated that the airbag inflators “may produce excessive internal pressure causing them to rupture and spray metal fragments in the car.”¹⁸ Six months later, an Oklahoma teen died after her airbag deployed propelling the metal fragments toward her.¹⁹ Both Honda and Takata settled with the family while maintaining no fault for the death.²⁰ Over the next nine years, Takata airbag defects had been attributed to over 100 injuries and 20 deaths in the United States.²¹ While Takata continued to maintain no fault for the injuries, a 2014 *New York Times* article noted internal memos documenting knowledge of the defect as early as 2004.²² As a result, Takata’s public image suffered, it faced multiple lawsuits, and eventually filed for bankruptcy.²³

As of January 2018, over 72 million American vehicles have been impacted by the Takata recall.²⁴ The defect occurs due to the degradation of the inflators within the airbag causing the explosive force of the airbag to shoot metal fragments throughout the car.²⁵ This degradation begins as early as six years after manufacture and degrades

17. *Timeline of Takata Airbag Recalls*, AUTOMOTIVE NEWS (May 20, 2015, 7:05 AM), [https://perma.cc/3GPC-LMMX].

18. *Id.* The initial recalls only affected Accord and Civic 2001 models. *Id.*

19. Dana Herteneke, *Airbag Malfunction That Killed OK Teen Not Under Recall in State*, NEWS9.COM (Oct. 21, 2014, 5:02 PM CDT), [https://web.archive.org/web/20180321152815/http://www.news9.com/story/26850686/airbag-malfunction-that-killed-ok-teen-not-under-recall-in-state].

20. The suit was settled for an undisclosed sum. *Timeline of Takata Airbag Recalls*, *supra* note 17.

21. Worldwide, Takata Airbags have been linked to at least 16 deaths including 5 from Malaysia. Associated Press, *supra* note 5; Reuters, *Takata’s Faulty Air Bag is Now Linked to 11 Deaths in the U.S.*, FORTUNE (Oct. 21, 2016), [https://perma.cc/7RAP-2VNT]; Takata Airbag Recall, CONSUMER REP., *supra* note 2..

22. Tabuchi, *supra* note 7.

23. See generally, *In Re Takata Airbag Prods. Liab. Litig.*, 193 F. Supp. 3d 1324 (S.D. Fla. 2016). As noted above, the suit settled in January for \$1 billion and Takata admitting guilt for its action with respect to injuries to car manufacturers and drivers. Fisks & Butters, *supra* note 7. Since the start of 2014 until January 27, 2017, Takata’s share price decreased 58.62%. *Takata Corp: 7312:JP*, BLOOMBERG MKTS, [https://perma.cc/PMN7-H5JL]. During the same timeframe, the Nikkei 225 (Japan’s benchmark index) increased 18.6%. *Nikkei 225: NKY:IND*, BLOOMBERG MKTS, [https://perma.cc/N6XH-X92X].

24. See *Takata Air Bags Recall Expands to 3.3 Million Vehicles*, CBS (Jan. 7, 2018, 10:41 AM EST), [https://perma.cc/E53T-MJNN] (noting that 3.3 million vehicles were recalled in addition to 69 million vehicles already recalled).

25. Takata Airbag Recall, CONSUMER REP., *supra* note 2.

faster in vehicles located in high-humidity locations.²⁶ Because the degradation process does not begin for a few years after initial sale, vehicles currently in production can be legally sold and subject to the recall two years later.²⁷

On June 25, 2017, Takata declared Chapter 11 bankruptcy²⁸ due to the mounting bills resulting from governmental sanctions,²⁹ auto manufacturer claims,³⁰ and individual consumer claims against the company.³¹ After the declaration of bankruptcy, Key Safety Systems, an American car-parts manufacturer, purchased Takata's assets.³² This purchase ensures that the issue of defective airbags will eventually be resolved by protecting the plants and expertise of the company.³³ Though the recalls will still continue as planned, many of the claimants

26. As noted, the ammonium nitrate degrades due to moisture in the air. *Id.* The level and speed of degradation vary depending on the amount of moisture in the air. *Id.* The National Highway Transportation Safety Administration advises individuals in Zone C (encompassing northern states plus Utah and Colorado) that degradation does not become significant for 15–20 years. *Takata Airbag Inflator Recall*, MOPAR, [https://perma.cc/MH5J-QJ66]. Cars residing in Zone B (encompassing states as north as Pennsylvania and as south as Arkansas as well as New Mexico and Arizona) will not experience significant degradation for 10–15 years. *Id.* Finally, those in Zone A (including the southeastern United States, Texas, California, Hawai'i, and Puerto Rico) may experience degradation between 6–9 years. *Id.*

27. Shepardson, *supra* note 9.

28. See Jonathan Soble, *Effects of Takata Bankruptcy to Extend Far and Wide*, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/business/takata-japan-bankruptcy.html> (provides a high-level view on Chapter 11 bankruptcy as well as the impact of the Takata recall on the purchaser of Takata, car manufacturers and customers).

29. For example, Takata agreed to pay the United States government a total of \$1 billion for criminal actions associated with the airbag recall. Specifically, Takata agreed to plead guilty to wire fraud. Press Release, U.S. Dep't of Justice, Takata Corp. Agrees to Plead Guilty and Pay \$1 Billion in Criminal Penalties for Airbag Scheme (Jan. 13, 2017), [https://perma.cc/EQR2-KDEF].

30. Susannah Nesmith, *Nissan, Ford, BMW Sue Takata Over Faulty Airbag Losses*, BLOOMBERG (Mar. 10, 2017, 5:03 PM CST), [https://web.archive.org/web/20171019231734/https://www.bloomberg.com/news/articles/2017-03-10/nissan-ford-bmw-sue-takata-over-faulty-airbag-losses] (discussing claims of fraud made by Nissan, Ford, and BMW against Takata).

31. Jackie Wattles, *Have an Exploding Airbag? You Might Get \$500*, CNN (May 21, 2017, 7:17 PM ET), [https://perma.cc/725B-Z2JF].

32. Because many of the issues involved in the Takata recall, Key Safety Systems purchased Takata's assets for an estimated \$1.6 billion. See *Takata, Japan's Airbag Giant, Files for Bankruptcy Protection*, GUARDIAN (June 25, 2017, 10:08 PM EDT), [https://perma.cc/4KPB-MB32]. The money would go to pay some of the debts of Takata, other sums would go to pay legal judgment, while finally some would go to allow a piece of Takata to come out of the bankruptcy to produce at least some airbags. Soble, *supra* note 28.

33. Soble, *supra* note 28.

(including future claimants) have now lost an opportunity to collect from the manufacturer of the defective airbags.³⁴

The bankruptcy, therefore, leaves a hole in protection and recovery for injuries. The limitation is far from absolute, but one of the generally more straightforward routes of recovery has been eliminated.³⁵ One of the major issues with the removal of Takata as a recovery source is the shift in liability to other actors in the market such as used-car dealers. Because the defect in cars may not occur until after two years, many affected cars are now in possession of used-car dealers.³⁶ Unlike new-car dealers, used-car dealers are less protected from liability by manufacturers.³⁷ With the uncertainty of protection from manufacturers and the further uncertainty in the handling of claims against these dealers, used-car dealers may potentially be fully liable for any injuries caused by these cars. In order to protect against liability, tort law provides two alternatives for dealers in possession of defective vehicles: fix the part or warn of the harm.³⁸ As noted, the supply of replacement airbags has limited the ability to fix defective

34. Based on bankruptcy protections, Takata is protected from current and future lawsuits related to the recalled airbags. Ryan Beene, *What Takata's Bankruptcy Means for Airbag Recalls: Quicktake Q&A*, BLOOMBERG (June 25, 2017, 7:53 PM CDT),

[<https://web.archive.org/web/20180321173230/https://www.bloomberg.com/news/articles/2017-06-26/what-takata-s-bankruptcy-means-for-airbag-recalls-quicktake-q-a>].

Further, the individuals most likely to receive the more numerous lawsuits are the car manufacturers. Hans Greimel, *Automakers Out Billions on Takata Deal: Supplier's Customers Fear Getting Stiffed After Bankruptcy*, AUTOMOTIVE NEWS (July 3, 2017, 12:01 AM), [<https://perma.cc/CGK6-L7Y7>].

35. Greimel, *supra* note 34.

36. Even though there have been numerous reports and knowledge of the airbag recall since 2014, cars are being declared as defective even 4 years later. In early January 2018 another 3.3 million cars were declared defective. *Takata Air Bags Recall Expands to 3.3 Million Vehicles*, *supra* note 24. Based on a 2010 report, roughly 60 percent of vehicles sold by used-car dealers are between 3 and 5 years old. NAT'L INDEP. AUTO. DEALERS ASS'N, NIADA'S USED CAR INDUSTRY REPORT: 2010 FACTS AND STATISTICS ON THE USED MOTOR VEHICLE INDUSTRY 8 (2010), [<https://perma.cc/F7NR-7BN3>]. Assuming these statistics have remained the same, this would put a majority of used-car stock in the prime recall age. Further, with NHTSA allocating airbags to older cars in higher humidity climates, it is likely that those cars between 3 and 5 years old are the least likely to have received replacement parts. *Takata Airbag Recall*, CONSUMER REP., *supra* note 2.

37. Manufacturers provide indemnification to new-car dealers. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (AM. LAW INST., 1998). This protection is not necessarily extended to used-car dealers who may be therefore left paying the cost of harms.

38. *Kothe v. Tysdale*, 46 N.W.2d. 233, 236 (Minn. 1951); *Barni v. Kutner*, 76 A.2d 801, 805 (Del. Super. Ct. 1950).

cars.³⁹ Thus, as of now, used-car dealers must resort to providing some warning with the hope that it will protect against liability.

Because of the uncertainty regarding used-car dealer liability, a simple warning without statutory approval may not adequately cover these dealers. Unlike Takata or major manufacturers, a \$3 million claim against a used-car dealer could be catastrophic to the business.⁴⁰ Not only could used-car dealers potentially be financially ruined without the additional protection, but consumers could also be substantially limited in their recovery. Instead of recovering from a large corporation, the recovery would be possibly limited to the individual dealership.⁴¹ If any of these claims against used-car dealers are successful, then these dealers may end up declaring bankruptcy as well. Though the bankruptcy would only limit those who have claims against that dealer, it will still limit the amount injured parties would be able to collect.

The next lucrative pool of recovery resides with manufacturers. Manufacturers can be held liable under two theories of liability. First, if the manufacturer knows of the defect, they can be held liable for negligently permitting the defect to occur.⁴² In the case of the Takata recall, if vehicle manufacturers knew of the defect when they originally manufactured the cars, then they would have acted negligently in the construction of the vehicle. Second, even if the manufacturer did not know of the defect, they may be held strictly liable for producing and distributing vehicles with the defect itself.⁴³ This is grounded in the idea

39. See Trop, *supra* note 11.

40. Based on a 2010 report, the average independent used-car dealer had annual gross sales of \$3,844,062. NAT'L INDEP. AUTO. DEALERS ASS'N, *supra* note 36, at 22. Figures on profits before taxes were not available, but this number would be substantially lower factoring in the cost of the vehicles as well as other expenses associated with dealerships. With judgments costing at least \$3 million, one claim would cost almost a year of gross sales to cover the claim. Damages so far have reached an excess of \$3 million. *Takata Airbags Settlement*, CLASSACTION.COM (Feb. 19, 2018), [<https://perma.cc/4AWS-AZYC>]

41. In speaking with members of the legal team of a Fortune 1000 insurance company representing many used-car dealers, the general consensus was that there was not enough information available to determine whether these insurers would be required to insure these dealers. If these dealerships are structured as a corporation, then the limitation on recovery would either be the assets of the corporation or the insurance covering the insurance. Without insurance covering these used-car dealers, the recovery limitation could be set at those direct assets of the dealership.

42. Annotation, *Manufacturer's Liability for Negligence Causing Injury to Person or Damage to Property, of Ultimate Consumer or User*, 164 A.L.R. 569 (1946).

43. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (holding that a manufacturer can be held liable for the components in the vehicle if it is reasonably certain to cause harm when negligently made).

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that manufacturers of life-threatening objects must have a heightened awareness that the object they manufacture could result in high risk of injury.⁴⁴ In this case, whether manufacturers knew of the defect upon manufacture, or manufactured vehicles with life-threatening defects is irrelevant. These manufacturers have been held liable regardless.⁴⁵

Automobile insurance has historically, and continues to be, the method of recovery for automobile accidents.⁴⁶ At the outset of a policy, insurance companies provide options that provide different limits for different types of coverage.⁴⁷ To determine the proper pricing of the coverage, insurers employ actuaries whose job is to calculate the likelihood of harm, the cost the harm, and the coverage available at that price.⁴⁸ The higher the risk of coverage, the higher the cost of the policy. In addition to standard policies, insurance companies offer insurance riders.⁴⁹ These riders are additional coverages that an individual can choose to include on the policy covering some specific or increased risk.⁵⁰ The rider does not amend the coverage other than to cover these additional harms. After purchasing the insurance policy and rider, an individual will be compensated for any damages for so long as they pay the premium payments.

In general, automobile insurance policies provide two main benefits to policy holders.⁵¹ The first type of benefits are first-party benefits.⁵² These benefits provide that an insured can make a claim against their own insurance company if they were to become injured in the car.⁵³ These benefits are not limited by at-fault or no-fault

44. *Id.*

45. See Nathan Bomey, *Honda Owners to Get up to \$500, Rental Cars in Takata Air Bag Settlement*, USA TODAY (Sept. 1, 2017, 3:10 PM ET), [https://perma.cc/G3Z6-NMK3].

46. See *Facts + Statistics: Auto Insurance*, INS. INFO. INST., [https://perma.cc/2J74-M2FC].

47. See, e.g., *Typical Components of an Auto Insurance Policy*, ALLSTATE (Nov. 2016), [https://perma.cc/PX72-262R].

48. See *What is an Actuary?*, BE AN ACTUARY., [https://perma.cc/S9F9-LVEE].

49. *Rider*, INVESTOPEDIA, [https://web.archive.org/web/20180323131137/https://www.investopedia.com/terms/r/rider.asp].

50. *Id.*

51. See, e.g., *Auto Coverages & Policies*, ALLSTATE, [https://perma.cc/3V43-K5H7]; *Auto Insurance Coverage*, NATIONWIDE, [https://perma.cc/U259-UG35]; *Car Insurance Coverages*, PROGRESSIVE, [https://perma.cc/7XVC-N5PW]; *Car Insurance Coverage That Fits your Life*, STATE FARM, [https://perma.cc/7R9B-7Z54].

52. *Understanding Auto Insurance: First Party Coverage*, CRAWFORD YINGLING INS., [https://perma.cc/5X5Y-EWG8].

53. *Id.*

accidents.⁵⁴ Rather, these benefits will be paid by the insurer to their insured for any damages to the car or injuries to the insured.⁵⁵ The second type of benefits provided under insurance contracts are third-party benefits.⁵⁶ These benefits allow an individual to make a claim against another party's insurance.⁵⁷ This occurs in at-fault accidents where one of the parties is liable to the other for the accident.⁵⁸ In cases where both parties have insurance, the injured party will file a first-party claim against their insurance and then that insurer will file a subrogation claim against the liable party's third-party benefits to collect from the liable party.⁵⁹

Currently, there appears to some misunderstandings between insurance companies, both of drivers and dealers, as to who should pay for the extraordinary harms resulting from the airbag recall.⁶⁰ If a party is injured as a result of the defective airbags, who pays for resulting exacerbated injuries?⁶¹ This question is further muddled by the fact that outside of these transactions between consumers, dealers, and manufacturers are harmed third parties. These third parties include passengers and borrowers of cars. Unlike purchasers of these vehicles, passengers and borrowers are not party to any contract between dealers and purchasers which may limit potential tort claims.⁶² Further, these

54. BUS. & LEGAL RES., COORDINATION OF BENEFITS HANDBOOK ¶ 861 (2017).

55. *Id.*

56. *Third-Party Insurance*, INVESTOPEDIA, [https://web.archive.org/web/20180323133224/https://www.investopedia.com/terms/t/third-party-insurance.asp].

57. For example, if an individual is injured in an accident and the other party is at fault, the individual would make a claim against the other party's insurance to pay for any harms due to that person's fault.

58. JOHN A. GEBAUER ET AL., 39A CAL. JUR. 3D INSURANCE CONTRACTS § 450 (2018), Westlaw.

59. See Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 MO. L. REV. 723, 723 (2005). According to Parker:

Subrogation exists in the law as a mechanism for insurers to recover the costs of reimbursing injured insured parties. The right of subrogation is extremely important to insurers. The inclusion of provisions recognizing the right of insurance companies to seek subrogation or reimbursement for payments made in the event of a loss are the norm for almost every type of insurance contract. *Id.*

60. *Supra* note 41.

61. Exacerbated injuries in this case refer to those that occur as a result of the defective airbag causing excessive injuries to the occupant of the vehicle.

62. In general, tort claims only arise when a duty is owed to the party harmed. *Tort, Negligence and Nuisance Claims—Overview*, LEXIS PSL, [https://perma.cc/8MKE-JSBF]. In these contexts, the dealer has no knowledge of who

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individuals are not necessarily provided with the same level of information as purchasers of these cars and are therefore unable to make an informed choice in transportation.

II. POTENTIAL SOLUTIONS TO INFORM AND PROTECT CONSUMERS

Two potential solutions exist to protect owners and third-party occupants. First, a law could require each affected airbag to display a prominent warning label to indicate the likelihood and severity of the harm associated with the airbags. This option provides a low-cost way to warn vehicle users of the high risk of harm from their airbags. However, the application of these labels may limit manufacturer liability and provide no recovery to harmed consumers.⁶³ Thus, the preferable solution to the issues raised by the Takata recall is the requirement of insurers to provide a specifically-tailored insurance rider to affected cars. This solution will provide recovery for affected consumers as well as incentivize cooperation between insurers, auto-manufacturers, and car owners to swiftly resolve the issue.

A. *Affixed Airbag Warnings*

The most cost-effective way to minimize the harm caused by the Takata recall is to require manufacturers, dealers, and mechanics to affix a warning label to each affected airbag. These labels would function by warning all occupants, not merely purchasers, of the harm associated with the defective airbags in order to make informed decisions on whether to use the car. These labels would be temporary, provided that they cannot be removed without special tools or effort to ensure they were only removed intentionally.⁶⁴ While this focus on warning consumers about the risk associated with the vehicles provides an improvement from current options, the solution limits recovery for harmed consumers and does not necessarily speed the resolution of the issue.⁶⁵

may use the car other than the person they sell it to and would therefore be unable to owe a duty to a party that did not exist at the time of contract.

63. In other words, if the manufacturer or dealer is simply able to warn of the harms associated with the airbags, then it is possible that they may achieve limited liability. See, e.g., *Kothe v. Tysdale*, 46 N.W.2d 233 (Minn. 1951).

64. Temporary in this instance would mean that they could be removed in the future, but not that they could be removed by owners of the cars. They would, however, be able to be removed when the vehicle is fixed. This semi-permanent manner does mean that it is possible someone with the knowledge and tools could remove the label without actually fixing the defect.

65. See, e.g., *Kothe*, 46 N.W.2d at 233.

1. THE WARNING LABEL DESIGN

Legislation relating to the warning labels themselves would require each label to include an adequate description of the defect as well as the potential harms associated with the airbag. The label would also be required to be prominently displayed in order to ensure that all drivers and passengers subject to the recalled airbags would understand the harm and the risks. For vehicles currently in production, the manufacturer would affix the labels before sale. Even though the recall does not begin for two years, consumers should know the harm presented when they purchase the car. However, cars already in circulation would need to have labels affixed by the first party with an ability to do so.⁶⁶ These parties would likely end up being car dealers or auto mechanics. Because most cars are serviced at the earlier of 6 months or 6,000 miles,⁶⁷ even cars with current recalls would have the labels added within a short time frame.

The requirement to place a warning label on the airbags should also come with the requirement that the dealer or mechanic last in possession of the vehicle after affixing the label adequately describe the risks and harms.⁶⁸ While warnings can arguably be ineffective either by inadequately describing the problem or by being ignored by the intended recipient, the description requirement therefore limits the usual ineffectiveness of warnings.⁶⁹ The regulation would also require the owner or purchaser of the car to acknowledge that the dealer or mechanic described the issue, answered all questions, and provided follow-up information regarding their future replacement.⁷⁰ This acknowledgment addresses any concerns raised about the adequacy of the verbal warning provided by the dealer or mechanic.⁷¹ This

66. This requirement is intended to ensure that not only are new cars receiving these warnings, but so are currently used cars. First party here means an individual who otherwise provides services to the car be it in fixing or replacing parts, or by taking ownership of the vehicle prior to resale.

67. As recommended by Car-Care.org, everyone should have their transmission fluid and engine oil checked every 6 months or 6,000 miles. *General Service Schedule*, CARCARE, [<https://perma.cc/EW7T-64U5>]. Because these are two services that most should not go without, it is likely car owners will be bringing these cars in to see the mechanic or dealer to replace them.

68. This would mean that the dealer or mechanic must describe why the label is being affixed to the car and what the label says.

69. Lisa A. Robinson et al., *Consumer Warning Labels Aren't Working*, HARV. BUS. REV. (Nov. 30, 2016), [<https://perma.cc/P5FC-CELM>].

70. Any acknowledgement must be written in plain English as well as direct and to the point so a non-lawyer could understand what they are signing and its meaning.

71. Essentially, if any individual were to claim that they did not receive an adequate warning by the dealer or by the label itself, this acknowledgement curtails

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additional requirement, however, does not address impacted third parties. Because these individuals did not purchase the vehicle, they may still not adequately understand the risks of the car based on the label itself.⁷² However, this concern is at least somewhat mitigated by the ability of car owners to provide information to these third parties based on questions raised by the warning label.

2. BENEFITS AND DRAWBACKS TO WARNING LABELS

The benefit to prominently displaying the warning and making the label semi-permanent means that everyone who is impacted by the airbag will be made aware of the risks. Further, it will likely encourage consumers to replace their airbags for both the added safety as well as the increased aesthetic appeal. Individuals will be constantly reminded that the airbag needs replacement. With the ease of verifying whether a car's airbags are defective, dealers will know whether to affix a label and warn the owner of the risks.⁷³ Dealers and mechanics will also be notified of the defects by the label while performing service.⁷⁴ Dealers and mechanics will thus be able to quickly verify if and when the airbag should be replaced and do so if a part becomes available. Therefore, the resolution of the issue on an individualized level will go faster for those owners.

Although the fixture of the warning label may increase the speed car owners replace their airbags, there are many inefficiencies associated with this strategy. Foremost, warning labels are ineffective in that passengers may not appreciate the severity of the injury or ignore the warning altogether.⁷⁵ Further, some consumers may refuse to accept a warning label in their car. For the warning to be effective, it would need to be sizable and located in a place that the average driver or passenger could not avoid. Thus, it is likely that certain individuals may be inclined to refuse the label or remove the label for aesthetic purposes. While any liability for a failure to maintain the label could be placed on the owner, many of these owners are unlikely to have the

these claims by showing that the individual signed their understanding of the risks and of the actions of the dealer and manufacturer.

72. See Robinson, *supra* note 69.

73. Anyone with access to a VIN can check the manufacturer or other websites to determine what recalls are currently active on any given vehicle. *Recalls Look-up by VIN – Vehicle Identification Number*, SAFERCAR.GOV, [https://perma.cc/P4LY-GU4Y].

74. This will be accomplished by both providing the label to show the person working on it that there is a visible recall label in the vehicle as well as an ability to check required recalls.

75. Robinson, *supra* note 69.

assets to compensate a harmed passenger.⁷⁶ If the desire is to avoid harm to third parties, allow them to make a meaningful choice in transportation, and provide compensation for these harmed consumers, then the ability for the warning label to be removed would fail to adequately serve these purposes.

In most contract and tort law, the potentially liable party is required to either fix or warn of a potential harm faced by another to whom that party owes a duty.⁷⁷ Enacting this regulation as stated therefore provides a potential limitation on damages paid by used-car dealers and manufacturers.⁷⁸ The harmed owners or occupants may no longer claim they were unaware of the risk or that the producers of the vehicle did not warn them of the risk. Further, by enacting specific regulations that state the minimum requirements of the airbags, manufacturers and dealers may point to the compliance with the regulation as an affirmative defense in any suit.⁷⁹ This drawback substantially harms individuals who were injured by the defect and would ignore one of the biggest focal points affecting the Takata airbag recall, providing adequate recovery.

This additional protection, while limiting future plaintiffs does protect another under-addressed group of actors: used-car dealers. As noted, there is currently a lack of consensus regarding the liability of used-car dealers within the airbag recall.⁸⁰ By providing a warning label that used-car dealers can affix to their inventory, these dealers become more protected from liability for an issue they did not create.⁸¹ Though the dealers and mechanics played no part in the harm caused to the consumer, they still economically benefit from the sale or repair of these cars. The only individuals who do not materially benefit from the sale of these cars are third parties who simply ride in the car. Therefore, it seems counterintuitive to limit the third party's ability to recover damages in the event of an injury. With the Takata bankruptcy already limiting recovery, any additional limits on recovery may result in damages for serious injuries or deaths becoming unrecoverable.⁸²

Though cost effective within the spectrum of reasonable solutions, the requirement of a warning label would be inadequate by failing to address the large scale issue of incentivizing a speedy resolution to the

76. *Takata Airbags Settlement*, *supra* note 40.

77. *See, e.g., Kothe v. Tysdale*, 46 N.W.2d 233, 236 (Minn. 1951); *Barni v. Kutner*, 76 A.2d 801, 805 (Del. Super. Ct. 1950).

78. *Kothe*, 46 N.W.2d. at 236; *Barni*, 76 A.2d at 805.

79. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–70 (2000).

80. *Supra* note 41.

81. *See, e.g., Kothe*, 46 N.W.2d. at 236; *Barni*, 76 A.2d at 803–05.

82. *Soble*, *supra* note 28.

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problem. If the warnings prove an adequate disclaimer of liability for those involved, then manufacturers and dealers may become less inclined to strive for a wholesale solution. Rather, manufacturers and dealers would fix the airbags as the parts became available, but would not increase production or devise other solutions to the problem as they would be financially protected. It is possible that some companies may choose to increase goodwill by attempting to resolve the issue sooner rather than later, but companies currently have that opportunity and the issue remains as it does.

Though the use of warning labels on vehicles could be used as a preliminary method of protecting both buyers and users of cars, a warning label by itself would be ineffective at protecting consumers and affecting change. The warning labels provide the opportunity to assess the benefits and costs of using the vehicle, however, a more targeted change would be necessary, one that not only increases awareness for consumers, but also provides meaningful safety changes and a safety net for consumers. To positively drive change at the current problem the most effective way would be to require insurance policy riders specifically tailored to the Takata airbag issue.

B. Specific Insurance Rider

The primary basis of recovery for most car related injuries is insurance.⁸³ The same logic and basis for recovery should be applied to those injured by the defective airbags. Due to the idiosyncratic nature of the Takata recall and the extraordinary harms presented by affected vehicles, legislation requiring insurance riders specific to cars affected by the recall should be enacted. The use of riders helps to protect both owners and third parties while also incentivizing insurance companies and car manufacturers to seek to remedy the situation as a whole as they are potentially liable for large sums of money in the event of damages.

1. THE COVERAGE

The proposed insurance rider would function similar to any other auto-insurance rider. If an individual was injured in an accident, the insurance company would pay first-party benefits if the injury arose because of defective airbags.⁸⁴ The process of claims would also remain the same as the coverage would cover for both ordinary accidents as well as those injuries resulting from the defective airbags. Upon the

83. See *Facts + Statistics: Auto Insurance*, *supra* note 46.

84. See *Understanding Auto Insurance: First Party Coverage*, *supra* note 52.

filing of an insurance claim, an adjuster would investigate to determine the cause of the accident and damage.⁸⁵ The actuarial process would also remain the same, albeit with a higher risk to calculate.⁸⁶ Insurance companies would compute the likelihood of risk along with the likely damages and price the rider premiums based on this calculation.⁸⁷ However, one increased cost to insurers would be the administrative policing required to ensure compliance with the policy. These administrative costs would be minimized as discussed later and the overall cost to insurance companies would remain roughly the same.

Similar to other insurance riders,⁸⁸ the inclusion of the rider would increase the policy costs and coverages. As there would be no substantial change in actuarial practices, the rider would be priced simply to match the higher risk of harm. Thus, the underlying insurance policy would cost an amount equal to an ordinary policy plus the extraordinary risk of harm associated with these vehicles. While a part remains unavailable for a given vehicle, the owner would pay the base cost of the policy, and the manufacturer of the vehicle would pay the cost of the rider. In order to highlight the risk of harm to the owners of these vehicles, the insurance policies would come on specially packaged paperwork that emphasizes the rider premium pricing. Therefore, when a part does become available, an insured would understand the risk of harm by ignoring the notification of an available part.

Manufacturers would be required to pay the pricing premium on these policies due to either negligence or strict liability on their part. Based on some reports, car manufacturers may have had specific knowledge that the Takata airbags were defective prior to the first recalls.⁸⁹ In this case, the manufacturers continued to produce potentially life-threatening vehicles for consumer use and can be found

85. See generally *Claims Adjuster Job Description Sample Template*, ZIPRECRUITER, [<https://perma.cc/4S9T-MY65>]. As will be discussed later, the first-party benefits would only pay for the aggravated injuries as a result of the defective airbags. If, and when, an issue arose between competing insurance companies regarding the extent of the airbag damage versus an ordinary accident a medical expert would be required to differentiate the injuries to the harmed party.

86. Higher risk in this case and as used throughout the rest of this Comment refers to the level of harm that can come to someone as a result of this defect.

87. See *What is an Actuary?*, *supra* note 48.

88. *Rider*, *supra* note 49.

89. In May 2017, Toyota, BMW, Subaru, and Mazda agreed to pay \$553 million for their role in the Takata recall. Neal E. Boudette, *\$553 Million Accord for U.S. Drivers over Takata Airbags*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/business/takata-airbag-settlement.html>.

negligent.⁹⁰ Even if these manufacturers did not have specific knowledge of the defect, their production and distribution of a defective product still opens them up to strict liability.⁹¹ Though Takata should be required to pay for these policies, the bankruptcy substantially limits any recovery against it. The payment of the cost of these riders, therefore, functions as a way to cause manufacturers to pay for at least some harms they have produced.

Manufacturers would also be required to pay for the cost of replacing the airbags. This requirement would not change much from current recall procedures, but rather specifies the requirements of manufacturers under this framework.⁹² This ensures that the individuals most at risk by this defect—consumers—are limited in the total cost they must bear for the failings of manufacturers and Takata. In exchange for the payment of premiums and replacement costs, car manufacturers would be limited from liability not resulting from fraud. With actuarial-fair pricing, the riders hold accountable manufacturers by requiring the premium payments, while simplifying the recovery procedure. In essence, insurers are in the best position to pay out benefits, manufacturers are in the best position to pay for the harms, and consumers are protected to the extent available.

2. INCENTIVIZING INSURANCE COMPANIES AND AUTOMOBILE MANUFACTURERS

The ultimate goal is not simply to require automobile companies to pay for any harms they may have created, but rather to fix the problem and eliminate the harm. The most effective way to accelerate the elimination of these harms is to increase production at airbag manufacturing plants. To do so, the aggregate cost of these rider premiums will encourage manufacturers to resolve the issue faster and incentivize them to invest in airbag production.⁹³ This investment could target increased production at current airbag manufacturing plants or

90. *Manufacturer's Liability for Negligence Causing Injury to Person or Damage to Property, of Ultimate Consumer or User*, *supra* note 42.

91. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051–53 (N.Y. 1916).

92. Within a reasonable time after determination that a defect does in fact exist, a manufacturer must mail a notification of the recall, explain the procedures for fixing the defect, and finally notify the purchaser that the recall will be handled at no charge. *Motor Vehicle Defects and Safety Recalls: What Every Vehicle Owner Should Know*, SAFERCAR.ORG, [<https://perma.cc/D3WG-LQ4D>].

93. This theory is based on the cost-benefit analysis companies undergo when making business decisions. If the cost to fix the problem costs less than the continual premium payments, then it would be beneficial for companies to spend the money now and eliminate the future costs. *See generally* E.J. MISHAN & EUSTON QUAH, *COST-BENEFIT ANALYSIS* (5th ed. 2007).

entice manufacturers with similar machinery to switch to the production of airbags. This investment would produce more airbags and therefore shorten the time to resolution. However, at the end of the day, these companies will make a business decision on whether to continue paying the premiums or shift money to invest in airbag manufacture. If, after a calculation of the costs of both strategies,⁹⁴ the company determines that it is cheaper to pay the insurance premiums, then the recall timeframe may not shorten at all.⁹⁵

Because the ultimate goal of this insurance coverage is to accelerate the replacement of defective airbags, the insurance rider should focus on incentivizing all the players in the market. One way to do so would be focusing on insurance companies themselves. As noted, this insurance policy would only cover first-party as opposed to third-party benefits. In drafting the legislation for this policy, there should be a statutory limit for these first-party coverages, but no limit to third-party coverages. In the event of an accident resulting in injuries from the defective airbag, the defective vehicle owner's insurance would pay up to the statutory maximum.

If a statutorily required cap on first-party benefits were applied below the typical damages amount, the onus would then switch to the at-fault driver's insurer for any injuries above the cap.⁹⁶ Actuaries for each company individually price policies to account for the injuries to and caused by their insureds.⁹⁷ However, the requirement that the other party's insurance pay damages exceeding the first-party benefit cap may not be accounted for in the pricing of these policies. Rather, the isolated nature of these injuries and the potential high costs, open insurance companies up to astronomical third-party payments. Thus, to minimize the likelihood of having to pay out these non-actuarial accounted for injuries, insurance companies are likely to invest in, or otherwise incentivize, airbag manufacturers to resolve the problem quicker. Even if insurers are able to price these policies correctly, the impact will

94. Consideration will also be given to the goodwill of the company. Though the dollar cost of the insurance policies may be lower and therefore facially the choice option, companies will also consider the cost of potentially having their name associated with fatal accidents. Many companies may prefer the higher cost of investment in manufacturing to limit the negative publicity associated with these accidents.

95. It is also possible that there could be a statutorily required payment to airbag manufacturers if it was determined that manufacturers would prefer to pay the premiums rather than invest in airbag manufacturing to accelerate the process.

96. For example, an accident involves car A and car B. Car B is at fault because it rear-ended car A. Car A's occupants are injured by the defective airbag. Car A's insurance would pay for the cost of the defective airbag injuries to car A's occupants up to the statutory limit. For every amount as a result of the defective airbag above and beyond the statutory limit would be paid by the insurer of car B.

97. See *What is an Actuary?*, *supra* note 48.

remain the same. The burden would instead shift to manufacturers now paying an even higher premium to minimize these occurrences to limit the higher premiums.

To properly affect change, the process of purchasing a car would also need to change. Most states currently require an individual to have some form of insurance on their car at all times.⁹⁸ Under this proposed solution, dealers, both new and used, would need to explain the defect, its impact, and the insurance rider. The purchaser would then sign a form stating their understanding of the risk of the car as well as a certification that they will make their best efforts to replace the airbag as one becomes available. This form would work to both inform the purchaser that different coverage is required while also protecting the dealer from any future argument that they failed to notify the buyer of the risk. This puts the buyer on notice and provides a defense for the dealer. Unlike the issue with the warning labels, this requirement shifts the risk and recovery from the dealers to the insurance companies. If a third party is injured as a passenger he or she will still be able to be compensated for these high-cost harms while also protecting the used-car dealers.⁹⁹ This shift does not burden the actually harmed party, but rather ensures recovery due to the larger size of insurance companies to those dealers.

3. WHAT HAPPENS AFTER REPLACEMENT IS AVAILABLE?

As noted, the cost of replacing the airbags would be solely on the manufacturers.¹⁰⁰ This requirement is not a departure from current practice, but it instead ensures that the cost borne by consumers is as minimized as possible.¹⁰¹ In exchange for manufacturers covering the additional cost of the rider and the cost of repair, owners would be required to take the car to the dealer or mechanic to fix the airbag if a part becomes available. Upon receiving notification that a replacement part became available, owners would be required to schedule the

98. Currently, 49 states and the District of Columbia require auto insurance. The only state not to require auto insurance is New Hampshire. However, New Hampshire requires that an individual show that they have funds sufficient to pay for damages in the event of an at-fault accident. *Background on: Compulsory Auto/Uninsured Motorists*, INS. INFO. INST. (Feb. 2, 2018), [<https://perma.cc/7Y7C-88DQ>].

99. The used-car dealer will have satisfied their duty to warn, and the insurance covers the gap for any harm caused to an individual resulting from the defective air bag. *Kothe v. Tysdale*, 46 N.W.2d. 233, 236 (Minn. 1951); *Barni v. Kutner*, 76 A.2d 801, 805 (Del. Super. Ct. 1950).

100. See *infra* Part II.B.1.

101. *Safety Issues & Recalls*, NHTSA, [<https://perma.cc/H4KM-TGDR>].

replacement or, in the alternative, pay the cost of the rider after their policy renews. Not only would the rider price shift to the owner, but insurance companies would be eligible to charge a premium on the rider equal to two to three times the actual rider cost to force compliance.¹⁰²

The ability of insurers to statutorily raise rates on insureds after the parts become available to remedy the situation would likely be met with the most consumer pushback. The government would be allowing individuals to be charged higher rates by a private actor for a failure to address an issue they did not create. However, the issue affects more than car owners. Passengers are in no position to choose to fix the vehicle or pay the premium. These policies, therefore, can positively influence owners to repair their vehicles.¹⁰³ The noncompliance of fixing the defective airbag impacts society at large and this incentive will help resolve the issue more quickly on an individual level. If utilizing private companies as an effective tax to force compliance is met with too much resistance, the same goal could be achieved by levying a tax on all cars that have not corrected the defect.¹⁰⁴

In order to ensure that noncompliance was not based simply on a lack of awareness, insurance companies would be required to prominently display the price of the rider and explain the coverage in the policy documents upon renewal. This display would encourage individuals to repair their car as soon as possible to lower their insurance premiums. Unlike the placement of a waiver, the higher priced premium provides a tangible monetary benefit to owners. While potentially unbeknownst to them, the car they originally purchased provides a higher risk to passengers and themselves. This bold display allows consumers to grasp the rider price and better influence their likelihood to make a change. The display of the premium also dispels any argument by cynical policyholders that the insurance company would keep their rates higher even after fixing the defect. Thus, similar to the warning, providing a prominent rider premium on insurance

102. Two to three is an arbitrary increase. However, the increase would be high enough to encourage replacement of these airbags. Because of the notification period later described, these insureds have time to replace the airbags before this increase would go into effect.

103. The cost-benefit analysis that companies would go through would be the same for customers, but with substantially outweighed costs to benefits. Here, the cost would be the time to take the car to get the service completed while the benefit would be a safer car and a lower insurance premium payment.

104. This tax is not fully fleshed out in this Comment, but would require similar functions as the policy rider here. For example, the payment would need to be high enough to strongly encourage compliance as well as explicitly describe the reason for the tax and how insureds could fix the issue.

policy statements would, at an individual level, incentivize owners to resolve the problem as soon as practicable.

4. THE NOTIFICATION AND DISTRIBUTION PROCESS

One of the most important aspects in implementing this solution is devising a method of distributing replacement parts and notifying owners of part availability. The distribution element requires some method of ensuring that the replacement parts are provided fairly across all demographics; for example, location, car manufacturer, and income level. The easiest, and likely most effective, way to distribute the parts would be to provide parts to the owners with the highest rider premium first.¹⁰⁵ The rider pricing shows the price an individual would pay with the same risk factors other than the defective airbag. Thus, the higher the price of the rider, the more likely the harm to owners or passengers and the more likely to need repair. These determinations would not be made by some broad regulation or government policy, but rather individually calculated by private actors with an incentive to accurately weigh the risk. This information could be used to rank the need for the replacement parts and allocate the parts to those consumers with the highest premiums first.

In order to most effectively implement these procedures, the insurance companies should collaborate to establish a joint venture specifically tasked with handling the communication and policing functions of the companies.¹⁰⁶ The joint venture would obtain a list of insureds and their rider premiums from the insurance companies. The joint venture would then communicate with airbag manufacturers to be notified as parts become available.¹⁰⁷ Upon notification from the airbag manufacturer that parts are available, the joint venture would be tasked

105. This is currently being done to some extent. The National Highway Traffic Safety Administration is requiring replacement parts to be sent to high-humidity climates. Due to the high risk of high-humidity climates, this policy could already be affecting the change suggested. However, it is possible that older vehicles in less humid climates present a similar risk as well. See Takata Airbag Recall, CONSUMER REP., *supra* note 2.

106. Policing functions in this sense refers to the requirement of insurers to ensure that the actions of their insureds and the representation made by the insureds are true. Specifically, policing will require companies to ensure that their insureds have actually replaced the airbags or encourage the insureds to make the replacement.

107. Working with the airbag manufacturers would be relatively easy as the manufacturing space is relatively narrow. Though not indicative of the number of other producers, Autoliv in 2015 comprised forty-one percent of the airbag manufacturing market. Craig Trudell & Niclas Rolander, *Autoliv Comes Out on Top After Takata's Airbag Mess*, AUTOMOTIVE NEWS (Mar. 25, 2016, 6:51 AM), [<https://perma.cc/4MHA-L5KJ>].

with notifying and distributing parts to the insureds. The joint venture would provide notice in the mail to insureds when the part became available for them. After receiving notice, the insured would then let the joint venture know which dealer or mechanic to send the part to. Ideally, consumers would then replace their defective airbags.

In order to ensure that insurance companies do not shift the payment of the premiums to the car owner before the consumer had an opportunity to replace the airbag, there would be a limitation on the insurer to not raise rates until the next renewal period.¹⁰⁸ Upon mailing the policy renewal paperwork, the insurer would be required to provide explicit notice within the renewal documents that a part is currently being held for a customer and the consumer should replace it or be charged for the rider. Unlike the restriction on increasing premiums during the policy period for insurers, such a restriction would not apply to consumers. That is, upon notification to the insurer from the joint venture that the insured had replaced the airbag, the insurance company would immediately remove the rider coverage and cost. This would incentivize consumers to replace their airbag as soon as practicable.

The final duty of the joint venture would be to police the policies after notification to ensure owners are correctly charged the applicable premium. There could either be a notification requirement on owners or dealers and mechanics to let the joint venture know the airbag that had been replaced. For simplicity, the dealers and mechanics who service the vehicle would report which vehicles had been repaired and which ones still are waiting to be fixed. The joint venture would then be tasked with communicating to the proper insurance company whether to continue or reduce the rider coverage and premium.

C. Why Will It Work?

This insurance rider addresses the two main issues that have arisen for consumers as a result of the Takata airbag recall as well as addressing some secondary concerns. Foremost, due to the Takata bankruptcy, these insurance policies would provide recovery for third-party victims in the event of an accident.¹⁰⁹ Additionally, by economically implicating these insurance and automobile manufacturing companies to cover potentially high risk losses, these companies become incentivized to address the issue.¹¹⁰ By protecting consumers

108. "A large portion of carriers only offer six month policy periods." Emily Delbridge, *What is a Policy Period?*, BALANCE (Feb. 15, 2018), [<https://perma.cc/86V7-T7BM>].

109. See Soble, *supra* note 28.

110. See MISHAN & QUOH, *supra* note 93.

and increasing the speed at which the issue is addressed, the solution can produce positive benefits to society.

1. PROTECTING PASSENGERS

The defective airbags affect not only the individuals who purchase the cars, but third parties who use those cars in one way or another. Particularly if the car had been resold after initial manufacture, the Takata bankruptcy severely limits what non-purchasers are able to recover.¹¹¹ The requirement of an insurance rider to explicitly cover all harms associated with the airbags provides a pool of recovery for all harmed individuals. As auto-insurance policies currently do, the insurer would pay out for any injuries to the victim. Regardless of the ultimately at-fault party, the victim would no longer be required to file a lawsuit to recover damages. That burden would fall on the insurance companies instead. As opposed to the potential scenario currently where a victim would either be barred from recovery or required to expend time and money to obtain a recovery, these insurance riders would protect all owners and third parties.

2. INCENTIVIZING MARKET ACTORS INTO COMPLIANCE

These insurance policies would also work to more quickly resolve the issue on both individual and macro levels. For the individual consumer, the incentive to fix the airbag has now become recognizably higher than it currently is. While the current risk of harm for drivers and passengers of cars includes death, the average consumer is likely unable to fully appreciate the risk the defective vehicles pose. Between the low likelihood of harm and the fact that the airbags are hidden behind other components, consumers are likely to ignore the harm rather than get it resolved. With the prominent display of rider costs, consumers have a monthly reminder of the impact that the failure to fix the issue can cause after a part becomes available. Further, with the tax or increased premiums for noncompliance, the choice to not resolve the issue will continue until consumers resolve the problem.

By requiring insurance companies to offer coverage that covers less than \$3 million worth of damage,¹¹² these policies increase the

111. See Soble, *supra* note 28.

112. Though many of the settlements so far have been undisclosed, one lawsuit filed by the family of Gujit Rathore settled the case with Takata for \$3 million. See *Takata Airbags Settlement*, *supra* note 77. However, this settlement occurred in 2012. In 2016 after it was discovered that Takata knew about the issue, Ms. Rathore's family attempted to reopen the lawsuit. Margaret Cronin Fisk, *Takata Air Bag Victim's Family Cites Skewed Data to Reopen Suit*, BLOOMBERG (Jan. 5, 2016, 7:13 PM EST),

likelihood that the issue as a whole will be resolved sooner rather than later. Not only will insurance and manufacturing companies become incentivized to increase airbag production, but they also have the resources and influence to do so. Unlike the average consumer whose concern relates to a vehicle or two, insurance and automobile-manufacturing companies now become liable for large swaths of potentially life-threatening vehicles. Whether by providing money to help finance a larger scale production of replacement airbags, or by offering to pay additional money for every airbag produced, these companies have the financial means to influence behavior. Whether by ramping up production at already existing manufacturers or by creating incentives to add producers into the market, insurance companies and manufacturing companies can improve the availability of replacement parts to consumers. In order to minimize their risk, these companies will likely seek to address the issue for all cars.

3. SECONDARY BENEFITS

These policies would also provide benefits to insurers in the long run. Individuals are more likely to continue coverage with current insurance companies rather than changing companies at the end of every policy period.¹¹³ For the companies that are required to, or opt into this insurance rider, customers are more likely to continue coverage due to the loyalty or indifference towards changing companies.¹¹⁴ If the requirements do not apply to all insurers, then it is likely that the insurers that offer coverage will be able to capture a larger market share of insureds after the airbag recall concludes and become better positioned going forward.

A slightly less direct focus of the riders is to protect used-car dealers from liability for their role in the recall. Up until now, used-car dealers have been stuck between holding a large supply of inventory and potentially being unprotected from liability in the event of an accident.¹¹⁵ By enacting these insurance riders as well as requiring purchasers to note that they understand the risks and need for a specialized rider, these dealers have provided notice and have also ensured that another party bears the risk of injury. Used-car dealers

<https://www.bloomberg.com/news/articles/2016-01-06/takata-air-bag-victim-s-family-cites-skewed-data-to-reopen-suit>.

113. 38 percent of Americans who have car insurance have not compared their price for car insurance in at least three years. Jennifer Calfas, *This Car Insurance Mistake Could Cost You \$1,846*, TIME (June 13, 2017), <http://time.com/money/4815146/car-insurance-price-comparison-study/>.

114. *See id.*

115. *Supra* notes 36–39 and accompanying text.

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may be liable if they are negligent in their duty to warn or fix the problem if they are capable,¹¹⁶ but they will not be held liable for simply selling their vehicles. Similarly, auto mechanics or other individuals who regularly interact with cars will also be protected by these insurance policies. These broad protections will help to shore up the used-car market and remove ambiguities on liabilities resulting from the airbag recall.

CONCLUSION

The Takata recall has spotlighted a serious issue in the gaps in liability that can result when a mass produced car part becomes defective. Not only can the injuries be catastrophic,¹¹⁷ but the blame for liability can become muddled. Further exacerbating this issue is the Takata bankruptcy which significantly limits potential recovery for parties harmed by these airbags. Though, these confluence of factors may not occur to this extent again, large scale recalls are nothing new in modern times.¹¹⁸ Therefore, the same principles and solutions can be applied to future mass recalls.

Many of the steps outlined to implement this solution, for example, the drafting of an insurance rider and the creation of a joint venture, can be replicated for future recalls based on the limitations at the time. If, for example, Takata did not declare bankruptcy and was instead still a fully functioning company, the insurance premiums to be paid by manufacturers would instead be paid by Takata. That said, this Comment does not attempt to argue that the ultimately liable party would be safe from liability because of these insurance riders. Rather, these riders should act as a backstop to ensure recovery can always be obtained. If future policies were enacted and companies such as Takata were paying the premiums, legislators should ensure that those companies pay substantial fees for relying on this insurance coverage. Whether the companies are charged a fee based on the potential harm to insureds or the size of the recall, companies should not be relying on these policies to encourage poor behavior. A potential way to limit the

116. *Kothe v. Tysdale*, 46 N.W.2d. 233, 236 (Minn. 1951); *Barni v. Kutner*, 76 A.2d 801, 805 (Del. Super. Ct. 1950).

117. See Chris Isidore, *Takata Airbag Victims Looked Like They Had Been Shot or Stabbed*, CNN (Nov. 20, 2014, 1:43 PM ET), [<https://perma.cc/7MLF-RCCZ>].

118. Examples of large scale recalls include Toyota's gas pedals and GM's ignition switches. See, e.g., *5 of the Largest Car Recalls in History*, INVESTOPEDIA, [<https://web.archive.org/web/20180324144427/https://www.investopedia.com/slide-show/car-recalls/?article=1>]; Eric D. Lawrence, *GM Settles Deadly Ignition Switch Cases for \$120 Million*, USA TODAY, (Oct. 20, 2017, 1:07 PM ET), [<https://perma.cc/JVC7-HQXF>].

reliance on these policies and encourage compliance with the spirit of these policies is to charge increasing fees every month the defect exists. By making the reliance on these policies progressively more expensive, companies will be encouraged to remedy the situation as quickly as possible.

In addition, the joint venture proposed can continue to be used as a method of facilitating recalls and minimizing harm to insureds. Though the Takata recall has been exceptional in the time required to produce the necessary replacement parts, a waiting time between the notification of many defective parts and the actual fixes still exists. Therefore, the joint venture could continue to function as a method for distributing replacement recalls amongst insureds based on higher levels of risk. If the joint venture took this approach, the insurance companies could look to car manufacturers to help fund and run this venture to make it a viable option going forward. Thus, the recommended courses of action will not become useless upon the resolution of the Takata recall.

The discussion throughout this analysis is not meant to be a choice for legislators nor is it intended to be an exhaustive list of options. Particularly relating to the Takata recall, there are substantial differences in risk factors between different sections of the country and different car model years that suggest implementing both the options identified.¹¹⁹ Though there are noted limitations with each framework, each presents at least some level of protection for the truly harmed parties from this recall. At minimum, the disclosure offered by the warning labels and the protection provided by the insurance rider present ways to limit continual harm to those already aggrieved parties. For this and future recalls the important key will be to minimize the impact on owners by ensuring compliance with safety standards at the outset, or making the cost to ignore the issue prohibitive. Though policies must strive to reach these goals, they also must keep in mind the impact on third parties and other market players. In the end, any policy must focus on notifying the at risk parties and protecting those ultimately harmed.

119. See Takata Airbag Recall, CONSUMER REP., *supra* note 2.