

JUSTICE WATCH

GM dilemma may leave scar on bankruptcy law

It's an unfortunate but not unusual scenario: A company's Chapter 11 bankruptcy leaves those injured or killed by its defective product without legal recourse.



Pacenti

Asbestos class action litigation is ripe with stories of companies, such as John Manville Corp., seeking shelter from class action lawsuits under Chapter 11.

But General Motors Inc.'s current dilemma with its deadly ignition switch defect may end up leaving a searing scar on bankruptcy law, attorneys in the field say. The faulty part has led to a worldwide recall of 2.6 million vehicles.

"This is an extremely complicated area," said **Jeffrey Davis**, a bankruptcy specialist and professor at the Levin College of Law at the University of Florida in Gainesville. "The case law is not well-settled."

The defect was discovered but kept secret long before GM declared bankruptcy in June 2009. Thus it was impossible for any claims relating to the defect to be discharged under the bankruptcy plan.

Under terms of the GM bankruptcy settlement, the carmaker is no longer legally liable for incidents that occurred before its July 2009 emergence from Chapter 11, many bankruptcy attorneys



ANDREW HARRER/BLOOMBERG NEWS

The National Highway Traffic Safety Administration and consumer advocate groups want GM, which makes Saturn, to establish a \$1 billion fund for victims of its defective products.

have said since the recall.

Adding insult to injury, these plaintiffs are the taxpayers who bailed GM out when the federal government took a temporary 60 percent stake in the company.

But GM CEO **Mary Barra** recently told Congress that the company is determined "to do the right thing" for those affected by the faulty ignition switch defect,

which has caused more than a dozen deaths and more than 30 crashes.



Barra

The National Highway Traffic Safety Administration and consumer advocate groups have pressed GM to establish a \$1 billion fund for victims of its defective products.

This solution, however, may spark more problems for the estimated 2,500 lawsuits from those injured in GM vehicles for other reasons that were discharged in the bankruptcy, said attorney **Lewis S. "Mike" Eidson**.

Former bondholders given the shaft by the bank-



Eidson

ruptcy also most likely won't be happy with such a fund, he said.

"There will be a howl that you will hear forever from coast to coast if they pay these people but not the others," said Eidson, a partner at Colson Hicks Eidson in Coral Gables who has been contacted by GM car owners looking to sue over the defect.

Eidson is renowned for piloting automotive product liability litigation. He was the national co-lead counsel in the class action involving the recall of 40 million defective tires manufactured by Firestone Tire Co. and served on the plaintiff steering com-

mittee in multidistrict litigation against Toyota Motor Corp., which was facing hundreds of lawsuits involving sudden unintended acceleration.

That problem cost Toyota \$1.2 billion in a settlement of a criminal investigation by the U.S. Justice Department.

Federal prosecutors, no doubt, will be looking at GM's actions leading up to the recall.

"The bankruptcy as a shield will not protect them against criminal charges," Eidson said. "Everybody agrees that bankruptcy does not protect criminal charges and fines."

But GM's immediate concern is the growing number of lawsuits connected with the recall. Not only are families who lost loved ones filing litigation but owners of recalled vehicles claiming economic losses.

Attorney **Peter Prieto**, a partner at Podhurst Orseck in Miami, last week amended a recall lawsuit against GM in South Florida to include a civil racketeering charge.

"We are not aware of any other lawsuit that alleges RICO," Prieto said. "This case is a classic RICO because it involves wrongful conduct that expands over a long period of time."

Prieto said he doesn't believe a judge would allow GM to use the bankruptcy to get out of paying for a defect that it kept fraudulently hidden.

Two engineers, including one who lied during a deposition in a wrongful death suit in Georgia involving the defect, have been placed on paid leave. Both worked on the Chevy Cobalt, a model heavily involved in the recall.

"The law will not permit GM to hide the ball by concealing the dangerous defect that gave rise to the claims, and then argue that the claims

based on that defect were extinguished by the bankruptcy," Prieto said. "The law is not going to reward a party who hides the truth."

Davis, the UF professor, said the fact that GM failed to disclose the defect before its reorganization will haunt it because the bankruptcy judge never had a chance to assess it in the bankruptcy plan.

"You don't escape by creating a new company," he said. "The new company carries the debts of the old company unless it gets discharged."

Plaintiff attorneys contend GM made a diabolical cost-analysis decision on crashes involving the defective ignition switch for more than a decade until it could no longer keep it a secret and announced the recall in January.

GM recalled vehicles worldwide because the defective ignition switches might cause engines to stall and prevent air bags from deploying in crashes.

The recall has used up all the goodwill GM achieved by turning around the company after emerging from bankruptcy with taxpayer assistance. The GM bailout is seen as a big reason why President **Barack Obama** carried Ohio in the 2012 election. The company has had 16 consecutive profitable quarters with a \$3.8 billion profit in 2013.

NO LONGER LIABLE

Attorney **Scott Baena**, a bankruptcy expert and partner at Bilzin Sumberg Baena Price & Axelrod in Miami, noted that bankruptcy plans can be reopened if fraud is discovered and it's within 180 days of confirmation of the plan.

The current recall only meets one of those criteria. The National Highway Traffic Safety Administration has said



2007 Saturn Sky

GM IGNITION SWITCH RECALLS

2003-2007 Saturn Ion

2007 Saturn Sky

2005-2007 Pontiac G5

2006-2007 Pontiac Solstice

2005-2007 Chevrolet Cobalt

2006-2007 Chevrolet HHR

GM withheld critical information that would have helped identify the defect.

"To be honest, I've always had a problem because of that 180-day limitation," Baena said.

GM appears to be open to creating a victims fund. It recently hired **Kenneth Feinberg** as a consultant to explore and evaluate options in its response to families of accident victims. He is the lawyer who helped navigate federal victim compensation issues in the wake of the 9/11 ter-

ror attacks, the BP Deepwater Horizon oil disaster, and the Boston Marathon bombings.

It remains to be seen if creditors who had their claims discharged during the bankruptcy cry foul if such a fund is created.

"They have no legal obligation to do that," Eidson said. "As far as I can see, they've done this for some other reason, like a crisis management or public relations reason."

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