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CENTER FOR JUSTICE &
DEMOCRACY
NEWS

Dear Friends,

This quarter's *Impact* focuses on General Motor and the auto industry. And the news just doesn't stop!

As of publication, the U.S. Department of Justice and state Attorneys General have yet to release their criminal findings. Our particular area of expertise is the victim compensation fund set up by Ken Feinberg. When Mr. Feinberg worked for BP on a similar effort, we raised serious ethical concerns. He gave claimants the impression that he was neutral and independent but, according to a federal judge, he wasn't. He was working for BP.

As legal ethics expert Monroe H. Freedman told us at the time, "The BP-Feinberg matter raises an issue that goes well beyond that case. That is, the use of a "Claims Facility" ... [for] any case in which a defendant is potentially liable for multiple causes of action and/or a class action.... [T]his kind of device can effectively nullify applicable ethical rules, as well as seriously impair access to justice on the part of claimants. Shouldn't something be done about this?"

You bet. We're working on it! If you have thoughts, we'd love to hear them.

Have a wonderful summer.

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: GENERAL MOTORS

RECALL-MANIA

"Terrifying," "dangerous," "widow-maker," "deathtrap," "potentially-disfiguring," "decapitating," "crippling," "grisly," "gruesome," "impaling," "disemboweling," "mutilating," "mangling," "maiming," "suffocating" and "rolling sarcophagus." These words describe a real horror show: the 2.6 million defective cars General Motors (GM) knowingly kept on highways for over a decade, killing or injuring untold numbers of drivers and passengers.

Actually, these are words that GM warned workers not to use when handling recalls during a confidential 2008 PowerPoint presentation, telling them to "think how it would look if everything they say or email wound up as a front-page headline." They have come back to haunt the company, with GM's safety defect cover-up now front-page news. It took a civil lawsuit that threatened to expose GM's concealment for the automaker to admit, and for govern-



ment regulators and the public to learn, that 2.6 million Chevrolet Cobalts, Saturn Ions and other small GM cars had faulty ignition switches where keys when bumped or jostled could cause vehicles to lose power and deactivate critical systems like steering, brakes and air bags.

This civil lawsuit was brought by Ken and Beth Melton, whose incredibly persistent attorney, Lance Cooper, hired his own engineer and discovered that GM hid information about a massive faulty ignition

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THE BANKRUPTCY SHIELD AND AN IMPOSSIBLE COMPENSATION FUND

When the U.S. Treasury Department, GM and Chrysler first cut their bankruptcy/bail-out deals in 2009, they all decided it would be good policy to abandon the customers of the two companies who were - or would later be - killed or injured in collisions because of vehicle defects. There were about 10 million Chryslers and 30 million GM cars then on the road.

Eventually, responding to enormous outside pressure, both companies gave in a little. Today, this immunity extends only to crashes that occurred before July 2009. Plaintiffs injured before that time must seek compensation from the defunct shell of GM, meaning there is basically no legal recourse available, at least against GM.

In bankruptcy, injury victims are not usually discarded like this, especially when there are known products on the market that will continue to severely harm or kill people. Trust funds often are established to help victims. (This is how victims of the Dalkon Shield IUD, which injured or killed thousands of women, asbestos poisoning and some priest abuse cases have been compensated.) But neither GM nor Chrysler did this at the time, even though statistically, every year there are at least 500 to 1000 serious injuries or deaths due to Chrysler and GM car defects - even aside from the ignition switch problem.

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defect. The Meltons' daughter Brooke died in March 2010 on her 29th birthday after her 2005 Chevy Cobalt's engine suddenly shut off, which caused the car to spin out, hydroplane, collide with an oncoming vehicle and roll off the road, plummeting 15 feet into a creek. Pre-trial discovery revealed that GM was aware of the ignition switch defect for years and silently corrected it in 2006 or early 2007 without changing the identification number. This prevented creation of any official records or notice to the public or NHTSA about the alteration. "I was furious that this information was known about and not taken care of before in 2005," Ken Melton told *NBC News* in a March 14, 2014 interview. "If it had been, my daughter would still be here and we would not be here talking about this." "It has to come down to money but that really doesn't even make sense to me," added Beth Melton. "In the end, they're going to have to pay for it. They need to care about their customers. They need to care about human lives."

The Meltons' suit and resulting publicity prompted GM to confirm that the design had been changed and triggered long-delayed action. In mid-February 2014, GM finally recalled over 778,000 cars with faulty ignition switches. By February 25th, the number rose to 1.6 million cars, with GM tying 13 deaths and 34 crashes to the ignition switch defect. Soon after, NHTSA launched an investigation into GM's failure to act on the ignition-switch problem. In March, the U.S. Justice Department (DOJ) began a criminal investigation. By the end of the month, the carmaker had recalled 2.6 million vehicles worldwide.

NHTSA's Acting Administrator David Friedman also appeared before Congress to face questions about the agency's repeated failures to both detect the defect and compel GM to act. According to a March 2014 *Associated Press* review of NHTSA complaints, "over a nine-year period, 164 drivers reported that their 2005-2007 Chevrolet Cobalts stalled without warning. That was far

more than any of the car's competitors from the same model years, except for the Toyota Corolla, which was recalled after a government investigation in 2010." NHTSA continues to blame GM for the cover-up, and on May 16, 2014, it fined GM \$35 million, the maximum civil penalty NHTSA could impose under the law, and agreed to submit to greater agency oversight.

And the bad news continues. On June 13th, GM recalled more than half a million Chevy Camaros, including 2014 models, due to an ignition problem that mirrored the defect in the 2.6 million small cars the company recalled earlier this year. Then on June 16th, GM issued its biggest recall to date, recalling 3.36 million mid-size and large cars worldwide (3.16 million in the U.S.), model years 2000 to 2014, for a defect nearly identical to the ignition switch problem in Camaros, Cobalts, Ions and other small GM cars.

During June 18th House hearings, U.S. House Energy & Commerce Chair Fred Upton (R-Mich.) also revealed evidence that the company ignored an ignition switch safety concern in the 2006 Chevy Impala – one of the GM models recalled two days before the House hearing – which it knew about as far back as 2005. As reported in the June 18th *WSJ*, a GM employee "told GM engineers that the 2006 Chevrolet Impala sedan she was driving in August 2005 shut off after she went over a bump in the road. In a later Aug. 30, 2005, email she warned that the problem appeared to be the design of the Impala's ignition switch, and noted that a GM technician who looked at her car had said other employees had complained about a similar problem with the Saturn Solstice – a smaller car that shared many of the components of the 2005 Chevrolet Cobalt and other vehicles." In one of many emails, the employee wrote, "I think this is a serious safety problem, especially if this switch is on multiple programs. I'm thinking big recall. I was driving 45 mph when I hit the pothole and the car shut off, and I had a car driving behind me swerved

around me. I don't like to imagine a customer driving with their kids in the back seat, on I-75 and hitting a pothole, in rush hour traffic. I think you should seriously consider changing this part to a switch with a stronger detent."

To date, GM has issued 54 separate recalls involving over 17.7 million vehicles in the U.S. in 2014 (over 20 million worldwide), recalling "more cars and trucks in the U.S. this year than it has sold here in the five years since it filed for bankruptcy," according to a May 21st *CNN* report, and, by extension, revealing other classes of victims above and beyond those impacted by the ignition switch defect. "Every time I see a recall from General Motors, I give a nod to Brooke," Beth Melon said. "These people need to know that there are problems with their cars and people are finding out – and I think it has a lot to do with the case that started with our daughter."

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IMPACT

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But there are limits to GM's new-found "safety consciousness." The *New York Times* reports, "G.M. has resisted recalling almost 1.8 million full-size pickup trucks and sport utility vehicles from the 1999 to 2003 model years for corrosion-related brake failures," even though NHTSA has "received about 1,000 complaints from owners, some of whom report narrowly avoiding crashes."

As of publication, Congress, DOJ, the U.S. Securities and Exchange Commission and at least nine states are in the midst of conducting their own ignition switch investigations. GM owners have filed over 80 federal lawsuits, with most seeking class action status, for lost value and other economic damages related to the 2.6 million ignition switch recall; the automaker argues such claims can't go forward given the 2009 bankruptcy deal. (See article, *The Bankruptcy Shield and an Impossible Compensation Fund*.) GM is facing a similar lawsuit filed on behalf

of 15 million consumers, who owned or leased GM vehicles sold between GM's July 10, 2009 bankruptcy and April 1, 2014, or who later sold such vehicles at dirt-cheap prices. The suit alleges that GM's recent recalls and ignition switch defect cover-up cost the class billions of dollars in lost resale value, regardless of whether their vehicles were subject to a recall.

Candice Anderson – who pled guilty to criminally negligent homicide after her 25-year-old fiancé died when the 2004 Saturn Ion she was driving crashed into a tree without explanation – and her fiancé's family also want their 2008 settlement with GM reopened, alleging that the automaker deliberately concealed the ignition switch defect. "GM allowed Candice Anderson to believe that she was solely responsible for causing the death of her fiancé, Gene Mikale Erickson, when GM had knowledge that would exculpate her," according to the

complaint, which seeks punitive damages.

Many other victims who've suffered crash injuries or death from one of the 2.6 million small GM cars with defective ignition switches have turned to the civil courts for justice. GM has said it will fight them in court. The Meltons are among those families, arguing that their September 2013 settlement with GM should be nullified and the case reopened because the carmaker hid evidence when they signed the agreement. "We want to know who at General Motors knew, and what General Motors is going to do in the future, and what happened to Brooke and who allowed it," explained Beth Melton in a June 4 *CNN Money* article. According to the June 12th *Associated Press*, GM is "trying to move the case to federal court so it can use bankruptcy as a shield from the claim."

Has anything really changed at GM?

THE BANKRUPTCY SHIELD AND AN IMPOSSIBLE COMPENSATION FUND continued...

Under the law of most states, where a new, or successor company (like "new GM"), acquires the trade name, good will and customer lists of the bankrupt company, and it continues to produce the same line of products, holding itself out to customers as the same, the new company is supposed to bear the costs of injuries from defective products sold by the old company. And when there's fraud involved, as is evident here, they should bear these costs.

As noted, the deal struck between GM and government to allow the company to reorganize under bankruptcy laws contained a provision that immunized it from every product liability claim it had at the time. Cases involving hundreds of victims were immediately thrown out of court or never filed. Since the faulty ignition switch disaster, a great deal of pressure was brought to bear on GM to compensate pre-bankruptcy victims of not only the switch defect, but also all defects. It did not do that. But it has decided to compensate some (not all) ignition switch victims. It has hired

Ken Feinberg to facilitate that process. Unfortunately, the compensation protocol developed by Feinberg and GM is extremely problematic and will keep many deserving victims from getting anything.



The attorney for Brooke Melton's family, Lance Cooper, summed up the problems in a June 30 press release, noting that the fund will exclude victims involved in crashes involving "over a million of the vehicles GM recalled to replace defective ignition switches." In addition, "the evidence that the claimants' are required to present in order to prove that the defect caused their harm" will be impossible to obtain for many deserving victims

since "much of the evidence that would normally be available was destroyed as a result of GM's cover-up of the defect." Claims begin August 1.

Similarly, Clarence Ditlow of the Center for Auto Safety explained in a statement, "Claimants filing a claim with the Administrator will be required to prove that the ignition switch defect in an 'eligible vehicle,' as defined in the Program, was the 'proximate cause' of the death or physical injury in the accident." However, most claims "will be on older crashes ... where the vehicles are no longer available" and "[i]n crashes before 2010, police reports will likely not be available" making proof "difficult, if not impossible." Says Ditlow, "At the very least, in processing claims Mr. Feinberg must apply a presumption that if there is a record of stalling on a vehicle, the claim is valid. To do otherwise will be to deny most claims filed by consumers who cannot afford lawyers or experts." So far, there's no sign Feinberg and GM will do the right thing.

USED AND RENTED CARS: WATCH OUT

On October 7, 2004, Raechel and Jacqueline Houck, sisters in their early 20s, were killed after their rented 2004 Chrysler PT Cruiser suddenly veered out of control from an underhood fire, crossed the highway median, crashed head-on into an oncoming tractor-trailer and burst into flames. The Cruiser, rented from Enterprise in California, was subject to a recall for possible power steering fluid leaks that could cause a fire. Enterprise never repaired the car.

After a \$15 million dollar jury verdict, the resulting negative publicity and pressure from consumer groups, in 2012, Enterprise joined fellow major rental companies in 1) agreeing to repair recalled vehicles before renting or selling them and 2) backing federal legislation that would force rental car

companies to stop renting recalled vehicles. However, despite repeated calls for reform, nothing has changed legally. U.S. rental car companies and used car dealers are still not required to repair recalled autos, remove them from the marketplace or alert customers to recalls before renting or selling recalled vehicles, even if the company is aware of the recall.

Major car rental companies have endorsed the “Raechel and Jacqueline Houck Safe Rental Car Act” that would require them to ground recalled vehicles as soon as they receive a safety recall notice and prohibit them from being rented or sold until they are fixed, without a law. “Recalled cars endanger the lives of everyone who shares the roads, not only the people who are riding in them, but other drivers as



well,” Raechel and Jacqueline Houck’s mother Cally testified in a May 21, 2013 congressional hearing on the bill. “Nobody should have to endure the loss of a loved one because a rental car company didn’t bother to get an unsafe, recalled car repaired. This is simple to fix. This is doable now. Please pass this law.”

WHAT'S WRONG WITH NHTSA?

Over 33,000 people are killed each year on our nation’s highways. And according to the most recent National Highway Traffic and Safety Administration (NHTSA) data, in 2012, an estimated 2.36 million people were injured in motor vehicle traffic crashes, 145,000 more cases than the previous year. Could NHTSA, the federal agency responsible for auto safety, be doing more?

Yes, but there are limits to what it can do. For one thing, NHTSA repeatedly has an annual vehicle safety budget of less than \$150 million for rulemaking, enforcement and research, an inadequate amount to fulfill its mission to “[s]ave lives, prevent injuries, reduce vehicle-related crashes.” To put this in perspective, GM posted a \$3.8 billion profit for 2013, with fourth quarter net income totaling over \$900 million. “NHTSA is a wonderful agency with a vital mission but it is woefully underfunded, understaffed and outgunned by the industry it regulates,” the Center for Auto Safety’s Clarence Ditlow told a

U.S. Senate subcommittee on November 7, 2013.

Unlike other public health and safety agencies, NHTSA can’t afford its own state-of-the-art research facility, so it rents space from Honda. The Office of Defects Investigation, which is tasked with undertaking investigations and conducting recalls to ensure auto safety, has had a \$10 million annual budget since 2005 and is severely short-staffed with only 51 employees.

Lack of transparency is a major problem, with NHTSA refusing to give the public full access to defect investigations and its complaint database as well as technical service bulletins (TSBs), which are “issued by car companies to notify dealers of problems that have been reported by drivers, mechanics and others and to outline any necessary fixes,” explained the June 17, 2014 *WSJ*. TSBs “can apply to minor problems like a faulty air conditioner or cup holder, but also to problems that can turn out to be bigger. That is what



happened with the ignition-switch problem, which GM didn’t consider a serious issue for years.”

Weak agency leadership is another problem. “You have to be tough, able to withstand endless pressures to cut deals or concede,” ex-NHTSA Administrator Claybrook explained in an April 2, 2014 speech to Wayne State University Law School students. “You need a little armor when you challenge an industry with a higher GNP than 90% of the countries in the world.”

Given NHTSA’s inability and unwillingness in many instances to properly police the auto industry, Congress should step in. As CAS’s Ditlow told Congress in November 2013, “The federal government through the National Highway Traffic Safety Administration should lead the way to vehicle safety and not clean up afterwards.”