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Policy Issues in the General Motors Vehicle Recall

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The 2014 General Motors Recall

General Motors Co. (GM) has notified the National Highway Traffic Safety Administration (NHTSA) that it is recalling 2.2 million vehicles because of a faulty ignition switch, which can affect the operation of the airbag system.[1] The defect that GM identified was a "condition in which the ignition switch may unintentionally move from the 'run' position to the 'accessory' or 'off' position resulting in a loss of power.... In some cases, the timing of the ignition switch movement relative to the activation of the sensing algorithm of the crash event may result in the airbags not deploying."[2]

GM has said that it knows of 12 deaths tied to this problem, all occurring in 2009 or earlier.[3] GM announced this recall in three separate instances:

- February 10, 2014: GM said that it was recalling 619,122 model year (MY) 2005-2007 Chevrolet Cobalt and model year 2007 Pontiac G5 vehicles;
- February 24, 2014: GM identified 748,024 additional vehicles with the same problem and included them in the recall.[4]
- March 28, 2014: GM recalled 823,788 vehicles sold in the United States between 2008 and 2011.[5] The company said in a press release that "about 95,000 faulty switches were sold," of which about 90,000 were used to repair older vehicles rather than being installed in newly manufactured vehicles. As GM could not identify the vehicles in which the faulty switches were installed, it chose to recall nearly 824,000 vehicles in which the switches might have been installed.[6]

GM has said it was aware of a problem with certain ignition switches as far back as 2001.[7] This has raised a question regarding the timeliness of GM's 2014 recall notice, as well as the impact of the 2009 bankruptcy of General Motors Corporation, a predecessor company, on liability for injuries and deaths that may be related to this defect.

As discussed later in this report, motor vehicle recalls can be initiated by either the automaker or by NHTSA. Most recalls are initiated by automakers, often after discussions with NHTSA. This GM recall was initiated by the manufacturer.[8] In response, NHTSA has opened an inquiry to

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[1] National Highway Traffic Safety Administration, *GM Recall*, 14V047000, http://www-odi.nhtsa.dot.gov/owners/SearchResults?searchType=ID&targetCategory=R&searchCriteria.nhtsa_ids=14V047000.

[2] O. Kevin Vincent, Chief Counsel, *Special Order Directed to General Motors LLC*, National Highway Traffic Safety Administration, TQ 14-001, NHTSA Recall No. 14V-047, March 4, 2014, p. 1, http://www.nhtsa.gov/About+NHTSA/NHTSA+Timeliness+Query+on+2014+GM+Recall+of+Ignition+Switches.

[3] Hilary Stout, Bill Vlasic, and Danielle Ivory et al., "General Motors Misled Grieving Families on a Lethal Flaw," *New York Times*, March 24, 2014.

[4] The additional vehicles cited are the MY 2006-2007 Chevrolet HHR and Pontiac Solstice, MY2003-2007 Saturn Ion and MY 2007 Saturn Sky.

[5] Vehicles cited in the March 28 recall are the following: MY 2008-2010 Chevrolet Cobalt, MY 2008-2011 Chevrolet HHR, MY 2008-2010 Pontiac Solstice, MY 2008-2010 Pontiac G5 and MY 2008-2010 Saturn Sky.

[6] General Motors Press Release, *GM Moves to Secure Recalled Ignition Switches*, March 28, 2014, http://media.gm.com/media/us/en/gm/news.detail.print.html/content/Pages/news/us/en/2014/mar/0328-ignition-service.html.

[7] See memorandum, Majority Staff, House Committee on Energy and Commerce Subcommittee on Oversight and Investigations to subcommittee members, "Hearing on 'The GM Ignition Switch Recall: Why Did It Take So Long?'" March 30, 2014, p. 5.

[8] The switches were made by Delphi Corporation from 2004 to 2006.

"evaluate the timing of GM's defect decisionmaking and reporting of the safety defect to NHTSA."[9]

This report discusses the NHTSA process by which vehicle safety defects are identified and vehicles are recalled, and the impact which the 2009 GM bankruptcy may have on liability for this defect.

NHTSA Defect Investigation and Recall Process

In recent years there have typically been around 150 recalls of vehicles each year affecting around 15 million vehicles.[10] Virtually all vehicle recalls are initiated by manufacturers, though NHTSA may influence a manufacturer's decision to recall a vehicle. One way NHTSA influences manufacturer recalls is by initiating a defect investigation. Former NHTSA Administrator David Strickland told Congress in March 2010 that voluntary recalls are preferable, since NHTSA-ordered actions can be subject to lengthy delays. For example, if a manufacturer resists a NHTSA recall order, the agency must go to court to prove that a defect exists that creates an "unreasonable safety risk."[11] NHTSA has estimated that it opens an average of around one hundred defect investigations each year, and that about half the investigations it opens result in a safety recall or other manufacturer action; these represent about one-quarter of all vehicle recalls.[12]

NHTSA's defect and recall process, which is managed by its Office of Defects Investigation (ODI), has eight segments, with several points where a decision to begin or continue an investigation is made:

- Pre-Investigation
  - Issue Evaluation
  - Defect Petitions
- Investigation
  - Preliminary Evaluations
  - Recall Queries
  - Engineering Analyses
- Recall Review
  - Audit Queries
  - Equipment Queries
  - Timeliness Queries

[9] O. Kevin Vincent, Chief Counsel, NHTSA, *Special Order Directed to General Motors LLC*, p. 2.

[10] Edmunds.com, "Yearly Number of Recalls vs. Number of Potentially Affected Vehicles for Model Years 1990 and Newer," March 3, 2014, http://www.edmunds.com/industry-center/data/recalls.html.

[11] David Strickland, NHTSA Administrator, Testimony to the House Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection, March 11, 2010, http://energycommerce.house.gov/Press_111/20100311/Strickland.Testimony.pdf.

[12] United States Department of Transportation, National Highway Traffic Safety Administration, FY 2012 Congressional Budget Justification, p. 51, http://www.dot.gov/budget/2011/budgetestimates/nhtsa.pdf. (Similar information is not included in the agency's more recent budget estimates.)

Receiving Information About Potential Defects

ODI receives information about possible defects through several channels. It maintains a toll-free hotline (888-327-4236) and an online site (http://www.safercar.gov) through which consumers can report complaints about motor vehicles. Consumers can also mail a letter or fax information to ODI. NHTSA has a form on its website that complainants can fill out and submit. NHTSA also receives "Early Warning" information from manufacturers intended to help it identify potential safety defects.[13] Specifically, the early warning system requires manufacturers to report on a quarterly basis:

- the number of vehicles, tires, and child restraint systems, by make, model, and model (production) year, that were produced;
- the number of claims and notices involving death (including those in foreign countries), personal injury, and property damage by make, model, model year, and vehicle identification number;
- the number of paid warranty claims in the United States that involve specified components and systems;
- the number of field reports received from the manufacturer's employees, representatives, dealers, and fleets, related to problems with specified components and systems, and copies of all field reports (except those from dealers); and
- all consumer complaints received regarding a product.

Manufacturers are also required to inform NHTSA of safety recalls or other safety campaigns conducted in foreign countries on motor vehicles or equipment similar to those sold in the United States. This information is entered into the ARTEMIS defect information system for analysis.

Pre-investigation: Defects Analysis and Identification

Complaints are assessed by the Defects and Recall Information Analysis Division within ODI. That division then analyzes information for evidence of safety defects and may undertake field investigations, surveys, and testing. When a pattern suggesting the possible existence of a safety defect is found, an analyst assembles an initial evaluation package for review by the chief of the Defects and Recall Information Analysis Division. The initial evaluation package is then sent to members of a peer review panel two weeks before a regularly scheduled review panel meeting to consider the evaluation.

The NHTSA peer review panel is composed of representatives from the defects analysis and vehicle investigation divisions. The panel meets once every two weeks to consider the initial evaluation packages proposing that investigations be opened. If the review panel decides to proceed with an investigation, analysts in the appropriate vehicle investigation division conduct a preliminary evaluation. If the panel decides not to proceed to an investigation, the reasons are recorded.

[13] The Early Warning Reporting (EWR) requirement was part of the 2000 TREAD Act (Transportation Recall Enhancement, Accountability, and Documentation Act), P.L. 106-414.

Stages of Investigation

There are two main stages to an investigation: preliminary evaluation and the engineering analysis. According to NHTSA reports, the average completion time for a defect investigation has been eight months since at least calendar year 2000.[14] However, that average includes investigations that are terminated during the process and does not indicate the time required for investigations that result in recalls requested by NHTSA, which typically exceeds one year.[15]

Preliminary Evaluation

The preliminary evaluation is based on analysis of additional data obtained from the manufacturer about the potential defect, and may include testing, field investigations, and surveys to determine the number of similar complaints. A preliminary evaluation typically takes four months. However, the process may be terminated because the manufacturer initiates a voluntary recall while the preliminary evaluation is underway. If not, at the conclusion of a preliminary evaluation the vehicle investigation division chief and the director of ODI may decide to end the investigation if there does not appear to be evidence of a safety defect, or to proceed to the next stage.

Engineering Analysis

The next stage involves a more detailed engineering analysis. During the engineering analysis, further technical information may be requested from a manufacturer, and further testing, additional field investigations, and more surveys may be done to help determine whether a safety defect exists. An engineering analysis can take up to one year.

Recalls

At the conclusion of an engineering analysis, the vehicle investigative division chief and the director of ODI may decide to close the investigation, or they may decide that the evidence warrants a safety recall. If they recommend a recall, NHTSA sends a letter to the manufacturer requesting that it conduct a recall. NHTSA's Defects and Recall Information Analysis Division monitors recalls. However, manufacturers may decide to initiate a recall before NHTSA concludes a defect investigation. In 2012, Congress changed the recall notification process by requiring manufacturers to post recall information, searchable by vehicle make and model, on the Internet, and by allowing NHTSA to order manufacturers to make additional efforts to contact owners of recalled vehicles.[16]

Defect Identification/Recall Process Issues

In the wake of two prominent vehicle defect investigations over the past 15 years, the U.S. Department of Transportation Office of Inspector General (DOTIG) examined ODI's defect investigation process and issued reports in 2002, 2004, and 2011 highlighting areas of possible improvement. Some of the issues identified in the 2002 report were cited again in the 2011 report, indicating persistent challenges. These included the quality of the information in ODI's vehicle

[14] This eight-month average figure for calendar year 2000 is cited in NHTSA's FY2004 budget estimate; the figure was repeated in subsequent budget estimates up through the FY2014 budget estimate.

[15] United States Department of Transportation, Office of Inspector General, *Process Improvements are Needed for Identifying and Addressing Vehicle Safety Defects*, MH-2012-001, October 6, 2011, p. 15.

[16] In P.L. 112-141, Moving Ahead for Progress in the 21st Century Act (MAP-21), §§31301 and 31310.

complaints database and documentation of ODI's decision making regarding defect investigations.

Complaint Database Data Quality

NHTSA uses its complaints database to analyze complaints for patterns suggesting vehicle defects. The DOTIG reports found that such analysis is hindered by inconsistent data. Complaints are submitted by the public, and are screened and entered into NHTSA's complaints database. In 2002, and again in 2011, DOTIG observed that the large number of complaints submitted represented a heavy workload for the screening staff.

In its 2002 review, DOTIG estimated that, as ODI was receiving an average of over 34,000 complaints each year, the staff responsible for reviewing those complaints had "an average of about 12 minutes per complaint to review the information, search the defect database for similar complaints, related investigations, and recalls, and decide whether to recommend an investigation."[17] The relatively limited amount of time each screener had to process each complaint, combined with the number of complaints processed each year and the undoubted variety in the quality of information in each complaint, contributed to problems with the data; in that report DOTIG found that the (then-current version of) NHTSA's defects database contained incorrectly recorded information and that the problems identified in complaints in the database did not always reflect all of the information relevant to the potential defect that was included in the complaint.[18]

In 2011, DOTIG found that the number of complaints had increased to an average of around 40,000 each year.[19] The number of complaints submitted annually has continued to increase, raising the question of whether NHTSA has enough staff to thoroughly screen and analyze the complaints it receives.

Documentation of Decision Making and Investigations

DOTIG has repeatedly noted gaps in information regarding NHTSA's decision making in defect investigations. In its 2002 review, DOTIG examined a random sample of 59 defect cases that were either recommended for, or led to, investigation. Of those 59 cases, 21 began immediately as investigations, bypassing the defect analysis/investigation recommendation stage. The remaining 38 cases were recommended for investigation. Investigations were opened for 28 of the cases. At the time those decisions were made, there was no process for recording the reasons why investigations were not undertaken in 10 cases. ODI officials were able to provide reasons why at least some of the cases did not lead to investigations. But DOTIG found no consistent differences between the cases that led to investigations and those that did not.[20]

In 2011, DOTIG noted that ODI did not adequately track, retain, or document information related to actions taken prior to opening a defect investigation. For example, ODI did not store pre-investigation information in its defects database, which "limited the availability of documentation

[17] United States Department of Transportation, Office of Inspector General, *Review of the Office of Defects Investigation*, MH-2002-071, January 3, 2002, p. 26.

[18] Ibid.

[19] United States Department of Transportation, Office of Inspector General, *Process Improvements are Needed for Identifying and Addressing Vehicle Safety Defects*, MH-2012-001, October 6, 2011, p. 5.

[20] United States Department of Transportation, Office of Inspector General, Review of the Office of Defects Investigation, MH-2002-071, January 3, 2002, pp. 14-15.

supporting pre-investigation monitoring, diminished the monitoring of potential risks, and increased the likelihood of losing or destroying current and historical data on potential safety defects."[21] Also, ODI did not document the decisions of the panel that reviews initial evaluations and determines whether to initiate an investigation. Finally, ODI did not consistently document the elements of its investigations, including meetings with manufacturers and associated complaints.[22] According to NHTSA, these issues have now been addressed.

Bankruptcy-Related Product Liability Issues

On June 1, 2009, General Motors Corporation filed a chapter 11 bankruptcy petition. On July 5, 2009, the bankruptcy court approved the sale of the company's "good" assets in a "section 363 sale."[23] The sale closed on July 10, 2009.[24] The buyer was a newly formed corporation that, after the sale was completed, changed its name to General Motors Company. Media reports at the time widely reported the event as GM emerging from bankruptcy;[25] however, the company that entered bankruptcy in June remained in bankruptcy after the sale—though its name was changed to "Motors Liquidation Company." General Motors Company was a completely new company. For simplicity, to make the identity of each company clear, "Old GM" is used to refer to General Motors Corporation, and "New GM" is used to refer to General Motors Company.

Section 363 of the Bankruptcy Code allows sales outside of the ordinary course of business free of liens and other encumbrances.[26] Pursuant to this statute, subject to the bankruptcy court's approval, New GM could have purchased Old GM's assets without accepting any sort of liability for vehicles manufactured by Old GM. Indeed, this happened in the reorganization of Chrysler Corp., which filed for chapter 11 bankruptcy one month earlier than Old GM. The new company (New Chrysler) that purchased assets in a section 363 sale from Chrysler Corp. initially did not accept any liability for vehicles manufactured by the company in bankruptcy (Old Chrysler).[27] The result was public outcry.[28] New GM avoided such an outcry by agreeing, as part of the sale,

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[21] United States Department of Transportation, Office of Inspector General, *Process Improvements are Needed for Identifying and Addressing Vehicle Safety Defects*, MH-2012-001, October 6, 2011, p. 13.

[22] Ibid., pp. 15-16.

[23] In re: General Motors Corp., "Decision On Debtors' Motion For Approval Of (1) Sale Of Assets To Vehicle Acquisition Holdings LLC; (2) Assumption And Assignment Of Related Executory Contracts; And (3) Entry Into UAW Retiree Settlement Agreement," http://www.motorsliquidationdocket.com/pdflib/2967_50026.pdf/.

[24] Motors Liquidation Company, Court Documents and Claims Register, General Information, http://www.motorsliquidationdocket.com/.

[25] *See e.g.*, David Bailey, "GM Emerges from Chapter 11 Bankruptcy," Reuters, July 13, 2009, http://blogs.reuters.com/great-debate-uk/2009/07/13/gm-emerges-from-chapter-11-bankruptcy/; "A Leaner GM Zooms Out of Bankruptcy," Associated Press, July 10, 2009, http://www.nbcnews.com/id/31826205/ns/business-autos/t/leaner-gm-zooms-out-bankruptcy/#.UzmZwoVxD3U; "A 'New' GM Emerges From Bankruptcy," National Public Radio, July 10, 2009, http://www.npr.org/templates/story/story.php?storyId=106459662.

[26] 11 U.S.C. §363.

[27] Subsequently, in August 2009, New Chrysler agreed to accept responsibility for product liability claims involving vehicles manufactured by Old Chrysler that were involved in accidents occurring on or after June 10, 2009, the closing date of the section 363 sale by Old Chrysler. Chrysler Group LLC press release, "Chrysler Group to Expand Product Liability Claims," August 27, 2009, http://media.chrysler.com/newsrelease.do;jsessionid=0C67C34D83C78C7331ED89E420CA523B?&id=9029&mid=1.

[28] *See e.g.*, Mark F. Anderson, "Consumer Groups Protest Chrysler & GM Avoiding Product Liability Claims," California Lemon Law Lawyer Blog, July 3, 2009, http://www.californialemonlawlawyerblog.com/2009/07/consumer_groups_protest_chrysl.html; Maureen Backman, "Bankrupt Chrysler Avoids Accountability for Dangerous Vehicle Defects," Public Citizen, 2009, http://www.citizen.org/getlink.cfm?ID=18764; Daniel Dell'Osso and Casey Kaufman, "Do Auto Products Liability Claims Have Life After Bankruptcy?" *The Trial Lawyer* 21, Fall 2009,

to accept liability for claims "aris[ing] directly out of death, personal injury or other injury to persons or damage to property caused by accidents or incidents first occurring on or after the closing date [of the sale]."[29] All claims arising from accidents or incidents that occurred before July 10, 2009, remained the responsibility of Old GM.

After New Chrysler aligned its liability policy with New GM's, Joanne Doroshow, executive director of the consumer group Center for Justice and Democracy, welcomed the change, saying, "while this decision is a victory for consumers, there are still hundreds of people who were injured before the bankruptcies by defective Chrysler and GM vehicles that still have no recourse because the companies continue to take no responsibility for pre-bankruptcy deaths and injuries."[30]

In March 2011, Motors Liquidation Company (Old GM) did "emerge" from bankruptcy. Its remaining assets were divided into four trusts, one of which is devoted to liability claims against Old GM.[31] The current value of that trust and the possible value of claims against it are not readily known. Although there is concern that the trust's resources are insufficient to cover all claims arising from accidents occurring before July 10, 2009,[32] the amount of the shortfall—if any—is unknown.

As it agreed, New GM will bear responsibility for any product liability claims that have or may arise from incidents involving the recalled vehicles if those incidents occurred on or after July 10, 2009. However, it is not responsible for claims arising from incidents occurring prior to that date, even if the actual claim is filed later.

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http://www.brandilaw.com/CM/Articles/Do-Auto-Products-Liability-Claims-Have-Life-After-Bankruptcy.pdf.

[29] First Amendment to Amended and Restated Master Sale and Purchase Agreement, §2(b)(amending §2.3(a)(ix) of the Purchase Agreement), June 30, 2009, https://www.nclc.org/images/pdf/autobankruptcies/amendmenttogmarmspa.pdf.

[30] Associated Press, "Chrysler to Accept More Product Liability Claims," August 28, 2009.

[31] "Old GM Exits Chapter 11, Carved into Four Trusts," Reuters, March 31, 2011, http://www.reuters.com/article/2011/03/31/oldgm-exit-idUSN3121109620110331?feedType=RSS&feedName=cyclicalConsumerGoodsSector&rpc=43.

[32] Rick Newman, "How [the old] GM Betrayed Its Customers," The Exchange, March 25, 2014, http://finance.yahoo.com/blogs/the-exchange/the-big-decision-gm-must-make-on-recalls-152557908.html.

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