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Lessons for Litigators in GM's Valukas Report

by ANNA EBY

A defective ignition switch has caused General Motors a great amount of grief. Over the course of 10 years, the defective part led to more than a dozen deaths and numerous injuries before GM identified the problem, initiated a recall process and instituted a compensation plan for victims, an ordeal estimated to eventually cost the company over $9 billion, according to a July 5 article in Automotive News, "Just how much will recall storm cost GM?"

LITIGATION

As part of this process, GM hired Jenner & Block chairman Anton Valukas, a former U.S. Attorney, to conduct an extensive internal investigation of the company and its actions. Valukas and his team interviewed numerous former and current GM employees and reviewed millions of pages of documents before issuing the damning, 315-page report in late May.

What may resonate most with litigators is that the person who finally brought the ignition switch issue to GM's attention was a plaintiff's expert.

How did an expert, unaffiliated with GM and prior to receiving any discovery in the lawsuit in which she had been hired, find the answer that had eluded GM for years? She did some basic research and reviewed publicly available documents. The answer, it turns out, lay in plain sight.

According to the report, in 2002, a mid-level GM engineer approved an ignition switch for use in certain vehicles that did not meet GM's required torque specification—meaning that a key would turn too easily in the ignition. In testing, GM engineers observed that bumping the key while driving could turn the key to the "Accessory" or "Off" position, causing the vehicle to lose power. This was labeled a convenience issue, rather than a safety concern, thus making a long-term solution a low priority, and one subject to cost considerations.

What these engineers inexplicably failed to appreciate was that GM airbag systems were specifically designed to disable if the key were moved to the "Accessory" or "Off" position. As such, if a driver inadvertently bumped the key into the off position during an accident, the airbags would not deploy.

GM's in-house counsel and product investigation teams began to see accidents in which airbags did not deploy when they should have. Separately, the engineers responsible for the ignition switch remained aware of its defects, but not of its effects—disabled airbags.

Despite the fact that she had not been provided with discovery materials, a plaintiff's expert, while preparing a report in one of the airbag nondeployment cases, located two publicly available documents that connected the ignition switch defect to the disabled airbags. Both documents—one a Wisconsin State Patrol accident reconstruction report, the other a report prepared by researchers at Indiana University—were created in 2007 and examined the same fatal airbag nondeployment accident. Both addressed the possibility that the ignition's location in the "Accessory" position at the time of the accident had prevented the airbags from deploying. Crucially, both documents had been available to GM since 2007. In fact, Valukas discovered that GM's legal department received an electronic copy of the Wisconsin State Patrol report in March 2007. The Indiana University report is publicly available on the website of the National Highway Traffic Safety Administration, where the plaintiff's expert discovered it.

The expert concluded that the ignition switch in the vehicle that was the subject of her report was defective, causing the airbags not to deploy. The expert cited both the Wisconsin State Patrol and the Indiana University investigations in her report, which was issued in June 2012 and produced to GM. According to Valukas, it was not until this expert report that GM became aware of the connection between the ignition switch and the airbag nondeployment, despite similar information that had been publicly available for at least five years.

Even with this information, however, GM failed to issue a recall for the ignition switch. Because later model years of the affected vehicles did not have faulty ignition switches, GM investigators refused to accept the expert's conclusion. Unbeknownst to everyone, according to Valukas, the same engineer who had authorized the defective part in the first place later approved a design change, but without changing the part number (in violation of policy).

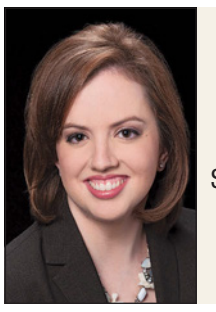
This fact stymied GM's investigation for years, until another expert solved that mystery in 2013 by taking apart two switches and comparing them. This revealed that the design of the switch had changed for vehicles produced from 2008 onward. None of GM's myriad of investigators had ever physically examined the switches.

Had GM done any of the things that these plaintiff's experts did—review available documents, examine the parts at issue—it might have answered its own questions years before a plaintiff's expert did so.

Beyond highlighting the importance of experts, the GM ignition switch matter also offers a cautionary tale for litigators about problem-solving and information-handling. How easy it is, particularly as litigation drags on, to become mired in the details and miss the forest for the trees.

This applies not only to specific facts or legal arguments that might be overlooked, but also to broader issues, such as case themes. The GM investigators who failed to see the information that was right in front of them are not so different from litigators who lose the thread of their case's story while getting bogged down with ancillary issues.

Cases can seem overwhelming in their complexity. But, at the end of the day, there is a story to be told, a problem to be solved. Maintaining a focus on the end-game, thinking big-picture and applying a little common sense most often lead to the right conclusion, as any expert will say. TTL



Anna Eby practices business litigation and is an associate at Bourland Law Firm in Round Rock. She writes about cars and the automotive industry on her blog, MotoristaBlog.com.

Indictment of Perry "Criminalizes Political Speech"

To the Editor:

The indictment of Texas Governor Rick Perry, by a Travis County (democrat) grand jury, criminalizes political speech. Rick Perry has been a successful Texas Governor for 14 years. He is a straight shooter. He speaks, then he delivers. Texans are different than Washington politicians, who promise the world, but deliver nothing. Texans deliver on their promises.

All Rick Perry did was what Texans expect—he promised to exercise a line item veto, then he did it. Now Perry is indicted for exercising his right to political speech. Stephen F. Austin got thrown into a Mexico City prison for speaking out against Santa Anna, and Austin being imprisoned for political speech was one of the grievances which led to the successful Texas Revolution of 1836.

LETTERTOTHEEDITOR

No law that can be used to indict politicians for exercising their right to political speech can stand. No indictment that criminalizes political speech should stand. The First Amendment still stands for something in Texas, and it still protects political speech. You don't indict public figures for exercising their right to free speech. If this folly is allowed to stand, every politician in Texas should be indicted. C'mon—get real.

I am a Democrat, an elected District Attorney for four border counties in Texas' Big Bend. I support Rick Perry's right to free speech. I oppose indicting political enemies.

Sincerely,

Rod Ponton
83rd District Attorney
Alpine, Texas