

5 Things GM Needs To Do Right Now

By **Maria Chutchian**

Law360, New York (April 09, 2014, 8:38 PM ET) -- As litigation mounts in response to [General Motors'](#) deadly ignition-switch defect, the automaker needs to weigh its options on how to address a potential return to bankruptcy, how to work with its insurance carriers and how to quell its public relations fiasco, experts say.

Although GM's 2009 bankruptcy could shield it from [claims](#) stemming from its [recall](#) of 2.5 million vehicles and the 13 deaths that occurred as a result of the defect, the company still has to determine how it will navigate itself out of the woods with angry customers, victims, the general public and possibly federal regulators. It has already taken steps to curb the fallout by hiring attorney Kenneth Feinberg and law firms [King & Spalding](#) and [Jenner & Block](#), but it still has a ways to go.

"This is a huge reputational risk problem," said John A. James, a professor at Pace University and expert on corporate governance.

Here are five courses of action GM could take to better position itself to address the legal and reputational ramifications of its faulty product:

Don't Shun the Public

Many attorneys suspect that the bankruptcy proceedings GM went through in 2009 will ultimately protect it from claims related to causes of action stemming from the prebankruptcy entity, known as Old GM. Because the automaker exited Chapter 11 by selling its assets to a newly formed entity, known as New GM, the sale order would have transferred the property to New GM "free and clear" of any liabilities that could be pinned on Old GM.

Although under the sale order, the purchaser assumed any liability relating to death or injury caused by the cars manufactured by the Old GM, those are only for accidents that occur "on or after the closing date" of the sale.

But that safety net shouldn't mean GM should tell its customers and victims to buzz off, experts say. Even if it does have protection from the sale order, it should make amends with its constituents if only for public relations purposes, whether that means establishing a trust for victim compensation or finding an alternative solution.

"I wouldn't be surprised if the federal government were to bring some sort of behind-the-scenes pressure on the management of GM to do the right thing, even if New GM doesn't have a legal

obligation to do so," Kenneth N. Russak of [Frاندzel Robins Bloom & Csato LC](#) said. "New GM might decide it does need to do that in order to maintain good public relations and a solid reputation."

Examine Insurance Policies

There are two types of insurance GM needs to consider as it addresses its liabilities: its own and that of Delphi Automotive PLC, which manufactured the defective ignition switches and also went through its own stint in bankruptcy.

If either has any type of catastrophic insurance, the carriers will become players in the litigation as well. Each policy should be studied to be sure that GM's current actions in response to the defect and recall will not cross any lines with the insurers, according to Chuck Tatelbaum of Florida-based [Tripp Scott](#). Its responses ought to be made in conjunction with the insurers so they have no grounds to withhold coverage, he said.

"The last thing you ever want to do is do something so insurance company says, 'You prejudiced our case and therefore we're going to deny coverage,'" he said.

The insurance companies can help set up a trust for victims of the defects, Tatelbaum added. In exchange for millions in damages, GM can help itself and its insurers by negotiating a settlement that will prevent it from having to defend itself against mass tort claims.

Determine How to Use Bankruptcy

As the lawsuits pile up, attorneys have wondered whether GM will choose to protect itself by returning to bankruptcy, not because it can't handle the litigation financially, but because it could attempt to use the automatic stay to delay litigation.

However, since the company would presumably return to Old GM's bankruptcy, which is still open in the Manhattan bankruptcy court under the name [Motors Liquidation Co.](#), it's not clear that the automatic stay protecting debtors from litigation could extend to New GM.

Extending the stay to New GM would be "not easy but it's potentially an option," Eric W. Sleeper of [Barton LLP](#) said.

If the company decides it does want to return to Old GM's bankruptcy case for the potential benefit of the stay, attorneys would probably have to revisit the confirmation order and determine whether it's able to reopen it and establish a new trust, since the funds for a potential trust would likely come from New GM as the Old GM does not have the necessary assets.

However it decides to incorporate the bankruptcy, GM can take solace in the fact that plaintiffs are unlikely to convince a judge to revoke its 2009 plan confirmation order unless they can prove that the failure to disclose defects is tantamount to obtaining a plan confirmation through

fraud, experts said. Since plan confirmation orders can be revoked only in their entirety, not partially, GM is probably in the clear, Russak said.

Evaluate the Government's Role

The U.S. government famously bailed out GM when it entered bankruptcy, allowing it to emerge quickly and continue operations as an entirely new entity. Though it was the majority shareholder in the new company for some time, the government divested its last shares in December at a substantial loss to taxpayers.

The [U.S. Department of Justice](#) is reportedly investigating GM's alleged failure to disclose the problems to the court, or the government, when the bailout took place. Still, since it owned the automaker for a short period, the government's involvement in the defect problem isn't entirely out of the question, and that unique factor ought to be taken into account, Sleeper says.

"Since it [was] also conceivably the financier and owner of the new entity and the new entity continued this policy that allowed this liability to occur, I can't see how the U.S. government wouldn't be dragged in in some way, shape or form," he said.

Additionally, the [National Highway Traffic Safety Administration](#) has been accused by certain lawmakers of failing to catch the defects and forcing a recall years ago, but experts have said that any oversight on the agency's part won't protect GM from criminal charges if the DOJ decides to pursue them.

Study Asbestos, Toyota Cases

The only situations similar to what GM is experiencing now are the mass tort litigation filed against companies connected to asbestos-containing products and the manufacturer of Dalkon Shield, the defective intrauterine device that caused hundreds of thousands of lawsuits. In most of the asbestos cases, the businesses filed for bankruptcy and set up a trust to pay back claimants, including those who wouldn't have known about their injuries until many years down the road, when asbestos-related illnesses begin to present themselves.

Sen. Richard Blumenthal, D-Conn., already has proposed setting up a trust for victims of the ignition-switch defect. Even if it opts not to return to bankruptcy, GM should seriously consider that option, which would in return protect it and its insurers from additional claims, Tattelbaum said.

"As far as ultimately what they're going to do, I think they have to come up with a vehicle just like the other mass tort defendants have done, whether it's been asbestos [or] Dalkon Shield," he said.

GM should also pay attention to what, if anything, comes out of the DOJ investigation into Toyota's handling of a recent recall, specifically with respect to its executives and managers,

James said. The public wants to know what is being done to ensure that a deadly mistake like this doesn't happen again, and that starts with the board, he added.

"GM and Toyota are total failures in internal governance," he said.

--Editing by Elizabeth Bowen and Richard McVay.