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Secret Settlements Fueled GM's Latest Ethical Inferno

Richard Zitrin, The Recorder

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The stories about General Motors' failure to reveal information about ignition defects affecting the safety of millions of car owners is not GM's first effort to keep its dirty laundry secret.

Memories are short, even when it comes to outrageous corporate behavior, and even when that behavior relates to hundreds of accidents and deaths and hundreds of millions of dollars paid. So here's a pop quiz: How many people remember the story in the 1980s and 1990s of GM's side-mounted gas tank fires? Here's a reminder: For years, many GM trucks had side-mounted gas tanks that did not sit within the frame of the vehicle. Eventually consumer groups and news organizations began claiming these gas tanks were defective because of how easily they could catch on fire or explode in side-impact accidents. But GM insistently denied there was a problem. And there was virtually no evidence that crash victims had been suing GM.

Still, the criticism continued. Clarence Ditlow, then and now head of the original Nader Raider organization, the Center for Auto Safety, continued to say the gas tanks were unsafe. And an NBC network news magazine televised a demonstration that showed a GM truck blowing up.

But GM and its lawyers, in their hubris, were so confident in their disinformation that they took the aggressive steps of threatening NBC with defamation claims and, in 1993, suing Ditlow, the center, and for good measure its founder, Ralph Nader, for defamation.

NBC quickly backed down and apologized, but not the Center for Auto Safety. Ditlow dug in for a fight, and after three years of discovery wars, finally obtained the names of 245 gas tank defect cases that had been filed starting in 1973 (sic!) and running through 1996, when the list was provided.

How could this be? GM had forcefully and repeatedly denied that there was a defect. GM's lawyers even sued over the issue. And surely no car company would have hidden from its consumers something as serious as gas tanks that could burst into flames. Besides, if there were all these explosions and fires, how could GM have possibly kept them a secret?

The answer is that GM settled its cases secretly, one at a time, in return for a promise from plaintiffs' lawyers that they would reveal none of the information about the defect that they'd gained in discovery.

By the new millennium, well after Ditlow learned of the 245 cases, gas tank fire litigation was still going on, still largely in secret. Finally in 2001, the Los Angeles Times intervened in a Montana lawsuit involving several members of the Boyd family, killed in a gas tank explosion. The Times asked a federal district court to require GM to release information about cases that had been secretly settled over the years. Needless to say, GM, having spent years denying everything, fought tooth and nail.

District Judge Donald Malloy ruled that the Times—and the public—had the right to that information, but in late 2002, the Ninth Circuit remanded the case for a good cause hearing. Finally, in May 2003, 30 years after the first case was filed and seven years after the forced disclosure to the Center for Auto Safety, Judge Malloy, finding GM had no good cause for secrecy, ordered the information released: 297 separate cases settled for \$495 million.

Somehow, with our short memories, recollections fade. The questions most often asked about gas tank defects seems to be, "Didn't GM sue NBC and make them back down?" or at best, "Wasn't there something or other about GM trucks' gas tanks years ago?" To this day, GM has never admitted that the gas-tank placement was dangerous.

And yet here is GM again. This time, according to widespread reports, GM denied for years that its small-car ignition systems were dangerously defective. They stonewalled discovery for those who sued, and required secrecy from those who stayed the course until they got the smoking gun in discovery. And while GM changed the ignition architecture in new cars, it breathed not a word to millions of consumers whose cars had—and still have—the old defect.

What does this have to do with the moral compass of lawyers? Plenty. Last week, GM fired two senior lawyers: one in charge of products liability litigation, the other the supposed liaison to GM's engineers on product safety issues. Ditlow told me this week that the "safety" lawyer was deeply involved in the gas-tank cover-ups.

As for outside counsel, defense lawyers too often choose to protect their client's dangerous products instead of the public safety. They stonewall discovery and then offer premiums on settlements conditioned on absolute secrecy. Plaintiffs' lawyers too often look only at their

clients'—and, not coincidentally, their own—bottom line. Though they profess to be lawyers for victims, too many turn a blind eye to the real costs of secrecy: the *future* victims, kept in the dark about the truth, who will suffer the same heartaches their clients have already suffered. At the least, these lawyers should be explaining these hidden costs to their clients, many of whom would never accept a settlement if the cost was that their own grief was visited on another family.

In short, no self-respecting lawyer, on either side, should be a party to this kind of collusion.

Fortunately, there are ways to put a stop to this. Perhaps the best are "sunshine in litigation" laws that would forbid agreements or stipulations that keep information from the public. On May, 20, the Sunshine in Litigation Act ("SILA") co-sponsored by Senators Blumenthal (D-CT) and Graham (R-SC), was dropped in the United States Senate. This bill, S.2364, which I was involved in drafting, would do exactly that:

"[A] court shall not enforce any provision of a settlement agreement or [stipulation] among parties that prohibits one or more parties from—(A) disclosing the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or (B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety."

SILA provides appropriate exceptions for individuals' personal identifying information, including health and financial information. The bill also allows protection for trade secrets: *true* trade secrets, not those involving ignitions or exploding gas tanks that don't work right.

Similar legislation passed through the Senate Judiciary Committee in 2011 with bipartisan support. After all, this bill presents neither a partisan issue nor a political issue, but a *human* issue. There is no legitimate reason to oppose it; the true opposition comes from companies that simply want a blanket license to keep their products' dangers from public view. This time around, perhaps SILA will prevail on both sides of the aisle through both houses of Congress. Then advocates, including me, can move on to similar legislation state-by-state.

It's an old expression that you can't legislate morality. But sometimes you can legislate lawyers' behavior. Especially when that behavior is used to keep the public in the dark about serious, even deadly, harms.

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