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Exploding Takata Airbags

From Cover-Up To Accountability

BY CHRIS GLOVER

Airbags are supposed to keep you safe, but in 2004, a driver from Greenville, Alabama¹, learned what happens when a safety product malfunctions. The driver was operating a vehicle manufactured by Honda Motor Co., Inc. (Honda), which incorporated a defective Takata airbag. The driver's side airbag exploded, injuring the driver and becoming the first incident in what would unfold as the largest safety recall in U.S. history.² Honda, which owned a portion of Takata, encouraged the driver to settle personal injury claims confidentially, to keep the incident quiet. In 2007, three more incidents involving exploding Takata airbags injured more people. Again, Honda encouraged those who were injured to agree to confidential settlements. Honda also demanded Takata redesign the airbags, and in November 2008, it issued a small recall for about 4,000 Honda vehicles that included Takata airbags. The following year, a Honda driver was killed – the first airbag-related death. The company issued its first sweeping recall of all vehicles with Takata airbags.³ Meanwhile, Takata had conducted tests on its airbags and found a deadly defect. But it chose to try and bury the evidence rather than widen the safety recall until pressed by federal regulators.

LARGEST RECALL IN U.S. HISTORY

By May 2015, six deaths worldwide were linked to the exploding airbags,⁴ prompting the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) to recall Takata airbags. The agency determined airbags were prone to instability. NHTSA is overseeing the largest safety recall in U.S. history, which is now linked to 22 deaths and more than 230 injuries worldwide. The initial recall included approximately 35 million airbags, but has since skyrocketed to approximately 50 million, which were installed by 19 automakers in a total of 37 million vehicles. NHTSA anticipates more airbags will be recalled by December 2019 – bringing the total number of affected airbags to around 65-70 million.

One of the last official counts shows that there are still more than 800,000 airbags that have not yet been recalled in Georgia. As a result, the injuries continue to mount. A Carroll County man was severely injured with laceration injuries when a Takata airbag exploded and propelled shrapnel into his Honda. In April of 2017, a gentleman in

Marietta lost his eyesight due to defects in a Takata airbag contained in a Toyota Corolla. Recently, in February of 2018, a man from Buford, Georgia was badly burned when his Takata airbag exploded in a BMW he was driving.

The recall stems from a highly unstable and explosive chemical compound – ammonium nitrate – used in the airbag inflators.⁵ Despite knowing its potential to cause fatal injuries, Takata admitted to using the compound because it was a cheaper alternative propellant. The cheaper, more dangerous alternative uses an excessive amount of force when an airbag deploys, spewing shrapnel onto drivers and passengers. The explosion is very similar to that of a military-grade hand grenade because it explodes the metal encasement that houses the chemical compound and shoots the metal in all directions. Ammonium nitrate is also known to deteriorate when it is exposed to moisture, such as humidity, further enhancing the risk of explosion.

More than a dozen global automakers have used Takata airbags, including BMW, Fiat Chrysler, Daimler, Ford, General Motors,

Honda, Mazda, Mitsubishi, Nissan, Subaru, and Toyota. Further complicating the recall, many Takata airbags salvaged from wrecked cars have ended up in other vehicles.⁶ The complex recall is progressing slowly. An independent monitor reported that as of September 15, 2017, automakers have recalled 43.1 million Takata airbag inflators, but only 43 percent of those recalled have been replaced. NHTSA will continue phasing in the free recall over the next three years. Because an airbag is likely to deteriorate faster in high heat and humidity, vehicles in states with that type of climate are getting priority. Older model vehicles with Takata airbags are also at the top of the recall list.

VICTIMS EXPERIENCE SERIOUS INJURIES AND DEATH

When airbags explode, drivers and passengers in the immediate direction of the projectiles become human pin cushions. Doctors treating patients injured by the exploding airbags say the wounds resemble those of shooting or stabbing victims. For example, when highway troopers in Orlando, Florida, found

Jennifer Griffin with blood gushing from a gash in her neck, they were baffled by the extent of her injuries. They thought she had been stabbed. Instead, her injuries were the result of the exploding Takata airbag in her Honda Civic. The bomb-like explosion sent a two-inch piece of shrapnel flying into Griffin's neck. In another case, Angelina Sujata was driving her 2001 Honda Civic in 2012 at about 25 miles per hour near Columbia, South Carolina, when the vehicle in front of her slammed on the brakes. The next thing Sujata remembered was a sharp pain in her chest, which was sliced open to the bone. Victims of the exploding airbags have also been left with fractured facial and upper torso bones, partially or completely blinded and even killed.

I have represented dozens of individuals who lost their vocal cords, eyesight, received horrible laceration injuries to their face, neck, arms and massive burn injuries. Most recently, I filed a case involving a Ford vehicle where my client has a golf ball sized hole in his chest from shrapnel thrown out of the airbag. Each case is a tragedy not only because of the individual stories of pain and disfigurement it causes, but because deep down, we know that Takata and the car companies knew long before these injuries occurred the deadly problems with this airbag.

HOLDING TAKATA ACCOUNTABLE

Since the recall was initiated, consumers have sought justice in several ways, including: individual personal injury or wrongful death lawsuits; class action lawsuits to recover the economic losses; and through a multidistrict litigation (MDL).

The U.S. Department of Justice (DOJ) also launched a criminal case against the company and indicted three of its executives for falsifying documents. The criminal case, *U.S. v. Takata Corporation*, Case No. 16-cr-20810 (E.D. Mich.), was filed in the U.S. District Court for the Eastern District of Michigan. In February 2017, to end the criminal case, Takata pleaded guilty to fraud because of its attempts to cover up data showing the lethal nature of its products, as well as falsifying documents in order to make the airbags appear safe. The fraud charge was accompanied by \$1 billion in penalties, including \$850 million in restitution to automakers, \$125 million for victims

and families and a \$25 million criminal fine. A month later, Takata paid the \$125 million to the Individual Restitution Fund (IRF), which was established through a Restitution Order from the federal court handling the criminal case. The fund was created to compensate those who have suffered, or will suffer in the future, a personal injury or wrongful death caused by a malfunctioning Takata airbag inflator and who have not already resolved their claims against the company.⁷

However, within four months of creating the IRF, Takata filed for bankruptcy and Chapter 11 protection, leaving many plaintiffs to fear the promised compensation would be diminished or eliminated entirely. So, to protect the failed manufacturer's dwindling assets and hold it accountable, lawyers representing TK Holdings, Inc., (Takata's U.S. division) and a number of plaintiff groups reached agreement on a Bankruptcy Plan of Reorganization (Plan) in February 2018, which centered on the \$1.6 billion sale of Takata's remaining assets to Key Safety Systems, Inc.⁸

BANKRUPTCY PLAN OF REORGANIZATION PROTECTS CLAIMS AGAINST TAKATA

The Plan includes two resolutions and was approved by Judge Brendan Shannon of the U.S. Bankruptcy Court for the District of Delaware. It creates the Takata Airbag Tort Compensation Trust Fund (Trust Fund) and the Original Equipment Manufacturer (OEM) Channeling Injunction—two additional avenues for those seeking reparation from the failed Takata company. The Trust Fund will work together with the IRF to pay out compensation to those eligible, while the OEM Channeling Injunction provides assurance to future victims that their claims will be protected.

INDIVIDUAL RESTITUTION FUND

Under the IRF, injured individuals or families of those killed may collect regardless of which company manufactured the vehicle they were in at the time of their injury or death. Injuries may include lacerations; eye injuries (vision damage or loss of vision); burns; fractures to the skull, face or neck; traumatic brain injury; Larynx or vocal cord injury; vascular complications related to laceration; nerve damage and hearing injury. The IRF does not cover other

types of losses, including economic losses, caused by the malfunctioning airbag. The Special Master, Professor Eric D. Green, who was appointed by the federal court overseeing Takata's criminal case, will administer the IRF and announce additional eligibility criteria after it is approved by the federal court. The Special Master is also developing a formula for allocating funds to those eligible, and will make recommendations to the court on distributions to eligible claimants.

TAKATA AIRBAG TORT COMPENSATION TRUST FUND

The Trust Fund is separate from the IRF but, again, will complement the IRF's role in compensating Takata airbag victims. The IRF was created by a Channeling Injunction entered by the bankruptcy court that will channel all claims into the fund that are made against a participating OEM. All OEMs have the right to join in the fund, but as of the date of writing this paper, only Honda has entered the Fund. It, too, will compensate personal injury and wrongful death claims resulting from Takata airbag malfunctions, as well as personal injury and wrongful death cases that result from a malfunction of other Takata products. Professor Green has also been appointed as the Trustee for the Trust Fund. The Trust Fund will remain under the Bankruptcy Court's jurisdiction. It is expected to be funded and operational by mid-April 2018 and should be able to receive claims by May 2018. After the Trust Fund is operational, Takata airbag claimants will be able to file a single claim for both the Trust Fund and the IRF. Takata airbag claimants may be eligible to recover from one or both funds.

Those seeking justice through the Trust Fund for claims related to malfunctioning Takata airbags will receive compensation based on the severity of the injury. The amount will range from \$10,000 for bruising to \$5 million for death or loss of eyesight. The injuries are stackable, so a claimant would be compensated based on each injury, excluding death—which would be paid only once.

ORIGINAL EQUIPMENT MANUFACTURER CHANNELING INJUNCTION

The OEMs that installed defective airbags in the vehicles they manufactured may also

share some of the legal responsibility. They also hold certain legal defenses that could create excessive delay or toss out a claim altogether. The Channeling Injunction, which currently only includes one OEM, Honda, allows Honda to deny any fault placed on Takata, third parties or the victims, but requires it to pay 100 percent of compensatory damages. The Channeling Injunction also requires Honda to waive its available traditional legal defenses, such as expiration of statute of limitations (regardless of the age of the vehicle), a claimant not acting on a recall letter, or driving violations. The agreement establishing the Channeling Injunction also predetermined the punitive damages and included those in future claims. The punitive damages are based on known, prior settlement values in other cases.

Although Honda is the only OEM taking part in the IRF created by the Channeling Injunction, other OEMs have the right to join. The OEMs not joining the Channeling Injunction can be sued in the traditional civil justice system. Plaintiffs face greater risk on those claims because OEMs not included in the Channeling Injunction maintain their

usual legal defenses and right to appeal any judgments against them. Even so, OEMs not joining the Channeling Injunction could face larger verdicts in part because of the threat of punitive damages awards.

TAKATA AIRBAGS MULTIDISTRICT LITIGATION (MDL)

Plaintiffs with personal injury and wrongful death filed in Federal Court can litigate through the Takata MDL. Numerous class action suits, including personal injury suits against Takata, have been consolidated in the MDL that is located in the United States District Court for the Southern District of Florida, Case No. 15-md-02599-FAM.⁹ In 2015, U.S. District Judge Federico A. Moreno, the federal judge overseeing the MDL, established a two-track structure for the claims – personal injury and economic damages¹⁰ Takata is being released from the MDL due to the bankruptcy discharge; however, claims are proceeding against the various OEM defendants at different rates on the two tracks. A number of economic loss settlements, in which Beasley Allen's Consumer Fraud Section has been involved, have been reached

with OEMs, including \$553.6 million with Toyota, Subaru, Mazda and BMW, and preliminarily approved settlements for \$605 million with Honda and \$97.7 million with Nissan.¹¹ Personal injury and wrongful death claims are proceeding more slowly because a different process for addressing those types of claims is required.

If you need more information on the Takata airbags personal injury litigation and compensation funds, contact Beasley Allen at 800-898-2034 or email Chris Glover at Chris.Glover@beasleyallen.com. Chris works out of Beasley Allen's Atlanta, Georgia, office and handles cases of personal injury. He will be glad to talk with you. ●

ABOUT THE AUTHOR



Chris Glover is a Principal in the Atlanta office of the Beasley Allen Law Firm. A graduate of the Samford University Cumberland School of Law, his practice primarily focuses on catastrophic personal injury and wrongful death.

FOOTNOTES

- 1 New York Times: Takata Saw and Hid Risk in Airbags in 2004, Former Workers Say: <https://www.nytimes.com/2014/11/07/business/airbag-maker-takata-is-said-to-have-conducted-secret-tests.html>
- 2 National Highway Traffic Safety Administration: What's Wrong With Your Air Bag?: <https://www.nhtsa.gov/recall-spotlight/takata-air-bags>
- 3 Car And Driver: Takata Airbag Victims Fund opened for claims: <https://blog.caranddriver.com/massive-takata-airbag-recall-everything-you-need-to-know-including-full-list-of-affected-vehicles/>
- 4 CNN: Airbag maker Takata announces largest auto recall ever: <http://money.cnn.com/2015/05/19/news/companies/takata-recall/index.html>
- 5 Beasley Allen: Takata pleads guilty to criminal wrongdoing over unstable air bags: <http://www.beasleyallen.com/news/takata-pleads-guilty-to-criminal-wrongdoing-over-unstable-air-bags/>
- 6 Car and Driver: Massive Takata Airbag Recall: Everything You Need to Know, Including Full List of Affected Vehicles: <https://blog.caranddriver.com/massive-takata-airbag-recall-everything-you-need-to-know-including-full-list-of-affected-vehicles/>
- 7 Takata Airbag Restitution Fund: Frequently Asked Questions: <http://www.takataspecialmaster.com/faq>
- 8 Reuters: Takata, injured drivers reach deal to end U.S. bankruptcy: <https://www.reuters.com/article/us-takata-bankruptcy-settlement/takata-injured-drivers-reach-deal-to-end-u-s-bankruptcy-idUSKBN1FV0T2>
- 9 Beasley Allen: Four major automakers settle Takata airbag MDL claims: <http://www.beasleyallen.com/news/four-major-automakers-settle-takata-airbag-mdl-claims/>
- 10 Jere Beasley Report: MDL Judge Selects Firms To Lead Takata Air Bag MDL: <http://www.jerebeasleyreport.com/2015/05/mdl-judge-selects-firms-to-lead-takata-air-bag-mdl/>
- 11 Beasley Allen: Deadly Takata airbags remain in millions of cars: <http://www.beasleyallen.com/news/deadly-takata-airbags-remain-in-millions-of-cars/>



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