

Airbag Debacles Continue to Endanger Consumers

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The Takata airbag debacle has demonstrated how corporate recklessness and greed can transform a safety device into a source of danger, as ten deaths and even more severe injuries have been linked to shrapnel from exploding inflators. And while the Takata recall continues to expand, rival supplier Continental also recently issued a large recall of its own due to a sensor defect that may cause airbags to either fail to deploy or deploy at the wrong time. Neither recall shows any signs of resolution in the near future, and as is too often the case, consumers will continue to bear the brunt of these corporate failures as the injuries and deaths will continue to occur until a real solution is executed for all affected vehicles.

This article will summarize the key developments in the evolving Takata and Continental airbag debacles, and will analyze how those developments will impact consumers throughout the country.

The Takata Airbag Recall Grows Beyond Historic Levels

The Takata airbag recall revolves around an inflator defect which can cause certain Takata airbags to deploy with too much force. When this occurs, the inflator containing the airbag propellant may rupture and eject metal shrapnel towards the vehicle's occupants.¹ The horrific potential of this defect to maim or kill consumers is evidenced by the fact that police investigators have confused Takata airbag injuries with homicide stabbing wounds.²

So far, the defect has been linked to the deaths of ten individuals, with many more people reporting severe injuries, including complete loss of an eye as well as severe and permanent facial scarring.³ The most recent confirmed Takata inflator-related fatality occurred in December 2015 in South Carolina.⁴ The victim, Joel Knight, was attempting to avoid a cow that was in the road when he struck a tree, which in turn caused the Takata airbag in his 2006 Ford Ranger to deploy and shoot metal shrapnel into his neck.⁵ Notably, this is the first confirmed Takata inflator-related fatality that did not occur in a vehicle manufactured by Honda.⁶

At the time of this writing, the Takata recall is believed to affect up to 25 million vehicles, earning it the dubious distinction of being the largest automotive recall in US history.⁷ A total of twelve auto manufacturers have issued recalls related to the defect, including BMW, Daimler/Mercedes, Fiat Chrysler, Ford, General Motors, Honda, Mazda, Mitsubishi, Nissan, Subaru, Toyota, and Volkswagen/Audi.⁸ This list has been subject to constant expansion and revision over the past several years. The two most recent additions are Mercedes and Volkswagen, both of which agreed to recall vehicles this February after Takata identified another 5 million potentially affected inflators in a report it sent to NHTSA in January.⁹

Still No Consensus on a Root Cause or How Many Inflators Are Susceptible to Rupturing

At the center of the Takata airbag debacle is the controversial use of ammonium nitrate as an airbag propellant. Ammonium nitrate is a relatively inexpensive but volatile compound that is “highly sensitive to moisture.”¹⁰ Whistleblowers have stated that Takata’s decision to switch to ammonium nitrate was driven by financial concerns, and that the company had been warned by its own engineers about the “irregular ballistic” consequences of the chemical.¹¹

Although Takata has defended the use of ammonium nitrate, claiming that the chemical can be safe if properly manufactured, the company recently entered into a settlement with NHTSA in November 2015 in which Takata agreed to pay a \$200 million dollar penalty and pledged to stop using ammonium nitrate in its inflators by 2018.¹² Takata further promised to either identify the root cause for the ruptures and “demonstrate to NHTSA’s satisfaction that its inflators are safe by December 31, 2018,” or be prepared to declare all such inflators defective and issue a recall.¹³

The recent death of Joel Knight has caused many to question whether the delayed timetable contained in the November 2015 agreement is sufficient to protect consumers. In February, Senator Bill Nelson (D-Fla.) sent a letter to NHTSA, asking that the Agency order Takata to immediately recall all of the inflators which contain ammonium nitrate.¹⁴ NHTSA Administrator Mark Rosekind declined to do so, stating, in part, that expanding the recall to all ammonium nitrate inflators may result in replacement parts being taken away from the vehicles most at risk of sustaining a rupture.¹⁵ The availability of replacement parts has been a chronic problem in the Takata recalls, as consumers have often been forced to wait for months to receive a fix after receiving a recall notice.¹⁶ However, the safety of even the replacement inflators remains a concern. Speaking from the Senate Floor, Senator Nelson recently questioned whether consumers are “basically getting a newer version of the old version that has been so defective In other words, are we going to replace an old live grenade with a new live grenade?”¹⁷

A group of ten automakers announced in February that their investigation into the defect revealed three contributing factors: (1) the fact that the propellant contains ammonium nitrate; (2) the manner in which the Takata inflator assemblies were constructed; and (3) exposure to heat and humidity.¹⁸ Significantly, however, the group’s spokesperson refused to comment as to whether the use of ammonium nitrate as an airbag propellant is a fundamentally safe proposition.¹⁹ Safety advocates contend that it is not, and as such have disputed the group’s findings.²⁰

Automakers Attempt to Distance Themselves from Takata

This past November, Honda announced that it was no longer going longer going to use Takata as a supplier for certain inflators, stating that it had learned that the company “misrepresented and manipulated test data.”²¹ Subsequently, the New York Times reported that it had obtained emails which “suggest that manipulation was both bold and broad, involving open exchanges among Takata employees in Japan and the United States.”²² In one such email, a Takata engineer proclaimed “Happy Manipulating!!!” when referring to airbag test results.²³ That same engineer also described an instance

where the company's airbags were stated to have passed tests that were never conducted, writing that "[i]t has come to my attention that the practice has gone beyond all reasonable bounds and likely constitutes fraud."²⁴

Honda's decision to drop Takata as a supplier has been followed by many other automakers, prompting concerns that Takata may go bankrupt.²⁵ These concerns were deepened when Honda, which has an ownership interest in Takata, stated that it has no plans to provide for a financial bailout of Takata.²⁶

From a litigation perspective, these recent developments should worry advocates representing injured consumers, who must remain wary of a possible tactic to dump liability into the lap of a company that may cease to exist. From a practical perspective, there is good reason to be skeptical of auto manufacturers' efforts to distance themselves from what appears to be a lengthy campaign to conceal a critical safety defect. For example, NHTSA has already fined Honda "for failing to report more than 1,700 death and injury claims" to the government.²⁷ Although the fine related to Honda's failure to report injuries and deaths linked to a variety of different causes, the NHTSA investigation culminating in the fine was prompted in large part by Honda's apparent failure to report the 2009 death of Ashley Parham, who allegedly suffered fatal wounds after the Takata airbag in her Honda vehicle ruptured in May 2009.²⁸ Moreover, Honda also reportedly settled with multiple Takata airbag victims following ruptures dating back as early as 2004, obtaining binding confidentiality agreements which ensured the silence of the victims, which in turn helped to keep the defect hidden for more than a decade.²⁹

The Takata Litigation

The Takata recalls have also been the subject of lawsuits around the country at both the federal and state levels. At the federal level, both economic loss class actions and personal injury and wrongful death lawsuits have been consolidated into a Multi-District Litigation ("MDL") that is being overseen by Judge Moreno of the Miami Division of the United States District Court for the Southern District of Florida.

The MDL Plaintiffs have filed Consolidated Complaints for both the economic loss and personal injury claims. The economic loss Consolidated Complaint seeks recovery under a variety of theories, including civil liability for violation of the federal Racketeer Influenced & Corrupt Organization Act ("RICO").³⁰ The Court rejected Honda and Takata's motion to dismiss the RICO claims in December, reasoning, in part, that the Plaintiffs had included "pages" of "specific communications" showing "that the defendants, acting as an enterprise, knew of a defect in the Takata airbag, knew that Takata had concealed the defect, and defrauded consumers by selling and servicing vehicles for more money than consumers would have paid had the vehicle not contained a defective airbag."³¹

Discovery is underway in both the federal MDL and the state court injury actions. Depositions have already begun at the state court level, with several state court plaintiffs cross-noticing the depositions to be used in multiple actions.³² The federal MDL Plaintiffs anticipate taking depositions

beginning in spring 2016.³³ Additionally, the automaker Defendants have represented that they anticipate their document production to be “substantially” completed in the MDL by May 2016 subject “to several contingencies.”³⁴ Takata has indicated that its document production will be “substantially” completed as to “subset of records on one or more categories from [the MDL] Plaintiffs’ second request for production” by approximately July 2016.³⁵

Spotting a Takata Case

As a result of the issues discussed above, Takata injuries will likely continue into the foreseeable future. For purposes of identifying a Takata case, it is important to know that Takata injuries come in two general varieties, which have been commonly referred to as “Type 1” and “Type 2” cases. Type 1 cases involve shrapnel being ejected from the airbags and into the faces and bodies of the vehicle’s occupants. The reported injuries in Type 1 cases have included disfigurement, blindness, and even death.³⁶ Type 2 cases involve airbags which deploy in an overly aggressive manner. The injury mechanism in Type 2 cases is blunt force trauma. The reported injuries in Type 2 cases have included paraplegia and death.³⁷

Any case involving both one of the auto manufacturers known to use Takata airbags and either a Type 1 or Type 2 injury should be carefully vetted. When vetting such a case, it is important to remember that the recall lists available online are often incomplete, and are subject to constant change as the rolling recalls have continued through this day. As such, if the client has suffered a Type 1 or Type 2 injury, it may be worthwhile to proceed with further investigation even if the vehicle has not yet been included on one of the constantly changing recall lists.

The Continental Airbag Recall

January and February 2016 brought a wave of new airbag recalls, this time including airbags supplied by Continental. The Continental recall was issued over concerns that the airbag control units, which are responsible for determining when the airbags are to be deployed, are susceptible to corrosion.³⁸ Should the units become corroded, it is possible that either the airbags or the seatbelt pretensioners may fail to deploy, or possibly deploy when they should not.³⁹ Continental has stated that it supplied the potentially defective control units for use in airbags equipped in 5 million vehicles manufactured by Honda, Fiat Chrysler, Kia, Mercedes-Benz, Mazda, Volvo Trucks, and Volkswagen from 2006 through 2010.⁴⁰ Between 1.5 million and 2 million of those affected airbags were equipped in vehicles sold in the US.⁴¹

So far, Honda reports that it is aware of two confirmed injuries related to the defect, in addition to 74 injury allegations, 1,575 warranty claims, and 83 field reports.⁴² One of the injury cases reported to Honda involved the complete failure of an airbag to deploy in a 2008 Accord which ran into a concrete block wall at 50 miles per hour last March in Belleview, Florida.⁴³ In addition, Fiat-Chrysler

reports that it is aware of seven injuries which are potentially related to the defect, as well as up to 25 inadvertent airbag deployments.⁴⁴

Similar to the Takata recall, which began as a limited recall and was expanded over time, the Continental recall was initially isolated to just 126,260 Mercedes vehicles in the fall of 2015.⁴⁵ The major expansion to the initial recall followed a determination by Honda that the airbag control units in certain 2008 and 2009 Accords have the same “safety-related defect” as the one which prompted the fall 2015 Mercedes recall.⁴⁶ Honda had apparently started looking into this issue after a 2008 Accord became the subject of a products liability lawsuit arising from an October 26, 2013 incident.⁴⁷

Documents filed with NHTSA show that Continental learned about potential problems with its control units back in 2008 after Daimler sent Continental a unit that was the subject of a consumer complaint.⁴⁸ Continental then conducted an investigation along with Atmel Corporation (“Atmel”), which ultimately led to a design change intended to “reduce the likelihood of corrosion” and “prevent the corrosion from occurring in the future.”⁴⁹

While a fix has been promised for affected vehicle owners, there remain significant questions as to when that fix will actually be made available. Continental claims that it is “ramping up production of service parts.”⁵⁰ However, at the time of this writing, the supplier still has not provided a notification schedule to automakers.⁵¹ Additionally, Honda has reportedly told its dealerships that “replacement parts are in very short supply and can only be ordered for vehicles with crash damage or with airbag issues.”⁵² Honda also reportedly does not expect to be able to provide repairs for all of its affected vehicles until fall 2016.⁵³

Conclusion

Recent developments indicate that the Takata and Continental airbag debacles are still evolving with no clear end or resolution in sight. As is too often the case, it is the consumers who will bear the real brunt of the ongoing recalls as the defects will likely continue to injure, maim, and kill motorists until real solutions are implemented. And if history is any barometer, the real solutions will only come about if consumer justice attorneys continue to bring meritorious cases in order to press the manufacturers into taking the necessary corrective actions.

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