

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE:

GENERAL MOTORS LLC IGNITION  
SWITCH LITIGATION

No. 14-MD-2543 (JMF)

This Document Relates to:

ALL ECONOMIC LOSS CLASS ACTIONS

**ALLOCATION DECISION OF LAYN R. PHILLIPS**

## I. INTRODUCTION

1. The underlying “Actions” in this case are generally comprised of (a) all economic loss claims, whether asserted as class, mass, or individual actions, however denominated, that are consolidated for pretrial proceedings in the United States District Court for the District of New York in *In re: General Motors Ignition Switch*, Case No. 14-MD-2543 (JMF) (the “MDL Court”), and (b) all economic loss claims, whether asserted as class, mass, or individual claims, including all Late Claim Motions and all Proposed Proofs of Claim involving alleged economic loss, however denominated, filed or asserted in the Bankruptcy Code Chapter 11 case pending in the United States Bankruptcy Court for the Southern District of New York captioned *In re Motors Liquidation Company, et al., f/k/a General Motors Corp., et al.*, Case No. 09-50026 (MG) (the “Bankruptcy Court”) (collectively referred to as “the Actions”).

2. In Order No. 132 issued on September 11, 2017 (Docket No. 292), the MDL Court appointed the undersigned as mediator for the Actions, and the undersigned has overseen the mediation efforts in the economic loss cases since that time.

3. After numerous mediation sessions, the parties have reached agreement in principle on certain key terms to resolve the Actions on a Class-wide basis (the “Proposed Settlement”). The parties are working to reach a final agreement and execute a master Settlement Agreement.<sup>1</sup>

4. The Proposed Settlement will provide, among other things, monetary benefits to the Proposed Class Members. In order to receive a monetary payment, Class Members will be required to file claims. Steve W. Berman of Hagens Berman Sobol Shapiro LLP and Elizabeth J. Cabraser of Lief Cabraser Heimann & Bernstein, LLP, who are “Plaintiffs’ Class Counsel,” are

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<sup>1</sup> All terms not defined herein have been defined in the Settlement Agreement.

expected to propose a Plan of Allocation under which a “Base Payment Amount” will be calculated by dividing the number of qualified claims submitted by Class Members into the Net Common Fund.

5. Plaintiffs’ Class Counsel have requested that I oversee an allocation proceeding in which (a) counsel representing each proposed Subclass (“Allocation Counsel”) present evidence relating to the strength of the claims for the Subclass that he represents (the “Allocation Proceeding”), and (b) I decide, based on the relative strengths of the claims for each Subclass, whether the Base Payment Amount should be adjusted by Subclass (the “Allocation Decision”).

6. Plaintiffs’ Class Counsel requested that members of the Executive Committee volunteer to serve as Allocation Counsel for the Subclasses, and members of the following Executive Committee firms volunteered to do so: Marc Seltzer of Susman Godfrey LLP (Subclass 1), Kevin Dean of Motley Rice LLC (Subclass 2), Matthew Weinshall of Podhurst Orseck, P.A. (Subclass 3), Steven Davis of Boies Schiller Flexner LLP (Subclass 4), and John Tangren of DiCello Levitt Gutzler (Subclass 5).

7. An Allocation Proceeding was held on February 21, 2020, at which Allocation Counsel submitted written and oral arguments seeking to demonstrate the strength of each Subclasses’ claims in the Actions. At my request, Allocation Counsel made follow-up submissions on February 24, 2020. I have considered all of these arguments and evidence in rendering the Allocation Decision below.

## **II. THE PROPOSED CLASS AND SUBCLASSES**

8. The Settlement Class is expected to be defined generally as “all Persons who, at any time as of or before the Recall Announcement Date of the Recall(s) applicable to the Subject Vehicle, own(ed), purchase(d), and/or lease(d) a Subject Vehicle in any of the fifty States, the

District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and all other United States territories and/or possessions.” “Recall Announcement Date” and the “Subject Vehicles” are defined in the Settlement Agreement.

9. The Class is divided into five proposed Subclasses defined as follows:

Subclass 1: The Delta Ignition Switch Subclass, comprised of those Class Members who own(ed), purchase(d), and/or lease(d) a Subject Vehicle subject to NHTSA Recall No. 14v047. The representatives of Subclass 1 are Valeria Glenn, Marion Smoke, Grace Belford, Barbara Hill, Ray Wieters, Camille Burns, Chimen Basseri, Michael Benton, Sylvia Benton, Kimberly Brown, Crystal Hardin, Javier Malaga, Winifred Mattos, William Rukeyeser, Yvonne Elaine Rodriguez, Annet Tivin, Nathan Terry, Michael Pesce, LaTonia Tucker, Neysa Williams, Jennifer Dunn, Barry Wilborn, Patricia Backus, Susan Benner, Heather Holleman, Alphonso Wright, James Dooley, Philip Zivnuska, Dawn Talbot, Lisa West, Debra Quinn, Robert Wyman, Colin Elliott, Richard Leger, Sheree Anderson, Rafael Lanis, Anna Allshouse, Janelle Davis, William Hill, Elizabeth D. Johnson, Linda Wright, Kenneth Robinson, Laurie Holzwarth, Susan Rangel, Sandra Horton, Wayne Wittenberg, Michael Amezquita, Steven Sileo, Javier Delacruz, Bernadette Romero, Donna Quagliana, Michael Rooney, William Ross, Leland Tilson, Jolene Mulske, Bonnie Taylor, Jerrile Gordon, Paulette Hand, William Bernick, Janice Bagley, Shawn Doucette, Shirley Gilbert, George Mathis, Paul Pollastro, Mary Dias, Garrett Mancieri, Frances James, Norma Lee Holmes, Helen A. Brown, Silas Walton, Michael Graciano, Keisha Hunter, Alexis Crockett, Blair Tomlinson, Melinda Graley, and Nancy Bellow.

Subclass 2: The Key Rotation Subclass, comprised of those Class Members who own(ed), purchase(d), and/or lease(d) a Subject Vehicle subject to NHTSA Recall Nos. 14v355, 14v394, and 14v400. The representatives of Subclass 2 are Gerald Smith, Joe Glover, Yvonne James-Bivins, Michelle Thomas, Trina Bruche, John Marvin Brutche, Jr., Wandell Littles Beazer, Stacey Bowens, Debra Forbes, Rhonda Haskins, Verlena Walker, Jenny Mathis, Debra Cole, Charlene Kapraun, Keith Nathan, Martha Cesco, Cheryl Reed, Lyle Wirtles, Lori Green, Raymond Naquin, Jerrod Pinkett, Brittany Vining, Sophia Marks, David Price, Brian Semrau, Franklin Wloch, Christine Leonzal, Larry Haynes, Youloundra Smith, Deloris Hamilton, Ronald Robinson, Heather Francis, Arteca Heckard, Irene Torres, Gwen Moore, Lisa Axelrod, Tracie Edwards, Georgianna Parisi, Bradley Siefke, Steven M. Steidle, William Troiano, Carleta Burton, Shelton Glass, Annette Hopkins, Cassandra Legrand, Kimberly Mayfield, Gareebah Al-ghamdi, Dawn Bacon, Dawn Fuller, and Malinda Stafford.

Subclass 3: The Camaro Knee-Key Subclass, comprised of those Class Members who own(ed), purchase(d), and/or lease(d) a Subject Vehicle subject to NHTSA Recall No. 14v346. The representatives of Subclass 3 are Santiago Orosco, Harvey Sobelman, Billy Mosley, Cliff Redmon, Valerie Mortz Rogers, Harry Albert, Ashley Murray, Mario Stefano, Debra Cummings, Bruce Wright, Denise Wright, and Sharon Newsome.

Subclass 4: The Power Steering Subclass, comprised of those Class Members who own(ed), purchase(d), and/or lease(d) a Subject Vehicle subject to NHTSA Recall No. 14v153. The representatives of Subclass 4 are Celeste Deleo,

Dale Dowdy, Lane Blackwell, Jr., Melody Lombardo, Susan Viens, Reggie Welch, Felisha Johnson, and Reynaldo Spellman.

Subclass 5: The Side Airbag Subclass, comprised of those Class Members who own(ed), purchase(d), and/or lease(d) a Subject Vehicle subject to NHTSA Recall No. 14v118. The representatives of Subclass 5 are Kellie Cereceres, Margaret Lesnansky, Joni Ferden-Precht, Rochelle Bankhead, Towana Ferguson, Heidi Wood, Carl Bosch, Evelyn Bosch, Bryan Wallace, Jennifer Sullivan, Christopher Tinen, Bonnie Hensley, Richelle Draper, Gail Bainbridge, Raymond Berg, David Schumacher, Greg Theobald, Alexis Byrd, Paul Jenks, and Christy Smith.

### **III. FINDINGS**

10. Having aided the parties in reaching the Proposed Settlement, I have now been asked by Plaintiffs' Class Counsel to oversee an Allocation Proceeding and determine how to distribute the Net Common Fund among the five proposed Subclasses that comprise the Proposed Settlement Class.

11. The Plan of Allocation proposed by Plaintiffs' Class Counsel first requires the calculation of a pro rata "Base Payment Amount" determined by dividing the number of qualified claims submitted by Settlement Class Members into the Net Common Fund.

12. The Base Payment Amount to be distributed pro rata among the qualified claims in each Subclass will then be increased or decreased based upon my determination to increase the distribution to one or more Subclasses.

13. In arriving at the Allocation Decision, I have relied on the following: the detailed 64-page Economic Loss Plaintiffs' Offer of Proof dated July 20, 2019 presenting the Plaintiffs'

best evidence, based on a detailed review of all discovery in this matter, supporting liability claims on behalf of each proposed Subclass; the Deferred Prosecution Agreement of September 16, 2015 with its attached Statement of Facts (the “DPA” and “DPA Statement of Facts,” respectively). These documents provide me with admissions by GM and a Statement of Facts vetted by the U.S. Attorney’s Office for the Southern District of New York. I have also reviewed the May 16, 2014 Consent Order that GM entered into with the National Highway Traffic Safety Administration (“NHTSA Consent Order”) and the letters submitted by New GM to NHTSA pursuant to 49 C.F.R. § 573.6 on March 17, 2014, April 14, 2014 and June 19, 2014, explaining from New GM’s perspective the events leading up to the Recalls (the “573 Letters”). Finally, I have received written and oral presentations from Allocation Counsel for each Subclass, including arguments as to how the Subclasses compare with respect to the strength of their liability cases.

14. I am not making any findings about the likely outcome of a trial on the merits, but rather evaluating the relative strengths of the liability claims of each of the Subclasses.

15. I am relying on the information detailed above and the knowledge I gained as Court Mediator during six in-person mediation sessions, numerous phone conferences and review of multiple written submissions. I have not independently reviewed the more than 700 depositions taken in these cases or the more than 20 million pages of documents produced. Such a process would have been virtually impossible to complete in a realistic time frame.

16. In their presentations to me, Allocation Counsel for all five subclasses argue that they overpaid for their GM vehicles because they purchased/leased vehicles with safety defects.

17. In order to succeed at a trial, each Subclass would have to prove, among other things, (1) liability and (2) economic injury.

18. With respect to economic injury, on August 6, 2019 the Court held that Plaintiff's proof, including its expert testimony, was insufficient to establish benefit of the bargain damages. Given the Court's rejection of the proof and experts relied on by Plaintiffs to establish damages, and the fact that the most recent damage studies submitted by Mr. Boedeker on behalf of Plaintiffs suggest there is no material difference in damages from Subclass to Subclass, I am focusing my analysis on the relative likelihood of establishing liability rather than attempting to differentiate among the Subclasses on the basis of relative damages.

19. Based upon my review I have concluded that (i) Subclass 1 has a materially better case on liability than any of the other Subclasses and is therefore entitled to a 2X multiplier, and (ii) that Subclass 2's case is less robust than Subclass 1's but superior to those of Subclasses 3, 4 and 5 and, therefore, Subclass 2 is entitled to a 1.5X multiplier. I have concluded that Subclasses 3, 4, and 5 are not entitled to a multiplier and should all be treated similarly. All three of the Subclasses have weaker liability cases than Subclasses 1 and 2 and I find no distinction among them sufficient to warrant disparate treatment.

20. The conclusion that Subclass 1 is entitled to a 2X multiplier is based primarily on the fact that New GM entered into the DPA, pursuant to which New GM admitted that with respect to vehicles owned or leased by the members of Subclass 1, "GM knowingly manufactured and sold several models of vehicles equipped with the Defective Switch." DPA Statement of Facts ¶ 115. New GM agreed that it would not "make any statement, in litigation or otherwise, contradicting the Statement of Facts . . . ." DPA Letter Agreement ¶ 13.

21. Because of the DPA, it is clear that Subclass 1 has the strongest liability case. In addition, in the NHTSA Consent Order GM acknowledged there was a violation of "the Safety



Act by failing to provide notice to NHTSA on the safety-related defect that is the subject of Recall No. 14v047 . . . .”

22. Subclasses 2 and 3 have argued vigorously that in many ways they are similarly situated to Subclass 1, but I nevertheless conclude that their positions are far weaker than Subclass 1’s. Most importantly, neither can take direct advantage of the DPA Statement of Facts which never refers to the vehicles subject to the Subclass 2 or 3 Recalls. Subclass 2, however, has made a credible case that using the evidence developed with respect to Subclass 1, it can piece together a liability case that is stronger than that of any Subclass other than Subclass 1.

23. Specifically, Subclass 2 argues, based on documents and deposition testimony, that because of: (1) the similarity between the ignition switches in the Subclass 1 and Subclass 2 vehicles, and (2) Old GM’s and New GM’s cross-platform knowledge, Old GM and New GM “knowingly sold” the 14v355, 14v394 and 14v400 vehicles “with defective ignition switches.” Without commenting on the outcome of a trial, I conclude that the likelihood of success for Subclass 2 is lower than that of Subclass 1, but higher than that of all other Subclasses. I have therefore concluded that Subclass 2 is entitled to a 1.5X multiplier.

24. Subclass 3 is faced with a more difficult liability case than Subclass 2 because the allegedly defective ignition switch in vehicles owned and leased by Subclass 3 members cannot be said to be identical or nearly identical to the Subclass 1 ignition switch which is covered in the DPA.

25. The different phrasing of the Offer of Proof with respect to the Subclasses makes this clear. For Subclass 2 the Offer of Proof argues that given “cross-platform knowledge” Old GM “had knowledge” of the defect in 2002 “and otherwise knew about this defect and its dangerous consequences no later than 2007.” ¶54.

26. In contrast to the liability case Subclasses 1 and 2 can present, the case for Subclass 3 is weaker, requiring argument by analogy and multi-step evidentiary links to attempt to bring itself within the umbrella of the DPA. In addition, Subclasses 3, 4 and 5 face a difficult path to establishing Old and New GM's contemporaneous knowledge of the respective defects, having to depend primarily on post-sale customer complaints rather than the DPA.

27. Thus, with respect to Subclass 3, the Offer of Proof argues that New GM's knowledge is evidenced by the facts that between 2010 when the vehicles were first sold, and 2014, there were three known accidents, eight vehicle owner questionnaires, three lawsuits, one warranty claim and 14 field reports received. ¶79. The Offer of Proof then argues that Old GM's knowledge in 2002 concerning the Delta Ignition Switch "should have triggered an investigative response across platforms given the platforms common parts ...." Id. at 84. New GM states that the issue was first identified internally in 2014 "during GM evaluations of 2014 GM current production vehicles for knee to key clearance." June 19, 2014, 573 Letter at 1.

28. Similarly, the Offer of Proof with respect to Subclass 4 states that there were "common defects in the electric power steering systems" and focuses on post-sale customer complaints and warranty claims. That contention leaves open the issue as to whether there was sufficient data to put Old GM and New GM on notice of the defect. New GM notes that beginning in 2004 Old GM remediated the problem, first when supplier Delphi replaced the supplier it was using to manufacturer the torque sensors identified as contributing to the issue, and thereafter when Old GM announced a Customer Satisfaction program that addressed the issue and led NHTSA to close an Engineering Analysis investigation. Attachment B to April 14, 2014, 573 Letter.

29. Finally, as to Subclass 5, the Side Airbag Subclass, there is no similarity to or overlap with Subclass 1 and the proof as to Old GM's or New GM's knowledge of the defect as detailed in Plaintiffs' Offer of Proof is weaker than that available to Subclasses 1 and 2.

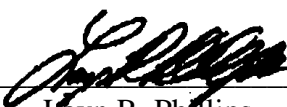
30. It would be impossible to create a perfect or even near perfect allocation among and within the Subclasses. The evidence is complex, technical and nuanced, and New GM and the GUC Trust would undoubtedly contest liability vigorously. The time and expense of five separate Subclass trials on the merits and a potentially complex and costly claims processing system would eat up a significant amount of the settlement fund and delay distribution by at least a year and probably far longer. I believe that the Allocation Decision detailed above represents a fair, equitable and reasonable distribution among the Subclasses.

#### IV. ALLOCATION SUMMARY

Based on the foregoing findings, I conclude that the Base Payment Amount should be adjusted (or not) as follows for each Subclass:

Subclass No.	Subclass Name	Base Payment Amount Adjustment
1	Delta Ignition Switch Subclass	2X
2	Key Rotation Subclass	1.5X
3	Camaro Knee-Key Subclass	No Adjustment
4	Power Steering Subclass	No Adjustment
5	Side Airbag Subclass	No Adjustment

DATED: March 25, 2020

  
 Layn R. Phillips