GM MDL RAISES QUESTIONS ABOUT FIDUCIARY DUTY

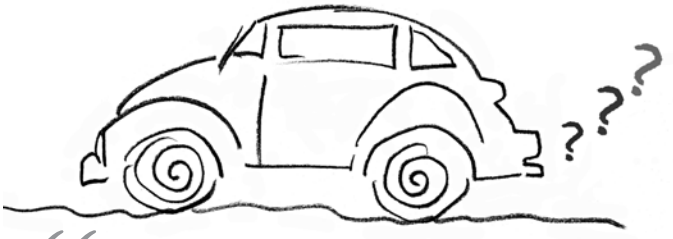
IN 2014, GENERAL MOTORS (GM) RECALLED AT LEAST 30 MILLION CARS WORLDWIDE for problems related to faulty ignition switches that could unexpectedly shut the engine off and prevent the airbags from inflating. Lance Cooper, a solo practitioner from Marietta, Georgia, helped to discover and bring about public awareness of the problem.

Plaintiffs began filing suit against GM. The Judicial Panel on Multidistrict Litigation centralized the cases and transferred them to Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York for coordinated pretrial proceedings under MDL-2543. The judge appointed a Plaintiff Executive Committee, which included Cooper, and three co-lead counsel.

On Jan. 11, 2016, Judge Furman held the first bellwether trial, *Scheuer*. Co-lead counsel Robert Hilliard was lead counsel in the case. During the trial, evidence showed that the *Scheuer* plaintiff likely committed fraud and perjury. The *Scheuer* case was withdrawn.

Following the demise of the *Scheuer* case, Cooper moved the MDL court to remove Hilliard and the other two co-lead counsel, and to reevaluate the bellwether trial schedule. No other MDL attorney joined him. Cooper asserted that the withdrawal of the *Scheuer* case was the result of "a long series of poor decisions and mismanagement" by the co-lead counsel. Cooper further claimed that the co-lead counsel breached their fiduciary duty to the plaintiffs by revising the bellwether trial schedule to replace *Yingling*, a wrongful death case, with *Scheuer*.

Yingling involved the death of James Yingling, a father whose vehicle had been preserved after the accident. Under Cooper's analysis, "liability [was] good and damages [were] substantial." Cooper claimed that after Judge Furman had scheduled *Yingling* as the first bellwether case, Hilliard met with the plaintiff's attorney in the *Yingling* case and attempted to convince him to try the case together and split the attorney's fees 50-50. Cooper asserted that when the attorney refused, Hilliard and the other co-lead counsel successfully moved the court to replace *Yingling* with *Scheuer*. Cooper argued that there is "only one possible explanation" for replacing *Yingling* with *Scheuer*: "[t]he Co-Leads wanted to ensure that at least one of them tried the first bellwether trial, and they wanted to ensure that they maximized their attorneys' fees in the process."



> "MILLER REJECTED THE WIDELY ACCEPTED 'QUASI-CLASS ACTION' THEORY UNDERLYING SETTLEMENT OF MASS-TORT MDLS THAT LEAD COUNSEL'S DUTIES ARE THE SAME AS CLASS-ACTION COUNSEL, WHO OWE FIDUCIARY DUTIES TO ALL CLASS MEMBERS, INCLUDING MEMBERS WHO HAVE NOT PERSONALLY RETAINED THEM.

GM hired NYU Law Prof. Geoffrey Parsons Miller to respond to Cooper's motion. Miller submitted an expert declaration on the professional responsibilities of MDL lead counsel. According to Miller, MDL lead counsel should work "fairly, efficiently, and economically" to benefit all plaintiffs. But he disagreed with, in his view, the legally unsupportable proposition that lead counsel's obligation to their individual clients should be limited by obligations owed to other MDL lawyers and clients. Miller rejected the widely accepted "quasi-class action" theory underlying settlement of mass-tort MDLs that lead counsel's duties are the same as class-action counsel, who owe fiduciary duties to all class members, including members who have not personally retained them. Instead, Miller argued that MDL lead counsel do not owe a fiduciary duty to all plaintiffs in aggregate, non-class action proceedings, e.g., MDL actions.

In making the distinction, Miller called into question the fairness of all global settlements reached in MDL actions by lead counsel on behalf of thousands of plaintiffs. It's a significant number: Approximately 20 mass-tort MDLs comprise more than one third of all civil cases pending in the federal courts. Nearly 95 percent of them are resolved by global settlements negotiated by a handful of lead counsel on behalf of thousands of individual plaintiffs. These global settlements rest on the bedrock principle that settlement agreements have been negotiated by counsel who owe a fiduciary duty to all plaintiffs.

Judge Furman denied Cooper's motion. The court did not acknowledge the professional responsibility arguments advanced by Miller, but said a more detailed opinion was forthcoming. Rather, the court focused on the lack of co-lead counsel's wrongdoing. The court explained that Cooper's motion was untimely and fell short of reaching the standards for reconsideration. But "[m]ore fundamentally, the Cooper Plaintiffs provide little or no evidence to support their (sometimes wild) accusations of impropriety and underhandedness on the part of Lead Counsel." The court characterized Cooper's motion as "Monday morning quarterbacking."

Judge Furman noted that Cooper failed to recognize that the *Scheuer* trial contributed many benefits to the MDL process, beyond solely determining potential settlement values for the untried cases. For example, the *Scheuer* trial helped to establish procedural rules for the remaining MDL cases. Additionally, GM will face four more bellwether trials and 20 state trials, which involve different attorneys and fact scenarios. The effects of those trials on GM and the MDL process as a whole remain to be seen.

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