The New York Times | http://nyti.ms/1JatFyq

BUSINESS DAY

Laws Hinder Prosecutors in Charging G.M. Employees in Ignition Defect

By DANIELLE IVORY and BEN PROTESS JULY 19, 2015

From the factory floor to the corporate suite, employees at General Motors saw indications of a deadly ignition defect and failed to disclose the problem to the government.

Yet even now that prosecutors are closing in on a criminal case against the automaker, their effort to charge individual employees at the center of the case has hit an obstacle: legal loopholes that the auto industry helped create. And while some G.M. employees still face investigation, the prospect of sweeping indictments across the company's ranks has faded, according to people briefed on the investigation.

The prosecutors' struggle centers on high legal standards and gaps in the oversight of carmakers, according to those people. The gaps, which do not exist in some other industries like pharmaceuticals and food, stem from nearly five decades in which the auto industry beat back efforts to strengthen criminal penalties.

In one prominent example, lobbyists and trade groups blunted a law requiring car companies to notify regulators of certain safety defects within

five working days, persuading Congress to water it down so that it carries only civil penalties, not criminal liability. On at least three occasions, public records show, lawmakers tried to insert stronger criminal punishment into federal legislation, only to encounter fierce opposition from the industry.

"When you don't have the legal tools to prosecute someone who acted badly and hurt someone else, it is incredibly frustrating," said Matthew L. Schwartz, a former prosecutor at the United States attorney's office in Manhattan, which, along with the F.B.I., is handling the G.M. investigation. Mr. Schwartz, who is now a partner at Boies, Schiller & Flexner, was not involved in the G.M. investigation.

One opportunity to strengthen the law arose after widespread recalls of Ford vehicles with Firestone tires in the late 1990s, which were eventually linked to 271 deaths. At the time, Senator John McCain, Republican of Arizona, introduced a bill with language that would have made it criminal for auto manufacturers to introduce vehicles with safety defects into interstate commerce if they know of the defects at the time.

But facing pressure from the U.S. Chamber of Commerce and the Alliance of Automobile Manufacturers, lawmakers approved a bill with softer language.

Another opportunity arose after the G.M. recall last year, when Senator Richard Blumenthal, Democrat of Connecticut, introduced legislation to impose criminal penalties on a corporate officer who knowingly conceals that a product poses a danger of death or injury. But the bill gained no traction. While he intends to reintroduce that measure, last week a bipartisan group of senators blocked a similar effort to stiffen criminal penalties.

The pattern of loopholes and legislative victories illustrates the lobbying might and political clout of the auto industry, even as it careens from one safety crisis to another.

Over the last year and a half, the Alliance of Automobile Manufacturers, a

prominent industry trade group, has employed six lobbying firms to represent its interests in Washington. Car companies themselves, including G.M., have formed political action committees and donated millions of dollars to congressional campaigns in recent years, records show.

Wade Newton, a spokesman for the auto alliance, argued that criminal penalties would neither speed up recall decisions nor enhance regulators' ability to spot defect trends earlier.

Despite the industry's lobbying, lawmakers have adopted some limited criminal penalties for carmakers, though those laws come with a high burden of proof. That burden stands in contrast to other industries in which intent is not required to prove criminal wrongdoing.

For example, prosecutors criminally charged a unit of BP for the very act of killing brown pelicans in the 2010 Gulf of Mexico oil spill. Employees in that case were charged with, among other things, violations of the Clean Water Act, another law that does not require a showing of intent. And yet, prosecutors cannot automatically charge G.M., or its employees, for a defect linked to the deaths of at least 124 people.

Mr. Schwartz, the former prosecutor, explained that "unlike other regulated industries where health or human safety is involved, there is no criminal statute aimed at the carmakersthat does not require specific criminal intent."

Without such a law, prosecutors typically rely on wire fraud grounds to prosecute wrongdoing in the car industry. The wire fraud statute requires prosecutors to prove that someone intended to defraud, not just that the conduct was deceptive.

Against that backdrop, federal prosecutors have struggled to prove outright fraud by any one employee at G.M., according to the people briefed on the inquiry, who requested anonymity to discuss a private investigation.

Even so, the prosecutors have homed in on G.M. itself, prompting negotiations with the automaker over a deal to resolve the criminal investigation as soon as this summer, the people involved in the case said. The New York Times reported in May that a deal between G.M. and Preet Bharara, the top federal prosecutor in Manhattan, might top the $1.2 billion that Toyota paid last year in a settlement with his office for concealing unintended acceleration problems in its cars.

Asked whether G.M. expected current or former employees to face charges, a company spokesman, Jim Cain, said the company did not know. G.M., which is paying the legal bills for the current and former employees, said, “We continue to cooperate fully.”

The contrasting potential outcomes of the G.M. case — criminal wrongdoing for the company, possibly none for individuals — will most likely fuel concerns that prosecutors lack the will to criminally charge the top rungs of the corporate world. In a recent speech during her presidential campaign, Hillary Clinton seized on that sentiment, declaring that her administration would “prosecute individuals as well as firms when they commit fraud.”

A spokesman for the United States attorney’s office in Manhattan declined to comment.

But in the past, prosecutors have publicly argued for the need to exercise discretion in making decisions about charges rather than satiate public demands for corporate accountability.

Prosecutors also emphasize the importance of criminally prosecuting corporations — as in the Toyota example — noting that in some cases they can prove a collective failure at a company even when they cannot prove a criminal act by its individual employees.

For G.M., the problems came to light in February 2014, when it began recalling 2.6 million Chevrolet Cobalts, Saturn Ions and other small cars with

faulty ignitions that could unexpectedly turn off, cutting power to the engine and disabling power steering, power brakes and airbags. The company disclosed soon after that workers had been aware of clues pointing to the defect for more than a decade.

But even with those admissions, the law is relatively porous when it comes to holding automobile employees or executives criminally accountable for making false statements.

Under the so-called Tread Act, which was passed after the Ford-Firestone recall, company employees must have lied to or misled their federal regulatory agency, the National Highway Traffic Safety Administration, with the specific intention of doing so. The defect in question also must be tied to an injury or death — often a difficult connection to prove — and there is a safe-harbor provision for a person who "corrects any improper reports or failure to report within a reasonable time."

"It's a very limited provision, the burden of proof is quite high, and then finally you have a safe-harbor provision that is a catchall," said Clarence Ditlow, the executive director of the Center for Auto Safety, an outspoken critic of the car industry.

There is little mystery why the law is set up this way.

For nearly 50 years, legislative attempts to provide prosecutors additional leeway to criminally charge automakers and their employees have been quashed.

Months before President Lyndon Johnson signed the National Traffic and Motor Vehicle Safety Act in 1966, which created the agency that would later become the N.H.T.S.A., Senator Vance Hartke, Democrat of Indiana, tried to add an amendment that would allow people who knowingly and willfully violated the law to incur a criminal penalty.

Ralph Nader, the consumer advocate whose book “Unsafe at Any Speed” had been published the year before, believed the amendment would pass until Senator John O. Pastore, Democrat of Rhode Island, got up to speak. In a booming voice, Mr. Pastore railed against the provision: “We are not dealing with mobsters and gangsters. We are dealing with an industry which is the industrial pride of America.”

The nays had it. The amendment failed — foreshadowing Mr. McCain’s unsuccessful efforts some 30 years later.

Today, the legal landscape still protects auto employees.

A G.M. employee told regulators that the company had not assessed the cause of an accident tied to the ignition defect, the 2004 crash that killed Gene Erickson, when in fact the company had determined a likely cause. But there is no known evidence that the employee intended to mislead regulators.

And Raymond DeGiorgio, once an obscure engineer at G.M., also has come under attack in Congress as the employee who originally signed off on the deadly ignition switch and then approved an order to replace it in 2006 without changing the part number — an omission that may have hidden the problem from the company and its regulators.

And yet there is no publicly known evidence that shows Mr. DeGiorgio intentionally withheld the information, a necessary element to proving a crime.

Mr. DeGiorgio, for his part, has defended his actions. “All I can say is that I did my job,” he told The New York Times last year. “I didn’t lie, cheat or steal. I did my job the best I could.”

Bill Vlasic and Peter J. Henning contributed reporting.

A version of this article appears in print on July 20, 2015, on page B1 of the New York edition with the headline: Laws Hinder Prosecutors in Charging G.M. Employees.