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GM Likely Immune for Ignition-Linked Crashes Before Bankruptcy, But New Fund Possible

Plaintiffs suing General Motors Co. over an alleged ignition-switch defect would have a very difficult time persuading a judge to roll back the company's immunity for pre-bankruptcy accidents for fraud on the court, bankruptcy attorneys told Bloomberg BNA in a series of recent interviews.

The ''extraordinary'' circumstances might provide an exception to the usual rules, some said.

But a fund to compensate claimants might be a more realistic way to provide relief, attorneys said.

Sen. Richard Blumenthal (D.-Conn.) urged Attorney General Eric H. Holder Jr. March 24 to use government leverage to get GM to create such a fund.

''The most direct and cost-effective way is for the Department of Justice and GM to reach an agreement, and my hope is that GM recognizes that it can help itself and also help parents and loved ones of victims who were injured or killed or suffered damages,'' Blumenthal told Bloomberg BNA in an interview March 25.

Old GM to New GM. GM emerged from bankruptcy July 10, 2009, when the U.S. Bankruptcy Court for the Southern District of New York confirmed the sale of the old company's assets to a new GM company backed by the U.S. government (37 PSLR 755, 7/13/09).

Objectors, including tort plaintiffs, had sought to block a provision giving New GM immunity to product liability claims for Old GM's cars.

They succeeded in part, securing a change to the sale agreement in which New GM assumed liability for harm from post-bankruptcy accidents due to defects in Old GM vehicles (37 PSLR 738, 7/6/09).

Recent recalls of Chevrolet Cobalts and other GM vehicles for an ignition-switch problem have focused new attention on older accidents. The affected vehicles were made in the mid-2000s, up through model year 2007. GM said it identified 12 deaths related to the switch issue, but safety advocates and plaintiffs' attorneys say there may be many more.

Some plaintiffs' attorneys, including Bob Hilliard of Corpus Christi, Texas, have floated the idea of returning to the bankruptcy court with an argument that GM should not be immune to suit because it committed fraud on the court (42 PSLR 295, 3/24/14).

Meanwhile, a complaint in a proposed class action filed in the U.S. District Court for the Central District of California March 19 seeks to hold GM liable for the loss in value of recalled vehicles through a successor liability theory and through GM's alleged post-bankruptcy failure to carry out obligations under the Transportation Recall Enhancement, Accountability and Documentation Act (the TREAD Act) (*McConnell v. General Motors LLC*, C.D. Cal., No. 8:14-cv-00424, *complaint filed* 3/19/14).

The Plan Controls. Steven N. Berger, a bankruptcy attorney at Engelman Berger PC in Phoenix, pointed to two concepts in bankruptcy law that could make a fraud-on-the-court argument difficult. The centrality of the reorganization plan is one.

''Once the plan comes together, it's been vetted through the bankruptcy process and all the parties have had a chance to object, deadlines are established in the plan for filing claims, claims are organized into classes, and they're told how they're going to be paid and treated, once all that happens, then the plan stands as the document that usually controls on everything,'' Berger said in a March 20 interview.

Courts generally ''interpret a plan document to be very broad and final,'' he said.

''There is one bankruptcy code exception to that, that lets parties actually file a motion to revoke confirmation of a plan,'' he said, referring to 11 U.S.C. § 1144. ''But that has to be based on actual fraud on the court.''

The argument would have to be that, had the court possessed the withheld information, ''it would never have approved this plan because it doesn't comply with all the other requirements of the bankruptcy code,'' he said.

And a fraud on the court argument is subject to a 180-day time limit from the date of the order confirming the plan, Berger said.

''From what we've researched, that deadline is pretty jealously guarded by the courts and enforced strictly—even where someone can say, there was fraud and we didn't know about it until after the six months,'' Berger said.

The other principle concerns the finality of ''sales free and clear,'' also called 363 sales, which was the type of transaction used in the GM bankruptcy case. ''The assets are more attractive if you know you're getting them free and clear of any prior claims,'' Berger said.

Fraud Showing Is Difficult. Standards to show fraud on the court are high for parties challenging a reorganization plan, Berger said.

''If they were timely, they would have to show some intentional fraud—memo to subordinate: don't tell anyone about this defect, let alone the bankruptcy court—or some kind of reckless disregard,'' such as a policy of not disclosing defects, he said.

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''It's very much an actual fraud kind of standard. And it has to be the kind of fraud where a judge says, I never would have approved this plan,'' he said.

''Frankly, an additional group of products liability claimants—the existence of that would be pretty unlikely in most cases to have the court change its mind because normally the plan will provide some mechanism for people with those kinds of claims to participate in the dividends from the old company,'' Berger said.

''And how do you go back and redo a business deal where the new company agrees what it's going to take over and what it's not, when it's already taken the assets, paid what it's going to pay, and moved on?''

C.R. Chip Bowles Jr., a bankruptcy attorney at Bingham Greenebaum Doll LLP in Louisville, Ky., also pointed to the 180-day limit as an obstacle in getting the plan revoked, but perhaps not an insurmountable one.

Many attorneys say the 180-day limit is an absolute bar, Bowles told Bloomberg BNA March 25. ''They may be right,'' he said.

But Bowles said the nature of the fraud might matter to a court. ''It just seems to me that fraud on the court that might involve people's lives—there might be a judge somewhere who would say, that's sufficient fraud on the court that it will not be allowed to proceed,'' he said.

''Forget 1144, I'll use my inherent powers, either as a federal district court judge or a federal bankruptcy court judge, to either revoke confirmation of the plan, highly unlikely, or to revoke the liability waivers that they got,'' Bowles said.

That would be a long shot, but the difference is ''the fact that people died,'' he said.

''If it turns out GM actively hid this from a recall and a dozen people died since they knew it should have been recalled, you're talking about a species of fraud that's as bad as you can get: People died because they lied,'' he said.

Blumenthal also acknowledged the legal obstacles to revoking immunity because ''bankruptcy organization is final.''

''But these circumstances are pretty extraordinary,'' he said.

Objectors' Attorney: Big Hurdle. Steve Jakubowski, a bankruptcy attorney with Robbins, Salomon & Patt Ltd. in Chicago, who represented the Center for Auto Safety and tort plaintiffs when they objected to the reorganization plan in June 2009, told Bloomberg BNA March 24 that plaintiffs trying to revoke immunity ''are facing an insurmountable hurdle. I do not see the bankruptcy court having any authority to reverse the sale.''

''I don't understand how this could possibly be the type of fraud that would justify re-opening the sale,'' he said. ''The reason is, by definition New GM was a new entity. By definition it knew nothing about the alleged fraud. So, as a buyer, it committed no fraud.''

If Old GM, as the seller, ''deceived people in connection with the existence of this defect,'' Jakubowski said, ''the party that should be seeking to re-open the order is not a plaintiff, but New GM, because New GM agreed to pick up all the liabilities after closing.''

Jakubowki said, ''With respect to accidents that occurred before the closing, I think one can fairly assume, based on what you saw with respect to the ignition issue, and with respect to what people knew what was going on with defects in the saddlebag gas tanks and the collapsible roofs on the SUVs and a host of other defects, that there was more there than was told in connection with the bankruptcy proceeding.

''There were likely a lot of times in which Old GM was not completely candid with respect to defects. But that wouldn't have changed anything,'' he said.

Same Judge, Previous Revocation Attempt. Interestingly, plaintiffs representing a proposed class previously tried to get Judge Robert E. Gerber, who oversaw the GM bankruptcy proceeding, to revoke the GM confirmation order on fraud grounds—to the extent of covering their claim for about $180 million to fix proposed class members' 2007 and 2008 Chevrolet Impalas' allegedly defective spindle rods.

In that case, *In re Motors Liquidation Co. (Morgenstein v. Motors Liquidation Co.)*, 2012 BL 18760, 462 B.R. 494 (Bankr. S.D.N.Y. 2012), which Berger and an associate found in their research, the court rejected the bid.

First, a partial revocation isn't possible, the court said. Section 1144 ''only provides for revocation of an entire confirmation order,'' Gerber said.

And second, the complaint involving the Impala spindle rods also didn't sufficiently allege a fraud upon the court, Gerber said.

Successor Liability. Bowles said he doesn't regard successor liability as a likely avenue to obtaining recovery from GM. Classic successor liability involves a new company that is ''not really a different enterprise,'' he said.

''New GM that came out of bankruptcy and Old GM, although they both make cars under the General Motors brand, they're radically different things. There are different asset bases, a lot of different issues, everything's different. That's going to be fairly hard under state law, to prove, that you're some form of successor,'' Bowles said.

A bad-faith argument might get around it, he said, but the proponent would have to show New GM's knowledge of the continuing problem.

Fund. Jakubowski said that while plan revocation is unlikely to succeed, ''Senator Blumenthal is going down the appropriate path here'' in asking Holder to force GM to create a fund.

''Now, after Toyota, the whole world has changed,'' Jakubowski said. ''Now you're looking at a corporation being slapped hard, not for what they did pre-petition, but for the continuing coverup post-petition.''

Toyota settled a Department of Justice criminal investigation by agreeing to pay a $1.2 billion fine for wrongdoing in connection with sudden acceleration problems that led to recalls of more than 10 million vehicles worldwide in 2009 and 2010. The settlement was approved March 20 (42 PSLR 286, 3/24/14).

The DOJ opened a criminal investigation March 11 into GM's handling of the ignition flaw (42 PSLR 268, 3/17/14).

Blumenthal said the means to create a GM fund would be ''the same mechanism as was used in the Toyota case. They can reach a deferred prosecution, which would, in effect, put a hold on the prosecution on the condition that they establish a fund.''

''It could also do that as a result of criminal prosecution, but I'm sure that GM would much prefer to avoid the prosecution and establish a fund. So they could do

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it after a conviction as well. Restitution can be ordered by a court,'' Blumenthal said.

Jakubowksi, who represented GM objectors, said he and safety groups, plaintiffs' attorneys, Blumenthal's office and others have been talking about creating a fund.

Jakubowski said accident victims ''were the only ones who did not assume the risk of financial loss when they dealt with GM. Every other party who got 10 cents on the dollar assumed the risk—the unions, or the pension funds, or the bondholders, or the shareholders—they all assumed the risk. But the driver of a car didn't assume the risk that GM would be self-insured,'' he said.

He compared the ignition issue to the Ford Pinto problems in the 1970s. ''It's the same conduct. Cost-benefit analysis, they figure it doesn't matter. Now, after $1.2 billion for an acceleration floor-mat issue''—the amount of Toyota's settlement with the DOJ—''it does matter. There's no cost-benefit analysis that can justify it.''

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