Successor Liability, Company Law, and Bankruptcy: The Context of Liability for Defective Products

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Abstract

After suffering through five years of losses and a precipitous decline in market share, General Motors found itself in a precarious position—with $172.8 billion in liabilities and $82.3 billion in assets. At approximately the same time, the United States was experiencing its greatest financial crisis since the Great Depression. General Motors received $13.4 billion from the Obama and Bush Administrations as part of their plans to "save the American automobile industry." The confluence of these events led General Motors to file for Chapter 11 bankruptcy in June of 2009 in order to restructure its debt and reconfigure its corporate structure while continuing to operate as the "New GM" during the reorganization. In this process, the "New GM" decided it would not assume responsibility for injuries that drivers and others had suffered attributable to various vehicle defects in automobiles and trucks General Motors had manufactured. This article takes a close look at the issues presented relating to the General Motors bankruptcy in light of principles relating to successor liability and American company law.

Key Words: Bankruptcy; Successor Liability; Products Liability; Reorganization; De Facto Merger; "New GM"

1. Introduction

On December 31, 2008, the U.S. Treasury Department extended $13.4 billion to General Motors (GM), making the U.S. government the largest stakeholder in the corporation. Under the terms of the agreement, GM was required to present a plan to rebuild and restructure in order to guaranty its long-term viability. On March 30, 2009, President Obama announced that his administration had concluded that GM's efforts did not justify the continued infusion of taxpayer dollars. The President gave GM sixty days to adopt drastic changes, or it would face bankruptcy. On June 1, 2009, GM filed for Chapter 11 bankruptcy in the Southern District of New York. GM's bankruptcy filing revealed that its liabilities were more than double its assets—with $82.3 billion in assets and $ 172.8 billion in liabilities.

However, before GM had filed for bankruptcy, it had already entered into a proposed or *prepackaged* sale agreement under Section 363(b) of the Bankruptcy Code, which allowed GM to restructure its debts by selling substantially all of its assets. This transaction is known as a "363 Sale" (See Skeel, 2015).

The bankruptcy court approved GM's prepackaged 363 Sale on July 5, 2009. [A *prepackaged* sale is one that is agreed to before the filing of a bankruptcy petition (generally, Teloni, 2015).] The bankruptcy court referred to the purchasing entity as the "New GM" and referred to the selling entity as "Old GM" (Krolicki & Bailey, 2009; Cohn & Bowles, 2016).

Under Section 363 of the Bankruptcy Code, assets are sold "free and clear of any interest in such property...." As a result, "New GM" received substantially all of the company's assets, while "Old GM" retained most of the company's liabilities. The decision of the bankruptcy court essentially allowed "New GM" to continue operating free from past debts and claims of creditors.

It can be argued that GM's 363 Sale was in fact what has been termed a "*sleight-of-hand transaction*" (Warner, 2016), in which a debtor is permitted to internally *restructure* under the guise of an asset sale. "Old GM" assumed all future liability claims from incidents that occurred *prior* to the bankruptcy filing date, and successor liability claims against "New GM" were barred (Lubben, 2014). The GM filing would have the effect of barring injured persons, victims of defective GM products, from seeking compensation for their injuries. As Collins (2009) noted: "Using estimates derived primarily from historical averages, GM's class [of potential plaintiffs] consists of roughly 2000 people, 500-600 of whom are likely to have serious claims, with a potential total liability to GM of between $1 billion and $2 billion." Collins further reported that "GM paid $ 1.1 billion in products liability claims in 2007 and $921 million in 2008, according to a filing with the Securities and Exchange Commission."

"New GM" contends that the 363 Sale created a "bankruptcy shield" from product liability claims filed against the company. As Painter (1984, pp. 1049-1050) noted: "Tort victims are considered unsecured nonpriority creditors, meaning they are only repaid after all other secured and priority creditors have been repaid."

The actions undertaken by General Motors have resulted in a reassessment of the traditional rule relating to the non-liability of a successor corporation for the debts of a predecessor corporation.

2. Background: The Development of Successor Liability

Citing Fletcher's *Cyclopedia of the Law of Private Corporations* (1983), the United States Court of Appeals for the Third Circuit decided *Polius v. Clark Equipment Co.* (1986) on the basis of the general rule that "where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor" (*Polius*, 1986, p. 77).

The traditional rule was applied in the case of *Bernard v. Kee Manufacturing Company, Inc.* (hereinafter *Key Manufacturing*, 1982), where the Supreme Court of Florida framed the issue as follows:

> "whether the purchaser of the assets of a manufacturing firm which continues under the same trade name the general product line of the seller can be liable for a defective product [a lawn mower] manufactured by the seller, even though the traditional corporate law rule would impose no liability?" (*Kee Manufacturing*, 1982, p. 1048).

The record of the case yielded the following facts: The assets acquired by Kee Manufacturing Company, Inc. included the manufacturing plant, inventory, good will, and perhaps most importantly, the right to use the name "Kee Manufacturing Company." The successor company used the assets it had purchased in order to continue to manufacture its lawn mowers. In addition, it continued to employ the same factory personnel and used the trade name "Kee Mowers." Although the successor corporation had acquired the assets in 1972, it had stated in a brochure that it had been manufacturing lawn mowers since 1948.

However, these facts were not enough to breach the traditional rule and hold the successor corporation liable for damages. In an interesting discussion, the court raised a practical argument: small businesses might face great difficulty and high costs in seeking to obtain products liability insurance for defects in a predecessor's product. The court also raised several policy considerations:

> "Extending liability to the corporate successor is not consistent with at least one major premise of strict liability, which is to place responsibility for a defective product on the manufacturer who placed that product into commerce. The corporate successor has not created the risk.... Since the successor was never in a position to eliminate the risk, a major purpose of strict liability in modifying a manufacturer's behavior is also lost" (*Kee Manufacturing*, 1982, p. 1050; see also *Domine v. Fulton Iron Works*, 1979).

Professors Fisher and Powers (1988, p. 612) expanded upon the defense of the traditional rule. They noted that "if liability were found, the successor corporation would be willing to pay less for the predecessor's assets by an amount equal to the estimation of the amount of liability or the cost of insuring against liability."

The *Kee* court, however, recognized that several jurisdictions had rejected the general rule and had begun to extend liability to the successor corporation under certain circumstances "in an effort to effectuate an acknowledged purpose of strict liability for defective products, that the costs of a defective product should be included in that product" (*Key Manufacturing*, 1982, p. 1049; see also *Cyr v. B. Offen & Co.*, 1974; *Turner v. Bituminous Casualty Co.*, 1976).

Professor Phillips et al. (2002, p. 620) posited that the "doctrine of products liability for successor corporations grew out of an attempt to keep the consumer from being left remediless when the manufacturer of the product (the predecessor) was not available for suit."

As a result, courts began to develop a number of important exceptions to the general rule where:

- The purchaser expressly or impliedly agrees to assume such an obligation;
- Under certain circumstances where the transaction amounts to a consolidation or *de facto* merger of the entities;
- The purchasing corporation is "merely a continuation" of the selling corporation; or
- The transaction has been fraudulently entered into in order to escape liability, as where the successor corporation is substantially controlled by the same persons or entities that controlled the predecessor corporation and where the assets were sold to the successor corporation for less than fair market value (*Kee Manufacturing*, 1982, p. 1049; see also *Husak v. Berkel, Inc.*, 1975, p. 176).

3. Extension of Liability

In deciding whether to commit to such an extension of liability, several courts began to shift the emphasis from a traditional corporate formalities approach found in the general rule to one involving an "inquiry regarding the nature of the business operations" conducted by the successor corporation (See *Dawejko v. Jorgensen Steel Co.*, 1981). For example, in *Turner v. Bituminous Casualty Co.* (1976), the Michigan Supreme Court recognized this extension of liability by focusing on issues relating to the continuity of management, personnel, physical location of operations, and corporate assets. In *Dawejko*, a Pennsylvania trial court chose a different approach and focused its attention on the "product line exception," which based liability on the continuing marketing of the predecessor's product by the successor corporation. The Pennsylvania approach mirrored that taken in *Ray v. Alad Corp.* (hereinafter *Ray*, 1977) where the California Supreme Court had found liability where the successor corporation had continued to market a *product line* purchased from a predecessor.

In *Ray*, the court enunciated several factors which would be relevant to a finding of liability. These factors included whether the successor corporation had advertised itself as an "ongoing operation"; whether it had maintained the same product, name, personnel, property, and clients; whether it had acquired the predecessor's name and good will; and whether the successor corporation or entity had required the predecessor corporation to dissolve.

The *Ray* court outlined the policy justifications for imposing liability on the successor corporation in the context of a *quid pro quo* for the successor corporation enjoying the predecessor's good will. Liability would be predicated upon several factors, including:

- The virtual destruction of a plaintiff's remedies against the original manufacturer caused by the successor corporation's acquisition of the business;
- The successor corporation's ability to assume the original manufacturer's risk-spreading; and
- The fairness of requiring the successor corporation to assume responsibility for defective products (*Ray*, 1977, pp. 8-9).

In finding liability, the California Supreme Court cited the seminal case of *Greenman v. Yuba Power Products, Inc.* (hereinafter *Greenman*, 1963), where Justice Trainer, the recognized author of the theory of strict liability in tort, had laid out the justifications for imposing strict liability on a manufacturer:

> "The purpose of the rule of strict tort liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves" (*Greenman*, 1963, p. 901; see also Geistfeld, 2006, p. 87).

The *Ray* court then stated that at its core, strict liability is based on the premise that "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business" (cited in *Escola v. Coca Cola Bottling Co.*, 1944, pp. 440-441).

In delineating the justifications for imposing strict liability upon a successor to a manufacturer under the circumstances of the case, the *Ray* court cited the following facts:

- Alad II (successor) had purchased Alad I's (predecessor) tangible assets, trade name and good will;
- Alad I had been dissolved within two months of the acquisition in accordance with the purchase agreement;
- Since the injury giving rise to the claim did not occur until more than six months after the dissolution, the plaintiff would face "formidable and probably insurmountable obstacles in attempting to obtain satisfaction of the judgment from former stockholders or directors" because Alad I's "known debts and liabilities have been actually paid" and its "known assets have been distributed to its shareholders" (*Ray*, 1977, p. 27).

The *Ray* court concluded that the imposition of liability upon Alad II would be both "fair and equitable" in light of the acquisition by Alad II of the trade name, good will, and customer lists of Alad I, its continuing to produce the same line of ladders, and its holding itself out to potential customers as the same enterprise.

Under these circumstances, Alad II enjoyed "a substantial benefit which its predecessor could not have enjoyed without the burden of potential liability for injuries from previously manufactured units." The court concluded:

> "We therefore conclude that a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired" (*Ray*, 1977, p. 34).

Interestingly, the *Ray* approach mirrored the intentional policy shift towards what has been termed the "loosest formulation of the exception" found in *Ramirez v. Amstead Industries, Inc.* (1981), in which the New Jersey Supreme Court had stated:

> "Where one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessors" (*Ramirez*, p. 825).

The viewpoint expressed in *Ray* has not been met with universal approval. For example, in *Guzman v. MRM/Elgin* (1991), the Massachusetts Supreme Court specifically rejected the "product line" exception and provided the following rationales for this rejection and for the retention of the traditional rule on non-liability:

- The "plaintiff's lack of a remedy against the original manufacturer is not a justification for imposing liability on another absent fault or causation."
- Strict liability is not based on risk-spreading, but on the goal of placing liability on one who sells a product in a defective condition. "To impose liability on a successor corporation which did not manufacture, sell or market the product would be contrary to this principle."
- The product line theory constitutes a "very real threat" to small businesses, inhibiting "the free alienability of corporate assets [and] forcing some small businesses to liquidate rather than transferring their assets, to the detriment of the economy in general" (*Guzman*, 1991, pp. 568-571).

3.1 The Merger or Consolidation Doctrine

The law relating to "mergers, consolidations, and acquisitions" provides a special area of discussion and "aside from the product line exception, the de facto merger exception has been the most controversial" (Fisher and Powers, 1988, p. 613; see also Matheson, 2011).

In general, Professors Phillps et al. (2002, p. 617) point out that "If a corporation acquires the stock of another corporation, the other corporation dissolves, and the acquirer then continues to market the product of the other, logically successor corporation liability should apply." Thus, in analyzing the area of consolidations, acquisitions, and mergers, there is one instance in which a successor corporation will be held liable as a *matter of law* for the actions of a predecessor corporation: that is, when a corporation formally acquires another corporation by means of a merger or acquisition pursuant to the terms of a statute—in a traditional *de jure* merger (see, e.g., *Hoover v. Recreation Equipment Corporation*, 1989).

A statutory or *de jure* merger (as opposed to a *de facto* merger) requires the approval of the shareholders of both corporations. The merger may be accomplished through an exchange of stock, or payment in cash or property for the stock of the acquired corporation. Upon the completion of the merger, the acquired corporation ceases to exist as a legal entity. In contrast, a *de facto* merger may occur "as a result of a vote of the directors of the two corporations, without shareholder approval" (Phillips et al., 2002, p. 616; generally, Reilly, 2003).

In a case of a *de facto* merger, some courts will apply successor liability only in circumstances when the assets of the acquired corporation are purchased with the stock of the successor corporation, so that the stockholders of the predecessor corporation become stockholders of the successor corporation (e.g., *Savage Arms, Inc. v. Western Auto Supply Co.*, 2001), although no continuity of shareholders is required in a traditional *de jure* merger. However, in applying the *de facto* merger doctrine to products liability cases, a majority of courts will require "some degree of common identity of officers, directors, and stockholders between the selling and purchasing corporations" (*Diaz v. South Bend Lathe, Inc.*, 1989), although this may not be a prerequisite as some jurisdictions do not require any continuity of shareholders or corporate personnel (*Hoover v. Recreation Equipment Corporation*, 1989).

4. Successor Liability and Bankruptcy

The extension of liability and a rejection of the traditional corporate rule of non-liability may, however, place this objective at direct loggerheads with the aims and purposes of the *preemption* (Hunter et al, 2012, p. 78) and “fresh start” principles of federal bankruptcy law.

Warner (2016) notes that one of the goals of the Bankruptcy Code (*Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)*, 2005) is to provide a debtor with a "fresh start" “while maximizing the value of the debtor's estate and the proceeds available to creditors by coordinating the orderly distribution of the debtor's assets in accordance with the Bankruptcy Code.” In a Chapter 7 bankruptcy proceeding, providing a debtor with a "fresh start" normally results in the discharge of the individual debtor's past debts and liabilities (see generally Orovitz, 2013). In contrast, the discharge under a Chapter 11 reorganization plan may involve a process of negotiating with creditors for a reduced payment on claims, pursuant to the intentions of the drafters of the Bankruptcy Code, who stated "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders" (cited in *New Wave Personal Communications, Inc. v. FCC*, 2001, p. 155, quoting H.R. Rep. No. 595, 1977, p. 220).

In interpreting the effect and purposes of bankruptcy, individual federal courts have reached very different conclusions and have based their decisions on very different theories in determining whether successor liability can exist under the Bankruptcy Code (e.g., Coco, 1997).

An early elucidation and application of principles unique to the relationship between bankruptcy and the liability of a successor corporation was laid out in the *bankruptcy proceeding* filed in *In re White Motor Credit Corporation* [White Motor] (1987), and in a subsequent *products liability suit* filed by the plaintiff in *Conway v. White Trucks* (1989, District Court). In the bankruptcy action filing by White Motor, the bankruptcy court stated the broad proposition that bankruptcy law may preclude or *preempt* the liability of a successor corporation that purchases the assets of a bankrupt party in a bankruptcy reorganization:

> "The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy code" (*In re White Motor Credit Corporation*, 1987, p. 950).

In *Conway v. White Trucks* (1989, District Court), the plaintiff was injured by an allegedly defective truck that had been manufactured and sold by the White Motor Corporation. However, after the truck had been sold, White Motor Corporation filed for bankruptcy. Volvo had purchased the assets of White Motors in bankruptcy and then continued to operate White's truck manufacturing business. The plaintiff sued Volvo in products liability for injuries sustained in an accident with a truck manufactured and sold by White Motor.

The District Court framed the issue as follows: whether Volvo, as the business successor to White Motor, can be held liable for injuries allegedly caused by a product sold by White Motor *before* Volvo had purchased White Motor's business in the bankruptcy proceeding?

The District Court had originally concluded that the imposition of successor liability on Volvo was rational in light of *Dawejko v. Jorgensen Steel Company* (1981). The court cited the fact that Volvo had purchased both the name and good will of White Motor; that although White Motor continued to operate under a new name, it no longer manufactured trucks; that Volvo marketed White Motor's former products with only insignificant changes under their former names; and that Volvo had kept many of the same clients and had retained many of White Motor's former employees.

On reconsideration after the jury had rendered its verdict, the District Court reaffirmed that while the "product line" exception was in fact the law in Pennsylvania, it concluded that the exception was not applicable to the facts established in this case. Interestingly, the District Court pointed to the existence of a fund in the bankruptcy court against which the plaintiff could have pursued its claim. The existence of this fund "outweighed the factors that had originally made imposition of successor liability seem appropriate" (*Conway v. White Trucks*, District Court, 1989, p. 452). The District Court evinced a preference for this approach over the "loose formulation" of liability under *Gonzalez*. The court stated:

> "… the record clearly reflects that there was available insurance coverage and a special fund was set aside in the course of the reorganization to accommodate those in the position of the Plaintiffs" (*Conway v. White Trucks*, District Court, 1989, p. 452).

The court dealt with another issue. The plaintiff in *Conway v. White Trucks* claimed that he did not have knowledge of the bankruptcy proceeding filed by White Motor until *after* the time for filing a claim had expired. The court disagreed, and noted that the plaintiff had in fact received notification—notification by publication—and that such notification "may be reasonable where ascertainment of unknown claimants may be burdensome." The court stated:

> "Conway, for whatever reasons, did not attempt to assert his inadequate notice argument against White either in the bankruptcy court or as a justification for allowing a late proof of claim, as permitted by Bankruptcy Rule 30003(c)(3), or in the District Court in opposing the grant of summary judgment in favor of White" (*Conway v. White Trucks*, 1989, Court of Appeals, p. 96).

The fact that the plaintiffs has lost "their opportunity to take advantage of these measures by failing to timely file a Proof of Claim" was not dispositive in and of itself in determining wither the general rule cited in *Polius v. Clark Equipment* (1986) or the "loose formulation" found in *Ramirez* (1981) should apply. In the end, the Third Circuit Court of Appeals affirmed the District Court's dismissal of the plaintiff's complaint against *Volvo* because "the loss of a remedy against the original manufacturer must be a prerequisite to the imposition of the product line exception." The plaintiff's had a remedy—they simply failed to properly exercise it.

Other cases have been decided based on the rational of *In re White Motors.* For example, in *Stewart v. Telex Communications, Inc.* (1991), the California Court of Appeals found the "bankruptcy subversion" argument to be persuasive in denying a products liability claim against a successor corporation that had purchased a predecessor corporation's assets in bankruptcy, holding that "it was the predecessor's bankruptcy and not [the successor's] subsequent purchase of the assets that destroyed [the plaintiff's] remedies" (*Stewart*, 1991, p. 676, citing *Nelson v. Tiffany Industries, Inc.*, 1985, p. 537). Since the bankruptcy of the predecessor and not the successor corporation's acquisition of the assets of the predecessor had resulted in the denial of the claim of the plaintiff, the plaintiff could not rely on one of the key exceptions to the general rule of non-liability under the theory that it would be fair to hold a successor corporation liable because of the "virtual destruction of the plaintiff's remedies against the original manufacturer caused by the *successor's acquisition* of the business."

It is important to note that not all jurisdictions have concurred with the *White* court. For example, in *Renkiewicz v. Allied Products Corporation* (1992), a Michigan Court of Appeals decided that the Bankruptcy Code did not discharge claims against a bankruptcy debtor that had accrued after the debtor's bankruptcy reorganization had been confirmed, and that such claims against a successor purchaser of the assets of a bankrupt party were not preempted by the bankruptcy statute. The *Renkiewicz* court distinguished its facts from those in *White,* since the claim in White had arisen before the bankruptcy claim had been confirmed.

Later, in *Zerand-Bernal Group, Inc. v. Cox* (1994), the Seventh Circuit decided that a 363 Sale only operated to extinguish a lien against the debtor, and held that a successor liability claim was *not* barred as a result. In *Morgan Olson LLL v. Frederico* (2012), a Federal District Court in New York refused to enforce an injunction that would have enjoined a successor liability claim on grounds that doing so would violate the plaintiffs' Fifth Amendment due process rights.

5. Returning to GM

Given this backdrop, in cases such as those involving GM, should successor liability be imposed on a party that carries out what may be termed as a "sleight-of-hand transaction" in which the corporation essentially sells its assets to itself and yet escapes most of its liabilities as if accomplished through the vehicle of an asset sale? As has been noted, the traditional plan of reorganization filed by a debtor is designed to ensure that an orderly distribution of a debtor's estate will take place in an effort to maximize the value of the estate so that each creditor will be paid to the fullest extent possible. Warner (2016) argues that:

> "Traditional reorganization serves the underlying goals of the bankruptcy system: protecting the rights of all creditors and trying to make them whole. Debtors have long used § 363 to sell a portion of their assets to generate cash for their reorganization plans. The legislative history of § 363 shows that Congress intended to protect the collateral of each creditor in the course of a 363 Sale" (Warner, 2016, pp. 554).
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> Warner continued:
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> "However, the 363 Sale process is susceptible to abuse by the debtor and unsecured creditors are left vulnerable. Unsecured creditors are unable or simply unwilling to protect their interests by taking part in a 363 Sale. As a result, a 363 Sale can disproportionately advantage the debtor and select creditors" (Warner, 2016, p. 554).

In the case of GM, the "New GM" received all of its predecessor's assets free and clear of liabilities, and retained the same shareholders and management as its predecessor while continuing operations—clearly not a "traditional asset sale." Warburton (2010, p. 547) argued that "[s]cholars disagree about whether the . . . GM 363 sale constituted [a] reorganization that should have been conducted pursuant to plan confirmation procedures instead of section 363 asset sales. In other words, were the section 363 transactions true asset sales or were they disguised reorganizations?"

5. Final Argument

The March 29, 2010 plan confirmed by the bankruptcy court allowed GM to restructure itself by reducing the number of its plants by thirteen, renegotiate its labor contracts, lay off approximately 23,000 workers, terminate 900 dealerships, and discontinue some of the weaker automobile brands in its sales portfolio such as Pontiac, Saturn, Hummer, and Saab in order to concentrate on the Chevrolet, Cadillac, GMC, and Buick brands. In reality, GM did not continue its operations as "New GM," although some radio and television broadcasts advertised as such. In fact, most of GM's employees and management remained with the company, indicating that what had occurred could be characterized more as an internal reorganization rather than an asset sale. Isidore (2012) reported that two years after GM escaped bankruptcy, the company posted its highest annual profits ever recorded.

Given the exigencies of the period 2008-2009, the federal government—clearly the largest creditor of GM—had a great interest in the success of GM's 363 Sale. While the 363 Sale was informally agreed to by the parties *prior* to filing for bankruptcy, Adler (2010) reported that GM's other creditors—including those who had product liability claims—were not given the opportunity to assess whether the value of the sale was fair and equitable to all parties involved. In essence, GM would determine which liabilities *it* would recognize and which liabilities *it* would discharge.

What is clear that while a public policy argument could be made as to the positive aspects of a 363 Sale, it is unclear whether the process was conducted at the expense of the seventeen individuals who were killed by GM's defective vehicles and "roughly 2000 people, 500-600 of whom are likely to have serious claims, with a potential total liability to GM of between $1 billion and $2 billion" (Collins, 2009), and whose families were potentially left without an effective remedy. These injured parties who were denied the opportunity to bring a products liability claim against the "New GM" were now forced to "compete with all other creditors for any assets left in the "Old GM"—now known as Motors Liquidation Company" (see Kubasek et al., 2015, Chapter 2).

A Post Script – At Least on GM

As a partial resolution of the issues surrounding the GM bankruptcy, "in the face of significant pressure from the public and state attorneys general, GM changed its bankruptcy plan and agreed to assume some liability for injuries to drivers as a result of vehicle defects" (Kubasek et al, 2015, citing *In re General Motors Corporation*, 2009). The "New GM" would be responsible for *post-bankruptcy* claims even if the claims arose from defects in vehicles manufactured prior to the bankruptcy. However, the "New GM" "would not be responsible for lawsuits against the Old GM that were pending at the time of the bankruptcy filing and any damages awarded to drivers who previously won a suit against the old GM but had not collected the money" (Kubasek et al, 2015). The list of these creditors included persons who had been injured prior to the filing of the General Motors bankruptcy petition as a result of the faulty ignition switches, but whose claims had not been adjudicated or who had been unsuccessful in collecting damages. These faulty switches had resulted in 84 deaths, 157 injuries, and in a recall of 2.6 million vehicles. These persons will be required to pursue their claims against "Old GM," allowing the "New GM" to avoid a potential $10 billion in claims (see Morrison, 2009; Brubaker & Tabb, 2010). Was this fair to these injured parties?

It seems that in bankruptcy, as in life, "timing *is* everything"!

6. Providing a Possible Solution

It will be no easy task attempting to balance the core purposes of bankruptcy, which include providing a debtor with a "fresh start" and not placing an unreasonable burden on the purchasers of assets to be responsible for debts for which they did not allocate resources through an escrow arrangement or which would negatively impact upon their equity position in their acquisition, *and* the interests of injured parties who have come to rely on strict liability for compensation for defective products in the spirit of *Greenman v. Yuba Power*: "The purpose of the rule of strict tort liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves" (*Greenman*, 1963, p. 901).

Here, we provide some "action points" to think about:

1. Vest in the bankruptcy court additional equitable powers to ascertain underlying facts relating to issues of liability for defective products in coordination with the *Consumer Products Safety Commission* and the *Federal Trade Commission* through the appointment of a **Products Liability Master** in such cases;
2. Permit the operation of the "traditional rule" regarding successor liability only in cases of a true asset sale/purchase which exhibits the characteristics of such a sale/purchase and not a mere corporate reorganization as may be argued took place in GM: new or substantially new management; new or substantially new funding sources for operations; etc.;
3. Require a "predecessor corporation" to **affirmatively disclose any product liability claims** of which they have actual knowledge or under a "reasonable basis to know" standard in the same way franchisors are required to affirmatively disclose law suits and potential claims (FDD, Litigation History, Part 3), and previous bankruptcies (FDD, Bankruptcy, Part 4) under the *Franchise Disclosure Document*, generally known as the *Franchise Rule*, promulgated by the Federal Trade Commission (FTC, 2017; see also Seid, 2016);
4. **Posting of notice** of proposed asset sales, bankruptcy actions, notice of defective products by such parties, information regarding filing of a proof of claim and other relevant information on the websites of the Federal Trade Commission and the Consumer Products Safety Commission and on a special "Asset Sale" website of the Bankruptcy Court with jurisdiction and a national "Bankruptcy Filing-Products Liability" website to be created;

5. **Amend the Bankruptcy Act** to establish product liability claims on the same level as other "priority creditors"; in fact, creating a *"super priority" class* for injured consumers for personal injury claims, with a non-priority (non-secured) status for property claims which may be compensated through traditional warranty actions or the purchase of insurance;
6. Require a corporation or other entity to post a ***"Bankruptcy Proceeding Product Liability Bond"*** with a modest set-up fee to be paid for jointly by the predecessor and successor corporation established under the auspices and authority of the Federal Bankruptcy Court, and the proceeds of which would be secured as a funding source as a trust fund held by the Federal Reserve Board by all corporations involved in domestic manufacturing operations, amounting to a the same percentage as required contributions to a state workers' compensation fund or some percentage thereof (suggested one-third to one-fourth) determined by federal law or pursuant to administrative regulations adopted by the Federal Trade Commission;
7. Upon determination by the Bankruptcy Court that products liability claims have been adequately discharged, the set-up fee (a sum of 1% to 3% of the amount of the bond) shall be retained by the Products Liability Master in the **Trust Fund** in order to guaranty the fiscal viability of the fund;
8. Recognize claims which arise from actions taken by predecessor corporations against successor corporations for a period of ***five years*** after the decree of the bankruptcy court unless it may be proven that the predecessor corporation engaged in fraud, misrepresentation or any similar conduct in which case there would be no statute of limitation for such claims.

The GM bankruptcy, and its subsequent self-determination as to claims it would or would not recognize, calls out for creative and practical solutions. What is apparent is that the mish-mash of actions undertaken by various Bankruptcy Courts, exercising jurisdiction in individual bankruptcy cases, in attempting to decide whether the general rule of non-liability for a successor corporation or to assign liability based on the application of one or more of the recognized exceptions, should and can only be met with a national solution which meets the conundrum of the proper balancing of competing interests.

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