

might have the same type of case. Be involved and know who is working on the kinds of cases you want to work on.¹⁰

Where the Cases Are Headed

In using and relying on the Valukas report, GM waived its attorney-client and work product privileges. It did so by revealing the specific subject matter of legal communications and using them to gain a tactical advantage in the litigation. We expect discovery to reveal further communications between GM and its inside and outside counsel, which we think are discoverable under theories of waiver and crime fraud exception.¹¹

One of those communications actually told GM to settle *Melton* in light of the nine years of cover-up and the potential exposure to punitive damages. Despite that warning, GM neither settled nor recalled the vehicles, and we think that should be an issue for punitive damages. Courts generally do not look favorably on litigants who waive part of the privilege to gain an advantage but then assert the privilege to keep related documents hidden.

If you are handling a GM case, you must study the Valukas report, which details GM's misconduct and negligence. GM even waived the attorney-client privilege and work product doctrine to release the report. It took Valukas more than 300 pages to tell the GM ignition defect story, and it clearly is not complete. The report identifies many documents and potential witnesses.

Even if you do not have a GM ignition switch case, the Valukas report shows how GM really works. It is chock-full of document names, types, forms, and committees. You can use it in any GM case and motion to compel. We expect to use it in cases against other automakers, given what it shows about the overall car-making process—and how much effort it takes to gather full data.

Valukas said his firm reviewed more

GM TESTS THE LIMITS OF LIABILITY POST-BANKRUPTCY

By Todd E. Phillips and
 Andrew J. Sackett

In April 2014, General Motors LLC (“New GM”) sought to avoid the potential responsibility for ignition switch defects by asking the U.S. Bankruptcy Court for the Southern District of New York to enforce the terms of its 2009 bankruptcy sale and injunction.¹ Those terms declared that New GM would not be liable for almost any products liability claims against General Motors Corp. (“Old GM”) except those that arose after Old GM was sold to and became New GM.² Enforcing such terms would enjoin plaintiffs who brought more than 80 economic loss class action lawsuits against New GM for the ignition switch defects from proceeding.

While New GM's attempt to evade liability based on its predecessor's bankruptcy was bold, it was not unexpected. For more than 30 years, defendants have aggressively used Chapter 11 bankruptcy filings and maneuvers within the bankruptcy process to devalue products liability lawsuits—or wipe them out entirely. Johns Manville, A.H. Robins, Dow Corning, and now GM have all availed themselves of mechanisms in the bankruptcy system to try to reduce their liability. Plaintiff attorneys whose clients are forced into the bankruptcy arena must be familiar with some basic tools to counteract these maneuvers.

Products liability defendants who are also debtors generally use some or all of the following bankruptcy mechanisms:

- **claims bar dates**, where the debtor seeks to use Bankruptcy Rule 3001 to establish a bar date, and products liability claimants must file proofs of claim before then to protect their claims
- **allowance proceedings**, where the debtor seeks to affix a dollar amount

on a particular claim or group of claims³

- **claims resolutions procedures**, a typically one-sided process in which the debtor attempts to resolve the tort claims in its favor within the confines of bankruptcy⁴
- **a sale of assets “free and clear,”** under 11 U.S.C. §363(f)(1), in an attempt to eliminate the purchaser's successor liability, leaving the claims with the debtor's estate
- **establishing post-confirmation trusts** and channeling liabilities to those trusts⁵
- **confirming a plan of reorganization** that provides for only partial payment of the liquidated tort liabilities

The law imposes clear limitations on a bankruptcy court's power to eliminate products liability claims. For example, when a bankrupt defendant attempts to limit the rights of future tort claimants in a products liability bankruptcy, it can raise issues of constitutional due process and notice. A similar issue has arisen in the GM litigation: Can a defendant that allegedly knew of a product defect fail to give notice to tens of thousands of affected people and still transfer its assets free and clear of liability?

Some statutory limitations have particular relevance to personal injury and wrongful death victims with products liability claims. Congress specifically reserved to the federal district courts (rather than bankruptcy courts) adjudicatory authority over these claims against debtors.⁶ Likewise, the right to a jury trial for personal injury and wrongful death claims is preserved in the district court and not affected by the bankruptcy filing, thus limiting a debtor's strategy to eliminate such claims.⁷

When Old GM filed for bankruptcy in 2009, the U.S. Treasury brokered a sale of Old GM's assets to New GM designed to be

than 41 million documents. We want to see what GM did not mention in the Valukas report, which—in our view—whitewashed management's involvement somewhat.

Numerous state court actions are pending around the country, but most of

the cases are in the MDL in New York—primarily because the bankruptcy court there handled GM's bankruptcy.¹² The court may split the cases into groups that involve economic injury only and those that also involve personal injury.

Kenneth Feinberg has begun

free and clear of all claims and liabilities except those expressly assumed by New GM.⁸ Existing products liability claims, like other unsecured claims, were channeled to what is called the General Unsecured Creditors Trust.⁹ Existing asbestos claims were channeled to a separate trust;¹⁰ the status of future asbestos claims is uncertain, as such claims against New GM were barred only to the “extent constitutionally permissible.”¹¹

New GM argues that it did not assume the liability for any products liability claims against Old GM except those arising directly out of death, personal injury, or other injury caused by accidents on or after the closing date in 2009.¹² New GM also assumed liability for lemon law and certain warranty claims.¹³ It has argued that all the claims for economic loss arising from the ignition switch defect are liabilities retained by Old GM and barred by the sale order and injunction.¹⁴

Plaintiffs have responded to this argument in several ways, some of which are being briefed.¹⁵ One is the question of constitutional notice. As a threshold issue, the parties must address whether the sale order and injunction violated plaintiffs’ procedural due process rights.¹⁶ Old GM was required as a matter of due process to give actual notice of the §363 sale to all known claimants.¹⁷ Many people at Old GM knew about the ignition switch defect, including lawyers and engineers.¹⁸ And Old GM knew or could easily have found out who the vehicle owners were.¹⁹ If the ignition switch plaintiffs did not receive notice, the injunction should not apply to them, leaving them free to pursue New GM.²⁰

Another argument against New GM’s position is that New GM has committed independent torts against the ignition switch plaintiffs. For example, many people at New GM knew about the ignition switch defect from the date of the bankruptcy

through the date of the first recall in February 2014, and plaintiffs have alleged that New GM’s concealment of the ignition switch defect is actionable.²¹

New GM’s actions raise the broader question of what role bankruptcies should have in resolving products liability lawsuits and amplify the dangers of using bankruptcy to circumvent protections for plaintiffs in the tort system. The bankruptcy process can appear biased in defendants’ favor, because it is focused on the debtor’s reorganization and ensuring the new entity can be profitable. Without action by bankruptcy counsel with an eye toward protecting individual rights, tort victims may see their rights reduced or eliminated.



Todd E. Phillips is a member of *Caplin & Drysdale* in Washington, D.C., and **Andrew J. Sackett** is of counsel to the firm. They can be reached at tphillips@capdale.com and asackett@capdale.com.

NOTES

1. Mot. of Gen. Motors LLC Pursuant to 11 U.S.C. §§105 and 363 to Enforce the Court’s July 5, 2009, Sale Order and Injunction, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. Apr. 21, 2014) [hereinafter Mot.].
2. Note that plaintiffs with personal injury or wrongful death claims that arose after July 10, 2009, regardless of whether the vehicle was manufactured by Old or New GM, have the right to pursue New GM in the tort system. See *In re Motors Liquidation Co.*, 447 B.R. 142, 144 (Bankr. S.D.N.Y. 2011).
3. 11 U.S.C. §502(c)(1) (2012).
4. See e.g. Debtors’ Mot. for an Or. Approving Certain Personal Injury Claims Res. Procs., *In re Great A. & P. Tea Co.*, No. 10-24549 (Bankr. S.D.N.Y. Sept. 11, 2011).
5. In the asbestos bankruptcy context only, Bankruptcy Code §524(g) provides a process

- for channeling asbestos liabilities to a post-bankruptcy trust. See 11 U.S.C. §524(g).
6. 28 U.S.C. §157(b)(2)(B) (2012).
7. 28 U.S.C. §§157(b)(5), 1411(a).
8. Or. Granting (I) Authorizing Sale of Assets Pursuant to Amend. & Restated Master Sale & Purchase Agreement with NGMCO, Inc., a U.S. Treas.-Sponsored Purchaser; (II) Authorizing Assumption & Assignment of Certain Executory Contracts & Unexpired Leases in Connection with the Sale; & (III) Granting Related Relief at 22, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. July 5, 2014) [hereinafter Sale Or.].
9. Debtors’ Second Amend. Jt. Ch. 11 Plan at 40–45 §6.2, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. Mar. 29, 2011).
10. *Id.* at 45–48 §6.3.
11. Sale Or., *supra* n. 8, at 23.
12. Amend. & Restated Master Sale & Purchase Agreement §2.3(a)(ix) (attached as Exhibit A to Sale Or., *supra* n. 8).
13. Mot., *supra* n. 1, at 10 ¶11.
14. *Id.* at 15–16 ¶22.
15. See Stip. & Agreed Scheduling Or. Regarding the Mot. for Leave to Pursue Claims Against Gen. Motors LLC, & Alternatively to File a Post-B. Date Proof of Claim in the Motors Liquidation Co. Bankr., *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. July 7, 2014); see also Endorsed Or. Regarding Letter to the Honorable Robert E. Gerber Regarding Briefing Sched. for the Four Threshold Issues, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. Aug. 22, 2014).
16. Suppl. Sched. Or. Regarding (I) Mot. of Gen. Motors LLC Pursuant to 11 U.S.C. §§105 & 363 to Enforce the Ct.’s July 5, 2009 Sale Or. & Inj., (II) Objection Filed by Certain Pls. in Respect Thereto, & (III) Adversary Proc. No. 14-019291 at 3, *In re Motors Liquidation Co.*, No. 09-50026 (Bankr. S.D.N.Y. July 11, 2014).
17. See 11 U.S.C. §363.
18. See e.g. Anton R. Valukas, *Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls 3-11* (Jenner & Block May 29, 2014).
19. When New GM recalled vehicles for the ignition switch defect, it relied on vehicle registration records to notify vehicle owners. See GM Ignition Recall Safety Info., Frequently Asked Questions (2014), www.gmignitionupdate.com/faq.html#L3.
20. See e.g. *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 706–07 (S.D.N.Y. 2012).
21. See e.g. *Mazzocchi v. Gen. Motors LLC*, No. 14-cv-02714 (S.D.N.Y. Apr. 23, 2014).

considering injuries and fatalities that occurred in certain GM vehicles. His plan identifies under what circumstances a claim will be considered.¹³ Although Feinberg has announced that he has determined that 19 fatality claims are eligible for an award, no awards had been

made at press time. For cases that are not eligible under the plan, those clients will need to file lawsuits against GM, and most of those will likely end up in the MDL.

GM has expanded its recall several times since February. At press time, GM had recalled more than 8 million

cars as a result of the investigation that started with Brooke’s death on that dark Georgia road. What grew out of Brooke’s accident has saved countless others, improved product safety, and made one of America’s largest companies reorganize and work with NHTSA