

Products Liability Law Daily Wrap Up, TOP STORY—MOTOR VEHICLES— S.D.N.Y.: Successor liability claims in GM ignition switch litigation allowed in eight jurisdictions but barred in Maryland, (Dec. 20, 2017)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

Claims based on successor liability brought by GM car owners and lessors against General Motors, LLC in multi-district litigation involving ignition switch defects alleging that they had sustained economic losses from the defects were allowed to go forward in eight jurisdictions because there was evidence that the claims fell within the "mere continuation" exception to the general rule against successor liability. However, the claims for plaintiffs in Maryland were barred because the plaintiffs could not satisfy the very strict test for this exception in this state (*In re: General Motors LLC Ignition Switch Litigation*, December 19, 2017, Furman, J.).

"Old GM" filed for Chapter 11 bankruptcy in June 2009, and the bankruptcy court approved the sale of most of its assets to a government-created corporate entity that eventually became "New GM." New GM acquired the assets "free and clear" of most of Old GM's liabilities, including "rights or claims based on any successor or transferee liability." Old GM retained assets and liabilities not expressly assumed by New GM. Old GM eventually was dissolved pursuant to the Chapter 11 plan, with the remaining assets and liabilities transferred to a trust (the GUC Trust). Creditors with unsecured claims against Old GM were allowed to bring them against the GUC Trust until early February 2012, after which no further claims were allowed except for those that amended a prior claim or were otherwise considered timely by the bankruptcy court.

Plaintiffs asserting economic losses filed an adversary proceeding in the bankruptcy court against New GM. After various proceedings, they asked the court to hold New GM liable as successor to Old GM's unsecured debts under the laws of all 50 states and the District of Columbia. New GM moved for summary judgment; as a result of a prior order entered by the MDL court, this motion was limited to successor liability claims brought by plaintiffs in the District of Columbia and the 15 states addressed by the court in its prior opinions.

The court ruled that the successor liability claims did not fail as a matter of law as a result of having belonged to Old GM's bankruptcy estate because the plaintiffs were denied their due process right to notice. A jurisdiction-by-jurisdiction analysis was required to determine which substantive law would apply. The court concluded that Delaware law should apply to plaintiffs in seven of them: California, the District of Columbia, Florida, Louisiana, Massachusetts, New York, and Wisconsin. Claims based on New GM's successor liability were barred as a matter of law in these jurisdictions [see *Products Liability Law Daily*'s August 7, 2017 [analysis](#)].

The court reserved judgment on the claims brought in the other nine jurisdictions pending further briefing. The claims brought by plaintiffs in Alabama, Maryland, Michigan, Missouri, Oklahoma, and Pennsylvania were subject to the substantive laws of those states. Michigan substantive law applied to Illinois claimants, and New York law applied to Texas and Virginia claimants. The court then reviewed the parties' supplemental submissions.

Alabama. Applying the "mere continuation" exception to the general rule against successor liability, the court found that the plaintiffs had provided substantial evidence supporting each of the four factors in the test for this exception. Although New GM argued that the plaintiffs failed to show that they were "deprived by the asset transaction of an effective remedy," there was no Alabama precedent suggesting that this superseded the test. GM also argued that the plaintiffs could not meet the requirement that the predecessor corporation have ceased ordinary business operations, liquidated, and dissolved soon after receiving consideration for the sale

because the GUC Trust existed for eight years after the sale. However, state law provides that the predecessor for purposes of this factor is the seller corporation, and that was Old GM, not the Trust.

Maryland. The plaintiffs did not have sufficient facts supporting their claims to survive summary judgment. The court observed that the mere continuation exception is applied strictly in Maryland—and that no Maryland court has applied this exception in favor of a plaintiff. Under Maryland law, the test for this exception is the continuation of the corporate entity rather than the continuation of the business operation, and the dissolution of Old GM was not sufficient to trigger successor liability. Although there was overlap of ownership, Old GM was issued only 10 percent of New GM's stock and the majority of New GM was owned by the U.S. government. The plaintiffs did not claim that the specific purpose of the asset sale was the place them out of the reach of Old GM's creditors. Finally, the plaintiffs did not dispute that the adequacy of consideration factor and the purpose of the asset sale factor both weighed against them.

Michigan. Under Michigan law, which applied to plaintiffs from both Michigan and Illinois, the court found that the Michigan Supreme Court likely would apply the continuity of enterprise exception to their economic loss claims. Michigan's four-factor test largely mirrors Alabama's, although the court noted that Michigan's exception is more lenient because Alabama requires plaintiffs to meet all four factors whereas Michigan applies the four factors as a balancing test; thus, it followed that the plaintiffs' claims also survived under Michigan law. As with the Alabama claims, GM argued that the exception did not apply because GUC Trust was a viable source for recovery; however, Michigan allows this exception when the predecessor continues as a "shell" or is underfunded. Whether the Trust was a predecessor of New GM was in dispute, and given that the Trust stated that it will "vigorously oppose" any of the plaintiffs' requests to recover from the Trust, there is doubt as to whether the plaintiffs would be able to recover.

Missouri. As with Michigan, the court found that Missouri's five-factor test for the mere continuation exception is more lenient than Alabama's because it involves the balancing of the factors. Evidence of overlap in operations, employees, equipment, place of business, and name was sufficient for the claims to survive summary judgment.

New York. Under New York law, which applied to the plaintiffs in Texas and Virginia, for the mere continuation exception and the de facto merger exception—which the state treats as being essentially identical—the courts look to four factors, of which the plaintiffs must prove continuity of ownership but the other factors are analyzed to determine whether it was the successor's intent to absorb and continue the predecessor's operation. The fact that Old GM received 10 percent of New GM's stock and warrants to purchase up to 15 percent was sufficient for a reasonable finder of fact to find that there was continuity of ownership. Although Old GM co-existed with New GM for two years, the fact that it is now fully dissolved and that there were questions regarding whether claims against the GUC Trust were viable made summary judgment unwarranted.

Oklahoma. The court determined that New GM had not conclusively negated the possibility that it as a mere continuation of Old GM because the plaintiffs provided evidence of a common identity of directors, officer, and shareholders. The fact that Old GM continued to exist for two years after the sale and that there was good consideration for the sale was not sufficient to find in favor of New GM.

Pennsylvania. The plaintiffs' claims survived summary judgment under the mere continuation and de facto merger exceptions, which are treated identically by the state's courts. The plaintiffs provided evidence of continuity of the enterprise and continuity of shareholders; Old GM had dissolved and there were doubts regarding the plaintiffs' ability to recover from the GUC Trust; and there was evidence that New GM had assumed obligations of Old GM necessary to continue normal business operations.

The case is No. [1:17-cv-09824-JMF \(14-MD-2543 \(JMF\) and 14-MC-2543 \(JMF\)\)](#).

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Companies: General Motors, LLC

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