

## [Products Liability Law Daily Wrap Up, TOP STORY—MOTOR VEHICLES—S.D.N.Y.: Successor liability claims against ‘New GM’ for ignition switch defects barred in seven of sixteen jurisdictions, \(Aug. 7, 2017\)](#)

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 asserting that they had sustained economic losses from the defects were not barred by "Old GM's" bankruptcy because the plaintiffs did not receive proper notice of their claims in or before the bankruptcy, the federal district court in New York handling the MDL ruled in granting summary judgment in part to the plaintiffs. However, claims brought by plaintiffs in seven of the sixteen jurisdictions at issue in which the court determined that Delaware substantive law applied clearly failed as a matter of law. The court did not make any substantive rulings on the merits in the remaining nine jurisdictions in which other states' laws applied because it found that additional briefing was required (*In re: General Motors LLC Ignition Switch Litigation*, August 3, 2017, Furman, J.).

So-called "Old GM" filed for Chapter 11 bankruptcy in June 2009. The following month, pursuant to Sec. 363 of the Bankruptcy Code, the bankruptcy court approved the sale of most of Old GM's assets to a government-created corporate entity that eventually became "New GM." The terms of the sale provided that 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 was eventually 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 could bring these claims 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.

In April 2014, a group of plaintiffs asserting economic losses, such as a diminishment in the value of their vehicles, brought an adversary proceeding in the bankruptcy court against New GM. GM moved to enforce the "free and clear" provision of Sec. 363. The bankruptcy court found that Old GM had violated the plaintiffs' due process rights because they were entitled to actual notice of the sale order rather than the notice by publication that was given because the claims were known to or reasonably ascertainable by GM, but the plaintiffs could not bring suit against New GM for Old GM's conduct because the plaintiffs had not been prejudiced by the lack of such notice [see *Products Liability Law Daily's* April 16, 2015 [analysis](#)]. The Second Circuit reversed and remanded the latter ruling, finding that the plaintiffs had been prejudiced by the improper notice [see *Products Liability Law Daily's* July 14, 2016 [analysis](#)]. The plaintiffs then filed a complaint seeking 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 on a subset of these successor liability claims. As a result of a prior order entered by the MDL court, New GM's 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.

**Successor liability.** 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. New GM argued that the successor liability claims failed in light of the Second Circuit's recent decision in *In re Tronox, Inc.*, in which toxic tort claims based on successor liability were barred by the bankruptcy court's discharge injunction because they were "generalized, derivative claims comprising estate property." However, the present court observed that unlike the plaintiffs in *Tronox*, which knew about (and filed) their claims prior to *Tronox's* bankruptcy filing, the ignition switch plaintiffs did not know about their claims prior to Old GM's bankruptcy

because Old GM deprived them of their constitutional rights to notice and to be heard. Despite the broad language of *Tronox*, the district court reasoned that its holding should not apply when a party could not have brought its claims prior to the bankruptcy filing, a conclusion that was strengthened by the Second Circuit's decision in the present litigation.

**Choice of law.** A jurisdiction-by-jurisdiction analysis was required to determine which substantive law would apply to the successor liability claims in each jurisdiction. GM argued that federal choice of law rules applied because the case implicated important federal interests and policies, or in the alternative that New York choice of law rules applied because the court was in New York; either way, GM asserted that Delaware or New York substantive law applied. However, GM did not demonstrate that there was a significant conflict between federal policies and interests and state choice of law rules. Neither a generalized federal interest in national uniformity of bankruptcy laws nor the specific circumstances of Old GM's bankruptcy implicated national policy to a degree justifying the use of federal choice of law rules. In addition, the plaintiffs had not challenged the legitimacy of the Sec. 363 sale or any conduct of the good faith purchaser (the U.S. government), but sought only to prevent New GM from allegedly enjoying the benefits of carrying on Old GM's business without the associated costs. Their claims were exclusively founded upon state-created rights. Furthermore, even though a federal court sitting in diversity normally applies the law of the state in which it sits, this general rule does not apply to MDL cases, in which the transferee court must apply the law of the state that would have applied to the individual cases if they had not been transferred for consolidation. In this case, the plaintiffs had been allowed to file directly into the MDL court solely to reduce costs and promote efficiency without any intent to alter the substantive law that would have applied without direct filing. By filing a master consolidated complaint, the plaintiffs did not consent to treat it as the operative complaint for choice of law purposes.

**Substantive law.** After conducting an individualized analysis of the sixteen jurisdictions involved, the court determined that Delaware law should apply to plaintiffs in seven of them: California, the District of Columbia, Florida, Louisiana, Massachusetts, New York, and Wisconsin. Under Delaware law, the "mere continuation" theory of successor liability has been narrowly construed, the court said, with the test being the continuation of the corporate entity, not the old entity's business operation or product lines. Applying the standards used by the Delaware courts, the district court found that the sale of Old GM's assets to the government entity was an arm's length transaction involving fair consideration, that Old GM continued to exist for two years after the sale and retained assets and liabilities, and that Old GM was issued only 10 percent of the ownership of New GM and these shares were earmarked for Old GM's creditors. Although six of New GM's thirteen board members had been Old GM board members, this was not sufficient to conclude that New GM essentially was the same "legal person" as Old GM. As a result, claims based on New GM's successor liability were barred as a matter of law in these jurisdictions.

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. Plaintiffs in these nine jurisdictions were directed to file supplemental memoranda of law on the merits by August 24, 2017.

The case is No. [1:17-cv-05400-JMF \(14-MD-2543 \(JMF\)\)](#).

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