Products Liability Law Daily Wrap Up, SETTLEMENT AGREEMENTS—MOTOR VEHICLES—S.D.N.Y.: Settlement agreement involving ignition switch and other plaintiffs unenforceable, (Jan. 22, 2018)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

A settlement agreement involving plaintiffs who owned or leased certain recalled GM vehicles containing ignition switch or other defects could not be enforced because the agreement was not fully executed by the other parties, the federal bankruptcy court administering the bankruptcy of General Motors Corp. ruled. Although the court found that the GUC Trust holding the assets of so-called Old GM had acted in bad faith in backing out of the agreement, it "regrettably" determined that the agreement contained an unambiguous provision stating that it would not become enforceable until executed. Other remedies that the plaintiffs might have were not before the court (*In re: Motors Liquidation Co.*, January 18, 2018, Glenn, M.).

In 2009, General Motors Corp. (Old GM) filed for bankruptcy and entered into a sale agreement to sell certain assets to a newly-created entity that subsequently became General Motors LLC (New GM). The sale agreement, as approved by the bankruptcy court, provided that if the bankruptcy court allowed for general unsecured claims against the sellers of more than $35 billion, New GM would be required to issue new common stock to cover the claims, up to 30 million new shares if the amount allowed by the court exceeded $42 billion. The court subsequently approved the debtors' Chapter 11 plan, which created the GUC Trust as the successor to Old GM for purposes of distribution of its assets to its general unsecured creditors.

In 2014, New GM issued several recalls involving millions of vehicles containing an ignition switch defect. Many lawsuits were filed, including those filed by the three sets of plaintiffs involved in the present case who had asserted economic loss or personal injury/wrongful death claims for vehicles involved in particular recalls over the ignition switch defect and certain other defects. These cases were consolidated before the court handling the multi-district litigation. New GM sought to enjoin these lawsuits against it by filing motions to enforce the sale order. After various proceedings, the present plaintiffs moved for authority to file late proofs of claim, and subsequently provided the GUC Trust with proffers of evidence indicating that the amount of damages for their claims, if found to be general unsecured claims, would exceed the threshold limit necessary to trigger New GM's obligation to issue additional shares. The plaintiffs and the GUC Trust disagreed over various issues regarding whether the plaintiffs could bring the late proofs of claim against the GUC Trust and whether the Trust's assets could satisfy these claims.

For months, negotiations took place among the parties. After there had been 21 drafts of the settlement agreement, which was signed off on by the signatory plaintiffs and the Wilmington Trust (the administrator and trustee of the GUC Trust), the GUC Trust met separately with New GM (not a party to the negotiations) and then informed the other parties that it had reversed its position and would not execute the agreement. Instead, New GM and the GUC Trust entered into a "forbearance agreement" pursuant to which New GM would pay all of the GUC Trust's expenses to fight additional ignition switch defect claims.

Last year, the court entered a scheduling order dividing the matter into two phases. Phase 1, the current phase, would decide whether the settlement agreement was a binding agreement and whether GM had standing to be heard on this issue. Phase 2, which is yet to be decided, will address whether the forbearance agreement should be approved; whether the settlement agreement should be approved under both bankruptcy law and non-bankruptcy law; whether New GM interfered with the settlement agreement; and whether the signatory plaintiffs and the participating unitholders interfered with the GUC Trust's performance under the sale agreement. The present proceeding involves a motion to enforce the terms of the settlement agreement.

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Standing. The court first ruled that New GM lacked prudential, constitutional, or bankruptcy standing to contest whether the settlement agreement was binding. GM was not a party to the settlement agreement and the agreement did not contain language unambiguously manifesting an intent to make New GM a beneficiary of it, with the court observing that GM actually was "the opposite of a beneficiary." New GM had a financial interest in the final outcome of the agreement, but that interest was substantially attenuated from the Phase 1 issue of the existence of a binding agreement. The court also found that GM was attempting to assert the legal rights of the GUC Trust rather than its own by arguing that the GUC Trust and the signatory plaintiffs never formed a binding settlement agreement. Finally, New GM was not a party of interest under §1109 of the U.S. Bankruptcy Code; the cases cited by New GM involved—unlike the present case— the issue of whether a party has bankruptcy standing after a contract is formed, and GM did not cite to any authority indicating that a third-party non-beneficiary to the agreement would be a party of interest in a dispute over whether a binding settlement agreement had been entered. However, the court indicated that New GM may have standing in the Phase 2 portion of the litigation.

Enforceability of unexecuted agreement. The unexecuted settlement agreement was not binding and, thus, unenforceable because the parties had reserved the right not to be bound. Applying the so-called *Winston* factors, particularly the objective intent of the parties as expressed in the language of the agreement, the court concluded that the parties did not have an oral agreement in place before negotiating the terms of the written agreement but instead contemplated that they would not be bound until the parties signed the written draft. There was an unambiguous provision that the agreement would not be enforceable until executed, but it was never fully executed by all of the parties. The plaintiffs argued that this provision was boilerplate, and "credibly" testified that during the negotiations the GUC Trust gave "every indication" that it intended to be bound and had informally signed off on the agreement. However, the court found that language similar to this provision has "repeatedly" been found to indicate that the parties did not intend to be bound orally, and observed that the agreement contained a merger provision providing that the settlement agreement contained the entire agreement and understanding between the parties.

Weighing the other *Winston* factors, the court also found that actions by the GUC Trust in leading up to the end of the negotiations did not constitute partial performance of the agreement. Although the court determined that the terms of the settlement had been agreed upon, and that the settlement was the type of agreement normally committed to writing and had, in fact, been committed to writing, these remaining factors were outweighed by the evidence of the objective intent of the parties not to be bound until the agreement was fully executed.

The case is No. 09-50026 (MG).

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