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Claims Chat

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Too Big to Flail: Resolving Claims Efficiently in the GM Cases

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With all the attention drawn to the rescue of General Motors (GM) during the 2012 presidential election, it may surprise the general public that the chapter 11 cases of the debtors in the GM bankruptcy continue even today.[2] Long after the § 363 sale of substantially all of the debtors' "good" assets to the present-day General Motors Co., and after the confirmation of the debtors' chapter 11 plan and the dissolution of each of the debtors, the cases remain open, and several hundred remaining claims against the debtors' estates are still being resolved.

That being said, the progress achieved to date has been impressive, especially considering that more than 71,000 proofs of claims were filed against the debtors in an aggregate amount of more than $300 billion, excluding unliquidated claims. Claims reconciliation in large bankruptcy cases requires integrated coordination and calculated planning by restructuring professionals. In this article, several facets of this planning and execution are explored in the context of the GM cases.

Tailoring the Claims Process to the Nature and Size of a Case

In most cases, the claims-reconciliation process follows a general pattern. After a debtor files its schedules of financial affairs, at some point the debtor seeks to establish a bar date for the filing of claims. As claims are filed, the debtor assesses and places claims in various categories to further understand the landscape of claims and to develop strategies to reconcile them. After the bar date, the debtor typically begins to file omnibus objections to claims. Gradually, the debtor files individual objections that could not have been more efficiently resolved through an omnibus objection or to address disputed claims that could not be settled.

The claims process in a case will often need to be tailored to the specific nature of the claims associated with the debtor's pre-petition business operations. For example, in GM (renamed Motors Liquidation Co. and known colloquially as "Old GM"), a sizeable amount of the claims against the debtors were personal-injury claims by persons who had been injured in automobile-related accidents. To efficiently resolve these claims, it was necessary to establish alternative dispute-resolution procedures to overcome the bankruptcy court's lack of jurisdiction to resolve those claims.[3]

In addition, many of the claims filed in the Old GM case were contingent claims by insurance companies or other parties that sought indemnification from the debtors on account of underlying product-liability claims or environmental liability that was shared by both the claimant and the debtors. As such claims may be disallowed under § 502(e)(1)(B) of the Bankruptcy Code, it was appropriate for the debtors to obtain an order authorizing the filing of omnibus objections to claims on the basis of § 502(e)(1)(B) in addition to the limited bases of objection specified in Rule 3007 of the Federal Rules of Bankruptcy Procedure (FRBP).[4]

The claims process will also often need to be tailored to the size of a chapter 11 case and the volume of claims filed in the case. For example, the debtors in the Old GM case obtained authority to

1 The views expressed in this article represent the views of the authors and not AlixPartners LLP or Weil, Gotshal & Manges LLP. The authors gratefully thank **Carrianne Basler**, Susan Brown, Joseph H. Smolinsky and David Vanaskey for their assistance with this article.

2 The entity that continues to produce cars today, General Motors Co., is a separate and distinct entity from the debtors that filed for chapter 11 protection, which are Motors Liquidation Company (f/k/a General Motors Corp.) and its affiliated debtors. General Motors Co. is not, and has never been, a debtor in any bankruptcy case.

3 28 U.S.C. § 157(b)(5).

4 Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 3007 and 9019(b) Authorizing the Debtors to (i) File Omnibus Claims Objections and (ii) Establish Procedures for Settling Certain Claims. *In re Motors Liquidation Co.*, Case No. 09-50026 (Bankr. S.D.N.Y. Oct. 6, 2009) (ECF No. 4180).

settle claims below a threshold settlement amount of $50 million without the need for court approval under FRBP 9019, subject to obtaining the consent of the statutory committee of unsecured creditors in certain instances. In many chapter 11 cases, particularly in large cases, it may also be advisable to seek an order or include a provision in the chapter 11 plan to prohibit, after the confirmation of the plan, new claims from being added to the claims register without court approval.

Claims to Resolve Prior to the General Claims Process

The general claims process is said to begin in earnest in the later stages of a chapter 11 case, but it is often apparent that the resolution of certain claims or categories of claims needs to be addressed much sooner because it may be integral to the confirmation or implementation of a chapter 11 plan. Such was the case with certain environmental and asbestos liabilities in the Old GM cases.

Prior to the commencement of the Old GM cases, the debtors were one of the largest owners of industrial property in the U.S. Along with that distinction came the undesirable burden of owning a considerable amount of property that exposed the debtors to substantial liability under environmental laws. In particular, environmental liability to governmental regulators for property that a debtor currently owns in bankruptcy may subject the debtor to administrative-priority claims on account of the obligation to remediate such property. A debtor will often relieve itself of its continuing remediation obligations by transferring the contaminated property pursuant to its chapter 11 plan to a trust created to own and remediate the property. The trust must be sufficiently funded, however, or governmental regulators will object to that aspect of the chapter 11 plan.

In Old GM, the debtors and their professionals undertook a monumental effort to analyze the debtors' properties and convince governmental regulators that the environmental trust contemplated by the debtors' plan was sufficiently funded. To foster transparency with governmental regulators, the debtors made available a secure web-based platform with real-time information about environmental conditions, cost estimates and assumptions. In the end, the debtors and governmental regulators agreed on the formation of a $536 million environmental trust, the largest ever created. The resulting trust was also unique in that rather than having a contingent reserve for cost overruns at every remediation site, the trust required fewer funds because it incorporated a portfolio-wide cushion to allow the shifting of funds from sites where there are underruns to sites where there are overruns, with the intention of having sufficient funds overall.

In addition to environmental liability, at the time the debtors' cases were commenced, approximately 29,000 asbestos personal-injury cases were pending against the debtor. In order to address both present and future claims, the debtors' chapter 11 plan provided for the creation of an asbestos trust through which all asbestos claims would be channeled. Due to the fact that the debtors' chapter 11 plan was essentially a "pot plan,"[5] the debtors' asbestos liabilities needed to be resolved before a meaningful level of distributions could be made to holders of allowed claims. The debtors' aggregate asbestos liability also needed to be established to overcome any potential objections relating to the feasibility of the plan insofar as the amount of distributions held in reserve, on account of the remaining disputed claims. While the debtors were prepared to proceed with an estimation hearing to determine its aggregate asbestos liability, the amount of the liability was eventually resolved consensually.

Finding Efficiencies in the Case

In the Old GM case, the sheer volume of claims and the overall magnitude of the cases required the debtors to find ways to work more efficiently with their counsel and the considerable number of professionals involved, many of whom were located in different parts of the country. An online claims-management portal was created by the debtors' financial advisers with input from debtors' counsel and other stakeholders to provide professionals with secure online access to all relevant claims information. The portal enabled professionals to not only instantly access copies of any claim and related documentation, but it also enabled them to view and update the status, case notes and history of any claim. By allowing the debtors to work more efficiently with their various advisers, the portal decreased the time necessary to review and manage claims, and to determine the appropriate course of action to resolve them.

In addition to relying on state-of-the-art information technology, the debtors sought to create efficiencies by looking for ways to change even common approaches to resolving claims. One such example is the approach taken by the debtors to expunge nearly 30,000 claims filed by individual bondholders whose rights to a distribution were already being represented by an indenture trustee or protected through other means. At the same time that the debtors sought authorization to object to those claims through omnibus objections, the debtors also made several nontraditional requests to the court.

The debtors sought to increase the number of individual bondholder claims that could be placed on each omnibus objection from 100 to 500. To avoid the costs of serving the voluminous omnibus objections, authorization was also obtained to send each claimant only a short individualized notice explaining the basis for the objection. In order to reduce the number of responses filed by the bondholders, which could have been time-consuming and costly to litigate, the individualized notices were written in "plain English" to clearly communicate to bondholders that their rights were already protected. The result was an extraordinarily low response rate from the individual bondholders.

Keys to Remember When Resolving Claims

- Perform initial claim analysis to understand the major categories of claims, major risk areas and special circumstances; this will help shape objection strategy and priorities.
- Think about the technology infrastructure needed to administer the case, and pay attention to workflow among the debtors, the financial adviser and counsel. How do you track who is doing what?
- Gain court approval early for any exceptions to Fed. R. Bank. P. 3007.
- Identify opportunities to deliver alternate forms of notice to minimize objection responses and save costs; minimize legalese in objections targeted to *pro se* claimants and others.
- Develop a clear strategy for handling late-filed claims. Use bar date order and claim-administration procedures to your advantage.

5 A "pot plan" is where each holder of an allowed claim gets a ratable distribution of the finite consideration available to creditors.

The ADR Process in the Case

Due to the nature of the debtors' former business, a considerable number of the claims filed in the cases were automobile-related personal-injury tort claims, which bankruptcy courts lack jurisdiction to liquidate under 28 U.S.C. § 157(b)(2)(B).[6] Even if the bankruptcy court could liquidate such claims, the individualized, fact-driven nature of each claim and the myriad experts necessary to prove one's case would have made the claims prohibitively time-consuming and expensive to litigate.

To address these claims, the debtors developed alternative-dispute resolution (ADR) procedures that incentivized claimants to participate in settlement negotiations and empowered the debtors to resolve claims quickly. The ADR procedures, which were ordered by the court, offered claimants the opportunity to cap their claims at a lower amount in exchange for certain benefits.[7] If a proposed cap was accepted by the debtors, the debtors prioritized the settlement and resolution of that capped claim ahead of other claims, which generally allowed the creditor that submitted the cap to receive distributions before other creditors. If settlement discussions on a capped claim were not successful, mediation would then occur, the costs of which were generally paid by the debtors. The capping process was successful beyond expectation and resulted in an approximately 50 percent reduction of disputed claim amounts prior to the start of negotiations.

Mediations occurred in five cities nationwide, and an approved list of mediators was established for each site. The claimant chose the mediator and location from the approved list. The American Arbitration Association facilitated scheduling mediation with all parties including the claimant (who was required to attend), claimant's counsel, a representative of the debtors who had settlement authority, and the debtors' counsel. Parties exchanged mediation statements, and there were no discovery limitations.

> **As the complexity and size of a chapter 11 case increases, the debtor and its professionals will generally have more opportunities to tailor the claims process to address the case's particular intricacies.**

At the mediation, the debtors took great pains to be compassionate to the claimants, many of whom had lost loved ones or suffered serious injury, and to describe the effect the bankruptcy filing had on the claims from both a process standpoint and a recovery standpoint. With all parties having full information on the respective claims and with the reality of recovering less than full value for an allowed claim, it was clear that settlement was almost always the right answer for the claimants in this case. In fact, approximately 95 percent of the matters that went to mediation were settled. With this high success rate, these ADR procedures may be useful in other cases that have a large number of claims wherein the debtor's litigation exposure is high, the potential recoveries for creditors are low, and the debtor wants to quickly and efficiently resolve the claims.

Dealing with *Pro Se* Claimants

In a case of this magnitude, it was also inevitable that the debtors would have a significant number of *pro se*

6 By law, personal-injury claimants are generally entitled to a jury trial.

7 Second Amended Order Pursuant to 11 U.S.C. § 105(a) and General Order M-390 Authorizing Implementation of Alternative Dispute Resolution Procedures, Including Mandatory Mediation. *In re Motors Liquidation Co.*, Case No. 09-50026 (Bankr. S.D.N.Y. Jun. 4, 2012) (ECF No. 11777).

Typical ADR Track in GM Bankruptcy Case Study

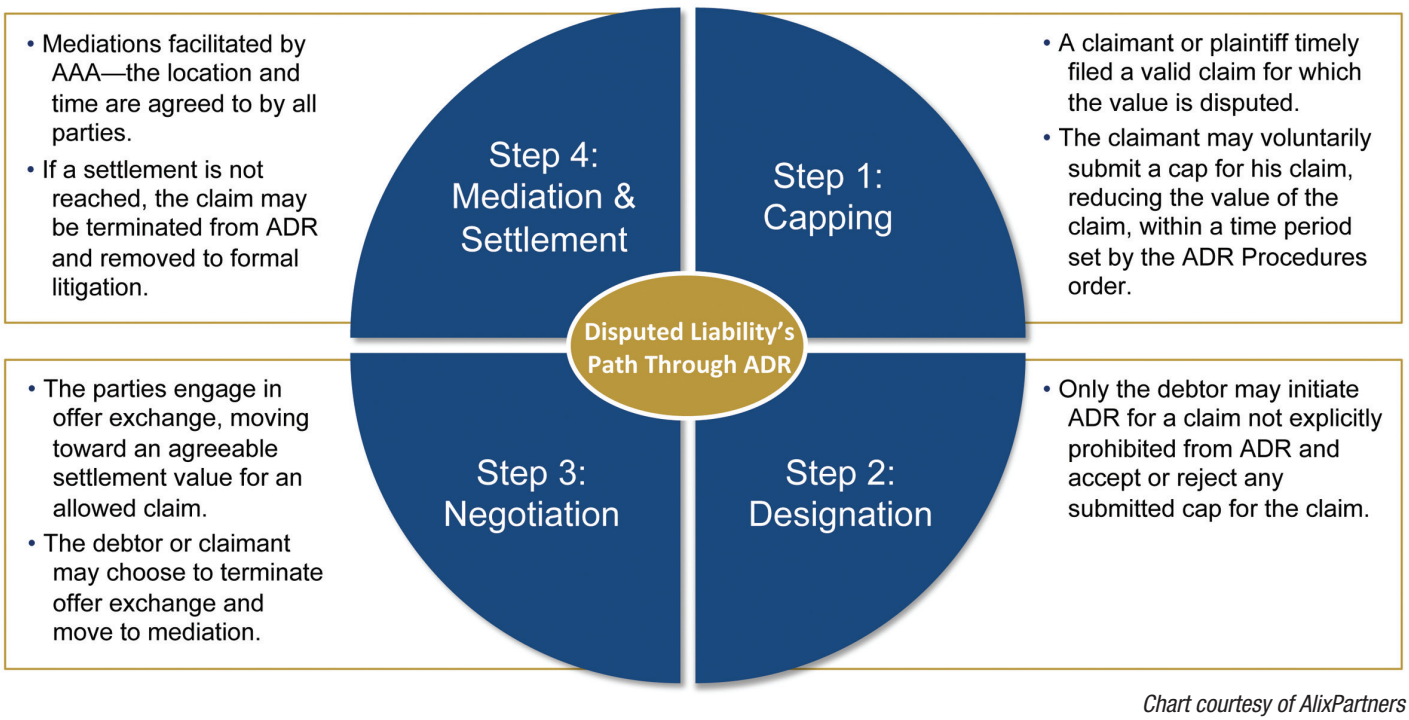

Chart courtesy of AlixPartners

claimants to interact with, as those claimants attempted to navigate the claims process. The debtors made significant efforts to streamline the handling of these claims—again using technology.

Understandably, *pro se* claimants often file claims without sufficient supporting documentation or any documentation at all. For these claimants, instead of pursuing an outright insufficient-documentation objection, the debtors made efforts to correspond with them to obtain any necessary documentation to further evaluate their claims. If such efforts were not successful due to a *pro se* claimant being nonresponsive, the debtor documented its efforts and typically filed an objection. This process allowed the debtors to separate *pro se* claimants who had legitimate grounds for filing claims from the many *pro se* claimants who filed a claim merely because they received notice of the bar date. More importantly, this process demonstrated to the court, creditor community and general public that the debtors had a real concern for ensuring that claimants were treated fairly throughout the process.

Conclusion

As the complexity and size of a chapter 11 case increases, the debtor and its professionals will generally have more opportunities to tailor the claims process to address the case's particular intricacies. Upon understanding the nature of the claims against a debtor, restructuring professionals should adapt the general claims process to facilitate case administration and look for ways to employ technology to do so. The proper use of technology and the ability to tailor the claims process will result in cases being administered faster, more efficiently and at less cost. abi

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