15-2844(L)

15-2847-(XAP), 15-2848 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF: MOTORS LIQUIDATION COMPANY,

Debtor.

(*Caption continued on inside cover)*

ON DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF GENERAL MOTORS LLC (GM LLC)

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Creditors-Appellants-Cross-Appellees,

SESAY AND BLEDSOE PLAINTIFFS, IGNITION SWITCH PLAINTIFFS, IGNITION SWITCH PRE-CLOSING ACCIDENT PLAINTIFFS, DORIS POWLEDGE PHILLIPS,
Appellants-Cross-Appellees,

GROMAN PLAINTIFFS,
Appellants

– v. –

GENERAL MOTORS LLC,
Appellee-Cross-Appellant,

WILMINGTON TRUST COMPANY,
Trustee-Appellee-Cross-Appellant,

PARTICIPATING UNITHOLDERS,
Creditor-Appellee-Cross-Appellant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The Chamber of Commerce of the United States of America has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. To protect its members' interests, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community.

The Chamber has a strong interest in this case. The Panel distorted bankruptcy and constitutional law to enable the pursuit of certain "successor liability" claims against General Motors LLC ("New GM") despite the Sale Order's preclusion of such claims. The Panel failed to account for the dubious nature of the claims at issue, which are the type of class-action allegations that cause great harm to the business community but offer paltry benefits for the class members. And the Panel's requirement that debtors catalogue all speculative theories of liability against them and provide

[1] Pursuant to Fed. R. App. P. 29(c), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel

direct-mail notice of those hypothetical liabilities to any potential plaintiff would place an enormous and unworkable burden on Chamber members.

INTRODUCTION AND SUMMARY OF ARGUMENT

To understand why rehearing and rehearing en banc should be granted, one must appreciate what this case does *not* involve. The claims at issue do *not* seek to require New GM to repair any defective ignition switches, to perform warranty service on vehicles purchased from General Motors Corporation ("Old GM"), or to recover for any post-sale accidents causing injury, death, or property damage. New GM agreed to assume all of *those* liabilities in the Sale Order. Instead, this case involves more than 100 class actions alleging far more attenuated claims of injury—for example, the alleged diminution of value of mature Old GM vehicles (which never manifested any symptom of the ignition-switch defect), or the costs of babysitting while a vehicle was repaired. Plaintiffs claim to represent a class that, based on such claims, seeks damages approaching $10 billion.

In permitting the Plaintiffs to pursue these dubious claims against New GM—notwithstanding the clear terms of the Sale Order entered seven years ago—the Panel strained to find both a due process violation and resulting prejudice from the fact that Old GM did not mail millions of individual notices of a widely publicized pending bankruptcy sale. The Panel

made little effort to consider the specific and unique circumstances of the parties' competing interests—as required by precedent—and it ignored the applicable standard of review that governs findings of prejudice.

If allowed to stand, the Panel's decision will impose enormous and impractical burdens on companies who participate in bankruptcy sales and drive up the costs for debtors, creditors, and purchasers alike. It will inevitably dilute the value of the estate of Chapter 11 debtors by requiring debtors to invite plaintiffs' lawyers to file claims regardless of merit. And it will perpetuate the kind of abusive and expensive litigation that will offer little in the way of relief for the class members, and provide an enormous windfall for the plaintiffs' lawyers who bring them.

ARGUMENT

I. THE PANEL'S DECISION DISTORTS ESTABLISHED PRINCIPLES OF DUE PROCESS AND IMPOSES ENORMOUS PRACTICAL BURDENS ON THE BANKRUPTCY PROCESS.

The Bankruptcy Court recognized the opportunistic nature of these claims, observing that dozens of class actions seeking damages for economic loss only were filed immediately after New GM announced a recall to address the ignition switch issue. *In re Motors Liquidation Co.*, 529 B.R. 510, 521 & n.4 (Bankr. S.D.N.Y. 2015). The Panel repeatedly glossed over this important distinction, describing Plaintiffs as "claiming that the ignition

switch defect caused personal injuries and economic losses, both before and after the § 363 sale closed." Slip Op. at 24.[2] *See also id.* at 62 (referring to "millions of faultless individuals with defective Old GM cars").

The Panel's failure to address the attenuated nature of Plaintiffs' claims affected its analysis. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Spinelli v. City of New York*, 579 F.3d 160, 170 (2d Cir. 2009). The analysis requires "a determination of the precise nature . . . of the private interest" at stake. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). And this flexibility extends to the form of notice required in any given case. *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 150 (2d Cir. 2014); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Panel, however, eschewed *any* flexibility. Specifically, the Panel incorrectly found the publication notice insufficient even though: (1) none of the claimants at issue notified Old GM of any loss or damage arising from alleged defects; (2) it would have cost millions of dollars to send direct mail

[2] One set of claims at issue are for personal injuries from accidents that occurred *before* the sale closed. *See* Slip Op. at 25. But these Plaintiffs were unquestionably on notice of a potential claim against Old GM before the sale, and had time to investigate and file claims against the estate.

notices to the millions of people who *might* have a faulty ignition switch (even assuming Old GM knew that this defect existed); (3) almost every single one of the claimants had actual notice of Old GM's widely-publicized bankruptcy; and (4) the Sale Order did not eliminate any claim against Old GM, but merely routed such claims to the trust established by the sale proceeds. Under these circumstances, and in light of the attenuated nature of the Plaintiffs' economic damages, the notice was constitutionally sufficient.

Moreover, the Panel's finding of prejudice from the lack of direct-mail notice gave short shrift to the factual findings of the Bankruptcy Court. Prejudice to a litigant is "a finding of fact" subject to reversal only when "clearly erroneous[.]" *U.S. ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 257 (2d Cir. 2004). Other courts have specifically held in the context of bankruptcy that "prejudice to creditors [is a] finding[] of fact and therefore subject to review for clear error." *In re Kaelin*, 308 F.3d 885, 888-89 (8th Cir. 2002) (citing *In re Arnold*, 252 B.R. 778, 784 (9th Cir. BAP 2000)). But the Panel erred by showing *no* deference to the Bankruptcy Court's finding that these Plaintiffs—even if they had received direct-mail notice and

objected—could not have changed the scope of the Sale Order, given that many objectors unsuccessfully opposed the cut-off of successor liability.[3]

The practical consequences of the Panel's distortion of due process are enormous. Future debtors will be required to spend millions of dollars and untold time mailing countless individual notices—a step that was likely redundant in this case, as GM's bankruptcy was front-page news nationwide. The decision also injects uncertainty into the bankruptcy process, making it more difficult to find purchasers and lowering the value of Section 363 sales to account for the risks of hidden successor liability. Moreover, as New GM notes, it requires debtors to provide not only notice of the sale to anybody who could bring a future claim—no matter how hypothetical or meritless—but also notice of the theory of liability. *See* Pet. for Rehearing at 2, 8-9. That novel requirement will prove disastrous for all participants in the bankruptcy process. It is an open invitation to plaintiffs' lawyers to dilute the value of the estate by filing dubious class-action claims like those at issue here. The assertion of millions of novel claims seeking billions of dollars will multiply the administrative costs to the estate. And it will harm other

[3] The Panel relied on *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), which sets forth the harmless-error standard for criminal trials. Criminal defendants' interests are far graver than the Plaintiffs' economic-loss claims, which were not extinguished by the sale but channeled to the debtor's estate.

creditors—especially unsecured creditors, including genuine tort victims—who will be left with a drastically reduced share of the debtor's proceeds.

Indeed, the class-action process is often abused, providing a windfall in lawyers' fees but few meaningful benefits for the class members. As Congress found a decade ago, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3), 119 Stat. 4. This was confirmed by a recent study conducted at the request of the Chamber's Institute of Legal Reform, which analyzed 148 consumer and employee class actions filed in or removed to federal court in 2009.[4] Of the six cases for which distribution data were public, five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.

Plaintiffs' lawyers are handsomely rewarded notwithstanding these abysmal claims rates, "[s]ince attorneys' fees in class actions are often calculated as a percentage of the recovery." Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 122 (2014). Businesses subject to large class actions are forced to spend immense amounts of money on defense costs, which can soar into the tens of millions of dollars. And

[4] *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* (Dec. 11, 2013), available at http://goo.gl/mCzSy5.

"when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Thus, the stakes in these class actions are so high that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). The Panel's decision encourages this behavior to the detriment of debtors and creditors alike.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing and rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Second Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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