

## BANKRUPTCY UPDATE

## Expert Analysis

# Detroit, General Motors And Other High-Profile Cases

**T**oday's column discusses the historic confirmation of the City of Detroit's plan of reorganization and the status of litigation that brought General Motors back before the bankruptcy court. The column also focuses on the potential sale of Energy Future Holdings' stake in Oncor Electric and the successful sale of substantially all of vitamin and supplement manufacturer Natrol Inc.'s assets. Finally, the column discusses the developments in the recently filed Trump Entertainment Resorts bankruptcy proceeding.

### Detroit Makes History

The City of Detroit sought bankruptcy protection under Chapter 9 of the Bankruptcy Code on July 18, 2013, making history as the largest municipality to seek bankruptcy protection to date.

As discussed in our prior column, in December 2013 the bankruptcy court ruled that Detroit is eligible for Chapter 9 relief, despite vehement opposition from city workers and retirees who anticipated that they will be forced to make the largest concessions in the bankruptcy proceeding. While the court noted that the city did not negotiate in good faith with its creditors, it nevertheless reasoned that engaging in good-faith negotiations prior to filing was not feasible in light of the multitude of parties involved.

In the months that followed this landmark decision, Detroit worked to gain additional plan support from its numerous creditor constituencies through a plan mediation process and filed several amended versions of its plan of reorganization as those negotia-

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tions evolved. Detroit garnered the support of unions and pension funds which agreed to slight benefit reductions. As a result, supermajorities of police and firefighters voted to accept the plan. By late July, Detroit filed its fifth amended plan which memorialized the city's settlements with certain bondholder and retiree groups.

The final hurdle to confirmation was removed when the city reached a settlement with its monoline insurers—insurance companies that provide guarantees to bondholders or issuers—to reduce its long-term debt burden during the confirmation trial. Both insurers received a combination of cash, debt and property development rights.

On Nov. 7, 2014, Detroit made history as it won confirmation of its reorganization plan. The plan eliminates more than \$7 billion in debt, allows Detroit to reinvest in essential city services and preserves a rare art collection valued at between \$1 billion and \$4 billion.

*City of Detroit, Mich.* (Bankr. E.D. Mich. Case No. 13-53846)

### General Motors

General Motors Company, which famously filed and emerged from bankruptcy in 2009, is continuing to deal with fallout from a deadly ignition switch defect which already resulted in several rounds of automobile recalls.

As discussed in prior columns, "Old GM" sold substantially all of its assets to "New GM" in 2009 pursuant to section 363 of the Bankruptcy Code. In a section

363 sale, unless expressly assumed by the purchaser, the debtor's liabilities attach to the sale proceeds.

Several years following emergence from bankruptcy, New GM became the subject of several class action lawsuits stemming from an ignition switch defect. In response, New GM argued that these liabilities relate to Old GM's products and are, therefore, barred by the sale order. In that respect, New GM sought a ruling from the bankruptcy court enforcing the sale order and barring the claims. The bankruptcy court indicated that it needs to resolve the following initial threshold questions first to rule on New GM's motion: (i) whether plaintiffs' due process rights were violated by insufficient notice of the 2009 sale, (ii) whether GM's actions in concealing the defect were a fraud on the court and (iii) scope of appropriate remedies. Discovery is ongoing, and a briefing schedule has been set.

In the interim, in October 2014, New GM was sued for \$10 billion in two consolidated class actions by customers who alleged the ignition switch problems caused 27 million vehicles to decrease in value. The suits include claims for breach of implied warranties, fraud by concealment and unjust enrichment in connection with sale of vehicles with model years 1997 to 2014. In November 2014, New GM retorted by filing a 91-page brief in bankruptcy court, once again arguing the claims should be barred by the sale order. A bankruptcy court ruling with respect to the sale injunction issues as applied to the various ignition-switch related litigations is expected in early 2015.

*Motors Liquidation Company* (Bankr. S.D.N.Y. Case No. 09-50026)

### Energy Future Holdings

On April 29, 2014, Energy Future Holdings Corp. (EFH) sought Chapter 11 bankruptcy protection in Delaware bankruptcy

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court, surpassing Enron in amount owed and marking the biggest energy company bankruptcy to date.

EFH filed bankruptcy with a “pre-negotiated” plan to spin off subsidiary Texas Competitive Electric Holdings Co. LLC (TCEH) in an equity swap with its first lien lenders who hold \$23 billion in debt. A pre-negotiated plan, similarly to a pre-packaged plan, involves prepetition negotiations between the debtor and its creditor constituencies regarding the terms of the restructuring but does not include pre-filing solicitation of plan votes.

In the summer, the debtors abandoned the restructuring support agreement in light of interest shown for purchasing the company’s stake in Oncor Electric Delivery Co. LLC. Subsequently, EFH filed a motion for approval of bid and auction procedures in connection with the sale of the Oncor stake, valued at as much as \$18 million. The bid procedures motion generated vehement opposition from the company’s creditors.

The objectors, notably including the official committee of unsecured creditors and an ad hoc group of noteholders, argued that the Oncor sale would shut off other restructuring options effectively depriving creditors of billions of dollars. Earlier this month, following a multi-day hearing, the bankruptcy court approved the bid procedures while ordering EFH to make substantial revisions to the proposed process.

The court noted that the proposed sale was a reasonable exercise of the debtor’s business judgment but required further transparency and increased involvement by the creditor committees. The court also required a longer sale process to allow for simultaneous development of alternative proposals.

*Energy Future Holdings Corp.* (Bankr. D. Del. Case No. 14-10979)

### Vitamin Maker

On June 11, 2014, vitamin and supplement manufacturer Natrol Inc. and six affiliates sought Chapter 11 protection in Delaware bankruptcy court listing \$86 million in liabilities, including a \$70 million secured obligation to Cerberus Business Finance LLC under the company’s prepetition credit agreement.

The filing was precipitated by alleged defaults under the credit agreement and was immediately followed by a contest over use of Cerberus’ cash collateral. Cerberus also immediately filed a motion seeking appointment of a chapter 11 trustee—to manage the affairs of the debtor in possession in place of current management—alleging the company’s management was in a state of disarray.

In July 2014, the debtors and Cerberus, with input from the official committee of unsecured creditors, reached a settlement resolving the cash collateral motion and motion to appoint a chapter 11 trustee. Under the settlement, Natrol gained access to Cerberus’ cash collateral to fund its operations and Cerberus received a fully secured, allowed claim for approximately \$68.8 million at 12.75 percent interest, plus costs and expenses. In lieu of appointment of the chapter 11 trustee, Natrol agreed to appoint an independent director to its board to approve all material transactions.

Following resolution of the cash collateral issues, Natrol moved forward with a sale process. Earlier this month, private equity firm ICV Partners was selected to act as the stalking horse bidder with an \$84 million bid for the company.

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Thereafter, an auction took place on Nov. 10, 2014, with a robust three-party bidding process. Ultimately, Aurobindo Pharma USA Inc. emerged with the highest and best bid of \$132.5 million in cash and assumption of certain liabilities. The impressive result will allow the debtors to not only save jobs, but pay off all creditors in full and make a substantial distribution to equity holders. ICV Partners will also be entitled to a breakup fee equal to 2 percent of its original \$84 million bid as well as an expense reimbursement of up to 1 percent. The order approving the sale was entered on Nov. 12, 2014, and the customary 14-day stay has been waived to allow the debtor to proceed with the closing.

*Natrol Inc.* (Bankr. D. Del. Case No. 14-11446)

### Trump Entertainment

On Sept. 9, 2014, Trump Entertainment Resorts Inc. filed for Chapter 11 protection in Delaware bankruptcy court, listing in excess of \$300 million in liabilities. The casino operator cited a decline in the Atlantic City gaming market, high labor and tax costs, and extreme weather conditions as the precipitating factors that caused the bankruptcy filing.

The filing marked the fourth time in bankruptcy court for the debtor and its predecessors. The company emerged from its most recent bankruptcy in 2010 burdened with more than \$340 million in first-lien debt and attempted to improve its financial condition by selling assets, including the Trump Marina property. According to its bankruptcy filings, as of the petition date, Trump Entertainment had \$285.6 million in principal and \$6.6 million in unpaid interest outstanding on a \$346.5 million first-lien credit facility administered by Icahn Agency Services LLC and approximately \$13.5 million in trade debt. The company did not secure post-petition financing and instead sought to rely on cash collateral to fund its operations.

On Oct. 1, 2014, Trump Entertainment filed its plan of reorganization and related disclosure statement. The plan provides for a debt for equity swap with its first-lien lenders controlled by Carl Icahn, who would receive a controlling stake in the reorganized debtor and make a further \$100 million cash infusion into the company. Unsecured creditors are not projected to receive distributions under the plan.

However, the plan is dependent upon multiple contingencies including rejection of the collective bargaining agreement with the debtor’s union and tax relief from local governments. Trump Entertainment successfully moved to reject the collective bargaining agreement in bankruptcy court, and the ruling is now under appeal. The debtor’s ability to continue using the Trump name and marks is also in question as Donald Trump sued the debtor through his licensing company for failure to comply with standards required under the licensing agreement. A motion to lift the automatic stay to proceed with the licensing action is currently pending.

On Nov. 5, 2014, the bankruptcy court held a hearing in connection with the debtor’s motion to approve its disclosure statement. The court noted that it remained unclear whether the company would run out of cash in the time it would take to confirm a plan. The court also expressed concerns that the plan was proposed solely for the benefit of Carl Icahn and suggested the case may be appropriately converted to a liquidation proceeding under Chapter 7. As a result, the court declined to approve the disclosure statement and continued the hearing.

*Trump Entertainment Resorts Inc.* (Bankr. D. Del. Case No. 14-12103)