

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg
. Chapter 11
. .
MOTORS LIQUIDATION COMPANY, . (Jointly administered)
et al., f/k/a GENERAL .
MOTORS CORP., et al, . One Bowling Green
. New York, NY 10004
Debtors. .
. Thursday, July 19, 2018
. 2:09 p.m.

TRANSCRIPT OF (CC: DOC# 14338, 14331, 14332, 14340, 14344)
ORAL ARGUMENT REGARDING THE APPLICATION OF FED.R.CIV.PROC. 23
TO THE PENDING SETTLEMENT APPROVAL AND CLAIMS ESTIMATE MOTION
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For General Motors LLC: King & Spalding, LLP
By: ARTHUR J. STEINBERG, ESQ.
SCOTT DAVIDSON, ESQ.
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2158

For the GUC Trust: Drinker, Biddle & Reath LLP
By: KRISTIN K. GOING, ESQ.
1177 Avenue of the Americas
41st Floor
New York, New York 10036-2714
(212) 248-3140

For the Ignition Switch Plaintiffs and Certain Non-Ignition Switch Plaintiffs: Brown Rudnick LLP
By: EDWARD S. WEISFELNER, ESQ.
HOWARD S. STEEL, ESQ.
7 Times Square
New York, New York 10036
(212) 209-4917

APPEARANCES CONTINUED.

Audio Operator: Karen, ECR

Transcription Company: Access Transcripts, LLC
10110 Youngwood Lane
Fishers, IN 46038
(855) 873-2223
www.accesstranscripts.com

APPEARANCES (Continued):

For Personal Injury
Accident Plaintiffs: Goodwin Procter LLP
By: WILLIAM P. WEINTRAUB, ESQ.
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 813-8839

For New GM: Paul, Weiss, Rifkind, Wharton &
Garrison LLP
By: KYLE J. KIMPLER, ESQ.
PAUL M. BASTA, ESQ.
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3023

Kirkland & Ellis LLP
By: MARK J. NOMEILLINI, SR, ESQ.
300 North LaSalle Street
Chicago, IL 60654
(312) 862-2410

TELEPHONIC APPEARANCES:

For the Ignition Switch
Plaintiffs and Certain
Non-Ignition Switch
Plaintiffs: Lief, Cabraser, Heimann & Bernstein
By: ELIZABETH J. CABRASER, ESQ.
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
(415) 956-1000

For Certain Personal
Injury/Death Plaintiffs: Hilliard Munoz & Gonzales LLP
By: ROBERT HILLIARD, ESQ.
719 South Shoreline Boulevard #500
Corpus Christi, Texas 78401
(361) 882-1612

For Creditor, Additional
Ignition Switch
Pre-Closing Accident
Plaintiffs: Andrews Myers, P.C.
By: LISA M. NORMAN, ESQ.
1885 Saint James Place, 15th Floor
Houston, TX 77056
(713) 850-4245



1 (Proceedings commences at 2:09 p.m.)

2 THE COURT: Please be seated. We're here in Motors
3 Liquidation Company, 09-50026. I have the list of appearances
4 in front of me. Let's begin with New GM's argument.

5 MR. BASTA: Good afternoon, Your Honor. Paul Basta
6 from Paul Weiss on behalf of New GM. Your Honor, I have an
7 outline to guide my argument.

8 THE COURT: Okay.

9 MR. BASTA: It will appear on your screen, and we'll
10 hand copies to our friends on the right here. Would you like a
11 hard copy, as well?

12 THE COURT: I will because I sometimes make notes on
13 it.

14 MR. BASTA: Okay.

15 THE COURT: Thank you.

16 MR. BASTA: Your Honor, we have organized our
17 argument today in three sections. We're happy to go in
18 whatever order Your Honor would like, but we can jump around
19 and answer questions. The first section is our primary case as
20 to why we believe Rule 23 must be applied to the proposed
21 settlement agreement. The second section addresses the
22 movants' proposed workaround to Rule 23 and why we believe the
23 workaround does not work. The third section covers, well, what
24 would happen if Your Honor agreed with us. We outlined where
25 we are on mediation with the personal injury/wrongful death



1 claims, and we can give Your Honor views as to where we could
2 go from here if Your Honor were to agree with us that Rule 23
3 applied.

4 Let me begin with why we believe Rule 23 must be
5 applied to the proposed settlement. Three distinct threads:
6 First, there's no question that the proposed settlement seeks
7 to assert class claims, and we believe that that violates
8 Musicland, Blockbuster, and the Motors Liquidation case.
9 There's no question that after the settlement agreement is
10 approved, that the class claims are deemed authorized to be
11 filed and filed, and we believe that that violates the agency
12 requirement laid out in American Reserve and Musicland.

13 And then, third, the proposed settlement agreement,
14 without question, seeks to settle class certification issues,
15 and that happens at the settlement agreement approval stage,
16 and we believe that violates Amchem, Borders, and Partsearch.
17 So let's take each one of those in turn.

18 It's crystal clear that the economic loss plaintiffs
19 seek to assert class claims. Back in 2016, before the Court
20 entered the scheduling order, the plaintiffs told the Court
21 that they would pursue class claims in the bankruptcy. On
22 December 22nd, the plaintiffs filed their late claims motion
23 seeking to file proposed class claims, and that's laid out in
24 the very beginning of that late claims motion, and they seek to
25 assert class claims on a proposed nationwide basis.



1 The plaintiffs argued that they met the requirements
2 for class certification. They said that individual joinders of
3 all class and sub-class members is impracticable, the class can
4 be readily identified, and the questions of law, in fact,
5 common to the class predominate. The plaintiffs told the Court
6 that they would seek certification at the appropriate time
7 after the conclusion of discovery in the MDL.

8 This year, one -- in April, one day before signing
9 the proposed settlement agreement, the plaintiffs amended the
10 proposed class claims and continued to proposed nationwide
11 treatment. In the revised filing, they said that there were no
12 obstacles to proceeding on a class basis and that they believed
13 that class-action treatment was superior to other methods of
14 dealing with the situation.

15 The case law is clear, Your Honor, that absent class
16 certification, a proposed class claim cannot assert claims on
17 behalf of anyone other than the named plaintiffs. That's laid
18 out in Judge Gerber's decision in Motors Liquidation Company,
19 where the Court said that the claim can be asserted as a class
20 claim if, but only if, it has shown compliance with Rule 23.
21 Blockbuster court held that in determining whether to permit
22 the filing of a class claim, bankruptcy courts must determine
23 that class certification requirements have been met. Similar
24 rulings in Musicland and in White Motor Company and Chaparral.

25 Second thread: What is the status of a proposed



1 class claim prior to certification? Does it count as a filed
2 claim? And, Your Honor, I think that the -- you know, the two
3 most important cases that drive the outcome here are American
4 Reserve Corp. and Amchem. And American Reserve Corp. is the
5 first case which authorized class claims in bankruptcy. And in
6 that case, all prior courts that had addressed class claims in
7 bankruptcy got caught up on Section 501 of the Bankruptcy Code
8 that said to file a claim, it has to be filed by the creditor.
9 And Judge Easterbrook, in American Reserve, said that that's
10 not exactly true, that under Rule 3001(b), a claim can be filed
11 either by a creditor or by the creditor's authorized agent, and
12 that the process of certifying the class creates the agency
13 relationship that allows the claim to be an authorized filed
14 claim.

15 The Court says in the middle -- classes are -- excuse
16 me, Your Honor -- not every effort to represent a class will
17 succeed. The representative agent is an agent only if the
18 class is certified. And it's this language that ties the whole
19 body of law together because, prior to certification, the class
20 claim is not even a filed claim because there has been no
21 agency authority for the filing of that claim. And that's why
22 we believe that it's a gating item.

23 The movants take the position that the class claim
24 can be estimated, even though it has not been certified and
25 therefore has not been filed, and that is inconsistent with two



1 cases that we found, Your Honor, American Solar King and
2 Lehman, both of which hold that unless you have a filed claim,
3 there is nothing to estimate.

4 THE COURT: Don't courts in asbestos cases estimate
5 -- I don't know what to call it -- potential claims?

6 MR. BASTA: Yes.

7 THE COURT: I mean, they're not filed claims. Future
8 claims. They're not even claims under 101.

9 MR. BASTA: Yes.

10 THE COURT: But yet bankruptcy courts -- there's
11 quite a few decisions where they -- cases where they do
12 estimate those claims.

13 MR. BASTA: In -- I can get that a little bit later
14 in the outline, Your Honor, but the --

15 THE COURT: I gave -- later, all right.

16 MR. BASTA: No, no, no. The -- I've done estimation
17 of mass tort cases before. In those cases, the question is
18 what are you estimating for, and you can estimate for the
19 purposes of creating a reserve or saying I need to set aside
20 this amount of money for the asbestos class, but that's not
21 estimation for allowance purposes.

22 THE COURT: What happens in most cases, the mass tort
23 cases, where it's been estimated for reserve purposes? How is
24 it later dealt with?

25 MR. BASTA: Either there's a settlement or -- a class



1 settlement or there is a -- there is an actual allowance
2 process for the claims or on how those claims will actually be
3 allowed, but distributions do not go unless there has been an
4 allowance mechanism.

5 THE COURT: And procedurally have you dealt with
6 cases where they've been estimated for reserve purposes, and
7 later on you said they are settled on a class basis?

8 MR. BASTA: They're settled on a class basis, yes.

9 THE COURT: And when they're settled on a class
10 basis, explain to me how that occurs.

11 MR. BASTA: Then you would go through the class
12 certification process at that time to determine class
13 certification so that the claims can be allowed.

14 THE COURT: And have any of those class -- have you
15 been personally involved where there has been a settlement of
16 the class claims that were previously estimated for reserve
17 purposes?

18 MR. BASTA: I have not, Your Honor.

19 THE COURT: But has that occurred to your knowledge?

20 MR. BASTA: I do not know, Your Honor. I cannot
21 recall. But I know that the way that this settlement
22 agreement --

23 THE COURT: I'm not interested in this --

24 MR. BASTA: I know.

25 THE COURT: This is what it is, but I'm trying to



1 understand because I read some of the asbestos cases, for
2 example. I didn't read -- I may have read some of the other
3 mass tort cases, but I definitely read the asbestos cases where
4 they've estimated. Yes, it sets up a reserve, but it was
5 unclear to me what happens later about how claims -- are
6 individual claims filed? Are class claims filed? Does class
7 certification occur? How has that been done?

8 MR. BASTA: Your Honor, in that scenario, unlike this
9 scenario where the debtor is still in possession, there would
10 be more tools available to the debtor, I believe, to implement
11 the settlement because, once the debtor had reached an
12 agreement, the debtor could file claims. There could be an
13 agreement that claims would actually be filed to -- and then
14 they would be allowed through that process. One of the things
15 that makes this unique is that we are beyond that period of
16 time.

17 THE COURT: Why can't -- here there is a proposed
18 settlement between the GUC Trust, which is standing in the
19 shoes of Old GM.

20 MR. BASTA: Right.

21 THE COURT: Why can't it settle with the signatory
22 plaintiffs to provide for claims of all economic -- we're not
23 -- and you agree that we're not dealing today with personal
24 injury/wrongful death, right?

25 MR. BASTA: Right.



1 THE COURT: So why can't the GUC Trust agree with the
2 signatory plaintiffs to allow claims or allow the -- in effect
3 treat them as filing the claim? I understand the amount is
4 still uncertain and they propose an estimation as a way of
5 resolving that. So, I mean, in -- I guess in the asbestos
6 cases I've read, for example, there was no agreement between
7 the debtor or a successor trust and putative plaintiffs. Here
8 there is.

9 MR. BASTA: Right.

10 THE COURT: Why doesn't that make a difference?

11 MR. BASTA: Well, I guess the -- I still think the
12 question is they can reach that agreement. They could reach
13 that agreement with the plaintiffs that have actually filed
14 claims, the two class representatives. They could reach that
15 agreement, but I don't know how they could reach an agreement
16 to file claims on behalf of the eleven and a half million class
17 representatives. There still needs to be an agency link so
18 that those people out there in the world that have the eleven
19 and a half, that they're giving the authority for the filing of
20 the claim.

21 Why is that so? Because it may have been an
22 inapposite question I asked last time, but at the last hearing,
23 I think I asked the question, if a debtor had scheduled claims,
24 they would be deemed allowed unless objected to. Why couldn't
25 the trust, in effect, schedule the claims but identify them as



1 disputed and then resolve through a settlement that they will
2 be -- that the amounts of the claims will be fixed through an
3 estimation process? Why doesn't that work?

4 MR. BASTA: I'm just going to move to that section.
5 Could you give me one minute, Your Honor? I'll move to that --

6 THE COURT: If you want to -- Mr. Basta, I'm
7 perfectly happy just -- if you can come back to my question,
8 your organization may make more sense than what I've asked.
9 I'm happy to let you go on.

10 MR. BASTA: I appreciate that, Your Honor. I have a
11 section on why we don't believe that that works that's more
12 linear, and I think I could get it in a more organized way if I
13 get to it then.

14 THE COURT: That's fine.

15 MR. BASTA: Thank you.

16 THE COURT: You can do that then.

17 MR. BASTA: Thank you. So if it's clear under
18 American Reserve that there's no agency relationship and
19 therefore there's no filed claim without certification. What
20 is the movants' argument that a class claim can proceed without
21 class certification? And, interestingly, they cite really the
22 same cases that we cite. They cite Musicland and they cite
23 Motors Liquidation for the proposition that there are greater
24 procedural advantages in bankruptcy, and therefore you don't
25 need to do class certification.



1 But all of those cases hold for the proposition that
2 you either have to have a filed claim by the creditor itself or
3 you need class certification to create the agency relationship
4 so that there are claims on file on behalf of everybody who's a
5 putative member of the class. We haven't found any case that
6 stands for the proposition that you can just treat the eleven
7 and a half million as-filed claims without an actual agency or
8 are properly processed.

9 It's also absolutely clear that this is a settlement
10 of the proposed class claim issues. The settlement motion,
11 which seeks to approve the settlement, says very squarely that
12 the settlement agreement resolves the late claims motions, the
13 late proof of claim issues, and the allowance of plaintiffs'
14 claims. By the time we get through the settlement agreement
15 phase, as Your Honor just pointed out, the only thing that
16 would be left to estimation would be to quantify the amount of
17 the claim.

18 THE COURT: Some of them may be at zero. If -- and I
19 think Mr. Weisfelner said at the last hearing that they
20 appeared -- well, let me just say they appear to agree that
21 state law continues to apply. They acknowledged variations in
22 state law, as already determined by Judge Gerber. And if the
23 state -- if the law of a particular state where someone
24 purchased a vehicle and claims economic loss requires
25 manifestation and they haven't had manifestation, they appear



1 to agree that that would be the law that applied, and it might
2 result in the claim being estimated at zero.

3 MR. BASTA: But -- and Mr. Weisfelner did mention
4 that at the last hearing, and I do think that is what's being
5 worked out right now in the MDL. And when we get to
6 estimation, what's happening in the MDL will translate into the
7 estimation in this court.

8 THE COURT: But, of course, the MDL relates to claims
9 against New GM, not against Old GM.

10 MR. BASTA: It is true that the MDL relates to New GM
11 and not Old GM, but the elements of the claims against New GM
12 are the same as the elements of the claim against Old GM, plus
13 successor liability. So what the district court is handling is
14 many of the same issues that would be addressed here.

15 I mean, we actually believe that what Mr. Weisfelner
16 said at the last hearing where he -- he gave the example that
17 the class is eleven and a half million and that he did some
18 math and said, based upon Judge Furman's manifest defect
19 rulings already, that he suspected that two million may have
20 already dropped out of the class. We think that that's an
21 example of why class certification is so necessary.

22 I mean, if two million vehicles are already dropping
23 out, I think we need class certification to decide, you know,
24 who represents those two million vehicles, why are they being
25 dropped out, and that's why the class certification rules are



1 so important. And that's why Amchem, which is the key to this
2 section of our argument, said that, in the settlement context,
3 you know, you even need heightened scrutiny around class
4 certification issues to make sure there's adequate
5 representation and that everybody is aligned.

6 It's clear that the settlement agreement itself is
7 proposing to resolve all of plaintiffs' claims, and it includes
8 a resolution of all putative class members, even though they
9 have not participated yet in the bankruptcy proceeding. And
10 it's also clear, Your Honor -- I think this is a very important
11 slide for the Court to see what is occurring at the settlement
12 stage and what is occurring at the estimation stage.

13 At the settlement stage, the GUC Trust is consenting
14 to the authorized filing of the proposed class claims, and we
15 submit that that's inconsistent with Amchem. In exchange for
16 the \$15 million settlement payment, all of the disputes,
17 including the propriety of Rule 23 certification, are settled
18 at the settlement stage, not at the estimation stage. And the
19 estimation stage, as Your Honor has asked questions, is where
20 Your Honor sees it applying the different state law rules.

21 But here the class certification issues would be
22 resolved in advance of all those rules. And at the settlement
23 stage, all eleven and a half million plaintiffs will be bound
24 by the settlement agreement and will be delegating to signatory
25 plaintiffs the right to adjudicate their relative recovery to



1 other members of the groups.

2 So if someone is in a state that requires manifest
3 defect, there is no process to come back to this Court to say,
4 well, those people are out and these people are in and this
5 criteria would allow somebody to get 12 cents and this criteria
6 would allow somebody to get 18 cents. All of that is being
7 done without any allowance process and without any delegation
8 of representational authority to the signatory plaintiffs to
9 negotiate that differentiated outcome on their behalf. And so
10 by the time you get to the estimation stage, you will have a
11 class-wide claim, and the only thing that's -- will have waived
12 any right to object on Rule 23 grounds, and the only thing that
13 will be left will be to quantify things.

14 This is the details of how this is implemented.
15 Section 2.5 of the settlement agreement says that the
16 settlement agreement, not the estimation trial, authorizes the
17 filing. That's in 2.5(x). The settlement motion expressly
18 says that class certification is being settled. It says in the
19 absence of the settlement, the Court would need to decide
20 whether class certification for the economic loss plaintiffs'
21 proposed class proof of claims would be appropriate. This
22 could lead for the need to resolve issues under the very laws
23 of the 50 states and the District of Columbia. So they're
24 clearly seeking to settle class certification rather than show
25 that class certification requirements have been satisfied.



1 THE COURT: Although I understood the plaintiffs to
2 agree that, as part of the estimation process, the Court would
3 consider applicable state law from each state in which the cars
4 were purchased. I'm right about that. I mean --

5 MR. BASTA: I think that's correct, Your Honor.

6 THE COURT: So they're not -- they haven't settled
7 that issue. They acknowledge that that's an issue for the
8 Court to determine as to what is the applicable state law in
9 which relevant jurisdiction.

10 MR. BASTA: But they're not coming in here and
11 saying, let's do it on a class-wide basis and let's ignore all
12 the differences in state law. They're saying, let's use the
13 estimation to replicate what class certification would
14 otherwise do, and we're here saying that no court has ever done
15 that, and that when you go through the requirements of what
16 claims can be estimated in the language of the agreement, that
17 that's not what it provides for. You need to actually be
18 estimating claims.

19 But I agree with Your Honor. I don't believe that
20 they're taking the position that at estimation, they would
21 ignore differences in law. The proposed settlement makes it
22 clear that all parties' disputes are resolved. And so by the
23 time it gets to estimation, all objections to the class claims
24 will have been withdrawn or settled.

25 Movants say that when we get to the estimation, there



1 will be millions of claims to estimate, and that we should do
2 the claims on a class-wide basis. I would note that it is my
3 understanding in the MDL that, based upon Judge Furman's
4 rulings on manifest defect, that the plaintiffs are not seeking
5 a -- no longer seeking a nationwide claim treatment in the MDL,
6 but they continue to seek it here.

7 The law is absolutely clear from the Supreme Court
8 that the Court does not have authority to settle proposed
9 class-action issues without certification, and Amchem we
10 believe is the -- along with American Reserve is the second
11 most important decision here. The Court said federal courts
12 lack authority to substitute for Rule 23 certification criteria
13 a standard never adopted, that if the settlement is fair and
14 certification is proper, quote:

15 "The safeguards provided by the Rule 23(a) and (b)
16 class qualifying criteria, we emphasize, are not
17 impractical impediments -- checks shorn of utility --
18 in the settlement class context."

19 But other specifications of the rule -- those
20 designated to protect absentees by blocking unwarranted or
21 overbroad class definitions -- demand undiluted, even
22 heightened, attention in the settlement context.

23 And every bankruptcy court that we have found has
24 followed Amchem -- Worldcom, Partsearch, and BGI Group all --
25 when conducting settlement of class certification issues,



1 conducts an analysis under both Rule 23 and under 9019. We
2 note that co-lead counsel in this situation in the W.R. Grace
3 matter argued that where a class is not already -- a Court has
4 not already certified a class, the Court, at the preliminary
5 approval stage, must determine whether the class satisfies the
6 requirements of Rule 23.

7 THE COURT: What does that mean -- what does that
8 require a Court to do at the preliminary approval stage?

9 MR. BASTA: It requires the Court to determine class
10 certification.

11 THE COURT: For settlement purposes?

12 MR. BASTA: For settlement.

13 THE COURT: The difficulty of litigating a case with
14 eleven and a half million plaintiffs, that drops out.

15 MR. BASTA: It drops out. And that's what happened
16 in Amchem. In Amchem, the Supreme Court -- the district court
17 looked at the impracticality of the situation and allowed the
18 fairness of the settlement and the need for the settlement to
19 be a factor when considering whether the Rule 23 prongs had
20 been met, and the Third Circuit and then the Supreme Court --
21 the Third Circuit overturned it. The Supreme Court affirmed
22 the Third Circuit and said it's not about impracticality.
23 These rules are foundational. You have to follow them.

24 THE COURT: And am I correct that if a proposed class
25 settlement is presented to the Court, notice to the putative



1 class members has to be given at that stage, and they have an
2 opportunity to appear and object if they wish or support the
3 settlement?

4 MR. BASTA: Yes.

5 THE COURT: Okay.

6 MR. BASTA: Yes. So what is the basis for the
7 movants' argument that a class claim can be settled without
8 class certification? Again, we go back to the same cases.
9 They say that New GM cites several cases in which courts
10 applied Bankruptcy Rule 9019 and Rule 23 to proposed
11 settlements at the request of the movants. However, none of
12 these cases hold that Rule 23 certification is required to
13 settle a group of plaintiffs' claims. But that's not true,
14 Your Honor. Every case that is cited stands for the
15 proposition that, as a gating item, you have to find that
16 Rule 23 has been satisfied. And earlier on, I believe that the
17 movants had argued that you either went under a 9019 route or
18 you went down on a Rule 23 route.

19 It doesn't appear that they're continuing to make
20 that argument because we believe the law is crystal clear that
21 you have to do Rule 23 up front. And we don't believe that
22 they have any response to Amchem, and that to comply with due
23 process, Rule 23 requires prior notice to putative class
24 members of the settlement and an opportunity to object or opt
25 out before approval of the settlement that binds them.



1 Can I just take some water, Your Honor?

2 THE COURT: Yeah.

3 MR. BASTA: Your Honor, I received a note from
4 Mr. Nomellini on the asbestos cases where he wanted me to
5 clarify that in asbestos cases, there's always future claimants
6 and there's always a future claims committee, and it's always
7 arising in the plan context, not outside of the --

8 THE COURT: But those estimations -- according to my
9 understanding, including not only future claims, which are not
10 claims --

11 MR. BASTA: But a --

12 THE COURT: -- but also current prepetition claims,
13 as well. So they've usually estimated both at the same time.

14 MR. BASTA: Right.

15 THE COURT: I'm pretty sure that's true.

16 MR. BASTA: And that estimation in those cases has
17 arisen in the context of plan feasibility. So that's our main
18 case as to why we think that Rule 23 has to be satisfied. We
19 want to address what the workaround that the movants have
20 proposed -- and we note, Your Honor, that we think that, you
21 know, Rule 23 is being viewed as this incredible obstacle to
22 getting to a resolution of this entire situation.

23 THE COURT: Well, when I read their brief, it doesn't
24 seem that way because Mr. Weisfelner and the signatory
25 plaintiffs argued that they do satisfy.



1 MR. BASTA: And they do argue that, but I think that
2 the reason why we -- they are not -- in prior appearances, they
3 said they were going to seek class certification here, and
4 they're not now.

5 THE COURT: Well, that was before they had a
6 settlement with the GUC Trust.

7 MR. BASTA: And that was before they had a
8 settlement.

9 THE COURT: That's the big difference.

10 MR. BASTA: It was before they had settlement, but
11 it's also looking at what's happening in the MDL and wanting to
12 get things going here, and I understand that. But Rule 23 is
13 -- could -- if it applied, would solve a lot of the problems in
14 the structure of the settlement. It would allow the class
15 claims to proceed. It would provide a mechanism to bind the
16 millions of individuals that they seek to bind to the
17 settlement, and it would provide for the millions of people who
18 would be now represented to provide the consensual releases to
19 the trust -- GUC Trust beneficiaries.

20 THE COURT: It sounds like you're arguing how they
21 ought to certify the classes -- class or classes and -- so we
22 can get this on its way and bind all of the economic loss --

23 MR. BASTA: Your Honor, we're --

24 THE COURT: So you're not going to oppose class
25 certification. Is that correct?



1 MR. BASTA: No, we just -- we're saying that it is
2 the mechanism that needs to be followed. That's what we're
3 arguing.

4 THE COURT: What is -- do you intend to -- if I
5 require class certification, do you intend to oppose class
6 certification of economic loss plaintiffs? Yes or no?

7 MR. BASTA: We -- yes. And we intend to say that the
8 district court's resolution of the class --

9 THE COURT: Well, I -- my question is, if they seek
10 class certification in the bankruptcy court for economic loss
11 plaintiffs who purchased their vehicles with defects, not just
12 the -- capital I -- Ignition switch defects, but the other
13 defects that they're seeking to settle, they purchased them
14 before the sale to New GM. It's New GM's intention to oppose
15 certification of one or more classes. Am I correct?

16 MR. BASTA: Yes. Yes, Your Honor. So what is the
17 plaintiffs' proposed workaround? First, they take the position
18 that the Court can allow claims on behalf of millions of
19 individuals who did not file proof of claim through estimation
20 under 502(c). They argue that they can send out a notice and,
21 through a notice, they can deem all these individuals to be a
22 party to the settlement agreement. And they argue that they
23 can deem all of these individuals to provide a release to the
24 GUC Trust beneficiaries. They say that this approach is the
25 functional equivalent of a Rule 23 settlement, but we submit



1 that they need to show that each of their three prongs work as
2 a matter of law. And if they don't work, we submit that Rule
3 23 has to be followed.

4 And we start with why the Court cannot estimate
5 unfiled claims. What's the movants' argument? Movants'
6 argument is 502(c) necessarily permits the estimation of
7 unfiled claims for allowance purposes. What is our argument?
8 The sale agreement, the plan, the GUC Trust agreement requires
9 that the Court estimate claims that are capable of being
10 allowed. We argue that no court has ever estimated the allowed
11 amount of a claim that was never filed and that movants cite no
12 case holding -- providing for that.

13 We argue that Rule 3002 requires that creditor must
14 file a proof of claim for the claim to be allowed, and since
15 the -- without class certification, the creditor is not filing
16 the claim. It's not capable of being allowed and therefore
17 cannot count against the adjustment shares threshold, as we
18 previously pointed out, unless it's certified the class
19 members' claims as an unfiled claim.

20 Both sides, Your Honor -- and this is very important
21 -- agree that the Court needs to estimate plaintiffs' claims
22 for allowance purposes. It's in their Rule 23 brief. It says
23 the settlement agreement contemplates that this Court will
24 estimate the plaintiffs' claims for allowance and distribution
25 purposes. That necessarily means the claim has to be capable



1 of being allowed. The language -- we believe that the reason
2 it's structured this way stems from the language in the sale
3 agreement where the highlighted language says estimating the
4 aggregate allowed general unsecured claims against seller's
5 estate.

6 THE COURT: So if you have allowed general unsecured
7 claims, the amount of the claim is fixed. What is there to
8 estimate? A claim is allowed in a specific amount. If the
9 claim is filed and -- or scheduled as disputed or unliquidated,
10 it's not an allowed claim. An allowed claim is only the result
11 of either a contested claim proceeding, or if it's estimated --
12 I have trouble with the phrasing of estimating the aggregate
13 allowed general unsecured claims.

14 MR. BASTA: So I have a slide on this. Let me go up
15 to that because I think that's one of the key issues here. So
16 the language as Your Honor just read, and in my first bullet,
17 it says the Court can estimate aggregate allowed general
18 unsecured claims. And we differ on what that language means.
19 And there are three words: aggregate, allowed -- estimate,
20 aggregate, allowed, three words. And you could -- we could sit
21 here and say to Your Honor, that means that you have to allow
22 every single claim, and I think at the last hearing, Your Honor
23 asked me questions whether that was really GM's position, that
24 we were going to sit there and allow every single one of the
25 claims because -- and if that was the reading, then you would



1 arguably not be giving effect to aggregate because you would do
2 every single claim.

3 Now, plaintiffs take the opposite view and they say,
4 well, what that just means is you can just estimate even
5 unfiled claims, and our argument is that if that's the reading,
6 Your Honor's giving no effect to the word "allowed." And what
7 the word "allowed" in the agreement means is that Your Honor
8 should estimate claims that are capable of being allowed. And
9 our argument is that for a claim to be capable of being
10 allowed, you need to look at whether it's complied with the
11 bankruptcy rules for being an allowed claim.

12 Under 501, you can only make distributions to an
13 allowed claim. And so in the absence of that filing
14 requirement, it can never be allowed and it can never count
15 against adjustment shares. But it is not our position, Your
16 Honor, that we have to sit there with a -- you know, for 48
17 years, trying to add up all of these allowed claims.

18 Let me go back, Your Honor. So we were -- I was in
19 the middle, and we just skipped ahead on what the language
20 means. We think that it's also supported -- our view of giving
21 effect to the word "allowance" is supported by the language in
22 the plan and the GUC Trust agreement. And the language in the
23 plan on estimation says that the Court -- if the Court can't
24 estimate any contingent, unliquidated, or disputed claim, and
25 that should constitute either the allowed amount of such claim



1 or a maximum limitation on such claim, i.e. a reserve. I think
2 that's what the plan says, and the GUC Trust has similar
3 language.

4 And so it's also clear that there can be no
5 distribution under the plan unless a claim has been allowed,
6 and that's also consistent with the bankruptcy court. The way
7 that this has been structured, the only time that there will be
8 allowance is at the settlement stage. And at the settlement
9 stage, Your Honor, there's nothing to allow because there's no
10 claims that have been filed.

11 Now, could they argue that this maximum limitation
12 language in the plan authorizes the Court to do an estimation
13 for reserve purposes? We think they could argue that, but we
14 don't think that would go anywhere because, once you've
15 estimated for reserve purposes, there still needs to be some
16 allowance process somewhere down the road. And if Your Honor's
17 going to do a reserve and then an allowance later, it doesn't
18 make -- we don't believe that that, under the contract, would
19 trigger the adjustment shares or advance the ball. And when
20 you had a later class certification ruling, you could have
21 inconsistent outcomes between the reserve methodology and the
22 allowance methodology.

23 So what claims -- and this is, Your Honor, where I
24 promised to get back to when Your Honor asked me why they
25 couldn't just settle and deem the claims to be allowed. And



1 let me walk through it. We're going to start with
2 Rule 3002(a): An unsecured creditor must file a proof of claim
3 for the claim allowed. If they don't file it, it's not
4 allowed.

5 Who must file? Any creditor whose claim or interest
6 is not scheduled or is scheduled as disputed, contingent, or
7 unliquidated shall file a proof of claim. Any creditor who
8 fails to do so shall not be treated as a creditor with respect
9 to such claim for voting and distribution purposes.

10 When I was here last time, Your Honor, Your Honor
11 said, well, couldn't the debtor have filed the claims as
12 disputed, contingent, or unliquidated? If they had, it would
13 not get them to where they need to be because they still need
14 to file a proof of claim.

15 Rule 3021 says, distribution shall be made to
16 creditors whose claims have been allowed, and 502(a) says a
17 claim or interest, proof of which is filed, is deemed allowed.
18 Section 1111(a), a proof of claim is deemed filed under
19 Section 501 that appears in the schedules, but then there is an
20 exception -- unless that is disputed as -- is scheduled as
21 disputed, contingent, and unliquidated. And we certainly know
22 this is disputed, contingent, and unliquidated, or at least
23 disputed and unliquidated.

24 Section 1.54 of the plan: If no proof of claim has
25 been filed by the applicable deadline, such claim shall not be



1 valid and shall be disregarded. It's consistent with Colliers,
2 it's consistent with cases, so that's the basis for our view.

3 We -- movants do not cite a single case where a Court
4 has estimated an unfiled claim for purposes of allowance, and
5 we cite Solar King and Lehman. The Court says, it's quite
6 another matter to assume that 502(c) alone can operate to
7 render a contingent or unliquidated claim allowable when
8 there's no proof of claim on file and the claim is not
9 scheduled.

10 The cases cited by the movants, as Your Honor and I
11 just discussed, go to estimation for purposes other than
12 allowance. I will not go through each of the cases, but you
13 have them.

14 There are two cases -- one of them was my case, which
15 was MSR Resorts -- where estimation was done for the purposes
16 of assisting in a sale transaction. In MS Resorts, we had a
17 hotel. We were thinking of rejecting a Marriott contract. We
18 were working with Marriott. We agree on an estimation so we
19 could estimate rejection claims for the purposes of deciding
20 whether it was a good business judgment for the debtor to sell
21 the property free of the management agreement or with the
22 management agreement rejected. They cite that for the
23 proposition that you could estimate for other purposes, but
24 that's very different than here, where the purpose is really
25 being done for allowance.



1 THE COURT: One of the things that strikes me is
2 estimation has been used for purposes other than what 502(c),
3 by its express terms, provides. So, for example, there have
4 been cases that have used estimation on administrative claims.
5 There's nothing in 502(c) that would suggest that. So one way
6 or another, courts have used estimation beyond the four corners
7 of the terms of the code. Would you agree with that?

8 MR. BASTA: I would agree with that.

9 THE COURT: You did it in MSR.

10 MR. BASTA: I did it in MSR, but I would just say the
11 link here is the language that says that "allow claims." And
12 so it seems to me -- our view is that in order for it to really
13 count, in order for us to be separated from the billion plus of
14 adjustment shares, there needs to be a showing that what's
15 going to trigger that is a view from the Court that these
16 claims can be allowed. We think that that's what was bargained
17 for in that language.

18 We've covered this already. They argue that Rule 23
19 is unnecessary based on the greater procedural advantages, but
20 every case that they cite supports for the proposition that you
21 either have to have a creditor proof of claim or you have to
22 have a class proof of claim. They don't support the
23 proposition that the Court can estimate unfiled claims.

24 If Your Honor looks at some of their quotations, they
25 cite Motors Liquidation. It says, because of matters unique to



1 bankruptcy, class action may not be preferable, but if you keep
2 reading, a few sentences later, it says because individual
3 claimants could just fill out a proof of claim. They cite
4 Ephedra to say superiority of class actions is lost in
5 bankruptcy. Only compelling reason for allowing an opt-out
6 class can justify Rule 23. We'd point out that they add a few
7 sentences later that because it allows plaintiffs to file
8 proofs of claim without counsel and at virtually no cost, we
9 think that it's -- that they -- we understand Your Honor's
10 point that their prior conduct was before they reached a
11 settlement on the class claims, but I think it was clear from
12 their prior conduct that they anticipated trying to reach a
13 settlement.

14 I mean, they amended their class claim two days
15 before the settlement agreement was signed, and they amended
16 the class claim and it was clear even then that they were
17 trying to proceed and that they believed that they are
18 proceeding on a class basis. And again the structure of the
19 settlement agreement is to proceed on a class basis and to go
20 into estimation as a class basis. So they've not adjusted
21 their approach to say, we're not going down class
22 certification. Their approach is, we are doing class
23 certification, but we're just settling it.

24 Let's turn to in rem jurisdiction. What does it get
25 them? We don't think it's a substitute for Rule 23. So they



1 are that -- because the bankruptcy court has in rem
2 jurisdiction over the assets of the estate, it is empowered to
3 determine the rights of all parties with respect to the res of
4 the estate, and therefore may issue bar orders and enjoin
5 claims under Section 105.

6 What is our argument? It does more than just release
7 claims against the estate. It binds 11.4 million individuals
8 to a settlement agreement that they're not a party and
9 delegates authority to the signatory plaintiffs to adjudicate
10 their claims.

11 With respect to the release and waiver, the
12 segregation of the assets, our view is that's an improper plan
13 modification. And that's an important point, Your Honor, and
14 it really does hurt GM because, if the GUC Trust assets were
15 not segregated for the benefit of the existing beneficiaries,
16 they could be used to pay down the plaintiffs' claims, which
17 means that the damages asserted against New GM in the MDL would
18 be less. And so the fact that these --

19 THE COURT: You lost me on this point. Just go back
20 over it.

21 MR. BASTA: Sorry, Your Honor. Under the
22 settlement --

23 THE COURT: I want to make sure I'm understanding.

24 MR. BASTA: Yes, I need to do it more slowly. Under
25 the settlement agreement, the 500 million or so potential GUC



1 Trust assets are segregated for the benefit of existing GUC
2 Trust beneficiaries, unit holders. That violates the plan.
3 The plan provides for pro rata treatment for everybody. It
4 is --

5 THE COURT: I'm aware of that. Go ahead.

6 MR. BASTA: Right. It provides for pro rata
7 treatment. The reason why we're harmed by that is that if that
8 \$500 million was available to pay plaintiffs' claims, the
9 plaintiffs in the MDL have recognized they can't get more than
10 100 cents. So if that \$500 million could be used to pay down
11 their claims, the amount of damages that are asserted against
12 New GM in the MDL would be less. But since those -- that
13 \$500 million is being segregated for the benefit of trust
14 beneficiaries, it's not available to us, so we suffer an
15 economic harm. And we believe we're a party to the plan, and
16 we believe the statute is clear that a substantially
17 consummated plan cannot be modified. And we don't believe that
18 in rem jurisdiction gives them an ability to modify a
19 substantially consummated plan.

20 And I would point -- and I doubt this is a popular
21 argument, but that we think this pervades everything. In other
22 words, even if Your Honor certified the class, we would be
23 still back here at the approval of the settlement stage,
24 arguing that that segregation of those assets is an improper
25 plan modification.



1 We also, Your Honor, believe that it's improper,
2 through a notice, to bind parties to a settlement agreement.
3 It's absolutely clear that that's what the settlement agreement
4 does. It mandates that every plaintiff consent to the
5 adjudication of their claim, and it binds them. It says in
6 paragraph 5 of the settlement order, the settlement shall be
7 effective and binding on all parties.

8 So it's not a situation where you're just sending out
9 a notice and saying to somebody, you need to release your
10 claim. This is actually binding them to an agreement to which
11 they're not a party. And we have cited cases, SportsStuff, and
12 other cases in our papers that we don't believe there's -- that
13 a settlement agreement is binding between the parties that
14 execute the settlement agreement and that you cannot, through a
15 notice, force somebody to be a party to that settlement
16 agreement.

17 We note that this also hits on Amchem, where one of
18 the elements on Amchem and why Rule 23 is required, is that it
19 -- the Court can assure itself that when parties are being
20 bound, that they're represented adequately in connection with
21 that process.

22 I've already covered the substantially consummated
23 plan modification, so I'll move that quickly. We cite here the
24 elements of the plan that require pro rata treatment. The
25 settlement agreement also provides for a channeling injunction



1 outside of the plan, and we don't believe that that works
2 either. If you take an example, assume that before GM's plan
3 confirmed, GM sent out a notice and said, we're going to put
4 half of our assets over here, and you can only look at those
5 assets, and we're going to put half of our assets over there,
6 and you can only go against those assets, and we're sending out
7 a notice, and anyone who can object, you can object, but after
8 that, we're divvying up the assets.

9 Well, that wouldn't work. That would be a sub rosa
10 plan. Your Honor commented on that in the Dewey LeBoeuf
11 matter, and we believe that if you're really going to segregate
12 asset and pool creditors into one asset, that it can't be done
13 in the context of a settlement. And channeling injunctions,
14 under Adelphia and other Second Circuit case law, are really
15 necessary for a reorganization.

16 THE COURT: How do you reconcile your arguments about
17 prohibition on a material plan modification with the
18 consequences of a due process violation by which the --
19 certainly as to those where there's been determined to be a due
20 process violation, the ignition switch defect plaintiffs.
21 They're not bound by the plan, are they? I mean, that, I
22 thought, was the -- it's one of the conundrums we face is that
23 the Second Circuit determined they're not bound by -- they
24 can't be bound. They weren't given proper notice.

25 MR. BASTA: Well --



1 THE COURT: So how can your arguments about no
2 material plan modification apply to dealing with the people for
3 whom there was due process violation?

4 MR. BASTA: Your Honor, the GUC Trust agreement
5 itself contemplates what happens if a late claim comes in, and
6 it provides a catch-up distribution mechanism in the GUC Trust
7 agreement. And it doesn't say that if a late claim that needs
8 to now come into the pool, that you can segregate the assets.
9 In fact, it's the opposite. It basically says that the -- the
10 way it works is that the next assets that come in need to catch
11 up the people who have been left behind until they reach the
12 pro rata status.

13 And that is one of our points here, which is that
14 under the settlement agreement, the reality is, is that we
15 think these people, as the adjustment shares are issued, would
16 be the only people that would get the adjustment shares because
17 of the catch-up mechanism. All the value would have to go to
18 get them up to the 30-cent recovery that everybody else
19 received. But we don't believe that the fact that -- that
20 because of the procedural due process violation, that that
21 creates a license to force people into one set of assets and
22 not into another.

23 THE COURT: If the economic loss plaintiffs and
24 personal injury/wrongful death plaintiffs, if their recovery
25 did not exceed the recovery of all other GM creditors, how



1 would New GM be adversely affected by the fact that this
2 agreement provides for the segregation? I could see your point
3 if the result could be that the -- while personal
4 injury/wrongful death plaintiffs and economic loss plaintiffs
5 together wound up with a greater recovery than all other
6 creditors. Maybe I'm missing something in there.

7 MR. BASTA: So let me try it this way. The -- we
8 have to issue adjustment shares based on the aggregate amount
9 of general unsecured claims. That's indifferent to whether
10 somebody gets 30 cents and somebody gets 20 cents. If the
11 claims are above a certain amount, we have to issue the
12 adjustment shares.

13 THE COURT: But how are you hurt?

14 MR. BASTA: We are hurt in the following respect,
15 which is that if there's \$500 million of claims -- of assets
16 that could satisfy plaintiffs' claims, then the damages against
17 us in the MDL are greater than they otherwise would be if the
18 creditors could first seek recourse.

19 THE COURT: If all other creditors recovered 30
20 cents, and even after receiving the aggregate -- even after
21 New GM issued the aggregate shares, and all of these additional
22 new claims had a recovery of 25 cents, how are you -- how is
23 New GM hurt by that? You have not wound up -- they -- no
24 creditor has received more than they otherwise would.

25 MR. BASTA: If -- okay. Let's do the mathematical



1 example. Let's say that after -- let's say that the 500
2 million of GUC Trust assets go to existing GUC Trust
3 beneficiaries. In the -- and then, as a result of the issuance
4 of the adjustment shares, the signatory plaintiffs end up with
5 25 cents.

6 THE COURT: Yeah, they wound up getting less.

7 MR. BASTA: They get -- so now they get 25 cents.

8 Now there's a 75-cent claim against New GM under --

9 THE COURT: I don't know whether there's a claim
10 against New GM or not.

11 MR. BASTA: Well, asserted claim against New GM.

12 THE COURT: I don't know whether there's going to be
13 a -- the position that New GM has taken previously is that if
14 economic loss plaintiffs can recover against Old GM, they have
15 no claim against New GM. That's been the position they've
16 taken.

17 MR. BASTA: And I'm certainly not --

18 THE COURT: That was before you came in.

19 MR. BASTA: And I'm certainly not waiving that
20 argument, Your Honor. I'm just making the point that the
21 question here is -- if you have modifying substantially --
22 modifying a substantially consummated plan, there's a
23 prohibition. In prior arguments, it has been said, you guys
24 should not care about that, you should not care. And -- well,
25 I disagree that that's the standard. I think we're a party to



1 the plan, we're a party to the sale agreement that's embedded
2 in the plan, and so I think we have standing to argue that you
3 can't do an improper plan modification. But even if you ask
4 me, what is your economic interest in that issue, I would say
5 we have an economic interest because plaintiffs are getting
6 less from Old GM and seeking more from New GM, and the standard
7 in Global Industries on standing is that we have to have a
8 trifle of an economic interest to have standing, and that's
9 certainly an economic interest to basically voice our
10 opposition to the plan modification.

11 THE COURT: Okay. Go ahead.

12 MR. BASTA: We point out channeling injunctions are
13 not appropriate outside of plan confirmation. They cite a
14 number of bar order cases that arise in the settlement -- in
15 the insurance context, when an insurer contributes money to a
16 debtor and obtains a release of claims that are derivative of
17 the estate claims. There -- those are really falling under,
18 like, contribution. That's not at all what is happening here.
19 They say nothing about the ability to force individual
20 creditors to be a party to a settlement.

21 Here it's the debtor or the GUC Trust itself, not
22 some third party, that's making a contribution. The GUC Trust
23 is not contributing to itself to justify getting the release,
24 and here we go through the math, Your Honor, to show that, at
25 the end of the day, we think that the existing plaintiffs, the



1 plaintiffs that are here that we're addressing today, are the
2 ones that are actually going to end up getting the \$15 million
3 and the adjustment shares if they were ever to be issued.

4 So what is the contribution of the GUC Trust to
5 justify it getting the release? We don't think that its
6 concession that it's allowing the late-filed claims and its not
7 objecting to class certification is a contribution that
8 justifies a release. That's a legal conclusion.

9 THE COURT: That you haven't persuaded me about, but
10 -- I'm not saying you persuaded me on other things, but you
11 definitely haven't persuaded me about this one.

12 MR. BASTA: Our final argument, Your Honor, is that
13 they'll try to justify the third-party releases to the GUC
14 Trust beneficiaries. There is no contribution that's occurring
15 by the GUC Trust beneficiaries to support a non-consensual,
16 non-debtor release.

17 THE COURT: Sure. A knockdown, drag-out battle over
18 the next however many years.

19 MR. BASTA: Your Honor, that is the body of our
20 argument. If I could turn Your Honor to where we would go from
21 here.

22 THE COURT: Sure.

23 MR. BASTA: And I know it's not part of today, but I
24 wanted to update the Court on what we're doing on personal
25 injury and wrongful death claims. We requested and were in the



1 process of obtaining MDL order 148 information for personal
2 injury/wrongful death plaintiffs with the intention of
3 mediating and settling those personal injury claims.

4 THE COURT: And I read Mr. Weintraub's motion with an
5 additional 69 plaintiffs. How many personal injury/wrongful
6 death plaintiffs have asserted claims against the GUC Trust
7 against -- in the Old GM case?

8 MR. BASTA: 576.

9 THE COURT: Okay. All right.

10 MR. BASTA: And what we have said -- Mr. Weintraub
11 sent me a note and said that he would give us the information,
12 but he wanted New GM to commit that it had an intent to mediate
13 in good faith to settle those claims. And I responded and told
14 him that he has that commitment with two caveats. One is that
15 we wanted to receive the date -- the Rule 148 date from all of
16 the 576 so we could look at it holistically, and that, second,
17 there were some timing issues because New GM has a process to
18 evaluate that data. And then it goes into the mediation like
19 it has done successfully in the district court having analyzed
20 that data, and we needed time to analyze that data.

21 And we've gotten some great cooperation. 450 of the
22 576 plaintiffs have agreed and are in the process of providing
23 us that information. There is a set of -- I can't do the math
24 -- 125 claims that are considering the request, but have not
25 yet decided to give us that info.



1 THE COURT: Does that mean you won't go forward with
2 mediation unless the 125 agree?

3 MR. BASTA: Your Honor, we're waiting -- expect them
4 to come back and agree to provide us the information.

5 THE COURT: Are you prepared to go into mediation if
6 you don't receive affirmative responses from the other 125?

7 MR. BASTA: Not at the moment, Your Honor. We would
8 much prefer to deal with this on a holistic basis.

9 So what is our approach and suggested approach, Your
10 Honor, if the Court were to conclude that Rule 23 is a gating
11 item? Where do things stand in the MDL? We expect in the next
12 few months, and I have a timeline, that the district court is
13 going to rule on class certification in the three bellwether
14 states, manifest defect in the remaining 35 states, summary
15 judgment on benefit of the bargain in the three bellwether
16 states, and on the Daubert challenge. The summary judgment
17 covers a number of other issues including implied warranty,
18 unjust enrichment, consumer protection, ignition switch repair,
19 and fraudulent concealment.

20 We believe that following these rulings, that the
21 bankruptcy court and the parties will have much better guidance
22 from the MDL. If you look at this timeline, on the top part of
23 the timeline -- excuse me for one second, Your Honor.

24 THE COURT: Sure.

25 MR. BASTA: If you look at the top of the timeline,



1 that is the proposed schedule that's based upon the filings by
2 the movants for this settlement process. They filed on -- the
3 notice -- as soon as the Court approved the notice procedures
4 on August 1st. We've had to meet and confer with them about
5 coming up with the customer information for the notice. It's
6 not a "push-the-button" exercise. They have to go to IHS Polk
7 to obtain the customer information. We believe that's a four
8 to six week process. We've built in five weeks here. We
9 assume once that happens, we could be at settlement here on
10 October 31st.

11 Your Honor indicated previously that if the Court
12 approved the settlement, that there would be court-ordered
13 mediation in advance of an estimation hearing. We built that
14 in. There needs to be fact discovery in advance of estimation.
15 So we're looking at -- if there was no objection to class
16 certification, we're looking at -- on its own terms, at dealing
17 with estimation around March.

18 If you look at what's happening in the MDL, the
19 briefing is complete on manifest defect in 35 states, and we're
20 awaiting decision. By October 12th, the briefing will be
21 complete on a class certification and summary judgment and
22 benefit of the bargain. By November 2nd, there will be
23 briefing complete on Daubert motions.

24 So our recommendation, Your Honor, is that we allow
25 the district court to do these rulings. Your Honor started the



1 day -- I have the quote from Mr. Weisfelner where he recognized
2 that what is happening in the district court would have an
3 impact on the buckets of claims that would be the subject of an
4 estimation hearing. And so our approach would be to allow that
5 to proceed, and we would be back before the Court after those
6 issues are resolved.

7 THE COURT: Okay. I see some irony in the fact that
8 New GM has taken the position -- I raised this before, that if
9 economic loss plaintiffs recover -- can recover in the
10 bankruptcy court, they have no claim against New GM. That puts
11 aside the -- putting aside the whole successor liability issue,
12 they have no claim against New GM, and yet you want to litigate
13 this in the district court where you say they wouldn't be able
14 to recover.

15 MR. BASTA: I understand the irony, Your Honor. I
16 think that what -- our position is as follows, which makes this
17 case unique. Normally, in a bankruptcy claim context, we'd go
18 to the bankruptcy court and ask the bankruptcy court to rule on
19 Class 23, or they would ask the bankruptcy court to rule on
20 Class 23. This is complicated because plaintiffs first sought
21 class certification in the district court and --

22 THE COURT: No. That was before there was a
23 settlement in the GUC Trust.

24 MR. BASTA: And before there was a -- but they are
25 proceeding --



1 THE COURT: Which is a -- you know, changes the
2 posture rather dramatically.

3 MR. BASTA: I understand, Your Honor. But we do have
4 a class certification process happening in the district court
5 already.

6 THE COURT: If the claims were -- if the cases, not
7 claims -- if the cases were going to be litigated to judgment
8 in the district court, that all makes perfect sense to me. But
9 in the context in which the GUC Trust and the signatory
10 plaintiffs are seeking to settle, even if I conclude that
11 Rule 23 applies, it seems to me fundamentally different the
12 issue that the -- issues that the bankruptcy court would need
13 to resolve than the district court would need to resolve if
14 claims against New GM are litigated to judgment.

15 MR. BASTA: I would like to address that, Your Honor,
16 because we believe that there's substantial overlap between the
17 class --

18 THE COURT: You said that in your papers, and they
19 say they don't think there's substantial overlap.

20 MR. BASTA: And they don't. But if Your Honor would
21 like to hear more about -- when we started, we had filed a stay
22 motion. In that stay motion, we argued why Your Honor should
23 not decide class certification. You should let the MDL do the
24 class certification. That motion was predicated on the
25 substantial overlap on class certification issues.



1 One of the reasons Mr. Nomellini is here from
2 Kirkland is that I think he can, if Your Honor would like to
3 get into it, explain, if we were going to get into class
4 certification in this court, what would be entailed and how
5 much overlap and long it would take vis-a-vis what's happening
6 in the MDL.

7 And so I don't know where Your Honor is going to come
8 out on today's hearing. And Your Honor in the order this
9 morning said you wanted to hear from the parties about what
10 next steps are, and we're prepared to discuss that. We would
11 like to put a marker down and say we think that class
12 certification here would be highly duplicative on the issues of
13 common issues of law and common issues of fact, and it's highly
14 intertwined between benefit of the bargain, manifest defect,
15 and Daubert, issues that are already being decided. Because
16 the resolution of that substantive issues go to whether there
17 are common issues of law across the board.

18 THE COURT: I'll wait to hear that.

19 MR. BASTA: Okay. Any further questions for me at
20 this time, Your Honor?

21 THE COURT: Not at this time.

22 MR. BASTA: Thank you.

23 THE COURT: Thank you very much. All right. I don't
24 know how the argument among the GUC Trust and participating
25 signatory is going to be divided or not. I purposely didn't



1 address that issue.

2 MS. GOING: My son did that for me.

3 THE COURT: I'm impressed.

4 MS. GOING: I am, too. Good afternoon, Your Honor.

5 Kristin Going, Drinker Biddle on behalf of the GUC Trust.

6 Your Honor, I thought I would do a little bit of
7 reverse order and start with just three points of rebuttal to
8 Mr. Basta's presentation. The first one -- and I'm not going
9 to belabor this point, but as far as the consideration for the
10 release, there is \$21 million of real money that the GUC trust
11 is contributing to the settlement. And that might not be
12 significant to New GM, but it's certainly significant to the
13 GUC Trust, particularly in light of the fact that, as you know
14 all too well, the avoidance action litigation is now going to
15 go forward so that --

16 THE COURT: Are you telling me something I didn't
17 know?

18 MS. GOING: No. I've read the same papers you have.
19 But to us, that means that this could be the last \$21 million
20 in the GUC Trust if we end up having to pay out the full amount
21 of the avoidance action claim.

22 Second, while I appreciate Mr. Basta raising the MSR
23 Resorts case, I am going to disagree with his analysis that
24 this was not seeking estimation of an unfiled claim for
25 allowance. It certainly reads like that is exactly what they



1 sought and, in fact, the settlement provides for a specific
2 claim amount. And so I don't know how it could be anything
3 else but for allowance. I think --

4 THE COURT: But it was still a two-party dispute
5 fundamentally, wasn't it?

6 MS. GOING: It was, Your Honor. But I'm not sure
7 how --

8 THE COURT: I mean, my comment to Mr. Basta,
9 estimation has been used, including by me, to estimate -- I use
10 the claim -- I use the term "claims" loosely because it's been
11 used for administrative claims, which aren't really claims.
12 Administrative expense, that's probably -- the statute doesn't
13 provide for it. Judges have used it, used estimation.
14 Estimation has been used in a number -- because it's very
15 practical. It cuts through a lot of things and can resolve a
16 lot of issues that otherwise could take years sometimes.

17 But MSR was not -- was fundamentally a two-party
18 dispute. Both parties agreed to the procedure the Judge Lang
19 used. Am I right in that?

20 MS. GOING: No. In fact, Marriott objected to this
21 notion. Ironically, they called it -- the objected on the
22 grounds that it was an attempt by the debtor to estimate a
23 hypothetical claim. I've heard that before. But I'm not sure
24 -- and I'll certainly get into it in my presentation. But
25 nothing in 502(c) or any estimation cases that I've seen has



1 made that distinction that somehow estimation is allowed to be
2 used when it's a two-party dispute, but not when it's a multi
3 party dispute or a class action. And again, that's going to go
4 to the point that we believe it's claims, which is a right to
5 payment, not a proof of claim that is being estimated.

6 That brings me to my next point, which is that I got
7 the sense that New GM either believes or is trying to argue
8 that the settlement agreement somehow allows the proofs of
9 claim. And that's not the case at all. If you look at section
10 2.5 of the settlement agreement, what we are agreeing to is we
11 are consenting to the late filing of the proofs of claim and
12 agreeing to seek an estimation order that would estimate the
13 aggregated allowed amount. So all we are agreeing to is to
14 allow those late claims to be filed.

15 And I think this idea that New GM continues to focus
16 on the proofs of claim is a red herring, because in effect, we
17 could estimate -- and I'm going to go through the contracts
18 that show. We could estimate without the settlement. We could
19 estimate without proofs of claim. I think New GM is really
20 seizing on the procedural morass that has occurred in this case
21 to try to argue the fact that we have to go through this entire
22 process to determine whether or not late claims can be allowed
23 before we can move forward.

24 But the reality is, the reason why we even have this
25 notion of whether or not late claims can be allowed is because



1 we have claimants who didn't receive notice of when they could
2 file a claim timely. So I don't think that they should be
3 allowed to use this procedural process as a shield and argue
4 that there are all these steps that must be jumped through,
5 when really, what the settlement is trying to do is resolve
6 years and years of problems that arise from the fact that these
7 claims weren't in the original bankruptcy and not --

8 THE COURT: Putting aside the terms of this specific
9 settlement, could the GUC Trust agree that the -- all of the
10 late claims could be filed and then essentially object to large
11 groups of the claims because these people are in states where
12 manifestation is required and they're -- they didn't manifest.
13 All of the arguments, which essentially would have to be dealt
14 with in an estimation proceeding, the GUC Trust has the ability
15 to agree to the filing of the late claims.

16 MS. GOING: Absolutely. Absolutely. So now I'm
17 going to start with, I think, the one area where we agree with
18 New GM, and that is really how they framed the question that's
19 before Your Honor. And this was paragraph 4 of their brief
20 where they said, "The first question, the gating question is
21 whether or not you can estimate proofs of claim, or can you
22 estimate claims as defined in 101(5) of the Bankruptcy Code."
23 And then they said -- sorry.

24 UNIDENTIFIED: That's okay.

25 MS. GOING: And I think this is important. They



1 said, "If the answer to that question is no, then can you
2 estimate these claims without deciding whether or not rule
3 certification is necessary?" And it's important here, because
4 they recognized the problem that if, in fact, you decide that
5 you can estimate claims, then you don't even need to get to the
6 question of Rule 23 certification. Because it's only if you
7 decide that a court can only estimate proofs of claim that you
8 start going down the "rabbit hole," as I'll call it, of Rule
9 23.

10 THE COURT: But I understood Mr. Basta's argument to
11 say that the statute in the rules only permits distributions to
12 people who will file proofs of claim, and that the agency
13 principle requires that for -- to file proofs of claim on
14 anybody's behalf you either certify the class, or they,
15 themselves, file a proof of claim.

16 So you can't -- do you believe that there can be
17 distributions to economic loss plaintiffs who either haven't
18 filed proofs of claims themselves or a class claim hasn't been
19 filed on their behalf?

20 MS. GOING: Yes, I do.

21 THE COURT: What's the basis?

22 MS. GOING: Because --

23 THE COURT: Mr. Basta has gone through statutory
24 sections, rule section, et cetera at some length to say the
25 code and the rules only permit distributions to people who have



1 allowed claims. They have an allowed claim. You have to
2 either -- it's schedule and is not -- you know, it's not
3 disputed, it's not unliquidated, all that, or you've filed a
4 proof of claim.

5 MS. GOING: Absolutely. But, interestingly enough,
6 the one section that Mr. Basta didn't put up there was 502(c),
7 which is the mechanism by which you can estimate to -- in order
8 to create an allowed claim that would then be paid. And I'm
9 getting there with my statute.

10 THE COURT: Go ahead.

11 MS. GOING: So 502(c) states that there will be
12 estimated for purposes of allowance. And the phrase "estimated
13 for purposes of allowance" means that you're determining
14 through the estimation process what the allowed amount of the
15 claim is. New GM has consistently made this unbelievable
16 argument that a proof of claim must be filed and allowed before
17 it can be estimated.

18 THE COURT: Well, it can't be allowed because then
19 that's the whole point -- you can't -- if it's allowed --

20 MS. GOING: You can't estimate an --

21 THE COURT: -- a fixed amount, there's nothing to
22 estimate.

23 MS. GOING: That's right. Right. And then our
24 second point regarding the statute is: What can be estimated?
25 And 502(c) answers that question by saying it's any contingent



1 or unliquidated claim. Again, noticeably absent is proof of
2 claim, or claim, proof of which has been filed under section
3 501.

4 So here we have the difference between a claim and a
5 proof of claim. And as the legislative history has told us,
6 Congress intended "claim," as defined under the Bankruptcy
7 Code, to have the broadest possible definition. And they use
8 that broad definition when setting forth the process and
9 procedure for estimation in 502(c).

10 In their brief, New GM has made this analogy with
11 1129(b), cramdown section. And they were citing that as an
12 argument as to why you, Judge, should interchange proof of
13 claim with claim in the Bankruptcy Code. But I think when I
14 actually went through that myself, I thought, you know, this
15 actually proves our point because 1129(b) provides that you
16 have to pay the present value of a secured creditor's claim,
17 right.

18 If you exchange that for proof of claim -- if claim
19 really meant proof of claim in 1129(b), then you could easily
20 have a situation where a secured debt gets schedule. Secured
21 creditor then wouldn't have to file a proof of claim. And the
22 debtor would turn around and say, aha, under 1129(b), I only
23 have to pay the present value of your proof of claim. And
24 because you didn't file a proof of claim, I don't have to pay
25 you anything. And I think if that's the case, I really believe



1 Mr. Basta, being an excellent debtor's lawyer, he would've
2 exploited that loophole a long time ago.

3 THE COURT: Do you have a hard copy of your slides --

4 MS. GOING: I do.

5 THE COURT: -- for me?

6 MS. GOING: I'm sorry, Your Honor. If you want me

7 to --

8 THE COURT: Just because I do make --

9 MS. GOING: -- hand it up.

10 THE COURT: -- notes on them (indiscernible). Thank
11 you.

12 MR. BASTA: Thank you.

13 MS. GOING: New GM's entire argument about claim and
14 proof of claim and the fact that every time you read claim, you
15 really have to read the words "proof of claim," that flies in
16 the face of basic contract interpretation principles. And
17 again, if you look at, in contrast, 502(c) and 502(a), you can
18 see that when Congress intended to talk about a proof of claim
19 in the Bankruptcy Code, it knew how to do so. And that the
20 words "proof of claim" cannot be read into and exchanged for
21 every instance where the Bankruptcy Code says "claim."

22 I'm going to turn now to the various contracts and
23 agreements where the estimation process is contemplated. And
24 so first the sale agreement. New GM has literally twisted
25 themselves into a pretzel trying to contort the language of



1 this first sentence of 3.2. They consistently failed to cite
2 the first phrase of this sentence, which says, "At any time."
3 And I believe that that's because they realized that that is
4 particularly problematic if you consider the history and when
5 this agreement was actually entered into, because the sale
6 agreement was entered into in July of 2009. And it says, "At
7 any time, we can -- the sellers can seek an order -- a claims
8 estimate order."

9 At that point, not only was there not a bar date, but
10 there hadn't even been a motion to set a bar date. The motion
11 to set the bar date was filed on September 2nd, and the bar
12 date for all proofs of claim was November 30th.

13 So what this language actually contemplates, the
14 sellers, Old GM, could have literally gone the very next day
15 and filed a motion seeking to estimate the entirety of the
16 claims against the estate before any of them had been filed.
17 So regardless of what 502(c) says -- and we believe it also
18 authorizes the estimation of claims -- the sale agreement that
19 New GM entered into specifically allows for the estimation of
20 something other than just proofs of claim.

21 THE COURT: So what would the purpose of the
22 estimation had been at that very early stage of the case?

23 MS. GOING: So the purpose would be -- I mean, we've
24 understood that to be a purchase price adjustment. That at the
25 time the sale was agreed to, there was, you know, a belief that



1 claims would be in X amount, and if it ended up being that the
2 claims were higher than X amount, then New GM would pay an
3 additional value. And so that provision --

4 THE COURT: But that wouldn't be an estimation for
5 distribution purposes. It would be an estimation for the
6 purposes of determining what New GM had to pay. Am I right in
7 that? I mean, because your point that this is all before there
8 even is a bar date. You have no idea what the amount of the
9 proofs of claim that'll be filed. And yet the agreement
10 provided that there -- Old GM could've requested an estimation.

11 MS. GOING: But it's not --

12 THE COURT: And the purchase price would be adjusted
13 if the estimation was over \$35 billion. But that wouldn't
14 determine any of the amounts that would be paid for
15 distribution.

16 MS. GOING: I don't believe that actually is the
17 case, Your Honor.

18 THE COURT: Why not?

19 MS. GOING: Because if you read the words --

20 THE COURT: How could it be otherwise?

21 MS. GOING: Because it's -- because that's what they
22 agreed to, estimating the aggregate allowed general unsecured
23 claims against the seller's estates.

24 THE COURT: Yeah. But that doesn't say anything
25 about distribution, who gets what. And how could it?



1 MS. GOING: You're right. Okay. It doesn't say
2 anything about distribution, but it certainly establishes what
3 the total amount of allowed unsecured claims are.

4 THE COURT: For the purposes of how much new GM had
5 to pay for Old GM, correct?

6 MS. GOING: That language isn't in there, either.

7 THE COURT: You're the one who told me that this is,
8 in effect, a provision that deals with a purchase price
9 adjustment. If you estimate the claims and they're above \$35
10 billion, New GM has got to pay more than it previously agreed.

11 MS. GOING: Absolutely, Your Honor. But if you're
12 estimating the aggregate allowed amount of general unsecured
13 claims, then you have actually established --

14 THE COURT: Show me where it says something about --
15 anything about distribution.

16 MS. GOING: It does not.

17 THE COURT: Okay. Go on.

18 MS. GOING: Turning to the language in the plan.
19 Again, it is consistent with the sale agreement, which provides
20 that the GUC Trust administrator may, at any time, request that
21 the bankruptcy court estimate the contingent, undisputed,
22 unliquidated claims under 502(c) of the Bankruptcy Code.
23 Again, this is -- no mention of estimating proofs of claim, and
24 also indicating that the GUC Trust administrator has the
25 ability to do this at any time.



1 And the GUC Trust agreement, again, mirrors the other
2 two documents to provide that the estimation can occur at any
3 time, and it is an estimation of claims, of rights to payment.
4 It's not an estimation of proofs of claim.

5 THE COURT: Okay. Isn't that the equivalent of what
6 happens in the asbestos cases when claims are estimated for
7 reserve purposes, not distribution purposes? Would you agree?

8 MS. GOING: I do agree. But -- even --

9 THE COURT: And here, this settlement contemplates
10 estimating claims for distribution purposes.

11 MS. GOING: I -- no.

12 THE COURT: Mr. Weisfelner's shaking his head no.

13 MS. GOING: I don't agree, because I think it's no
14 different in the asbestos cases.

15 THE COURT: But it's estimating the aggregate amount
16 that would be paid subject to a plan that would have to be
17 approved by the Court for how it would be distributed. It caps
18 the amount that's going to be paid for allowed claims. The
19 part's correct. Do you agree?

20 MS. GOING: Exactly.

21 THE COURT: Okay.

22 MS. GOING: Yes. Just like section 3.2 of the sale
23 agreement.

24 THE COURT: On the asbestos cases. In fact, because
25 of the jury trial rights, et cetera, the courts have said no,



1 this is not for distribution purposes. It's purposes of
2 reserve, and maybe there's -- you know, a question I've never
3 quite understood is: What happens if there's not enough money
4 in the reserve at the end of the day?

5 MS. GOING: But that's exactly what we have here with
6 section 3.2 of the sale agreement where it would be capping --
7 seeking estimation to cap the total amount of generalized
8 secured claims. The reason why I say it's not for distribution
9 purposes is because you -- as you outlined, the resolution of
10 the estimation doesn't actually delineate who gets X dollars.
11 There's an additional process, right? You are estimating the
12 total amount --

13 THE COURT: So maybe Mr. Basta's partly correct and
14 partly incorrect that a settlement with the GUC Trust can
15 provide for estimation of the aggregate amount and determine
16 how much, if any, New GM has to -- how many additional shares
17 it has to come forward with. And that is separate from the
18 issue of distribution.

19 And it may be that class certification for
20 distribution purposes has to happen, but the -- a settlement --
21 not this settlement. A settlement could provide for estimation
22 for purposes of determining whether New GM has to contribute
23 additional shares. And some different procedure may have to be
24 followed, including Rule 23 certification to determine who gets
25 what.



1 MS. GOING: I agree with that, Your Honor.

2 THE COURT: Okay. Go ahead.

3 MS. GOING: The last point I just wanted to touch on,
4 the side letter, because it is also consistent with the other
5 agreements. And again, this is an agreement that New GM signed
6 and is bound by. And they agreed that we may, at any time,
7 seek a claims estimate order as such term is defined under the
8 sale agreement. So again, there is consistency throughout
9 these documents. We're entitled to seek a claims estimate
10 order at any time, and we're entitled to seek an estimate of a
11 right to payment, not just proofs of claim. There's no
12 limiting language in any of the agreements, nor in the statute.

13 THE COURT: Okay.

14 MS. GOING: And I'm going to turn the podium over to
15 Mr. Weisfelner now to address the Rule 23 issues.

16 THE COURT: Okay. Thank you very much, Ms. Going.

17 MS. GOING: Thank you.

18 MR. WEISFELNER: Good afternoon, Judge. For the
19 record, Edward Weisfelner together with my partner, Howard
20 Steel. And on the phone I believe is our co-designated
21 counsel, Sander Esserman, as well as the co-lead counsels,
22 Steve Berman and Elizabeth Cabraser.

23 Your Honor, I apologize we are the only lawyer to
24 address you today who didn't come with a PowerPoint
25 presentation. I want you to be assured that that's not because



1 I'm the only lawyer who's not getting paid by the hour. It's
2 just that we didn't think the PowerPoint presentation was
3 necessary. I can assure you that I have prepared remarks that
4 I'd like to ultimately go through. But I do want to take an
5 opportunity out of sequence, and I will highlight the points
6 again in my prepared remarks to address at least some of the
7 issues that were raised during the colloquy between Your Honor
8 and Mr. Basta.

9 Your Honor asked a question on asbestos cases. And
10 in particular you asked what happens assuming that the
11 estimation procedures that occur in those cases are for reserve
12 purposes. And as far as I'm aware, typically once you set the
13 reserve, it's not all over and done with. What happens, I
14 think in every one of those cases, is the parties then
15 negotiate over and produce what's known as a trust distribution
16 procedure, otherwise known as the TDP. It's typically
17 negotiated as between the futures representative or futures
18 committee, the current tort committee with or without debtor's
19 involvement. And it's that trust distribution procedure, which
20 is put out on a notice to all affected parties, that determines
21 who gets what out of the reserve that was set aside.

22 So to the extent that Your Honor still had that
23 question, I wanted to address it. And it's not unlike what we
24 contemplate in this case. Assuming that the settlement is
25 approved, assuming there is then an estimation proceeding that



1 triggers all or any portion of the adjustment shares, there
2 will be a subsequent procedure negotiated as between lead
3 counsel for the economic loss plaintiffs and lead counsel for
4 the personal injury/wrongful death claims to the extent they
5 still exist after they're mediated and settled by GM. It will
6 be under the auspices of Judge Cote, and will ultimately be
7 presented to Your Honor on notice to --

8 THE COURT: Not Judge Cote. Who's the mediator?

9 MR. WEISFELNER: I thought it was Cote.

10 THE COURT: No.

11 MR. WEISFELNER: Cote. I'm mispronouncing it. Cote.

12 And will ultimately be presented to Your Honor --

13 THE COURT: I have nothing wrong -- I think Judge
14 Cote probably would want nothing to do with this, but --

15 MR. WEISFELNER: On notice again, Your Honor, to the
16 world. And, Your Honor, I don't want to prejudge that stage of
17 the proceeding, but were we obligated, required, or suggested
18 that Rule 23 apply at this state, we'll consider it. But by
19 that time, the adjustment shares having been triggered, GM may
20 be out of our collective hairs then and forever.

21 THE COURT: Never.

22 MR. WEISFELNER: But you're probably right. It's
23 never. Now, there was a concern, and again, I'll touch upon
24 this in my prepared remarks, about agency and the agency
25 length. Who's --



1 THE COURT: Well, it's American Reserve. I mean,
2 this -- I understand -- it's not out of thin air. I mean, it's
3 case law.

4 MR. WEISFELNER: Well, sure. But they're talking
5 about who's going to protect -- for example, Weisfelner has
6 cited for the proposition that we acknowledge 2 million cars
7 can't possibly be part of the estimation. That's not what
8 Weisfelner said, but let's assume for the purpose of this
9 argument. Mr. Basta then argues, oh, my God, who's going to
10 protect the 2 million that Weisfelner just threw under the bus?

11 These people on this side of the courtroom reflecting
12 the plaintiff's side had no agency to resolve these issues in
13 favor of any of the plaintiffs who aren't before you, let alone
14 these poor individuals we threw under the bus.

15 Your Honor has posed in the past a hypothetical
16 about, well, why couldn't I do what the settlement in the
17 estimation motion asked me to do in a situation where the
18 debtor scheduled the claims. And it's been pointed out, well,
19 but if they scheduled it as contingent and unliquidated, it
20 doesn't really get you very far.

21 I think of a different hypothetical that I think
22 addresses the agency point of view. Imagine, if you would, a
23 situation where you have an ad hoc committee that's very active
24 in the case. Even an official committee that's very active in
25 the case. That committee settles a dispute with a debtor in



1 possession. And the resolution of that dispute goes out on
2 notice to the world, the absent creditors, claimholders that
3 the ad hoc or official committee purported to represent, for
4 their consideration and objection. No objection, or the
5 objections are overruled.

6 That settlement's approved under the court's auspices
7 using 9019, using 105 of the Bankruptcy Code. No suggestion
8 that you need a class in order to protect the interest of the
9 absent claimants who are invested in the agency of their
10 official or ad hoc committee.

11 Now, Your Honor, I'm sort of glad that I heard Mr.
12 Nomellini -- is that your name?

13 MR. NOMESELLINI: Nomellini from Kirkland is here
14 because we're all searching for cases that one could cite to as
15 authority for different propositions. And I think we quite
16 rightly cited to Mr. Basta's case, MSR Resources. I think an
17 even more compelling case is a Kirkland case called GenOn. And
18 I don't know, Paul, if you were involved in GenOn before you
19 left, but you've got to listen to this case. And I have copies
20 of the pleadings I'd like to hand up to you, and we have a set
21 available for your clerk and one for opposing counsel. But I
22 think this is a powerfully important case.

23 There were anti-trust actions pending in two
24 different jurisdictions, pre-petition, those anti-trust actions
25 were moved to an MDL. There were class proofs of claim filed



1 on behalf of two MDL classes. Those class proofs of claim, the
2 claims of the underlying class members were resolved between
3 the debtor represented by Kirkland and the class action
4 plaintiff's lawyers.

5 THE COURT: Had there been a certified class?

6 MR. WEISFELNER: No. And the methodology for giving
7 notice of the settlement, and an opportunity to be heard and
8 object was under, gee, I don't know, 9019 of the bankruptcy
9 rules and Bankruptcy Code section 105. Not a mention of
10 section -- Rule 23. Not a reference to it even though there's
11 a pending MDL. Even though the class was never certified. So
12 the notion that you can't resolve potentially contested class
13 claims that are filed as class claims before there's a
14 settlement without application of Rule 23 is belied by New GM's
15 counsel's own activities in the GenOn case. Not to mention --

16 THE COURT: Was the settlement approved?

17 MR. WEISFELNER: Your Honor, it's interesting. The
18 hearing on that settlement was originally scheduled for July
19 11th. This hearing, GM's side sought to adjourn. You weren't
20 aware of it, but they asked all of us if we could come up with
21 different dates and propose different dates to you for reasons
22 that were never made clear to us as to why they needed a
23 different date.

24 Once it was clear that we weren't going to move
25 today's hearing ate, coincidentally or not, I don't know, but



1 the GenOn hearing was kicked to the 25th of July, a couple of
2 days from that. But I'll tell you, you look at the docket
3 sheet, not one objection to the proposed settlement. Not one.
4 A settlement, again, of class action proofs of claim that are
5 being resolved by the bankruptcy court without reference to
6 Rule 23.

7 That's to say nothing of the fact, by the way -- and
8 again, I'll stress it when I go through my prepared remarks.
9 Rule 23 applies in accordance with Rule 9014 in an adversary
10 proceeding, X versus Y. It does not apply to a contested
11 matter. The late claims motion is a contested matter. The
12 settlement motion is a contested matter. The estimation motion
13 is a contested matter, not an adversary proceeding. And by its
14 terms, that being 9014, Rule 23 does not apply unless the court
15 orders otherwise.

16 THE COURT: Yeah. And what American Reserve and
17 other cases have said is that as applied to a proof of -- a
18 class claim, it's a two-step inquiry. One, whether the court,
19 in the exercise of its discretion, applies Rule 23. And if the
20 court applies Rule 23, then you have to go on and satisfy the
21 requirements of Rule 23, whether it's a settlement or
22 litigated. You agree with that?

23 MR. WEISFELNER: Yes, I do. And, Your Honor, in
24 particular, we cite for the proposition Your Honor just
25 mentioned. And the cases that Mr. Basta relied on in his own



1 presentation, the three cases that just said what you said;
2 Musicland, Blockbuster, and Judge Gerber's decision in GM
3 having to do with GM's liability for apartheid. I didn't
4 really get the connection until I read the case in some detail.

5 But what each of those cases say is we're not going
6 to apply Rule 23 in this matter or trigger its application
7 under 9014 because we have a better mechanism under bankruptcy.

8 THE COURT: Sure. If there were potentially 100
9 claimants or 200 claimants, have them file proofs of claim.
10 They don't need a lawyer. They file a proof of claim. The
11 Court can deal with it efficiently. Those situations don't
12 involve 11.4 million potential claimants.

13 MR. WEISFELNER: Exactly right. Your Honor, the last
14 point I want to make, and I'll dive into it in greater detail
15 when I get through my prepared remarks, is the reliance on
16 Amchem for the proposition that contested issues involving
17 class certification can't be settled. That's not what Amchem
18 stands for. I think we all know by now what the circumstances
19 of Amchem was. It was a consorted effort among the asbestos
20 plaintiffs' class with large, and the members of the CRV, I
21 think it was called, the various defendant law firms that were
22 part of the -- again, a collective that were dealing with
23 asbestos claims.

24 And the problem that Amchem had was the claims that
25 were being settled and asserted outside of a class context were



1 future claims, present claims, broken up into a variety of
2 present claims, asbestosis, mesothelioma, lung cancer, no
3 reference or provision for fear of cancer or a lot of other
4 claims that, in the history of asbestos litigation, weren't
5 getting compensated. And the argument that was made is, well,
6 wait a second, how could you ever certify this class into the
7 four theories of certification? Numericity, we'll give you
8 that one. But commonality. What's the commonality between
9 someone who died from asbestos and someone who's got pleural
10 thickening?

11 That's why Amchem denied certification and said that
12 if you're going to try and settle the issue of certification,
13 you have to do it under a heightened degree of scrutiny. It
14 does not stand for the proposition that New GM keeps touting
15 that you can never settle Rule 23 certification issues in the
16 context of a settlement.

17 THE COURT: I don't think they've taken that
18 position, but maybe you read it that way. I don't. I think
19 their position is that a settlement doesn't permit you to
20 ignore the requirements for certification of a class.

21 MR. WEISFELNER: I agree with that.

22 THE COURT: You agree with that proposition.

23 MR. WEISFELNER: I think to the extent that --

24 THE COURT: That's what I understood their argument
25 to be.



1 MR. WEISFELNER: Yeah. Well, I think they went a
2 little above board, if not in their paper, certainly in today's
3 presentation. Where I thought I saw the case cited for the
4 proposition that you can't settle, period, class
5 certifications.

6 THE COURT: Well, I reject that position. I don't
7 think that was their position. But I would reject that
8 position.

9 MR. WEISFELNER: Good. Then I'll skip that part of
10 my prepared --

11 THE COURT: Mr. Basta, go ahead. (Indiscernible) on
12 this point.

13 MR. BASTA: I hate to agree with Mr. Weisfelner, but
14 that is --

15 THE COURT: Sometimes it's worthwhile to -- that's
16 the argument share.

17 MR. BASTA: Yeah. Usually it's in another context.
18 But it is our argument, and I can address it now or in --

19 THE COURT: No.

20 MR. BASTA: There is case law, Your Honor. It's not
21 Amchem. But we cited in our brief cases that stand for the
22 proposition that courts have an independent responsibility to
23 make a determination that every Rule 23 requirement is met, and
24 therefore parties may not settle or stipulate that a
25 certifiable class exists outside of Rule 23. And there's a



1 body of law that stands for that proposition.

2 THE COURT: All right. Go ahead, Mr. Weisfelner.

3 MR. WEISFELNER: Okay. Then maybe I will stress it
4 when I come to it. In any event, let me tell you by way of
5 introduction that --

6 THE COURT: Well, I read a bankruptcy court decision
7 yesterday which certified a class based on a stipulation of the
8 parties because there had been a state court certification --
9 class certification beforehand, and the bankruptcy court
10 concluded that that was satisfactory, that the stipulation that
11 was entered into was -- basically satisfied the requirements
12 for class certification based on what had been decided in the
13 state court on certification.

14 MR. WEISFELNER: Your Honor, look, I'm hoping never
15 to go down that rabbit hole with you and Mr. Basta because --

16 THE COURT: Well, your brief argued at some length
17 that of course you can satisfy Rule 23.

18 MR. WEISFELNER: Well, you're right, because one
19 always likes to have a fallback position. But our primary
20 position is that neither the settlement motion nor the
21 estimation motion requires certification of the class in order
22 to protect the interest of absent claims. And I think that's
23 really the first question, whether the rights of absent
24 claimants are being properly protected in the settlement
25 motion, the estimation motion in our proposed notice.



1 To a lesser extent, and to be generous, I guess the
2 second question is whether New GM's rights are being properly
3 protected in this context, assuming that, one, we're concerned
4 about New GM's rights.

5 Look, it's our position that the proposed notice of
6 settlement and the estimation proceedings utilizing Bankruptcy
7 Rule 9019 and section 105 of the Code is both procedurally and
8 substantively proper and sufficient, and that compliance with
9 Rule 23 is not necessary. New GM contends, and I have to
10 stress this, without a single case support its position, that
11 this court may not settle or estimate unfiled claims, and that
12 compliance with Rule 23 is mandatory. No court has ever held a
13 compliance with Rule 23 is required.

14 THE COURT: Are there any cases that approve
15 distribution to putative claimants that have not filed proofs
16 of claim or are not part of a certified class?

17 MR. WEISFELNER: Yes, Your Honor. Every single one
18 of the asbestos claims that had estimation for reserve
19 purposes, and then subsequently had the court's approval of a
20 TDP, a trust distribution procedure. There were separate
21 procedures for how people put in, for lack of a better term, a
22 "claim" against that trust, and how those claims were
23 ultimately going to be resolved. And some of the TDPs afforded
24 people the opportunity to opt out into a trial court system.
25 Many of them didn't.



1 THE COURT: Are there reported decisions that approve
2 distribution to putative creditors, claimants who have not
3 filed proofs of claims or been part of a certified -- I'm not
4 questioning that you say that's what's been done. But my
5 question is, are there reported decisions that have addressed
6 whether that is appropriate or not. I don't remember seeing
7 any.

8 MR. WEISFELNER: I'm not aware of any. And one
9 would've thought that the researchers on my end would've found
10 them if they existed. And I think that the inherent authority
11 of distributions being made through the TDP process was
12 inherent in the original reserve orders that set up the
13 reserve. But, Your Honor, I can't (indiscernible) find it.

14 THE COURT: All right. Go ahead.

15 MR. WEISFELNER: As I said before, there is no single
16 decision that held that compliance of Rule 23 is required
17 alongside a 9019 procedure. Now, that's not to say that some
18 courts haven't applied them simultaneously. Your Honor applied
19 them simultaneously. My only point is it's not required, and
20 in the context of this case, ought not be required.

21 And let's understand what it is that --

22 THE COURT: Was Partsearch your case?

23 MR. WEISFELNER: Say again.

24 THE COURT: Was Partsearch your case?

25 MR. WEISFELNER: It may have been my firm's, but it



1 wasn't mine personally, no.

2 THE COURT: Okay. I thought it was your firm.

3 MR. WEISFELNER: Let's remember what we're talking
4 about in this case. We are talking about what happens to the
5 so-called "adjustment shares" and who's going to get a part of
6 those adjustment shares. The adjustment shares, at maximum, is
7 worth \$1 billion. We hope to be able to demonstrate to Your
8 Honor that at \$1 billion, you're not going to get economic loss
9 claimants, let alone economic loss and personal injury
10 claimants compensated either in full, or compensated consistent
11 with what Mr. Golden's clients got as trust beneficiaries in
12 the past.

13 So in that context, I think we have to remember that
14 we are taking about not planned distributions that otherwise
15 affect other general unsecured creditors. Here, we're talking
16 about access to a purchase price adjustment that, by design,
17 doesn't injure the trust beneficiaries. They get to keep what
18 they got, and they get exclusive access to what's left without
19 us crawling up their backs or seeking claw back. And, in
20 exchange, we get whatever is there when Your Honor considers
21 whether the adjustment shares ought to be satisfied.

22 I want to start with, first, principals. Absent
23 claimants did not file timely proofs of claim in this case.
24 That's absolutely true. But I think you have to take into
25 account why. It was because they didn't receive due process



1 notice of the bar date in the first place, or any indication
2 that they were sold and were operating dangerously defective,
3 life-threatening cars.

4 It's also the case that Old GM didn't bother
5 scheduling the plaintiff's claims, neither as an allowed amount
6 or a contingent amount, or an unliquidated amount. And that's
7 because Old GM didn't acknowledge that the defects existed,
8 even though they should have known. It simply pretended that
9 the defects didn't exist.

10 Now, in response to this fairly unique set of
11 circumstances, this court already determined that the proper
12 recourse was for the plaintiffs to seek authority to file late
13 proofs of claim. In that context, co-leads and designated
14 counsel filed an appropriate late claims motion seeking
15 authority to file a late claim. And we attached to our late
16 claims motion a proposed class proof of claim, which, as Mr.
17 Basta indicated, we later amended.

18 Interestingly enough, neither the New GM or our
19 adversary at the time, the GUC Trust, insisted at that point
20 that all absent claimants had to file either an individual
21 joinder to our motion, or, for that matter, individual proofs
22 of claim. Instead, they were happy to rely on the proposed
23 class claim that was filed by designated counsel and co-lead
24 counsel. Why would they have to rely on the class claim and
25 the late claims motion that we filed? Because to insist



1 otherwise would've cost them millions of dollars to effect due
2 process notice to the absent members that, hey, you better file
3 either a joinder to the late claims motion that Weisfelner
4 filed, or come up with your own proof of claim, because we're
5 never going to acknowledge that you, as a punitive member of
6 this class, filed the claim.

7 They didn't do that because they were happy to rely
8 on the agency, or the representative capacity, of designated
9 counsel. In fact, New GM has consistently relied on the
10 actions of co-lead and designated counsel in order to have a
11 binding effect on absent claimants. They did it throughout
12 these proceedings.

13 Just a couple of examples. In April of 2017, the
14 hearing of -- April 20th hearing, Mr. Steinberg is quoted
15 saying that at the August 31 status conference, designated
16 counsel said, "We perceive ourselves as having taken the mantle
17 of preserving and protecting the rights of non-ignition-switch
18 plaintiffs in this court." Judge Gerber was looking for
19 someone to be the representative counsel. And then if anybody
20 wanted to get an effect supplement, what it is that we had to
21 say, he was giving them the right to do that on their own. He
22 was saying, who is going to -- because we litigated the 2014
23 threshold issues. We had designated counsel as well, too.

24 And basically, the designated counsel in the
25 bankruptcy court are here. They're the representatives of the



1 lead counsel in the MDL. So the Brown Rudnick firm basically,
2 as I said, is Hagens Berman and Lieff Cabraser's lawyer, and
3 Mr. Weintraub is Bob Hilliard's lawyer. And the lead counsel
4 in the MDL have a responsibility to be the representative
5 counsel for the economic loss claims and the presale and
6 post-sale accident claims.

7 I think that disposes of the agency argument by
8 waiver. It goes beyond that. New GM's opening brief on the
9 2016 threshold issues at page 34, it's the ECF Number 13865,
10 quote, "There's no question that non-ignition-switch plaintiffs
11 and non-ignition-switch post-closing accident plaintiffs are
12 among those bound by the November 2015 decision, December 2015
13 judgment. Designated counsel actively participated in all
14 bankruptcy court proceedings through the issuance of the
15 December 15th judgment." And the point was therefore absent
16 members were bound.

17 November 16, 2016, order to show cause. This is
18 13-802 in the ECF system explaining that the rulings on the
19 2016 threshold issues, including the issue of whether plaintiff
20 should be granted authority to file late claims, would be
21 binding on all persons.

22 May 17th, and this is the last example, the hearing
23 transcript at 203 through 208, New GM's counsel asserts that
24 all plaintiffs served with a scheduling order identifying
25 certain issues to be briefed were bound by the rulings on those



1 issues and had waived any arguments that were not raised in
2 connection with that briefing.

3 Now, for the first time, GM is saying we've got to
4 really be careful and protect the rights of absent creditors
5 who didn't file claims, because we can't trust the
6 representatives to serve their best interest. Let's remember,
7 by the way, that the motion --

8 THE COURT: Well, that's what Rule 23 certification
9 does. It determines whether the class representatives
10 adequately represent the unnamed, unserved class members.
11 Isn't that correct?

12 MR. WEISFELNER: Well, you're right. But, Your
13 Honor, let's talk about what happens in a Rule 23 context
14 versus the paradigm that we presented which is 9019, 105, and
15 notice. So the difference is, if there is any, every member of
16 our class on whose behalf we proffered a claim as part of the
17 class proof of claim gets a notice that says we settled under
18 Rule 9019 and 105. Here's exactly what the settlement
19 provides, here's what's going to happen, we're hoping for an
20 estimation proceeding but there's no guarantee.

21 If the estimation proceeding triggers the maximum
22 adjustment shares, we're talking about a lot of money, and that
23 lot of money is going to get divided up pursuant to a
24 subsequent proceeding on notice to you at an opportunity to be
25 heard in front of the bankruptcy court. Speak now or forever



1 hold your peace. That's the notice that we contemplate.

2 What's the notice that's contemplated under Rule 23
3 that's better or different? Listen, folks, there's a class --
4 actually, there are a bunch of subclasses. The representative
5 members of those class have entered into a single identical
6 settlement across the classes. To the extent that you think
7 that you're not being properly treated vis-à-vis any other
8 subclass member when you don't even know how much money there
9 is to openly be divided, speak now or forever hold your peace.
10 That's the same notice they're going to get.

11 How is it that compliance with Rule 23, assuming it's
12 required, and we don't think it is, serves the interests of the
13 absent creditors any better than the notice that we're
14 professing? And there are a lot of reasons, by the way, why we
15 didn't go the Rule 23 route, including most specifically, I'm
16 telling you under Rule 23 there's a settlement. Don't ask me
17 how much the settlement's for, don't ask me how much you're
18 going to get out of it, you've just got to trust me.

19 And in the Rule 23 context, we thought that was going
20 to be a lot harder to demonstrate. Maybe not impossible,
21 certainly not impossible, as opposed to telling them under
22 bankruptcy where you have in rem jurisdiction and it's a
23 proceeding against the world, and you have jurisdiction against
24 everyone to say speak now or forever hold your peace because
25 we're asking to give a waiver and a release in favor of



1 triggering the estimation procedure which may or may not get
2 you anything. But if we're successful, it could get you quite
3 a lot to be determined. The "to be determined" part doesn't
4 really fit the contours of Rule 23 notice as easily as 9019 and
5 105.

6 Now, you've got to remember that our late claims
7 motion wasn't embraced by the GUC Trust. It was opposed by the
8 GUC Trust, and opposed pretty vigorously. It was also opposed
9 by the GUC Trust beneficiaries represented by Akin, and it was
10 opposed by New GM. It was only after discovery and preliminary
11 motion practice that we actually reached a settlement. Well,
12 we reached a settlement, we had the settlement reneged on, we
13 had the settlement resurrected --

14 THE COURT: Let's pass over that part of this.

15 MR. WEISFELNER: Okay. But now GM contends that the
16 Court can adjudicate the rights of absent claimants without
17 class certification and they're wrong. Again, I want to go
18 over some of the applicable fundamental principles.

19 We all know that bankruptcy favors settlement. I
20 don't have to go through all the cites. They're in our brief.
21 We also know that bankruptcy is a collective proceeding. Levy
22 v. Lewis, (2nd Cir. 1980). The bankruptcy court has authority
23 to determine all claims, be they filed or not, to estate
24 property, whether held by present or absent claimants. The
25 cite to that is both 28 U.S.C. Section 1334(e), as construed by



1 Optical Techs at the Eleventh Circuit, 2005, and the Supreme
2 Court's ruling in Tennessee Student Assistance, 541 U.S. 440,
3 where the Court held, and I'm quoting: "A bankruptcy
4 proceeding is one against the world." And that court's in rem
5 jurisdiction permits to determine all claims that anyone,
6 whether named in the action or not, has the property or thing
7 in question.

8 It's in this context the bankruptcy court can issue
9 bar orders under Section 105 to assist in settlements. It's
10 the Munford case at Eleventh Circuit. And the bankruptcy court
11 can channel claims to a settlement fund. That's the
12 Johns-Manville case, Second Circuit 1988, and that's exactly
13 the framework that we're utilizing here.

14 There is a res, the adjustment shares, as when and if
15 they're triggered, Your Honor has in rem jurisdiction to
16 determine everyone in the world's rights as to those adjustment
17 shares. Once they exist, and only after they exist, we will
18 present Your Honor with a mechanism for how to distribute the
19 adjustment shares, and Your Honor will approve it on notice to
20 everyone that's affected, and everyone will have an opportunity
21 to step forward and claim that the distribution procedure
22 somehow isn't fair or equitable.

23 THE COURT: So you argue in your brief, and I'm
24 saying the alternative, that class certification is easily
25 achievable here and non-opt-out class because it's a limited



1 fund case. And so if there were a structured settlement that
2 provided for an estimation of the potential allowed amount, and
3 I think Mr. Basta talked about the term has to be potentially
4 allowable. It was an estimation of the potentially allowable
5 claims and estimation went forward and it determined that GM
6 has to pay 750 million in value, and then the question is, who
7 gets that?

8 I know you say that it's been done in the asbestos
9 cases through a separate trust and there are procedures about
10 how distributions are -- claims against the trust,
11 distributions from the trust. That's why I ask were there any
12 cases that support that construct.

13 The settlement that's before me as part of the
14 questions I asked this morning -- sorry they were so late --
15 but about does this settlement terminate if the Court requires
16 Rule 7023 certification, really for distribution purposes?
17 Okay. And I don't know -- I'm sure New GM would be even less
18 thrilled if the Court determined that the potentially allowable
19 claims total a billion dollars and then a year later it turns
20 out, well, there really are only 750 million who are entitled
21 to receive a distribution, what happens to that extra \$250
22 million? New GM is required not to wait until the end of the
23 day, but if the GUC Trust --

24 MR. WEISFELNER: Well, see, that's where we think
25 GM's rights are going to be protected in the context of the



1 estimation proceeding.

2 THE COURT: I'm sure they're thrilled and very warmed
3 by your saying that.

4 MR. WEISFELNER: No, I know. But that's opposed to
5 them standing up and telling Your Honor that we need to protect
6 the rights of the absent class members. Now, to the extent
7 that they're talking about their rights, listen, I don't want
8 to pay a billion dollars' worth of value, and somehow you're
9 going to come up with a distribution procedure that's only
10 going to allocate 750. What do we -- think about the logic of
11 that. We have to convince Your Honor in estimating the claims
12 in order to hit the maximum that we're 10 billion above the
13 current threshold. So having put on that case that we're
14 10 billion above the threshold, triggering the billion dollars,
15 we then have to apply the billion dollars to, by definition,
16 \$10 billion worth of claims. It's a ten-cent-on-the-dollar
17 maximum distribution.

18 I can assure Your Honor, on penalty of being
19 disbarred, we're not going to have \$250 million left over to
20 return to Mr. Basta's client. That concept makes no sense.

21 THE COURT: I know I'm taking this out of order, but
22 the questions I asked in the order I entered this morning, can
23 you tell me whether this settlement terminates if the Court
24 concludes that 7023 certification of economic loss claimants is
25 required?



1 MR. WEISFELNER: Okay. Your Honor, I've had an
2 opportunity to consult with one of my lead counsel. I've had
3 an opportunity to think about the question. I've had an
4 opportunity to talk to Drinker Biddle. My understanding is
5 they haven't had an opportunity to consult with their client.
6 My view and the view of the people I've been able to consult
7 with so far is that the settlement lives. We may have to go
8 through it on a line-by-line basis to see what, if any, changes
9 need to be made to it. But the concept of the settlement, the
10 purpose of the settlement, the benefits of the settlement we
11 think lives whether Your Honor requires certification of the
12 class or not.

13 Your second question is, suppose Your Honor openly
14 denies certification of the class, and I can give you my
15 informed, thoughtful --

16 THE COURT: I don't think I asked that.

17 MR. WEISFELNER: Yeah, I thought you asked what
18 happens if Your Honor applies Rule 23 and we can't comply with
19 it. All right. The thing the signatory plaintiffs prepared to
20 modify to provide the settlement terminates only if the Court
21 does not certify one or more of the classes.

22 THE COURT: By that question, what I thought I was
23 asking is, so if the GUC Trust and the signatory plaintiffs
24 agree that either the current settlement or as modified would
25 require, if the Court determined, required 7023 certification



1 of classes. If at the end -- I was I guess expressing that if
2 a condition is -- if certification's not given, either side has
3 the right to terminate the agreement. It's not, you know, back
4 to the drawing board.

5 I was really -- the second question followed from the
6 first. Does the proposed settlement terminate if the Court
7 concludes settlement approval of economic loss claimants
8 require certification of one or more classes?

9 MR. WEISFELNER: And I think the answer to that is
10 no.

11 THE COURT: Well, you say no, but you -- justifiably,
12 I only asked the question this morning.

13 MR. WEISFELNER: Right.

14 THE COURT: And if, at the end of the day, I conclude
15 I can't certify the class, does the GUC Trust as signatory
16 plaintiffs have the right to declare the agreement terminated?

17 THE WITNESS: I haven't thought about it, but I would
18 think we'd all want to reserve the right if Your Honor doesn't
19 certify the class to think about whether or not there's any
20 basis to go forward. If you've required Rule 23 to apply and
21 we can't comply with Rule 23, then I'm not sure the question is
22 anything other than moot.

23 THE COURT: All right.

24 MR. WEISFELNER: I mean, let me quickly try and --

25 THE COURT: Go ahead. Go back to your prepared



1 argument.

2 MR. WEISFELNER: -- and complete this. Your Honor,
3 GM takes the position that the bankruptcy court can approve
4 this settlement of class proofs of claim without first
5 certifying the class. However, as I've indicated, counsel for
6 New GM is seeking to do just that in the (indiscernible)
7 bankruptcy case. And Your Honor can read it for yourself, but
8 that's --

9 THE COURT: Not tonight.

10 MR. WEISFELNER: But that's exactly what is going on
11 there.

12 THE COURT: Did they file a brief in support of what
13 they were doing?

14 MR. WEISFELNER: Just the motion, no brief. And,
15 again, I don't think they anticipate and the docket doesn't
16 reflect any objections. As an aside, we should also point out,
17 as I think I have already, that Rule 23 doesn't even apply
18 unless the Court orders otherwise.

19 By the way, I want to go back to the presentation
20 that New GM gave you, and in particular I want to point to
21 page 42 where you are taken through all of the applicable
22 rules.

23 THE COURT: I actually turned over that page 42,
24 turned over the corner of it to go back and look at it, so go
25 ahead.



1 MR. WEISFELNER: Yeah, they talk about 302(a),
2 303(c)(2), 321, 502. What they didn't reference is Bankruptcy
3 Rule 3004. 3004 provides in relevant part that the debtor or
4 trustee may file a proof of claim on behalf of a creditor that
5 has failed to file a timely claim. Let's do that again. That
6 rule provides that a debtor can file a claim on behalf of a
7 creditor that missed the bar date.

8 Well, as a practical matter, what does our settlement
9 with the GUC trust do?

10 THE COURT: Yeah. The rule provides that they file a
11 proof of claim within 30 days after the expiration of the time
12 for filing claims.

13 MR. WEISFELNER: Right. But let's remember this
14 case, okay?

15 THE COURT: You say that time hasn't run because of
16 the due process notice.

17 MR. WEISFELNER: There was no effective bar date.

18 THE COURT: Okay. All right.

19 MR. WEISFELNER: So my point is, if the debtor, which
20 is now being represented by the GUC Trust, could otherwise file
21 a proof of claim on behalf of all the absent members, and then
22 could settle those claims -- and this is not in the context of
23 a plan. This is in the context of whacking up a price
24 adjustment. That seems to be the construct of what we're
25 asking for.



1 THE COURT: Well, that's kind of what I inartfully,
2 without going to the rules, was basically what I was asking
3 about at the last hearing. I did it inartfully, but what
4 you're suggesting is is that Rule 3004 would permit the GUC
5 Trust to file them as unliquidated proofs of claim for all
6 economic loss claimants. Is that -- am I --

7 MR. WEISFELNER: That's my point, that, you know, it
8 sort of does away with their agency argument. They didn't like
9 us as an agent in this context. They liked us as agents every
10 time they were looking to bind the absent members, but now they
11 don't like us as agent. Well, do you like the debtor as an
12 agent consistent with the bankruptcy rules itself? Your
13 Honor --

14 THE COURT: Have you looked at what the law is with
15 respect to Rule 3004 and how it's been applied?

16 MR. WEISFELNER: I have not. But, you know, again,
17 it contemplates debtor's filing of late claims if the creditor
18 has blown a bar date by 30 days. So then applicable to our
19 case, you know, the creditor blew a bar date through no fault
20 of its own by a period of a couple of years. All I'm saying
21 is, if you think about it conceptually, you know, if a debtor
22 can file a claim --

23 THE COURT: I don't know what the --

24 MR. WEISFELNER: -- can't the debtor's representative
25 file a claim?



1 THE COURT: Yeah, I don't know. That's why I asked
2 you whether you actually researched it, but I don't know
3 whether or how it's been applied, but go ahead.

4 MR. WEISFELNER: In any event, you know, I look at
5 the due process notice, and again, you know, sort of thinking
6 about what greater rights are we affording the absent creditors
7 here if we do Rule 23 or we do Bankruptcy Rule 9019?

8 THE COURT: Well, yeah. Sometimes the Supreme Court
9 insists that procedures be followed precisely, if the rules
10 require, in order to distribute from a debtor, debtor's estate
11 to a creditor, that there be an allowed proof of claim.

12 MR. WEISFELNER: Sure.

13 THE COURT: Maybe there is a way you think you could
14 do it without it. But if the rules require it, sometimes the
15 Supreme Court requires you do it that way.

16 MR. WEISFELNER: Right. But I don't --

17 THE COURT: The bankruptcy court can't deviate from
18 what the code and the rules provide.

19 MR. WEISFELNER: Your Honor, I don't disagree. But
20 not only don't we have a Supreme Court decision that says that,
21 we don't have a district court case that says that. We don't
22 have --

23 THE COURT: Well, but Mr. Basta cites a number of
24 code sections that say you have to have -- there has to be a
25 claim that's been asserted.



1 MR. WEISFELNER: Right. But we can also -- and the
2 plan provides and the sale agreement provides that Your Honor
3 can estimate claims for allowance purposes. Once the claim is
4 estimated for allowance purposes, the only operative then issue
5 is for distribution purposes. And the Code sections talk about
6 distributions in the context of a plan of reorganization.

7 The distributions we're talking about is in the
8 context, not of the plan of reorganization, but of the sale
9 agreement and the triggering of the additional sale proceeds
10 because the claims were above a certain threshold amount. So
11 it's outside the context, I would suggest, Your Honor, of the
12 code provisions that New GM cites to where we've talked about
13 though shalt not get a distribution under a plan of
14 reorganization unless and until your claim is allowed. Well
15 that's nice. We didn't have an opportunity to have our claims
16 allowed together with everyone else's back in 2009.

17 THE COURT: And the answer to that is that, if you're
18 permitted to file late claims, you'll get your chance now.
19 It's not equitably moot because there is this accordion feature
20 that would require New GM to pony up a lot more value.

21 MR. WEISFELNER: I sort of agree and disagree for the
22 following reason. Had I been allowed way back when, before
23 distributions started to be made to anybody else, and we're
24 talking about distributing the extra billion dollars worth of
25 claims, everyone would have had a pari-passu distribution of



1 some dollar amount. By definition, the GUC Trust beneficiaries
2 would have gotten less cents on the dollar than what they've
3 already received. And by definition, if I get 100 percent of
4 the adjustment shares worth a billion dollars on account of
5 \$10 billion worth of claims, by definition, my constituent
6 doesn't get more than ten cents on the dollar.

7 So the general rule that says you've got to comply
8 with the code provisions that talk about allowance of claims
9 for a distribution I suggest have already been violated, not by
10 us, but by GM --

11 THE COURT: But Judge Gerber recognized that -- he
12 gave with one hand, he said the remedy is motion for late
13 claim, and he took away with the other by saying equitable
14 mootness. Second Circuit vacates equitable mootness. And
15 there is certainly nothing in what Judge Gerber said that
16 indicated -- and I didn't see anything in the arguments that
17 were made to him, because I did look. There was nothing in the
18 arguments that suggest that he was made aware that there was
19 this accordion feature that potentially required New GM to
20 contribute an additional \$1 billion.

21 MR. WEISFELNER: Well, I can assure Your Honor that
22 Judge Gerber was very much aware.

23 THE COURT: I'm not so sure about that.

24 MR. WEISFELNER: It was in the papers and it was in
25 oral argument. But neither here nor there, my point is this:



1 To slavishly adhere to the code provisions that talk about the
2 filing of claims, the allowance of claims for distribution
3 purposes is really outside the context of what this set of
4 motions is all about.

5 THE COURT: You know, like or not, Mr. Weisfelner,
6 the Supreme Court has limited the power of bankruptcy judges to
7 depart from express provisions of the code. I can't use 105
8 because I think it would be more fair to folks to simply
9 disregard what express code provisions require.

10 I feel quite constrained by that, particularly if the
11 code and rules provide an avenue to potentially allow the
12 signatory plaintiffs to accomplish exactly what they want.
13 Maybe not the way they want to do it, but it does provide
14 provisions that could get you there.

15 MR. WEISFELNER: And I guess all I'm saying is, if I
16 take a look at 502 and I think about the allowance of claims as
17 mandated by the bankruptcy code, and I talk about who can file
18 a claim under the bankruptcy rules, and I think about the
19 purpose for which the settlement and estimation motions are
20 going forward, and it's not for distribution under a plan. And
21 in particular, you know, their argument under Section 3.2 of
22 the sale agreement, you've got to take a look at the
23 legislative history of the sale agreement.

24 And I think this sort of plays into my argument on
25 the statute and where I think Your Honor does have authority to



1 estimate these claims for purposes of triggering the adjustment
2 shares subject to Your Honor's enforcement of whatever
3 distributive mechanism we put forward before you, which may or
4 may not require some additional protections. But 3.2 was
5 designed in order to avoid improper dilution to the GUC Trust
6 beneficiaries.

7 Well, you think about it, this is exactly what our
8 settlement achieves. You get and keep everything that you were
9 given before under the plan. We get and keep only what we can
10 demonstrate on the back of our own claims, not yours, would
11 trigger the adjustment shares. The claims and the allowance of
12 claims up to this point in the case is done. It's below the
13 threshold to trigger the adjustment shares.

14 They ain't never going to get triggered unless you
15 allow the people who were deprived of the right of filing
16 proofs of claim and who relied because everyone wanted them to
17 rely on us filing a class proof of claim on their behalf. Your
18 Honor, you're not allowing these claims for distribution
19 purposes pursuant to a plan. You're allowing these claims for
20 subsequent consideration of distribution pursuant to procedures
21 that will be developed and presented to you with an opportunity
22 to consider them and object down the road.

23 And for those reasons, I think it's the height of
24 irony that New GM would force a Rule 23 compliance here so that
25 we can then argue about whether or not we comply with Rule 23.



1 This thing will drag on for another period of time, which is
2 not the be-all and end-all of whether or not you've got to
3 comply with the law. I get that. But again, Your Honor, I
4 suggest to you, with all humility and respect, that there's
5 nothing in the code or the rules --

6 THE COURT: That's like saying with all due respect
7 Your Honor, but --

8 MR. WEISFELNER: I guess it is like that, so maybe
9 I'll just say it straight out.

10 THE COURT: Why don't you drop that part.

11 MR. WEISFELNER: Listen, Judge, I think that
12 construction of the statutes that provides that anytime you
13 have a proof of claim that has been settled in terms of whether
14 or not it represents allowed or allowable claims, and the
15 debtor is simply saying I don't have any objection to the
16 allowance of the claims, but I don't know how much the claims
17 are worth so I'm asking the Court to please estimate them.

18 THE COURT: Well, you know, I'm wondering would the
19 GUC Trust by itself have standing to tell the Court we are
20 going to permit the filing of late claims for both personal
21 injury, wrongful death, and economic loss plaintiffs, and we
22 request pursuant to the sale agreement and the side letter that
23 we go forward now and estimate the expected allowed amount of
24 general unsecured claims, and no Rule 23 certification is
25 required to do any of that.



1 Once you have determined the estimated aggregate
2 allowed amount of the claims and the amount of additional
3 shares that New GM is required to give us, the Court will then
4 be asked to determine how it should be distributed. And it is
5 possible that the Court will have -- that it will require
6 certification of classes of economic loss claimants in order to
7 do the distribution.

8 But there is nothing in the Code or in the sale
9 agreement or the side letter that requires certification of
10 classes or class for distribution purposes in order to
11 authorize the Court to go ahead and estimate the claims. And
12 let's say I go through and do that and determine that
13 \$750 million, and GM's going to appeal and do whatever it's
14 going to do, and if it prevails, you know, if the GUC Trust
15 prevails, GM better come up with the value.

16 And the issue about -- because nobody is presenting
17 me with a plan of distribution. It's all subject to further
18 negotiation agreement and ultimately approval of the Court.
19 And I would commend Magistrate Judge Cott for trying to hammer
20 that out.

21 What about what I just said doesn't work?

22 MR. WEISFELNER: Well, I'll let Your Honor into the
23 thought processes when we were negotiating this not with
24 Drinker Biddle but with their predecessor. And among the
25 alternatives that were being suggested is a single solitary



1 motion along the lines that Your Honor suggested. We'd like
2 Your Honor to estimate the aggregate allowed amount of claims
3 to determine whether or not the adjustment shares are
4 triggered.

5 The problem with that is that you have some embedded
6 issues that we thought the settlement was required for. For
7 example, we have a determination by a variety of courts,
8 including the Second Circuit, that there was a deprivation of
9 due process as it related to the ignition switch defect cars
10 cap letters. This settlement also resolves whether or not the
11 non-ignition switch defect claimants suffered a due process
12 right such that they too should have their claims estimated.

13 Notice I didn't use the word ability to file late
14 claims but have their claims estimated. And there were other
15 discrete issues that were settled.

16 THE COURT: And it would seem to me on that specific
17 issue that the GUC Trust could also say, yes, we recognize that
18 there are unadjudicated issues regarding due process violations
19 for other than these few recalls. And we have decided in
20 consultation with the signature plaintiffs that we will permit
21 late claims to be filed on behalf of all putative claimants
22 where there have been all of the -- they're going to have the
23 burden of showing if there's been the ignition switch defects
24 that -- not the ignition, this other kind of defect; a lot of
25 them were related to the ignition switch -- resulted in



1 economic loss or was the cause of personal injury and wrongful
2 death.

3 MR. WEISFELNER: But you already said that they'd
4 have to file punitive claims. Who's filing? What claims?

5 THE COURT: No, I didn't say that. I'm clearing up
6 putative claimants, okay, as opposed to filed claimants. And I
7 guess the reason I'm, you know, anticipating that New GM's
8 going to argue, but this group of plaintiffs don't have the
9 authority to go ahead and negotiate with the GUC Trust, and so
10 I'm trying to cut that part out. It seems to me everything
11 I've suggested the GUC Trust could have decided on its own.

12 It could have decided, yes, we recognize that there
13 are these additional potential due process violations, and we
14 have decided not to contest that. We've decided to permit late
15 claims on behalf of economic loss claimants who can show that
16 the value was affected by all of these other recalls, as well.

17 MR. WEISFELNER: Well, Your Honor, certainly I will
18 assure Your Honor that if Your Honor were to, unfortunately
19 from our prospective, rule that Rule 23 does apply, we will go
20 back to the drawing board and determine a mechanism that either
21 avoids it or complies with it. But we think this settlement,
22 as negotiated between us, the GUC Trust, and the GUC Trust
23 beneficiaries makes imminent sense.

24 THE COURT: You know, I could be wrong about this and
25 then go back and read a lot of materials again. It strikes me



1 that the Rule 23 issue really only comes into play with respect
2 to distribution.

3 MR. WEISFELNER: And, Your Honor, it strikes us the
4 same way, that it certainly doesn't apply to the settlement or
5 estimation and may in fact apply down the road to distribution.
6 Not that I'm conceding it will, but I certainly believe that
7 the Court's power under 9019 and 105 is sufficient to get us
8 through --

9 THE COURT: Look, Mr. Basta talked about potentially
10 allowable general unsecured claims. He says the claim has to
11 be filed for it to be potentially allowable. I'm not reading
12 the sale agreement or the side letter as for the purposes of
13 requiring estimation to determine how much in value from
14 additional shares should be considered as requiring that.

15 MR. WEISFELNER: Your Honor, we agree. And if you
16 don't have to have a filed claim, then I don't think you have
17 to worry about certifying --

18 THE COURT: Well, I may have to worry about it before
19 I can approve distribution.

20 MR. WEISFELNER: And, Your Honor, I'm prepared to
21 concede that solely for purposes of today because I think we
22 can get through settlement and estimation.

23 THE COURT: But ere is the question, and this was the
24 reason for my order.

25 MR. WEISFELNER: Okay.



1 THE COURT: If you enter into a -- hypothetically, if
2 you enter into a proposed settlement that requires A, B, and C,
3 and the Court concludes I can't agree with C, does the
4 settlement agreement fail and is it thereby terminated? Okay.
5 I might agree with this construct that there's a settlement
6 agreement, it requires estimation, and those go forward, but I
7 don't agree that I can approve distributions without 7023, you
8 know, class certification.

9 So that's why I asked the question. Does this
10 settlement agreement in effect provide that, if I conclude
11 Rule 7023 class certification is required for distribution, the
12 settlement's terminated?

13 MR. WEISFELNER: And, Your Honor, I don't believe it
14 is terminated. I believe we can --

15 THE COURT: I've read it four times in the last
16 couple of days and it's unclear.

17 MR. WEISFELNER: Well, to the extent it's unclear, we
18 will make it crystal clear if we're lucky in our negotiations
19 with the parties. I believe that's our intent. I do believe
20 that Your Honor could move forward to the settlement and
21 estimation motion even after telling all of us that we will
22 never get to distributions absent fill in the blank, whatever
23 Your Honor ultimately tells us you're going to fill in. To our
24 mind, the hard part --

25 THE COURT: I haven't made up my mind. I want to



1 make that clear, Mr. Weisfelner.

2 MR. WEISFELNER: And I know that. And all I'm
3 suggesting, much in the way that people try and figure out what
4 the way forward is, I think we set a date for notice, figure
5 out if the notice is appropriate. Because if we do have some
6 issues that have cropped up based on our meet and confer, which
7 I won't go into today --

8 THE COURT: You'll solve those.

9 MR. WEISFELNER: We may or may not solve those. We
10 may need Your Honor's approval on the methodology of resolution
11 that we've temporarily come up with. I will just tell you that
12 it looks like it's going to cost many, many millions of dollars
13 above the \$6 million budget to give actual notice to everyone
14 because GM claims that they don't have the information, you
15 have to go to Polk to get.

16 Polk will take four to six months to get it at a
17 price of 11 cents per registration. And if the car's flipped
18 over multiple times, it could be 11 cents, not times 11.4
19 million vehicles, but 11 cents time a multiple of 11.4.

20 THE COURT: Let me ask, and I -- my notes are buried
21 under here, and I intended to ask this -- I wanted to ask this
22 question. It's unclear to me whom you believe -- what is the
23 scope of -- I know you use the small C class as opposed to the
24 big C class, certified class. Who are the claimants who you
25 are seeking to have compensated on the economic loss claims?



1 Is it only those people who owned their vehicles at the time of
2 the sale to New GM? What about used car purchasers who
3 purchased post-sale to GM pre-recalls? So the sale is 2009,
4 the first recall is 2014. What about people who bought used
5 cars between 2009 and the first recall in 2014?

6 MR. WEISFELNER: Your Honor, that's why you were
7 right and Mr. Basta was wrong when you talked about the
8 differences between the MDL and the bankruptcy. The answer to
9 your specific question about who we purport to bind in this
10 settlement and benefit through this settlement is anybody who
11 suffered an economic loss because of their acquisition of a GM
12 car up through and including the date of the sale, July of
13 2009. That would include the original purchasers, whatever
14 year they bought their cars, and any subsequent owners of those
15 same vehicles by virtue of used car sales, be they --

16 THE COURT: Up to 2009.

17 MR. WEISFELNER: Right. Be they direct or
18 certified --

19 THE COURT: Not post-2009.

20 MR. WEISFELNER: Not post-2009. I hope I got that
21 right. Someone throw something at me if I'm wrong. I got it
22 right.

23 Your Honor, I just want to flip through my notes
24 quickly to make sure I haven't left anything off.

25 Again, we cited any number of different decisions



1 including the Supreme Court in Martin v. Wilks, a 1989
2 decision, that where you have a special remedial scheme that
3 forecloses successive litigation by non-litigants, for example,
4 in bankruptcy or probate, legal proceedings may terminate
5 preexisting rights if the scheme is otherwise consistent with
6 due process.

7 Ephedra which my adversary cited, it does stand for
8 the proposition that the superiority of class action is lost in
9 bankruptcy. That's the quotation. Judge Rakoff stated that
10 bankruptcy notice directed specifically at class members is a
11 proper substitute for the protections provided by the notice
12 requirements of Rule 23.

13 We talked about how we view the Amchem decision. It
14 doesn't say you can never settle the issue of Rule 23, only
15 that if you do try and settle it, the Court has to deal with
16 heightened scrutiny. Estimation according to New GM is only
17 done in the plan context. You only have to look at Chemtura
18 out of the Southern District 2011 to see all the collected
19 cases there where estimation was done for a variety of
20 purposes -- reserves, voting, channeling claims, and a bunch of
21 other stuff.

22 And we think MEASURE is a good example of a court in
23 this jurisdiction estimating a claim without a proof of claim
24 having been filed.

25 THE COURT: Channeling claims, doesn't that require



1 that at some point in time, as specified in whatever the
2 agreement is, people have to come forward and put in their
3 claim?

4 MR. WEISFELNER: Well, Your Honor, again, there's
5 going to be a mechanism devised by virtue of discussions
6 between plaintiffs' lawyers, both economic loss and personal
7 injury, that affords everyone an opportunity to assert their
8 entitlement to adjustment shares in a manner that is as
9 efficient and fair as possible. And, Your Honor, or the
10 mediation judge, if you don't like the way we propose to give
11 notice, you don't like the way people stand up and say here's
12 what I'm entitled to and here's why, you'll let us know and
13 there will be no distribution until it's all approved.

14 THE COURT: Tell me, if you assume that I conclude
15 that 7023 class certification is required and that the
16 agreement is not terminated, it's either modified or does not
17 terminate, how would you propose to proceed?

18 MR. WEISFELNER: Your Honor, I'm not sure. And I
19 want to take an -- and the reason I say that is because I have
20 some definitive ideas. I don't want to be so forward as to
21 assume what the GUC Trust is going to agree or not agree to,
22 and especially, you know, without some input from the GUC Trust
23 beneficiary.

24 THE COURT: Okay. Fair enough.

25 MR. WEISFELNER: Your Honor, I'd also request that



1 the Court take careful consideration of the Hoffinger case.
2 That was the pool case where the Court concluded there were
3 likely to be other claims that arose in the future because of -
4 - I don't remember if it was bad construct of the pools or
5 whatnot. And in that case, the Court estimated claims, future
6 claims, without having the benefit of any proof of claim having
7 been filed.

8 Owens Corning, USG are two of the asbestos cases --
9 THE COURT: Yeah, but people don't collect unless
10 they --

11 MR. WEISFELNER: Unless they make --

12 THE COURT: The asbestos is future claims and --

13 MR. WEISFELNER: That's right. And there's some
14 mechanism in the trust beneficiary documentation that gets
15 people their entitlement to the distribution.

16 THE COURT: Does that -- are there any cases that
17 excuse the filing of prepetition collections and provide for
18 distributions to injured people who suffered injury
19 prepetition --

20 MR. WEISFELNER: Yes.

21 THE COURT: -- and didn't file proofs of claim?

22 MR. WEISFELNER: Yes. Many of the asbestos cases, as
23 Your Honor may or may not know, are typically divided up into
24 different disease categories. The diseases, some of the most
25 significant diseases, don't manifest themselves, so you had the



1 injury but it hasn't manifested itself yet. This goes to the
2 whole issue of triggering insurance coverage is that the
3 claimants made policies that covered you during exposure or
4 during manifestation, and we've got the ruling that applies to
5 everybody.

6 But in any event, if you've got pleural plaques,
7 you're entitled to a certain level of distribution. That's a
8 prepetition claim. But what the trust distribution procedures
9 provide for is if your pleural plaques ultimately result down
10 the road in the manifestation of cancer or more serious
11 mesothelioma, then there are provisions in the trust
12 distribution mechanism for your claim to be accorded additional
13 funding.

14 Let's remember that what's different about this case
15 than all of the other asbestos cases is your economic losses
16 aren't getting any worse. They ain't getting any better, but
17 they're not getting any worse over time. So the complexity of
18 the trust distribution procedures in some of these mass tort
19 cases where exposure and manifestation can be years apart are
20 very, very complicated.

21 I know we're working on the Takata case and coming up
22 with distribution methodologies for people who suffered an
23 injury based on the Takata air bags. And, again, it's a more
24 streamlined process because we're not talking about the
25 injuries getting any worse.



1 THE COURT: You know, I've never had to apply 524(g),
2 but is there anything in 524(g) that deals with people who've
3 suffered prepetition injury but didn't file a proof of claim
4 able to be paid in the trust?

5 MR. WEISFELNER: Well, yeah. I mean, what 524(g)
6 says, and I acknowledge that it is specific to the asbestos
7 arena, is that whatever prepetition claims you have against the
8 debtor are channeled to the fund that we've established.
9 Remember the fund is typically made up primarily of insurance
10 proceeds, so the channeling channels your claims to that fund
11 and typically releases the contributing insurance carriers.

12 THE COURT: You know, my question is are people who
13 are injured prepetition but didn't file a proof of claim, does
14 524(g) cover them as well?

15 MR. WEISFELNER: It does, but some would argue that
16 the guaranty of 524(g) comes in the fact that you need a
17 75 percent vote in favor. And then questions do arise if we
18 don't know who has a prepetition claim. Do we count them as
19 part of the 75 percent or not? But otherwise the asbestos
20 cases and other cases do estimate prepetition claims without
21 the benefit of a filed proof of claim.

22 Chemtura collects those cases, and there are plenty
23 of other cites in our brief, not to mention MEASURE, where
24 prepetition claims get estimated without the benefit of a filed
25 proof of claim. In fact, in MEASURE, they were estimating



1 rejection damages. The debtor hadn't even filed the motion to
2 reject yet. It was just trying to estimate it so it understood
3 whether or not it should sell the asset with or without the
4 contract attaching to it.

5 THE COURT: Right.

6 MR. WEISFELNER: I'm just going to go through the
7 last pages of my notes. I don't think I've missed anything.

8 Obviously, Your Honor discerned when you were getting
9 all these arguments about what we said in our late claims
10 motion, what we said in our proof of claim about the class
11 actions was all done before we settled.

12 THE COURT: Briefly, Mr. Weisfelner, can you go
13 ahead --

14 MR. WEISFELNER: Your Honor, I have nothing else.

15 THE COURT: Could you briefly address the issue of
16 overlap between class certification in the district court and
17 what's happening here?

18 MR. WEISFELNER: I can, Your Honor.

19 First and foremost, I think you have to understand
20 the defendant. The defendant in this matter is Old GM, as
21 represented by the GUC Trust. The defendant before Judge
22 Furman is New General Motors. And putting aside the claims
23 that sound in the nature of successor liability, New GM is
24 being pursued for what is commonly referred to as independent
25 claims.



1 What is it that New GM did, or failed to do, that
2 caused the injury either to economic loss parties or personal
3 injury wrongful death parties, having nothing to do with what
4 it is Old GM did or failed to do, with the exception of
5 successor liability, and having everything to do with duty to
6 warn, failure to recall in a timely fashion, and other
7 independent claims?

8 THE COURT: So your view of it is the MDL concerned
9 successor liability and independent claims?

10 MR. WEISFELNER: Not only that, but it's considering
11 and the timeline that you've seen for certification is
12 certification for trial purposes and not certification for
13 settlement purposes. And there are other --

14 THE COURT: All right. We're going to end here. I
15 am likely to speak with Judge Furman about the class
16 certification issues that he is being asked to or is likely to
17 address and what, if any, because if I conclude Rule 7023
18 certification is not required, there won't be any. But if I
19 can conclude 7023 certification is required, to what extent is
20 there overlap? New GM deals with that extensively in their
21 motion for stay which we're not arguing today.

22 But I just want to put everybody here on notice that
23 I am going to be away part of -- I'll be back next Thursday.
24 After I return, I expect to speak with Judge Furman about
25 what's been happening here today and what the path forward is



1 likely to be.

2 Mr. Basta, I don't want to hear any further argument
3 today.

4 MR. BASTA: Understood, Your Honor. I was just going
5 to try to respond to Mr. Weisfelner's points, but I understand.

6 THE COURT: Okay. I've read a lot of paper and I
7 appreciate the arguments that have been made, and the
8 PowerPoints from Mr. Basta and Ms. Going. Mr. Weisfelner likes
9 to talk it rather than show it.

10 Okay. Thank you, very much. We're adjourned.

11 (Proceedings concluded at 5:03 p.m.)

12 * * * * *

13

14

15

16

17

18

19

20

21

22

23

24

25



