



AMERICAN  
BANKRUPTCY  
INSTITUTE

# 2018 Winter Leadership Conference

## **Takata: The Global Car Crash**

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# TAKATA: The Global Car Crash

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## Introduction to Takata

## The Takata Recall and Bankruptcy

- Takata Corporation (“TKJP” and together with its subsidiaries, “Takata”) was founded in 1933 as a textile company and started focusing on automotive systems in the early 1950s
- Takata’s products included airbag systems, seat belts, child restraint systems, steering wheels, and electronic devices such as satellite sensors and electronic control units
- Starting in 2003, phase-stabilized ammonium nitrate (“PSAN”) airbag propellants manufactured by Takata began to rupture causing personal injury and death
- Because of these accidents relating to PSAN inflators, certain of the Debtors’ original equipment manufacturer customers (the “OEMs”) began to initiate voluntary recalls
- On June 11, 2014, after receiving multiple complaints and reports, NHTSA opened a formal investigation into Takata’s PSAN inflators



## The Takata Recall and Bankruptcy



*“One of the largest and most complex cases in history.”*

U.S. Bankruptcy Judge Brendan L. Shannon

- 24 deaths, hundreds of injuries worldwide
- Largest vehicle recall in U.S. history
- 70+ million Takata airbag inflators recalled by 19 automakers
- Significant global implications
- Unparalleled media coverage
- DOJ Plea – Restitution
  - \$125M to victims / \$850M to OEMs
- Global Restructuring
  - On June 25, 2017 (the “**Petition Date**”), TK Holdings Inc. (“TKH”) along with certain other Takata entities based in the United States and Mexico (collectively, the “**Debtors**”) commenced chapter 11 cases
  - At the same time, TKJP and certain Japanese affiliates commenced insolvency proceedings in Japan
  - Out-of-court restructurings in Europe, China, and other jurisdictions
- OEMs filed claims in excess of \$45 billion

## Resolution

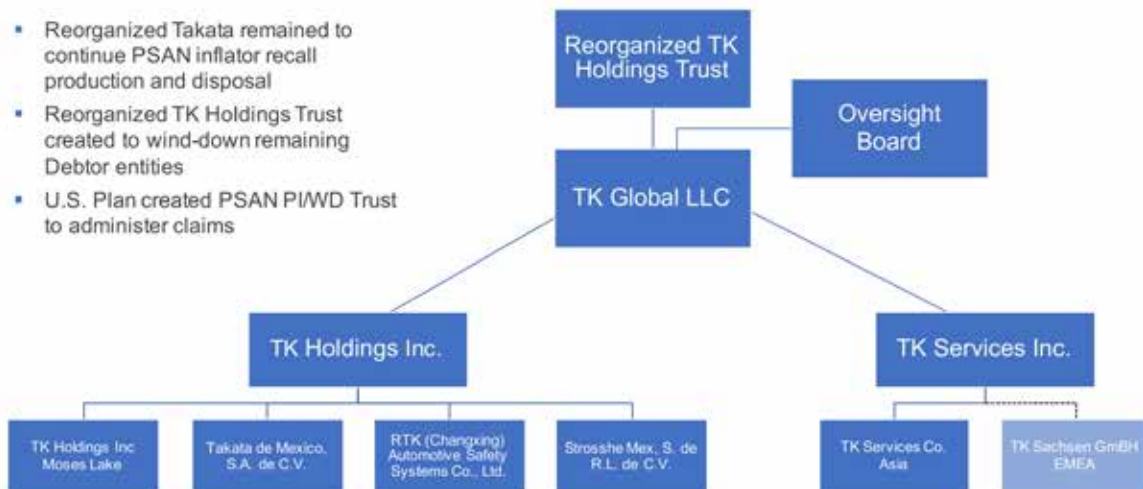


- Takata assets (other than PSAN inflators & liabilities) merged into Key Safety Systems (“**KSS**”)
- Created combined entity of Joyson Safety Systems
- \$1.59 billion deal

## Resolution- Reorganized Takata

### BANKRUPTCY ENTITY STRUCTURE

- Reorganized Takata remained to continue PSAN inflator recall production and disposal
- Reorganized TK Holdings Trust created to wind-down remaining Debtor entities
- U.S. Plan created PSAN PIWD Trust to administer claims



## “Takata Customer Group” OEM Claimants

BMW, Fiat Chrysler Automobiles, Ford, GM, Honda, Jaguar/Land Rover,

Mazda, Mercedes-Benz, Mitsubishi Motors, Nissan, PSA Groupe, Subaru,

Toyota, Volvo and Volkswagen

## Auto Industry Bankruptcy Concepts

### CUSTOMER GROUPS

- **Purpose:** A group of customers working to minimize costs while protecting their respective production for a set period of time
- **Participating Customers:** Generally any customer that represents at least 5% of the distressed supplier's total sales, but those customers which do not require production are not usually expected to participate
- **Benefits of a Customer Group:**
  - All customers in the customer group are in it together for a set period of time (no resourcing unless an event of default)
  - One customer is not subsidizing the production of another customer
  - Accommodation Agreement is executed by the supplier and all participating customers, setting forth specific terms and conditions agreed to by all



## **“Takata Customer Group” U.S. Legal Teams**

BakerHostetler, Bowman and Brooke LLP, Davis Polk & Wardwell, Dykema, Frost

Brown Todd, Honigman, Jones Day, Kramer Levin, Mayer Brown,

McGuireWoods, Morris Nichols Arsht & Tunnell, Norton Rose Fulbright,

O’Melveny, Orrick, Paul Weiss, Sidley Austin LLP, Sullivan & Cromwell LLP, Vorys

Sater Seymour & Pease, and White & Case

## **Financial Advisors**

Deloitte, Jefferies, KPMG, FTI Consulting, Lazard, Alderney Advisors, PwC,

Frontier Financial and Moelis & Company

## Takata's Legal Team

Weil Gotshal & Manges, Richards Layton & Finger, Nagashima Ohno &

Tsunematsu, Baker McKenzie, Young Conaway Stargatt & Taylor, Covington,

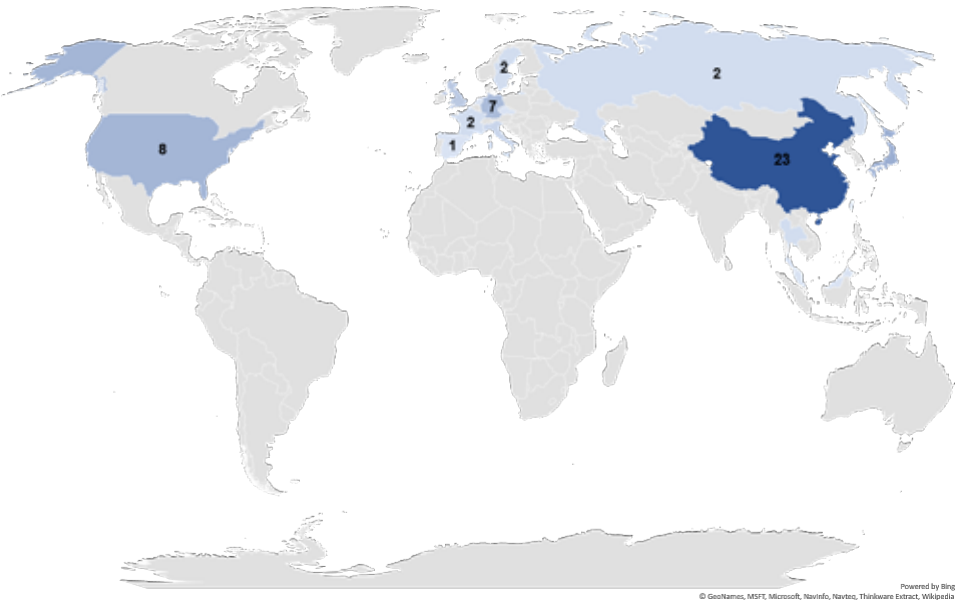
Von Wobeser y Sierra

## A Global Deal – OEMs Who Purchased PSAN Inflators

- |  |  |   |   |
|--|--|---|---|
| 1. Honda                                   | 20. Nissan                                 | 42. UD Trucks Corporation               | 63. China Motor Corporation                       |
| 2. Honda Automobile (China) Co., Ltd.      | 21. Nissan China Investment Co Ltd.        | 43. Subaru                              | 64. Tianjin FAW Toyota Motor Co., Ltd.            |
| 3. Toyota                                  | 22. FCA                                    | 44. DAF Trucks NV                       | 65. Sichuan FAW Toyota Motor Co., Ltd.            |
| 4. New United Motor Manufacturing, Inc.    | 23. BMW                                    | 45. McLaren Automotive                  | 66. Perusahaan Otomobil Kedua Sendirian Berhad    |
| 5. Daihatsu Motor Co., Ltd.                | 24. Rolls-Royce Motor Cars Ltd.            | 46. Dongfeng Passenger Vehicle Company  | 67. Beijing Benz Automotive Co., Ltd.             |
| 6. Hino Motors, Ltd.                       | 25. BMW Brilliance Automotive Limited      | 47. Iveco SPA                           | 68. Beijing Benz Automotive Co., Ltd.-Daimler     |
| 7. GM                                      | 26. Ford                                   | 48. GAC Honda Automobile Co., Ltd.      | 69. Changan PSA Automobiles Co., Ltd.             |
| 8. Grammer AG                              | 27. Daimler                                | 49. Dongfeng Honda Automobile Co., Ltd. | 70. PCMA Rus Ooo                                  |
| 9. SAIC General Motors Corporation Limited | 28. Daimler Trucks North America LLC       | 50. FAW Car Co. Ltd.                    | 71. Changan Mazda Automobile Co., Ltd.-Mazda      |
| 10. Volkswagen                             | 29. Mazda                                  | 51. Lifan Industry (Group) Co., Ltd.    | 72. Dongfeng Motor Company Limited                |
| 11. Skoda Auto                             | 30. PSA                                    | 52. National Electric Vehicle Sweden AB | 73. Spartan Motors, Inc.                          |
| 12. Porsche AG                             | 31. Opel AG                                | 53. AvtoVAZ                             | 74. Karma (Fisker) Automotive                     |
| 13. Seat SA                                | 32. Mitsubishi                             | 54. Changan Ford Automobile Co., Ltd    | 75. Fujian Daimler Automotive Co., Ltd.           |
| 14. Bentley Motors Ltd                     | 33. Mitsubishi Motors (Thailand) Co., Ltd. | 55. Ferrari NV                          | 76. Tan Chong Motor Assemblies Sdn Bhd            |
| 15. Automobili Lamborghini S.p.A           | 34. JLR                                    | 56. Tesla                               | 77. Shanghai LTI Automobile Components Co., Ltd.  |
| 16. Audi AG                                | 35. Chery Jaguar Land Rover                | 57. Renault                             | 78. Zhengzhou Nissan Co., Ltd.                    |
| 17. SAIC Volkswagen Automotive Co., Ltd.   | 36. Volvo                                  | 58. GAC Toyota Motor Co., Ltd.          | 79. Anhui Jianghuai Automobile Co., Ltd           |
| 18. FAW-Volkswagen Automotive Co., Ltd     | 37. UD Trucks Corporation                  | 59. GAC-FCA Automobile Co., Ltd         | 80. Shenzhen BYD Daimler New Technology Co., Ltd. |
| 19. FAW-Volkswagen Automotive Co., Ltd     | 38. Subaru                                 | 60. Renault                             |   |
|  | 39. AutoAlliance(Thailand) Co., Ltd.       | 61. GAC Toyota Motor Co., Ltd.          |   |
|  | 40. Aston Martin Lagonda Limited           | 62. GAC-FCA Automobile Co., Ltd         |   |
|  | 41. DAF Trucks NV                          |   |   |

## Locations of Consenting and Joining OEMs

China	23
Japan	9
United States	8
Germany	7
United Kingdom	5
Italy	3
Thailand	2
Sweden	2
Russia	2
France	2
Taiwan	1
Spain	1
Netherlands	1
Malaysia	1
Czech Republic	1



## Auto Industry Bankruptcy Concepts



## Auto Industry Bankruptcy Concepts

### ACCOMMODATION AGREEMENT & ACCESS AGREEMENT

Used either with customer group or by a single customer to document accommodations being provided to a distressed supplier:

#### Accommodation Agreement

- Details the accommodations being made by customer(s), the obligations of the supplier, and the accommodations and/or obligations of others (lender and/or owner)

#### Access Agreement

- Grants the customer(s) a security interest in the assets of supplier and the ability to access supplier's facilities to continue production, if needed

## Auto Industry Bankruptcy Concepts

### ACCOMMODATION PROTOCOLS

- **Understand the end game**
  - Rehabilitate/reorganize
  - Facilitate sale
  - Support until resource production
- **Ensure continued production from supplier and/or long-term viability of supplier**
- **How much will it cost to:**
  - Rehabilitate supplier
  - Sustain operations through a sale
  - Wind-down the supplier
- **Potential sources of funding to support supplier through distress**
  - Supplier with operational improvements
  - Lender
  - Owner
  - Customers



## Auto Industry Bankruptcy Concepts

### ACCOMMODATION AGREEMENT: KEY PROVISIONS



#### Customer Obligations:

- Financial obligations
- Expedited payment terms
- Non-resource period
- Inventory purchase
- Price increases
- Suspension of setoff rights



#### Lender Obligations:

- Quid Pro Quo: Lender will forbear from any existing defaults
- Continue to lend
- Consent to customer liens
- Consent to access rights



#### Supplier Obligations:

- Continued production
- Inventory bank build
- Operate within approved budget and restructuring plan
- Obtain and receive similar accommodations from other customers
- Tooling acknowledgement
- Secured lender consent (may be party to agreement or execute separate acknowledgement)
- Supplier may grant to customer the following:
  - Lien on supplier operating assets
  - Option to purchase tooling and equipment
  - License to use IP

## Auto Industry Bankruptcy Concepts

### ACCOMMODATION AGREEMENT: KEY PROVISIONS cont'd

#### Other Provisions

- Execution of Access Agreement
  - Right of access
  - Use of supplier employees
- Events of Default (which lead to ability to resource) include:
  - Material breach of agreement
  - Bankruptcy filing
  - Lender enforces its lien rights
  - Additional supplier request for financial accommodations
  - Material adverse change in financial condition
- In event of bankruptcy, supplier required to seek early court approval



## Auto Industry Bankruptcy Concepts

### BANKRUPTCY PROCEEDINGS

#### ▪ Initial Concerns

- Confirm which entities are included in bankruptcy filing
- Confirm the entities with which customer conducts business
- Confirm that supplier plans to continue performing pursuant to the contracts in place
- Understand setoff limitations (may not setoff post-petition receivables with prepetition claim amounts)
- Understand the impact of the automatic stay

#### ▪ Other Key Concerns

- Assumption/rejection of contracts
  - Adequate assurance of future performance
  - Cure (liability for past and/or unknown warranty claims)
- Treatment of warranty and other obligations under the debtor's plan
- Confidentiality/filing documents under seal
- Proof of Claim
  - Determine amounts due (e.g. warranty claims) to customer as of the petition date
  - Include any future, unknown warranty claims



## Bar Date and Noticing Issues

## Bar Date and Noticing Issues

## 385

## Bar Date and Noticing Issues

### NOTICING REQUIREMENTS cont'd

- **PPICs**
  - In the United States
    - Individuals who owned vehicles equipped with PSAN inflators manufactured by the Debtors prior to the Petition Date ("PPICs") were likely unknown creditors given that the Debtors did not have name and address information for them.
    - Notwithstanding the foregoing, out of an abundance of caution the Debtors purchased the name and address information for PPICs located in the United States, through a provider of financial and other informational services ("IHS"), at a cost of approximately \$4.5 million and sought to send them notice.
  - Outside of the United States
    - For owners of vehicles with non-desiccated PSAN inflators located out of the United States, the Debtors was only required to employ reasonably diligent efforts to identify such owners, which is typically restricted to a debtor's books and records.
  - Desiccated PSAN inflators
    - As of the Petition Date, desiccated PSAN inflators were not subject to recall; however, recalls were subsequently extended to approximately 3 million vehicles with calcium sulfate desiccant.
      - Takata proposed to include the owners of such vehicles in their Noticing Protocol.
    - In excluding all other desiccated PSAN inflators from the postcard noticing program, it was assumed that the Debtors had no knowledge of issues with other desiccated PSAN inflators.

## Bar Date and Noticing Issues

### NOTICING PROTOCOL

- **Noticing Protocol Generally**
  - To comply with the requirements under the Bankruptcy Code and Bankruptcy Rules, the Debtors had to provide notice to known and unknown creditors and other parties in interest of a number of key events and deadlines during the chapter 11 cases.
    - The issues that needed to be solved for were HOW, TO WHOM, and at WHAT COST the Debtors would be required to send such notices.
  - In light of the critical importance and complexities regarding noticing, the Debtors commenced work developing their Noticing Protocol months prior to the Petition Date.
  - To implement the Noticing Protocol, the Debtors sought and received certain relief under the Notice of Commencement Motion and the Bar Date Motion.
- **Prepetition Noticing Protocol Negotiations with KSS and OEMs**
  - Commenced several months prior to the Petition Date and culminated shortly following the commencement of the chapter 11 cases with the Initial Noticing Protocol, which was the starting place for negotiations with the TCC, UCC, MDL Plaintiffs and UST.
- **Postpetition Noticing Protocol Negotiations with TCC, UCC, MDL Plaintiffs and UST**
  - Shortly following the Petition Date, the Debtors filed their Noticing Motions (discussed below), which described the Noticing Protocol that had been agreed upon with KSS and the OEMs.
  - Negotiations with these parties continued for many weeks, during which time the Debtors modified the Bar Date Order and Noticing Protocol materials considerably; however, the parties could not reach agreement on several important issues, which resulted in a contested hearing on the Bar Date Motion.

## Bar Date and Noticing Issues

### NOTICING PROTOCOL cont'd

- **Notice of Commencement Motion**
  - Standard Notice of Commencement sent to “traditional notice parties”
  - Excused Debtors from serving the Notice of Commencement on any PPICs unless such parties were otherwise identified on the Debtors’ Schedules
  - Court approved of PPICs receiving notice of the commencement of the chapter 11 cases via a combined postcard notice (the “**PPIC Combined Notice**”) for which the Debtors would seek authority in connection with the Bar Date Motion; and
  - Ordered IHS to provide the Debtors, at the Debtors’ expense, with the necessary information to send the PPIC Combined Notice.
- **Bar Date Motion/Order**
  - Established three deadlines for filing proofs of claim:
    - General Bar Date: November 27, 2017;
    - Governmental Bar Date: December 22, 2017; and
    - PPIC Bar Date: December 27, 2017.
  - Authorized Debtors’ mailing of the PPIC Combined Notice to approximately 83 million individuals, which represented all individuals who were, or had been since January 1, 2013, the registered owner of a vehicle in the United States containing a PSAN inflator (the “**PPIC Notice Parties**”).
    - PPIC Combined Notice was mailed on size 6” x 9” postcard with 8.5 point font on the front and 7.5 point font on the back
    - PPIC Combined Notice provided creditors with actual notice of, among other things, the following:
      - PPIC Bar Date;
      - Process for obtaining replacement airbags;
      - Restitution funds established by the Department of Justice;
      - Disclosure statement and confirmation hearing dates and objection deadlines; and
      - Fact that a claimant’s interests may be affected by a chapter 11 plan of reorganization through releases, injunctions, sale “free and clear” orders, or otherwise.
  - Authorized publication in 68 publications across 39 countries
  - Excused the Debtors from servicing any further notices by mail on PPICs during chapter 11 cases
  - Allowed PPICs to opt into service by email for important case updates

## Bar Date and Noticing Issues

### NOTICING PROTOCOL cont'd

- **Final Noticing Protocol**
  - General Bar Date and general proof of claim form for traditional creditors
  - PPIC Bar Date (30 days after General Bar Date) and specialized PPIC proof of claim form for PPICs
    - All personal injury claimants – regardless of whether their claims related to PSAN inflators – were given until the PPIC Bar Date to file claims.
    - Neither the FCR nor any future claimant was required to file a proof of claim prior to the PPIC Bar Date for injuries sustained after the Petition Date arising out of or relating to PSAN Inflators.
    - Personal injury claimants listed on the Debtors’ Schedules – regardless of whether their claims related to PSAN Inflators – were not required to file proofs of claim, and the Bar Date Order provided the Tort Committee a consent right over the personal injury claimants listed on the Schedules.
  - Postcard notices mailed to approximately 87 million individuals
    - Bar Date Order provided that the PPIC Combined Notice constituted good and sufficient notice of, among other things, (a) the hearings set to consider approval of the disclosure statement and confirmation of the chapter 11 plan, and all related objection deadlines and procedures; (b) the terms of the contemplated plan highlighted therein; and (c) the opportunity for PPICs to “opt out” of certain of the third-party release provisions of the contemplated plan and the procedures for doing so.
  - Publication notices issued in 68 newspapers across 39 countries
    - Bar Date Order provided that identities and contact information of PPICs were not reasonably ascertainable and that such parties therefore were unknown creditors with respect to any claims they may have against the Debtors’ estates, for whom notice by publication pursuant to Bankruptcy Rule 2002 was appropriate and sufficient.
    - Bar Date Order provided that publication of the publication notice alone constituted adequate notice of the Bar Dates and other matters described therein on all unknown creditors, without regard to the additional elements of the Noticing Protocol (i.e., the PPIC Combined Notice).

## Bar Date and Noticing Issues

### NOTICING PROTOCOL cont'd

	Typical Large Case (100,000 creditors)	Initial Protocol	Final Protocol
<b>Known Creditors</b>	Notice by physical mail	Notice by physical mail	Notice by physical mail
<b>Unknown Creditors</b>	Publication notice in 1-5 U.S. newspapers	Postcard notices to approx. 87 million unknown creditors across U.S. + Publication notice in 74 publications across 64 countries	Postcard notices to approx. 87 million unknown creditors across U.S. + Publication notice in 68 publications across 39 countries
<b>Other Noticing</b>	N/A	Global social media and internet outreach program	N/A
<b>Cost</b>	\$450,000	\$56 million	\$50 million

## Automatic Stay Issues

## Extension of Automatic Stay & 105(a) Injunction

### PSAN RELATED LAWSUITS

#### ■ Categories:

- States v. Debtors + TKJP + OEMs (5)
- PI/WD/EL πs v. Debtors + TKJP + OEMs (100+)
- Lemon Law πs v. OEMs (500+)

#### ■ Other Considerations

- The State Actions (USVI, HI, and NM) were most concerning for the Debtors and TKJP because of the police and regulatory power exception to the automatic stay. See 11 U.S.C. § 362(b)(4).
- The OEMs conditioned their support for the Accommodation Agreement upon the Debtors' requesting unprecedented relief: using section 105(a) of the Bankruptcy Code to extend the automatic stay to apply to claims brought against the non-debtor OEMs.
  - Automatic stay only available to debtor, not non-debtor third parties or co-defendants. See *A.H. Robins*, 788 F.2d 994, 999 (4th Cir. 1986).
  - Automatic stay can only be extended in "unusual circumstances," which do not exist where the third-party defendant is "independently liable"—e.g., as joint tortfeasor. *Id.* (quoting *In re Metal Ctr.*, 31 B.R. 458, 462 (Bankr. D. Conn. 1983)).
  - In the past, courts extended the stay for the stay for (i) insiders and affiliates, (ii) insureds and co-insureds, and (iii) guarantors. But had not done so for multi-national corporations with thousands of employees, like the OEMs.

## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ■ Extension of Automatic Stay

- To enjoin claims against a non-debtor co-defendant, or extend the automatic stay, courts ask:
  - Whether the bankruptcy court has subject matter jurisdiction over the proceedings against the non-debtor;
  - Whether it is appropriate to expand the protections of the automatic stay to the non-debtor under section 105 of the Bankruptcy Code (*i.e.*, the "unusual circumstances" test); and
  - Whether issuing a preliminary injunction is a proper exercise of discretion (*i.e.*, the bankruptcy-adjusted preliminary injunction test). See, *e.g.*, *In re W.R. Grace & Co.*, 2008 Bankr. LEXIS 1048, at \*19-43 (Bankr. D. Del. April 11, 2008).
- Based on our research, only one judge in the entire country, Judge Judith Fitzgerald of the Bankruptcy Court for the Western District of Pennsylvania, had ever extended the automatic stay to a non-debtor corporate co-defendant. And she did it twice—once in 2004 and again in 2008—while serving as a visiting judge in the Bankruptcy Court for the District of Delaware.
- Two categories of non-debtor co-defendants the Debtors were seeking to protect: (i) TKJP on the State Actions and (ii) the OEMs in all the Actions.



## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ■ Subject Matter Jurisdiction

- Section 105(a) “does not provide an independent source of federal subject matter jurisdiction.” *In re Phila. Newspapers*, 407 B.R. 606, 611 (E.D. Pa. 2009). Therefore, “a bankruptcy court may not enjoin proceedings between third parties unless those proceedings arise in or under or are related to the underlying bankruptcy.” *In re Third Eighty-Ninth Assoc.*, 138 B.R. 144, 146 (S.D.N.Y. 1992); see 28 U.S.C. § 1334(b).
  - TKH did not argue “arising in” or “arising under” chapter 11 subject-matter jurisdiction.
  - The “generally accepted test” for determining whether a bankruptcy court has related-to jurisdiction over litigation between non-debtor third parties is whether “the outcome of the proceeding could conceivably have any effect on the estate being administered in the bankruptcy.” *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).
  - But the allegedly related lawsuit must affect the bankruptcy proceeding without the intervention of yet another lawsuit.” *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002).
- Pacor instructs courts to ask two questions in determining whether related-to jurisdiction exists.
  - Is the debtor’s indemnification liability triggered automatically upon the filing of the action against the non-debtor?
    - If no → no related-to jurisdiction
  - Is a later successful lawsuit against the debtor, after resolution of the underlying action, a prerequisite to a finding of indemnification owing from the debtor to the non-debtor?
    - If yes → no related-to jurisdiction. See *In re Lower Bucks Hosp.*, 488 B.R. 303, 315 (E.D. Pa. 2013)

## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ■ Debtors’ Indemnification Obligations

- Good language: Seller shall defend, indemnify, and hold Buyer and Buyer’s affiliates . . . free and harmless from and against any loss, cost, liability, claims, demands, or lawsuits, including attorney and other professional fees, arising from or relating to (a) the Goods (including costs and expenses related to any product liability claim or any recall ordered by any federal, provincial, state, local or foreign government).
- Bad language: Supplier will indemnify and hold [OEM] harmless for the costs of any services or other actions undertaken by [OEM] to correct or remedy any Reimbursement Event that is determined to be attributable to Supplier.
- Fortunately, Judge Shannon took a more holistic approach.
  - “While the issue of the indemnities and their enforceability is not ultimately before me, in its simplest terms, I would be surprised if the situation were otherwise, and if the debtors did not have at least a meaningful prospect of indemnity exposure here.” August 16, 2017 Hr’g Tr. at 14:13-17.
  - “I’m satisfied that the debtors’ indemnity obligations meet the identity of interest prong of the subject matter jurisdiction analysis.” *Id.* at 17:12-14.

## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ▪ Unusual Circumstances

- Courts “generally use” two factors to determine whether it is appropriate to expand the protections of the automatic stay to non-debtors under section 105(a):
  - Whether the non-debtor and debtor share an identity of interest such that a suit against the non-debtor is essentially a suit against the debtor; and/or
  - Whether the third-party action will have an adverse impact on the debtor’s ability to reorganize. *See In re W.R. Grace & Co.*, 2008 Bankr. LEXIS 1048, at \*36.
- It’s unclear if both factors are necessary.
  - *In re Johns-Manville Corp.*, 26 B.R. 405, 418 (Bankr. S.D.N.Y. 1983) used “or.” Whereas *A.H. Robins*, which relied heavily on *Johns-Manville* used “and.” *See A.H. Robins*, 788 F.2d at 998.
  - And things have not gotten clearer over time. In 2008, Bankruptcy Judge Fitzgerald used “and.” *See In re W.R. Grace & Co.*, 2008 Bankr. LEXIS 1048, at \*36. A year later, in 2009, District Judge Robreno used “or.” *See In re Phila. Newspapers, LLC*, 407 B.R. at 615.
- Best practice is to demonstrate both.

## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ▪ Identity of Interest

- Identity of interest: Unlike the bad-precedent-creating asbestos cases, every plaintiff knew whether or not Takata made the airbag in its car.
  - “The case before me is not analogous to an asbestos case where there are often dozens of potentially responsible parties, each one effectively to the exclusion of the others and a persistent and legitimate question of whether a plaintiff has any actual relationship to a particular defendant. Here, every single claimant knows the vehicle they purchased and can establish the fact that it contains a Takata airbag system.” August 16, 2017 Hr’g Tr. at 16:12-20.

#### ▪ Adverse Impact on Restructuring

- Adverse impact on restructuring: Used the complexity of the deal as a sword.
- The Debtors were engaged in “the largest recall in history, while simultaneously attempting to implement a reorganization strategy around the globe involving dozens of plants and tens of thousands of employees through proceedings that are pending here and in Japan.” *Id.* at 18:14-20.
  - “And, at the same time, they are party to literally hundreds of active lawsuits involving not only injured plaintiffs but also naming the debtors’ most important customers and business partners, entities that are absolutely crucial to the reorganization effort as it is presently postured.” *Id.* at 18:20-25.
  - “What the debtors seek and need is a breathing spell to focus the attention of all stakeholders on the reorganization process.” *Id.* at 19:1-3.

## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ▪ Preliminary Injunction Factors

- In the reorganization context, the usual standard is slightly modified to consider whether the debtor has a reasonable likelihood of a successful reorganization, as opposed to a reasonable likelihood of success on the merits. See *In re W.R. Grace & Co.*, 2008 Bankr. LEXIS 1048, at \*43–44; *In re Saxby's Coffee*, 440 B.R. 369, 379 (Bankr. E.D. Pa. 2009).
  - “Case law here teaches that the proper focus is on the debtors’ prospect for a successful reorganization and whether the conduct to be enjoined threatens that reorganization.” August 16, 2017 Hr’g Tr. at 25:21-24.
- To issue an injunction:
  - There must be the danger of imminent, irreparable harm to the estate or the debtor’s ability to reorganize;
  - There must be a reasonable likelihood of a successful reorganization;
  - The court must balance the relative harm between the debtor and the creditor who would be restrained; and
  - The court must consider the public interest, which requires a balancing of the public interest in successful bankruptcy reorganizations with competing societal interests. See, e.g., *In re Monroe Well Service*, 67 B.R. 746, 752-53 (E.D. Pa. 1986).

## Extension of Automatic Stay & 105(a) Injunction

### LEGAL STANDARDS

#### ▪ Results

- Judge Shannon extended the automatic stay, for 90 days, to all actions in the US (and Canada) against TKJP and the OEMs, except for the MDL pending in the Southern District of Florida.
  - PI/WD/EL (TKH + TKJP + the OEMs) → stayed
  - Lemon Law (the OEMs) → stayed
  - State Actions (TKH + TKJP + the OEMs) → stayed
- Before the preliminary injunction expired, the Debtors moved once more to stay the Enjoined Actions (*i.e.*, not the MDL) until February 24, 2018.
  - PI/WD/EL (TKH + TKJP + the OEMs) → stayed
  - Lemon Law (the OEMs) → stayed
  - State Actions (TKH + TKJP + the OEMs) → stayed for 30 days
- After 30 days, the Debtors and TKJP entered into a “Stipulated Litigation Schedule” with the States to allow some discovery to proceed during the bankruptcy.
- The Debtors subsequently brought a separate adversary proceeding against the States, seeking declaratory judgment that the States’ claims were dischargeable under the Bankruptcy Code.

# Dischargeability Issues

## Dischargeability Issues

### DISCHARGEABILITY ADVERSARY PROCEEDING

- In December 2017, the Debtors sought a declaratory judgment that claims asserted by certain State AGs were dischargeable under section 1141(d)(1)(A) of the Bankruptcy Code and did not fall within section 1141(d)(6)(A)'s narrow exception to discharge. The Debtors argued:
  - Corporate debts are presumed to be dischargeable unless specifically excepted;
  - Only frauds perpetrated against a domestic governmental unit are excepted from discharge; and
  - If the States' claims were non-dischargeable, it would transform dischargeable individual claims into non-dischargeable governmental claims.
- In response, the State AGs argued that section 1141(d)(6)(A) contained no requirement that a predicate act be perpetrated against a governmental unit. Rather, section 1141(d)(6)(A) provides merely that plan confirmation does not discharge a corporate debtor "from any debt – (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit." According to the State AGs, the text requires merely that the debt be "owed" to the States.
- Two days before the confirmation hearing, Judge Shannon ruled that the States' consumer protection claims may be discharged under section 1141(d)(6) of the Bankruptcy Code.
  - Specifically, the claims asserted by the States were not of a "kind specified in" section 523(a)(2)(A) or (B) because the States made no allegation that the Debtors made false representations to, or committed fraud upon, the States.
  - Rather, the Debtors' alleged conduct—violations of consumer protection statutes—occurred with respect to the citizens of the respective States, not the States themselves.
  - Congress did not choose to include section 523(a)(7)—fine, penalty, or forfeiture payable to a governmental unit—in identifying claims from which a corporate debtor may not receive a discharge.
- To facilitate settlement, Judge Shannon later withdrew the decision upon agreement by the parties.