GM ACCIDENT VICTIMS' EXECUTIVE SUMMARY

CONGRESS SHOULD ENACT LEGISLATION THAT BRINGS JUSTICE TO THE GM ACCIDENT VICTIMS

- The Auto Team chose a federal bailout of Old GM through a bankruptcy sale, thereby enabling the Auto Team to "cherry-pick" liabilities that New GM would assume in the bailout.

- The Auto Team did not consider the GM accident victims to be important to New GM's commercial success, so it targeted their successor liability claims for elimination in the bailout.

- The final Sale Agreement called for New GM to assume approximately $60 billion in liabilities, including those of Old GM's trade vendors, unions, pensioners, and senior executives, whose claims were paid in full.

- The personal injury products liability claims left behind aggregated only $200 million, and they recovered about 15 cents on the dollar.

- Under Michigan law, New GM would have been the legal successor to Old GM and liable to consumers injured by Old GM's product defects. The bankruptcy court's sale order, however, prevented the GM accident victims from suing New GM after the sale.

- Few of the other general unsecured claimants left behind (*e.g.*, the bondholders) had successor liability rights against New GM because there was no identity of interest among the owners of Old GM (*i.e.*, the public) and the owners of New GM (*i.e.*, the government and the unions).

- In April 2014, the Federal Circuit Court of Appeals issued a decision holding that GM dealerships left behind in the bailout stated an actionable Fifth Amendment takings claim based on the dealers' allegation that the government directed GM to reject these dealership contracts in GM's bankruptcy.

- In July 2015, Robbins, Salomon & Patt filed a lawsuit against the federal government in the United States Court of Federal Claims alleging that the government's targeting of the accident victims in the bailout "went too far" by forcing the accident victims to absorb a disproportionate burden of the costs of the bailout that, in all fairness and justice, should have been borne by the public as a whole.

- The case was dismissed by the Court of Federal Claims on statute of limitations grounds even though the DOJ's lawyer conceded at oral argument that the case was timely filed. The case was filed on July 9, 2015, within six years of the closing of the sale and extinguishment of the victims' successor liability claims. The Court held the action should have been filed no later than July 5, 2015, within six years of the entry of the order approving the sale even though the order itself did not result in a loss of the victims' property rights.

- That decision was affirmed in August 2019 by the Federal Circuit Court of Appeals. The United States Supreme Court denied certiorari on October 5, 2020. An amicus brief in support of the petition was filed by the Center for Auto Safety.

- The victims seek enactment of legislation, consistent with established precedent, that waives the statute of limitations and directs the Department of Justice to settle the accident victims' takings claims through the Judgment Fund. *See* attached memorandum in support of this legislative fix.

Proposal to Address the Plight of GM Accident Victims Left Behind in the Federal Government's Bailout of "Old GM"

Purpose:

Enact legislation set forth in HR 7016 that will right an injustice that impacts 632 Americans whose personal injury claims for product defects against General Motors were wiped out in the federal government's 2009 bailout of "Old GM." Victims left behind in the GM bailout can be found in nearly every state. They were not the cause of GM's problems and they deserved better.

Background:

- The claims of the GM accident victims were treated far worse by the federal government than most of GM's other creditors. In the bailout, the Auto Team agreed to pay $60 billion of claims owed to Old GM's corporate vendors, unions, and senior executives in full immediately after the bailout while leaving a few hundred million in claims of accident victims behind to be extinguished in the bankruptcy in exchange for a projected recovery of 12-15 cents on the dollar years down the road.
- There are 632 claimants in the United States and 9 claimants in Canada holding "allowed" personal injury products liability claims in the GM bankruptcy case. These claimants filed proofs of claim aggregating $3,503,080,914. The most common claims cited by these "allowed" claimants were for deaths and loss of consortium, spinal and brain injuries, limb amputations, and loss of eyesight or hearing. The most common defects cited were from rollovers, collapsing roofs and panels, exploding or non-functioning airbags, and even exploding gas tanks. It's fair to say that if an accident victim's claim was "allowed" in Old GM's bankruptcy case, the injury suffered was extensive and often debilitating, if not deadly.
- At the time of the sale in 2009, GM recorded on its balance sheet a reserve of $936 million for projected liability to accident victims on account of their products liability claims against GM. This projection was based on a comprehensive risk analysis commissioned by Old GM from AON Global Risk Consulting.
- The total "allowed" claims of these accident victims in the bankruptcy case, however, totaled only $247,611,160. Total payouts on these claims averaged approximately 30%, so the accident victims actually received distributions of only approximately $74 million, or 7.9% of the recorded expected liability to be paid these claimants at the time of the sale.
- To fund payments to Old GM's unsecured creditors (e.g., bondholders, accident victims, environmental agencies, hazardous waste site co-contributors, rejected "splinter" union contract creditors, terminated executives), New GM delivered to Old GM in the sale a small portion of its equity to be held in trust by Old GM for distribution pro rata on account of "allowed" unsecured claims in the bankruptcy case.

- When the sale closed in July 2009, New GM's stock was projected to return 15 cents on the dollar to "allowed" claimants. By the time distributions were finally made years later, however, New GM's stock had significantly appreciated such that approximately 30 cents on the dollar was paid on such "allowed" claims. As applied here, therefore, total distributions to the accident victims on their "allowed" claims represented only a 2.19% return on the amounts originally sought in their filed proofs of claim (7.3% * 30% = 2.19%).
- The manner in which the accident victims' "allowed" claims were squeezed to a pittance of the amount sought in their filed proofs of claim is worthy of our most extreme indignation and disgust. It was a cold, heartless process headed by top industry consultants being compensated at well over $1,000 an hour. These professional firms earned tens, even hundreds of millions of dollars in the Old GM bankruptcy while the claims of the accident victims were reduced to near nothing.
- By way of example, the professionals forced parties to mediate their claims and then told the lawyers representing the accident victims that if they don't settle, they'll "go to the end of the line" and be tied up in bankruptcy purgatory for years. As a result, the accident victims' "allowed" claims for distribution purposes averaged only 7.3% of the amounts originally sought in their filed proofs of claims, and they only received distributions at 30% (or 2.19%) of that "allowed" amount.
- Many victims rely entirely on substandard coverage through Medicaid for their ongoing medical care. The burdens on the victims' families have been overwhelming.
- In 2015, a lawsuit was brought against the government for forcing the accident victims' successor liability claims to be extinguished in the bailout in violation of the Constitution's Fifth Amendment takings clause. Even though the government agreed at oral argument that the suit was timely filed, the trial court dismissed the case, holding that the victims filed their lawsuit four days too late. The trial court held that the complaint should have been filed not within six years following the close of the bailout (when the victims' successor liability claims against New GM were actually extinguished), but upon the mere entry of the bankruptcy court's order entered four days earlier that authorized the sale (which order, by its terms, was not effective until June 9, 2009, exactly six years before the filing of the complaint that the government agreed was timely filed).
- The Federal Circuit Court of Appeals affirmed, holding instead that the complaint should have been filed no later than nine days before the closing of the sale, the date the proposed form of order was uploaded to the bankruptcy court for consideration.
- Despite an amicus brief filed in support by the Center for Auto Safety and compelling arguments advanced by leading takings law practitioners, the United States Supreme Court denied the victims' petition for certiorari in October 2020.

Proposed Resolution:

- **To correct the injustice dealt the GM accident victims in the bailout, the victims seek bipartisan support for HR 7016, which waives the statute of limitations defense in respect of this case and directs the Department of Justice ("DOJ") to settle the claims of the accident victims and just compensating them for their loss. The proposed legislative fix in HR 7016 is set forth at Exhibit 1 and merits everyone's support.**
- **The settlement can be funded by legislative directive from the "Judgment Fund" without the need for special Congressional budgetary authorization.** The Judgment Fund is a permanent, indefinite appropriation that was created by Congress in 1956 to pay judgments entered against the federal government. The Judgment Fund was created to reduce Congress' workload, so that individual appropriations would not be needed for each case settled or judgment entered. It requires no further congressional action and does not expire at the close of any fiscal year. Between fiscal years 2010 and 2016, the federal government paid out from the Judgment Fund approximately $20.7 billion in claims to thousands of persons or entities.

Precedent for a Legislative Fix in the *Pigford* Case:

- There is important precedent that is on point with the legislative fix proposed by HR 7016.
- In 1997, a class action was filed alleging that the USDA systematically discriminated against Black farmers in providing USDA loans, crop payments, and disaster payments. Claims extending as far back as 1981 were alleged, but claims accruing before 1995 were barred by the two-year statute of limitations of the Equal Credit Opportunity Act ("ECOA").
- The Justice Department's Office of Legal Counsel ("OLC") was then asked whether the government could waive the statute of limitations defense and settle the claims. OLC reasoned that because the statute of limitations was part of the terms of the consent to the waiver of sovereign immunity established by Congress, modifying the terms of consent required legislative action. 22 Op. O.L.C. 127, 128 (1998) ("ECOA's statute of limitations applies to both administrative and litigative settlements of ECOA claims, and it may not be waived by the executive branch.").
- Recognizing the injustice of barring Black farmers from bringing their unresolved claims of discrimination, Congress enacted a legislative fix in 1998 to revive and enable settlement of these time-barred discrimination claims against the USDA.
- The legislative fix enacted by Congress waived the ECOA's statute of limitations through inclusion of a single page of legislation in a 920-page omnibus funding bill. This section of the bill provided that the ECOA's two-year statute of limitations would be waived for any discrimination complaint "that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period beginning on January 1, 1981 and ending December 31, 1996." The bill became law on October 21, 1998. *See Omnibus*

Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, § 741, 112 Stat. 2681, at 112 Stat. 2681-30, pp. 31-32 (codified at 7 U.S.C. § 2297, Notes)

- Because the legislative fix meant that the class claims in the *Pigford* case extending back to 1981 were timely, the Clinton administration could then settle the case using the Judgment Fund without the need for further Congressional authorization.
- Two months after the legislation passed, the government and class counsel for the Black farmers filed a joint motion seeking preliminary and final approval of a settlement agreement and consent decree. The settlement was approved by the court on April 14, 1999, less than six months after the legislative fix was enacted. *Pigford v. Glickman*, 185 F.R.D. 82, 113 (D.D.C. 1999).
- The resulting settlement paid out approximately $770 million to the Black farmers that were members of the class. The settlement was funded through the Judgment Fund. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination by Black Farmers*, Cong. Research Serv., RS20430 at 3 (2013) ("The funds to pay the costs of the settlement (including legal fees) came from the Judgment Fund operated by the Department of the Treasury, not from USDA accounts or appropriations.").

Precedent for a Legislative Fix in the *Lilly Ledbetter* Fair Pay Act of 2009:

- Congress also amended Title VII and related anti-discrimination laws in the Lilly Ledbetter Fair Pay Act of 2009 to resuscitate and enable settlement of time-barred claims seeking equal pay for women and other protected groups.
- From 1979 until 1998, Lilly Ledbetter worked as a supervisor for the Goodyear Tire & Rubber Company. Although Ledbetter initially received a salary similar to the salaries paid to her male colleagues, a pay disparity developed over time.
- Ledbetter filed a discrimination claim with the Equal Employment Opportunity Commission ("EEOC") in 1998 alleging that Goodyear Tire & Rubber, Inc., had unlawfully discriminated against her on the basis of her sex in violation of Title VII. Ledbetter alleged that her current pay was discriminatorily low due to a long series of decisions reflecting Goodyear's pervasive discrimination against female managers in general and Ledbetter in particular. A jury found in her favor, and the district court entered judgment for backpay and damages, but the appellate court reversed.
- The United States Supreme Court granted review in order to resolve a disagreement among the appellate courts regarding the proper application in Title VII disparate treatment pay cases of the six-to-nine-month limit for filing claims "after the alleged unlawful employment practice occurred." The question addressed by the Supreme Court was how to determine what types of activities constitute an unlawful employment practice for purposes of starting the clock on the filing deadline. Ledbetter argued that each paycheck she received

constituted a new violation of the statute and therefore reset the clock with regard to filing a claim. The Supreme Court rejected this argument, holding that even if employees suffer continuing effects from past discrimination, their claims are time barred unless filed within the specified limitations period following the original discriminatory act. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 628 (2007) ("a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination").

- Because this decision made it more difficult for employees to sue for discrimination under not just Title VII, but also under the Age Discrimination in Employment Act and the Americans with Disabilities Act, Congress passed the Lilly Ledbetter Fair Pay Act of 2009 to amend these anti-discrimination laws and provide that the time limit for suing employers for legacy claims of unequal pay begins anew each time the employer issues a paycheck.

Constitutionality of Proposed Legislative Fix:

- Congress has the power "to pay the debts" of the United States. U.S. Const., art. I, § 8, cl.1 ("Congress shall have Power . . . to pay the Debts . . . of the United States"). **The United States Supreme Court has defined the term "debts" to mean not only monetary debts, but also moral debts.** *United States v. Realty Co.*, 163 U.S. 427, 440 (1896) (acknowledging that "[t]he nation owes a 'debt' to an individual when his claim grows out of general principles of right and justice, when, in other words, it is based upon considerations of a moral or merely honorary nature"). **The Court has further stated that "Congress, under its broad constitutional power to define and 'to pay the Debts . . . of the United States,' may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States."** *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980).

Analysis of the Proposed Legislative Fix:

- **The proposed legislative fix of HR 7016 is consistent with established legislative precedent that waives the applicable statute of limitations and that directs the DOJ to settle disputes using the Judgment Fund without the need for additional Congressional appropriation.**
- As applied here, the legislative fix of HR 7016 would:
    (i) waive the statute of limitations defense to the victims' takings claims;
    (ii) require the attorney general to expeditiously settle the takings claims of the accident victims for 2.5 times the $247,411,130 amount represented by their "allowed claims" in the GM bankruptcy case, plus—as permitted in all takings cases—interest, costs, and reasonable legal fees; and

(iii) require that the settlement be funded entirely from the Judgment Fund.

- The rationale for paying the accident victims a multiple of 2.5 times the principal amount of the victims' allowed claims in the bankruptcy case begins with the uncontroverted fact that on the eve of the bailout, the government and Old GM projected $936 million in total claims of accident victims based on a comprehensive risk analysis commissioned by Old GM from AON Global Risk Consulting.
- Total "allowed" or settled claims of accident victims in the GM bankruptcy, however, totaled only $247,411,130, significantly less than was projected.
- Fairness dictates that this disparity between the projected and allowed claims of accident victims left behind in the GM bankruptcy case be bridged by providing victims with a 2.5x multiple of the principal amount of their allowed claims in the GM bankruptcy case, or $618,527,825.
- This is a fair resolution since if one nets against the $936 million in projected liabilities to accident victims at the time of the sale in 2009 the approximately 30% actually paid out on "allowed" claims in the bankruptcy case, the projected net $655 million owing the accident victims *ex ante* is nearly equivalent to the $618,527,825 base amount from multiplying the $247,411,130 in "allowed" claims by 2.5.
- The proposed legislation, therefore, provides fair and appropriate "just compensation" to the accident victims in settlement of the Fifth Amendment takings claims asserted by them in the "eligible complaint" (as defined in Section 3(3) of the proposed legislation, i.e., the *Campbell v. United States* complaint) filed with the Court of Federal Claims on July 9, 2015.

Implementation of the Proposed Legislative Fix:

- If the proposed legislative fix is passed, the accident victims' takings case before the United States Court of Federal Claims (captioned *Campbell v. United States*, Case No. 15-717) can be reopened to enable implementation of the legislative fix and settlement.
- As in *Pigford*, the parties can then move for approval of the class action settlement required by the legislative fix.
- The aggregate settlement (representing the "allowed" claims 2.5x multiple plus interest) would total approximately $973 million, plus costs and reasonable legal fees, and can be fully funded through the "Judgment Fund" without the need for additional Congressional authorization.

EXHIBIT 1

117TH CONGRESS
2ND SESSION

H. R. 7016

To waive the statute of limitations for cases against the government related to the General Motors bailout that were filed on or before July 9, 2015, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. CARTER of Louisiana introduced the following bill; which was referred to the Committee on Judiciary

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A BILL

To waive the statute of limitations for cases against the government related to the General Motors bailout that were filed on or before July 9, 2015, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "_____ Act of 2022".

SEC. 2. SETTLEMENT OF ACCIDENT VICTIM LITIGATION RELATED TO THE GENERAL MOTORS BAILOUT; WAIVER OF STATUTE OF LIMITATIONS.

(a) Any eligible civil action arising from the filing of an eligible complaint alleging a violation of the takings clause of amendment V to the United States Constitution is not subject to any statute of limitations.

(b) The United States shall pay just compensation to an eligible claimant, consistent with amendment V to the Constitution of the United States, to resolve an eligible claim. Just compensation payments to eligible claimants shall be made pursuant to section 1304 of title 31, United States Code.

(c) If a settlement agreement has not been submitted to the court presiding over an eligible complaint within 30 days after the date of enactment of this Act, the Attorney General shall submit a report to Congress describing the reasons why a settlement agreement was not reached with counsel of record to an eligible complaint.

SEC. 3. DEFINITIONS.

For purposes of this Act, the following definitions shall apply:

(1) The term ''eligible claim'' means a claim asserted in an eligible complaint on behalf of all eligible claimants.

(2) The term ''eligible claimant'' means a plaintiff, class member, or putative class member in respect of the eligible complaint who holds an eligible claim and who filed a proof of claim in the bankruptcy case captioned In re Motors Liquidation Company, et al., No. 09- 50026 (Bankr. S.D.N.Y), based on death or personal injuries that were caused by or attributable to alleged defects in motor vehicles designed for operation on public roadways, or by the component parts of such motor vehicles, and in each case, manufactured, sold, or delivered by General Motors Corporation or any of its subsidiaries on or before June 1, 2009.

(3) The term ''eligible complaint'' means the complaint filed with the United States Court of Federal Claims by or on behalf of eligible claimants on July 9, 2015, captioned Campbell, et al., v. United States, No. 15-717, alleging violation by the United States of amendment V to the Constitution in connection with the acquisition on July 10, 2009 by NGMCO, Inc., a United States Treasury-sponsored entity, of substantially all the assets of General Motors Corporation.

(4) The term ''just compensation'' means payment of a lump-sum amount equal to the sum of—

(A) 2.5 times the ''allowed amount'' listed on the final claims register filed on June 3, 2021 in the In re Motors Liquidation Company bankruptcy case in respect of a proof of claim filed by or on behalf of an eligible claimant, plus

(B) interest thereon, plus

(C) reasonable court-approved fees and costs to counsel of record on the eligible complaint, all without offset of any kind.

Interest shall accrue on all eligible claims from July 10, 2009 to the effective date of settlement at a rate of three and one-half percent (3.5 percent) per annum, compounded quarterly.