

## **THE AUTO BAILOUT ACCIDENT VICTIMS RECOVERY ACT (“AVRA”) OF 2024**

### *Questions and Answers*

#### **WHO ARE THE AVRA VICTIMS AND HOW MANY ARE THERE?**

- 633 accident victims in 45 of the 50 states who died or suffered serious personal injuries from product defects in defective GM cars were left behind by the federal government when it bought General Motors out of bankruptcy in the 2009 bailout. Before GM filed bankruptcy, GM disclosed in filings with the SEC that the projected liability to these claimants was \$936 million, or approximately \$1.5 million per accident victim. The actual aggregate payouts to these victims in GM’s bankruptcy, however, was only \$74.2 million, or about \$120,000 per accident victim. This amount was wholly insufficient to compensate the victims for their injuries and the costs of their continuing care.

#### **SHOULD THE FEDERAL GOVERNMENT HAVE ASSUMED THESE CLAIMS IN THE GM BAILOUT?**

- Yes. The federal government unfairly singled out the accident victims’ claims for elimination in the bailout while concurrently assuming \$60 billion in other liabilities in full. These assumed liabilities included all ordinary course liabilities (such as to trade creditors and management) and all liabilities owing to GM’s active trade unions. Before GM filed bankruptcy, GM predicted the total payout to accident victims at \$936 million. In bankruptcy, however, all GM accident victims were forced into mandatory mediation and given non-negotiable “take it or go to the back of the line” settlement offers. As a result, aggregate accident victim recoveries were squeezed down to only \$74.2 million, or a mere 7.9% of the \$936 million projected owing at the time of the bailout.
- The claims of the accident victims were not the cause of GM's problems. The victims trusted that their vehicles would run properly, but if not, they would be made whole for product defects. They never should have been caught up in a massive government bailout and forced against their will by the government to accept pennies on the dollar when the government voluntarily assumed \$60 billion in claims of vendors, dealers, unions, and management without discount.
- In so doing, the government targeted the accident victims to bear a disproportionate share of the burden of the bailout, even threatening the bankruptcy court that it would abandon the bailout, declare GM in default, and force it into liquidation if the accident victims’ successor liability claims against New GM were not extinguished in the final bankruptcy court order approving the bailout. Making the accident victims whole simply puts them on par with the \$60 billion of other ordinary course liabilities of GM that were all assumed in full by the federal government through “New GM.”

#### **WHAT RELIEF IS BEING SOUGHT ON BEHALF OF THE ACCIDENT VICTIMS?**

- The relief sought is introduction and passage of The Auto Bailout Accident Victims Relief Act of 2024 (“AVRA”), which mirrors H.R. 7016 that was introduced in the 117<sup>th</sup> Congress by Congressman Troy Carter (D-LA). The AVRA provides the “just compensation” required by the U.S. Constitution’s Fifth Amendment based on the federal government’s having failed to justly compensate the GM accident victims whose successor liability claims against New GM were unfairly targeted by the government for extinguishment in the GM bailout.
- Here, unlike all other claimants in the bankruptcy, the accident victims had successor liability claims against New GM under Michigan law that uniquely inured to them alone on account of their having been injured by the defective products of New GM’s predecessor, “Old GM.” By requiring that these claims be extinguished as a condition of the bailout while at the same time paying \$60 billion of other claims of vendors, management, and unions in full, the federal government violated the Fifth Amendment’s Takings

Clause by placing a disproportionate share of the burden of the bailout on the accident victims. The AVRA remedies this injustice by providing “just compensation” to these victims.

### **HOW MUCH WILL THE LEGISLATION COST AND HOW WILL IT BE FUNDED?**

- The legislation will cost approximately \$1.2 billion and will be funded through the Judgment Fund. When enacted, these accident victims, most of whom died or suffered serious personal injuries from defective GM vehicles, will receive about \$1.7 – \$2.0 million per claimant. This level of recovery is fair and is consistent with the \$936 million projected owing to these victims by GM in its 10-Q filing with the SEC in May 2009, just one month before the bankruptcy filing.

### **WHAT ARE THE ARGUMENTS FOR AND AGAINST PASSAGE?**

- Argument: *GM. should privately settle the litigation without the government’s involvement.*
  - Counterargument: The litigation to be settled is not against GM. All potential claims of the accident victims against New GM were extinguished in the Bankruptcy Court’s order approving the sale of Old GM’s assets to New GM (whose majority owner was the federal government). Rather, the litigation to be settled through the AVRA is against the federal government under the Takings Clause for having required as a condition to its acquisition of Old GM that the successor liability claims of the accident victims against New GM be extinguished in the sale. There was no need for this requirement since \$60 billion in ordinary course liabilities, trade payables, and claims of labor unions were paid in full and the total claims of accident victims left behind represented only about 1% of the total projected enterprise value of New GM after the closing of the sale.
- Argument: *The Federal government’s exposure in the AVRA could be limitless.*
  - Counterargument: The only accident victims who qualify for the class settlement are those having fixed, “allowed” claims listed on the final “Claims Register” filed on June 3, 2021 in the GM bankruptcy case. Since the accident victims’ aggregate “allowed” claims in the bankruptcy case total about \$250 million, the full settlement cost under the legislative language of the AVRA, including interest, fees, and costs, will not exceed \$1.2 billion.
- Argument: *Congressional House and Senate Democrats won’t support passage of the AVRA for fear of embarrassing President Biden and the previous administration.*
  - Counterargument: Strong bipartisan support in both the House and Senate is expected. Indeed, 20 of the 26 Senators on the Committee of Commerce, Science, and Transportation (including Senators Thune, Klobuchar, Warner, Wicker, Cantwell, and Kerry) wrote a strongly worded letter dated June 9, 2009 insisting that the accident victims’ claims be assumed in the bailout by New GM.
- Argument: *The legislation is akin to the legislation that failed in 2022 in support of Delphi Corporation’s Salaried Retirees (H.R. 6929-117th Congress) who—like the GM Accident Victims—were left behind in the GM bailout. Why should Congress view the wrong by the federal government differently for the AVRA victims versus the Delphi Salaried Retirees? Isn’t this setting a bad precedent?*
  - Counterargument: *The wrongs suffered by the GM Accident Victims cannot fairly be compared to the Delphi salaried retirees’ losses in any moral, legal, or financial sense.*
    - The AVRA is not a handout, but a return of ill-gotten gains earned by the government at the victims’ expense since the stock of New GM—60% of which was owned by the federal government after the bailout—was necessarily worth \$936 million more after the bailout with the accident victims’ claims extinguished.
    - When the federal Pension Benefit Guarantee Corporation (“PBGC”) took over the pension plan following Delphi’s own bankruptcy in 2005, it reduced the monthly retirement benefits paid to

most salaried retirees by only approximately 30% (though the reductions reached approximately 70% for more highly compensated salaried retirees). Further, Congress did approve a special health tax credit for Delphi's salaried retirees that in several cases paid up to 72% of their health care costs.

- While the losses were certainly painful for the Delphi salaried retirees as a group, their losses cannot be compared to the physical suffering experienced daily by nearly all 633 accident victims. In addition, unlike the Delphi salaried retirees, the accident victims and their families received no federal guaranty payments and no tax credits to cushion their losses. Instead, all they received was about 8 cents on the dollar, a significant portion of which went to cover attorneys' fees, expert witness fees, and other out-of-pocket litigation costs.
- Republican Congressional concerns that topping-up the retirement plans of the Delphi salaried retirees through legislative appropriation would create pressure to top up every terminated plan do not apply here. The plight of the accident victims left behind in the bailout is a unique situation unto itself, unlike anything else out there.
- Argument: *Members of Congress that opposed or voted against the GM bailout in 2009 will effectively be endorsing yet another bailout?*
  - Counterargument: The bailout happened and cannot be reversed, but it was morally and constitutionally wrong for the federal government to leave the accident victims behind. In so doing, the federal government profited off the backs of the most vulnerable just because—in the words of the Auto Team itself—the accident victims were not important to the commercial success of New GM after the bailout. The claims of the accident victims, however, were not the cause of GM's demise. Given that the Federal government agreed to pay \$60 billion of other ordinary course liabilities to vendors, dealers, unions, and senior management in full, it should not have callously stripped the accident victims of their successor liability claims against New GM. Unlike all other claimants against Old GM, the accident victims were entitled under Michigan law to assert successor liability claims against New GM for product defects in cars manufactured by Old GM.
- Argument: *The legislation only bails out lawyers who failed to timely prosecute a successful Fifth Amendment Takings case against the federal government.*
  - Counterargument: The case was “too big to win.” Had the accident victims succeeded in their Fifth Amendment Takings case, damages (including accrued interest, fees, and costs) would have approached \$2 billion. Indeed, the Court of Federal Claims and the Federal Circuit Court Of Appeals could not agree on a single proposition of law as to why the case should be dismissed at the pleadings stage on statute of limitations grounds. The Court of Federal Claims held that even though the case would have been timely filed had the statute of limitations started running on the day the order approving the bailout went effective, the statute of limitations started running four days earlier, on the date the sale order approving the bailout was entered on the bankruptcy docket. The Federal Circuit Court of Appeals disagreed, holding that the statute of limitations started running five days before that, on the day the final form of sale order approving the bailout was uploaded by the government to the Bankruptcy Court for entry. Notably, the Department of Justice's lead counsel at oral argument before the Court of Federal Claims stated without qualification that it believed the case was timely filed and so was not seeking dismissal of the case on statute of limitations grounds.
  - Counterargument: On August 10, 2023, the United States Supreme Court agreed to hear the appeal of the Second Circuit's decision affirming the Purdue Pharma reorganization plan, which similarly extinguished claims of tort claimants against non-debtor third parties without their consent. Every bankruptcy judge that has publicly spoken about this case has predicted the Supreme Court will hold that nonconsensual releases of tort claims against non-debtor third parties in a reorganization plan are not permitted under the Bankruptcy Code. While the GM bailout was effectuated through a

bankruptcy “363” sale, not a reorganization plan, if nonconsensual non-debtor third-party releases are inappropriate in a reorganization plan, they surely are inappropriate in a bankruptcy sale too. Ironically, the same Department of Justice that successfully argued in the GM bankruptcy case that nonconsensual releases by the accident victims of non-debtor third parties were entirely appropriate now is passionately arguing as the petitioner before the Supreme Court that nonconsensual releases of non-debtor third parties are impermissible as a matter of bankruptcy and constitutional law.

### **IS THERE PRECEDENT FOR THE AVRA?**

- Precedent for the AVRA is rooted in legislation enacted to resolve the so-called “Black Farmers” class action (*Pigford v. Glicksman*) against the USDA in 1997. There, Congress inserted a single page of legislative text into the 920-page 1999 Omnibus Appropriations bill that enabled time-barred claims of African American farmers against the USDA to be filed with the court and thereafter settled by the Department of Justice. Payouts in the *Pigford* class action settlement, also drawn exclusively from the Judgment Fund, totaled \$800 million in the aggregate.
- Similar relief was provided by Congress in August 2022 in the Camp Lejeune Justice Act that enabled service members and their families the opportunity to commence legal action against the government for exposure to toxins at the base despite being barred by applicable statutes of limitations and repose that expired long ago.

### **WHAT EFFORTS ARE BEING UNDERTAKEN TO OBTAIN SUPPORT IN THE U.S. HOUSE AND SENATE?**

- *House*: The AVRA was introduced as H.R. 8440 on May 16, 2024 by Congressman Barry Moore (R-AL) and Congressman Troy Carter (D-LA). Here are links to their [joint letter](#) to the other 433 members of the U.S. House of Representatives and to the [press release](#) announcing the introduction of H.R. 8440
- *Senate*: Our lead outreach will start with the five Senators still in office (Sens. Klobuchar, Thune, Wicker, Warner, Cantwell) who, as mentioned above, in June 2009 [wrote a letter](#) with 15 other Senators demanding that New GM assume the claims of the accident victims. We believe passage in the Senate is feasible given the reasons stated above and the expected broad spectrum of bipartisan support for the legislation in the House.