

Takata Ch. 11 Tort Committee Has Tough Road Ahead

By **Matt Chiappardi**

Law360, Wilmington (July 10, 2017, 1:59 PM EDT) -- An official committee in the Takata Chapter 11 that includes personal injury victims is a crucial way to ensure those claimants' rights, but it will be a tough journey through a difficult and delicate bankruptcy where there may not be enough money to go around, experts say.

The formation of an official tort claimants committee, which is expected to include personal injury claimants as well as those claiming financial losses, gives those affected by Takata's defective air bags a concentrated and powerful voice in the young Chapter 11 case that has thus far been dominated by deals among the debtor and its automotive industry customers.

While the committee is expected to have significant influence over the case and its linchpin \$1.6 billion sale proposed to Takata competitor Key Safety Systems Inc., its entry into the mix adds another layer of complexity to a bankruptcy with a multitude of moving parts, each with the potential to go wrong.

And unlike the similar cases that involved huge asbestos-related liabilities, the Takata case doesn't appear to have coffers as deep, a situation that could lead to some bitter fighting over what money is available.

"Asbestos cases had a lot of money, but there might not be enough to fight over here," said Aram Ordubegian, Arent Fox LLP's West Coast team leader and a partner in its bankruptcy and financial restructuring group. "There are trial lawyers who will fight to the bitter end, and there are times that works, but you may end up having a hollow victory. The administrative expenses end up gobbling up what would be there for plaintiffs."

Another potentially complicating factor is that members of the committee may not be accustomed to the dealmaking ethic that permeates large bankruptcies, giving rise to the possibility that compromise plans that have the best chance of preserving value could be upset.

Ted Gavin of corporate restructuring firm Gavin Solmonese LLC says that having an official committee with experienced bankruptcy counsel will certainly temper the aggressive nature of tort litigation, but in product liability cases often "the gloves are off" and the plaintiffs have something much more personal and tragic at stake than simple economic redress.

"Having claimants with serious anger and personal experiences, those can feed on each other and you

end up with a much more intransigent party to deal with,” Gavin said. “The best thing will be to cut a deal. Nobody does well when a bankruptcy languishes.”

Just what deal to cut against what is likely a finite pot for recoveries is what experts expect will be the tricky part.

When Takata made its plea deal with the U.S. Department of Justice in January, the company set aside \$125 million in a fund for wrongful death and personal injury claims. That pool of money is expected to be augmented by the proposed sale to Key Safety, but the grand total could be dwarfed by the amount of liability that actually exists.

“It’s not going to be smooth sailing because there’s simply not enough to go around,” said veteran attorney Hugh M. Ray, who heads McKool Smith PC’s national bankruptcy practice. “Nobody knows how big the elephant is.”

Making matters even more complex, that liability could include potential injuries that won’t occur for many years from air bags that haven’t been recalled or have yet to be replaced.

During Takata’s first-day hearing in June, Kevin R. Dean of Motley Rice LLC, who represents three members of the committee, argued that the defective air bag inflators that are linked to the failures became a problem as they aged.

The air bags have been alleged to have a greater tendency to fail in humid conditions, and Dean said a number of inflators that have been treated with an anti-moisture agent are not subject to recall, making them a potential problem perhaps a decade down the road.

“It’s going to be a question of capturing that liability,” said Brian L. Davidoff, chair of Greenberg Glusker Fields Claman & Machtinger LLP’s bankruptcy and financial restructuring group.

Davidoff said he wouldn’t be surprised if there is a mechanism set up much like a future claims representative in an asbestos bankruptcy. But unlike asbestos cases, there isn’t a specific section of the Bankruptcy Code dedicated to the process, he said.

Another potential wrench is that personal injury claimants are entitled to a jury trial, something which could bolster the committee’s leverage, said Jordi Guso, a partner at Berger Singerman LLP.

Guso also says that some form of future claims representative mechanism may be needed in the case, and that the Takata Chapter 11 is one where we may see new bankruptcy law through circuit-level judicial opinions.

The committee may try to assert its strength by trying to delay the sale process, which Takata must complete by the end of February in order to perform on its plea deal with the U.S. government or risk having its case reopened and further criminal charges applied.

“The natural instinct is to slow the train down,” Guso said. “When you slow the parties down, your negotiation leverage goes up. Whether that translates into material leverage is tough to say, but the committee will definitely be heard and get significant airtime.”

Ray added that U.S. Bankruptcy Judge Brendan L. Shannon, who is presiding over the case, is likely to be

receptive to the committee's concerns and potentially extend the sale process.

"The judge will listen and drag it out because it is in the best interests of the debtor's estate to see what issues and players emerge," he said.

Even if there isn't a rocky sale process, the international nature of the bankruptcy could hold many potential pitfalls, said University of Chicago Law School professor Douglas G. Baird.

Along with filing a Chapter 11 case in the United States, Takata's parent in Japan filed the equivalent, known as a civil rehabilitation, in its home country, and more international cases could be coming.

"There are a lot of moving parts," Baird said. "Having to align this for a global settlement is not necessarily legally problematic, but it's more courts, more judges and more lawyers. It just makes it more complex."

Baird said that the "black box" for the case will be the proceedings in Japan. If something were to go wrong there, it stands to also disrupt a case in the U.S. that is now perched on a delicate balance.

But the brightest spot for the case, and by extension the personal injury claimants, is that the issues in the Takata bankruptcy not only are solvable but are being shepherded by some of the most experienced and skilled bankruptcy attorneys and judge in the nation, Baird said.

"There is nothing to suggest these are not navigable challenges," Baird said. "This is not the first rodeo for the lawyers and the judge. Takata is in excellent hands."

--Editing by Rebecca Flanagan and Brian Baresch.