UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

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In the Matter of:

GENERAL MOTORS CORPORATION, et al.,

Debtors.

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United States Bankruptcy Court

One Bowling Green

New York, New York

June 25, 2009

9:03 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

keeping you all waiting. In this contested matter in a case under Chapter 11 of the Code, the General Motors Retiree Association, which I'll refer to as the "Retirees Association", moves for an order pursuant to Section 1114 of the Code, appointing an official 1114 committee. Its motion is opposed by the debtors and the creditors' committee.

The motion is denied, though without prejudice to reconsideration at a later time under appropriate circumstances, largely in accordance with the ruling by my colleague Judge Drain in Delphi on March 10 of this year. The following are my findings of fact, conclusions of law and bases for the exercise of my discretion in connection with this determination.

Turning first to my findings of fact, as facts I find that GM offers retiree benefits to salaried retirees who started work before 1993 under two plans: the GM Salaried Health Care Program, which I'll refer to as the "Health Care Program", which includes medical, prescription drug, dental and vision care; and the GM Life and Disability Benefits Program, which I'll call the "Life Insurance Program", which provides life insurance benefits. I refer to the two programs together as the "Welfare Plans".

The inference is compelling, and I so find, that the benefits offered under the Welfare Plans are quite important to many retirees, particularly those who are still under sixty-

five and who are ineligible for Medicare.

The salaried retirees are separate and apart from hourly retirees whose interests have been represented by the UAW or other unions. At this point, they have no officially designated representative, though, from everything I've seen so far, the Retirees Association has been a forceful and effective advocate on their behalf. And to the extent any retirees might have unsecured claims, their interests in that regard would be well-protected by the official creditors' committee.

Retirees are required to reenroll in these plans at the beginning of each calendar year, prior to which GM provides enrollment forms accompanied by an enrollment brochure explaining changes in benefits for the upcoming year. The debtors assert that these brochures have contained an unequivocal statement of GM's right to amend, modify or terminate the plans. But that was not always so. The Retirees Association asserts that, at least between 1974 and 1987, salaried retirees were performing under unilateral contracts that guaranteed lifetime benefits upon retirement without having also received statements reserving the right to amend or terminate. And the Retirees Association points to specific language in benefit handbooks that it asserts could reasonably be interpreted as a promise to provide such benefits. However, these matters were a subject of litigation, extensive litigation, going all the way up to an en banc decision of the

Sixth Circuit Court of Appeals, which I'll describe more fully in my conclusions of law.

GM effected changes in its retiree Welfare Plans from time to time. Prior to these Chapter 11 cases, three changes were made that are at least arguably significant. On July 2008, effective January 1, 2009, GM eliminated medical, dental, vision and extended care coverage for salaried retirees, their surviving spouses and their dependents age sixty-five or older. In September 2008, GM changed the plans to comply with a cap on salaried retiree health care; it was approved by the GM board of directors in 2007. And in February of this year, GM accelerated a planned reduction in salaried retiree life insurance, which had previously been announced in 2006 and was going to be effective in 2017, in respect to whose details are not material here, effective May 1, 2009. All but the third change, the one announced in February and effective May 1, were communicated to salaried retirees more than six months prior to the filing date, a time which is arguably significant to parties' rights.

GM has not proposed any further changes in either of the plans, at least insofar as it would implement them. And under the proposed sale agreement, assuming, of course, that it is approved, and without prejudging that issue in any way, the purchaser knew GM will assume responsibility for them going forward but as modified prepetition in the manner I just

described to provide them in lesser amounts.

Turning now to my conclusions of law and bases for the exercise of my discretion, as usual I start with the words of the statute. Section 1114 of the Code provides, in relevant part, in its subsection (d), "The Court, upon motion by any party-in-interest, and after notice and a hearing, shall order the appointment of a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the Court otherwise determines that it is appropriate to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement. The United States Trustee shall appoint any such committee."

Thus, under the statute, the Court must order the appointment of the committee if the debtor seeks to modify or not pay the retiree benefits. Alternatively, it may order the appointment if the Court otherwise determines that it's appropriate to serve as a bargaining representative for retirees not covered by a collective bargaining agreement.

The Retirees Association contends that Section 1114 of the Code applies to what the debtors did prepetition and would do post-petition here and that I thus should appoint a retirees' committee under each of the two separate regimes under which a retirees' committee should be appointed. I disagree with the Retirees Association with respect to the

first, and for the most part with respect to the second, although I think I should reserve room to have the ability going forward to make a discretionary limited appointment if circumstances not present now but in the future later warrant.

Turning to the matter of mandatory appointment, the backdrop as to the mandatory appointment issue is the fact that, as discussed in my findings of fact above, at some point in time GM started to tell its employees, who were of course its prospective retirees, that their welfare plans could be amended, modified or terminated. GM and the creditors' committee contend that Section 1114 doesn't apply when a debtor simply exercises the rights to modify or terminate that it has outside of bankruptcy. But the Retirees Association, in contrast, contends that 1114 applies to any modification or termination of retiree rights under a welfare plan, whether such termination or modification is authorized under non-bankruptcy law or not. And thus, in substance, it argues that Section 1114 improves upon non-bankruptcy law rights.

Though Sections 1114(d), (e) and (l) are, in my view, ambiguous, and the cases are somewhat split in this area, I must agree with GM and the creditors' committee. The Retirees Association says at page 9 of its motion that, quote, "A few courts have held, on a divided issue of law where other courts disagree, that this Section 1114 does not protect in bankruptcy benefits the Debtor retained the unfettered right to amend

outside of bankruptcy", quote. But I can't regard that as a fully accurate description of the state of the law, especially in this circuit and district. In fact, I think it's exactly the opposite.

The Retirees Association cites the Second Circuit's decision in LTV Steel Company v. United Mine Workers, In re Chateaugay Corporation, 945 F.2d 1205 (2nd Cir. 1991), as being one of the cases that holds against the retirement committee on this issue. And, of course, Chateaugay does. Chateaugay says, in fact, "The Bankruptcy Protection Act", which was the statute by which 1114's predecessor came into being, and from which 1114 evolved, "requires that during reorganization the parties continue to provide benefits according to the plan in effect at the time of the declaration of bankruptcy. The Bankruptcy Protection Act does not alter the terms of that plan." 945 F.2d at 1209. And that's exactly why Judge Restani dissented in that case.

But while acknowledging Chateaugay, the Retirees Association doesn't give enough recognition, in my view, to the fact that Chateaugay is a controlling decision of the Second Circuit, binding on me and the other judges in this circuit. Likewise, the Retirees Association cites decisions of a former visiting judge who sat in this district, and a district who affirmed him, in the case of Ames Department Stores, insufficient attention to the fact that those decisions were,

with respect, strikingly lacking in consideration of the applicable case law. They can only be read as having been roundly criticized by this circuit in a subsequent decision in Ames (see 76 F.3d 66 at page 71), though not on direct appeal, and while the thoughts were expressed in dictum.

The district court decision, which is available electronically but isn't published, expressed its conclusions in what some might say was an ipse dixit fashion, without parsing the words of the statute or relying upon any case law, which at that point in time included about nine cases, as observed by Judge Lifland in Ionosphere Clubs, 134 B.R. 515 at page 517 (1991). Unfortunately, the decision of the bankruptcy court was equally thin.

In that later Ames decision, the circuit held, "We think that there's a substantial room for disagreement with the categorical holding in the district court's orders that the debtor was required to follow the requirements of Section 1114;" reading from page 71, 76 F.3d at 71. And while the circuit in that Ames decision merely held that it couldn't be said that the argument for the debtor's interpretation was frivolous, that being an appeal of a sanctions determination or a denial of fees for pursuing a frivolous argument, and while the circuit expressly stated that it wasn't examining the, quote, "present status of the pertinent law", quote, id at 71, it was hardly an endorsement of the lower court's views. In

fact, the circuit made a point to cite Chateaugay and Doskocil, Federated Department Stores, New Value, and Collier as examples of authorities that had gone the other way. And it went on to observe that Collier -- Collier on Bankruptcy, of course -- provides that Section 1114 does not, however, protect retiree benefits beyond the contractual obligations of the debtor.

And the circuit observed, with respect to the bankruptcy court and district court Ames decisions upon which the Retirees Association relies, not one of the foregoing authorities was discussed or even mentioned by either the bankruptcy court or the district court. More importantly, neither court cited any interpretative authority that conflicted with that above cited.

Now, make no mistake, I don't read that decision as having ruled in favor of the principle for which the debtors and the creditors' committee argue here. In fact, it expressly stated that it was not then ruling on the existing law. But what I think it very effectively does, if not conclusively so, is say that I shouldn't be relying on those lower court Ames decisions.

But perhaps most importantly, in its briefing on this motion the Retirees Association failed even to mention Judge Drain's decision in March of this year in Delphi, 2009 WL 637315 (Bankr. S.D.N.Y. Mar. 10, 2009), until the Retirees Association filed its reply. And even then the Retirees

Association failed sufficiently, in my view, in that reply to acknowledge all of the things Judge Drain said and to discuss his substantive analysis before the retirees' committee properly commented on the relatively limited relief that Judge Drain had ultimately granted in Delphi. Of course, the Retirees Association made up for that in oral argument, but I think Judge Drain's decision in Delphi is of great importance.

I've previously noted many times in writing my view as to the importance of consistency in the decisions in the bankruptcy court in this district and that I follow the decisions of the other bankruptcy judges in this district, in the absence of clear error. But when we're talking about the Delphi decision, I think that's feigned praise since, in my view, Judge Drain's analysis was plainly correct and, by far, the most comprehensive and well-reasoned of any of the decisions in the 1114 area.

I note, by the way, that when I talk of Judge Drain's decision, although I'm principally speaking of his decision of March 10, there was a supplemental argument on or about March 11, as evidenced in a separate transcript to which I'll be referring in a moment or two, and that getting one's arms around Judge Drain's Delphi rulings is best achieved by consideration of both of the two decisions.

Judge Drain also dealt with the argument that I also heard here, that Chateaugay was overruled by statute by the

inclusion of new Section 1114(l) in BAPCPA. Judge Drain disagreed, and so do I. As Judge Drain observed, Section 1114(l), however, does not specifically deal with the issue of plans modifiable as of right and could conceivably apply to pre-bankruptcy breaches by debtors in financial distress of vested rights.

More importantly, even if it does apply to modifiable plans, I do not view Section 1114(l), which applies to a specific type of prepetition action, as overruling Doskocil and the line of cases that follow it which apply to post-petition actions. Nor does there appear to me to be any legislative history or other policy statements accompanying the 2005 amendment that would clearly set forth Congress's intention generally in Section 1114(l) to override, beyond its specific terms, the fundamental principle that bankruptcy does not give new rights to individual parties-in-interest or to cut back on the tenet set forth by the Supreme Court in Butner.

Now, I have not discussed the underlying principles as thoroughly as Judge Drain did there. In this oral dictated decision, I don't know if that's necessary or appropriate. But I've carefully read Judge Drain's analysis and I concur in it in full, even putting aside the deference in respect to which I give the decisions of my colleague judges. And since Chateaugay and Delphi are in alignment, I'm ruling in accordance with each of them that Section 1114 doesn't apply to

employee benefit plans that are terminable or amendable unilaterally by the plan sponsor. Putting it another way, Section 1114 does not trump any agreement between a company and its employee that gives the company the right to amend or terminate a welfare plan.

Thus, in terms of arguably persuasive authority, we're left only with the decision in Farmland Dairies. If one were to look solely at the words of the statute, which, as I've noted, is ambiguous, the Farmland Dairies view is not necessarily an unreasonable one. But Farmland can't be reasonable with the weight of authority in this area, only part of which I've noted above, and Farmland Dairies is inconsistent with the law in this circuit and district. Of course, when I speak of the weight of the authority I'm not counting noses; I'm looking at it qualitatively and at what level it was decided. That consideration is particularly relevant to Chateaugay and Delphi. And, as I've noted, I regard Delphi as by far the most thoughtful and comprehensive decision in this area. So for any retirees as to whom the debtor reserved the right to modify before they retired, they don't have rights under 1114.

So then we get to Sprague. GM and the creditors' committee each cite the Sixth Circuit's en banc decision in Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998), as having ruled that the health care programs explicitly permit

GM to unilaterally amend or terminate benefits under those programs. Sprague does hold that, although the Retirees Association is correct in noting that Sprague was a split decision and that it also isn't binding on me. And I agree with the Retirees Association, and perhaps the debtors agree with it as well -- I don't think they addressed it one way or the other -- that, on a question of federal law, Second Circuit law, and not Sixth Circuit law, controls in any area where the law of the two circuits is inconsistent.

But Judge Drain ruled, and I concur, that, and I'm quoting Judge Drain, "I continue to believe that the Sixth Circuit Sprague decision is one in which the Sixth Circuit at length determined en banc that there was no ambiguity in respect of GM's reservation of rights to modify at will its welfare plans, and that, were I to conclude otherwise, I would not be doing so by applying a different standard than that which is applied in the Second Circuit under Bouboulis v. Transport Workers Union of America, 442 F.3d 55 (2nd Cir. 2006), namely, that the plan documents contained, quote, 'specific written language that is reasonably susceptible to interpretation as a promise to vest benefits', end quote." I'm quoting from the transcript of the Delphi hearing of March 11, 2009, which probably should be read as a supplemental and second Delphi decision. See also the comments Judge Drain made in the course of argument at page 11.

And I recognize that sometimes judges say things in oral argument that they don't mean or that they're throwing up just to be devil's advocates, but from the context I believe that Judge Drain meant it here. If you read the opinions, they really are applying the same standard. They're basically saying there was nothing ambiguous.

Now, when I use the words above, quote, "specific written language that is reasonably susceptible to interpretation as a promise", quote, those words being the words that Judge Drain used, they in turn were a quotation from Bouboulis, 442 F.3d at page 61. And the Bouboulis words, in turn, were a quotation from the Second Circuit's decision in Devlin v. Blue Cross and Blue Shield, 274 F.3d at 84.

So when I rely on Judge Drain's analysis in this area and I concur with it, it's very clear to me that he gave careful consideration to both Bouboulis and Devlin and made a knowing and accurate determination that there was no material difference between Second Circuit law and Sixth Circuit law in this regard.

Thus, at the risk of a slight repetition, stating a similar thing a different way, I find insufficient basis to conclude that the standard that the Sixth Circuit applied in Sprague would be materially different than the standard that the Second Circuit would apply.

Now, is the Sprague conclusion debatable under those

standards? I think it plainly is. And if I were writing on a clean slate, I think I might well have agreed with the Boyce Martin dissent. But as to the issues upon which GM relies upon it, Sprague was an eight-to-five decision as to the early retirees, and a ten-to-three decision as to the general retirees. And the general retirees' analysis is the one that's more closely on point here.

A ten-to-three split isn't close, but once more I'd agree that this isn't a counting game. Rather, I look at it qualitatively and see things as Judge Drain commented on in argument. Judge Drain observed, "You may agree with Judge Martin, and maybe if one were writing on a clean slate one might agree with Judge Martin, but the Sixth Circuit ruled, and I find it very hard for me, when there's no difference in the standard, to say oh, the Sixth Circuit was wrong;" reading from the March 11 transcript at page 11.

Where the circuit court, with ten judges no less, having ruled as it did with respect to general retirees, addressing the same issues we have here, I think that as a matter of stare decisis I should respect its ruling and follow it.

Folks, as is implied by what I just said, I note that I'm doing so as a matter of stare decisis. I am not so ruling on the applicability of res judicata one way or the other, and I'm not relying on the doctrine of res judicata. I have some

reservations as to whether res judicata applies is not very similar to those Judge Drain had. But I don't need to reach that issue. In my view, Sprague and Delphi are so dramatically on point that they counsel the result I reach here on traditional bases of stare decisis. We have what we refer to in law school as the "blue Buick".

So now we get to the application of Section 1114(d). Turning first to its mandatory portion, GM hasn't moved for permission to change any retiree welfare plan benefits, which is hardly surprising in light of its position that it doesn't need court approval to do so and the case law that I described above, and I'm going to follow that it has the right to unilaterally amend or terminate such benefits. As at least the first portion of 1114 doesn't apply at all, if not the entirety of 1114(d), or 1114 at all for that matter, there's no occasion to apply the mandatory portion of Section 1114. So I'm going to deny appointment insofar as it's premised on the contention that appointment is mandatory.

Turning now to discretionary appointment, though appointment of a retiree committee isn't mandatory, I need also to consider discretionary appointment. As I noted, Section 1114(d) provides that the Court shall order the appointment of a committee of retired employees if the Court otherwise determines that it is appropriate. One can make an argument that if 1114 doesn't apply at all, there's no occasion to apply

the provision in 1114 providing discretionary authority either. But I think the better view might be consistent with what Judge Drain concluded in Delphi: that bankruptcy judges should have the discretion to appoint a retirees' committee, especially if its budget can be kept under control, in any instances where it would really accomplish something.

I don't reach that issue today because I here do not consider the appointment of a committee now to be necessary or appropriate for retirees for whom GM has the right to amend or terminate benefits, for, while I well understand the importance of these kinds of benefits to any retiree, believe me I do, I can't change retirees' non-bankruptcy rights. And there is no need to form a committee to argue or negotiate with respect to entitlements under Section 1114(l) as that can be done by the Retirees Association as an ad hoc committee with rights under Section 1109. See In re Anchor Glass Container Corp., 342 B.R. 878 at page 882, Middle District of Florida 2005 decision by Judge Alex Paskay.

As Judge Paskay noted in that case, "Unlike Section 1114(e), which contemplates motions brought by, and the debtor negotiating with, an authorized representative, Section 1114(l), similar to Section 1114(d), depends upon a motion brought by a party-in-interest. Section 1114(l) does not require, nor does it contemplate, the appointment of a committee."

I also made a similar point when I considered the application of the Ad Hoc Committee of Family and Dissident Bondholders a couple of days ago. In most, if not all, cases under the Code, an ad hoc committee can be heard perfectly satisfactorily under 1109 without being designated as a formal official committee.

Similarly, I share concerns articulated by the creditors' committee as to unnecessary costs in this case. And I also agree with another creditors' committee point, which, in my view, is quite significant. Even assuming that New GM were to be making further modifications in the future, assuming, of course, that I approve the 363 sale, all salaried retiree benefits would be entirely New GM's responsibilities. Thus, any modifications to such benefits would have to be negotiated with New GM and/or the U.S. Treasury.

As Judge Gonzalez noted in Chrysler, "A retiree committee should be appointed only if it's necessary to negotiate with the debtors, not with a purchaser of the debtors' assets." See the transcript of Judge Gonzalez's May 14 hearing in Chrysler at page 35.

With all of that said, I can't rule out the possibility that appointing a retirees' committee might be desirable and thus appropriate to facilitate some kind of negotiations in the future or any kind of a settlement, including with respect to any appeal of the determination I'm

making today, or in connection with some other matters where it would bring something to the table beyond appearing and being heard in a fashion for which it could already do that under 1109. That might be helpful, by way of example, to bind absent parties or dissenters.

That appears to be the rationale upon which Judge Drain allowed the formation of a committee, or one of them -- the other isn't applicable here -- though with a limited 200,000 dollar budget. And if it turned out to be necessary or desirable to do that here, I might be of a mind to do the same thing if asked. But that isn't now necessary, if it ever will be. For instance, I don't need a supplemental report of the type that Judge Drain did, and which was an element of the limited appointment authority that he granted. I'll simply note now that this ruling is without prejudice to any such eventuality.

Accordingly, the motion is denied without prejudice to reconsideration in the event of an eventuality of the type I just described.

Mr. Miller, you or your folks are to settle an order in accordance with this ruling at your earliest reasonable convenience.

MR. MILLER: Yes, sir.

THE COURT: All right, folks. Do we have any further business for today?

MR. MILLER: No, Your Honor.

THE COURT: All right, I want to thank you for waiting as long as you did on the matter that I had taken under advisement. We're adjourned for the day. Have a good day.

ALL: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 2:25 p.m.)