The GM Bankruptcy – The Environmental Story

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General Motors Corporation, the 100-year-old icon of American manufacturing and once the largest industrial company in the world, filed for bankruptcy in June 2009. With governmental sponsorship, 40 days later, "New GM" was formed via a sale under § 363 of the U.S. Bankruptcy Code to continue those portions of GM's business that could be salvaged.

That story is well known, but less well known is the story of how the balance of the GM case – particularly the environmental aspect – was resolved, resulting in the confirmation in March 2011 of the plan of liquidation for Motors Liquidation Company (MLC), the new name given to the remnant assets left behind in the GM bankruptcy. With recent talk about a second bailout (the tax benefits afforded New GM) and continuing public interest in the automobile industry bailouts – not to mention another slowdown in the economy – the environmental aspects of the GM bankruptcy merit discussion.

***James M. Redwine** was Vice President of Motors Liquidation Company (General Motors Corporation). He was responsible for all environmental functions in the GM/MLC case, including planning and managing the environmental strategy for the case, regulatory compliance at over 100 sites, and environmental claims management and administration. **David C. McMurtry**, Principal, D. McMurtry & Associates, LLC, directed the technical teams on the MLC case to define work scopes, prepare cost estimates and conduct negotiations with regulatory agencies leading to the settlement. **David R. Berz**, Partner at Weil Gotshal & Manges, LLP, in Washington, DC represented MLC in connection with the environmental aspects of the GM bankruptcy.*

Messrs. Berz and Redwine were co-recipients of the American Bar Association's 2011 Award for Excellence in Environmental and Resources Stewardship for their work on the GM/MLC case.

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Environmental Challenges Facing MLC

MLC's environmental liabilities were perhaps the largest issue to be faced in winding down MLC and formulating its plan of reorganization (liquidation). Consistent with the plan to establish new GM as a highly effective automobile manufacturer maker, as part of the § 363 sale, New GM was allowed to leave behind the environmental liabilities associated with the properties remaining in MLC, plus liabilities related to GM's non-owned Superfund sites. From an environmental perspective, the challenges of the MLC bankruptcy included:

1. MLC's owned property portfolio was enormous. Upon its formation MLC became the third-largest holder of industrial property in the U.S., with a portfolio of more than 48 million square feet of industrial space in 65-plus buildings on 7,300 acres in 14 states.

2. Many of MLC's properties were environmentally contaminated or had the potential to be contaminated. MLC's environmental team eventually determined that approximately two-thirds of MLC's properties were contaminated and required remediation.

3. Many of MLC's properties had not been thoroughly investigated and/or were early in the typical remedy selection processes applicable to sites subject to CERCLA and RCRA regulatory programs.

To achieve resolution of these environmental issues, significant resources would need to be dedicated to settle MLC's obligations with respect to its owned properties, and a way would have to be found to convince regulators and the public of the adequacy of those resources.

In spite of these challenges, MLC's plan of liquidation, which resulted in the largest environmental trust settlement in U.S. history, was approved in record time (approximately 20 months) without the costly and time-consuming litigation that has plagued other major bankruptcy cases with significant environmental liabilities. Moreover, the settlement that MLC achieved involved a unique trust structure that was hailed by the White House and many others.

How was this remarkable result achieved?

Meeting The Challenges

Although preliminary analyses of GM's potential environmental liabilities had been done before GM filed for bankruptcy, much more work remained. Many basic facts – such as the ownership status of much of the real estate for which GM had potential environmental liabilities, and the current status and adequacy of previous attempts to deal with these issues – remained to be explored. Perhaps most importantly (and not surprisingly, in light of the speed at which events were moving), an environmental strategy for the case had yet to be formulated.

To address these challenges, the MLC environmental team[1] had to deal with these problems in several stages. First, within days of the filing of the GM bankruptcy, the MLC environmental team had to learn as much as they could about the environmental status and condition of GM's properties. In the same time frame, MLC had to determine "what the case would be about" from an environmental perspective. MLC looked at the case from two vantage points: 1) the type and amount of administrative claims MLC would likely face from states in which its properties were located, and 2) what the case would be about from a larger standpoint. MLC determined that these two perspectives could intersect. The most appropriate strategy would be to use the opportunity of the GM bankruptcy creatively to avoid accusations that after bailing out GM, a toxic legacy was left behind, or that only half a bailout had been accomplished. To do this, MLC first had to obtain adequate funds through the debtor-in-possession (DIP) credit facility being offered by the U.S. Treasury. MLC understood that to obtain such funds as well as ultimate public acceptance of the adequacy of those funds, the review of MLC's properties would have to be based on sound environmental science. Moreover, this strategy had to be formulated within the framework of existing law at the intersection of bankruptcy and environmental laws so that the strategy would be accepted by the U.S. Treasury, the Official Committee of Unsecured Creditors and other constituencies.

The end result of the environmental portion of the GM bankruptcy was similar to many recent major cases, with the debtor's obligations receiving full or near-full funding. However, unlike those cases, MLC had chosen to request that funding under the DIP credit facility. Why? MLC understood that the bankruptcy case was likely to end with the formation of a custodial trust – a tool used in a number of recent bankruptcy cases with significant environmental components – that could then use the funds received to resolve GM's environmental obligations and manage its real estate portfolio. What were the alternatives? If MLC's approach had not been adopted, some sites probably would have fallen to cleanup by a federal or state Superfund program, which, if funds were available, would most likely have cost significantly more and resulted in significant delays in returning the sites to productive use.

To effectuate its strategy, MLC first had to correctly and immediately evaluate for bankruptcy purposes the intent and adequacy of GM's pre-bankruptcy environmental reserves. MLC next was required to anticipate the types and amounts of administrative "claims" that MLC was likely to face. MLC understood that the various governments could and would likely seek to require full compliance with environmental laws. To meet those claims, MLC estimated the costs to bring GM's 100-plus sites to full regulatory closure based on accepted regulatory strategies. MLC did not, for example, attempt to formulate a holding strategy or offer short-term solutions, which might ultimately result in higher life-cycle costs. At the same time, MLC sought to inject commercial realism into its estimates and avoid excessive conservatism that might result from the status of its portfolio. MLC also understood that it would most likely have only one opportunity to request adequate sums from the DIP credit facility. MLC's environmental group formed and directed teams of consultants to estimate these costs and performed this extensive preliminary estimation process within a two-week

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period.

By the end of June 2009, MLC had estimated the costs to bring GM's sites to regulatory closure at $536 million. In an all-night session, MLC negotiated the cost of the program with the U.S. Treasury and ultimately obtained full funding of its request. Granting of this request by the U.S. Treasury meant that the environmental component now constituted nearly half of the $1.2 billion MLC wind-down/bankruptcy case budget.

After the closing of the § 363 sale in mid-July 2009, MLC began formulating a strategy to gain regulatory and public acceptance of its environmental estimates, as well as for confirmation of a plan of liquidation. This effort included establishing the shape of the post-confirmation entity that would perform the remediation so that environmental impediments to redevelopment could be removed.

The first part of this strategy was to explain to regulators in U.S. EPA (headquarters and Regions 2 and 5) and in affected states how and why the $536 million environmental provision was formulated. MLC's strategy was to recognize the legitimate role of environmental regulators in protecting the public interest and to work intensively with them to review the adequacy of the environmental funds. MLC's environmental team very successfully built professional relations from scratch, working intensively with environmental regulators in the U.S. EPA and affected states, and doing so in the exigencies of a rapidly moving bankruptcy case.

MLC also understood that the initial environmental estimates created for the DIP budget would require additional review and technical justification to obtain regulatory acceptance. MLC then directed its consultant teams to review each and every site's environmental condition and estimates in detail, using bottom-up engineering reviews. MLC realized that the expedited nature of bankruptcy proceedings prevented it from employing standard in-field characterization techniques that might require years of work. MLC also understood that the U.S. Department of Justice and EPA were likely to use probabilistic expected-value techniques to articulate uncertainties in deriving their own estimates. MLC used these techniques in the first instance, thus speeding USDOJ and regulatory review of MLC's estimates.

This second round of environmental cost estimates was completed in October 2009. MLC, in consultation with its technical experts, then formulated the strategy both for the amounts that MLC would offer in settlement of the federal and state administrative claims and for gaining regulatory acceptance of these new estimates. This strategy first involved the creative use of the statistical and probabilistic estimating techniques previously mentioned to determine an appropriate settlement amount. MLC used its bottom-up engineering reviews to formulate base estimates for reasonable assumptions of remedies and quantities. On top of that amount, MLC proposed a cushion for unforeseeable or lower probability situations (see below). This cushion mechanism was accepted by the U.S. Treasury and environmental regulators in affected states and became one of the unique features of the environmental response trust formed at the effective date of MLC's plan of liquidation.

MLC and its teams then held dozens of parallel meetings with federal and state regulators and a Native American tribe to review and negotiate the closure cost estimates.[2] MLC directed its teams to deal with regulators openly and transparently. One of the ways they fostered transparency was through the early adoption of a web-based platform where they made available to regulators in real time not only all documentation available about the environmental condition of the MLC sites, but also their cost estimates, assumptions and backup documentation. Through enormous efforts, MLC and regulators were able to agree on these very complicated technical estimates in record time (within approximately six months, beginning in November 2009) and within MLC's original estimates.

MLC's Innovative Environmental Settlement

What was the purpose of the MLC environmental settlement? MLC's environmental team, from the early stages of the case, focused on the need to remove environmental impediments to the redevelopment of the sites in its portfolio. Why? Because once the environmental impediments to redevelopment were removed, the sites could be returned to job-creating productive uses in the private sector as quickly as possible. Conversely, without successfully addressing these issues, no settlement could be reached, and any remediation and redevelopment of the sites would be long delayed. The entire bankruptcy – a matter of national significance – could have been stalled, and the economic devastation in the local communities might still be in search of a solution. Buyers would have difficulty agreeing to purchase a property without a framework in place to address the environmental liabilities.

How were these issues addressed?

First, MLC designed its estimates to allow for prompt remediation. Those estimates took into consideration completion of all applicable regulatory processes, site investigation, remedy selection and closure construction for all sites within 10 years, in many cases sooner. MLC also, in consultation with its remediation experts, undertook to formulate project management and regulatory streamlining principles and procedures so that work could be proposed and completed within these time frames. MLC took into consideration the likely re-use of the properties when designing its estimates. MLC also put together documentation (scopes of work) of the bases for the numbers ultimately agreed to with applicable regulators and a system for tracking costs that included comparisons of those costs with the bases regulators had agreed to.

Second, early on, MLC focused on the features of the liquidation plan that would need to be created upon the conclusion of the MLC bankruptcy – including the shape of the post-confirmation trust, which would do most of the actual remediation on MLC's properties.

A major concern in this process was how MLC would gain acceptance of its environmental estimates, given the previously noted early status of traditional site characterization and remedy selection efforts at many MLC sites. MLC and its teams, drawing on their experience with insured brownfield redevelopment and contracting, used cutting-edge risk management and insurance techniques not commonly employed in bankruptcy proceedings.

MLC recognized that in a portfolio like the one it inherited, cost overruns would be encountered at some sites while cost under-runs would happen at others, and that a structure that allowed pooling and shifting of funds between sites was preferable. The typical alternative would be to add contingent reserves to every site, resulting in much higher funding requirements and potentially stranding unused funds. Analogizing to retention layers in insurance transactions, MLC recommended a portfolio-wide cushion to provide funds should they be needed to cover individual site cost overruns. Such a structure would allow the most efficient use of taxpayer dollars, shifting money from sites where it was not needed to those where it was. The unique risk-pooling and cushion structure MLC devised to address the environmental status of the properties in MLC's portfolio was adopted by the Treasury. In an effort perhaps worthy of a separate story, Treasury worked intensively with the USDOJ to adapt MLC's recommendations into a form that could be agreed to by – and then led efforts to negotiate with and obtain agreement from – the USEPA, 14 states, and a Native American tribe, not only on the settlement structure but also on the funding arrangements. All this was achieved in record time.

Thus, although environmental trusts are not new in the bankruptcy context, the environmental response trust created in the MLC case is unique as compared to the traditional large environmental bankruptcy in that it established an overall portfolio-wide remediation plan backed by significant funds while providing strong input to the states in which the remediation will take place. MLC's approach also saved taxpayers significant transactional costs compared to other recent large bankruptcy cases with significant environmental costs.

Although no one looks forward to the bankruptcy of any firm, the MLC environmental settlement could serve as a template for the handling of other large bankruptcy cases with significant environmental issues. The creativity in the use of innovative environmental cost-estimating techniques, of structures to allow for the national pooling of funds when dealing with difficult and undefined sites, and of a cooperative problem-solving approach between MLC and affected governmental agencies has much to recommend it in other bankruptcy proceedings.

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1 The MLC environmental team consisted of Jim Redwine, MLC's vice president, Environmental; David R. Berz, of Weil, Gotshal & Manges, counsel to Motors Liquidation Company; and Scott Haeger, Anthony Muzzin and Matthew Roling, all of AlixPartners. The technical estimating team was led by David McMurtry (D. McMurtry & Associates, LLC), who was associated with EFG-Brownfield Partners (Mary Hashem and Stuart Miner), who were themselves engaged to ensure that brownfield redevelopment perspectives were considered at every stage. Other members of the team were The Claro Group (George Hansen and others) and LFR-Arcadis (Frank Lorincz, Lowell McBurney, Steve Gaito and dozens of technical staff), the latter having worked on approximately half of GM's sites and known for its experience in fixed-price-environmental estimating. We very much appreciate the support and encouragement of Al Koch and Ted Stenger of AlixPartners, LLP, CEO and EVP, respectively, of Motors Liquidation Company.

2 *See* the environmental section (pages 43-47) of the Disclosure Statement For Debtors' Amended Joint Chapter 11 Plan, dated December 8, 2010 in *In re Motors Liquidation Company, et al*, United States District Court, Southern District of New York, Chapter 11 Case No. 09-50026 (REG) (Jointly Administered) (http://www.motorsliquidationdocket.com/pdflib/MLC_Amended_Disclosure_Statement.pdf; accessed June 20, 2012) , for additional details on the size and scope of the MLC environmental teams' estimation and negotiation efforts.

Partners Notes

Weil Tops The Charts In Global Private Equity For The First Half Of 2012

As the first half of 2012 has come to a close, Weil, Gotshal & Manges LLP took home the top spot in Bloomberg's Global Private Equity ranking based on the value of deals announced through June 2012. With over 21 percent of the market share for 2012, Weil easily took the first spot in the league tables.

Weil actively represents more than 50 sponsor clients globally, and the firm's success in 2012 includes advising on a diverse array of deals, many of which have been the highest-profile and most innovative announced this year. These deals include Thomas H. Lee Partners' $2.69 billion acquisition of Party City; Providence Equity Partners and an investor group's C$1.1 billion acquisition of Q9 networks; Centerbridge Partners' $1.1 billion take-private of P.F. Chang's China Bistro; and AMC's sale to Dalian Wanda Group from a group of private equity investors for $2.6 billion.

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"These firms are setting the stage for what's to come – creating new standards for client service, establishing solid, long-lasting reputations for handling the most highstakes issues and redefining what it means to be innovative in a world oft criticized for its devotion to old school practices," the report said.

The BTI Report identifies the law firms most likely to be recommended by other clients, that have a reputation as a go-to firm in times of crisis, and firms' use of new and innovative technology and legal strategies.