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Keeping Secured Lending Secure: The Limited Legacy of Chrysler's § 363 Bankruptcy

I. INTRODUCTION

In 2009, as the United States economy was in a deep recession, fear over a collapse of the secured lending markets proliferated.¹ As auto sales dwindled, dealers shut their doors, and leading parts manufacturers filed for bankruptcy, Chrysler, LLC (Chrysler)² and General Motors (GM) accepted government loans.³ When these loans proved insufficient to restore Chrysler and GM to financial health, the companies filed for bankruptcy.⁴ The government's role in both Chrysler's and GM's bankruptcies raised significant concern from secured lenders and market observers alike.⁵ Many investors were outraged that the government not only would invest in these companies but also

1. See, e.g., Barack Obama, President of the United States, Address on Financial Regulatory Reform to Leaders of the Financial Community (Sept. 14, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Financial-Rescue-and-Reform-at-Federal-Hall/ ("This was no longer just a financial crisis; it had become a full-blown economic crisis.").

2. It should be noted that "Old Carco, LLC," formerly known as "Chrysler, LLC," and now commonly referred to as "Old Chrysler," is the company that is undergoing Chapter 11. See Epiq Bankruptcy Solutions, Chapter 11 Proceeding General Information, <http://chapter11.epiqsystems.com/clientdefault.aspx?pk=1c8f7215-f675-41bf-a79b-e1b2cb9c18f0&l=1> (last visited Jan. 10, 2010). This Comment refers to "Old Chrysler" or "Old Carco LLC" as simply "Chrysler."

3. See Richard S. Chang, *Chrysler Dealer Closing Means Deals for Buyers*, N.Y. TIMES DEALBOOK (May 21, 2009, 10:00 EST), <http://wheels.blogs.nytimes.com/2009/05/21/chrysler-dealer-closings-mean-deals-for-buyers/> (noting that Chrysler has closed or will close a total of 789 dealerships around the country); Mark J. Roe, *The Chrysler Bankruptcy Sale: An Assessment*, FORBES, June 15, 2009, <http://www.forbes.com/2009/06/14/chrysler-uaw-bankruptcy-fiat-opinions-contributors-general-motors.html> ("Chrysler was, like General Motors, specially situated as a visibly troubled company in a traditionally important industry, suffering during a severe economic downturn."); *In re Delphi*, No. 05-44481(RDD), 2009 WL 2482146 (Bankr. S.D.N.Y. July 30, 2009) (ruling on the bankruptcy of auto parts supplier Delphi Corp.).

4. *In re Chrysler, LLC et al.*, 405 B.R. 85, 90 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *cert. denied sub nom. Ind. State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275 (2009); *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

5. See *infra* pp. 525-27 and notes 87-99.

would lead bankruptcy negotiations that supposedly improperly subordinated the interests of secured creditors to those of unsecured creditors.⁶ Yet, contrary to popular criticism, Chrysler's recent bankruptcy proceeding did not impermissibly subordinate the interests of secured creditors to those of the unsecured creditors. Most importantly, Chrysler's bankruptcy proceeding did not alter substantive bankruptcy law in a way that hampers secured lending in the United States.

This Comment begins by analyzing Chrysler's tumultuous history.⁷ The Comment then explains Chrysler's bankruptcy proceedings and explores Chrysler's § 363 sale.⁸ Next, Part IV details the objections of both outside observers and the creditors who brought suit seeking to stop the sale.⁹ Then, the Comment maintains that it was not only legal but also pragmatic and savvy to sell Chrysler's assets before entering a formal Chapter 11 bankruptcy plan.¹⁰ The Comment then argues that the negotiations between the TARP-backed banks and the executive branch were fair and did not overstep legal or ethical boundaries.¹¹ Next, the Comment concludes that no new standard has been set by Chrysler's bankruptcy proceeding and that this case does nothing to alter substantive bankruptcy law in the United States.¹² Finally, the Comment discusses several minor changes to secured lending that will likely result from the publicity surrounding Chrysler's § 363 sale.¹³

6. See Bill Visnic, *Chrysler Dissident Investors Cave; Political, Legal Wounds Linger*, EDMUNDS, May 11, 2009, <http://www.autoobserver.com/2009/05/chrysler-dissident-investors-cave-political-legal-wounds-linger.html>; Declan McCullagh, *Chrysler Bankruptcy Exposes Dirty Politics*, CBSNEWS.COM, May 7, 2009, <http://www.cbsnews.com/stories/2009/05/07/politics/otherpeoplesmoney/main4997900.shtml>.

7. See *infra* pp. 517-19 and notes 14-35.

8. See *infra* pp. 519-21 and notes 36-57. A § 363 sale is a sale of assets pursuant to 11 U.S.C. § 363(b) that takes place prior to, or as a part of, a company entering into a formal Chapter 11 bankruptcy plan. 11 U.S.C. § 363 (2006). This concept is discussed in depth *infra* pp. 522-25 and notes 59-86.

9. See *infra* Part IV, pp. 525-39.

10. See *infra* pp. 527-34.

11. See *infra* pp. 534-39.

12. See *infra* pp. 539-42.

13. See *infra* pp. 542-44.

II. CHRYSLER'S JOURNEY TO AND THROUGH BANKRUPTCY

Chrysler, the legendary car company that produces iconic cars such as the Jeep Wrangler and the Dodge Viper, has a history of ups and downs.¹⁴ Founded in 1925, Chrysler successfully navigated the Great Depression and World War II by maintaining innovative technology and strong product offerings.¹⁵ Due in part to the oil crisis and an ineffective overseas expansion, Chrysler suffered dire financial troubles and sought a government bailout in the 1970s.¹⁶ After repaying a majority of the government loans by the early 1980s, Chrysler acquired American Motors, the fourth-largest automaker in the United States.¹⁷ This led Chrysler into another financial crisis and prompted the company to reorganize again.¹⁸ In 1998, Daimler-Benz merged with Chrysler to form DaimlerChrysler.¹⁹ In 2007, Daimler sold Chrysler to the private investment firm Cerberus Capital Management.²⁰

In 2007, Chrysler began a global search for a strategic partner who could help Chrysler expand product offerings and retail locations.²¹ Chrysler discussed alliances with a number of competitors including: "GM, Fiat S.p.A. (Fiat), Nissan, Hyundai-Kia, Toyota, Volkswagen, Tata Motors, GAZ Group, Magna International, Mitsubishi Motors, Honda, Beijing Automotive, Tempo International Group, Hawtai Automobiles and Chery Automobile Co."²² Despite its efforts, Chrysler was unable to secure a partner by the fall of 2008.²³

Due to a number of factors, including the company's inability to find a strategic partner, Chrysler was drastically

14. Micheline Maynard, *Chrysler: A Short History*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/01/business/01history.html>.

15. Chrysler History, <http://www.edmunds.com/chrysler/history.html>.

16. *See id.*

17. Maynard, *supra* note 14.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See In re Chrysler, LLC et al.*, 405 B.R. 89, 90 (Bankr. S.D.N.Y. 2009).

22. *Id.* at 90.

23. *Id.*

affected by the global credit crunch of 2008.²⁴ In July 2008, amid significant job loss and a lack of consumer confidence in the economy, Chrysler announced that year-to-date sales had plunged twenty-nine percent over the same period in 2007.²⁵ Chrysler suffered from disastrous liquidity problems and, during 2008, the company suffered a net loss of \$16.8 billion.²⁶ In late 2008, Chrysler received \$4 billion dollars in government loans.²⁷ One term of the loans required Chrysler to submit a plan (Viability Plan) showing that it was able to sustain long-term viability and become a strong competitor in the U.S. marketplace.²⁸

While seeking the initial loans from the government, Chrysler simultaneously pursued a strategic alliance with Fiat.²⁹ In January 2009, Chrysler and Fiat entered into a preliminary deal that was partly conditioned on Chrysler meeting the requirements of the Viability Plan.³⁰ The Viability Plan called for Chrysler to file for Chapter 11 bankruptcy and emerge as a profitable company as quickly as possible.³¹

President Obama's Auto Task Force, a committee created to assist the President with auto industry related policy, conditionally approved Chrysler's Viability Plan in March 2009.³² As a part of this conditional acceptance, Chrysler and Fiat, with the assistance of the Auto Task Force, negotiated a new collective bargaining agreement with Chrysler's major labor union, the International Union, United Automobile, Aerospace and

24. See *id.*; see also Maynard, *supra* note 14 ("[Chrysler], like others in Detroit, was battered by a deep sales slump last year as a recession took hold.").

25. See Ben Rooney, *Consumer Spending Loses Steam*, CNNMONEY.COM, September 29, 2009, http://money.cnn.com/2008/09/29/news/economy/personal_income_spending/index.htm; Press Release, U.S. Bureau of Labor Statistics, Unemployment in July 2008 (Aug. 1, 2008), http://www.bls.gov/news.release/archives/empsit_08012008.pdf; Press Release, Chrysler LLC, Chrysler LLC Reports July 2008 U.S. Sales (Aug. 1, 2008), <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/08-01-2008/0004860329&EDATE=>.

26. *In re Chrysler, LLC et al.*, 405 B.R. 85 at 90.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. THE PRESIDENT OF THE UNITED STATES' AUTO TASK FORCE, DETERMINATION OF VIABILITY SUMMARY: CHRYSLER, LLC 5 (2009).

Agricultural Implement Workers of America (UAW), as well as a settlement with Chrysler's secured lenders.³³ On April 30, 2009, Chrysler and twenty-four of its domestic subsidiaries filed for bankruptcy in New York under Chapter 11 of the United States Code.³⁴ At the time of the filing, Chrysler's bankruptcy was the fifth largest in U.S. history.³⁵

Several days after Chrysler filed for bankruptcy, a collection of secured creditors led by the Indiana State Police Pensions Trust, the Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund (collectively, Objecting Creditors) formed in opposition to the proceedings.³⁶ Despite their opposition, the bankruptcy court approved a sale of substantially all of Chrysler's assets on May 31, 2009.³⁷ The Objecting Creditors subsequently appealed to the Second Circuit Court of Appeals.³⁸ On June 5, 2009, the Second Circuit affirmed the bankruptcy court's decision.³⁹ The Supreme Court denied the Objecting Creditors' petition for further review.⁴⁰ Finally, on June 10, 2009, less than two weeks after the bankruptcy court first approved the sale, the assets of Chrysler were sold to New CarCo Acquisition, LLC (New Chrysler).⁴¹

Chrysler and its partners selected what is commonly known as a § 363 sale described in that section of the Bankruptcy Code

33. See Press Release, US Treas. Dep't of Public Affairs, Obama Administration Auto Restructuring Initiative Chrysler-Fiat Alliance (Apr. 30, 2009), http://www.financialstability.gov/latest/tg_043009.html; *In re Chrysler LLC*, et al., 405 B.R. at 92.

34. *In re Chrysler LLC*, 576 F.3d 108, 111 (2d Cir. 2009), *cert. denied sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009).

35. See Linda Sandler et al., *Obama's 60-Day Chrysler Bankruptcy Goal Covers Only Asset Sale*, BLOOMBERG, May 13, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aJa0P8qxSNgo>.

36. *In re Chrysler LLC*, et al., 405 B.R. at 93.

37. *Id.* at 90.

38. *In re Chrysler LLC*, 576 F.3d at 108.

39. *Id.*

40. *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275 (2009).

41. *In re Chrysler LLC*, 576 F.3d at 112. "New Chrysler" is the newly created company that purchased the assets of "Old Chrysler" and merged with Fiat. See Brief for Appellants Indiana Pensioners, Indiana State Teachers Retirement Fund, at 44, *In re Chrysler LLC*, 576 F.3d 108 (2d Cir. 2009) [hereinafter Brief for Appellants]; *infra* pp. 531-32 and notes 128-141.

that regulates the procedure.⁴² Under a standard Chapter 11 bankruptcy, a debtor or other party of interest files a plan of reorganization that stipulates how a debtor will be reorganized and covers the repayment of a debtor's debts.⁴³ Shareholders and creditors then vote on a plan and, if accepted, the plan is reviewed by a court and either approved or denied.⁴⁴ In a § 363 sale, a debtor auctions off assets and allocates the money received to creditors according to seniority.⁴⁵ A § 363 sale often occurs prior to the debtor officially entering into a Chapter 11 reorganization plan.⁴⁶ Chrysler needed to sell assets quickly so as to maximize asset value, which not only would increase returns for secured creditors but also would maintain jobs and allow for a faster return to profitability for New Chrysler.⁴⁷ Therefore, Chrysler chose to use a § 363 sale because it allows for a quicker disposition of assets as opposed to waiting to dispose of assets in a formal Chapter 11 plan.⁴⁸

Financing for the sale to New Chrysler came from both the American and Canadian governments.⁴⁹ As a part of the sale, New

42. 11 U.S.C. § 363 (2006); see Andrew Ross Sorkin, *Moody's: Secured Lenders Shouldn't Fear Chrysler Precedent*, N.Y. TIMES DEALBOOK (June 22, 2009, 18:05 EST), <http://dealbook.blogs.nytimes.com/2009/06/22/moodys-secured-lenders-shouldnt-fear-chrysler-precedent/>.

43. See 11 U.S.C. §§ 1123-1124 (2006).

44. See 11 U.S.C. § 1126 (2006) (specifying the voting requirements for acceptance of a Chapter 11 plan); 11 U.S.C. § 1129 (2006) (specifying the requirements that a Chapter 11 plan must meet in order to be accepted by a court).

45. See 11 U.S.C. § 1129 (specifying in the commentary that "if [a class is] paid less than in full, then no class junior may receive anything under the plan"); *infra* note 53.

46. See 11 U.S.C. § 363; *In re Chrysler LLC*, 576 F.3d at 113-115.

47. See, e.g., *Trans World Airlines, Inc., et al.*, No. 01-00056(PJW), 2001 WL 1820326, at *3 (Bnkr. D. Del. April 2, 2001) (approving a § 363 sale in light of the "substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American"); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986) (approving the sale of a radio station that could not meet its operating expense obligations and would lose substantial value if it ceased operations).

48. See Sorkin, *supra* note 42 ("The so-called 363 sale [. . .] was chosen because it was significantly faster than getting approval of a formal plan of reorganization.").

49. *In re Chrysler LLC*, 576 F.3d at 112 ("Financing for the sale transaction—\$6 billion in senior secured financing, and debtor-in-possession financing for 60 days in the amount of \$4.96 billion—would come from the United States Treasury and from Export Development Canada."). The Canadian government contributed to the bailout because many Canadians were employed in GM's manufacturing plants located in Canada. See The Canadian Press, *Overcapacity an issue, but Chrysler*

Chrysler assumed a number of Chrysler's liabilities.⁵⁰ Also, New Chrysler paid \$2 billion in return for substantially all of Chrysler's assets.⁵¹ Several parties divided ownership of New Chrysler: 55 percent went to the UAW, 9.85 percent went to the United States Treasury, 2.46 percent went to Export Development Canada (the Canadian government), and 20 percent to Fiat S.p.A.⁵²

The absolute priority rule codified under 11 U.S.C. § 507 states that senior secured creditors must be paid in full before junior creditors receive any payment.⁵³ Under this rule, when a company enters bankruptcy, creditors' claims are prioritized according to seniority of debt.⁵⁴ Secured credit, generally the most senior class of debt, must be reimbursed in full before lower classes can be paid.⁵⁵ Chrysler's secured creditors, who had claims of approximately \$6.9 billion dollars and a first priority lien on virtually all of Chrysler's assets, received \$2 billion, or about twenty-nine percent of their claims.⁵⁶ Because the secured creditors were not paid in full, lower classes should be unable to recover any portion of their investment.⁵⁷ However, the Objecting Creditors assert that the court improperly allowed lower classes of creditors to recover.⁵⁸

plants will open in weeks: Fiat, CANADIANMANUFACTURING.COM, June 18, 2009, http://www.canadianmanufacturing.com/cmo/news/headline/article.jsp?content=20090618_095445_9644.

50. See *In re Chrysler LLC*, 576 F.3d at 111-112.

51. See *id.*

52. See *In re Chrysler LLC, et al.*, 405 B.R. 85, 92 (Bankr. S.D.N.Y. 2009). Also, Fiat has the right to earn an additional fifteen percent equity stake in "New Chrysler" if the company meets certain "performance metrics." See US Treas. Dep't of Public Affairs, *supra* note 33; *In re Chrysler, LLC*, 576 F.3d at 112.

53. 11 U.S.C. §507 (2006); see 11 U.S.C. §1129(c)(i) and (ii); 11 U.S.C. § 1129 ("[I]f [a class is] paid less than in full, then no class junior may receive anything under the plan. This codifies the absolute priority rule.").

54. 11 U.S.C. § 507.

55. *Id.*

56. *In re Chrysler LLC, et al.*, 405 B.R. at 93.

57. 11 U.S.C. § 507.

58. See *In re Chrysler LLC, et al.*, 405 B.R. at 85.

III. AN EXPLANATION OF § 363 SALES

A detailed historical analysis of 11 U.S.C. § 363 is beyond the scope of this Comment.⁵⁹ Nevertheless, a general understanding of the requirements of § 363 sales shows why its use in the present case does not hamper secured lending. Section 363(b) allows for a company's trustee or debtor-in-possession (DIP)⁶⁰ to "use, sell, or lease" assets and pay the proceeds to its creditors prior to court approval of a Chapter 11 bankruptcy plan.⁶¹ A court must approve a § 363 sale just as it must approve a Chapter 11 plan.⁶² The sale may include "all or substantially all of a debtor's assets."⁶³ The assets for sale need not be "perishable" or sold in an "emergency."⁶⁴ Furthermore, the debtor need not show good cause in order for a judge to approve the sale.⁶⁵

Federal courts have placed restrictions on court approval of § 363 sales.⁶⁶ In order to approve a § 363 sale, a court must identify an express business justification.⁶⁷ Courts typically make case-by-

59. For a detailed history of 11 U.S.C. § 363(b) and its predecessors, see Comm. of Equity Sec. Holders v. Lionel Corp. (*In re Lionel Corp.*), 722 F.2d 1063 (2d Cir. 1983); Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales*, 92 VA. L. REV. 1639 (Nov. 2006).

60. See 11 U.S.C. § 1101(1); BLACK'S LAW DICTIONARY (3d ed. 1999) (defining 'debtor-in-possession' as "[a] Chapter 11 or 12 debtor that continues to operate its business as a fiduciary to the bankruptcy estate. With certain exceptions, the debtor-in-possession has all the rights, powers, and duties of a Chapter 11 trustee.").

61. 11 U.S.C. § 363(b); see also *In re Lionel Corp.*, 722 F.2d at 1070 (ruling that a judge may authorize the sale of assets of a bankruptcy party's estate "out of the ordinary course of business and prior to the acceptance and outside of any plan of reorganization").

62. 11 U.S.C. § 363(c)(2)(B).

63. *In re Chrysler LLC*, 576 F.3d at 116-117.

64. See *In re Lionel Corp.*, 722 F.2d at 1070-1071. Note that this requirement differs from prior statutes, namely § 116(3) of the Bankruptcy Act of 1867, from which 11 U.S.C. § 363(b) emanates. *Id.*

65. See *In re Lionel Corp.*, 722 F.2d at 1069.

66. See *id.* (noting that a bankruptcy judge does not have "*carte blanche*" when approving a § 363 sale).

67. See *id.* at 1070 (noting that a court must "expressly find from the evidence presented . . . a good business reason to grant such an application."). While *Lionel* is a Second Circuit decision, a number of other circuits have adopted this standard. See *In re Continental Air Lines, Inc.*, 780 F.2d 1223, (5th Cir. 1986); *In re Air Beds, Inc.*, 92 B.R. 419, 423-424 (9th Cir. 1988); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 389 (6th Cir. 1986); *In re UAL Corp.*, 443 F.3d 565, 572 (7th Cir. 2006).

case determinations of what constitutes “business justifications.”⁶⁸ In *Community of Equity Security Holders v. Lionel Corp. (Lionel)*,⁶⁹ a landmark decision regarding § 363 sales, the Second Circuit listed several factors a court might consider in determining whether to approve a § 363 sale, including:

[T]he proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.⁷⁰

Subsequent decisions added other factors, including a requirement that the sale is proposed in good faith and that the purchaser act good faith.⁷¹ Even with these additional requirements, courts have consistently upheld § 363 sales that occur prior to a Chapter 11 plan approval.⁷²

68. See Brege, *supra* note 59, at 1652-1653 (noting that the courts have created a standard, and not a rule, that courts should examine when deciding whether or not to approve a § 363 sale).

69. 722 F.2d at 1070.

70. *Id.* at 1071.

71. See, e.g., *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 149-150 (3d Cir. 1986) (“[W]e hold that when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the “good faith” of the purchaser.”); *Trans World Airlines, Inc., et al.*, No. 01-00056(PJW), 2001 WL 1820326, at *3 (Bnkr. D. Del. April 2, 2001) (stating that a purchaser in a § 363 sale must act in good faith).

72. See, e.g., *Trans World Airlines*, 2001 WL 1820326, at *3 (approving a § 363(b) sale in light of the “substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA’s assets to American”); *Stephens Indus.*, 789 F.2d 386 (6th Cir. 1986) (approving the sale of a radio station that could not meet its operating expense obligations and would lose substantial value if it ceased operations); *In re UAL Corp.*, 443 F.3d 565, 572 (7th Cir. 2006) (approving a § 363(b) procedure modifying a collective bargaining agreement that had an impact on other creditors under Chapter 11); *In re Air Beds, Inc.*, 92 B.R.

The benefits of § 363 sales are numerous for both debtors and creditors. First, as the Second Circuit noted, “the speed of the process can maximize asset value by sale of the debtor’s business as a going concern.”⁷³ Also, because the assets are sold clear of liens, a § 363 sale often provides for the highest possible return on the asset.⁷⁴ This may allow for an otherwise unattainable recovery for junior creditors.⁷⁵ Further, § 363 sales in conjunction with a Chapter 11 filing offer substantial cost reduction over a Chapter 11 filing alone.⁷⁶ Section 363 sales can quickly address a substantial amount of creditor’s claims on debtor’s assets, thus reducing the administrative cost and complexity of a subsequent Chapter 11 filing.⁷⁷ Lastly, a § 363 sale can save a company from liquidating, in turn saving thousands of jobs, which benefits the company, its employees, and the economy as a whole.⁷⁸

Notwithstanding the benefits, § 363 sales suffer from substantial criticism.⁷⁹ Because a § 363 sale takes place outside of a Chapter 11 plan of reorganization, many argue that § 363 has a relaxed standard that creates an inherent conflict with the safeguards of a normal Chapter 11 proceeding.⁸⁰ A main safeguard

419, 423-424 (9th Cir. 1988) (approving the sale of various assets under 11 U.S.C. §363(b) but denying the distribution of sale proceeds).

73. *In re Chrysler LLC*, 576 F.3d at 115.

74. *See id.* (noting that because assets are “typically burnished (or ‘cleansed’) because (with certain limited exception) they are sold free and clear of liens, claims and liabilities [A] § 363 sale can often yield the highest price for the assets because the buyer can select the liabilities it will assume”).

75. *See Brege, supra* note 59, at 1655 (noting that junior creditors have the most to gain from the efficient disposition of assets).

76. *See James J. White, Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139, 164 (2004) (noting that § 363 sales are beneficial because they result in a lower priced bankruptcy reorganization); *see also Brege, supra* note 59, at 1653-4 (stating that “courts have critically considered the alternative costs that would result if a Section 363(b) sale were denied . . . [a]pproval of a sale in this context saves administrative expenses down the road”).

77. *See id.*

78. *See Trans World Airlines, Inc., et al., No. 01-00056(PJW)*, 2001 WL 1820326, at *14 (Bnkr. D. Del. April 2, 2001) (“There is a substantial public interest in preserving the value of TWA as a going concern [which] includes the preservation of jobs for TWA’s 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets.”).

79. *See infra* pp. 524-25 and notes 80-86.

80. *In re Chrysler LLC*, 576 F.3d 108, 113 (2d Cir. 2009), *cert. denied sub nom. Ind. State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275 (2009) (noting that

of Chapter 11 is that it allows creditors an opportunity to vote on the approval of a proposed reorganization of the debtor company.⁸¹ Critics claim that § 363 sales allow debtors to create and fulfill Chapter 11 plans all the while bypassing the creditor approval requirement of Chapter 11.⁸² In turn, there is a strong fear that one class of creditors can “strong-arm” the trustee or DIP into a § 363 sale, skirt Chapter 11 safeguards, and profit at the expense of other equity or debt holders.⁸³ As a result, critics are concerned that a proliferation of § 363 sales might lead to a mass circumvention of the safeguards of Chapter 11.⁸⁴ These criticisms have led some courts to refer to improper § 363 sales as “sub rosa” plans.⁸⁵

IV. OBJECTIONS TO THE BANKRUPTCY PLAN

Chrysler’s creditors and outside observers voiced fierce opposition to the § 363 sale.⁸⁷ Many claimed that the government’s

the courts “have identified an ‘apparent conflict’ between the expedient of a § 363(b) sale and the otherwise applicable features and safeguards of Chapter 11.” (citing *In re Lionel Corp.*, 722 F.2d at 1071).

81. *See id.* at 114.

82. *See In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir.1983) (noting that *sub rosa* 363 plans could “short circuit the requirements of Chapter 11 for confirmation of a reorganization plan”); *see also* Brege, *supra* note 59, at 1655 (“[A] section 363 [sale] appears to offer a side door to escape the rigors of the typical bankruptcy plan confirmation.”).

83. *See In re Chrysler LLC*, 576 F.3d at 116 (recognizing the concern senior creditors could “strong-arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders”).

84. *See In re Braniff*, 700 F.2d at 940 (“The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization play by establishing the terms of the plan *sub rosa* in connection with a sale of assets.”).

85. ‘Sub rosa’ is a Latin phrase meaning “under the rose,” and it generally connotes secrecy. BLACK’S LAW DICTIONARY (8th ed. 2004). While courts have questioned the usefulness of the term “sub rosa,” the term generally refers either to a § 363 sale that bypasses the requirements of § 363 sales set out by *Lionel* and its progeny, or to a § 363 sale that dictates the proceedings of a Chapter 11 proceeding while bypassing Chapter 11 requirements. *See In re Chrysler LLC*, 576 F.3d at 117 (“The term ‘sub rosa’ is something of a misnomer. It bespeaks a covert or secret activity, whereas secrecy has nothing to do with a § 363 transaction.”).

86. *See In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007) (“The trustee is prohibited from such use, sale or lease [under 11 U.S.C. § 363(b)] if it would amount to a *sub rosa* plan of reorganization.”).

87. *See In re Chrysler LLC*, 576 F.3d at 113-117; Stephen J. Lubben, *The Truth About Detroit’s Bankruptcies*, FORBES, July 7, 2009, <http://www.forbes.com/2009/>

attempt to stabilize the auto industry significantly increased the risk of secured lending in the United States.⁸⁸ The Objecting Creditor's objections were mostly legal in nature.⁸⁹ Outside observers (Observers), including journalists, legal scholars, and hedge fund managers, who were not senior creditors to Chrysler, voiced concern that ethical barriers were broken and feared the pragmatic ramifications of the supposed subordination of Chrysler's secured lenders to unsecured creditors.⁹⁰

The Objecting Creditors appealed the Bankruptcy Court's decision on four grounds.⁹¹ First, Objecting Creditors challenged the constitutionality of the use of TARP funds to bail out Chrysler and finance the company's bankruptcy.⁹² Second, the Objecting Creditors appealed the order granting limited liability to New Chrysler for existing and future tort claims arising from Chrysler.⁹³ Third, the Objecting Creditors argued that the proceeding was an impermissible sub rosa plan and should not be allowed under 11 U.S.C. § 363(b).⁹⁴ Lastly, the Objecting Creditors argued that the § 363 sale impermissibly subordinates their interests to the interests of unsecured creditors in violation of the absolute priority rule and 11 U.S.C. § 363.⁹⁵

07/26/chrysler-gm-bankruptcy-opinions-contributors-chapter-11-tarp.html (responding to the criticisms of Chrysler's bankruptcy proceedings); McCullagh, *supra* note 6.

88. See Bill Frezza, *Obama to Secured Creditors: Drop Dead*, REAL CLEAR MARKETS, May 4, 2009, http://www.realclearmarkets.com/articles/2009/05/obama_to_secured_creditors_dro.html.

89. See *In re Chrysler LLC*, 576 F.3d at 114-116, 119-120, 121, 123-124.

90. See McCullagh, *supra* note 6; Roe, *supra* note 3; Frezza, *supra* note 88; Press Release, Clifford S. Asness, Managing and Founding Principal of AQR Capital Management, LLC, Unafraid In Greenwich Connecticut (May 5, 2009), <http://dealbook.blogs.nytimes.com/2009/05/05/a-hedge-fund-manager-strikes-back-at-obama/>.

91. *In re Chrysler LLC*, 576 F.3d at 112-113.

92. See *id.* The majority of Observers do not take issue with the government's use of TARP funds to bail out the auto industry. Therefore, this claim is outside the scope of this Comment and will not be discussed.

93. *Id.* at 123-124. The majority of Observers do not take issue with the limitation of New Chrysler's liability for products and actions of Chrysler. Therefore, this claim is outside the scope of this Comment and will not be discussed.

94. *Id.* at 112-113.

95. See Brief for Appellants, *supra* note 41, at 2, 53 ("The Treasury's actions also violate the fundamental rules of priority and circumvent statutory protections attendant to a chapter 11 reorganization."); *In re Chrysler LLC*, 576 F.3d at 112-113.

The brunt of the Observers' argument was that the executive branch over-stepped legal and ethical boundaries by negotiating the § 363 sale between Chrysler and its secured lenders.⁹⁶ Observers argued that the executive branch upset the United States' "world leading" bankruptcy procedures by bullying Chrysler's creditors into accepting a settlement that they would not have accepted without overt pressure from the President.⁹⁷ In turn, Observers maintained that the government's intervention in Chrysler's bankruptcy set a standard that will dissuade creditors from making fully secured loans to large companies.⁹⁸

Most of the objections to the settlement from both the Objecting Creditors and Observers are grounded in arguments that the court's ruling does not comply with current case law and that it violates § 363 sales requirements.⁹⁹

A. *Did the § 363 Sale Comply with Current Case Law?*

The first argument raised by the Objecting Creditors was that the sale was a sub rosa plan because it improperly subordinated the rights of creditors and was therefore impermissible under current law.¹⁰⁰ While the § 363 sale affected a future Chapter 11 reorganization, it is permissible because it did not dictate proceedings of a future Chapter 11 plan.

Chrysler's § 363 sale was consistent with the spirit of the bankruptcy process. The overarching purpose of reorganizing a business like Chrysler through bankruptcy is to preserve the value of the debtor's assets and prevent the company from liquidating.¹⁰¹

96. See Visnic, *supra* note 6.

97. See Press Release, The Committee of Chrysler Non-Tarp Lenders, Statement from the Non-TARP Lenders to Chrysler (Apr. 30, 2009), <http://blogs.wsj.com/deals/2009/04/30/statement-from-non-tarp-lenders-of-chrysler/> [hereinafter Statement from Non-TARP Lenders]; see also Roe, *supra* note 3; Frezza, *supra* note 88 ("Are you following the disembowelment of Chrysler's secured creditors . . . [and] what it could do to the very concept of secured debt?").

98. See Frezza, *supra* note 88.

99. See Brief for Appellants, *supra* note 41, at 8 (arguing that the court ignored the precedent on § 363 sales set by *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983)).

100. See *id.* at 49.

101. See, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("[T]he fundamental purpose of reorganization is to prevent the debtor from going into

One of the primary goals of a § 363 sale is to “maximize asset value by the sale of the debtor’s business as a going concern.”¹⁰² Maximizing the value of the assets and avoiding liquidation enhances the value of the company, thus increasing the likelihood of recovery for the company’s creditors.¹⁰³

Citing *Lionel*, the Second Circuit emphasized that courts should reject § 363 sales that are not justified by a “good business reason.”¹⁰⁴ One of the most common business reasons that courts rely on is whether a delay in acceptance of a Chapter 11 plan of reorganization will drastically reduce the value of property to be sold.¹⁰⁵ Undoubtedly, Chrysler was in an emergency situation when it filed for bankruptcy; the company lost substantial value in the prior year, and it was losing over \$100 million per day.¹⁰⁶ More importantly, Chrysler and Fiat’s proposed alliance, which rested on the government’s acceptance of Chrysler’s Viability Plan, was about to expire.¹⁰⁷ If that deal was not completed, Chrysler would have been forced to liquidate, which would have reduced the value of Chrysler’s assets from \$2 billion to approximately \$800 million.¹⁰⁸ As the Second Circuit appropriately found, “consistent with an underlying purpose of the Bankruptcy Code—maximizing the value of the bankrupt estate—it was no abuse of discretion to determine that the Sale prevented further, unnecessary losses.”¹⁰⁹ Chrysler was in a dire situation, and a § 363 sale was the proper remedy.

liquidation.”); *In re Capitol Food Corp. of Fields Corner*, 490 F.3d 21, 25 (2007) (noting that a primary function of chapter 11 bankruptcy is the preservation of a business as going concerns and to maximize recoverable assets); *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (“[Chapter 11] embodies the general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate.”).

102. See *In re Chrysler LLC*, 576 F.3d 108, 115 (2d Cir. 2009), cert. denied sub nom. *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275 (2009).

103. See *Trans World Airlines, Inc., et al.*, No. 01-00056(PJW), 2001 WL 1820326, at *11 (Bnkr. D. Del. April 2, 2001).

104. See *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983) (noting that a court must “expressly find from the evidence presented . . . a good business reason to grant such an application”).

105. *In re Lionel Corp.*, 722 F.2d at 1066-1069.

106. See *In re Chrysler LLC*, 576 F.3d at 118-119.

107. See *id.*

108. See *id.*

109. *Id.*

Notwithstanding Chrysler's compliance with *Lionel* standards, Objecting Creditors claim that the sale so significantly affected any subsequent Chapter 11 proceeding that it is in contradiction to the precedent set by the Fifth Circuit in *In re Braniff, Inc.*¹¹⁰ The Objecting Creditors, however, based their criticism on a flawed interpretation of the Fifth Circuit's reasoning in *Braniff*. In *Braniff*, the Fifth Circuit rejected a proposed § 363 sale of substantially all of Braniff, Inc.'s assets because the sale agreement improperly dictated many terms of any forthcoming Chapter 11 plan.¹¹¹ Under the sale, Braniff, Inc. would have transferred its assets in return for unsecured notes and airline ticket vouchers.¹¹² This consideration could only be used in a future reorganization of the company.¹¹³ More importantly, the court focused on the fact that the plan would force secured creditors "to vote a portion of their deficiency claim in favor of any future reorganization plan approved by a majority of the unsecured creditors' committee."¹¹⁴ The court noted that forcing creditors to vote their claim in a specified manner did not fit within 11 U.S.C. § 363's approval of a "use, sale, or lease" of assets.¹¹⁵ Therefore, the court found that the sale did not merely influence Braniff's subsequent Chapter 11 plan, but rather dictated the results of a Chapter 11 plan without approval by the creditors as required by Chapter 11.¹¹⁶

The safeguards of a Chapter 11 proceeding do not strictly limit the authority of a trustee under 11 U.S.C. § 363(b) as much as the Objecting Creditors maintain.¹¹⁷ Citing *Braniff*, Objecting

110. See Brief for Appellants, *supra* note 41, at 49-50, 54 (citing *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) in support of their contention that a court should not approve a ruling that "effectively undermines or eliminates the chapter 11 process").

111. See *In re Braniff*, 700 F.2d at 939-940.

112. See *id.*

113. See *id.*

114. See *id.* (emphasis added).

115. *Id.*

116. *Id.* at 940.

117. Cf. Brege, *supra* note 59, at 1640 (noting that one can sell an asset through 11 U.S.C. § 363(b) "without first going through the rigors of developing a reorganization plan disposing of that asset"); Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 787 (Dec. 2002) (citing 11 U.S.C. § 363 and noting

Creditors maintain that a § 363 sale in which substantially all of a company's assets are sold "must scale the hurdles erected in Chapter 11."¹¹⁸ The safeguards of a Chapter 11 plan include, *inter alia*, the requirements that the plan was proposed in good faith; that creditors voted and approved of the plan; and that creditors' recovery under Chapter 11 is larger than a recovery under a Chapter 7 liquidation plan would have been.¹¹⁹ However, a trustee can sell the assets of a firm in a § 363 sale without developing a full Chapter 11 plan.¹²⁰ Moreover, the *Braniff* court never stated that a plan should be denied simply because it involved a sale of a majority of the company's assets.¹²¹ Even outside the context of § 363 sales, commentators have noted that Chapter 11 is rarely "a forum where the various stakeholders in a publicly held firm negotiate among each other over the firm's destiny."¹²² Rather, lenders controlling a Chapter 11 proceeding "merely put[] in place a preexisting deal."¹²³

The Chrysler sale did not dictate the procedures of a Chapter 11 proceeding. A sale of a company's assets will undoubtedly influence any eventual Chapter 11 plan.¹²⁴ Unlike in

that Chapter 11 bankruptcy procedures "provide[] a mechanism for selling assets free and clear of all claims even before a plan of reorganization is put in place").

118. Brief for Appellants, *supra* note 41, at 49-50 (citing *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983)).

119. 11 U.S.C. §1129.

120. See *Fla. Dep't of Revenue v. Piccadilly Cafeterias*, 128 S.Ct. 2326, 2330 n.2 (2008); see also *In re Baldwin-United Corp.*, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984) (approving the disposition of a major asset prior to the approval of full Chapter 11 plan of reorganization because the "debtors . . . are not dictating the terms of a plan by way of [the] disposition"); *Brege*, *supra* note 59, at 1640 (noting that one can sell an asset through 11 U.S.C. § 363(b) "without first going through the rigors of developing a reorganization plan disposing of that asset"); *Baird & Rasmussen*, *supra* note 117, at 787 ("Chapter 11 provides a mechanism for selling assets free and clear of all claims even before a plan of reorganization is put in place.").

121. See *In re Chrysler LLC*, 576 F.3d 108, 113 (2d Cir. 2009), *cert. denied sub nom. Ind. State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275 (2009); see also *In re Braniff*, 700 F.2d at 939 (refusing to rule on each individual factor of the sale, including the amount of assets sold, because the lower courts did not focus on individual factors but addressed the transaction as a whole).

122. See *Baird & Rasmussen*, *supra* note 117, at 752.

123. See *id.*

124. See, e.g., *In re Chrysler LLC*, 576 F.3d at 117 n.9; see *Comm. Of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1072 n.1 (2d Cir. 1983) (Winter, J. dissenting) ("[A] reorganization plan affects the rights of the parties as

Braniff, the Chrysler sale does not specifically dictate the terms of a Chapter 11 plan.¹²⁵ Chrysler sold substantially all of its assets in its § 363 sale, but the company will still go through a full Chapter 11 proceeding.¹²⁶ Therefore, Chrysler's proceedings are consistent with current precedent.¹²⁷

B. Were the Assets Sold to a New Company?

The Objecting Creditors also maintained that Chrysler's § 363 sale did not constitute a sale at all but was merely a reorganization of the company.¹²⁸ The Objecting Creditors insisted that the substance of the plan consisted of setting aside toxic assets for liquidation, partnering with a new company, and creating new financial arrangements, all of which should take place through Chapter 11 proceedings and not a § 363 sale.¹²⁹

Fiat management helped to guide Chrysler through bankruptcy and now operates the company post-bankruptcy.¹³⁰ Fiat is providing new technology, distribution outlets, and management expertise valued between \$3 billion and \$8 billion.¹³¹ Fiat has this control as part of the group that purchased the assets from Chrysler.¹³² Even though the company purchasing Chrysler's

well as the disposition of assets, [but] there is no inconsistency in allowing the disposition of property outside of the confirmation hearings.”).

125. *In re Chrysler LLC*, 576 F.3d at 117 n.9 (“But it is not a ‘*sub rosa* plan’ in the *Braniff* sense because it does not specifically ‘dictate,’ or ‘arrange’ *ex ante*, by contract, the terms of any subsequent plan.”).

126. See Michael J. de la Merced & Micheline Maynard, *Fiat Takes Over Chrysler After 42-Day Bankruptcy*, N.Y. TIMES, June 11, 2009, at B4, available at 2009 WLNR 11155384; see also Nick Bunkley & Bill Vlasic, *Chrysler Fights to Regain Lost Ground*, N.Y. TIMES, Dec. 8, 2009, at B5, available at 2009 WLNR 24722234 (noting that some of Chrysler's debts and several of its unwanted assets remain in Chapter 11).

127. See *supra* pp. 527-31 and notes 100-126.

128. See Brief for Appellants, *supra* note 41, at 44 (“The transaction before the Court is a “Sale” in name only; upon consummation, [N]ew Chrysler will be [O]ld Chrysler in essentially every respect.”).

129. See Brief for Appellants, *supra* note 41, at 44-45.

130. See *In re Chrysler LLC*, 576 F.3d at 119 (noting that Fiat's CEO will be managing “New Chrysler” and that Fiat management's experience with turning around troubled car companies is essential to “New Chrysler's” success).

131. See *id.* at 119; Brief for Appellants, *supra* note 41, at 10.

132. See *In re Chrysler LLC*, 576 F.3d at 112 (noting that Fiat will receive a 20% share of “New Chrysler,” with the right to purchase up to 51% of the company, in return for “provid[ing] [“]New Chrysler[“] with certain fuel-efficient vehicle

assets has been nicknamed "New Chrysler," the transaction constitutes more than a simple reorganization of Chrysler itself.¹³³

The Objecting Creditors argue against the sale by emphasizing that the new company would be selling many of the same products as the old company.¹³⁴ This is, however, a common feature and even a purpose of § 363 sales.¹³⁵ Indeed, one of the primary benefits of a § 363 sale is that it preserves the value of the company as a going concern by keeping the assets together and reestablishing control rights.¹³⁶ In keeping the assets together, the purchaser may well use the assets in a manner similar to the seller's use.¹³⁷ For example, in *Trans World Airlines, Inc.*, Trans World Airlines (TWA) sold substantially all of its assets (including gates, slots, and routes at hub airports as well as airplanes and staff) to American Airlines.¹³⁸ American Airlines' interest in these assets was to incorporate them into its current business and expand its operations.¹³⁹

With regards to business operations, Chrysler's § 363 sale mirrors TWA's § 363 sale.¹⁴⁰ Chrysler transferred the bulk of its assets, including its factories, product offerings, and work force, to

platforms, access to its worldwide distribution system, and new management that is experienced in turning around a failing auto company").

133. See *supra* pp. 530-31 and notes 125-132.

134. See Brief for Appellants, *supra* note 41, at at 44 ("[N]ew Chrysler["] will be [“O]ld Chrysler in essentially every respect. It will be called “Chrysler.” . . . It will manufacture and sell Chrysler and Dodge cars and minivans, Jeeps and Dodge Trucks.”).

135. See, e.g., *Trans World Airlines, Inc., et al.*, No. 01-00056(PJW), 2001 WL 1820326 (Bnkr. D. Del. April 2, 2001) (approving Trans World Airlines selling substantially all of its assets, including gates, hubs, slots, routs, planes and an experienced workforce to AMR Corporation (American Airlines)). American Airlines would use these assets to assist in operating its business.

136. Cf. *Trans World Airlines*, 2001 WL 1820326. The court noted that a § 363 sale would preserve the value of TWA as a going concern and would provide for the transfer of substantially all of TWA's assets to American, who would use the assets in a manner that would preserve 20,000 jobs. *Id.* at *14. Basically, a substantial majority of TWA's assets and would now be placed under the control of American; Baird & Rasmussen, *supra* note 117, at 786 (noting that in the market for selling firms as going concerns “a straightforward path exists for keeping the assets of the firm together and reestablishing coherent control rights”).

137. See *supra* note 135.

138. See *Trans World Airlines, Inc., et al.*, No. 01-00056(PJW), 2001 WL 1820326, at *5, *8 (Bnkr. D. Del. April 2, 2001).

139. See *id.*

140. See *id.*

Fiat, who incorporated them into its business and expanded its automobile manufacturing and sales operations.¹⁴¹ In short, if Chrysler's § 363 sale is considered *sub rosa*, then virtually every § 363 sale would be labeled *sub rosa*.¹⁴²

C. *Did the Sale Impermissibly Subordinate the Interests of Secured Creditors?*

Objecting Creditors maintained that this particular § 363 sale improperly subordinated the interests of secured lenders to those of unsecured lenders and violated the priority rules of Chapter 11.¹⁴³ As the Court of Appeals confirmed, this claim lacks merit.¹⁴⁴ As previously mentioned, the absolute priority rule states that senior secured creditors are to be paid in full before junior creditors receive any payment.¹⁴⁵ Contrary to Objecting Creditors' claims, the absolute priority rule was followed: unsecured lenders did not receive anything that belonged to secured lenders.¹⁴⁶ Under the sale, all of the proceeds were paid to the secured priority lenders.¹⁴⁷ Any equity stakes in New Chrysler that benefited unsecured creditors emanated from new sources (e.g., government loans, new technology from Fiat, and new management from Fiat).¹⁴⁸ Because these assets emanated from new sources and were not part of the debtor's estate, these assets were not subject to liens of the secured lenders.¹⁴⁹ Therefore, the

141. See *In re Chrysler LLC*, 576 F.3d 108, 119 (2d Cir. 2009), cert. denied sub nom. Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009).

142. See Brief for Debtors-Appellees Chrysler LLC, et al., at 31, *In re Chrysler LLC*, 576 F.3d 108, 112 (2d Cir. 2009).

143. *In re Chrysler LLC*, 576 F.3d at 112.

144. *Id.* at 118-119.

145. See *supra* notes 53-55.

146. See Lubben, *supra* note 87 ("The consideration for that sale goes to the 'old' debtor, and will be distributed according to the absolute priority rule.").

147. See *In re Chrysler LLC*, et al., 405 B.R. 85, 97-98 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), cert. denied sub nom. Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009) ("Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders.").

148. *In re Chrysler LLC*, 576 F.3d at 118-119.

149. See *id.* at 118 ("[A]ll the equity stakes in New Chrysler were entirely attributable to new value-including governmental loans, new technology, and new management-which were not assets of the debtor's estate.") (citing *In re Chrysler*,

government did not take assets from the senior lenders and give them to junior unsecured creditors.¹⁵⁰

Furthermore, courts have noted that the absolute priority rule need not be followed in a § 363 sale as long as other major factors outlined in *Lionel* and its progeny justify deviating from the rule.¹⁵¹ Therefore, even if the bankruptcy court had not strictly followed the absolute priority rule, the court would still be following established precedent.¹⁵²

The government bailed out the junior creditors in the sense that the government's new investment in Chrysler largely benefited the UAW.¹⁵³ While one may question the government's decision to support the UAW, it has no effect on the legality of Chrysler's § 363 sale or bankruptcy proceedings in general.¹⁵⁴ Unsecured lenders did not receive anything that rightfully belonged to secured lenders.¹⁵⁵ This transaction was in compliance with current bankruptcy code.¹⁵⁶

D. Was There Any Impropriety in the Negotiation of the Sale?

Objecting Creditors took issue with both sides of the negotiations of the § 363 sale: they claimed that secured lenders were unfairly forced to negotiate with the Treasury Department through a large group of banks, and that the government

LLC et al., 405 B.R. 85 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *cert. denied*, Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009)).

150. *Id.* at 118.

151. *See In re Iridium Operating LLC*, 478 F.3d 452, 463 (2d Cir. 2007) ("When a settlement is presented for court approval apart from a reorganization plan, however, the priority rule of 11 U.S.C. § 1129 is not necessarily implicated."). There are other instances in which the absolute priority rule need not be followed. *See generally* Clifford S. Harris, Note, *A Rule Unvanquished: The New Value Exception to the Absolute Priority Rule*, 89 MICH.L.REV. 2301 (Aug. 1991) (detailing several exceptions to the absolute priority rule).

152. *See supra* note 151.

153. *See Roe, supra* note 3 ("[T]he de facto deal was really that the government bought Chrysler from the creditors, giving it to the UAW, flooding Chrysler with cash, and hiring Fiat to manage it.").

154. *See* Lubben, *supra* note 87.

155. *See id.* ("The consideration for that sale goes to the 'old' debtor, and will be distributed according to the absolute priority rule.").

156. 11 U.S.C. § 1129; *see supra* pp. 533-34 and notes 145-155.

“outstepped legal and ethical boundaries” in negotiating the settlement.¹⁵⁷

1. Objections to Negotiations Led by TARP-Funded Banks

Some Observers were adamant in their contention that the executive branch’s involvement in Chrysler’s bankruptcy set a dangerous precedent that will hurt secured lending in the United States.¹⁵⁸ Specifically, these Observers took issue with the negotiation process because they claimed that the TARP-backed banks were hesitant to oppose the Treasury Department.¹⁵⁹ Yet three facts undermine the Observers’ position on this issue.

First, the creditors were bound to negotiate through TARP-backed banks. Through a series of agreements including the creditor contracts that were assumed when creditors first acquired Chrysler’s debt, the creditors ceded control to a designated agent.¹⁶⁰ In this case, that agent was the lead lender, JPMorgan Chase Bank NA.¹⁶¹ As the Second Circuit noted, “any action the agent takes at the request of the lenders holding a majority of Chrysler’s debt is binding on all lenders, those who agree and those who do not.”¹⁶² Because lenders holding a vast majority of Chrysler’s secured debt agreed to the § 363 sale, the agent properly authorized the § 363 sale of the assets.¹⁶³ In short, the Observers “avoid the inconvenient fact that [they], and

157. Visnic, *supra* note 6; see Statement from Non-TARP Lenders, *supra* note 96.

158. See Frezza, *supra* note 88 (“Why would anyone lend money to heavily unionized companies knowing that if things went wrong, the president and his men could trash their security interests by executive decree, hold them up to public vilification, and subject them to future retribution by regulators?”).

159. Andrew Ross Sorkin, *Lenders Fault Treasury in Chrysler Bankruptcy*, N.Y. TIMES DEALBOOK (April 30, 2009, 12:26 PM), <http://dealbook.blogs.nytimes.com/2009/04/30/chrysler-lenders-fault-government-as-bankruptcy-looms/>.

160. See *In re Chrysler LLC*, 576 F.3d 108, 120 (2d Cir. 2009), *cert. denied sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009); see also Lubben, *supra* note 87 (noting that all parties buying into loan agreed to “majority rule”).

161. See Lubben, *supra* note 87.

162. *In re Chrysler LLC*, 576 F.3d at 120.

163. *In re Chrysler LLC*, et al., 405 B.R. 85, 102 (Bankr. S.D.N.Y. 2009), *aff’d*, 576 F.3d 108 (2d Cir. 2009), *cert. denied sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009).

everyone else buying into this loan, agreed to ‘majority rule’,” and the majority agreed to the § 363 sale.¹⁶⁴

Second, Chrysler’s creditors were reasonable to accept the proposed payment of twenty-nine percent of their original debts.¹⁶⁵ Without government assistance, Chrysler was unappealing to investors, and the company would likely have been liquidated.¹⁶⁶ In liquidation Chrysler would have lost any goodwill value.¹⁶⁷ Therefore, the dealmakers believed that if Chrysler was liquidated the secured lenders would receive even less than twenty-nine cents per dollar invested.¹⁶⁸ Courts have previously approved § 363 sales when there is no evidence that the creditors would be better off going through an extended Chapter 11 proceeding.¹⁶⁹ The secured creditors made a sound business decision in accepting a payout of twenty-nine percent of their original investment and the court made a sound legal decision in approving the sale.

Furthermore, the secured lenders received a payout equal to the loan’s open market trading value.¹⁷⁰ In the months leading up to the bankruptcy filing, Chrysler’s secured loans traded between fifteen and seventy-five cents per dollar loaned.¹⁷¹ The Indiana Pension Funds, who led the objections to the § 363 sale, purchased Chrysler debt for forty-three cents per dollar loaned in July 2008.¹⁷² In the month before the filing, the loans were valued

164. Lubben, *supra* note 87.

165. *See id.*

166. *See* Roe, *supra* note 3; Steven Bavaria, *GM, Chrysler and the Secured Loan Market*, LEVERAGED FINANCE NEWS, June 4, 2009, http://www.leveragedfinance.com/blog/your_take/-194063-1.html.

167. *See* Bavaria, *supra* note 166 (“[Liquidating the company] would mean its assets would have been sold off piecemeal, with whatever goodwill that may have once been included in its valuation lost forever.”).

168. *See* Roe, *supra* note 3 (“[G]overnment deal makers believe that Chrysler’s liquidation value, which is what the secured creditors were entitled to, was even less than what they’re getting in the plan.”).

169. *See* Trans World Airlines, Inc., et al., 2001 WL 1820326, 2001 WL 1820326, at *14 (Bkr. D. Del. April 2, 2001).

170. *See* Bavaria, *supra* note 166.

171. *See id.*

172. *See* Richard Mourdock, Treasurer of the State of Ind., Driving in the Wrong Direction, Address to the Cato Institute, (Oct. 15, 2009), http://www.coyoteblog.com/coyote_blog/2009/10/government-strongarm-tactics-in-the-chrysler-bankruptcy.html. These funds purchased approximately \$43 million dollars of Chrysler’s secured debt for approximately \$17 million. *Id.*

as low as thirteen cents per dollar loaned.¹⁷³ Therefore, the lenders saw twenty-nine cents per dollar loaned as a reasonable offer.¹⁷⁴ Moreover, recent investors who purchased the debt below twenty-nine cents per dollar loaned could make money at a buyout of twenty-nine cents per dollar loaned.¹⁷⁵ Most importantly, the fact that the secured lenders received payment comparable to prices offered in open market trading reaffirms the value of secured loans generally.¹⁷⁶ Creditors were wise to accept the settlement.

Third, even lenders who did not receive TARP funding were satisfied with the settlement.¹⁷⁷ Overall, lenders holding approximately ninety percent of the loans supported the settlement.¹⁷⁸ Many of these creditors did not receive TARP funds but still approved of the settlement.¹⁷⁹ The Objecting Creditors' claim that the TARP funded banks only accepted the settlement due to government pressure is unwarranted.

2. Objections to the Role of the Executive Branch in Negotiations

Another major objection to the settlement is premised on the belief that the executive branch crossed "legal and ethical boundaries" while facilitating the deal between Chrysler and its secured lenders.¹⁸⁰ This claim lacks merit. Observers assert that the executive branch used its power to control the restructuring process of Chrysler and to create a result that the President felt was fair.¹⁸¹ While the executive branch, through the Auto Task

173. Katherine Burton, Sree Bhaktavatsalam & Pierre Paulden, *Yale, Halliburton, Gates Foundation Listed as Chrysler Lenders*, BLOOMBERG, May 2, 2009, <http://www.bloomberg.com/apps/news?pid=20601103&sid=a109vAXclorI>.

174. See Bavaria, *supra* note 166.

175. See Burton et. al., *supra* note 173.

176. See Bavaria, *supra* note 166.

177. See Burton et. al., *supra* note 173.

178. *In re Chrysler LLC*, et al., 405 B.R. 84, 102 (S.D.N.Y. 2009), *aff'd*, 576 F.3d 108, (2d Cir. 2009), *cert. denied sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009).

179. See Burton et. al., *supra* note 173. These investors include Elliot Management Corp. and York Capital Management LP. *Id.*

180. See Visnic, *supra* note 6.

181. See Jo-el J. Meyer, *Bankruptcy: Pension Funds Challenge Chrysler Sale, Say Secured Lenders' Rights 'Trampled'*, 92 BBR 1225 (May 26, 2009); see also Roe, *supra* note 3 ("[U]sually bankruptcy players—even lenders providing new money—do not get to decide whether the deal was fair.").

Force, was the leader of the negotiations between Chrysler and its creditors, no evidence was brought forth that it improperly exerted its influence on the secured lenders.¹⁸² Though the executive branch did play a large role in Chrysler's debt workout negotiations, the bankruptcy proceedings were subject to review by the judicial branch.¹⁸³ The reviewing courts found that Chrysler's § 363 sale was legally valid.¹⁸⁴

Moreover, it was entirely within the executive branch's authority to assist in negotiating the sale because of its position as DIP financier (Financer).¹⁸⁵ When large firms like Chrysler enter Chapter 11, they are typically illiquid and unable to operate without significant financing from outside investors.¹⁸⁶ The control that a Financer has over the funds needed by the bankrupt company gives the Financer substantial control over that company's operations.¹⁸⁷ As a result, the Financer, be it the government, a large financial institution, or a private individual, has substantial say in whether or not the company will sell its assets under a § 363 plan.¹⁸⁸

182. Michael J. de la Merced, *2 Lawyers on the G.M. Case Tell Their Story*, N.Y. TIMES DEALBOOK (July 25, 2009, 20:38 EST), <http://dealbook.blogs.nytimes.com/2009/07/25/2-lawyers-on-the-gm-case-tell-their-story/> (“[T]he auto task force hand[led] the actual negotiations with [Chrysler’s] secured lenders.”); see also Lubben, *supra* note 87 (“Chrysler’s senior lenders had agreed by contract to have JPMorgan Chase, the lead lender, negotiate on their behalf. We would have heard if Jamie Dimon felt Chase was being strong-armed into supporting the sale.”).

183. See *In re Chrysler LLC*, et al., 405 B.R. at 93.

184. See *In re Chrysler LLC*, 576 F.3d 108, 120 (2d Cir. 2009), cert. denied sub nom. Ind. State Police Pension Trust v. Chrysler LLC, 129 S.Ct. 2275 (2009).

185. See *infra* note 187; see also *In re Chrysler LLC*, 576 F.3d at 112 (noting that the government provided financing for the sale as debtor-in-possession). The full 336 page DIP contract between the United States government and Chrysler can be found at <http://www.financialstability.gov/docs/AIFP/chryslerDip.pdf>.

186. See Baird & Rasmussen, *supra* note 117, at 784-785.

187. See, e.g., *In re Western Pacific Airlines, Inc.*, 223 B.R. 567 (Bnkr. D. Colo. 1997) (authorizing a Chapter 11 debtor-airline to obtain financing needed to continue operating its business and prevent loss of value associated with many of its assets; terms of financing included allowing lender to appoint directors to debtor-airline’s board of directors thus giving lender substantial control of debtor’s operations); see also Baird & Rasmussen, *supra* note 117, at 785 (“These revolving credit facilities and the practical control they give lenders over a firm are some of the most striking changes in Chapter 11 practice over the last twenty years. . . . For the firms that are likely to survive as going concerns, professional investors ensure that they remain in control, regardless of whether the firm is inside of bankruptcy or out.”).

188. See Baird & Rasmussen, *supra* note 117, at 785.

In the present case, Chrysler was losing millions of dollars a day and the government provided DIP financing through multi-billion dollar loans.¹⁸⁹ Therefore, in its role as Financer, the government was able to influence the bankruptcy process and push for a § 363 sale. Yet the influence exerted by the executive branch was no greater than that exercised by other financiers in other transactions.¹⁹⁰ Overall, the Objector's claims of impropriety in the negotiation of the § 363 sale lacked evidence and failed to stand up to close scrutiny.

V. SECURED DEBT REMAINS SECURE

Objecting Creditors and Observers argued that Chrysler's § 363 proceeding created a new, disastrous standard of arbitrary subordination of secured debt.¹⁹¹ Commentators have proclaimed that investors will shy away from lending, even on a secured basis, to companies like Chrysler in the future.¹⁹² These claims are exaggerated and lack merit.

Barring another extreme catastrophic economic event, it is unlikely that the government will further invest in private companies like Chrysler.¹⁹³ The government never intended to bail out the auto industry.¹⁹⁴ Originally, the government only provided loans to Chrysler in an effort to spur the company to finding future

189. See *In re Chrysler LLC*, 576 F.3d at 112 (noting that the government provided financing for the sale as debtor-in-possession).

190. See Baird & Rasmussen, *supra* note 117.

191. See Roe, *supra* note 3; Frezza, *supra* note 88.

192. See Frezza, *supra* note 88 ("Why would anyone lend money to heavily unionized companies knowing that if things went wrong, the president and his men could trash their security interest by executive decree, hold them up to public vilification, and subject them to future retribution by regulators?").

193. See *infra* pp. 539-40 and notes 194-199.

194. See Press Release, The White House, Obama Administration Auto Restructuring Initiative General Motors Restructuring (June 1, 2009), http://www.financialstability.gov/latest/05312009_gm-factsheet.html [hereinafter Auto Restructuring Initiative] ("Consistent with the goal of clearly limiting the government's role as a *reluctant* equity owner but careful steward of taxpayer resources . . . [t]he government has no desire to own equity stakes in companies any longer than necessary, and will seek to dispose of its ownership interests as soon as practicable.") (emphasis added); see also Nora Macaluso, *Treasury Financing: Chrysler Financial Gets 1.5 Billion in TARP Funding to Spur Car Loans*, 92 BBR 184 (Jan. 27, 2009) ("[T]he [Treasury] department does not want to expand its automotive aid program beyond current levels.").

funding through other means.¹⁹⁵ Before the bailouts, the government clarified that it did not want to increase aid to the automotive industry.¹⁹⁶ Since the bailouts, the government has stated that it does not intend to provide any additional aid to the auto industry.¹⁹⁷ Thus the government has always been a reluctant investor and only got involved to prevent another sector of the U.S. economy from failing during drastic economic times.¹⁹⁸ Even in the unlikely event of future government intervention, adopting simple measures discussed below would negate this issue.¹⁹⁹

The circumstances surrounding the Chrysler bankruptcy are so rare that this case lacks significant precedential value.²⁰⁰ First, there was substantial pressure from the American public for the government to get involved.²⁰¹ Due to the public outcry against the government's use of the TARP funding to exclusively bail out banks and Wall Street firms, the government was under pressure to also assist rank-and-file employees.²⁰² In Chrysler's bankruptcy, the pressure for government assistance intensified since many of Chrysler's employees were members the UAW, a politically

195. See Macaluso, *supra* note 194 ("The government official said the terms are designed to provide incentives for the company to look for future funding through other programs, or through improved market conditions . . .").

196. See *id.* ("[T]he [Treasury] department does not want to expand its automotive aid program beyond current levels.").

197. See Nick Bunkley, *Wait is Likely for Chrysler's I.P.O., Adviser Says*, N.Y. TIMES DEALBOOK (Aug. 5, 2009, 14:01 EST) <http://dealbook.blogs.nytimes.com/2009/08/05/chrysler-ipo-likely-later-than-2010-auto-adviser-says/> ("[T]he government is not considering giving more financial aid to parts makers beyond the \$5 billion that already has gone to the many companies in that sector of the industry that are in or near bankruptcy.").

198. See Auto Restructuring Initiative, *supra* note 194 ("Consistent with the goal of clearly limiting the government's role as a *reluctant* equity owner but careful steward of taxpayer resources . . . [t]he government has no desire to own equity stakes in companies . . . and will seek to dispose of its ownership interest as soon as practicable.")(emphasis added); Roe, *supra* note 3 ("Chrysler was . . . a visibly troubled company in a traditionally important industry, suffering during a severe economic downturn. . . . Burned by the Lehman [Brothers bank] failure, government players might not have wanted to see that movie again.").

199. *Infra* pp. 542-44 and notes 217-227.

200. See Sorkin, *supra* note 42.

201. See, e.g., Roe, *supra* note 3 ("The government felt pressure to do something directly for blue collar types to balance this pro-Wall Street perception.").

202. See *id.*

influential union.²⁰³ Without governmental assistance, it is unlikely that another company could match the speed of Chrysler's bankruptcy.²⁰⁴ In short, the "perfect storm" of circumstances surrounding Chrysler's bankruptcy was so spectacularly rare that it gives Chrysler's bankruptcy limited precedential value.²⁰⁵

The limited precedential value is easily recognizable when looking at two major bankruptcy cases since Chrysler's proceedings. In GM's bankruptcy the secured lenders claims were paid in full.²⁰⁶ Moreover, in the bankruptcy proceedings of Delphi,²⁰⁷ a major part supplier to the automotive industry, the bankruptcy judge refused to use Chrysler's bankruptcy as a model for Delphi's proceeding.²⁰⁸ Though Delphi used a § 363 sale, its broad, public bidding process allowed its secured creditors the opportunity to assume control of the company and achieve a higher return than a private, government brokered § 363 sale.²⁰⁹ If Chrysler's bankruptcy had set a new standard, then GM and Delphi would have followed it. Chrysler's bankruptcy has not set new precedent that negatively affects the viability of secured

203. See *id.* ("Chrysler was . . . politically well-positioned, with an influential union.").

204. See Roe, *supra* note 3 ("[S]ince government money doesn't fuel ordinary chapter 11 reorganizations, there's one reason to think Chrysler was a stand-alone bankruptcy event.").

205. See Sorkin, *supra* note 42 (discussing Chrysler's "near-perfect storm of extenuating circumstances").

206. See *GM Lender Payout Augurs Well for Secured Loan Markets*, DBRS CAN. NEWSL., Vol. 1, Issue 8, June 3, 2009, available at <http://www.dbrs.com/research/228854/dbrs-canada-newsletter/gm-lender-payout-augurs-well-for-secured-loan-markets.pdf>; Roe, *supra* note 3.

207. *In re Delphi*, No. 05-44481(RDD), 2009 WL 2482146 (Bnkr. S.D.N.Y. July 30, 2009); see also David McLaughlin & Mike Spector, *End of Saga: Delphi Wins OK to Exit Bankruptcy*, WALL ST. J., July 31, 2009, at B1, available at <http://online.wsj.com/article/SB124897411664794259.html> (discussing the Delphi's bankruptcy procedures).

208. See Roe, *supra* note 3. In *Delphi*, the judge allowed for a much broader process for current creditors and outside investors to bid on Delphi's assets than did the judge in Chrysler's bankruptcy. See *In re Delphi*, 2009 WL 2482146; McLaughlin & Spector, *supra* note 207.

209. See *In re Delphi*, 2009 WL 2482146, at *5-*6; McLaughlin & Spector, *supra* note 207. This process resulted in Delphi's secured creditors purchasing the assets in exchange for forgiveness of approximately \$3.4 billion in loans. *Id.*; see Opinion Letter, Samuel Jordan, Washington Legal Foundation, *Whither Creditors' Rights?*, (Aug. 28, 2009), http://www.wlf.org/Upload/legalstudies/legalopinionletter/082809Jordan_LOL.pdf.

lending in America. Instead, Chrysler's bankruptcy should be viewed as the proper application of bankruptcy rules in an exceedingly rare situation.

Even though the circumstances surrounding the government's involvement with Chrysler were highly unusual, the means by which the government helped to reorganize Chrysler was "not unprecedented."²¹⁰ In fact, as one bankruptcy law professor noted, the procedure "was entirely ordinary."²¹¹ While perhaps not on the same size or scale of Chrysler's sale, § 363 sales are a routine and reasonable solution should a large corporation like Chrysler go bankrupt.²¹² This sale met the requirements set out in *Lionel* and paid creditors in complete compliance with the United States Bankruptcy Code.²¹³ Chrysler's § 363 sale reinforces current bankruptcy procedures. It will not hamper secured credit in the United States.

A. *Changes Resulting From Chrysler's § 363 Sale*

As one Washington Post analyst noted, "the market is always changing; ignoring the problem doesn't help."²¹⁴ Though Chrysler's bankruptcy proceeding complied with existing law, several changes will result from the publicity it attracted.²¹⁵

The Objecting Creditors were upset by the government's role in the debt workout negotiations.²¹⁶ Therefore, lenders might now insist on political intervention covenants to address the risks of government intervention, similar to those now used in loan contracts with debtors in developing countries.²¹⁷ These covenants

210. See Lubben, *supra* note 87.

211. See *id.*

212. See *supra* note 72; cf. Lubben, *supra* note 87 ("Chapter 11 now routinely involves a sale early in the case, with the remainder of the case devoted to distributing the proceeds of the sale among the creditors.").

213. See *supra* pp. 527-31 and notes 100-126.

214. *Lessons From the Fall of Giants*, WASH. POST, July 29, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/03/AR2009080302949.html>.

215. See *infra* notes 218 and 221.

216. See *supra* notes 180-181.

217. See Posting of Kenneth Anderson to the Volokh Conspiracy Blog, http://volokh.com/archives/archive_2009_05_31-2009_06_06.shtml#1243955114 (June 2, 2009, 11:05 EST) (noting that poison put provisions addressing political risk "allocates the

could possibly be in the form of poison put provisions.²¹⁸ Also, lenders may now decide to purchase political intervention insurance in order to better hedge against the risks of future government involvement.²¹⁹ Both of these concepts are in use in American contracts with less developed countries and could be incorporated into lender contracts with companies in the United States.²²⁰

Additionally, lenders will likely focus on the rights to control debt workout negotiations.²²¹ Objecting Creditors complained that they were forced to negotiate through TARP funded banks.²²² Objecting Creditors were forced to do so because they agreed to “majority rule” when they purchased Chrysler debt.²²³ Had these minority creditors not agreed to “majority rule,” they would likely have had a stronger voice in the negotiations with the government.²²⁴ Due to their minority status, these lenders may not have had the bargaining power to negotiate around “majority rule.” However, if smaller lenders are unable to

risk” among various parties and “gives the borrower-corporation some incentive not to seek government involvement”).

218. Generally used in bonds, poison put clauses allow a bondholder to redeem the bond before maturity if a certain event happens. See Investorwords.com, http://www.investorwords.com/7440/poison_put.html (last visited Sept. 29, 2009). Here, a poison put clause could state that the debt could be called if the federal government became an equity holder in the debtor company. Cf. Anderson, *supra* note 217.

219. See generally The Political Risk Insurance Center, PRI Essentials, <http://www.pri-center.com/directories/priessentials.cfm> (“[Political Risk Insurance (PRI)] allows investors to concentrate on the commercial aspects of investments, with the comfort that someone else - PRI providers - will help them avoid potential losses, or reimburse them in case of a covered loss related to political causes.”). Admittedly, political risk insurance is quite complex and product offerings may not fit all risks of various investors. See Jennifer Caplan, *Political Risk: Run for Cover?*, CFO.COM, Jan. 22, 2002, <http://www.cfo.com/article.cfm/3003066?f=related>. However, a number of reputable companies, including Lloyd’s of London, currently offer various political risk insurance policies. *Id.*

220. See Anderson, *supra* note 217.

221. See *infra* p. 544 and note 225.

222. See Sorkin, *supra* note 153.

223. *Supra* pp. 535 and notes 160-164.

224. Cf. Lubben, *supra* note 87 (arguing that the lenders who bought into the loan agreement voluntarily agreed to majority rule).

negotiate out of majority rule clauses, they can simply choose not to lend to companies borrowing from large TARP backed banks.²²⁵

Overall, many of the current default rules of investor contracts are freely changeable by agreement.²²⁶ Therefore, any of the above suggestions can be negotiated into a contract to offer lenders even more security than they currently have.²²⁷ In the future, creditors can mitigate the risk of government involvement by adopting these policies.

VI. CONCLUSION

Chrysler's § 363 sale was a high profile, highly publicized event that took place during a time of uncharacteristic government involvement in the economy. Many people not only were disgruntled with government bailouts out, but also were overwhelmed by the government leading a company into and out of bankruptcy.²²⁸ A small minority of creditors objected to the proceedings.²²⁹ Yet their arguments against the § 363 sale of Chrysler's assets failed to convince the trial court, failed to convince the Second Circuit, and were not novel enough to receive Supreme Court review.²³⁰ Chrysler's bankruptcy complied with written law and relevant precedent.²³¹ The executive branch and the courts respected the priority of secured lenders.²³² Chrysler's bankruptcy and the executive branch's involvement have not set a new standard and have not hampered secured credit in the United States. In the end, "it is much easier to criticize unusual characteristics of bankruptcy law than it is to truly understand and

225. See Baird & Rasmussen, *supra* note 117, at 18 ("Control rights are allocated through the corporate charter, the securities the firm issues, and the debt contracts into which it enters. Legal rules themselves also grant control rights. Many of these are default rules that investors change by agreement.").

226. See *id.* at 18.

227. See Anderson, *supra* note 217.

228. See, e.g., Frezza, *supra* note 88 (lamenting the governments role in Chrysler's bankruptcy filing).

229. See *supra* p. 537 and note 178.

230. *In re Chrysler LLC, et al.*, 405 B.R. 85 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108, (2nd Cir. 2009), *cert. denied*, *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S.Ct. 2275 (2009).

231. See *supra* pp. 528-31 and notes 104-127.

232. See *supra* pp. 533-34 and notes 143-156.

justify them.”²³³ Present criticisms do not stand up to an in-depth review of both the policies and the pragmatic effects of Chrysler’s § 363 sale.

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233. Brege, *supra* note 59, 1644-45.

