

## UNDERSTANDING THE BANKRUPTCIES OF CHRYSLER AND GENERAL MOTORS: A PRIMER

A. Joseph Warburton<sup>†</sup>

INTRODUCTION .....	531
I. THE RESTRUCTURINGS OF CHRYSLER AND GENERAL MOTORS...	532
A. <i>Chrysler</i> .....	533
B. <i>General Motors</i> .....	537
II. THE BANKRUPTCY PROCEEDINGS .....	539
III. THE ACADEMIC DEBATE .....	547
A. <i>Asset Sale Versus Reorganization</i> .....	547
B. <i>Creditor Consent</i> .....	551
C. <i>Market Test</i> .....	559
D. <i>Judicial Valuation</i> .....	569
E. <i>The Proper Objective of Bankruptcy Law</i> .....	570
IV. LOOKING TO THE FUTURE.....	572
V. RECOMMENDATIONS.....	578
CONCLUSION.....	581

### INTRODUCTION

The federal government's investment in the American automotive industry in 2008 and 2009 has sparked controversy over the government's role in private enterprise, in general, and the bankruptcy process, in particular. The U.S. Department of the Treasury spent tens of billions of dollars to rescue Chrysler and General Motors. The bulk of the funding was available only after the companies had filed for bankruptcy, wiping out their old shareholders, cutting their labor costs, and reducing their debt obligations. Certain creditors, who saw their investments in the companies sharply reduced, vigorously objected to the role of the government in the bankruptcy process. Some charge that in protecting the interests of taxpayers, the Treasury Department negotiated aggressively with creditors but, in protecting the interests of organized labor, it offered the United Autoworkers union special treatment.

The government's role in the bankruptcies of Chrysler and General

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<sup>†</sup> Assistant Professor of Law, Syracuse University College of Law. Assistant Professor of Finance, Syracuse University Whitman School of Management. I thank Penny Dearborn, Michael J. Thomas, and Sabin Willett for helpful comments and suggestions, Eileen Gould for research assistance, and the editors of the *Syracuse Law Review* for their solicitation of this Article.

Motors has generated much discussion in the popular press and the financial media. It has also generated debate among the leading corporate bankruptcy academics. Critics of the reorganizations assert that the bankruptcies threaten to undermine the rule of law. To save the politically powerful union, the government elevated the unsecured claims of organized labor above the secured claims of investors, according to critics, overturning well-established creditor priorities in bankruptcy. This precedent-setting distortion of bankruptcy priorities, critics believe, will have severe consequences, resulting in a greater cost of capital for borrowers. Supporters reply that the restructurings comply with existing bankruptcy laws and current bankruptcy practices, and believe that the government played fairly by the established rules. According to the supporters, the critics are bothered by the fact that the government was a major participant in the transactions, and that it chose to favor the union over investors. While critics may object to that decision, supporters say it is a policy question, not a legal one.

The scope and intensity of this debate suggest that these cases might have a crucial impact on the future of bankruptcy. This Article explores that possibility. Part I describes how the two automotive companies structured their bankruptcies. These structures were challenged in the courts, and that litigation is discussed in Part II. Part III presents the arguments made in the academic literature on each side of the debate, set forth in a point-counterpoint format. The discussion in Part III represents a hypothetical dialogue between academics on both sides of the debate. Unlike existing studies, which argue either for or against the restructurings, this Article takes an even-handed approach, exploring the arguments and counterarguments on both sides. Although it is too early to know what effects the *Chrysler* and *General Motors* decisions will have on bankruptcy law, cases decided in the months since the decisions provide an early glimpse. Part IV looks at the initial cases that cite or discuss *Chrysler* and *General Motors*. Part V then advances certain reforms which, by responding to the concerns on both sides of the debate, promise to bring greater clarity to bankruptcy law and practice.

#### I. THE RESTRUCTURINGS OF CHRYSLER AND GENERAL MOTORS

Even before the financial crisis erupted in 2008, the U.S. automotive industry was struggling with severe long-term challenges.<sup>1</sup>

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1. According to the Congressional Oversight Panel, “[f]oreign competitors had steadily eroded its market share. Rising fuel prices had softened demand for its products. Legacy costs had constrained its flexibility. And a series of poor strategic decisions by its executives

2010] **Bankruptcies of Chrysler and General Motors** 533

The financial crisis turned that long-term slump into an acute crisis. By the end of 2008, Chrysler and General Motors could not obtain the financing needed to conduct day-to-day operations. Facing the prospect of collapse, the Bush Administration provided short-term financing to the automotive companies using funds from the Troubled Asset Relief Program (TARP). The Obama Administration continued the financial assistance.

After reviewing the viability plans submitted by Chrysler and General Motors, however, the Obama Administration quickly concluded that the automakers were not viable as currently structured and that the best path forward would require utilizing the Bankruptcy Code.<sup>2</sup> Instead of a traditional, drawn-out bankruptcy process, the administration opted for a “quick and surgical” reorganization that would “make it easier for Chrysler and General Motors to clear away old liabilities.”<sup>3</sup> On April 30, 2009, Chrysler LLC and subsidiaries (collectively referred to herein as “Chrysler” or, in the context of its asset sale, “Old Chrysler”) filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code.<sup>4</sup> On June 10, 2009, the majority of Chrysler’s assets were sold to a newly-formed entity under section 363 of the Code.<sup>5</sup> On June 1, 2009, General Motors Corporation and subsidiaries (collectively referred to herein as “GM” or, in the context of its asset sale, “Old GM”) filed for bankruptcy protection under Chapter 11.<sup>6</sup> On July 5, 2009, GM sold the majority of its assets to a newly-formed entity under section 363.<sup>7</sup>

#### A. Chrysler

Upon Chrysler’s filing of Chapter 11, Cerberus Capital

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had compounded these problems. In 2008, U.S. automotive sales fell to a 26-year low.” CONG. OVERSIGHT PANEL, SEPTEMBER OVERSIGHT REPORT: THE USE OF TARP FUNDS IN THE SUPPORT AND REORGANIZATION OF THE DOMESTIC AUTOMOTIVE INDUSTRY 3 (2009) [hereinafter “PANEL REPORT”].

2. Press Release, Office of the White House Press Sec’y, Fact Sheet: Obama Administration New Path to Viability for GM & Chrysler (Mar. 30, 2009), available at [http://www.whitehouse.gov/assets/documents/Fact\\_Sheet\\_GM\\_Chrysler\\_FIN.pdf](http://www.whitehouse.gov/assets/documents/Fact_Sheet_GM_Chrysler_FIN.pdf).

3. *Id.*; see also President Barack Obama, American Automotive Industry (Mar. 30, 2009).

4. See Voluntary Petition, *In re* Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (No. 09-50002).

5. See *In re* Chrysler LLC (*Chrysler I*), 405 B.R. 84, 113 (Bankr. S.D.N.Y. 2009), *aff’d*, 576 F.3d 108 (2d Cir. 2009), *vacated sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009) (mem.).

6. See Voluntary Petition, *In re* Gen. Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009) (No. 09-50026) [hereinafter GM Voluntary Petition].

7. *In re* Gen. Motors Corp., 407 B.R. 463, 520 (Bankr. S.D.N.Y. 2009).

Management, L.P. and its affiliates owned 80% of Chrysler's equity and Daimler AG and its affiliates owned the remaining 20%.<sup>8</sup> Chrysler was also indebted to several groups of creditors. First, Chrysler owed \$6.9 billion to a syndicate of lenders, secured by a first-priority security interest in substantially all of Chrysler's assets.<sup>9</sup> Second, Chrysler owed \$2 billion to affiliates of its equity holders, secured by a second-priority security interest in Chrysler's assets.<sup>10</sup> Third, Chrysler owed \$4.27 billion to the U.S. Department of the Treasury (the "U.S. Treasury") pursuant to TARP, and to the Canadian government, secured by a third-priority security interest in Chrysler's assets.<sup>11</sup> Fourth, Chrysler owed \$10 billion to a trust established to provide healthcare benefits to union retirees (the "UAW Trust"), a voluntary employee benefit association.<sup>12</sup> Chrysler's \$10 billion commitment to the UAW Trust arose out of a litigation settlement reached in 2008 with the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (the "UAW").<sup>13</sup> Pursuant to the settlement, Chrysler was obligated to fund the UAW Trust with cash. The obligation was not secured. Finally, Chrysler owed approximately \$5 billion to various trade creditors, as well as billions in warranty and dealer obligations.<sup>14</sup> This indebtedness was unsecured. Following Chrysler's Chapter 11 filing, about \$5 billion in debtor-in-possession financing was provided by the U.S. Treasury and the Canadian government to fund Chrysler's bankruptcy.<sup>15</sup>

The crucial features of the Chrysler reorganization are set forth in a master transaction agreement,<sup>16</sup> and are illustrated in Figure 1 hereto. Under the agreement, with the approval of the bankruptcy court, Old Chrysler sold substantially all its operating assets to a newly-formed entity, New CarCo Acquisition LLC ("New Chrysler") in exchange for \$2 billion in cash from New Chrysler and the assumption of some of

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8. *Chrysler I*, 405 B.R. at 89.

9. *Id.*

10. *Id.*

11. The government's security interest had third priority in the assets encumbered by the first and second-priority security interests, and a first-priority security interest in any remaining unencumbered assets. *Id.* at 89-90.

12. Application for Immediate Stay of Sale Orders Issued by the Bankruptcy Court at 6, *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275 (2009) (No. 08A1096).

13. *Chrysler I*, 405 B.R. at 91.

14. *Id.* at 90.

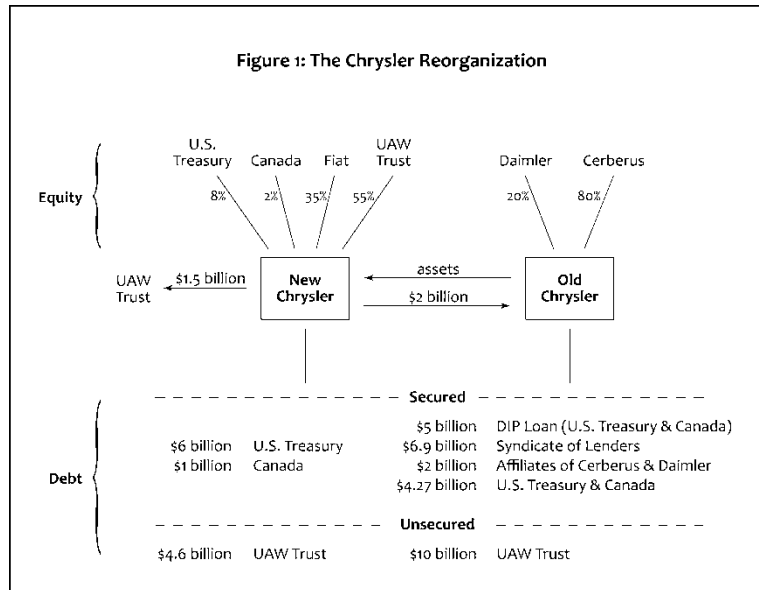
15. *Id.* at 92.

16. *See* Master Transaction Agreement Among Fiat S.p.A., New CarCo Acquisition LLC, Chrysler LLC, and Other Sellers Identified Therein (Apr. 30, 2009) (on file with the Syracuse Law Review).

2010] **Bankruptcies of Chrysler and General Motors**

535

Old Chrysler's liabilities (including certain obligations owed to the UAW Trust).<sup>17</sup> The \$2 billion received by Old Chrysler was distributed to the first-priority secured lenders.<sup>18</sup> Since the first-priority secured lenders were owed \$6.9 billion,<sup>19</sup> they received twenty-nine cents on the dollar, leaving no assets for junior secured lenders or for unsecured creditors<sup>20</sup> (including the UAW Trust). Chrysler's equity holders received nothing.<sup>21</sup>



New Chrysler received a commitment from the U.S. Treasury to provide \$6 billion in senior secured loans to fund the asset purchase and ongoing operations.<sup>22</sup> The Canadian government committed to provide

17. In addition to some of the obligations owed to the UAW Trust, New Chrysler also assumed certain unsecured trade claims, warranty obligations, and dealer incentive obligations.

18. *Chrysler I*, 405 B.R. at 92. Three Indiana pension funds, constituting a small minority of the first-priority secured debt, opposed the transaction, but the loan documentation stipulated that approval by a majority of the first-priority secured lenders was sufficient to bind all such lenders. With a priming lien, the debtor-in-possession lenders would have been entitled to repayment ahead of the first-priority secured lenders. However, the debtor-in-possession lenders were the U.S. Treasury and Canada, the sponsors of the restructuring, and they did not receive a priming lien. *See id.* at 92-93.

19. *Id.* at 89.

20. *Id.* at 93.

21. *Id.* at 92 n.10.

22. *Id.* at 92.

financing to New Chrysler's Canadian affiliate.<sup>23</sup> In return, New Chrysler issued an 8% equity stake to the U.S. Treasury and a 2% equity stake to the Canadian government.<sup>24</sup>

In addition, up to 35% of the equity in New Chrysler was awarded to Fiat S.p.A. ("Fiat") in return for its provision of technology, distribution systems, and other capabilities to New Chrysler.<sup>25</sup> As part of a collective bargaining agreement with the UAW, New Chrysler granted a 55% equity stake to the UAW Trust, paid \$1.5 billion in cash to the Trust, and issued \$4.6 billion in an unsecured note to the Trust.<sup>26</sup>

It was an important step for New Chrysler to reach the collective bargaining agreement with the UAW. Covering both active and retired workers, the agreement provides New Chrysler with Old Chrysler's labor force but at a reduced wage structure for active employees and a reduced funding structure for retirees, bringing them more into line with those of foreign auto manufacturers in the United States.<sup>27</sup> Such an agreement was obtainable, in part, because the UAW wanted to ensure continued employment for its active employees as well as continued funding of the UAW Trust. UAW retirees have to look exclusively to that UAW Trust for healthcare benefits, and Old Chrysler's obligation to continue funding the UAW Trust is solely a contractual (i.e. voidable) one, not subject to ERISA funding rules.<sup>28</sup> Consequently, the bankruptcy jeopardized the funding commitments that Chrysler had

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23. *Chrysler I*, 405 B.R. at 92.

24. *Id.* at 92.

25. *Id.* at 92 n.11. Fiat has an initial 20% stake, which increases to up to 35% upon achievement of certain performance metrics. The equity percentages presented above assume Fiat achieves those performance metrics. Initially, 9.85% of the equity in New Chrysler was held by the U.S. Treasury, 2.46% by the Canadian government, 67.69% by the UAW Trust, and 20% by Fiat. *Id.*

26. *Id.* at 92.

27. PANEL REPORT, *supra* note 1, at 18-19.

28. *See id.* at 14 n.49. ("By the end of the last century, Ford, Chrysler and GM found themselves faced with tens of billions of dollars in employee health obligations. In 2007 and 2008, after it became clear to both the companies and their unions that the state of the American automotive industry made these healthcare obligations unsustainable, the UAW and each of the three companies ultimately entered into an agreement whereby, in exchange for significant upfront payments principally in the form of cash and notes, healthcare obligations for retired union employees would be transferred off the books of the companies and into a trust (an independent entity totally separate from either the union or the automotive companies), the UAW Retiree Medical Benefits Trust, also known as a Voluntary Employees' Beneficiary Association (VEBA). VEBAs are tax free entities that pay health, life, or similar benefits. Although subject to the fiduciary requirements of the Employee Retirement Income Security Act of 1974 (ERISA), they are not subject to ERISA funding rules as are qualified retirement plans—a company's funding obligation is solely contractual.")

2010] **Bankruptcies of Chrysler and General Motors** 537

made to the UAW Trust. In place of its \$10 billion unsecured claim on Old Chrysler, the UAW Trust agreed to take a \$4.6 billion unsecured note from New Chrysler, as well as \$1.5 billion in upfront cash and a 55% equity stake in New Chrysler.<sup>29</sup> As a result, New Chrysler's commitment to fund retiree healthcare benefits is not as burdensome as the one that weighted down its predecessor, while the UAW Trust walks away from the reorganization with a greater payout than it would have received had it remained solely an unsecured creditor of Old Chrysler.

*B. General Motors*

At the time GM filed for Chapter 11 bankruptcy, it was a publicly-owned company.<sup>30</sup> Like Chrysler, GM had secured and unsecured debt. GM owed \$19.4 billion in pre-petition debt to the U.S. Treasury pursuant to TARP, which indebtedness was secured by a first-priority security interest in intellectual property, real property, cash, and equity, and a second-priority security interest in other assets.<sup>31</sup> In addition to its secured obligations to the U.S. Treasury, GM also owed \$3.9 billion to a syndicate of lenders led by Citicorp US, Inc., \$1.5 billion to a syndicate of lenders led by JP Morgan Chase, \$400 million to Export Development Bank Canada, and \$125 million to Gelco Corporation.<sup>32</sup> These loans were secured in part by GM's inventory, equipment, and equity. In addition to these secured obligations, GM owed an aggregate of \$117 billion in indebtedness issued on an unsecured basis.<sup>33</sup> This unsecured indebtedness included \$21 billion owed to the UAW Trust, and over \$27 billion in outstanding bonds.<sup>34</sup> After GM's Chapter 11 filing, debtor-in-possession financing was provided by the U.S. Treasury (\$30.1 billion) and the Canadian government (\$3.2 billion, with another \$6 billion to be provided later).<sup>35</sup>

The crucial features of the GM reorganization are set forth in a master sale and purchase agreement.<sup>36</sup> Under the agreement, with the approval of the bankruptcy court, a newly-formed entity, Vehicle

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29. Press Release, Office of the White House Press Sec'y, Obama Administration Auto Restructuring Initiative (Apr. 30, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Obama-Administration-Auto-Restructuring-Initiative](http://www.whitehouse.gov/the_press_office/Obama-Administration-Auto-Restructuring-Initiative).

30. See Neil King Jr. & Sharon Terlep, *GM Collapses into Government's Arms*, WALL ST. J., June 2, 2009, at A3.

31. *In re Gen. Motors Corp.*, 407 B.R. 463, 479 (Bankr. S.D.N.Y. 2009).

32. GM Voluntary Petition, *supra* note 6, at 94.

33. *Gen. Motors*, 407 B.R. at 481.

34. *Id.* at 484.

35. *Id.* at 480.

36. GM Voluntary Petition, *supra* note 6, at 11.

Acquisition Holdings LLC (“New GM”), purchased substantially all the operating assets of Old GM and assumed certain liabilities of Old GM (including obligations owed to the UAW Trust).<sup>37</sup> In exchange, New GM issued 10% of its common stock to Old GM,<sup>38</sup> along with warrants to purchase an additional 15%.<sup>39</sup> The U.S. Treasury and the Canadian government, which had lent Old GM over \$50 billion in combined pre- and post-petition secured financing,<sup>40</sup> assigned their loans to New GM, which then credit bid for the assets of Old GM.<sup>41</sup> New GM issued to the U.S. Treasury 61% of its common stock, \$2.1 billion of its preferred stock, and a \$6.7 billion note.<sup>42</sup> New GM issued to the Canadian government 12% of its common stock, \$400 million of its preferred stock, and a \$1.3 billion note.<sup>43</sup> Since New GM acquired Old GM’s assets by credit bidding the governments’ loans, which had second liens on certain assets of Old GM, New GM acquired certain assets subject to existing first-priority liens. The first-priority secured lenders of Old GM (other than the U.S. Treasury and the Canadian government) were repaid their \$6 billion in full by New GM. The unsecured lenders received from Old GM the 10% equity stake in New GM and the warrants to purchase an additional 15%. The shareholders of Old GM received nothing.

As it did with Chrysler, the UAW agreed to make concessions to New GM on employee compensation and benefits and on retiree healthcare. While the UAW Trust held a \$21 billion unsecured claim on Old GM,<sup>44</sup> the UAW agreed, in a collective bargaining agreement with New GM, to have the UAW Trust accept 17.5% of New GM’s common stock, warrants to purchase an additional 2.5%, \$6.5 billion of New GM’s preferred stock, and a \$2.5 billion note that matures in

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37. *Id.*

38. Old GM’s 10% stake can increase to up to 12% if the pre-petition unsecured claims against Old GM exceed \$35 billion. Gen. Motors Corp., Current Report (Form 8-K) (July 16, 2009); *Gen. Motors*, 407 B.R. at 482.

39. Gen. Motors Corp., Form 8-K, *supra* note 38; *Gen. Motors*, 407 B.R. at 482.

40. *Gen. Motors*, 407 B.R. at 482.

41. Section 363(k) provides that a secured party may bid at an asset sale and, if successful, offset against the purchase price of the assets its pre-existing claim on the seller, known as credit bidding. 3 COLLIER ON BANKRUPTCY ¶ 363.06[10] (Allan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009). Credit bidding enables a creditor to purchase assets, often without having to pay cash. *Id.* The right to credit bid is an important protection for a secured party, as it enables a secured party, particularly an undersecured one, to retake assets when it believes the bid price is below the assets’ market value. *Id.*

42. Gen. Motors Corp., Current Report (Form 8-K) (Nov. 16, 2009); *Gen. Motors*, 407 B.R. at 482.

43. *Gen. Motors*, 407 B.R. at 482.

44. *Id.* at 484.



2010] **Bankruptcies of Chrysler and General Motors** 5392017.<sup>45</sup>

In sum, the reorganizations of Chrysler and GM resulted in existing shareholders being wiped out, substantial losses for many creditors, and the UAW Trust receiving equity, debt and other consideration issued by New Chrysler and New GM. Certain creditors, who saw their investments in Old Chrysler and Old GM sharply reduced in the reorganization process, however, raised vigorous objections to the consideration paid to the UAW Trust, an unsecured creditor, and to the role the government played in the process.

## II. THE BANKRUPTCY PROCEEDINGS

The debate in the Chrysler and GM reorganizations focuses on the provisions of the Bankruptcy Code that allow a debtor to sell assets. Two sections, 363 and 1129, explicitly authorize the debtor's sale of assets. Section 1129 permits the sale of assets in connection with the debtor's plan of reorganization, which occurs only after the drafting of a complete plan, dissemination of a disclosure statement regarding the effect of the plan, creditor voting on the plan, and a confirmation hearing by the bankruptcy court.<sup>46</sup> This is typically a slow and drawn-out process. It can involve extended negotiations over a period of months or even years among creditors of various ranks, shareholders, and employees, as the parties untangle a complicated capital structure. The other section of the Code that authorizes asset sales is 363(b), which authorizes asset sales out of the debtor's ordinary course of business.<sup>47</sup> A sale conducted under section 363(b) is known as a "363 sale." A 363 sale can be done quickly, since it requires only the approval of the bankruptcy court, and can be done without the voting, disclosure and confirmation requirements of a reorganization plan.<sup>48</sup> As a result, a 363 sale typically can be completed faster than a sale conducted pursuant to a reorganization plan. In addition to this advantage over reorganization plans, 363 sales also have an advantage over sales conducted pursuant to state foreclosure laws. In a 363 sale, the debtor's property is sold to a buyer who takes "free and clear" of all liens, if the lienholders so consent.<sup>49</sup> Hence, assets in 363 sales will

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45. Gen. Motors Corp., Form 8-K, *supra* note 38; *Gen. Motors*, 407 B.R. at 482.

46. 7 COLLIER ON BANKRUPTCY ¶ 1129.02 (Allan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

47. 11 U.S.C. § 363(b)(1) (2006).

48. Notice of the proposed sale must be given, providing an opportunity for objections and a hearing if there are objections. 3 COLLIER ON BANKRUPTCY, *supra* note 41, ¶ 363.02[1].

49. 11 U.S.C. § 363(f) (2006). Section 363(f) permits asset sales free and clear of

often sell for higher prices than they would under state foreclosure law, where creditor claims may cloud the title. Due to these advantages, both debtors and creditors have become increasingly attracted to 363 sales.<sup>50</sup> Since the mid-1990s, 363 sales have frequently been employed to resolve large Chapter 11 cases by selling all or substantially all of the assets of the debtor, leaving the proceeds to be distributed to the debtor's creditors in accordance with the Code's priority rules.<sup>51</sup>

However, a sale of a substantial part of the debtor's assets may have the practical effect of deciding issues that would ordinarily be raised and addressed in the confirmation of a reorganization plan under section 1129. If the debtor is permitted to conduct a substantial asset sale pursuant to section 363 without complying with section 1129, it will be able to bypass the disclosure, voting, and confirmation provisions of that section without filing a plan. Hence, a court, in authorizing a 363 sale, should be wary of authorizing a transaction that is tantamount to a plan of reorganization. The protections in section 1129 are sufficiently important that courts have refused to approve 363 sales that would have the effect of short-circuiting a formal plan of reorganization. As stated in *Braniff*, the "debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with the sale of assets."<sup>52</sup> Courts refer to sales of substantial assets that avoid the section 1129 plan confirmation process as "sub rosa plans," since they dispose of assets and pay creditors without the benefits of a formal disclosure statement, a written plan, or a meaningful opportunity for creditors to participate in

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"any interest" which, although the term is not defined, certainly includes a lien or security interest. *Id.* Section 363(f) permits such sales without lien holder consent in some circumstances, such as when non-bankruptcy law would permit the sale free of the interest. 3 COLLIER ON BANKRUPTCY, *supra* note 41, ¶ 363.06.

50. See Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 753 (2002) (stating that, by conducting effective reorganizations under 363, we deprive ourselves of the "collective forum in which creditors and their common debtor fashion a future for a firm" and all the advantages of that process); Rachael M. Jackson, *Responding to Threats of Bankruptcy Abuse in a Post-Enron World: Trusting the Bankruptcy Judge as the Guardian of Debtor Estates*, 2005 COLUM. BUS. L. REV. 451, 460-64 (comparing 363 sales to sales in connection with a plan).

51. On the use of Chapter 11 to sell rather than reorganize companies, see Baird & Rasmussen, *supra* note 50, at 786; Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839, 848-60 (2005); Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 194-96 (2004); see also *infra* note 252.

52. Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re Braniff Airways, Inc.*), 700 F.2d 935, 940 (5th Cir. 1983).

2010] **Bankruptcies of Chrysler and General Motors** 541

the negotiation and voting processes.<sup>53</sup>

But because section 363 itself imposes no conditions on asset sales, other than requiring a hearing by the bankruptcy court, the precise contours of this restriction on 363 sales are left entirely to the courts. The stringency of the restriction, consequently, varies by jurisdiction. For instance, the Fifth Circuit takes a strict approach, requiring that any 363 sale of all or substantially all the debtor's assets comply with the Code's requirements for reorganization plans.<sup>54</sup> At the opposite end of the spectrum, the Second Circuit rejects this "equivalence" approach (both *Chrysler* and *General Motors* were conducted in the Second Circuit). While the Second Circuit rejects the requirement that sales of substantial assets go through the plan confirmation process, it does not grant the bankruptcy court carte blanche to approve 363 sales either.<sup>55</sup> The standard was set forth in 1983 in the *Lionel* case.<sup>56</sup> The *Lionel* court held that, in reviewing an application for a 363 sale, the court must find "a good business reason to grant such an application" as opposed to approving it to "blindly follow the hue and cry of the most vocal special interest groups."<sup>57</sup> Of course, guiding all courts, regardless of jurisdiction, is the fundamental principle of maximizing the value of the debtor's estate.<sup>58</sup>

The 363 sales of both Chrysler and GM were separately approved

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53. PANEL REPORT, *supra* note 1, at 47 n.237.

54. *Braniff*, 700 F.2d at 940; *see also In re Babcock & Wilcox Co.*, 250 F.3d 955, 960 (5th Cir. 2001); *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1125-26 (5th Cir. 1986).

55. *Motorola, Inc. v. Official Comm. of Unsecured Creditors & J.P. Morgan Chase Bank (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2007). Two years before *Iridium*, the Southern District of New York rejected a 363 sale on the grounds that section 363(b) is not to be utilized as a means of avoiding Chapter 11's plan confirmation procedures. Where it is clear that the terms of a section 363(b) sale would preempt or dictate the terms of a Chapter 11 plan, the proposed sale is beyond the scope of section 363(b) and should not be approved under that section.

*Contrarian Funds, LLC v. Westpoint Stevens, Inc. (In re Westpoint Stevens, Inc.)*, 333 B.R. 30, 52 (S.D.N.Y. 2005).

56. *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

57. *Id.*; *see also Iridium*, 478 F.3d at 466 n.21. Prior to *Lionel*, asset sales were permitted only when the asset was wasting away. The Second Circuit, in *Lionel*, replaced that restriction with a more expansive business purpose test. In the view of the *Chrysler* court, the business purpose test balances the debtor's ability to sell assets against the creditors' right to vote on the confirmation of a plan. *Chrysler I*, 405 B.R. 84, 95 (Bankr. S.D.N.Y. 2009).

58. The Supreme Court has asserted that "the general Code policy [is that] of maximizing the value of the bankruptcy estate." *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (citing *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 351-54 (1986)).

by the U.S. Bankruptcy Court for the Southern District of New York.<sup>59</sup> In *Chrysler*, the bankruptcy court reviewed the 363 sale procedures to determine if the asset sale would constitute a sub rosa plan of reorganization.<sup>60</sup> The court applied the *Lionel* test, which requires an articulated business justification for the sale of assets outside the ordinary course of business.<sup>61</sup> The bankruptcy court found that Chrysler's proposed sale of assets would preserve Chrysler's going concern value, which constitutes a good business reason for a 363 sale.<sup>62</sup> The court concluded that the proposed transaction was the only viable option to a liquidation, since no other proposals were forthcoming despite "the highly publicized and extensive efforts that have been expended in the last two years to" find an alternative.<sup>63</sup> Moreover, the sales price of \$2 billion exceeded Chrysler's liquidation value which, according to unrefuted expert testimony, ranged from zero to \$800 million.<sup>64</sup> The court reasoned that the transaction would generate

synergy between Chrysler, which provides its network of dealerships, its production of larger cars, and Fiat, which provides the smaller car technology, and the access to certain international markets, . . . an opportunity that the marketplace alone could not offer, and that certainly exceeds the liquidation value.<sup>65</sup>

Since Chrysler's factories had been shuttered to preserve resources, Chrysler was burning through cash. The court believed any delay of the sale would erode Chrysler's going concern value by an estimated \$100 million per day.<sup>66</sup> Fiat had also threatened to walk away from the deal if the sale did not close by June 15, 2009.<sup>67</sup> As a result, the court found

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59. *Chrysler I*, 405 B.R. at 113; *In re Gen. Motors Corp.*, 407 B.R. 463, 520 (Bankr. S.D.N.Y. 2009).

60. *Chrysler I*, 405 B.R. at 97.

61. *Id.* at 95 (citing *Lionel*, 722 F.2d at 1071).

62. *Chrysler I*, 405 B.R. at 96; see also *In re Silicon Graphics, Inc.*, Case No. 09-11701 (MG), slip op. at 1 (Bankr. S.D.N.Y. Apr. 24, 2009); *In re Lehman Bros. Holdings, Inc.*, Case No. 08-13555 (JMP), slip op. at 1 (Bankr. S.D.N.Y. May 12, 2009) (each holding that preservation of going concern value constitutes a good business reason to conduct a 363 sale).

63. *Chrysler I*, 405 B.R. at 96.

64. *Id.* at 97. The expert's earlier valuations had been higher, initially between zero and \$2.6 billion. The estimates declined over time because of cash expenditures, car sales and unprofitable operations over the period. *Id.* at 97 n.16.

65. *Id.* at 96.

66. *Id.*

67. *Id.* at 96-97. While the deadline seemed arbitrary, the court may have felt there was little leverage to force an extension. See also *In re Chrysler LLC (Chrysler II)*, 576 F.3d 108, 119 (2d Cir.), *vacated sub nom.* *Ind. State Police Pension Trust v. Chrysler LLC*,

2010] **Bankruptcies of Chrysler and General Motors** 543

that the proposed 363 sale would preserve Chrysler's going concern value, simultaneously maximizing the value of the debtor's estate.<sup>68</sup>

Having determined that the sale was proper under section 363(b), the bankruptcy court next examined whether those assets would be sold free and clear of the existing liens.<sup>69</sup> Section 363(f) provides that assets sold pursuant to 363(b) may be sold free and clear of liens if the holders of those liens so consent.<sup>70</sup> The bankruptcy court found that the first-priority secured lenders had provided that consent to the release of their liens.<sup>71</sup> Although not all of the first-priority secured lenders consented, consent was provided on their behalf by the collateral trustee, which was acting at the direction of the administrative agent for the first-priority secured lenders.<sup>72</sup> Pursuant to the terms of their credit agreement, the first-priority secured lenders agreed to appoint the administrative agent as their agent and to be bound by any actions the agent takes at the request of lenders holding a majority of the indebtedness.<sup>73</sup> Since lenders holding 92.5% of the indebtedness had supported the agent's actions, the collateral trustee's release of the lenders' liens was determined to be binding upon all of the first-priority secured lenders, due to their prior lending agreement.<sup>74</sup>

During the *Chrysler* bankruptcy proceedings, three Indiana state pension funds objected to the 363 sale of the assets to New Chrysler and the release of their liens.<sup>75</sup> The Indiana pension funds were among the first-priority secured lenders of Old Chrysler.<sup>76</sup> The dissident pension funds argued that the 363 sale would improperly result in value going to the unsecured creditors before the secured creditors had been paid in full.<sup>77</sup> Specifically, the pension funds pointed out that, according to the terms of the 363 sale documents, an unsecured creditor of Old Chrysler,

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130 S. Ct. 1015 (2009) (mem.). The precedential value of the opinion is uncertain as a result of the Supreme Court's action. *See infra* text accompanying notes 301-05.

68. *Chrysler I*, 405 B.R. at 97.

69. *Id.* at 98.

70. 11 U.S.C. § 363(f) (2006). Consent is one of five ways to satisfy 363(f).

71. *Chrysler I*, 405 B.R. at 102.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Chrysler I*, 405 B.R. at 93. The funds consist of two pension funds that are fiduciaries for retirement assets of Indiana police officers and school teachers, and an infrastructure construction fund. Petition for Writ of Certiorari at 4, *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009) (No. 09-285), 2009 WL 2864378. The three funds together held about \$43 million of first-priority secured debt of Chrysler. *Id.*

76. *Chrysler I*, 405 B.R. at 93.

77. *Id.* at 93.

the UAW Trust, would receive payments (consisting of \$1.5 billion in cash from New Chrysler, a 55% equity stake in New Chrysler, and a \$4.6 billion note issued by New Chrysler) before Old Chrysler's secured creditors had been paid in full.<sup>78</sup> The Indiana pension funds and the other first-priority secured lenders, receiving \$2 billion from the 363 sale on their \$6.9 billion claim, would be receiving only twenty-nine cents on the dollar, while the UAW Trust, an unsecured lender, would be receiving payments worth billions of dollars.<sup>79</sup> The Indiana pension funds argued that the 363 sale would violate creditor priorities, making it an illicit *sub rosa* plan as stated in *Braniff*.<sup>80</sup>

The Second Circuit, however, disagreed, noting that *Braniff* rejected the 363 sale in that case because the terms of the sales agreement attempted to explicitly "dictat[e] some of the terms of any future reorganization plan."<sup>81</sup> In *Braniff*, the parties attempted to require that "the reorganization plan . . . allocate the [proceeds of the sale] according to the terms of the agreement."<sup>82</sup> In *Chrysler II*, the court refused to view the 363 sale as "a '*sub rosa* plan' in the *Braniff* sense because the sales agreement did not specifically 'dictate,' or 'arrange' *ex ante*, by contract, the terms of any subsequent plan."<sup>83</sup> In the *Chrysler* 363 sale, there was

no attempt to allocate the sale proceeds away from the First-Lien Lenders. Rather, the security interest of the First-Lien Lenders will attach to the sale proceeds and there will be an immediate and infeasible distribution of all of the \$ 2 billion dollar cash sale price to the First-Lien Lenders, who are owed \$ 6.9 billion.<sup>84</sup>

In other words, unlike *Braniff*, all proceeds of the Chrysler 363 sale would be distributed entirely to the first-priority secured creditors.<sup>85</sup>

Key to the *Chrysler* court's conclusion was its view that the UAW Trust would not be receiving any payments *on account of its pre-petition claims on Old Chrysler*.<sup>86</sup> Instead, according to the court, the payments to the UAW Trust resulted from independent, arms-length

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78. *Id.* at 92.

79. *Id.* at 93.

80. *Chrysler I*, 405 B.R. at 95-96; Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re Braniff*), 700 F.2d 935, 940 (5th Cir. 1983).

81. *Chrysler II*, 576 F.3d 108, 117 (2d Cir. 2009) (citing *Braniff*, 700 F.2d at 940).

82. *Id.*

83. *Id.* at 188 n.9.

84. *Chrysler I*, 405 B.R. at 98.

85. *Id.* at 97 (stating that "[n]ot one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders").

86. *Id.* at 99 (emphasis added).

2010] **Bankruptcies of Chrysler and General Motors** 545

negotiations between the UAW and the buyer (New Chrysler), resulting in the UAW Trust providing new value to New Chrysler. The bankruptcy court stated:

[I]n negotiating with those groups essential to its viability, New Chrysler made certain agreements and provided ownership interests in the new entity, which was neither a diversion of value from the Debtors' assets nor an allocation of the proceeds from the sale of the Debtors' assets. The allocation of ownership interests in the new enterprise is irrelevant to the estates' economic interests.<sup>87</sup>

The bankruptcy court viewed the payments to the UAW Trust as "provided under separately-negotiated agreements with New Chrysler" and not on account of their pre-petition claims on Old Chrysler.<sup>88</sup>

The Indiana state pension funds immediately appealed the bankruptcy court's ruling. The Second Circuit issued a short order ratifying the bankruptcy court's decision and issuing a stay to allow for the U.S. Supreme Court's review. The Supreme Court, however, denied a request for a stay of the bankruptcy reorganization.<sup>89</sup> Upon remand, the Second Circuit affirmed the bankruptcy court's decision.<sup>90</sup> The Second Circuit agreed that *Lionel* required merely a "good business reason" for a 363 sale, which the proposed sale met since Chrysler was a "melting ice cube."<sup>91</sup> Moreover, the Second Circuit concluded that all consideration paid to the UAW Trust by New Chrysler was in exchange for new value given, not in exchange for the UAW Trust's claim on the debtor's estate.<sup>92</sup> Hence, the court concluded that the transaction was consistent with bankruptcy priority rules and that the 363 sale did not constitute a sub rosa plan.<sup>93</sup>

The *General Motors* bankruptcy court likewise had to evaluate a

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87. *Id.*

88. *Id.*

89. *Ind. State Police Pension Trust v. Chrysler LLC*, 129 S. Ct. 2275, 2276 (2009) (per curiam).

90. *Chrysler II*, 576 F.3d 108, 127 (2d Cir. 2009). On September 3, 2009, the Indiana pension funds filed a petition for writ of certiorari to the U.S. Supreme Court to appeal the Second Circuit's decision. Petition for Writ of Certiorari, *supra* note 75. The pension funds no longer sought to block the asset sale as before, but rather sought a greater repayment on the loan. *Id.* at 16-42. The Supreme Court, however, vacated the Second Circuit's ruling and remanded the case to the Second Circuit with instructions to dismiss the appeal as moot. *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009) (mem.); *see infra* text accompanying notes 301-05.

91. *Chrysler II*, 576 F.3d at 114.

92. *Id.* at 118.

93. *Id.* at 118 n.9.

proposed 363 sale of substantially all assets of the debtor.<sup>94</sup> As it did in *Chrysler*, the bankruptcy court applied a business justification test to GM's 363 sale.<sup>95</sup> The court stated that "[i]f . . . the transaction has 'a proper business justification' which has the potential to lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized."<sup>96</sup> And the bankruptcy court found that a proper business justification existed in the *General Motors* case.<sup>97</sup> Preserving the going-concern value of the business, according to the court, constitutes a strong business justification for a sale when "the only alternative to an immediate sale is liquidation."<sup>98</sup> The bankruptcy court agreed that the quick 363 sale would maximize the amount to be received by the bankruptcy estate.<sup>99</sup> As it did in *Chrysler*, the court focused on the difference between the amount Old GM would receive in a 363 sale and the amount that would be received in liquidation.<sup>100</sup> The bankruptcy court also cited a fairness opinion concluding that the purchase price was fair to GM.<sup>101</sup>

As in the *Chrysler* case, the *General Motors* court faced an objection to the proposed 363 sale. Holders of 0.01% of GM's unsecured bonds contended that the 363 sale constituted a sub rosa plan.<sup>102</sup> The bankruptcy court, however, disagreed.<sup>103</sup> The court found that the 363 sale would not alter creditor priorities, which if it did, might constitute a sub rosa plan.<sup>104</sup> The court agreed with the dissident bondholders that certain contracts with creditors of Old GM (the UAW Trust) were assumed by the buyer (New GM) and that some creditors of Old GM (the UAW Trust) received equity interests in the buyer (New GM).<sup>105</sup> But the court concluded that these arrangements were negotiated between the UAW and New GM independently, and, hence, they were outside the restrictions of the bankruptcy laws.<sup>106</sup>

While the 363 sale resulted in Old GM's secured creditors getting

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94. *In re Gen. Motors Corp.*, 407 B.R. 463 (S.D.N.Y. 2009).

95. *Id.* at 491.

96. *Id.*

97. *Id.* at 493.

98. *Id.*

99. *Gen. Motors*, 407 B.R. at 474, 481, 494.

100. *Id.* at 474, 481.

101. *Id.* at 481, 494. Although the opinion was delivered by GM's financial advisor, the court observed that no contrary evidence was submitted. *Id.* at 494.

102. *Id.* at 474.

103. *Id.*

104. *Gen. Motors*, 407 B.R. at 496-97.

105. *Id.* at 496.

106. *Id.* at 497-98.



2010] **Bankruptcies of Chrysler and General Motors** 547

paid in full (unlike *Chrysler*), Old GM's unsecured bondholders had to share pro rata with the other unsecured creditors the proceeds of the sale, principally the equity in New GM that Old GM received in the 363 sale. The dissenting GM bondholders objected to what they perceived as better treatment afforded certain other unsecured creditors, namely the UAW Trust and certain suppliers.<sup>107</sup> The bankruptcy court, however, disagreed, replying to the bondholders as follows:

The Court senses a disappointment on the part of dissenting bondholders that the Purchaser did not choose to deliver consideration to them in any manner other than by the Purchaser's delivery of consideration to GM as a whole, pursuant to which bondholders would share like other unsecured creditors—while many supplier creditors would have their agreements assumed and assigned, and new GM would enter into new agreements with the UAW and the majority of dealers. But that does not rise to the level of establishing a *sub rosa* plan. The objectors' real problem is with the decisions of the Purchaser, not with the Debtor, nor with any violation of the Code or caselaw.<sup>108</sup>

### III. THE ACADEMIC DEBATE

The *Chrysler* and *General Motors* cases are generating both criticism and support among leading bankruptcy academics.<sup>109</sup> Part III presents the arguments made on each side of the debate, set forth in a point-counterpoint format.

#### A. Asset Sale Versus Reorganization

The academic debate focuses first on the use of 363 sales in the reorganizations. Scholars disagree about whether the Chrysler and GM 363 sales constituted reorganizations that should have been conducted pursuant to plan confirmation procedures instead of section 363 asset sales. In other words, were the section 363 transactions true asset sales or were they disguised reorganizations?

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107. *Id.* at 496.

108. *Id.*

109. The arguments made in this Part are based primarily on Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531 (2009); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy* 12 (Harvard Law & Econ., No. 645; Univ. of Penn. Inst. for Law & Econ., No. 09-22; Univ. of Penn. Law Sch. Pub. Law, No. 09-17; Harvard Pub. Law, Working Paper No. 09-42, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1426530](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426530); and Barry E. Adler, *What's Good for General Motors*, reprinted in PANEL REPORT, *supra* note 1, Annex A.

*Critics*

The 363 sales were sales in name only. Upon completion of its sale, for example, New Chrysler will look like Old Chrysler in every respect: “It will be called ‘Chrysler.’ . . . Its employees, including most management, will be retained . . . . It will manufacture and sell Chrysler and Dodge cars and minivans, Jeeps, and Dodge trucks.”<sup>110</sup> Instead of effecting a sale of assets, the transactions enable the Treasury to invest government funds in Chrysler and allow the parties to cut off senior claims. In substance, the asset sale is a reorganization of Chrysler.

*Supporters*

Critics exaggerate the extent to which New Chrysler, after the sale, will resemble Old Chrysler. New Chrysler may manufacture the same line of vehicles, “but it will also make newer, smaller vehicles using Fiat technology.”<sup>111</sup> New Chrysler will be run by a new CEO, with turnaround experience.<sup>112</sup> It may employ many of the same employees, but “they will be working under new union contracts that contain a six-year no-strike provision.”<sup>113</sup> New Chrysler will sell cars in some of its old U.S. dealerships, but it will also be able to access Fiat dealerships in Europe.<sup>114</sup> This “transformative use of old and new assets is precisely what one would expect from the section 363(b) sale of a going concern.”<sup>115</sup>

*Critics*

The 363 sales by Old Chrysler and Old GM did more than merely sell assets for cash. The 363 sales effectively determined which creditors of the debtor would get paid, and how much they would be paid.<sup>116</sup> In *Chrysler*, for instance, the sale terms fully determined the distribution amount that Old Chrysler’s secured creditors would receive from the debtor: the first-priority secured parties’ distribution equaled the \$2 billion sales proceeds.<sup>117</sup> Moreover, the sale terms provided Old

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110. Brief for Appellants Ind. State Police Pension Trust at 46, *Chrysler II*, 576 F.3d 108 (2d Cir. 2009) (No. 09-2311-bk).

111. *Chrysler II*, 576 F.3d at 119 (noting that, at the time of the proceedings, Old Chrysler was manufacturing no cars at all).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Adler, *supra* note 109, at 3; Roe & Skeel, *supra* note 109, at 22.

117. Roe & Skeel, *supra* note 109, at 5.

2010] **Bankruptcies of Chrysler and General Motors** 549

Chrysler's unsecured creditor, the UAW Trust, with \$1.5 billion in cash, a promise of an additional \$4.6 billion, and substantial equity in New Chrysler.<sup>118</sup> The terms of the 363 sale, hence, fully determined the payments made to Old Chrysler's creditors. In other words, in both *Chrysler* and *General Motors*, the 363 sales were sub rosa reorganization plans and, as a result, should have been conducted pursuant to the traditional chapter 11 plan confirmation process

*Supporters*

The courts reviewed the 363 sales and concluded that they do not constitute sub rosa plans.<sup>119</sup> The bankruptcy judge in *Chrysler* opined that the 363 sales do not alter creditor priorities because “the UAW, the VEBA, and the Treasury are not receiving distributions on account of their pre-petition claims.”<sup>120</sup> Instead, they are receiving consideration “under separately-negotiated agreements with New Chrysler.”<sup>121</sup> New Chrysler negotiated with various constituencies “essential to the new venture, including . . . Chrysler's employees—contributing a skilled workforce with a more competitive cost structure.”<sup>122</sup> The Second Circuit echoed the bankruptcy judge's opinion, stating that the “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.”<sup>123</sup> While the 363 sale will have an inevitable influence over any eventual plan of reorganization, it is not a sub rosa plan in the *Braniff* sense because it does not explicitly dictate, by contract, the terms of the subsequent plan.<sup>124</sup> The \$2 billion sales proceeds were distributed entirely to the first-priority secured lenders, in accordance with bankruptcy laws.<sup>125</sup> The courts viewed the section 363 transactions as nothing more than asset sales, and not reorganizations altering creditor priorities.

*Critics*

The courts failed to comprehend the basic fact that the asset sales

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118. *Id.* at 22.

119. *Chrysler II*, 576 F.3d 108, 113-19 (2d Cir. 2009); *Chrysler I*, 405 B.R. 84, 97-98 (Bankr. S.D.N.Y. 2009); *In re Gen. Motors Corp.*, 407 B.R. 463, 495-98 (Bankr. S.D.N.Y. 2009).

120. *Chrysler I*, 405 B.R. at 99.

121. *Id.*

122. *Id.*

123. *Chrysler II*, 576 F.3d at 118.

124. *Id.* at 117.

125. *Id.* at 123.

were effectively reorganizations.<sup>126</sup> Hence, they failed to grasp the importance of the issue and to analyze it comprehensively.<sup>127</sup> For instance, “[w]ere it not for the creditors’ pre-petition claims on Old Chrysler, New Chrysler would not have picked up and promised to pay those creditors.”<sup>128</sup> Consider the cash and other consideration issued to the UAW Trust.<sup>129</sup> The UAW Trust funds obligations to retirees, not to the active workers that New Chrysler needs to employ.<sup>130</sup> It is hard to conclude without further inquiry that the stakeholders received payments for contributing new value to the purchaser and not on account of pre-petition claims against the seller.<sup>131</sup>

### *Supporters*

The purchaser’s assumption of the UAW retiree benefits was essential to buy peace with the UAW. While UAW retirees no longer work, the auto companies do need to employ active members of the UAW to run the assembly lines. So, UAW support is crucial. The *General Motors* court, acknowledging the importance of the UAW, stated that “New GM has not agreed to assume liability for Splinter Union Retiree Benefits . . . because . . . the Splinter Unions no longer have active employees working for GM” as the UAW does.<sup>132</sup>

### *Critics*

Even if the transactions are viewed as asset sales, the objections raised by the dissident creditors obligated the court to apply makeshift safeguards to substitute for the creditor protections that attend the section 1129 plan confirmation process. As the Fifth Circuit stated in *In re Continental Air Lines*:

[W]e hold that when an objector to a proposed transaction under § 363(b) claims that it is being denied certain protection because approval is sought pursuant to § 363(b) instead of as part of a reorganization plan, the objector must specify exactly what protection is being denied. If the court concludes that there has in actuality been such a denial, it may then consider *fashioning appropriate protective measures modeled on those which would attend a reorganization*

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126. Roe & Skeel, *supra* note 109, at 12.

127. *Id.*

128. *Id.* at 22.

129. *Id.*

130. *Id.*

131. Roe & Skeel, *supra* note 109, at 21.

132. *In re Gen. Motors Corp.*, 407 B.R. 463, 510 (Bankr. S.D.N.Y. 2009).

2010] **Bankruptcies of Chrysler and General Motors** 551

plan.<sup>133</sup>

This approach was adopted by the Bankruptcy Court for the Southern District of New York in *In re Crowthers McCall Pattern, Inc.*<sup>134</sup> That court stated that “where [a] business justification is shown for a transaction under section 363(b)” and that transaction “encroaches on a right afforded creditors or equity holders in the Chapter 11 plan process,”<sup>135</sup> then the court “may consider ‘fashioning appropriate protective measures modelled [sic] on those which would attend a reorganization plan.’”<sup>136</sup> In *Chrysler* and *General Motors*, the dissident creditors’ objections to the 363 sales required the bankruptcy court to review the adequacy of the creditor safeguards employed in those transactions, and adopt makeshift safeguards if the creditors were not adequately protected. The safeguards most often mentioned as reconciling 363 sales with section 1129 creditor protections are creditor consent, market testing, and judicial valuation.<sup>137</sup> The 363 sales should be reviewed for the presence and adequacy of these safeguards.

#### B. Creditor Consent

Section 363 contains no requirement that creditors consent to an asset sale. Instead, a 363 sale requires only bankruptcy court approval.<sup>138</sup> Creditors may object to the proposed 363 sale, and if so, the court will hold a hearing and consider the objections of the creditors before deciding whether to approve a sale.

#### Critics

Critics argue that the court, in making its decision, should consider whether the sale would obtain the consent required of a confirmation plan under section 1129. This follows from the *Continental Air Lines*<sup>139</sup> and *Crowthers McCall Pattern*<sup>140</sup> holdings that exhort the court to apply makeshift safeguards when a creditor objects to a 363 sale. Under section 1129, a confirmation plan is accepted by a class of creditors if it receives a favorable vote of (i) more than one-half of the number of creditors within that class, and (ii) creditors holding at least two-thirds

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133. 780 F.2d 1223, 1228 (5th Cir. 1986) (emphasis added).

134. 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990).

135. *Id.*

136. *Id.* n.11 (quoting *In re Cont’l Air Lines*, 780 F.2d 1223, 1228 (5th Cir. 1986)).

137. *Roe & Skeel*, *supra* note 109, at 11.

138. 11 U.S.C. § 363(b) (2006).

139. *Cont’l Air Lines*, 780 F.2d at 1228.

140. 114 B.R. 877, 855 (Bankr. S.D.N.Y. 1990).

of the dollar amount of claims held by creditors in the class.<sup>141</sup> That is, when a creditor objects to a 363 sale, the court should require, as a makeshift safeguard, the same consent required of confirmation plans under section 1129, namely acceptance by majority vote by the number of creditors within a class and two-thirds vote by dollar amount of claims within a class.

#### *Supporters*

In *Chrysler*, only a small minority of the class of first-priority secured creditors (the Indiana pension funds) objected to the 363 sale; a large majority of the class accepted the sale.<sup>142</sup> Those objecting creditors constituted less than 1% of the dollar amount of the first-priority secured debt.<sup>143</sup> Hence, the “class” would have accepted the plan over the objections of the dissident secured creditors. A similar argument can be made in *General Motors*. Holders of less than 0.01% of GM’s bonds objected to GM’s asset sale.<sup>144</sup>

#### *Critics*

Most lenders within Chrysler’s first-priority creditor class were TARP recipients, beholden to the government. Four such creditors (Citigroup, J.P. Morgan Chase, Goldman Sachs, and Morgan Stanley, who together received \$90 billion from the U.S. Treasury) held 70% of the dollar amount of the claims on Chrysler.<sup>145</sup> They were effectively wards of the state. Consequently, it may be argued, the judge should have disqualified the votes of these banks or classified the dissenting secured creditors as their own class, entitling them to veto the sales.<sup>146</sup>

In addition to being influenced by TARP funds, lenders were bullied into approving the sale. Accusations were made that “Perella Weinberg Partners was directly threatened by the White House and, in essence, compelled to withdraw its opposition to the Obama Chrysler restructuring deal under the threat that the full force of the White House press corps would destroy its reputation if it continued to fight.”<sup>147</sup> With respect to the GM transaction, President Obama declared publicly

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141. 11 U.S.C. §§ 1126(c), 1129(a)(7)(A) (2006).

142. *Chrysler I*, 405 B.R. 84, 93 (Bankr. S.D.N.Y. 2009).

143. *Id.*

144. *In re Gen. Motors Corp.*, 407 B.R. 463, 474 (Bankr. S.D.N.Y. 2009).

145. Neil King, Jr. & Jeffrey McCracken, *USA Inc.: U.S. Forced Chrysler’s Creditors to Blink*, WALL ST. J., May 11, 2009, at A1.

146. Adler, *supra* note 109, at 5; *see also* Roe & Skeel, *supra* note 109, at 14-16.

147. PANEL REPORT, *supra* note 1, at 93 (citing 155 CONG. REC. H5086-04 (daily ed. May 4, 2009) (statement of Rep. John Carter)).

2010] **Bankruptcies of Chrysler and General Motors** 553

that “[the holdout bondholders] were hoping that everybody else would make sacrifices, and they would have to make none . . . . I don’t stand with them.”<sup>148</sup> Others complained that small bondholders were “being ignored in negotiations”<sup>149</sup> and that “everything this Treasury touches turns to politics.”<sup>150</sup>

*Supporters*

Such accusations are merely speculative. It is difficult to know whether the majority of creditors acquiesced to government pressure. The bankruptcy court did not require a creditor vote on the 363 sale. Hence, any acquiescence would take the form of refraining from challenging the sales. It is possible that most creditors did not challenge the 363 sales because they believed that the sales gave them the best deal possible. It is also possible that the creditors did not challenge the 363 sales because they believed that the likely alternative would be a liquidation that would generate a smaller payout. In the end, the dissident creditors were unable to support their accusations of bullying. No evidence of bullying was presented to the Congressional Oversight Panel in response to its request.<sup>151</sup> The bankruptcy judge rejected this assertion of the dissident creditors.<sup>152</sup> The U.S. Treasury’s automotive task force has denied applying any such pressure.<sup>153</sup> Moreover, in other contexts, TARP recipients “have been quite vocal in their criticism of government actions that they disapprove of, suggesting that if they objected to the 363 sales, they would have made their views known.”<sup>154</sup> In addition, because of the strategic importance of creditor classes, any “gerrymandering” of classes has been interpreted as demonstrating a lack of good faith and prohibited by the courts.<sup>155</sup>

*Critics*

To object to a 363 sale in *Chrysler* or *General Motors*, “[n]o one should have had to show a money trail running to the controlling banks from the U.S. Treasury or explicit pressure via a smoking gun memo, e-

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148. Steven Mufson & Tomoeh Murakami Tse, *In Chrysler Saga, Hedge Funds Cast as Prime Villain*, WASH. POST, May 1, 2009, at A14.

149. Dennis Buckholtz, Op-Ed., *GM Bondholders Are People Like You and Me*, WALL ST. J., May 27, 2009, at A17.

150. *Gettelfinger Motors*, WALL ST. J., May 4, 2009, at A14.

151. PANEL REPORT, *supra* note 1, at 111 n.506.

152. *Chrysler I*, 405 B.R. 84, 103-04 (Bankr. S.D.N.Y. 2009).

153. PANEL REPORT, *supra* note 1, at 51.

154. *Id.* at 52.

155. See 7 COLLIER ON BANKRUPTCY, *supra* note 46, ¶ 1129.02[3][a][ii][B] n.45.

mail, or phone call to the banks.”<sup>156</sup> The absence of such overt pressure is not enough to dismiss the conflict. Creditors may have felt obligated to acquiesce tacitly to the government’s sale.<sup>157</sup> In addition to TARP funding, the big banks had to worry about upsetting the government’s policies on a variety of fronts, including other rescue arrangements and regulatory forbearance, as well as the potential nationalization of financial institutions, the desire to replace management, and the imposition of compensation caps.<sup>158</sup> The outcome of these policy debates may have been worth more to the big banks than contesting the reorganizations.<sup>159</sup> In other words, the pressure might be “inside the heads of the decisionmakers” at the banks, generating a serious problem under section 1129 if the creditors were not split into separate classes.<sup>160</sup>

With respect to gerrymandering of classes, that tactic raises concerns when it is done to gain acceptance of the plan over objections, not when it is done to facilitate rejection.<sup>161</sup> In *Chrysler* and *General Motors*, the redefining of classes should have been done to make it harder to gain acceptance of the sale. That would be consistent with the mandate to apply makeshift safeguards to protect objecting creditors.

#### *Supporters*

Even if the dissenting creditors had been declared their own class, they could not have blocked the transaction. While they could have prevented acceptance under section 1129(a), which requires acceptance by all classes of creditors, they could not have prevented acceptance under the “cram down” provisions of section 1129(b).<sup>162</sup> The cram down provisions allow acceptance of a confirmation plan over the objections of a dissenting class.<sup>163</sup> Hence, the 363 sales could have been crammed down the throats of the dissident lenders, even if the courts had declared them their own class.

#### *Critics*

The cram down provisions of section 1129(b) are available only for plans that contain (i) no unfair discrimination and (ii) fair and

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156. Roe & Skeel, *supra* note 109, at 16.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. 7 COLLIER ON BANKRUPTCY, *supra* note 46, ¶ 1129.03[3][a][ii][B] n.45.

162. 11 U.S.C. § 1129(b)(1) (2006).

163. *Id.*



2010] **Bankruptcies of Chrysler and General Motors** 555

equitable treatment.<sup>164</sup> The proposed sales violated both requirements. The rule against unfair discrimination requires that any reorganization plan not discriminate unfairly against a class of creditors.<sup>165</sup> In simple terms, similarly ranked creditors should be paid pro rata.<sup>166</sup> In the plan confirmation process, a reorganization plan will not be confirmed if a class of claims objects to the distributions under the plan because a class of equal priority receives a higher ratable return under the plan than the objecting class. Since a reorganization plan that “unfairly discriminates” would be unconfirmable in a traditional plan confirmation process, a 363 sale that unfairly discriminates should be blocked.<sup>167</sup>

Certain secured creditors, the Indiana pension funds, attempted to invoke the rule against unfair discrimination in the *Chrysler* 363 sale.<sup>168</sup> Since the value of the secured creditors’ claims exceeded the value of Chrysler’s collateral, the secured creditors were deemed to be in part secured creditors (to the extent of the value of the collateral) and in part unsecured creditors (to the extent of their deficiency claim, the amount by which their secured claims exceed the value of the collateral).<sup>169</sup> Hence, with respect to their deficiency claim, the secured creditors were unsecured creditors, ranking in priority equal to the UAW Trust and other unsecured creditors.<sup>170</sup> Yet the 363 sale resulted in billions of dollars being paid to the unsecured UAW Trust, while nothing was paid to the secured creditors on their deficiency claim.<sup>171</sup> The Indiana pension funds, who were secured creditors, argued that this result constitutes unfair discrimination.<sup>172</sup> Certain unsecured bondholders of

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164. *Id.*

165. *Id.*

166. 7 COLLIER ON BANKRUPTCY, *supra* note 46, ¶ 1129.03[3]. Cases tend to look at the disparity of treatment, and whether such disparity can be justified under the Code.

167. *Id.* ¶ 1129.03[3].

168. Brief for Appellants Indiana State Pension Trust et al. at 24, *Chrysler II*, 576 F.3d 108 (2d Cir. 2009) (No. 09-2311-bk), 2009 WL 1560029; *Chrysler II*, 576 F.3d at 112-13. No secured lenders objected to the 363 sale by GM because the secured lenders were paid in full (except for the United States and Canadian governments, the sponsors of the transaction).

169. Brief for Appellants Indiana State Pension Trust, *supra* note 168, at 24; *Chrysler II*, 576 F.3d at 123.

170. Brief for Appellants Indiana State Pension Trust, *supra* note 168, at 24; *Chrysler II*, 576 F.3d at 123.

171. Brief for Appellants Indiana State Pension Trust, *supra* note 168, at 24; *Chrysler II*, 576 F.3d at 123.

172. Brief for Appellants Indiana State Pension Trust, *supra* note 168, at 24; *Chrysler II*, 576 F.3d at 123.

GM also invoked the rule against unfair discrimination.<sup>173</sup> The unsecured bondholders had to share pro rata with all unsecured creditors the consideration Old GM received in the 363 sale, namely the 10% of the common stock of New GM and warrants for an additional 15%.<sup>174</sup> Some unsecured creditors, however, received better treatment.<sup>175</sup> The UAW Trust received 17.5% of the common stock of New GM and warrants for an additional 2.5%, \$6.5 billion in preferred stock, and a \$2.5 billion note.<sup>176</sup> The UAW Trust need not share these proceeds with the other unsecured creditors.<sup>177</sup>

In addition to no unfair discrimination, section 1129(b) also requires that a plan be “fair and equitable.”<sup>178</sup> The fair and equitable rule requires in part that a plan not be confirmed if a class of claims objects to a distribution because a lower priority class is receiving assets while the objecting class has not been paid in full.<sup>179</sup> In *Chrysler*, certain secured creditors objected to the 363 sale because they would only receive twenty-nine cents on the dollar while the UAW Trust, with a lower priority claim, would receive billions of dollars.<sup>180</sup>

Critics of the 363 sale, hence, argue that the dissident creditors could have blocked a cram down of the reorganization, due to violations of the no unfair discrimination rule and the fair and equitable treatment rule.<sup>181</sup> But they were deprived of that protection by the 363 sale process.<sup>182</sup>

### *Supporters*

The above criticisms are based upon a fundamental misconception. The fair and equitable treatment rule requires that no junior creditor, such as the UAW Trust, receive any distributions *on account of* that junior claim, so long as a senior class is not paid in full.<sup>183</sup> But if the

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173. Objection of the Unofficial Committee of Family and Dissident GM Bondholders at 8-11, *In re Gen. Motors Corp.*, 407 B.R. 463, 520 (Bankr. S.D.N.Y. 2009) (No. 09-50026 (REG)).

174. *Id.*

175. *Id.* at 8.

176. *Id.*

177. *Id.*

178. 11 U.S.C. § 1129(b)(1) (2006).

179. *Id.* § 1129(b)(2). Known as the absolute priority rule, it, along with the requirement that no creditor be paid more than it is owed, constitute the fair and equitable rule. 7 COLLIER ON BANKRUPTCY, *supra* note 46, ¶ 1129.03[4].

180. *Chrysler II*, 576 F.3d 118 (2d Cir. 2009).

181. Adler, *supra* note 109, at 4-5.

182. *Id.*; Roe & Skeel, *supra* note 109, at 14-16.

183. 11 U.S.C. § 1129(b)(2)(B)(ii) (2006) (emphasis added).

2010] **Bankruptcies of Chrysler and General Motors** 557

junior claim holder contributes new value, that claim holder is not barred from receiving property in exchange for that contribution. This is known as the “new value corollary” to the fair and equitable treatment rule. The payments made to the UAW Trust were not distributions *on account of* its unsecured claims against Old Chrysler. Rather, the payments to the UAW Trust were *on account of* new value given, supplying a labor force to New Chrysler on modified terms. The payments to the UAW Trust were also extracted from the buyer, New Chrysler, as part of an independent agreement between the auto maker and the UAW. They were not extracted from the debtor, Old Chrysler.<sup>184</sup> Hence, the fair and equitable treatment rule was not violated. By similar reasoning, the no unfair discrimination rule was not violated either.

*Critics*

The “new value corollary” to the fair and equitable treatment rule has not been universally adopted. Most importantly, the Second Circuit has not explicitly adopted it. Because the circuits have split over adoption of the corollary, the Supreme Court agreed to examine the issue in *Bank of America v. North LaSalle Street Partnership*.<sup>185</sup> In that case, however, the Supreme Court refused to conclude whether the Code contains a new value corollary, leaving the question undecided. But even if such a corollary does exist, that corollary requires a contribution of new *cash*. The Supreme Court held, in *Case v. Los Angeles Lumber Products Co.*, that any new value corollary “must be based on a contribution in money or in money’s worth.”<sup>186</sup> The Supreme Court elaborated on *Case* in *Norwest Bank Worthington v. Ahlers*, stating that a contribution of “labor, experience, and expertise” by a junior claim holder does not constitute a contribution of money for purposes of *Case*.<sup>187</sup> Since the UAW contributed labor, not fresh cash, to New Chrysler, it cannot rely upon a new value corollary to escape the fair and equitable treatment rule.<sup>188</sup>

*Supporters*

The limitations placed on the new value corollary in *Case* and

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184. Lubben, *No Big Deal*, *supra* note 109, at 545.

185. 526 U.S. 434, 437 (1999).

186. 308 U.S. 106, 122 (1939).

187. 485 U.S. 197, 203-205 (1988).

188. Critics might also argue that, by its own terms, the fair and equitable treatment rule applies only to dissenting *unsecured* creditors, not to dissenting *secured* creditors, such as the pension funds. See 11 U.S.C. § 1129(b)(2)(A)-(B).

*Ahlers* were merely dicta. The Supreme Court, in *North LaSalle*, asserted that the cash limitations *Case* and *Ahlers* placed on the corollary “never rose above the technical level of dictum.”<sup>189</sup> Moreover, the *North LaSalle* Court stated that there is “nothing to disparage the possibility apparent in the statutory text that the absolute priority rule . . . may carry a new value corollary.”<sup>190</sup> Hence, the adoption of the corollary by the Seventh and the Ninth Circuits did not trouble the Court.<sup>191</sup>

Notwithstanding the foregoing, one does not need to invoke the new value corollary to defend the Chrysler reorganization, as the dissident secured creditors of Chrysler lacked standing to object to the asset sale.<sup>192</sup> Under the loan agreement to which the senior secured creditors are party, the secured creditors appointed an administrative agent to act on their behalf.<sup>193</sup> The loan agreement states that, in the event of bankruptcy, the agent could be authorized to act on the behalf of the lenders, at the request of lenders holding a majority of Chrysler’s debt.<sup>194</sup> By the terms of the agreement, any action taken by the agent would be binding on all lenders, including those in disagreement.<sup>195</sup> After Chrysler filed for bankruptcy, a majority of the senior lenders authorized the agent to act, and the agent subsequently consented to the sale and release of liens under section 363(f)(2).<sup>196</sup> Because the consent was binding on all senior lenders, including the dissident pension funds, the court found that the dissident funds lacked standing to make this objection.<sup>197</sup>

### *Critics*

The creditors cannot delegate their vote to an agent, once a sale is deemed a sub rosa plan.<sup>198</sup> Any 363 sale that de facto determines distributions must be abandoned in favor of the section 1129 confirmation process or incorporate the creditor protections of section 1129. And section 1129 requires that the creditors vote individually and

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189. *N. LaSalle*, 526 U.S. at 445.

190. *Id.* at 449.

191. *Id.* at 443.

192. Lubben, *No Big Deal*, *supra* note 109, at 537.

193. *Chrysler II*, 576 F.3d 108, 119 (2d Cir. 2009).

194. *Id.* at 120.

195. *Id.*

196. *Id.*

197. This was the conclusion of the bankruptcy judge. *Chrysler I*, 405 B.R. 84, 100-04 (Bankr. S.D.N.Y. 2009). And it was upheld by the Second Circuit. *Chrysler II*, 576 F.3d at 108.

198. Roe & Skeel, *supra* note 109, at 15 n.51.

2010] **Bankruptcies of Chrysler and General Motors** 559

by their dollar claims. Creditors cannot, ex ante by contract, delegate that right provided by the Code. Section 1129 provides this protection despite the fact that creditors, contractually, accepted this risk in the loan agreement. In other words, an agent cannot vote on behalf of an entire class of creditors.

*C. Market Test*

The U.S. Supreme Court has ruled that a bankruptcy court should not approve arrangements “untested by competitive choice.”<sup>199</sup> A market test of a 363 sale, such as a contested auction, can ensure that the debtor is receiving a fair price for the assets, maximizing the value of the estate.<sup>200</sup> Hence, another creditor safeguard a court can employ in 363 asset sales is the adoption of bidding rules that facilitate a contested auction of the assets. The process generally involves the identification of an initial bidder (the “stalking horse”) and the approval of bidding procedures for competitive bids.<sup>201</sup> The Southern District of New York has issued guidelines for asset sales that are designed to facilitate auctions.<sup>202</sup> The guidelines require that bidders be granted access to relevant information, that the debtor market the assets adequately, and that the parties show that “the price will be the highest or best under the circumstances.”<sup>203</sup> Since courts are reluctant to disturb a sale at auction, the adoption of the bidding procedures is strategically important.<sup>204</sup>

*Critics*

While the *Chrysler* and *General Motors* courts did require solicitation of competing bids before approving the 363 sales, the bidding rules employed by the bankruptcy court were defective, critics contend, preventing a true market valuation of the assets. Section 363 permits a debtor to sell assets free and clear of any interests in them.<sup>205</sup>

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199. *Bank of Am. v. N. LaSalle St. P'ship*, 526 U.S. 434, 458 (1999). The Bankruptcy Code sections in that case, however, were not altogether the same as those in the *Chrysler* and *General Motors* cases.

200. See 6 COLLIER BUSINESS WORKOUT GUIDE ¶ 6.05 (Alan N. Resnick., 15th ed. rev. 2004) (discussing methods for maximizing the value of assets as “shopping the assets” and conducting an auction).

201. General Order M-331 at 2, *In re Adoption of Guidelines for the Conduct of Asset Sales* (S.D.N.Y. Sept. 5, 2006), amended by General Order M-383 (S.D.N.Y. Nov. 18, 2009), available at <http://www.nysb.uscourts.gov/orders/m383.pdf>.

202. *Id.* at 1.

203. *Id.* at 7.

204. See 3 COLLIER ON BANKRUPTCY, *supra* note 41, ¶ 363.11 (discussing policy of finality).

205. 11 U.S.C. § 363(f) (2006).

But the assets transferred in the Chrysler and GM 363 sales were not sold free and clear. Instead, the bankruptcy court required that any bidders assume the liabilities to the UAW Trust as a condition to the sale.<sup>206</sup> As a result, the purchasers (New Chrysler and New GM) took the assets subject to obligations to the UAW Trust.

Critics assert that this bidding structure prevented a true valuation of the assets. The assets may have fetched a higher price for the debtors had the assets been sold free and clear of the obligations to the UAW Trust.<sup>207</sup> Any potential bidder would reduce its bid knowing it would have to satisfy those obligations attached to the assets.<sup>208</sup> Thus, the bidding structure potentially deterred higher bids by parties unwilling to make the same concessions to the union as the government-sponsored purchaser did.<sup>209</sup> However, the purpose of the market test safeguard is to examine the proposed sale structure against potential alternative structures, not to lock-in the proposed structure. Such a bidding arrangement violates the mandate that the bidding procedures “must not chill the receipt of higher and better offers.”<sup>210</sup>

For instance, suppose the bidding rules require any bidder to assume \$20 of the seller’s liabilities. And suppose the highest bidder bids \$80 for the assets (with the assumed liabilities). In other words, the assets are implicitly valued at \$100 when the liabilities are attached (\$100 minus \$20 equals \$80). What one would like to know, however, is whether the assets would sell for more than \$100 when auctioned without the liabilities attached. In other words, one would like to know whether an alternative sales structure is superior to the one proposed. The auction establishes whether there exists a different sales structure that will generate greater net proceeds. In the auto bankruptcies, however, the bidding procedures did not answer that question. Instead, “what was put to market was the sub rosa plan itself.”<sup>211</sup> Such a bidding procedure defeats the purpose of holding the auction: to determine

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206. *Chrysler I*, 405 B.R. 84, 100 (Bankr. S.D.N.Y. 2009); *In re Gen. Motors Corp.*, 407 B.R. 463, 520 (Bankr. S.D.N.Y. 2009). There was an exception to this requirement, but that exception had to be specifically approved by the bankruptcy court after consultation with the UAW, the Treasury, and the other parties. Since the government was committed to rescuing the auto makers, any potential competing bidder “had to know that they were not competing with a commercial bidder who reasonably could be outbid. Since the Treasury would not be outbid, why should a commercial bidder bother” to make a bid? Roe & Skeel, *supra* note 109, at 18.

207. Adler, *supra* note 109, at 1.

208. *Id.* at 8.

209. *Id.*

210. General Order M-331, *supra* note 201, at 3.

211. Roe & Skeel, *supra* note 109, at 17.

2010] **Bankruptcies of Chrysler and General Motors** 561

whether the assets are more valuable without the obligations to the UAW retirees attached to them. In the Chrysler 363 sale, New Chrysler purchased Old Chrysler's assets for \$2 billion, and assumed \$4.6 billion of Old Chrysler's liabilities to the UAW Trust.<sup>212</sup> By requiring the assumption of the liabilities, the auction failed to answer whether the assets would have netted more for Old Chrysler without the attached liabilities (or whether yet some other sales structure would have been optimal). Perhaps, for instance, potential bidders felt they could have reached a better agreement with the UAW than the U.S. Treasury did.

*Supporters*

Despite the stated requirement that the liabilities to the UAW Trust be assumed, the debtor would have considered any non-complying proposals. In fact, the debtor had a fiduciary duty to do so, and the language of the bidding procedures order reflected that fiduciary duty.<sup>213</sup> This provided an opportunity for a competing bidder to come forward.

*Critics*

Any potential bidder with a non-conforming proposal needed to obtain the specific approval of the bankruptcy court after consultation with the UAW, the U.S. Treasury and the other parties. Since the government was committed to rescuing the auto makers, any potential bidder "had to know that they were not competing with a commercial bidder who reasonably could be outbid. Since the Treasury would not be outbid, why should a commercial bidder bother" to make a bid?<sup>214</sup>

*Supporters*

The critics are demanding auction procedures completely untainted by the parties in interest, but such procedures are rare in practice.<sup>215</sup> Instead, auction procedures often favor the stalking horse bidder, as was the case here.<sup>216</sup>

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212. Adler, *supra* note 109, at 1-2.

213. *Chrysler I*, 405 B.R. 84, 109 (Bankr. S.D.N.Y. 2009). There has been discussion about the ability of bankruptcy judges to allow non-conforming bids to participate in the auction process and to deny finality to auction sales. See Robert U. Sattin, *Finality in Auction Sales: It Ain't Over Till It's Over*, 23 AM. BANKR. INST. J. 1, 53 (2004).

214. Roe & Skeel, *supra* note 109, at 18.

215. Edward R. Morrison, *Chrysler, GM and the Future of Chapter 11*, 6 (Ctr. for Law & Econ. Studies, Working Paper No. 365, 2009), available at <http://ssrn.com/abstract=1529734>.

216. See *id.* at 6 n.36.

Further, no auction will be perfect, as there are inherent defects in any auction. Any imperfections, however, were irrelevant in the 363 sales of Chrysler and GM, because there were no alternative bidders.<sup>217</sup> The bidding procedures “could require a competitive bidder to stand on its head, but if there is no such bidder the contents of the procedures are purely academic.”<sup>218</sup>

Additionally, the sale price approved in the 363 transactions was not unfair. The dissenting creditors produced no credible evidence that the assets “were worth more than was being paid.”<sup>219</sup> If the objecting creditors truly believed the price was too low, they could have brought a competing buyer to the table. Were potential buyers ignoring an arbitrage opportunity simply because the procedures favored the government-sponsored bidder? The objecting creditors could have even credit bid themselves by utilizing their debt claim.<sup>220</sup> In fact, were it not for the proposed transactions, there would have been a substantially lower recovery for the creditors.<sup>221</sup>

### *Critics*

A defective 363 process can effect a distribution of sales proceeds in a manner inconsistent with the required statutory priority among creditors.<sup>222</sup> When a 363 sale lacks a true auction, resulting in a sale price below market value, the sales proceeds can be distributed in violation of statutory priority. Adler provides an example.<sup>223</sup> Suppose a debtor, upon filing for bankruptcy, has two unsecured creditors: a supplier owed \$60 and a bank owed \$20. The bank offers \$40 for all of the debtor’s assets, and the bankruptcy court approves the sale without receiving competing bids or otherwise establishing the assets’ market value. Suppose the debtor’s assets do indeed have a market value of \$40 (row 1 in Table 1). The supplier receives \$30 of the sales proceeds and the bank receives \$10 of the sales proceeds. The bank also takes ownership of the assets, but re-sells them for \$40, the price it paid to acquire them. The effective total distribution to the bank is \$10. Suppose instead the assets actually have a market value of \$60 (row 2). The supplier and the bank each still receive \$30 and \$10, respectively, from the sales proceeds. But now the bank can re-sell the assets for

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217. Lubben, *No Big Deal*, *supra* note 109, at 540.

218. *Id.* at 532.

219. *Id.* at 545.

220. *Id.* at 547.

221. *Chrysler I*, 405 B.R. 84, 105-06 (Bankr. S.D.N.Y. 2009).

222. Adler, *supra* note 109, at 7-8.

223. *Id.* at 8-9.



2010] **Bankruptcies of Chrysler and General Motors** 563

\$60, realizing a \$20 gain. Altogether, the bank has netted \$30 in the transaction, and so has the supplier. Had the bankruptcy court conducted an effective auction resulting in a sale price of \$60 (row 3), the bank would have received a distribution of only \$15 and the supplier a distribution of \$45. By failing to establish a proper market value for the 363 sale, the court has effectively distributed \$15 to the bank that should have been distributed to the supplier. In each of the three cases, the cash proceeds received by the debtor's estate are distributed fairly. But when deficient 363 sales procedures are employed, the bank walks away with too much value (by permitting the bank to purchase assets below market price). The supplier, without the ability to object to the 363 sale, as its class would in a confirmation process, is "left to suffer the consequences of judicial error."<sup>224</sup> Note that this example does not require any government intervention. A 363 sale at below market value can effect an improper distribution without the government playing a role.

**Table 1: Effective Distributions From a 363 Sale Below Market Value**

	Market Value	Sales Price	Distribution of Sales Proceeds		Gain on Re-Sale of Assets	Effective Total Distribution to Bank
			To Supplier	To Bank		
1	\$40	\$40	\$30	\$10	\$0	\$10
2	\$60	\$40	\$30	\$10	\$20	\$30
3	\$60	\$60	\$45	\$15	\$0	\$15

Hence, some view the Chrysler reorganization as a government intervention that resulted in the transfer of value from one group to another based on political considerations.<sup>225</sup> "Or, to borrow the description of one participant, the assets of retired Indiana policemen were given to retired Michigan autoworkers."<sup>226</sup> The purported disregard of creditors' rights in the auto bankruptcies opens the door to future distributions of assets to favorite groups. Critics wonder "why the UAW funds should be favored over other retirement funds, those

224. *Id.* at 9.

225. Adler notes that "[t]here is nothing in the Bankruptcy Code that allows a sale for less than fair value simply because the circumstances benefit a favored group of creditors." *Id.* at 3.

226. PANEL REPORT, *supra* note 1, at 52.

that invested in Chrysler secured debt.”<sup>227</sup> Critics further warn that *Chrysler*, by undermining the Code’s treatment of secured creditors under bankruptcy, could have adverse effects on the capital markets. Warren Buffett, for instance, has stated that the federal government’s actions in the bankruptcies can have “a whole lot of consequences” for deal making.<sup>228</sup> According to Buffett, the precedents are going to disrupt lending practices “in the future. . . . If we want to encourage lending in this country . . . we don’t want to say to somebody who lends and gets a secured position that the secured position doesn’t mean anything.”<sup>229</sup>

### *Supporters*

While the proceeds the debtor receives in a 363 sale must be distributed to its creditors in accordance with the Bankruptcy Code’s priority rule, the purchaser of assets is not restrained by the Code in its use of those assets, the price it pays to acquire them, or any other manner.<sup>230</sup> Hence, the purchaser is free to strike any deal it can with its own financiers, suppliers, labor unions, and other stakeholders. If these stakeholders establish relationships with the purchaser on more favorable terms than “those whose relationships terminated with the bankruptcy estate, this perceived disparity has a clear business reason; i.e., the purchaser needs to maintain these relationships to make its business viable.”<sup>231</sup> For instance, if the purchaser needs to continue ordering from the debtor’s suppliers, then those suppliers may be paid by the purchaser even though the suppliers are entitled to nothing under the debtor’s Chapter 11 plan. The two transactions are independent; there is no “exchange” of claims against the debtor for payments from the purchaser. This is the case so long as payments from the purchaser are made in exchange for the provision of goods or services to the purchaser. According to supporters of the Chrysler 363 sale, the assets were purchased cleanly and appropriately from Old Chrysler by New Chrysler for \$2 billion. New Chrysler then, in separate transactions, entered into independent agreements with financiers, suppliers, labor, and other stakeholders, some of which happen to involve Old Chrysler’s creditors. The *General Motors* bankruptcy judge stated that:

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227. Adler, *supra* note 109, at 6.

228. Lou Whiteman, *Buffett Warns of Chrysler Cramdown Ramifications*, THEDEAL.COM, May 5, 2009, available at [http://thedeal.com/dealscape/2009/05/buffett\\_warns\\_of\\_chrysler\\_cram.php](http://thedeal.com/dealscape/2009/05/buffett_warns_of_chrysler_cram.php).

229. *Id.*

230. PANEL REPORT, *supra* note 1, at 48.

231. *Id.*

2010] **Bankruptcies of Chrysler and General Motors** 565

A 363 sale may . . . be objectionable as a [disguised reorganization] plan if the sale itself seeks to allocate or dictate the distribution of sale proceeds among different classes of creditors. But none of those factors is present here. The [sale and purchase agreement] does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of the creditors of this estate. It merely brings in value. Creditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court.<sup>232</sup>

It is not alarming, or even unusual, that the U.S. Treasury pushed for favorable treatment of certain stakeholders, the UAW retirees. The U.S. Treasury was the debtor-in-possession (DIP) lender, with the power and influence that role confers in any bankruptcy. As the automotive companies' condition deteriorated, the government provided both pre- and post-petition financing. On account of the government's pre-petition claim, it had the rights of a pre-petition creditor entitled only to distributions from the bankruptcy estate in accordance with priority rules under Chapter 11. On account of its post-petition claim, however, the government had power and leverage as a DIP financier.<sup>233</sup> Because no post-petition lender is required to lend to the debtor and because dealing with bankrupt businesses is often regarded as quite risky, the leverage of the DIP lender is extremely high. There are no statutory limits on the conditions that DIP lenders may impose on the debtor. In other words, DIP lenders use the terms of the new loan to assume control and shape the outcome of the reorganization.<sup>234</sup> Because of its leverage, a DIP lender may have the power, for example, to decide which contracts (with suppliers, vendors, dealers, etc.) it wishes the debtor to assume and which contracts it wishes the debtor to reject. At the time Chrysler and GM filed bankruptcy, the capital markets were experiencing a credit freeze and the amount of money needed to reorganize the auto companies was very large. This allowed any DIP financier that stepped forward even more leverage than it may have had under ordinary circumstances.<sup>235</sup> Because the U.S. Treasury played an important role in financing and negotiating the restructuring of the automotive companies, it is not surprising that it exercised some

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232. *In re Gen. Motors Corp.*, 407 B.R. 463, 495-96 (Bankr. S.D.N.Y. 2009) (footnotes omitted).

233. To obtain financing to operate in Chapter 11, debtors arrange for debtor-in-possession (or DIP) financing. Such financing is often provided by creditors who have existing loans with the debtor and hence act largely to limit their losses.

234. Lubben, *No Big Deal*, *supra* note 109, at 535; see Miller & Waisman, *supra* note 51, at 154.

235. This argument also addresses claims of federal government bullying. See *supra* text accompanying notes 147-50.

of its bargaining power as a DIP lender to dictate that the UAW Trust receive special treatment. The U.S. Treasury, however, was nothing more than a normal DIP lender. Although the involvement of the U.S. government in these reorganizations may have been novel, its exercise of the DIP lender's power in connection with the 363 sale was not.<sup>236</sup> One "can debate whether it is wise for the government to bail out the UAW, but it does not implicate the bankruptcy process."<sup>237</sup>

### *Critics*

Because of the defects in the bidding process, it is impossible to know in practice whether priorities were adhered to. Because the process was so opaque, it is impossible to tell whether payments were made to the UAW Trust improperly on account of its unsecured claim on Old Chrysler or properly on account of its labor agreement with New Chrysler. It may be that the "retirees' payout came solely from the government's new money as funneled through New Chrysler."<sup>238</sup> But maybe some of the retirees' payout came from Old Chrysler's secured lenders.<sup>239</sup> Or, maybe the government subsidized both the retirees as well as the secured lenders.<sup>240</sup> The critics' point is that, without a true market test or any of the other standard mechanisms used to validate the process, it is impossible to answer such questions. Instead of clarifying priorities, the 363 sale, with its mandated assumption of liabilities, obfuscated them.<sup>241</sup>

### *Supporters*

It is common in 363 transactions for the purchaser to assume pre-petition liabilities. For example, American Airlines assumed \$3.5 billion of TWA's debts (arising mainly from aircraft leases), Hilco and Gordon Brothers assumed Sharper Image's pre-petition liabilities (arising from real estate leases and other executory contracts), and International Steel Group assumed certain liabilities of Bethlehem Steel

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236. Lubben, *No Big Deal*, *supra* note 109, at 546.

237. *Id.*

238. Roe & Skeel, *supra* note 109, at 6.

239. *Id.*

240. *Id.*

241. *Id.*; see Ralph Brubaker & Charles J. Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM* 20 (Ill. Law & Econ. Research Papers Series, No. LE10-001, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1549650](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1549650) (discussing the "impenetrability" of determining whether debt assumption constitutes a diversion of value away from other creditors or an essential step to keep the debtor's business intact going forward).

2010] **Bankruptcies of Chrysler and General Motors** 567

(environmental liabilities and obligations to employees).<sup>242</sup>

In addition, despite any imperfections, the 363 sale contained adequate safeguards, particularly in light of the emergency the debtors were in. Had the sales process taken any longer, the debtors would have had to liquidate.<sup>243</sup>

### *Critics*

The 363 sales proceeded at an unnecessarily fast pace. The bankruptcy courts in each case required that any competing bid be submitted within a matter of days. Critics cite the short amount of time permitted for competing 363 bids as an additional constraint imposed on the bidding process. In other words, the speed of the process purportedly discouraged the submission of competing bids, impeding a true market valuation of the assets. Professors Roe and Skeel comment:

The Chrysler chapter 11 proceeding went blindingly fast. One of the larger American industrial companies entered chapter 11 and exited 42 days later. Clearly speed was achieved because of the governments' cash infusion of \$15 billion on noncommercial terms into a company whose assets were valued at only \$2 billion . . . . As a matter of bankruptcy technique, the rapidity of the Chrysler chapter 11 was a tour de force.<sup>244</sup>

While critics concede that there was not a lot of time, they argue that there was sufficient time to apply makeshift safeguards to the 363 sales.<sup>245</sup> A proper auction may have required only a few additional weeks.<sup>246</sup> In addition, emergencies in prior cases have justified the use of a 363 sale in lieu of a plan confirmation.<sup>247</sup> But there is no precedent for emergencies justifying the jettison of safeguards in 363 sales, such as the use of a proper auction.<sup>248</sup> Emergencies justify a properly-conducted 363 sale, not the abandonment of creditor protections and priorities in a 363 sale.

### *Supporters*

The bankruptcy court agreed that a shortened sales process was

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242. See Morrison, *supra* note 215, at 7.

243. *In re* Gen. Motors Corp., 407 B.R. 463, 484-85 (Bankr. S.D.N.Y. 2009); *In re Chrysler II*, 576 F.3d 108, 114 (2d Cir. 2009) (likening the auto makers' assets to a "melting ice cube").

244. Roe & Skeel, *supra* note 109, at 1 (footnotes omitted).

245. *Id.* at 20-21.

246. *Id.* at 20 n.61.

247. *Id.* at 20.

248. *Id.*

proper because of the rapid erosion of the debtors' going concern values.<sup>249</sup> Chrysler's going concern value was eroding by \$100 million per day.<sup>250</sup> In addition, the shortened process did not disadvantage potential bidders. Chrysler had been marketed extensively for approximately two years before its bankruptcy. By the time the 363 bidding process had begun, any potential purchasers had already obtained relevant information or conducted due diligence.<sup>251</sup>

Moreover, creditors nearly always push for speed in a Chapter 11 reorganization. While the speed in *Chrysler* and *General Motors* was noteworthy, it was not unprecedented. Debtors often file prepackaged bankruptcies in order to shorten the traditional process of confirming a reorganization plan. Such prepackaged bankruptcies became popular in the "early 1990s, with bankruptcies wrapped up in a matter of weeks."<sup>252</sup> In 2007, for instance, the median case lasted only forty-three days.<sup>253</sup> The prepackaged bankruptcy of CIT Group in late 2009, the largest prepackaged bankruptcy in history, took only forty days.<sup>254</sup> The expediency of the Chrysler and GM 363 sales may be attributed to the care with which the bankruptcy packages were assembled, leaving little need for additional procedures and negotiation.

In addition, neither the *General Motors* nor the *Chrysler*

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249. *Chrysler I*, 405 B.R. 84, 109 (Bankr. S.D.N.Y. 2009).

250. *In re Chrysler*, Ch. 11 Case No. 09-50002-AJG, slip op. at 7 (S.D.N.Y. June 1, 2009).

251. *Chrysler I*, 405 B.R. at 108.

252. PANEL REPORT, *supra* note 1, at 50. Due to the increasing popularity of prepackaged bankruptcies and the development of the DIP financing market in the 1990s, the average time spent in a Chapter 11 reorganization declined from twenty-three months in the 1980s to sixteen months in the 2000s, a drop of 30%. Sreedhar T. Bharath et al., *The Changing Nature of Chapter 11*, 16 (Ohio St. Univ., Charles A. Dice Ctr. for Research in Fin. Econ., Working Paper No. 2008-4, 2007), available at <http://www.cob.ohio-state.edu/fin/dice/papers/2008/2008-4.pdf>. Evidence suggests that the development of the DIP financing market in the 1990s eroded the influence of debtors and equity holders in favor of creditors (as many DIP lenders are existing creditors). See David A. Skeel, *The Past, Present and Future of Debtor-In-Possession Financing*, 25 CARDOZO L. REV. 1905, 1916-21 (2004); Baird & Rasmussen, *supra* note 50; Lubben, *New and Improved*, *supra* note 51. As a result, since the 1980s, there have been fewer violations of the absolute priority rule in favor of equity holders. One study finds that frequency of absolute priority deviations in favor of equity holders declined from 75% of cases studied before 1990 to 9% in the 2000-05 period. See generally Bharath et al., *supra*. Ironically, the same DIP financing mechanism that had given creditors greater power in recent decades was used by the government in *Chrysler* to the detriment of the secured creditors.

253. See Lynn M. LoPucki Bankruptcy Research Database, [http://lopucki.law.ucla.edu/bankruptcy\\_research.asp](http://lopucki.law.ucla.edu/bankruptcy_research.asp); see also Mike Spector, *The Quickie Bankruptcy: More Companies Enter Court, and Exit, in a Flash*, WALL ST. J., Jan. 5, 2010, at C1.

254. Spector, *supra* note 253, at C1.

2010] **Bankruptcies of Chrysler and General Motors** 569

bankruptcy cases officially “closed” when the assets were sold. Roe and Skeel, quoted above, use the term “exit” to refer to the 363 sale, not to the actual winding up of the debtor. Both debtors, Old GM and Old Chrysler, still had to be wound up, and the proceeds of the 363 sales and any remaining assets had to be distributed to each company’s remaining creditors according to priorities and prevailing bankruptcy law. A 363 sale is only a part of the entire bankruptcy process, albeit a considerable part.

*D. Judicial Valuation*

As an alternative to a market test, the bankruptcy court can hear valuation evidence before approving a 363 sale. Valuation, however, is the least favored of the makeshift safeguards.<sup>255</sup> The valuation process is inaccurate and slow, and courts rarely rely on valuation alone.<sup>256</sup> While not as effective as the other safeguards, it can nevertheless provide a justification for approving a 363 sale.<sup>257</sup> In *Chrysler*, the debtor submitted a valuation showing a liquidation value between zero and \$800 million.<sup>258</sup> In *General Motors*, the debtor also submitted a valuation, showing a liquidation value between \$6 billion and \$10 billion.<sup>259</sup>

*Critics*

The *Chrysler* and *General Motors* courts each considered only one valuation, that submitted by the debtor.<sup>260</sup> Despite the notorious inaccuracy of valuations, each bankruptcy court considered evidence presented by only one side.<sup>261</sup> Moreover, the wide range of the valuations (\$0 to \$800 million for Chrysler and \$6 billion to \$10 billion for GM)<sup>262</sup> should have alerted the courts to the need to review more evidence.<sup>263</sup> However, as the dissident creditors in *Chrysler* argued, the parties were not given enough time to prepare an alternative valuation that would have challenged the debtor’s figures.<sup>264</sup>

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255. Roe & Skeel, *supra* note 109, at 21.

256. *Id.* at 11.

257. *Id.* at 21.

258. *Chrysler I*, 405 B.R. 84, 97 (Bankr. S.D.N.Y. 2009).

259. *In re Gen. Motors Corp.*, 407 B.R. 463, 481 (Bankr. S.D.N.Y. 2009).

260. *Id.*; *Chrysler I*, 405 B.R. at 97.

261. Roe & Skeel, *supra* note 109, at 13.

262. *Chrysler I*, 405 B.R. at 97; *Gen. Motors*, 407 B.R. at 481.

263. Roe & Skeel, *supra* note 109, at 13.

264. *Id.*

*Supporters*

While the court did not provide the dissident creditors with time to prepare an alternative valuation, those creditors should have anticipated the need for a valuation and had it ready for submission when the time came.<sup>265</sup> The dissenting creditors in *Chrysler* were also given the opportunity to contest the credibility of the valuation and the incentives of the authors.<sup>266</sup> Their arguments, however, were rejected by the court.<sup>267</sup> The dissenting creditors in *General Motors* did not contest the valuation in that case.<sup>268</sup>

*E. The Proper Objective of Bankruptcy Law*

*Chrysler* and *General Motors* have sparked a heated debate because they raise a very fundamental question: What is the primary goal of the Bankruptcy Code?

*Supporters*

Supporters of *Chrysler* and *General Motors* believe the purpose of the Bankruptcy Code is to dispose of the debtor's assets in the "best and most efficient way."<sup>269</sup> Those who adopt this goal make several arguments in favor of 363 sales over traditional reorganizations. Sales are cheaper and faster than the reorganization process.<sup>270</sup> Moreover, sales transfer assets to the parties better able to deploy the assets.<sup>271</sup> Also, as long as there is a marketplace for the assets, sales maximize creditor recoveries by allowing the assets to fetch a fair price.<sup>272</sup> Even some critics of *Chrysler* and *General Motors* accept the use of 363 sales in concept, "[a]s long as [the] sale of a firm's assets is subject to a true market test" such as an auction designed to achieve the highest sale price.<sup>273</sup> Supporters of 363 sales view the traditional reorganization as an unnecessary and costly process.<sup>274</sup>

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265. *Id.*

266. *See generally* Brief for Appellants, *supra* note 110, at 15-19.

267. *Chrysler II*, 576 F.3d 108, 119 n.11 (2d Cir. 2009).

268. *See In re Gen. Motors Corp.*, 407 B.R. 463, 481 (Bankr. S.D.N.Y. 2009).

269. Adler, *supra* note 109, at 9.

270. *See id.* at 9-10.

271. *See Baird & Rasmussen*, *supra* note 50, at 778.

272. *See id.* at 777. Some commentators disagree, believing that bankruptcy produces fire sales of assets a depressed prices, reducing creditor recoveries. *See generally* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007); Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511 (2009).

273. Adler, *supra* note 109, at 9.

274. *See Baird & Rasmussen*, *supra* note 50, at 777.



2010] **Bankruptcies of Chrysler and General Motors** 571*Critics*

Certain critics, however, disagree with the goal of maximizing creditor recoveries. They believe, instead, that the Code's primary goal should be the rehabilitation of the debtor. When the legislation creating the current Bankruptcy Code was passed in 1978, "it was unequivocal that the Bankruptcy Code's primary policy objective was debtor rehabilitation."<sup>275</sup> Chapter 11 reflects that objective. Chapter 11 provides a neutral forum for resolving conflicts among debtors, creditors and shareholders, as well as conflicts among creditors with opposing interests, in order to rehabilitate the debtor in an orderly fashion.<sup>276</sup> Further, Chapter 11 provides a forum to other stakeholders, such as employees, the community and the public interest.<sup>277</sup> Hence, Chapter 11 enables courts to consider public policy concerns and economic externalities, such as maximization of returns to all creditors, environmental impacts and job retention.<sup>278</sup> Critics of 363 sales lament the fact that bankruptcy has become a creditor-dominated process over recent years.<sup>279</sup> As stated by Professors Baird and Rasmussen:

To the extent we understand the law of corporate reorganizations as providing a collective forum in which creditors and their common debtor fashion a future for a firm that would otherwise be torn apart by financial distress, we may safely conclude that its era has come to an end.<sup>280</sup>

The process of formulating a consensual Chapter 11 confirmation plan requires gradually putting the plan's building blocks into place through negotiation and compromise among competing interests.<sup>281</sup> The 363 process lacks those elements of compromise and consensus.

According to critics, there is a risk that "employees [will] be replaced, firms will be dissolved, and the market will be flooded with workers" if creditors continue to turn to 363 sales instead of the reorganization process.<sup>282</sup> The absence of the Chapter 11 forum allows secured lenders to exert greater influence over the debtor. Excessive control by secured lenders may cause the debtor's operations to be managed solely in the interests of the controlling creditor group, to

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275. Miller & Waisman, *supra* note 51, at 170.

276. *Id.*

277. *Id.* at 171.

278. *Id.*

279. Creditors have experienced increasing influence as a result of the rise of the DIP financing market, distressed debt trading, and other factors. *See supra* note 252.

280. Baird & Rasmussen, *supra* note 50, at 753.

281. *See* Miller & Waisman, *supra* note 51, at 170.

282. *Id.* at 171.

ensure its own recovery.<sup>283</sup> The controlling creditor group has little incentive to realize more than the value of its own debt, which can lead senior lenders to sell assets at fire-sale prices, yielding low returns for junior creditors.<sup>284</sup> *Chrysler* further eviscerates the traditional reorganization process by allowing an even narrower controlling creditor group. By depriving a set of senior secured lenders of their protections under section 1129, *Chrysler* authorized a sale of substantially all assets of the estate over the objections of those dissenting lenders. According to the dissenting senior lenders, the controlling senior lenders caused the debtor to sell its assets at too conservative a valuation, yielding too low a recovery for the senior lender class. *Chrysler*, consequently, further narrows the circle of parties that may control the debtor, at the expense of other parties in interest.

#### *Supporters*

Supporters reply that the critics' arguments are inconsistent. The critics support the plan confirmation process because it allows for consideration of a wide range of interests, including such public policy concerns as retention of jobs. Yet they attack the inclusion of broader policy objectives into the 363 context in *Chrysler* and *General Motors*. The critics approve of 363 sales when private lenders use it to pursue their objectives, but not when the government uses it to pursue its objectives.

#### IV. LOOKING TO THE FUTURE

As the debate shows, supporters and critics of the *Chrysler* and *General Motors* restructurings disagree over whether the cases represent a turning point in the law and practice of bankruptcy. Hence, they will disagree over whether reforms are needed.

Supporters will argue that *Chrysler* and *General Motors* are one-off transactions that will be ignored in the future. In their view, courts will distinguish the two cases by noting the unusual circumstances surrounding the 363 sales. The cases are unique, in their view, in that the transactions required heavy government involvement. Without the government flooding the businesses with cash, the creditors might not

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283. *Id.* at 170.

284. See generally Andrei Shleifer & Robert W. Vishny, *Liquidation Values and Debt Capacity: A Market Equilibrium Approach*, 47 J. FIN. 1343 (1992); Todd C. Pulvino, *Do Asset Fire Sales Exist? An Empirical Investigation of Commercial Aircraft Transactions*, 53 J. FIN. 939 (1998).

2010] **Bankruptcies of Chrysler and General Motors** 573

have agreed to the terms of the reorganizations. Without that aspect, more creditors would have objected to the proposed terms, producing a more traditional and time-intensive reorganization process that may have ended in liquidation and a smaller net recovery by claimants. Critics, on the other hand, will argue that the auto bankruptcies establish dangerous precedents. From their perspective, they validated deal structures that disregard creditor priorities in bankruptcy. Critics will assert that those deal structures do not require government involvement or economic emergencies, and that they will be replicated in ordinary bankruptcies. The importance of *Chrysler* and *General Motors*, however, is more likely to fall somewhere in between these two extreme views. While it is too early to conclude what the future effects of the cases will be, events in the second half of 2009 provide a glimpse.

The *General Motors* court cited *Chrysler* as precedent for the proposition that a 363 sale can fully substitute for a section 1129 reorganization.<sup>285</sup> The *General Motors* court referred to *Chrysler* as “controlling authority” in the Second Circuit and made no attempt to distinguish the cases.<sup>286</sup> In *General Motors*, the bankruptcy court stated that “the *sub rosa* plan contention was squarely raised, and rejected, in *Chrysler*, which is directly on point and conclusive here.”<sup>287</sup> The court added, “[i]t is not just that the Court feels it *should* follow *Chrysler*. It must follow *Chrysler*. The Second Circuit’s *Chrysler* affirmance . . . is controlling authority.”<sup>288</sup> *Chrysler* has also been cited in other jurisdictions. The Bankruptcy Court in the Northern District of Ohio interpreted *Chrysler* as establishing an exception to bankruptcy’s absolute priority rule.<sup>289</sup> The *Chrysler* case is the sole authority the court cited for that exception. In the bankruptcy of the Phoenix Coyotes NHL hockey team, the debtor, in arguing for an abbreviated 363 sales process so as not to lose its existing bidder, cited the *Chrysler* decision.<sup>290</sup>

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285. *In re Gen. Motors Corp.*, 407 B.R. 463, 487-88 (Bankr. S.D.N.Y. 2009).

286. *Id.* at 505. The *General Motors* court relied upon *Chrysler II* even though it was later vacated.

287. *Id.* at 497.

288. *Id.* at 505. That statement is now debatable. See *infra* text accompanying notes 301-05.

289. *In re Arts Dairy, LLC*, 414 B.R. 219, 222 (Bankr. N.D. Ohio 2009) (noting that *Chrysler* allowed the “sale of secured assets free and clear of claims of dissenting secured creditors”).

290. PSE Sports & Entm’t LP’s Response to the City of Glendale’s Objection to Any Relocation Sale at 5, *In re Dewey Ranch, Hockey, LLC*, 406 B.R. 30 (Bankr. D. Ariz. 2009) (No. 2:09-bk-09488-RTBP). The argument, however, was rejected by the bankruptcy court. *Dewey Ranch Hockey*, 406 B.R. at 42 (Bankr.

But *Chrysler* has also been rejected as a precedent, even by the Bankruptcy Court in the Southern District of New York, the court that decided *Chrysler* and *General Motors*. In the bankruptcy of Delphi, one of GM's major parts suppliers, the government and GM were unsuccessful in attempting to replicate the 363 sales structure used in *Chrysler* and *General Motors*.<sup>291</sup> In *Delphi*, the U.S. Treasury and the debtor had arranged to sell substantially all of Delphi's assets to Platinum Equity, a private equity firm, in a private sale transaction. The Treasury and Delphi argued that Platinum Equity was the only acceptable purchaser.<sup>292</sup> That argument was challenged by the creditors, including the DIP lenders, many of whom would be repaid only twenty cents on the dollar under the terms of the proposed sale.<sup>293</sup> The creditors asserted that the proposed sale to Platinum Equity was a "sweetheart deal" that was "secretly negotiated with GM, Platinum and the U.S. Treasury's auto task force."<sup>294</sup> The creditors asked the bankruptcy court for more information to determine if the deal was fair, and for more time to decide if they would want to make a bid themselves for Delphi's assets.<sup>295</sup> The bankruptcy court sided with the creditors, asking "What's so special about Platinum? . . . They're just guys in suits. Why can't other guys in suits pay more?"<sup>296</sup> That decision opened the sales process up to other qualified bidders in an auction.<sup>297</sup> Ultimately, the court accepted a proposal by the DIP lenders to credit bid their loans.<sup>298</sup> Thus, the bankruptcy court in *Delphi* rejected the U.S. Treasury's proposed sale in favor of an open and competitive bidding process, in contrast to its stance in *Chrysler* and *General Motors*. One reason for the different stances of the bankruptcy court may be the different leverage the U.S. Treasury had in the various deals. In *Chrysler* and *General Motors*, the U.S. Treasury was the

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291. *In re Delphi Corp.*, No. 05-44481(RDD), 2009 WL 2482146, at \*1 (Bankr. S.D.N.Y. July 30, 2009).

292. Tensions Grow over Delphi's Platinum Deal, <http://dealbook.blogs.nytimes.com/2009/06/24/tensions-grow-over-delphis-platinum-deal/> (June 24, 2009, 05:26 EST).

293. Delphi Defends Its Platinum Deal, <http://dealbook.blogs.nytimes.com/2009/06/25/delphi-defends-its-platinum-deal/> (June 25, 2009, 07:11 EST).

294. *Id.*

295. Michael J. de la Merced, *Judge Orders Delphi, a Struggling Auto Parts Maker, to Be Open to Other Buyers*, N.Y. TIMES, June 11, 2009, at B4.

296. *Id.*

297. *Delphi*, 2009 WL 2482146, at \*5-6.

298. Bankruptcy Judge Approves Lender's Bid for Delphi, <http://dealbook.blogs.nytimes.com/2009/07/31/bankruptcy-judge-approves-lenders-bid-for-delphi> (July 31, 2009, 04:42 EST).

2010] **Bankruptcies of Chrysler and General Motors** 575

source of the DIP financing.<sup>299</sup> In *Delphi*, the Treasury, while heavily involved in negotiations, did not provide DIP financing, giving it considerably less leverage over the reorganization process.<sup>300</sup> Hence, *Delphi* suggests that *Chrysler* and *General Motors* have limited applicability, relevant only in instances of significant government intervention. Taken together, the three cases suggest that *Chrysler* and *General Motors* might be confined to restructurings backed by major government financing.

The U.S. Supreme Court further muddied the precedential value of *Chrysler* in December of 2009. Notwithstanding the earlier consummation of Chrysler's 363 sale, Chrysler's dissident creditors (the Indiana pension funds) petitioned for a writ of certiorari with the Supreme Court for a review of the merits of the Second Circuit's decision. The Court granted the petition, and held: "Petition for Certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit with instructions to dismiss the appeal as moot."<sup>301</sup> Because Chrysler's 363 sale closed before the Supreme Court could grant the certiorari petition, the Court's review of the Second Circuit's decision was moot. Why then did the Supreme Court grant the certiorari petition? The Court could have simply denied it. Denying certiorari is the more common means of handling moot cases.<sup>302</sup> If the Court had denied the certiorari petition, the Second Circuit's *Chrysler* opinion would stand as precedent. By granting the certiorari petition, vacating the *Chrysler* opinion, and instructing the Second Circuit to dismiss, the Court "eliminates a judgment" from the record.<sup>303</sup> *Munsingwear* states that such action is taken precisely "to prevent a judgment, unreviewable because of

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299. See generally *Chrysler II*, 576 F.3d 108 (2d Cir. 2009); *In re Gen. Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

300. *Delphi Strikes Pact with Lenders, G.M. over Reorganization*, <http://dealbook.blogs.nytimes.com/2009/07/16/delphi-strikes-pact-with-lenders-over-reorganization> (July 16, 2009, 10:44 EST).

301. *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015, 1015 (2009) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 n.2 (1950)).

302. The Supreme Court does not automatically vacate a lower court decision whenever a case becomes moot while a certiorari petition is pending. Brief for Federal Energy Regulatory Commission in Opposition at 11-14, *Enron Power Mktg. Inc. v. N. States Power Co.*, 528 U.S. 1182 (No. 99-916) (2000), 2000 WL 34005429. If it did, it would "disservice the public interest by eliminating judicial precedent that our judicial system regards as 'presumptively correct.'" Brubaker & Tabb, *supra* note 241, at 31 (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994)).

303. *Munsingwear*, 340 U.S. at 40.

mootness, from spawning any legal consequences.”<sup>304</sup> *Munsingwear* elaborates that “when [this] procedure is followed, the rights of all parties are preserved” and the action “clears the path for future relitigation of the issues between the parties.”<sup>305</sup> Thus, courts in the Second Circuit are bound by *Chrysler* in the manner that the *General Motors* court felt bound. The Supreme Court, by citing *Munsingwear*, indicated that it understood the consequences of its ruling. Hence, although we do not know exactly what the Supreme Court thought about *Chrysler*, we do know the Court felt that the decision warranted further review.

Where *Chrysler* may have its most lasting effect is on the consent required for a debtor to sell assets free and clear of liens. Section 363(f) permits the sale of a debtor’s assets free and clear of a security interest if the secured party so consents.<sup>306</sup> What happens when the security interest is in favor of a syndicate of lenders, and the lenders consent to the 363 sale by majority vote, but not unanimous vote? *Chrysler* held that the consent requirement of section 363 could be satisfied without unanimous consent, despite arguably contrary language in the credit documents.<sup>307</sup> The *Chrysler* court held that an administrative agent for the secured lenders may consent to the sale free and clear over the objections of dissenting minority secured lenders.<sup>308</sup> Pursuant to their credit agreement with Chrysler, the first-priority secured lenders had designated J.P. Morgan Chase Bank as their administrative agent.<sup>309</sup> That credit agreement provided that a majority of the lenders may direct the agent to act, and that all lenders will be bound by the agent’s exercise of its properly-delegated authority.<sup>310</sup> Since lenders holding 92.5% of the outstanding principal amount of the loans had directed the agent to direct the collateral trustee to consent to the sale of Chrysler’s assets free and clear of their security interests, the *Chrysler* court held that the agent acted with proper authority and that the dissenting lenders were bound by those actions.<sup>311</sup> The dissenting lenders made two arguments. They argued, first, that the amendment and waiver section of the credit agreement required the unanimous consent of the lenders in order to sell collateral free and clear of the security interest, and,

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304. *Id.* at 41.

305. *Id.* at 40.

306. 11 U.S.C. § 363(f)(2) (2006).

307. *Chrysler II*, 576 F.3d at 119.

308. *Id.* at 120.

309. *Id.*

310. *Id.*

311. *Id.*

2010] **Bankruptcies of Chrysler and General Motors** 577

second, that the credit agreement required unanimous consent to “release” any collateral from a security interest.<sup>312</sup> But the court responded that the 363 sale did not require any “amendment or waiver” of the credit documents, as the collateral trustee could be authorized to sell collateral pursuant to the existing terms of the credit documents without any amendment or waiver.<sup>313</sup> The court added that the 363 sale was not a “release” of collateral because the lenders’ security interest attached to the proceeds of the sale, which remains as collateral for the lenders.<sup>314</sup> The court explained that the credit documents were drafted to permit the administrative agent and the collateral trustee to act at the direction of the majority, to avoid giving “hold-up” power over the group to a minority of lenders exerting undue leverage.<sup>315</sup>

This is not an insignificant holding. The agent for the secured lenders often plays a primary role in a 363 sale by acting at the direction of the secured lenders (to consent to a 363 sale, to release liens, or to credit bid the lenders’ claims, for instance). Although the *Chrysler* court based its decision on the wording of the credit documents, that wording is customary language in syndicated credit facilities. Shortly after *Chrysler*, the Bankruptcy Court in the Southern District of New York had to face the issue again. In *Metaldyne*, the agent for the lenders made a credit bid for the assets of the debtor over the objection of a dissenting lender.<sup>316</sup> The bankruptcy court cited *Chrysler* in approving the sale, noting that the language of the contract provisions were “substantially identical” to those in *Chrysler*.<sup>317</sup> While the dissenting lender argued that unanimous lender consent was required to amend or modify the credit agreement to effect the release of collateral, the bankruptcy court relied upon *Chrysler* in stating that “the sale through a credit bid does not involve or require amendment or modification of the loan documents.”<sup>318</sup> Although it involved the District of Delaware and not the Southern District of New York, *Great Wide* raised similar issues and was similarly decided.<sup>319</sup> The *Chrysler*, *Metaldyne*, and *Great Wide* decisions suggest that when lenders contractually delegate authority over collateral to an agent or trustee as

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312. *Chrysler II*, 576 F.3d at 120.

313. *Id.*

314. *Id.*

315. *Id.* at 20.

316. *In re Metaldyne Corp.*, 409 B.R. 671, 673 (Bankr. S.D.N.Y. 2009).

317. *Id.* at 677.

318. *Id.* at 678.

319. *See In re GWLS Holdings Inc.*, No. 08-12430(PJW), 2009 WL 453110, at \*1 (Bankr. D. Del. Feb. 23, 2009).

part of the loan transaction, objecting secured creditors will likely be bound by the decisions of the majority, including on consent to the sale of assets under section 363 of the Code.

#### V. RECOMMENDATIONS

Regardless of whether *Chrysler* and *General Motors* are viewed as good or bad law, they suggest reforms that should appeal to both sides of the debate. One suggestion is for Congress to amend the Bankruptcy Code in a manner that clarifies the relationship between sections 363 and 1129. Even if *Chrysler* and *General Motors* are distinguished and have little precedential value, the cases illustrate the need for clarity in the area. And if they are not distinguished, *Chrysler* and *General Motors* have the potential to move the Second Circuit even further away from the Fifth Circuit on 363 sales than it currently is, requiring Congress or the U.S. Supreme Court to resolve the split.

An amendment could require, for example, that the bankruptcy court conduct a market test, such as an auction, whenever a 363 sale involves all or substantially all assets of the debtor.<sup>320</sup> But because market tests might not be feasible in mega-cases like GM, Congress may also want to provide guidance on the use of valuations in place of a market test. That is, Congress could lay out factors that substantiate a valuation in the absence of a market test or competing valuations. Such factors might include the extent of pre-petition marketing of the debtor's assets, the availability of DIP financing, and the existence of other potential purchasers.<sup>321</sup> Another suggestion is to amend the Code to provide that a 363 sale process cannot require a bidder to assume or pay some (but not all) claims of pre-petition creditors.<sup>322</sup> Mandatory assumption of certain liabilities gives the appearance (if not the reality) of the 363 sale dictating a distribution of proceeds in contravention of statutory priority. Mandatory assumption might also lead to lower bids for the debtor's assets. A prohibition on mandatory assumptions would

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320. Roe & Skeel, *supra* note 109, at 34-35; Adler, *supra* note 109, at 9-10. Adler would amend the Code further to require that a 363 sale conform to the same standard corporate directors must meet under state law when a corporation is up for sale. That is, the amendment would enable any creditor not paid in full to insist on the same process state law provides shareholders of solvent corporations, including the right to an openly contested auction with ample time provided to bidders. Such an amendment relies upon state courts' experience in determining whether a potential sale of a firm is likely to achieve the best price for investors, and seeks to provide similar safeguards in the bankruptcy context.

321. See Memorandum from Alexander Kerzhner on Valuation in § 363 Sales to the Barry L. Zaretsky Roundtable Dinner & Discussion: Too Big to Fail: Bankruptcy & Bailouts 18 (Feb. 10, 2010) (on file with author).

322. Adler, *supra* note 109, at 10.



2010] **Bankruptcies of Chrysler and General Motors** 579

have eliminated much of the debate in the *Chrysler* and *General Motors* cases. However, a prohibition on mandatory assumptions has drawbacks. Often a potential buyer is interested in certain assets that necessarily involve assumption of related liabilities (for example, contracts and leases). And creditors typically prefer bidding processes that are comprehensive, requiring all potential buyers to bid for the same package. A prohibition on mandatory assumptions could prove disruptive in this respect.

Of course, the Code could be amended to prohibit outright the use of 363 sales involving all or substantially all assets of the debtor. Without a 363 sale functioning as a reorganization plan, the parties would have to comply with the rules established by the Code for plan confirmations.<sup>323</sup> This would ensure that creditors are not deprived of the Code's protections and would restore Chapter 11 as a forum for rehabilitation of the debtor.<sup>324</sup> While such an amendment would satisfy those critics that question the propriety of 363 sales in general, the response may be excessive.<sup>325</sup> Many critics concede that 363 sales can be efficient so long as they are subject to a true market test.<sup>326</sup>

An important non-legislative step to reconciling asset sales with the traditional reorganization process would be for courts to reign in the scope of the section 363(m) mootness doctrine. According to the Code, so long as a sale has not been stayed pending appeal, any challenge to a 363(b) asset sale is rendered statutorily moot by 363(m).<sup>327</sup> As section 363(m) states,

The reversal or modification on appeal of an authorization under subsection (b) . . . of this section of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good faith . . . *unless such authorization and such sale . . . were stayed pending appeal.*<sup>328</sup>

Section 363(m) protects asset purchasers from a reversal on appeal of the sale. Limiting appellate jurisdiction over unstayed sales "furthers the policy of finality in bankruptcy sales . . . and assists the bankruptcy court to secure the best price for the debtor's assets."<sup>329</sup> It is argued

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323. *Id.* at 9.

324. *Id.*

325. *Id.*

326. See discussion *infra* Part III.C.

327. A party may only challenge the narrow issue of whether the property was sold to a good faith purchaser.

328. 11 U.S.C. § 363(m) (2006) (emphasis added).

329. Licensing by Paolo v. Sinatra (*In re Gucci*) (*Gucci I*), 105 F.3d 837, 840 (2d Cir. 1997).

that, “without this assurance of finality, purchasers could demand a large discount for investing in a property that is laden with the risk of endless litigation as to who has rights to estate property.”<sup>330</sup> Hence, the validity of a 363 sale to a good faith purchaser will not be disturbed unless a party has obtained a stay order.

Courts, however, have extended section 363(m) very broadly. Courts invoke the statutory mootness doctrine to deny challenges to both the sale itself and the allocation of the proceeds. According to its text, section 363(m) protects the “validity of a sale” from appellate reconsideration. Nothing in the text of section 363(m) protects the *allocation of the sale proceeds* from appellate reconsideration. Thus, while 363(m) lets a buyer know it has acquired title to an asset free and clear, the consideration that the buyer paid for the asset should remain subject to the claims of creditors under the wrestling match of Chapter 11. Such a restriction of the mootness doctrine would not cloud a buyer’s title, as it would not require an unwinding of a sale. Moreover, a reigning in of the mootness doctrine should be achievable without any legislative action, as the text of 363(m) already limits that section to issues of “validity of title” only. Hence, courts could restrict the doctrine without congressional action. There is, in fact, precedent for a literal reading of 363(m). The Second Circuit has stated that “it is not entirely clear why an appellate court, considering an appeal from an unstayed but unwarranted order of sale . . . could not order some other form of relief other than invalidation of the sale.”<sup>331</sup> In one of the cases arising out of the Enron bankruptcy, the District Court for the Southern District of New York held that “inherent in the fact that 363(m) provides only that the *validity* of an unstayed sale cannot be disturbed on appeal is the corollary that other relief may be available and hence not moot.”<sup>332</sup> Most recently, however, the U.S. Supreme Court’s decision in *Chrysler* suggests that mootness is an area where much remains unsettled. The Indiana pension funds initially petitioned the Supreme Court, asking that it block Chrysler’s sale of its assets. That petition was denied. After the sale closed and the moneys were paid, the Indiana pension funds again petitioned the Supreme Court. Even though the pension funds, this time, were challenging only the allocation of the sales proceeds, not the validity of the asset sale itself,

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330. Licensing by Paolo v. Sinatra (*In re Gucci*) (*Gucci II*), 126 F.3d 380, 387 (2d Cir. 1997).

331. *Gucci I*, 105 F.3d at 840 n.1.

332. *Mission Iowa Wind Co. v. Enron Corp.*, 291 B.R. 39, 41 (Bankr. S.D.N.Y. 2002) (emphasis in original).

2010] **Bankruptcies of Chrysler and General Motors** 581

the Court held that the issue was moot.<sup>333</sup>

Finally, one recommendation is not legislative or judicial, but transactional. In light of *Chrysler* and *Metaldyne*, lenders, borrowers and their attorneys would be wise to review the language in their credit and security documents. In each case, dissident creditors tried to block the 363 transactions by citing the waiver and amendment language in the credit agreements. That language is rather customary and routine in syndicated credit facilities. The language stipulates that the administrative agent may amend or modify the credit agreement or waive rights (such as with respect to a default) with the consent of the required lenders, typically defined as lenders holding a majority or supermajority of the principal amount of the loan. Often the provision adds that unanimous consent is required for certain amendments, modifications and waivers that impact fundamental terms, such as lender commitments, the interest rate, the maturity date, and the release of collateral or proceeds from the lien. The objecting minority lenders in *Chrysler* and *Metaldyne* argued that the 363 sales constituted a release of collateral which requires unanimous lender approval. These cases highlight the need for lenders, borrowers and their attorneys to scrutinize this boilerplate language in credit documents in order to anticipate the tactics of hostile minority lenders in bankruptcy. Although the *Chrysler* and *General Motors* courts did not accept the arguments of the dissident creditors, the cases highlight the fact that these arguments are being made. These cases also highlight the potential for divergent interests among lenders in a syndicate, particularly within bankruptcy, giving importance to these routine provisions.

#### CONCLUSION

This Article has examined two bankruptcy cases that are possibly the most publicized and politicized cases in history, the government-sponsored restructurings of Chrysler and General Motors. To critics, the restructurings distort well-established bankruptcy principles. To supporters, they merely reflect current bankruptcy practice, which is increasingly employing major asset sales to bypass the traditional Chapter 11 reorganization process. At the heart of the controversy is a tension between section 363 and Chapter 11 of the Bankruptcy Code. The expansive use of asset sales under 363 has enabled secured creditors to gain control of the bankruptcy process and creatively accomplish restructurings faster than under Chapter 11. These new

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333. *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009) (mem.).

bankruptcy practices also have the potential to disenfranchise junior creditors and other stakeholders of the debtor, implementing short-term fixes without addressing the debtor's more fundamental organizational issues. The courts have not been successful in resolving this tension between 363 asset sales and Chapter 11 reorganizations with any uniformity or predictability. This Article suggests reforms aimed at clarifying the relationship. Although commentators may not agree on the implications of *Chrysler* and *General Motors*, they should, nonetheless, be able to agree on the need for clarity in this relationship between two key sections of the Bankruptcy Code.