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RETOOLING GENERAL MOTORS: DEFENDING AN INNOVATIVE USE OF THE BANKRUPTCY CODE TO SAVE AMERICA'S AUTO INDUSTRY

*Joseph H. Smolinsky**

INTRODUCTION

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming[.]

President Theodore Roosevelt¹

The “bailout” of General Motors Corporation (GM) has been criticized in many circles as the pursuit of a socialist agenda, the perpetuation of an ongoing problem of moral hazard, or simply an example of a bad business blunder that would never be replicated in the private sector. But, as this Article will point out, it was none of those things.

The significance of GM to the U.S. economy cannot be overstated. Liquidation would have meant almost certain devastation to many segments of the economy. Economists, with the benefit of hindsight, have confirmed the obvious: the cost of the restructuring to taxpayers has been fairly modest when compared to the alternative of inaction. And with the help of more stable capital markets, the newly created General Motors Company is now back in public hands, beyond the need for taxpayer support.

Aside from the direct economic ramifications at stake, the failure of GM—perhaps the most iconic representation of American manufacturing—could have destroyed the national psyche and consumer confidence at a critical time in the 2008–2009 financial crisis. A government takeover of GM in the traditional sense could have been equally damaging. Therefore, the manner in which the U.S. government stepped in was equally important to the decision to do so.

The rescue of GM and Chrysler LLC (Chrysler) was most stunning in its use of traditional Chapter 11 procedures. There was no seizing of assets by the U.S. government under principles of nationalization or eminent

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1. President Theodore Roosevelt, Address at the Sorbonne in Paris, France, The Man in the Arena: Citizenship in a Republic (Apr. 23, 1910).

domain. There was no bailout involving direct payments to creditors or financial grants typically associated with creating moral hazard. Despite the media frenzy and public outcry from parochial interests claiming cronyism and backroom politics, the auto restructurings were very much like the routine Chapter 11 cases that insolvency professionals handle on a daily basis. Ultimately, the parties involved conducted the sale transactions at the center of the restructurings with the utmost transparency and afforded all possible and available due process to affected parties.

It is certainly true that GM's bankruptcy led to limited recoveries for various constituencies. And the GM bankruptcy case, more than others, exposed the plight of thousands of retirees, stockholders, and product liability claimants that the bankruptcy hit particularly hard.² But the GM bankruptcy achieved results vastly better than the alternatives and, despite assertions of favoritism, provided all creditors with distributions consistent with the priority scheme established by Congress under the U.S. Bankruptcy Code.³ This Article will explore some of the criticisms leveled against the GM Chapter 11 process.

In the final analysis, the executive branch, acting through the U.S. Department of the Treasury (the U.S. Treasury), bravely stepped out of its comfort zone to lead an effort to grant GM and Chrysler fresh starts by using traditional Chapter 11 tools. These transactions were unprecedented, and success was in no way assured. Yet the Bankruptcy Code provided a legislative framework and judicial oversight that was tangible and against which the U.S. government's actions could be evaluated.

I. THE GENERAL MOTORS STORY

We've got to go back to making things.
President Barack H. Obama⁴

A. THE FOUNDING AND IMPORTANCE OF GENERAL MOTORS TO THE NATION'S ECONOMY

Founded in 1908 by William C. Durant, GM revolutionized the automotive market by adopting the groundbreaking strategy of “[a] car for every purse and purpose.”⁵ This strategy divided the automotive market into distinct price segments, from low-priced to luxury automobiles, and led GM to become one company growing through the creation and management of multiple brands. Throughout its history, GM produced some of the most

2. See, e.g., Mike Spector, *Car Bailouts Left Behind Crash Victims*, WALL ST. J., May 27, 2011, at A1.

3. 11 U.S.C. §§ 1101–1146 (2006).

4. President Barack H. Obama, Address at Solyndra, Inc. in Fremont, California (May 26, 2010), available at <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000420.pdf>.

5. GEN. MOTORS CORP., SIXTEENTH ANNUAL REPORT 8 (1925).

striking and memorable automotive designs, including the Chevrolet Corvette, Buick Riviera, and Cadillac Eldorado. For many years, GM supplied one in five vehicles driven in the United States.⁶ Its “highly-skilled engineering and development personnel [even] designed and manufactured . . . the first lunar roving vehicle driven on the moon.”⁷

But it is neither the historical nor sentimental significance of GM that caused the U.S. and Canadian governments to jump to its aid in the tail end of 2008. At the time of the filing, GM was the largest U.S. automobile manufacturer and the second-largest automobile manufacturer in the world, with a reach across the U.S. and global economies. As of March 31, 2009, its consolidated global assets and liabilities totaled approximately \$82.3 billion and \$172.8 billion, respectively, and it reported global revenues of approximately \$150 billion for the 2008 fiscal year.⁸ Also, as of March 31, 2009, GM employed approximately 235,000 employees worldwide, of whom approximately 91,000 were residents of the United States.⁹

GM relied not only upon its direct salaried and hourly employees but also upon the thousands of suppliers that, in turn, count on GM for their survival. These suppliers include a myriad of indirect suppliers (not Tier I part suppliers) such as advertising agencies and financial consulting and other service providers that supported GM’s operations. Each of these suppliers hired employees dedicated to the automotive industry. One quickly realizes the severe adverse impact that would occur to the U.S. economy if GM were to shut down operations. A contemporaneous liquidation of the even more financially precarious Chrysler could have exacerbated the effects on the U.S. work force in a worst case scenario. In fact, it is said that one in ten Americans, directly or indirectly, receives a paycheck from the automobile industry.¹⁰

GM and its suppliers existed in a symbiotic relationship: each depended on the other for survival. In North America, GM relied upon approximately

6. Affidavit of Fredrick A. Henderson Pursuant to Local Bankruptcy Rule 1007-2 ¶ 20, *In re Motors Liquidation Co.*, 2011 WL 3805896 (Bankr. S.D.N.Y. Aug. 23, 2011) (ECF No. 21) [hereinafter Henderson Affidavit]. Unless otherwise specified, all court document docket numbers contained herein are in reference to *In re Motors Liquidation Co. (f/k/a Gen. Motors Corp.)*, 2011 WL 3805896 (Bankr. S.D.N.Y. Aug. 23, 2011) (No. 09-50026), available at <http://www.motorsliquidationdocket.com/maincase.php3>.

7. Henderson Affidavit, *supra* note 6, ¶ 20.

8. Gen. Motors Corp., Quarterly Report (Form 10-Q) 2 (May 8, 2009).

9. Motion of Debtors for Entry of Order Pursuant to 11 U.S.C. §§ 105(a), 363(b), and 507, (I) Authorizing Debtors to (a) Pay Certain Employee Compensation and Benefits and (b) Maintain and Continue Such Benefits and Other Employee-Related Programs and (II) Directing Banks to Honor Prepetition Checks for Payment of Prepetition Employee Obligations (ECF No. 33); Henderson Affidavit, *supra* note 6, ¶ 23.

10. Henderson Affidavit, *supra* note 6, ¶ 48; SEAN P. MCALINDEN, KIM HILL, BERNARD SWIECKI, ECONOMIC CONTRIBUTION OF THE AUTOMOTIVE INDUSTRY TO THE U.S. ECONOMY—AN UPDATE: A STUDY PREPARED FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, 34 (Economics and Business Group Center for Automotive Research, Fall 2003).

11,500 suppliers.¹¹ For over 600 of such suppliers, including industry “heavyweights” such as Delphi Corporation, GM represented 30 percent or more of their annual revenues.¹² In the years leading up to GM’s bankruptcy filing, GM made vendor payments totaling approximately \$50 billion annually.¹³ Operating on a “just-in-time” inventory management model, GM typically assembles component parts from numerous suppliers into vehicles within a few hours of delivery to GM’s assembly facilities.¹⁴ While providing GM significant cost savings by reducing inventory expense, “just-in-time” manufacturing has one potentially fatal flaw—if one of the thousands of component parts is not timely delivered, the entire production line quickly grinds to a halt. Additionally, an overnight loss of a customer like GM could threaten the existence of a highly leveraged direct (Tier I) supplier. Because such suppliers also provided parts for Ford, Chrysler, and other original equipment manufacturers (OEMs), a GM shutdown could threaten the entire U.S. automotive industry.

B. THE EVENTS LEADING TO GENERAL MOTORS’ BANKRUPTCY

With an upside down balance sheet and ever increasing retiree costs and other long-term obligations, GM needed to restructure its operations and finances. The “Great Recession,” which began in the second half of 2007, was the triggering event that forced GM to come to terms with its issues and address them in a meaningful manner. GM had already been experiencing a downward trend in sales as GM’s U.S. market share (the largest single market for GM’s products) steadily declined from 45 percent in 1980 to 22 percent in 2008.¹⁵ This drop was due, in large part, to the fact that foreign OEMs (with lower cost structures and legacy benefit obligations) entered the market with cheaper alternatives to GM vehicles.¹⁶ In recent years, the loss of market share had accelerated. In the fourth quarter of 2008, for example, GM’s domestic automobile sales decreased by 36 percent compared to the corresponding period in 2007.¹⁷ For the first quarter of 2009, GM’s domestic automobile sales plummeted by 49 percent compared to the corresponding period in 2008.¹⁸ The combination of sharply declining sales and enormously burdensome fixed costs opened a spigot of red ink.

By the fall of 2008, GM was in the midst of a severe liquidity crisis, and its ability to continue operations grew increasingly uncertain. GM

11. Henderson Affidavit, *supra* note 6, ¶ 25.

12. *Id.*

13. *Id.*

14. *Id.* ¶ 26.

15. *Id.* ¶ 10.

16. *See id.*

17. *Id.* ¶ 11.

18. *Id.*

previously had recognized the need to transform its operations and balance sheet to create a leaner, more efficient, and more profitable business. Unfortunately, because of the continuing and deepening recession, aggravated by the collapse of Lehman Brothers Holdings Inc. on September 15, 2008, GM was not able to achieve its objective.

These exigent economic circumstances compelled GM to seek financial assistance from the U.S. government to sustain its operations. Both sides of the aisle in Congress took seriously the dire warnings that assistance was necessary to avoid a potentially fatal systemic failure throughout the domestic automotive industry, and the concomitant harm to the overall U.S. economy from the loss of hundreds of thousands to potentially millions of jobs. What faced the nation was not an isolated request for charity but the threat of a sequential shutdown of GM and hundreds of ancillary businesses.

1. Viability Plan I—Too Little, Too Late

On November 21, 2008, the Speaker of the House of Representatives, Nancy Pelosi, and the Senate Majority Leader, Harry Reid, released a letter to the chief executive officers of GM, Chrysler, and Ford Motor Company, outlining the requirements for the domestic OEMs to request government loans, including the submission of additional information demonstrating future economic viability.¹⁹

In response, on December 2, 2008, GM submitted to the Senate Banking Committee and the House of Representatives Financial Services Committee a proposed viability plan (Viability Plan I), pursuant to which GM committed to using “[g]overnment funding to exclusively sustain and restructure its operations in the United States and aggressively retool its product mix.”²⁰ In Viability Plan I, GM requested an immediate loan of \$4 billion to ensure minimum liquidity through the end of 2008, a second \$4 billion draw in January 2009, a third draw of \$2 billion in February 2009, and a fourth draw of \$2 billion at an unstated date in 2009, under an aggregate loan facility of \$12 billion.²¹ In addition, GM sought access to an incremental \$6 billion line of credit, for a total of \$18 billion in requested government loans.²² “Notwithstanding the critical need for emergency funding by domestic OEMs, Congress did not act on the request, and GM was compelled to seek immediate financial support from the U.S. Treasury to avoid the suspension of operations.”²³

19. *Letter from Pelosi, Reid to Auto Makers on Terms*, BLOGS.WSJ.COM (Nov. 21, 2008, 5:44 PM), <http://blogs.wsj.com/autoshow/2008/11/21/letter-form-pelosi-reid-to-auto-makers-on-terms/>.

20. Gen. Motors Corp., *Restructuring Plan for Long-Term Viability*, Dec. 2, 2008, at 4 [hereinafter Viability Plan I].

21. *Id.* at 5.

22. *Id.*

23. Henderson Affidavit, *supra* note 6, ¶ 53.

2. A Helping Hand from the U.S. Treasury

On December 19, 2008, President George W. Bush announced that the outgoing administration would make short-term, emergency funding available to GM and Chrysler under the Troubled Asset Relief Program (TARP)²⁴ to prevent both companies from commencing immediate bankruptcy cases and potentially becoming subject to a fire-sale liquidation.

“On December 31, 2008, GM and the U.S. Treasury entered into an agreement . . . that provided GM with emergency financing of up to an initial \$13.4 billion pursuant to a secured term loan facility.”²⁵ On the same day, GM accessed the facility and borrowed \$4 billion from the U.S. Treasury.²⁶ GM would borrow an additional \$5.4 billion on January 21, 2009 and the remaining \$4 billion on February 17, 2009.²⁷ In addition, on April 29, 2009, the Canadian and Ontario governments, through the Export Development Canada (the Canadian EDC)²⁸ provided bridge financing to GM in the form of a three-year C\$3 billion term loan.²⁹ By the time GM would enter bankruptcy, GM would have drawn down approximately \$400 million on the facility.³⁰

3. Viability Plan II—Back to the Drawing Board

Like the congressional mandate, the U.S. Treasury facility required GM to develop a plan to transform its business and demonstrate future viability. But subsequent to December 2, 2008, when GM submitted Viability Plan I, the continued decline of global economic conditions, when combined with public speculation about GM’s future and survival, further reduced GM’s sales, volume, revenue, and cash flow. GM was on the brink of a downward death spiral.

In February 2009, President Obama formed the Presidential Task Force on the Auto Industry, which included cabinet level officials, to evaluate available options (the Automotive Task Force).³¹ Also assembled was a

24. 12 U.S.C. § 5211(a)(1) (2006).

25. Henderson Affidavit, *supra* note 6, ¶ 54.

26. *Id.*

27. *Id.*

28. The Canadian EDC is Canada’s government-owned export credit agency that provides financing, insurance, and risk management to Canadian exporters and investors. *Id.* ¶ 117.

29. *Id.*

30. *Id.* ¶ 118.

31. The members of the Automotive Task Force were: the Secretary of the U.S. Department of the Treasury, Timothy F. Geithner; the Director of the National Economic Council, Lawrence H. Summers; the secretaries of Transportation, Commerce, Labor, and Energy; the Chair of the President’s Council of Economic Advisers; the Director of the Office of Management and Budget; the Environmental Protection Agency Administrator; and the Director of the White House Office of Energy and Climate Change. Press Release, the White House, Geithner, Summers Convene Official Designees to Presidential Task Force on the Auto Industry (Feb. 20, 2009), *available at* <http://www.whitehouse.gov/the-press-office/geithner-summers-convene-official-designees-presidential-task-force-auto-industry> [hereinafter Task Force Designee Press Release].

team of savvy restructuring and legal professionals (Team Auto) that was responsible for managing the day-to-day restructuring initiatives and negotiations.³²

On February 17, 2009, GM submitted a greatly revised business plan designed to achieve and sustain GM's long-term viability, international competitiveness, and energy efficiency (Viability Plan II).³³ Viability Plan II attempted to address improvement to GM's revenues, costs, and balance sheet for its U.S. and foreign operations, as well as GM's plan to reduce petroleum dependency and greenhouse gas emissions.

Although GM proposed to close fourteen plants and decrease its global work force by 47,000 (including 10,000 white-collar workers), GM's initial proposal failed to sufficiently overhaul its operations.³⁴ The initial plan did not provide for mandated labor concessions and benefits modifications or overall reduction of GM bond obligations.³⁵ More importantly, the proposal premised GM's continued survival on tenuous, optimistic assumptions, which, if GM missed, could easily return it to financial distress.³⁶ For example, if GM missed its projected share of overall global sales by 1 percent, GM would suffer a \$2 billion cash flow reduction.³⁷

On March 30, 2009, President Obama announced that Viability Plan II failed to provide a means for GM "not only to survive, but succeed in this competitive global market."³⁸ President Obama outlined a series of actions that GM needed to take to receive additional federal assistance, including reaching an agreement with its unions regarding labor and legacy obligations, and with its bondholders regarding debt reduction, as well as submitting a revised business plan that was more aggressive in terms of scope and timing.³⁹

President Obama indicated that the U.S. Treasury would extend additional secured financing for working capital for a period of another sixty days, during which GM would need to negotiate, develop, and implement a more aggressive and comprehensive viability plan.⁴⁰ GM

32. The name "Team Auto" was coined by Steven L. Rattner. Team Auto included, among others, Ron Bloom, Steven L. Rattner, Harry Wilson, and Matthew A. Feldman. Both Wilson and Feldman had extensive restructuring backgrounds and were the lead negotiators for Team Auto. Wilson was a partner at Silver Point Capital, a well-known hedge fund in the restructuring arena, and Feldman was a senior restructuring partner at Willkie Farr & Gallagher LLP. *Id.*

33. Gen. Motors Corp., *2009–2014 Restructuring Plan*, Feb. 17, 2009 [hereinafter Viability Plan II].

34. *Id.* at 13, 23.

35. Viability Plan I, *supra* note 20.

36. See Declaration of Harry Wilson, Ex. B, 3–5 (ECF No. 2577) (Determination of Viability Summary General Motors Corporation) [hereinafter Wilson Declaration].

37. *Id.* at 4.

38. President Barack H. Obama, Remarks on the American Automotive Industry (Mar. 30, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-american-automotive-industry-33009>.

39. *Id.*

40. *Id.*

would inevitably borrow an additional \$4 billion from the U.S. Treasury. President Obama stated publicly for the first time in March 2009 that GM needed a fresh start to implement such a plan and suggested that the U.S. Bankruptcy Code could be used as a mechanism to help the company restructure quickly and emerge stronger.⁴¹ President Obama set a deadline of June 1, 2009 for GM to demonstrate that its viability plan would fundamentally transform GM's operations into a profitable and competitive American car company.⁴²

By this time, GM realized that token cost saving measures would not be acceptable, and future government assistance would not be an open-ended bailout, but rather, would be dependent on a substantial reduction in debt. Specifically, the Automotive Task Force required GM to “substantially reduce GM’s outstanding debt and existing liabilities to a level where they [were] consistent with both its normalized cash flow and the cyclical nature of its business.”⁴³ The only way to accomplish this outside of bankruptcy would be a voluntary exchange of the company’s public debt for equity. On April 27, 2009, GM launched an out-of-court restructuring through a public exchange offer, which would have substantially reduced GM’s \$27 billion in long-term obligations.⁴⁴ The exchange offer would have consolidated GM’s obligations to the U.S. Treasury and was conditioned on reducing retiree benefits by \$10 billion.⁴⁵ The exchange offer, however, failed to garner sufficient support from GM bondholders.

GM was now out of options. The company was simply too large to attract a private purchaser or new lending source. But management, now without CEO Rick Wagoner, who resigned on March 29, 2009⁴⁶ amid pressure from the U.S. government, was doubtful that GM could survive a protracted Chapter 11 case.⁴⁷

4. Planning the 363 Transaction—Daring to Whisper the “B” Word

Out of options to complete an out-of-court restructuring, GM and Team Auto began seriously discussing the bankruptcy alternatives. Because the U.S. Treasury was not prepared to fund a long-term debtor-in-possession financing package while the parties negotiated the future of GM in a “free

41. *Id.*

42. *See id.*

43. Wilson Declaration, *supra* note 36 (Obama Administration New Path to Viability for GM & Chrysler, Detailed Findings on GM and Chrysler Plans).

44. *See* Gen. Motors Corp., Tender Offer Statement (Sch. to Rule 14d-10) (Apr. 27, 2009); Henderson Affidavit, *supra* note 6, ¶ 71.

45. Henderson Affidavit, *supra* note 6, ¶ 72.

46. Gen. Motors Corp., Current Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 8-K) (Apr. 2, 2009).

47. Viability Plan II, *supra* note 33, at 34 (“The Company remains convinced bankruptcy would be protracted with a significant possibility that exit would not be achieved.”).

fall” bankruptcy, a deal structure was necessary to extract GM’s business and operating assets from bankruptcy as quickly as possible. A “prepackaged” Chapter 11 case with pre-filing solicitation of creditors could be concluded quickly with creditor support but likely would have met the same fate as the failed exchange offer. Moreover, a “prepackaged” Chapter 11 case would have limited GM’s ability to reject contracts and shutter non-core operations, thus failing to achieve the goals set by the Automotive Task Force.

No one had a true level of confidence that GM could have sustained even its severely weakened sales levels during an expedited plan process. GM and the restructuring professionals on Team Auto came to realize that, under the circumstances, an expedited sale of substantially all of GM’s operating assets was the only reasonable course of action. Given the amounts that the U.S. Treasury and Canadian EDC had lent, and would be lending as a first priority loan, a credit bid of the debt for the assets and a portion of the equity of the newly formed company, coupled with cash to fund a wind-down of the estate left behind, would constitute a formidable and appropriate stalking-horse bid to acquire GM’s assets and operations.

With new leadership in place following Rick Wagoner’s departure, GM was open to utilizing the bankruptcy laws to implement a transaction under which substantially all of GM’s operational assets would be sold, subject to any higher or better offers, in an expedited process under § 363 of the Bankruptcy Code. Section 363 of the Bankruptcy Code authorizes a debtor to use, sell, or lease property of the debtor’s estate outside the ordinary course of its business, subject to notice and a hearing.⁴⁸

The U.S. and Canadian governments began designing the framework of a sale (the 363 Transaction) whereby they would contribute their notes representing billions of dollars of secured loans to a newly formed U.S. Treasury-sponsored entity that would later become the new General Motors Company (the Purchaser or New GM), which, in turn, would credit bid the debt to acquire GM’s operating assets. The Purchaser would assume certain specified liabilities that were necessary to preserve the going-concern value of the enterprise and create a “New GM” free of virtually all entanglement with bankruptcy. Any unprofitable or non-core assets would remain with GM’s bankruptcy estate (Old GM) which would be disposed of by Old GM in an orderly fashion. This stratagem was groundbreaking in that just a few weeks earlier, Rick Wagoner reportedly announced publicly that bankruptcy for GM was not a viable option as “no one would buy a car from a bankrupt company.”⁴⁹

48. 11 U.S.C. § 363(b) (2006).

49. Alison Fitzgerald & Julianna Goldman, *Obama Saving GM Needed Dealmaker Team to Break It (Update2)*, BLOOMBERG, June 1, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=alvxAe73XHbM>.

The proposed 363 Transaction would not only address GM's debt obligations but would also significantly restructure its future legacy obligations to its employees through a settlement with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)—the labor union that represented the largest portion of GM's U.S. unionized employees.⁵⁰ Resolution of the legacy retirement benefit issues and work rules for a refocused employer was a gating issue. Concessions were necessary to clean up the balance sheet and ensure future viability. Yet, as described in more detail below, the Bankruptcy Code contains provisions that limit a debtor's ability to modify retiree benefits and collective bargaining agreements without protracted negotiations and possible litigation that, in this case, would have jeopardized an expeditious exit from bankruptcy for the operating assets.⁵¹ A consensual deal with the UAW would be critical.

With the structure now set, Team Auto, with input from the U.S. Treasury, the Automotive Task Force, and the Canadian EDC, fully negotiated the Master Sale and Purchase Agreement and completed its due diligence on the assets to be acquired and contracts to be assigned to the Purchaser. Simultaneously, GM, with significant assistance from Team Auto, negotiated a settlement and an amended collective bargaining agreement that contained significant cash and non-cash concessions from the UAW in exchange for, among other things, a 17.5 percent stake in New GM common stock.⁵²

50. See *infra* text accompanying note 110.

51. See 11 U.S.C. §§ 1113, 1114.

52. *In re Gen. Motors Corp.*, 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009).

Under the 363 Transaction, the equity of the Purchaser (i.e., New GM) would be distributed initially as follows⁵³:

	New Common Stock	Series A Preferred Stock	Warrants
U.S. Treasury	60.8%	\$2.1 billion	
Canadian EDC	11.7%	\$400 million	
UAW's new voluntary employee beneficiary association trust	17.5%	\$6.5 billion	6-year warrants to acquire 2.5% of New GM common stock with an exercise price based on \$75 billion total equity value
Old GM	10%, plus up to an additional 2% of New GM common stock if general unsecured claims exceed \$35 billion		Two sets of warrants, each to acquire 7.5% of outstanding New GM common stock with an exercise price of \$15 billion and \$30 billion total equity value

As proposed, the 363 Transaction would preserve the value of GM as an operating enterprise (i.e., going-concern value, not mere liquidation); avoid the domino effect upon other OEMs and Tier I suppliers that would follow a GM liquidation; continue employment for hundreds of thousands of persons at GM, as well as employees of those employers who rely upon GM; protect the many communities dependent on the continuation of the business; restore consumer confidence in GM and its products and dealers; and establish an automotive manufacturing business that would be viable, competitive, and reliable, as well as a standard bearer and bellwether industry considered essential for the United States.

C. THE GENERAL MOTORS BANKRUPTCY

In the face of this crisis, which threatened the liquidation of not only GM but also the automobile industry of the United States, GM filed for bankruptcy protection on June 1, 2009, in the U.S. Bankruptcy Court for the

53. *Id.* at 482–83.

Southern District of New York (the Bankruptcy Court) under Chapter 11 of the Bankruptcy Code.⁵⁴

1. Implementing the 363 Transaction

GM concurrently filed, with its voluntary petition for Chapter 11 relief, a motion with the Bankruptcy Court requesting approval of the 363 Transaction, under which the debtors would sell their operating assets to the Purchaser in exchange for a package of cash and non-cash consideration valued at over \$90 billion, subject to any higher or better offers.⁵⁵ On June 2, 2009, the Bankruptcy Court, after notice and a hearing, approved notice and other related procedures and set June 19, 2009 as the deadline for parties to object to the proposed transaction, June 22, 2009 as the deadline to submit any higher or better bids, and June 30, 2009 as the date for a hearing to consider approval of the transaction and opposition thereto.⁵⁶

Although opposing parties filed hundreds of objections to the 363 Transaction, GM received neither any meaningful bids nor any other alternative proposals to the 363 Transaction. Notably, no objector argued that the 363 Transaction was not in GM's best interests. The evidentiary record in this regard was undisputed. As the Bankruptcy Court found, "the only alternative to an immediate sale [was] liquidation," in which case unsecured creditors would recover nothing and secured creditors would receive only a portion of their claim.⁵⁷ Furthermore, the Bankruptcy Court found that the U.S. Treasury, with the support of the Canadian EDC, was the only entity prepared to finance the Chapter 11 cases, and such financing was conditioned on the satisfaction of certain milestones for completion of the sale transaction.⁵⁸

On July 5, 2009, the Bankruptcy Court issued a decision and order overruling all remaining objections, and authorized the 363 Transaction. The sale of GM's continuing business closed on July 10, 2009.⁵⁹ On the

54. Voluntary Petition for Chapter 11 (ECF No. 1).

55. Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Scheduling Sale Approval Hearing (ECF No. 92).

56. Order Pursuant to 11 U.S.C. §§ 105, 363, and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006 (I) Approving Procedures for Sale of Debtors' Assets Pursuant to Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser; (II) Scheduling Bid Deadline and Sale Hearing Date; (III) Establishing Assumption and Assignment Procedures; and (IV) Fixing Notice Procedures and Approving Form of Notice (ECF No. 274).

57. *In re* Gen. Motors Corp., 407 B.R. 463, 474, 493 (Bankr. S.D.N.Y. 2009).

58. *Id.* at 480.

59. Disclosure Statement for Debtors' Amended Joint Chapter 11 Plan at 31 (ECF No. 8023) [hereinafter Disclosure Statement].

closing date, the Purchaser took on the name General Motors Company (i.e., New GM), and the entity formerly known as General Motors Corporation changed its name to Motors Liquidation Company.⁶⁰ Less than eighteen months later, in November 2010, New GM conducted an initial public offering of stock held by the U.S. Treasury and Canadian EDC and returned to the big board of the New York Stock Exchange.⁶¹

2. “Old” General Motors and the Wind-Down Process

Motors Liquidation Company remained in Chapter 11 following the sale to manage the wind-down of the remaining assets, as well as the resolution of all remaining claims against it (i.e., all liabilities not assumed by New GM). These claims included many types of general unsecured claims (e.g., breach of contract and rejection damage claims, personal injury and product liability tort claims, off-site environmental liabilities, etc.) and certain secured, administrative, and priority claims. To fund the administration of Old GM’s wind-down and ensure that the 363 Transaction sale consideration, in the form of stock and warrants, would be available for Old GM’s general unsecured creditors, the U.S. Treasury and Canadian EDC agreed to provide \$1.175 billion in secured post-petition financing.⁶² This financing would be used for, among other things, the cleanup and maintenance of remaining real estate holdings.

To establish the potential universe of liabilities, Motors Liquidation Company filed with the Bankruptcy Court its schedules of assets and liabilities, on which it listed all the obligations that it believed it owed to its creditors.⁶³ To the extent a creditor disagreed with the amounts set forth on the schedules, it was required to file a proof of claim establishing the basis of such claim.⁶⁴ Creditors filed over 80,000 claims with asserted amounts aggregating more than \$246 billion.

The make-up of remaining creditors of Old GM was unique. In a typical large Chapter 11 case, creditors include trade vendors, contract counterparties, and financial institutions holding long-term debt. In this case, many of Old GM’s creditors were ordinary Americans—for example,

60. Amended Notice of Change of Case Caption, (ECF No. 3106).

61. Gen. Motors Corp., Registration Statement (Form S-1) (Aug. 18, 2010).

62. Disclosure Statement, *supra* note 59, at 28.

63. See Statement of Financial Affairs for Motors Liquidation Co. (f/k/a General Motors Corp.) (ECF No. 4060-78); see also Notice of Filing of Amendment to Motors Liquidation Co.’s Schedules of Assets and Liabilities (ECF No. 4161); see also Schedules of Assets and Liabilities for Remediation and Liability Management Company, Inc. (ECF No. 4244-47).

64. See Order Pursuant to Section 502(b)(9) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(3) Establishing the Deadline for Filing Proofs of Claim (Including Claims under Bankruptcy Code Section 503(b)(9)) and Procedures Relating Thereto and Approving the Form and Manner of Notice Thereof (ECF No. 4079); See also Order Pursuant to Section 502(b)(9) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(3) Establishing the Deadline for Filing Proofs of Claim (Including Claims under Bankruptcy Rule 503(b)(9)) and Procedures Relating Thereto and Approving the Form and Manner of Notice Thereof (ECF No. 4586).

middle class Americans who counted on GM as a blue chip haven for their most precious retirement savings.

Additionally, like every other major automotive manufacturer, GM faced thousands of lawsuits at any given time for alleged product defects resulting in road accidents. The size and breadth of GM, however, permitted it to accept significant risk for general liability exposure. It was self-insured for personal injury and most product liability claims up to \$35 million per claim. The lack of third-party insurance meant that these claimants, who had already suffered tragic losses, would be treated as any other creditor of GM and receive cents on the dollar.⁶⁵

To ease the burden of the claims reconciliation process, Old GM established omnibus claims objection and settlement procedures consistent with those used in other large Chapter 11 cases.⁶⁶ These procedures supplemented existing claims resolution procedures set forth in the Federal Rules of Bankruptcy Procedure to address the unprecedented number of claims filed.⁶⁷ Claimants were welcomed to participate in hearings by telephone, often at Old GM's cost in the case of individual claimants, which significantly reduced the burden of participating in the case. The ability to tell one's stories of the impact that the GM bankruptcy had had on one's life, through letters, pleadings, and arguments to the court, served for many as a needed cathartic exercise that would not have been available in a government takeover or other non-judicial process.

Old GM also implemented alternative dispute resolution procedures to assist in the resolution of claims.⁶⁸ These procedures established an informal negotiation period which would be followed by a mediation conducted by a member of a panel selected by the claimant. As of late 2011, this process had resulted in the consensual resolution of asserted liabilities totaling over \$10 billion.

As of June 30, 2011, Motors Liquidation Company has objected to more than 65,000 claims, settled hundreds of claims, and conducted

65. Unlike with the claims of other creditors that could be adjudicated quickly in the bankruptcy court, the bankruptcy court does not have jurisdiction to estimate or liquidate personal injury claims. 28 U.S.C. § 157(b)(5) (2006). Thus, claimants holding such claims were faced with the prospect of prosecuting full trials in other fora before any personal injury claimant would be able to participate in creditor distributions.

66. *See, e.g.*, Order Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 3007 and 9019(b) Authorizing the Debtors to (I) File Omnibus Claims Objections and (II) Establish Procedures for Settling Certain Claims (ECF No. 4180).

67. *Id.*

68. Order Pursuant to 11 U.S.C. § 105(a) and General Order M-390 Authorizing Implementation of Alternative Dispute Resolution Procedures, Including Mandatory Mediation (ECF No. 5037); Amended Order Pursuant to 11 U.S.C. § 105(a) and General Order M-390 Authorizing Implementation of Alternative Dispute Procedures, Including Mandatory Mediation (ECF No. 7558).

numerous mediations, all resulting in a reduction of general unsecured liabilities to an aggregate maximum of less than \$39.5 billion.⁶⁹

II. CRITICISMS OF THE GM “BAILOUT”

Naysayers of the GM rescue fall into three categories: (1) those who express a lack of confidence that GM could be run successfully from within the D.C. Beltway; (2) those who believe that certain constituents (e.g., the UAW) received beneficial treatment to the detriment of other more deserving groups; and (3) those who believe that the government had stepped over constitutional boundaries by providing financial taxpayer support to, and acquiring the equity of, GM.

A. THE OBAMA MOTOR CO.?

Does anyone really believe that politicians and bureaucrats in Washington can successfully steer a multi-national corporation to economic viability?

Congressman John Boehner⁷⁰

In the planning stages of the auto “bailout,” there was tremendous skepticism that the government could take effective control of GM without the process becoming a failed political exercise.⁷¹ With access to billions of dollars of taxpayer funds in play, the U.S. Treasury and the Automotive Task Force wielded extraordinary power to control not only whether GM and Chrysler could reorganize, but also to dictate how such a reorganization (or liquidation) would occur and which voting districts would be the net winners and losers.

In retrospect, a restructuring plan for GM easily could have been bogged down in debate over a variety of decisions that ultimately would have significant local impact, such as which plants to close, which vendor contracts to continue, and which brand names to retire. Critics were on firm ground in raising concerns about the ability of politicians to sacrifice their own constituencies for the common good. Yet despite the public nature of the bankruptcy filing, the restructuring of GM was largely unaffected by political grandstanding. There were three main reasons for this: the Automotive Task Force and Team Auto, the use of TARP funds, and the speed of the transaction.

1. The Automotive Task Force and Team Auto

First and foremost, the organization and utilization of the Automotive Task Force (and, in particular, of Team Auto) was a well-designed move to

69. Motors Liquidation Company GUC Trust Quarterly GUC Trust Reports as of June 30, 2011 (ECF No. 10648).

70. Congressman John Boehner, Remarks Regarding the Federal Bail-Out of GM and Chrysler (June 1, 2009).

71. See, e.g., *The Obama Motor Co.*, WALL ST. J., June 2, 2009, at A11.

divorce the negotiation of the actual terms of the sale transaction from the political arena. Team Auto was not the product of partisan politics, but rather, its members were recruited, in large part, from hedge funds and Wall Street law firms. These professionals understood distressed investing and ran the transaction much like they would a private equity deal. The Automotive Task Force mandated that Team Auto conduct due diligence, make reasonable business judgments, and fashion a transaction geared more toward maximizing the value of the reorganized enterprise than fulfilling noneconomic objectives.⁷² This is not to say that Team Auto was free from political pressures.⁷³ Nevertheless, given the momentum and speed of the transaction and the identity of the negotiators on the front lines, the restructuring process stayed on track.

Had the U.S. Treasury and the Automotive Task Force been driven by political concerns, they could have structured the requirements set forth for the \$13.4 billion bridge loan to preserve constituency interests. In contrast, the U.S. Treasury and the Automotive Task Force took a hard-nosed approach that required a restructured GM “not only to survive, but to succeed in this competitive global market[.]”⁷⁴ In doing so, the Automotive Task Force created accountability to generate positive cash flow and maintain a competitive advantage over other OEMs.⁷⁵ Noticeably absent from the sale agreement were “pork barrel” conditions or terms improvidently favoring specific constituencies. As a point of comparison, the French government conditioned €6.5 billion in loans made to French automotive manufacturers Peugeot S.A. and Renault S.A. upon no plant closures or compulsory work force reductions during the five-year terms of the loans, despite some industry experts suggesting that the French automotive industry has one-third more jobs and plants than it needs.⁷⁶ Other European countries have also raised warnings about plant closures by linking jobs to bailout aid.⁷⁷ For example, the restructuring of GM’s European Opel operations became a tug-of-war between Germany, the United Kingdom, and Spain as each country sought to preserve factories located in their respective countries irrespective of whether a business case

72. Henderson Affidavit, *supra* note 6, ¶ 60–61.

73. See generally STEVEN RATTNER, OVERHAUL: AN INSIDER’S ACCOUNT OF THE OBAMA ADMINISTRATION’S EMERGENCY RESCUE OF THE AUTO INDUSTRY 238–39, 246–47, 262–63 (Houghton Mifflin Harcourt 2010).

74. President Barack H. Obama, Remarks on the American Automotive Industry 4 (Mar. 30, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-american-automotive-industry-33009>; see also Henderson Affidavit, *supra* note 6, ¶ 63.

75. Wilson Declaration, *supra* note 36 (Obama Administration New Path to Viability for GM & Chrysler, Detailed Findings on GM and Chrysler Plans).

76. John Reed & Anousha Sakoui, *Carmaking: A Fork in the Road*, FIN. TIMES, Dec.10, 2009, at 7.

77. *Id.*

existed for the continued operation of the factory.⁷⁸ The GM sale and the loan transactions generally were free from such conditions.

2. The Use of TARP

The fact that Congress pre-authorized the mechanism by which the U.S. Treasury would provide funding for the GM bankruptcy and the subsequent wind-down served, without a doubt, to reduce political interference with completion of the transaction. One could easily surmise that if the funding of GM and the sale transaction was put before Congress for approval independently from TARP, the ensuing debate over the specifics of the surviving company's business plan could have either resulted in a larger, less nimble, and more precarious enterprise, or could have damaged value simply by bogging down and delaying the transaction to the detriment of value.

3. The Speed of the Transaction

By the time GM filed its Chapter 11 case on June 1, 2009, GM had fully negotiated the structure and terms of the sale with the U.S. Treasury. GM also reached agreements with an ad hoc group of bondholders and the UAW. The Bankruptcy Court approved the transaction, and the parties consummated the sale, just thirty-nine days after the commencement of the Chapter 11 case. The speed at which this case was conducted was not designed to squelch political opposition, but was necessary for appropriate business concerns.⁷⁹

Although the Bankruptcy Court approval process played out publicly, and was the subject of a three-day evidentiary hearing on the propriety of the transaction, the speed at which the sale was conducted left little time for special interest groups to mobilize and exert pressure to modify the terms of the 363 Transaction. Accordingly, the economic underpinnings of the restructuring negotiated by Team Auto remained fundamentally unaltered.

78. See Paul Betts, *Spain Risks Losing to Germany and UK in Opel Game*, FIN. TIMES, Oct. 16, 2009, at 16.

79. Harvey R. Miller, a senior partner at Weil, Gotshal & Manges, LLP, stated to the Bankruptcy Court at the sale hearing:

[I]f there's going to be a recovery of value for the assets of General Motors, it's necessary in an absolute sense that the assets be sold as quickly as possible to a purchaser who will immediately commence and resume the operations of a new General Motors. That is the primary objective of these Chapter 11 cases and why General Motors has elected to proceed pursuant to Section 363 of the Bankruptcy Code to sell substantially all of its assets.

Transcript of Hearing at 38:18–25 (ECF No. 374).

B. IN ORDER TO FORM A MORE PERFECT UNION?

The truth is that the bailouts and bankruptcy processes of GM and Chrysler were riddled with unethical conduct and blatantly favored the politically powerful UAW over other classes.

Mark Modica⁸⁰

Opponents of the 363 Transaction allege that, relative to other creditor constituencies, the UAW and its membership received a “sweetheart” deal and obtained better treatment than they were entitled. The deal struck between New GM and the UAW, however, exemplifies the hardball and realistic economic approach undertaken by the Automotive Task Force and Team Auto. The legal requirements of the National Labor Relations Act (NLRA) and certain provisions of the Bankruptcy Code provided the UAW with significant leverage and a seat at the table of GM’s restructuring. Before exploring the details of the UAW negotiations, it is beneficial to examine the legal framework within which GM and the U.S. government needed to engage the UAW.

1. Treatment of Collective Bargaining Agreements in Bankruptcy

A Chapter 11 debtor may generally either “assume” or “reject” any executory contract as part of its reorganization process, based on its assessment of whether the contract provides a benefit to or is necessary for the company’s reorganization.⁸¹ While there is no definition for “executory contracts” in the Bankruptcy Code, an “executory contract” is typically viewed as a contract by which the parties owe material obligations to one another.⁸² Collective bargaining agreements are considered executory contracts.

By assumption of a contract, a company assumes all liabilities under the agreement and the agreement continues forward with the reorganized

80. Mark Modica, *Let’s Not Forget Ethical Shortcomings of Auto Bailout*, NAT’L LEGAL AND POLICY CTR. (June 28, 2011, 8:53 AM), <http://nlpc.org/stories/2011/06/28/ex-car-czar%E2%80%99s-book-exposes-ethical-shortcomings-gm-bailout>.

81. 11 U.S.C. § 365 (2006).

82. Professor Countryman’s definition of executory contract was expressed as follows: “A contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.” Vern Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439, 460 (1973); *see also In re U.S. Wireless Data, Inc.*, 547 F.3d 484, 488 n.1 (2d Cir. 2008); *In re Texscan Corp.*, 976 F.2d 1269, 1272 (9th Cir. 1992); *Cameron v. Pfaff Plumbing & Heating, Inc.*, 966 F.2d 414, 416 (8th Cir. 1992); *Sharon Steel Corp. v. Nat’l Fuel Distribution Corp.*, 872 F.2d 36, 39 (3d Cir. 1989); *Collingwood Grain Inc. v. Coast Trading Inc. (In re Coast Trading Co.)*, 744 F.2d 686, 692 (9th Cir. 1984).

company after it exits bankruptcy.⁸³ Debtors typically assume contracts which are profitable or otherwise provide some necessary benefit to the company (e.g., a below market rate lease). In contrast, by rejecting a contract, a company is relieved of all future obligations under the contract, and all claims arising from the contract are treated as claims arising prior to the bankruptcy case.⁸⁴ Debtors typically reject contracts where the debtor's obligations are more burdensome than the totality of future benefits (e.g., an above market supply contract). Whether a debtor could assume or reject an agreement is generally subject to the debtor's business judgment.⁸⁵ The mere threat of rejection often provides valuable leverage for a debtor to renegotiate the terms of burdensome executory contracts.

Prior to the 1984 amendments to the Bankruptcy Code that codified § 1113, the majority of federal circuit courts of appeals agreed that under the Bankruptcy Code, collective bargaining agreements could be rejected like any other executory contract. These courts, however, differed over whether to apply a stricter standard.⁸⁶ In *NLRB v. Bildisco & Bildisco*, the Supreme Court held that a debtor may reject a collective bargaining agreement, but that the bankruptcy court should apply a higher standard than that applied to the rejection of other types of executory contracts.⁸⁷ The Court also held that a bankruptcy court should approve rejection of a collective bargaining agreement if the debtor can demonstrate that the agreement "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the contract labor."⁸⁸ The Court further ruled that rejection is appropriate when "reasonable efforts to negotiate a

83. 11 U.S.C. § 365; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32 (1984); *see also* *Adventure Res. v. Holland*, 137 F.3d 786 (4th Cir. 1998); *Collingwood Grain Inc. v. Coast Trading Inc. (In re Coast Trading Co.)*, 744 F.2d 686, 692–93 (9th Cir. 1984).

84. 11 U.S.C. § 365(g).

85. *See* *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985); *In re Old Carco LLC*, 406 B.R. 180, 188 (Bankr. S.D.N.Y. 2009); *In re Pilgrim's Pride Corp.*, 403 B.R. 413, 422 (Bankr. N.D. Tex. 2009).

86. Federal circuit courts of appeals have discussed this issue:

Compare *NLRB v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 84 (3d Cir. 1982) (holding that the rejection of a collective bargaining agreement is not qualified by the restrictions of § 8(d) of the NLRA on modification), *aff'd*, 465 U.S. 513 (1984), *with* *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698, 707 (2d Cir. 1975) (requiring debtor in possession to show not only that the collective bargaining agreement is burdensome to the estate, but also that the equities balance in favor of rejection), *and In re Rath Packing Co.*, 36 B.R. 979, 988 (Bankr. N.D. Iowa 1984) (stating its "reluctance to accept the rationale for [the] heightened scrutiny" given to the rejection of labor agreements), *aff'd*, 48 B.R. 315 (N.D. Iowa 1985).

Mark A. Jacoby, Michael K. Kam & Jose Singer-Freeman, *Collective Bargaining Agreements, Employee Benefits, and Executive Compensation*, in 2 WEIL, GOTSHAL & MANGES LLP, REORGANIZING FAILING BUSINESSES 24-5 n.7 (rev. ed. 2006).

87. *Bildisco*, 465 U.S. at 516, 524.

88. *Id.* at 526.

voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.”⁸⁹

Organized labor lobbied Congress to overturn *Bildisco* and change the standard for rejecting collective bargaining agreements.⁹⁰ As a result, in 1984, Congress amended the Bankruptcy Code to include a specific provision that articulated a new, more labor-friendly standard, as well as procedures, for rejecting collective bargaining agreements; these were codified in § 1113 of the Bankruptcy Code. Section 1113 sets forth the exclusive procedures pursuant to which a debtor may reject a collective bargaining agreement.⁹¹ Congress also shifted jurisdiction and oversight from the National Labor Relations Board to the federal bankruptcy courts.⁹²

Section 1113 of the Bankruptcy Code requires that a debtor seek bankruptcy court approval to reject a collective bargaining agreement.⁹³ To obtain bankruptcy court approval to reject, the debtor must satisfy certain requirements.⁹⁴ Until these requirements are met, the debtor is prohibited from unilaterally altering any term.⁹⁵

First, prior to applying to a bankruptcy court for rejection, the debtor must “make a proposal to the [union], based on the most complete and reliable information available at the time, . . . which [identifies] those modifications [to] the employees['] benefits and protections that are necessary to permit the reorganization of the debtor.”⁹⁶ The proposal must

89. *Id.*

90. Jacoby, Kam & Singer-Freeman, *supra* note 86, at 2.

91. 11 U.S.C. § 1113(a) (2006).

92. Jacoby, Kam & Singer-Freeman, *supra* note 86, at 24-8.

93. 11 U.S.C. § 1113; *see* Jacoby, Kam & Singer-Freeman, *supra* note 86, at 24-6 n.12 (citing 11 U.S.C. § 1113(d)(2)) (“If the bankruptcy court does not rule on the application for rejection within thirty days after the ‘date of the commencement of the hearing,’ the debtor may reject or modify the collective bargaining agreement pending the ruling.”).

94. *See* 11 U.S.C. § 1113.

95. *Id.* § 1113(f). If the debtor is able to show that without emergency interim relief from a collective bargaining agreement the debtor will be required to cease business operations, § 1113(e) authorizes such relief. *Id.* § 1113(e).

96. 11 U.S.C. § 1113(b)(1)(A). “[T]he ‘necessary’ requirement has been the subject of vigorous judicial and academic debate.” Jacoby, Kam & Singer-Freeman, *supra* note 86, at 24-6 (footnote omitted). In addition,

[c]ourts have questioned whether “necessary” means that the modifications must be “essential” to the debtor’s business, and to what goal must they be necessary. *See* Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82[, 88-90] (2d Cir. 1987); Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074[, 1086-89] (3d Cir. 1986); Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884[, 892-97] (B.A.P. 8th Cir. 2001); *In re* Tex. Sheet Metals, Inc., 90 B.R. 260, 265 (Bankr. S.D. Tex. 1988); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1113.06(2) (Lawrence P. King, Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005); Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 526-34 (1994); Anne J. McClain, Note, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J. 191[, 206-08] (1991) (criticizing courts for focusing on necessary requirement); Kay M. Rector,

assure “that all creditors, the debtor and all of the affected parties [will be] treated fairly and equitably.”⁹⁷ The debtor must also provide to the union “relevant information . . . necessary to evaluate the proposal.”⁹⁸ Additionally, “[b]etween the time of the making of the proposal and the time of the hearing on the rejection of the existing collective bargaining agreement, the debtor must meet and confer with the union in good faith in an attempt to reach a voluntary settlement.”⁹⁹

A bankruptcy court may authorize rejection only if the union has refused to accept the debtor’s proposal without good cause and the balance of the equities must clearly favor rejection of the collective bargaining agreement.¹⁰⁰ Although courts differ on what constitutes “good cause,” a debtor does not need to show bad faith.¹⁰¹ Rather, if a debtor can demonstrate that a union has rejected a proposal that meets its needs and preserves the debtor’s required savings, the bankruptcy court may find that the union has rejected the proposal without “good cause.”¹⁰²

Section 1113 makes rejection of a collective bargaining agreement an extraordinarily difficult process. In fact, compliance with § 1113 would be virtually impossible in the timeframe that would be available in the 363 Transaction. Further, the NLRA requires a purchaser of a business to negotiate a successor agreement with a union in good faith.¹⁰³ Given the precarious nature of GM, it is highly doubtful whether GM could have survived a prolonged renegotiation process.

2. Retiring Retiree Benefits

Section 1114 similarly shields retiree benefits from modification during the Chapter 11 process. The Bankruptcy Code defines “retiree benefits” as,

Comment, *How Necessary Is “Necessary” Under Section 1113? Truck Drivers Local 807 v. Carey Transportation*, 13 J. CORP. L. 941, 947[-]52 (1988).

Id. at 24-6 n.16.

97. 11 U.S.C. § 1113(b)(1)(A); *In re Bruno’s Supermarkets, LLC*, 2009 Bankr. LEXIS 1366 *10-12 (Bankr. N.D. Ala. Apr. 27, 2009); *In re Am. Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984); *Nat’l Forge Co. v. Indep. Union of Nat’l Forge Emps. (In re Nat’l Forge Co.)*, 289 B.R. 803, 809-10 (Bankr. W.D. Pa. 2003); *In re Elec. Contracting Servs. Co.*, 305 B.R. 22, 26 (Bankr. D. Colo. 2003); *In re Mesaba Aviation, Inc.*, 341 B.R. 693, 748-49 (Bankr. D. Minn. 2006).

98. 11 U.S.C. § 1113(b)(1)(B).

99. Jacoby, Kam & Singer-Freeman, *supra* note 86, at 24-7.

100. *Id.* at 24-8.

101. *Id.*

102. *See In re Valley Steel Prods. Co.*, 142 B.R. 337, 341-42 (Bankr. E.D. Mo. 1992) (finding no “good cause” where the union “ignored the [d]ebtors’ [p]roposals and [did not make] any efforts to negotiate or provide a counter proposal”); *In re Blue Diamond Coal Co.*, 131 B.R. 633, 647 (Bankr. E.D. Tenn. 1991) (finding union did not have “good cause” for refusing proposal for modifications of collective bargaining agreement where provisions inhibiting debtor’s outsourcing would be eliminated).

103. *See* 29 U.S.C. § 158(d) (2006).

payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program . . . maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.¹⁰⁴

Pursuant to § 1114(c)(1), a labor organization or union is the “authorized representative” for those “receiving retiree benefits covered by a collective bargaining agreement to which such labor organization is a [party], unless . . . [the union] elects not to serve . . . or the court, upon motion by any party in interest, . . . determines that different representation . . . is appropriate.”¹⁰⁵ Section 1114(c)(2) of the Bankruptcy Code provides that if a labor organization elects not to serve as the authorized representative, the court shall, “upon a motion by any party in interest and after notice and a hearing, . . . appoint a committee of retired employees [to represent all such retirees] if the debtor seeks to modify or [terminate] retiree benefits.”¹⁰⁶ To the extent the retiree benefits received are not covered by a collective bargaining agreement, the bankruptcy court appoints an authorized representative of the retirees to negotiate with the debtor.¹⁰⁷ A committee created pursuant to § 1114 has “the same rights, powers, and duties” as creditors’ and equity security holders’ committees appointed under § 1102 of the Bankruptcy Code.¹⁰⁸

A debtor is required to timely pay and may not modify any retiree benefits unless the court, on motion of the debtor or the authorized representative, authorizes modification. These modifications would be authorized only after certain conditions are met or if the debtor and the authorized representative agree to such modifications.¹⁰⁹ The process for involuntary modification is similar to the process under § 1113 of the Bankruptcy Code.

Like § 1113, § 1114 effectively ties the hands of Chapter 11 debtors that need to move expeditiously through the Chapter 11 process. For the debtor, litigation is often not a prudent course unless survival depends on the requested modifications.

104. 11 U.S.C. § 1114(a) (2006).

105. *Id.* § 1114(c)(1).

106. *Id.* § 1114(c)(2).

107. *Id.* § 1114(d).

108. *Id.* § 1114(b)(2).

109. *Id.* § 1114(e), (f).

3. Negotiating with the UAW

The UAW represented most of GM's unionized employees.¹¹⁰ It was also GM's largest unsecured creditor because of the prior restructuring of GM's healthcare obligations through the use of voluntary employee beneficiary associations (VEBAs) under § 501(c)(9) of the Internal Revenue Code of 1986.¹¹¹ Given §§ 1113 and 1114 of the Bankruptcy Code and other applicable law, the UAW could have demanded that all claims arising from their collective bargaining agreements and retiree benefit plans ride through any GM reorganization unscathed. As a point of reference, numerous other Chapter 11 debtors have gone through arduous litigation, only to leave their collective bargaining agreements and retiree benefits substantially untouched.¹¹²

The UAW could have also tapped its considerable political capital to impose significant pressure for many elected officials, including President Obama. But, from the beginning—including the initial December 2008 bridge loan—the U.S. government conditioned any funding on GM coming to terms with its legacy employee obligations and a reduction of unnecessary production capacity (i.e., layoffs). The UAW's collective bargaining agreement and GM's retiree benefit plans needed to be recut.

110. Approximately 68 percent of GM's U.S. unionized employees were represented by the UAW at the time of the filing of the Chapter 11 cases. See Henderson Affidavit, *supra* note 6, ¶ 23.

111. See *In re Gen. Motors Corp.*, 407 B.R. 463, 473 (Bankr. S.D.N.Y. 2009).

112. The Chapter 11 cases of The Delphi Corporation (Delphi) are an example of the typical length of negotiations over contract modifications:

Soon after the commencement of the chapter 11 cases, Delphi obtained a scheduling order setting forth certain requirements of Delphi and its unions [(including the UAW)] that included the submission of written proposals by Delphi to its unions setting forth proposed modifications deemed necessary by Delphi to enable its reorganization. It set a two-month deadline for Delphi to file section 1113 rejection motions if the parties were unable to achieve a consensual agreement. The parties extended the deadline twice while they engaged in negotiations as required by section 1113(b)(1). . . . The unions regularly stated that their members would strike if Delphi obtained court authorization to reject their respective [collective bargaining agreements] and attempted to impose modifications to wage rates, work rules, and benefits. . . . After months of negotiations, Delphi and the [UAW] agreed on an incentive program that would encourage eligible workers to retire early in exchange for lump sum payments, substantially subsidized by GM, thereby reducing the ongoing labor force. In an effort to resolve remaining issues, Delphi filed its section 1113 rejection motion. . . . In the face of persistent and caustic comments by union leaders that their membership would strike if Delphi attempted to impose modifications of the [collective bargaining agreement] postrejection, Delphi indefinitely adjourned the prosecution of the rejection motions. Negotiations resumed with the unions with GM's participation. Almost one year later, Delphi and the UAW, the principal representative of Delphi's organized employees, agreed to amendments of its [collective bargaining agreement].

Harvey R. Miller et al., *The State of the Unions in Reorganization and Restructuring Cases*, 15 AM. BANKR. INST. L. REV. 465, 493–94 (2007).

Plants needed to be closed. The UAW and its members would need to share in the sacrifice.

While some critics may argue that the UAW got a “sweetheart” deal, the UAW did make significant concessions, including, among other things, reductions in overtime pay, bonuses, and benefits.¹¹³ The UAW also created greater competitive flexibility for GM to increase and decrease production capacity as necessary by permitting temporary flex employees, suspending the job security program, and creating new special attrition plans to reduce head count.¹¹⁴ A number of retiree benefits were also reduced or eliminated.¹¹⁵ In light of the aforementioned legal constraints and the required timing of the transaction, any suggestion that the deal for the UAW was too rich should be leveled at the UAW and not the U.S. government that was operating within the confines of the applicable law.

C. A NEED FOR SPEED?

[A] lengthy chapter 11 case for the Debtors is not an option. . . . In fact, the notion that a reorganization with a plan confirmation could be completed in 90 days in a case of this size and complexity is ludicrous . . .

Hon. Robert E. Gerber¹¹⁶

Another concern raised about the GM bankruptcy process was the hasty nature of the 363 Transaction, which potentially sacrificed creditors’ rights in the process. The critics would argue that a transaction of this magnitude should only be conducted under a plan of reorganization where creditors have the right to challenge the impact of the proposed transaction on the treatment of their individual claims.

Several factors, including the lack of additional financing and the concern over erosion in value, however, dictated the timing of the transaction. In fact, such timing is in line with other emergency sales under § 363 of the Bankruptcy Code.¹¹⁷ Had any credible party expressed an interest in funding an alternative transaction, the Bankruptcy Court may have put the brakes on, if at all possible. It is worth noting that just thirty days prior to the GM Chapter 11 case, Chrysler, one of the other “Big

113. Declaration of David Curson, Ex. A, at 2, 8–9 (ECF No. 2518) (UAW General Motors – Modifications to 2007 Agreement and Addendum to VEBA Agreement).

114. *Id.* at 2, 3, 8.

115. *Id.* at 11–14.

116. *In re Gen. Motors Corp.*, 407 B.R. at 485.

117. *See, e.g., In re Lehman Bros. Holdings Inc.*, 407 B.R. 77, 80, 82, 86 (S.D.N.Y. 2009) (affirming bankruptcy court’s approval of sale of debtors’ investment banking business three days after the filing of sale motion); *see also In re Stone Barn Manhattan LLC*, 405 B.R. 68, 71–72 (Bankr. S.D.N.Y. 2009) (approving sale of debtors’ entire retail business forty-four days after filing); *In re Refco, Inc.*, 354 B.R. 515, 517 (B.A.P. 8th Cir. 2006) (approving sale of regulated commodities futures merchant bank twenty-eight days after commencement of bankruptcy case).

Three,” had undergone substantially the same process—a sale of all operating assets under a very tight deadline.¹¹⁸

1. The Bankruptcy Sales Process

A debtor may sell substantially all of its assets pursuant to § 363 of the Bankruptcy Code or through a Chapter 11 plan. A Chapter 11 plan, however, requires substantially more time to approve and implement.

Section 363 of the Bankruptcy Code permits a debtor to sell assets outside the ordinary course of business upon notice and a hearing. While the plain language of § 363(b) of the Bankruptcy Code appears to provide a debtor with the unfettered right to dispose of any or all of its assets, courts have required that the decision to sell assets outside the ordinary course of business be based on the debtor’s “reasonable business judgment.”¹¹⁹ Such sales can be of individual items or substantially all of a debtor’s assets. Although for the latter to be permitted, there must be an articulated reason not to conduct the sale through a plan, such as in the case where the assets are perishable or constitute “melting ice cubes.”¹²⁰ To demonstrate sound business judgment, courts typically require a debtor to market the asset to obtain the highest and best offer to maximize the proceeds from the sale for the benefit of creditors and all parties in interest.

A sale of substantially all of a debtor’s assets can be subject to attack on the basis that it constitutes an impermissible *sub rosa* plan. The term *sub rosa* is generally used in this context to describe a post-petition, pre-

118. *In re Chrysler LLC (Chrysler I)*, 405 B.R. 84, 92–93 (Bankr. S.D.N.Y. 2009), *aff’d*, 2009 U.S. App. LEXIS 12351 (2d Cir. June 5, 2009) (summary order) and 576 F.3d 108 (2d Cir. 2009) (supplementary opinion), *vacated as moot*, *Ind. State Police Pension Trust v. Chrysler LLC (Chrysler II)*, 130 S. Ct. 1015, 1015 (2009). Although the judgment recorded at *Chrysler I* has been vacated, the Court’s rationale in *Chrysler I* remains persuasive and should arguably be given *stare decisis* effect. See, for example, Justice Powell’s dissenting opinion in *Davis v. Cty. of Los Angeles*:

Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of [that] Circuit.

440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting).

119. See generally *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel)*, 722 F.2d 1063, 1070 (2d Cir. 1983) (stating that “there must be some articulated business justification, other than appeasement of major creditors, for using, selling or leasing property out of the ordinary course of business”); *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2007) (noting that in the Second Circuit, a 363(b) sale is permissible if the judge finds that there is sufficient evidence that there is a good business reason for the sale); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (upholding the bankruptcy court’s decision that an “articulated business reason justified the sale” of the debtor’s radio station); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 175–76 (D. Del. 1991) (noting that the courts in the Third Circuit have adopted the sound business purpose test).

120. *In re Lionel*, 722 F.2d at 1071 (2d Cir. 1983).

confirmation transaction outside the ordinary course of business which allocates value to specific creditors, a process that is more appropriately implemented pursuant to a Chapter 11 plan.¹²¹ A sale of substantially all of a debtor's assets under § 363 of the Bankruptcy Code is permitted where the assets are perishable, provided that the debtor is free to allocate sale proceeds as it sees fit under a subsequently filed Chapter 11 plan. Nevertheless, although pursuant to § 363(f) of the Bankruptcy Code a purchaser is free to assume whatever liabilities it chooses, it cannot designate how different creditors or equity holders will be treated in a debtor's Chapter 11 plan.¹²²

In *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, a proposed sale contemplated certain agreements between Braniff, the debtor, and a group consisting of certain unsecured and secured creditors of Braniff, and the transfer of certain assets to Pacific Southwest Airlines (PSA), in exchange for travel vouchers, unsecured notes, and a profit participation in PSA's proposed operation of the assets (the PSA Agreement). Both the bankruptcy court and the district court had approved the transaction, but the Fifth Circuit reversed, concluding that the transaction was beyond the scope permitted by § 363 of the Bankruptcy Code and had established the terms of a plan of reorganization *sub rosa*. The *Braniff* court was most troubled by a provision within the PSA Agreement requiring that the travel vouchers be used only in a future Braniff reorganization, and be issued only to former Braniff employees, shareholders, or unsecured creditors. According to the *Braniff* court, the PSA Agreement not only changed the composition of Braniff's assets, but had the practical effect of dictating the terms of any future reorganization plan by requiring allocation of the vouchers according to the PSA Agreement, at the risk of forfeiting a valuable asset.¹²³ The *Braniff* court was also troubled by a provision in the PSA Agreement requiring "secured creditors to vote a portion of their deficiency claim in favor of any future reorganization plan approved by a majority of the unsecured creditor's committee [and a provision providing] for the release of claims by all parties against Braniff, its secured creditors, and its officers and directors."¹²⁴ In essence, the sale proposed in *Braniff* would have: (1)

121. See Craig A. Sloane, *Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 BANKR. DEV. J. 37, 37-38 (1999).

122. *Chrysler I*, 576 F.3d at 126 (affirming the bankruptcy court's approval of the sale over objections that a sale free and clear of any interests should not include successor liability claims explaining that the "possibility of transferring assets free and clear of existing tort liability was a critical inducement to the [s]ale"); see also *Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 169 n.3 (2d Cir. 2005) ("Section 363 permits sales of assets free and clear of claims and interests. It thus allows purchasers . . . to acquire assets without any accompanying liabilities.").

123. *In re Braniff Airways, Inc.*, 700 F.2d 935, 939-40.

124. *Id.*

controlled distributions in a future plan of reorganization; (2) obligated secured creditors to vote for such plan; and (3) released claims of all parties against the debtors, its officers and directors, and the secured creditors. The *Braniff* court held that when a proposed sale transaction dictates specific terms of an ensuing reorganization plan, “the parties . . . must scale the hurdles erected in Chapter 11.”¹²⁵ The *Braniff* court concluded that, were the transaction approved, little would remain for further reorganization: “These considerations reinforce our view that this is in fact a reorganization,” and not a mere asset sale within the confines of § 363(b) of the Bankruptcy Code.¹²⁶

The tension between the broad authority granted to a debtor in § 363(b), and the rigorous solicitation and approval process of a Chapter 11 plan, has been a source of significant debate, most vociferously when the sale involves substantially all of a debtor’s assets. Most courts to consider the issue have concluded that a debtor may dispose of substantially all of its assets pursuant to § 363(b) of the Bankruptcy Code when circumstances dictate an expeditious transaction.¹²⁷ Courts typically apply stricter scrutiny to a sale of substantially all of a debtor’s assets because this type of transaction may provide an attractive opportunity to circumvent the protections that the Bankruptcy Code provides for reorganizations.¹²⁸

2. Expediency of the 363 Transaction

As GM’s largest secured creditor, the U.S. government¹²⁹ dedicated substantial time and effort to negotiating with the debtors to preserve the going-concern value of the GM enterprise. Surveys taken prior to the GM bankruptcy showed that consumers needed to have confidence in GM’s products (i.e., that a GM would exist in the future that would stand behind its products).¹³⁰ Both GM and the U.S. Treasury were well aware that consumers would hesitate when purchasing cars and trucks from a bankrupt company, and that the longer GM was in bankruptcy, the more significant the potential for erosion of the value of its assets. GM’s assets were fragile and a quick § 363(b) sale was not only warranted, but necessary to preserve

125. *Id.* at 940 (“*See e.g.*[.] 11 U.S.C. § 1125 [(2006)] (disclosure requirements); *id.* § 1126 (voting); *id.* § 1129(a)(7) (best interests of creditors test); *id.* § 1129(b)(2)(B) (absolute priority rule).”).

126. *Id.*

127. *See, e.g.*, *Mission Iowa Wind Co. v. Enron Corp. (In re Enron Corp.)*, 291 B.R. 39, 43 (S.D.N.Y. 2003) (“Where a debtor attempts to sell substantially all of its assets pursuant to 11 U.S.C. § 363(b), instead of waiting for confirmation of a reorganization plan and the safeguards that that process provides, more than cursory scrutiny is required by the [b]ankruptcy [c]ourt.”).

128. *See In re New Hampshire Elec. Coop., Inc.*, 131 B.R. 249, 252 (Bankr. D.N.H. 1991) (“[T]he closer the transaction gets to the heart of the reorganization process, the more scrutiny the [c]ourt has to give that matter.”).

129. *In re Gen. Motors Corp.*, 407 B.R. 463, 473 (Bankr. S.D.N.Y. 2009).

130. Viability Plan II, *supra* note 33, at 36, 103, 112–17.

the going-concern value of GM. In fact, the linchpin for the sale hearing before the Bankruptcy Court was the uncontroverted testimony that any delay in the § 363 sale would result in continuing and increasing revenue erosion and further loss of market share to other domestic and foreign manufacturers that were not suffering aggravated financial distress.¹³¹

After a three-day hearing, with more than 850 objections having been filed and addressed, the Bankruptcy Court approved the sale to New GM on July 5, 2009. The Bankruptcy Court found that absent an immediate sale, it was highly probable that GM would have to liquidate.¹³² There were no other realistic alternatives available. There were no merger partners, acquirers, or investors willing and able to purchase GM's business. Other than the U.S. Treasury and the Canadian EDC, there were no lenders willing and able to finance the debtor's continued operations. The Bankruptcy Court further found that no debtor-in-possession financing was available in the absence of the 363 Transaction.¹³³ No entity—other than the U.S. Treasury—had the wherewithal or the inclination to provide such financing.¹³⁴

The *sub rosa* argument had been articulated by several creditors, principally bondholders. In the end, GM was able to establish that the sale transaction did not dictate the terms of a plan of reorganization and that the estate's portion of the sale consideration was unencumbered from any contractual condition or requirement. The Bankruptcy Court observed:

[A] debtor cannot enter into a transaction that would amount to a sub rosa plan of reorganization or an attempt to circumvent the chapter 11 requirements for confirmation of a plan of reorganization. If, however, the transaction has a proper business justification which has the potential to

131. The Court noted:

Observers might differ as to the causes or opine that there were others as well, and might differ especially with respect to which causes were most important. But what is clear is that, especially in 2008 and 2009, GM suffered a steep erosion in revenues, significant operating losses, and a dramatic loss of liquidity, putting its future in grave jeopardy.

In re Gen. Motors Corp., 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009).

132. The Court stated:

As nobody can seriously dispute, the only alternative to an immediate sale is liquidation—a disastrous result for GM's creditors, its employees, the suppliers who depend on GM for their own existence, and the communities in which GM operates. In the event of a liquidation, creditors now trying to increase their incremental recoveries would get nothing.

Id. at 474.

133. *See id.* at 491–92 (“If the 363 Transaction [was] disapproved, GM [would have lost] its funding and its liquidity . . . and its only alternative [would have been] liquidation.”).

134. *Id.* at 480.

lead toward confirmation of a plan and is not to evade the plan confirmation process, the transaction may be authorized.¹³⁵

As to the contention that the 363 Transaction was a *sub rosa* plan because the Purchaser was allowed to “cherry-pick” certain liabilities for assumption, and failed to provide consideration to all of GM’s stakeholders, the court noted that “that does not rise to the level of establishing a *sub rosa* plan. The objectors’ real problem is with the decisions of the [p]urchaser, not with the [d]ebtor[s], nor with any violation of the [Bankruptcy] Code or caselaw.”¹³⁶

The Bankruptcy Court was not persuaded by arguments that the sale of substantially all of the debtor’s assets could only be achieved under a Chapter 11 plan. The Bankruptcy Court noted that § 363(b)

does not provide, in words or substance, that it may not be used in chapter 11 cases for dispositions of property exceeding any particular size, or where the property is of such importance that it should alternatively be disposed of under a plan. Nor does any other provision of the [Bankruptcy] Code so provide.¹³⁷

D. TRANSPARENCY IN THE PROCESS

An underappreciated aspect of the GM Chapter 11 cases is the stark transparency of the entire process. All aspects of GM’s Chapter 11 cases, including the 363 Transaction, were subject to notice and an opportunity to be heard by a neutral third-party tribunal (i.e., the Bankruptcy Court). As with many other time sensitive matters in the Bankruptcy Court, so was substantial discovery on an expedited basis (both document production and depositions) made available to opponents of the 363 Transaction.¹³⁸ The bankruptcy process also provided opposing parties a means to appeal if they believed that the Bankruptcy Court erred. Several appeals of the order approving the 363 Transaction were in fact brought.¹³⁹ The entire process was a matter of public record and was subject to public review.

135. *Id.* at 491 (internal quotation marks omitted).

136. *Id.* at 496.

137. *Id.* at 486.

138. *See Parker v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 430 B.R. 65, 73–74 (S.D.N.Y. 2010), *appeal dismissed as moot*, No. 10-4882-bk, doc. 90 (2d Cir. July 28, 2011), *cert. denied*, 2012 WL 33339 (Jan. 9, 2011) (affirming the 363 Transaction over objection of a purported GM bondholder and rejecting appellant’s argument that the speed of the 363 Transaction violated his due process rights because the record showed that over a period of ten days, GM provided full and prompt discovery to every party that requested it, including appellant).

139. Appeals were filed by various parties including one of GM’s labor unions, the IUE-CWA, an ad hoc committee of asbestos claimants, a group of product liability tort claimants, and certain pro se bondholders. *See, e.g.*, Notice of Appeal of Order Authorizing the Sale of Assets Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC (ECF No. 2988); Joinder of Mark Buttita, as Personal Representative of Salvatore Buttita, to the Ad Hoc Committee of Asbestos Personal Injury Claimants’ Motion for an Order Certifying Sale Order for

Although some might criticize the expedited nature of the 363 Transaction, opposing parties still voiced their opposition in a meaningful manner, and the Bankruptcy Court held hearings over three days to consider such opposition. Parties filed over 850 objections and responses to the 363 Transaction that are now part of the public record of the cases. The transcript for the hearing to approve the 363 Transaction is over 1,200 pages. Most importantly, nothing prohibited any party from proposing an alternative to the 363 Transaction or the financing provided by the U.S. Treasury and Canadian EDC, on which the 363 Transaction was predicated.¹⁴⁰ Had an alternative been proposed, GM would have had a fiduciary obligation to consider such proposal; and, if such proposal provided a more meaningful recovery to creditors, GM would likely have been obligated to pursue such proposal if it were possible.

The Bankruptcy Code also provides a predetermined framework for creditors' rights. This framework, including priority schemes for allocation of value to creditors and equity holders, is a critical element of transparency. Transparency is illusory if there is no predictability and parties cannot assess whether the transaction is fundamentally fair and consistent with traditional norms.

Some critics have suggested that certain creditors, such as products liability tort victims, should receive preferential treatment because of the disproportional "pain" suffered by such creditors.¹⁴¹ The argument is that, unlike bondholders, tort claimants did not extend credit to GM and did not voluntarily agree that they could be injured. Since the Bankruptcy Code makes clear that no such priority exists in the Chapter 11 context, counsel for claimants have been accepting of the treatment afforded to their clients. Through the Bankruptcy Code, Congress has already determined which creditors are entitled to priority and in the absence of congressional amendment to the Code, parties have an expectation of where they must stand.

If the U.S. government were to nationalize GM and devise a restructuring or forced sale on its own without a pre-established distribution scheme such as those set out in the Bankruptcy Code, these types of arguments would stand on firmer ground. Moreover, a lack of transparency would engender creditor frustration.

Immediate Appeal to the United States Court of Appeals, Pursuant to 28 U.S.C. § 158(D)(2) or in the Alternative for a Stay of the Sale Order, Pursuant to Fed. R. Bankr. P. 8005 (ECF No. 3013); Notice of Appeal (ECF No. 3060); Notice of Appeal (ECF No. 3115); Notice of Appeal (ECF No. 3265).

140. Wilson Declaration, *supra* note 36, ¶ 11; Henderson Affidavit, *supra* note 6, ¶ 14–15.

141. See, e.g., Spector, *supra* note 2.

III. IMPROVING THE PROCESS

In retrospect, the GM bankruptcy appears to be an overwhelming success. GM has positioned itself again as a strong contender in the automotive sector. Hundreds of thousands of jobs were preserved and billions of dollars of enterprise value maintained. But a sale pursuant to § 363 of the Bankruptcy Code is not the answer for government intervention in all “too big to fail” restructurings. Every restructuring generates different considerations. In addition to sales pursuant to § 363, the Bankruptcy Code provides various other tools that may make Chapter 11 a viable alternative for future government assistance of systemically significant companies.

To prepare for the next restructuring cycle, it may make sense for Congress to analyze lessons learned from the automotive restructurings to determine if reforms to the Bankruptcy Code are warranted or desirable. While the recent Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)¹⁴² has provided an alternative means of addressing the insolvency of systemically important financial institutions, the lack of transparency and predictability of a government takeover under the Dodd-Frank Act is less than ideal.

Although the Dodd-Frank Act provides a means for the U.S. government to provide bridge financing to a distressed company, it strips many of the safeguards and protections provided by the bankruptcy process. In the first instance, the Federal Deposit Insurance Corporation (FDIC) and the U.S. Federal Reserve effectively have exclusive jurisdiction to determine how a financial institution will be liquidated or recapitalized. The FDIC and Federal Reserve also would have the unilateral ability to determine how value is monetized and how collateral of secured creditors is valued for purposes of distributions. There would be no judicial oversight or forum to address individual creditor disputes. While Chapter 11 is not a perfect solution, it provides the checks and balances that insulate the U.S. government from allegations that they have acted arbitrarily or capriciously.

A. MAKING NATIONAL INTERESTS A FACTOR FOR CONSIDERATION

The Bankruptcy Code¹⁴³ and the Federal Rules of Bankruptcy Procedure¹⁴⁴ generally dictate the parties that have standing in a bankruptcy case. Entities that are neither creditors nor equity holders may be affected substantially by the outcome of a case, yet the bankruptcy court is not empowered to consider their interests. This typically makes perfect sense because the goals of Chapter 11 are to promote a fresh start for the debtor

142. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

143. 11 U.S.C. § 1109(b) (2006).

144. Fed. R. Bankr. P. 2018, 7024.

and maximize value for creditors and equity holders. In the context of a debtor that is deemed “too big to fail,” however, the national interest may be paramount to creditor recoveries.

Amendments to the Bankruptcy Code could be considered to provide the U.S. government with standing to promote the national interest in appropriate and limited circumstances. The bankruptcy court could likewise be empowered to consider the national interest in approving or disapproving of transactions out of the ordinary course of business.

This would permit the bankruptcy court to consider matters beyond the scope of the interest of creditors. For example, assume two alternative transactions were pending before the bankruptcy court. Transaction A would provide for recoveries to creditors of approximately fifty cents on the dollar but would require the immediate shutdown of certain operations critical to the economy as a whole. On the other hand, Transaction B would provide recoveries of approximately forty-five cents on the dollar but would provide a more orderly wind-down of certain operations that would minimize the overall impact of the transaction. Under the current Bankruptcy Code, the debtor would be duty bound to select Transaction A over Transaction B even though the impact on the country could be catastrophic. What constitutes the “public good” may be subject to much debate, but should not the court at least have an opportunity to consider it?

Such a public interest standard is not without precedent. For example, § 1165 of the Bankruptcy Code, which governs railroad reorganizations, provides that in applying the provisions governing railroad reorganizations, the court and the trustee “shall consider the public interest in addition to the interests of the debtor, creditors, and equity security holders.”¹⁴⁵ A similar provision could be enacted for systemically important institutions.

Section 1109(b) of the Bankruptcy Code currently provides that “a party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise or may appear to be heard on any issue in a case under this chapter.”¹⁴⁶ In recognition of the “public interest,” § 1109 of the Bankruptcy Code could be amended to grant an appropriate regulatory agency standing to participate in the Chapter 11 case of a systemically important institution. These amendments could go so far as to divest a Chapter 11 debtor of its exclusive rights to control its Chapter 11 case and the plan process by allowing a regulatory agency, such as the FDIC, to seek the appointment of a receiver within the Chapter 11 cases or to seek leave of the bankruptcy court to terminate exclusivity and propose its own

145. 11 U.S.C. § 1165.

146. *Id.* § 1109(b).

Chapter 11 plan that otherwise complies with the requirements of § 1129 of the Bankruptcy Code.¹⁴⁷

B. REVIEW OF PRIORITIES SCHEME

Though Congress could amend the Bankruptcy Code to provide priority treatment to additional creditor constituencies, each exception to the equal sharing of pain among similarly situated creditors undermines the overarching purpose of the bankruptcy process to permit a company to rehabilitate, reorganize, and recover while providing for an equitable distribution of value. The Bankruptcy Code is already replete with special interest exceptions which hamper a company's ability to reorganize.¹⁴⁸

The plight of product liability victims in the GM case, for example, is not an indication of a need to alter the priority scheme for such claims. The root of the issue was the lack of third-party insurance except for the largest of claims. The problem would be better solved by monitoring the health of companies self-insuring risk rather than by altering the priority scheme for certain claimants. In any event, these issues are worthy of debate so long as the loudest voices are not controlled by special interest groups.

CONCLUSION

The restructuring of GM was historic not only in the importance of the rescue to the stabilization of the U.S. economy but also for the U.S. government's innovative use of the Bankruptcy Code to implement an emergency sale of the operating assets while leaving behind the non-core assets and most liabilities. As with any government action, there were supporters and detractors. Some critics have argued that certain creditor constituencies did not receive sufficient recoveries, yet additional recoveries would have resulted in greater expenditures of taxpayer dollars. Others, of course, have criticized the use of taxpayer dollars in the first instance; yet liquidation would have eliminated the possibility that unsecured creditors would receive any distributions, multiplying the pain felt by individual creditors and having an even worse effect on the national budget. Liquidation could have exacted an even greater toll on taxpayers through the result of lost jobs, decreased tax revenues, and increased expenditures on unemployment assistance, healthcare, and environmental remediation.

Overall, the process worked. Had the U.S. Treasury attempted to implement a restructuring without the transparency of bankruptcy court oversight, the public outcry would have been thunderous. The likely outcome would have been that the U.S. Treasury would have had expended multiples of what it ultimately did in an effort to keep GM afloat and allow

147. *Id.* § 1129.

148. *See, e.g., id.* § 362(b)(1)–(28).

the company to honor all of its obligations. Alternatively, the U.S. Treasury would have had to engineer some form of nationalization by fiat where the form of consideration ultimately paid to creditors certainly would be challenged as arbitrary and unconstitutional.

In response to the last financial crisis, the U.S. government has spent significant resources developing procedures for winding down systemically significant financial institutions while minimizing the impact on the global economy. Winding down a company like GM, however, is not a realistic option. Given the success of the 363 Transaction, Congress should evaluate whether modifications to the Bankruptcy Code are appropriate to ensure that in future financial crises, the United States could effectively utilize the Bankruptcy Code to rescue systemically significant companies with nowhere else to turn.