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ROAD CLOSED:

**THE INEQUITABLE TREATMENT OF
PRE-CLOSING PRODUCTS LIABILITY
CLAIMANTS UNDER THE AUTO INDUSTRY
BAILOUT**

O thou wicked servant, I forgave thee all that debt, because thou desiredst me:

[S]houldest not thou also have had compassion on thy fellow servant, even as I had pity on thee?¹

INTRODUCTION

Throughout 2008, the American automobile manufacturing industry faced a steady decline in market share and revenue due to increasing foreign competition and decreasing demand resulting from spiking oil prices.² Pension obligations and other legacy costs, coupled with poor decision-making and financial planning on the part of management, only exacerbated the problem, and by the end of 2008 domestic sales fell to their lowest ebb in over 25 years.³ On December 19, 2008, Secretary Henry Paulson of the United States Department of the Treasury (Treasury Department) announced the Treasury Department's and President George W. Bush's intention to prevent imminent and potentially disastrous bankruptcies in this industry by providing billions of dollars in loans to General Motors Corporation and its related companies (GM) and Chrysler L.L.C. and its related companies (Chrysler) under the Troubled Asset Relief Program (TARP).⁴ The rationale for the bailout was manifold⁵ but is,

1. *Matthew* 18:32–33.

2. See Alex Ortolani, *GM, Chrysler May Lead Sales Slide to Cap 16-Year Low*, BLOOMBERG, Jan. 2, 2009, <http://www.bloomberg.com/apps/news?sid=aem7CeFJvoNg&pid=20601087>.

3. See CONG. OVERSIGHT PANEL, SEPTEMBER OVERSIGHT REPORT: THE USE OF TARP FUNDS IN SUPPORT AND REORGANIZATION OF THE DOMESTIC AUTOMOTIVE INDUSTRY I (2009), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg11151964/pdf/CHRG-111shrg11151964.pdf>.

4. Press Release, U.S. Dep't of the Treasury, Secretary Paulson Statement on Stabilizing the Automotive Industry (Dec. 19, 2008), available at <http://financialstability.gov/latest/hp1332.html> [hereinafter Press Release, Secretary Paulson]; Troubled Asset Relief Program (TARP), 12 U.S.C.A. §§ 5211–5241 (2008).

5. See *In re General Motors Corp.*, 407 B.R. 463, 477 (Bankr. S.D.N.Y. 2009) (explaining that U.S. automakers' failure would result in the unemployment of an unacceptably large number of Americans employed directly by the automakers). The resultant failure of businesses that rely directly (such as suppliers and dealerships) and indirectly (such as local businesses in factory towns) on the industry would magnify those losses exponentially, resulting in essentially incalculable costs to the American taxpayer. *Id.*

perhaps, best summarized by the term “too big to fail.”⁶ Through the end of 2008 and the first half of 2009, President Barack Obama’s Administration and the Treasury Department, under the new leadership of Timothy Geithner, continued the government’s commitment to GM⁷ and Chrysler⁸ by making them a series of loans, guarantees, and equity investments before, during, and after each filed for Chapter 11.⁹ The government’s purpose was to ensure the automakers’ orderly restructuring¹⁰ in anticipation of bankruptcy.¹¹

While the paths taken by GM and Chrysler differed, most of the salient components were essentially the same: (1) each relied on massive federal financial assistance¹² to stave off what would have been a disastrous liquidation;¹³ (2) each received this assistance before, during, and after

6. See, e.g., George W. Kuney & Michael St. James, *A Proposal for Chapter 10: Reorganization for “Too Big to Fail” Companies*, AM. BANKR. INST. J., Mar. 2009, at 73.

7. See ProPublica, Eye on the Bailout: General Motors, <http://bailout.propublica.org/entities/233-general-motors> [hereinafter ProPublica–General Motors] (last visited Feb. 11, 2010) (detailing the government’s commitment to GM totaling \$50,744,684,329 and breaking down as follows: \$884 million debt obligation (Dec. 29, 2008); \$13.4 billion debt obligation (Dec. 31, 2008); \$2 billion debt obligation (Apr. 22, 2009); \$4 billion debt obligation (May 20, 2009); \$360.6 million debt obligation guaranteeing GM’s warranty commitments for its cars during the bankruptcy period under the Warranty Commitment Assistance Program (May 27, 2009); \$23 billion debt obligation, equity interest (June 3, 2009); and \$7.1 billion debt obligation (July 10, 2009)).

8. See ProPublica, Eye on the Bailout: Chrysler, <http://bailout.propublica.org/entities/93-chrysler> [hereinafter ProPublica–Chrysler] (last visited Feb. 11, 2010) (detailing the government’s commitment to Chrysler totaling \$12,812,130,642 and breaking down as follows: *Pre-filing*: \$4 billion debt obligation (Jan. 2, 2009) and \$280.1 million debt obligation guaranteeing Chrysler’s warranty commitments for its cars during the bankruptcy period under the Warranty Commitment Program (Apr. 29, 2009); *During Bankruptcy*: \$1.9 billion debt obligation (May 1, 2009); *Post-Closing*: \$6.6 billion debt obligation (May 27, 2009)).

9. GM filed its Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York on June 1, 2009. *In re General Motors*, 407 B.R. at 479. Chrysler filed its Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York on April 30, 2009. *In re Chrysler L.L.C.*, 405 B.R. 84, 87 (Bankr. S.D.N.Y. 2009), *aff’d*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler L.L.C., 130 S.Ct. 1015 (2009). The Supreme Court remanded the appeal to the Second Circuit with instructions to vacate its affirmance as moot. Ind. State Police Pension Trust v. Chrysler L.L.C., 130 S.Ct. 1015, 1015 (2009). Because there were no allegations of bad faith on the part of the purchaser and because the decision of the bankruptcy court was not stayed pending appeal, the vacatur operates only to eradicate the precedential value of the Circuit Court’s decision, and does not unwind the sale authorized by the bankruptcy court. See 11 U.S.C. § 363(m) (2006). See also posting of Leo Donofrio, Esq. to Natural Born Citizen: Respecting the Constitution?, <http://naturalborncitizen.wordpress.com/2009/12/14/analysis-of-december-14-2009-us-supreme-court-decision-regarding-chrysler-sale/> (Dec. 14, 2009, 17:04 EST).

10. Press Release, Secretary Paulson, *supra* note 4.

11. See *Ramifications of Auto Industry Bankruptcies (Part II): Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 19, 21–23 (2009) [hereinafter *Hearing Part II*] (prepared statement of Ron Bloom, Senior Advisor, United States Department of the Treasury).

12. See ProPublica–General Motors, *supra* note 7; ProPublica–Chrysler, *supra* note 8.

13. See *In re General Motors*, 407 B.R. at 480–81. The realizable value, net of costs, of the liquidation of GM’s assets was approximately \$6 to \$10 billion. *Id.* Total secured debt was

restructuring;¹⁴ (3) each participated in the Obama Administration's warranty commitment plan designed to promote consumer confidence in the distressed manufacturers by ensuring the coverage of warranties for cars purchased during the restructuring period;¹⁵ (4) each restructured under the shield of § 363 of the Bankruptcy Code (the Code),¹⁶ explicitly, or in the case of GM, functionally,¹⁷ insulating the emerging companies from certain products liability claims;¹⁸ and (5) each voluntarily assumed products liabilities arising from automobiles purchased before bankruptcy involved in accidents occurring post-closing,¹⁹ although this last concession was only made after intense pressure was applied by Washington.²⁰

Section 363(f) of the Code enables a trustee or debtor in possession²¹ to sell assets outside the ordinary course of business "free and clear" of interests in those assets.²² Stripping the debtor's property of these

approximately \$50 billion and general unsecured liabilities were estimated at nearly \$117 billion, without even accounting for several classes of potential claims. *Id. See also Ramifications of Auto Industry Bankruptcies (Part III): Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 17 (2009) (joint prepared statement of Louann Van Der Wiele, Vice President and Associate General Counsel, Chrysler Group, L.L.C. and Kevyn D. Orr, Partner, Jones Day) (stating that no class of Chrysler creditors other than first-lien creditors would receive any value upon liquidation).

14. See ProPublica—General Motors, *supra* note 7; ProPublica—Chrysler, *supra* note 8.

15. White House, Obama Administration's New Warranty Commitment Program (Mar. 30, 2009), http://www.whitehouse.gov/assets/documents/Warranty_Commitment_Program.pdf [hereinafter Warranty Commitment Program].

16. 11 U.S.C. § 363 (2006). All further references to the "Code" are to the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101–1330 (2006).

17. See Interview with J. Kent Emison, *infra* note 133. The GM plan does provide for unsecured creditors, of which pre-closing products liability claimants are a subclass. *Id.* However, given the many products liability claimants' contingent status, the vast difference between the total debt due to unsecured creditors and what is provided for in the plan, and that this amount is to be divided among all unsecured creditors pro rata, the provision is unlikely to account for much, if any, relief for their substantial injuries. *Id.*

18. See *Hearing Part II*, *supra* note 11, at 22–32.

19. See Mike Spector, *Corporate News: GM Agrees to Liability for Defects After Bankruptcy—Auto Maker's Decision Comes Amid Pressure from States, Consumer Advocates in Advance of Tuesday Hearing*, WALL ST. J., June 29, 2009, at B3, available at <http://online.wsj.com/article/SB124614495545265019.html>; see also Press Release, Chrysler Group L.L.C., Chrysler Group to Expand Accepted Product Liability Claims (Aug. 27, 2009), http://www.chryslergroupllc.com/news/archive/2009/08/27/product_liability_claims.

20. See, e.g., Spector, *supra* note 19. This pressure was, in turn, generated through powerful lobbying efforts on the part of plaintiffs' advocates; but it was the government's influence, powerful due to the massive assistance the companies received in the bailout, which proved crucial to obtaining their acquiescence. *Id.*; see also Tomoeh Murakami Tse & Kendra Marr, *GM to Allow Some Product Liability Claims*, WASH. POST, June 29, 2009, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062802466.html>.

21. See 11 U.S.C. § 1107(a) (2006) ("Subject to . . . limitations . . . a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.").

22. 11 U.S.C. § 363(f) (2006) ("The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate . . ." subject to certain restrictions.).

encumbrances encourages buyers to pay a premium price well above what the assets would receive in liquidation in a way that, in theory, produces a more efficient result than a standard Chapter 11 reorganization plan.²³ However, commentators have argued that § 363(f) was intended to perform this function within the context of a fully negotiated plan and that allowing debtors to use it in preplan sales is an unacceptable end-run around reorganization, freeing purchasers from liabilities which might otherwise attach to assets using the standard mechanism.²⁴ Courts, however, have not sided with the critics,²⁵ and the “free and clear” provision has firmly ensconced § 363 as the most attractive mechanism for the sale of liability-burdened businesses.²⁶ It is the standard operating procedure of such sales that injury claims²⁷ rest against the debtor-seller.²⁸ The injury claims at issue in this note may be separated into a tripartite framework of injuries arising from products purchased before the debtor filed for bankruptcy: those that were involved in accidents that occurred (1) prepetition; (2) during pendency; and (3) post-closing (so-called “future claims”).

It is this note’s position that the federal government, in providing bankruptcy-anticipatory bailout monies to these companies under TARP, made a perverse—yet correctable—policy choice to preserve its own investment in the automobile industry by choosing to promote consumer confidence in the automakers while neglecting to protect accident victims whose interests in recovery would be severely curtailed by the provisions of § 363. It exerted pressure on the companies to assume future claim liability for accidents arising from cars purchased prepetition, but without insisting

23. Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales*, 92 VA. L. REV. 1639, 1655–73 (2006) (arguing that optimizing efficiency in § 363 sales can be a function of locating the appropriate level of judicial oversight in such sales).

24. George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 236. (2002) (showing that courts have, for the most part, interpreted “interests” in this provision to include “claims,” and more specifically, unsecured claims like products liability claims, which are normally disposed of through the normal course and application of a Chapter 11 reorganization plan, but which may sometimes attach to the assets themselves and thus fall upon the purchaser through the application of successor liability principles).

25. See *id.* at 236. Despite Professor Kuney’s textual critique,

[b]ankruptcy courts . . . have chosen not to follow the plain meaning of § 363(f), but instead to interpret that subsection’s words “any interest” to mean “any claim or interest” so as to give the debtor or trustee the same power to sell prior to plan confirmation as that under a confirmed plan, and to strip off liens, claims and other interests in the process.

Id. (citations omitted).

26. *Id.* at 267 (“[T]he dominant interpretation is that § 363(f) can be used to sell property free and clear of claims that could otherwise be assertable against the buyer of the assets under the common law doctrine of successor liability.”).

27. “Injury claims,” as a subset of “claims,” are herein defined as claims which derive from product liability principles or from a breach of the implied warranty of merchantability.

28. See Kuney, *supra* note 24, at 267.

on the provision of similar protection to prepetition and pendency claimants. The federal government's choices—massive public investment, resort to the liability shield of § 363, and selective mitigation of its effects for only certain classes of similarly situated claimants—have thus produced an arbitrary and unacceptable result that will allow some claimants, but not others, to recover based entirely on when their injuries occurred.

Part I of this note will discuss the § 363 process, focusing particularly on the policy reasons for the “free and clear” provision and some of the counterarguments. Part II will describe the GM and Chrysler bankruptcies themselves: the background leading to their potential insolvency, and the federal government's measures under both the Presidential Task Force on the Auto Industry (Task Force) and the bailout designed to stave off their liquidation. Part III will outline the current legal status of the four primary companies emerging from the § 363 sales (Old GM, New GM, Old Chrysler, and New Chrysler) with respect to the disposition of assets and the assignment of products liabilities for prepetition claims, claims during pendency, and future claims. Part IV will discuss the policy considerations informing the federal government's decision to intervene in the automobile industry crisis, how those decisions militate toward a vision of the automakers' restructuring as primarily policy-based, and why, given that vision and the automakers' voluntary assumption of future claims liability, the extinguishment or practical inconsequence of prepetition and pendency products liability claims is unacceptable. Finally, Part V will present and discuss options open to GM, Chrysler, and the policy-makers in the Obama Administration and the Treasury Department that may produce a more equitable result.

I. OVERVIEW OF § 363 SALES

Central to both GM's and Chrysler's plans for reorganization was the asset sale process afforded to debtors under § 363 of the Code.²⁹ Contextualizing the operation of § 363 within Chapter 11 requires a brief discussion of the reorganization process itself.

A. CHAPTER 11 REORGANIZATION: PRESERVING GOING CONCERN VALUE

Historically, a primary function of Chapter 11 reorganization has been to free a distressed, but valuable, business from liabilities attached to its assets so as to preserve it as a going concern.³⁰ The concept of “going

29. See *In re General Motors Corp.*, 407 B.R. 463, 473 (Bankr. S.D.N.Y. 2009); *In re Chrysler L.L.C.*, 405 B.R. 84, 94 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom. Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S.Ct. 1015 (2009); see also 11 U.S.C. § 363 (2006).

30. See Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153,

concern value” derived from eighteenth century railroad receiverships as the model for modern bankruptcy.³¹ That model developed because the assets of insolvent railroad companies (e.g., miles of track, railroad cars, etc.) were close to valueless without the superstructure of a functioning railway system.³² Given that a core concern of bankruptcy is the retention of the maximum value of the debtor’s assets, that goal in the railroad context meant establishing the concept of going concern value.³³ One commentator has distilled a simple (if somewhat reductive) rule: When the value of a firm’s assets exceeds the value those assets would garner in liquidation, the goals of the Code are best served by the firm’s continuing operation.³⁴

B. CHAPTER 11: THE REORGANIZATION PLAN

Chapter 11 traditionally accomplishes the goal of preserving and maximizing value through the mechanism of the reorganization plan,³⁵ an involved process that often, in the case of large companies, requires several years to complete.³⁶ During this process, the Code provides a variety of mechanisms for the disposal of debtors’ and creditors’ various interests.³⁷ The debtor is aided by such devices as the power to reject executory contracts,³⁸ the automatic stay of actions against her,³⁹ and the right to propose the plan of reorganization.⁴⁰ Creditors are afforded, among other things, the right to commence an involuntarily Chapter 11 proceeding against the debtor,⁴¹ the right to participate in and consent to the reorganization plan,⁴² due process rights,⁴³ and the protection that their best interests⁴⁴ be served by the reorganization plan.⁴⁵ The primary object of this

154 (2004); *see also* Douglas G. Baird, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573, 580 (1998) (discussing the conflict between two axiomatic approaches, traditionalist and proceduralist, to bankruptcy policy in the context of Chapter 11, but averring that any approach must accept that “Chapter 11 of the Bankruptcy Code helps ensure that firms in distress survive”).

31. *See* Miller & Waisman, *supra* note 30, at 160–66.

32. *See id.* at 164.

33. *See id.* at 165.

34. Omer Tene, *Revisiting the Creditor’s Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganizations*, 19 BANKR. DEV. J. 287, 292 (2003). Tene explains that “[i]f . . . the firm [will] be viable despite its financial distress, the firm is reorganized and it continues to operate as a going-concern.” *Id.* The article further states: “[W]e subscribe to the view that bankruptcy law . . . must seek to maximize the going-concern value of the assets of the debtor . . .” *Id.* at 294 (citations omitted).

35. *See* 11 U.S.C. §§ 1121–1129 (2006).

36. *See, e.g.,* Brege, *supra* note 23, at 1637, 1639; Kuney, *supra* note 24, at 236–37.

37. Miller & Waisman, *supra* note 30, at 177.

38. 11 U.S.C. § 365 (2006).

39. *Id.* § 362.

40. *Id.* § 1121.

41. *Id.* § 303.

42. *Id.* § 1126.

43. *Id.* § 102.

44. *See* Kane v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 843 F.2d 636, 649 (2d Cir. 1988) (interpreting 11 U.S.C. § 1129(a)(7) to provide that a plan passes that section’s “best

process is to balance all parties' interests with the larger policies that undergird bankruptcy law: the preservation of value and the prevention of inefficient economic dislocation.⁴⁶ These policies provide a sort of overriding philosophical template through which the corporate reorganization is to be administered. Ideally, the plan should operate to reorganize the company efficiently, and to maximize the overall value of the estate's assets.⁴⁷

C. SECTION 363: ASSET SALES DESIGNED TO MAXIMIZE VALUE

Pre-confirmation § 363 asset sales in Chapter 11⁴⁸ theoretically operate as a streamlining method for preserving the maximum value of the assets of a deeply distressed corporation.⁴⁹ As the primary goal of Chapter 11 is to retain maximum value for assets, often those assets are worth more before a lengthy plan of reorganization is consummated.⁵⁰ This is especially true for large companies. Often, a large business in Chapter 11 is bleeding money at a substantial rate for many of the same reasons for which it filed for bankruptcy protection, such as paralyzing pension obligations and other agency costs, but which are not necessarily related to the value of its assets.⁵¹ For large, financially distressed businesses like GM and Chrysler, this bleeding may be caused by enormous contract, salary, and pension obligations, coupled with shrinking market share and depleted creditworthiness that can make such obligations even harder to satisfy.⁵²

Section 363, therefore, was intended to operate within Chapter 11 to provide the trustee with the power to sell assets outside the normal course of business when they are “of a perishable nature or liable to deteriorate in value.”⁵³ As most businesses in Chapter 11 qualify as “distressed” in one

interest test” if creditors are no worse off than they would have been in a liquidation under Chapter 7); David Gray Carlson, *Indemnity, Liability, Insolvency*, 25 CARDOZO L. REV. 1951, 1959 (2004) (explaining 11 U.S.C. § 1129(a)(7)(A) provides that “when a plan is actually confirmed, it must give every creditor at least what she would have received in [C]hapter 7”).

45. See Miller & Waisman, *supra* note 30, at 176–77.

46. Brege, *supra* note 23, at 1640.

47. Bonner Mall P’ship v. U.S. Bancorp Mortgage Co. (*In re Bonner Mall P’ship*), 2 F.3d 899, 916 (9th Cir. 1993) (“[S]uccessful debtor reorganization and maximization of the value of the estate are the primary purposes [of Chapter 11].”) (citations omitted).

48. See Brege, *supra* note 23, at 1648 (explaining that “section [363(b)] applies to Chapters 7, 11, 12 and 13 of the Code”).

49. See Robert E. Steinberg, *The Seven Deadly Sins in §363 Sales*, AM. BANKR. INST. J., June 2005, at 22.

50. See, e.g., *In re Chrysler L.L.C.*, 405 B.R. 84, 95 (Bankr. S.D.N.Y. 2009), *aff’d*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom. Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S.Ct. 1015 (2009) (explaining that the most important factor in determining when the resort to § 363 is the product of sound business judgment is “whether the asset is increasing or decreasing in value”) (citation omitted).

51. See Brege, *supra* note 23, at 1653–58.

52. See CONG. OVERSIGHT PANEL, *supra* note 3, at 1, 5.

53. Comm. of Equity Sec. Holders v. Lionel Corp. (*In re Lionel Corp.*), 722 F.2d 1063, 1066 (2d Cir. 1983).

way or another, § 363 asset sales have largely replaced the more costly and time-consuming process of confirming standard Chapter 11 reorganization plans.⁵⁴ While commentators and jurists debate the correct interpretation of “interests” under the “free and clear” provision of § 363(f),⁵⁵ the popularity of these asset sales has stemmed primarily from the enormous insulation from liability that the subsection affords and the generally broad interpretation given to it by the courts.⁵⁶ That debate has sought to reconcile the provisions of § 363(b)⁵⁷ and (f), governing the trustee’s power to conduct sales of substantially all the assets of the estate outside the ordinary course of business, with the provisions of correlative sections of the Code governing the use of such sales⁵⁸ within the more deliberative context of a reorganization plan.⁵⁹

1. The Minority Position: A Conservative Reading of § 363

Early in the jurisprudential history of the Bankruptcy Reform Act of 1978,⁶⁰ courts were loath to extend the protection of § 363’s liability shield in sales of substantially all the assets of the debtor’s estate,⁶¹ except in the

54. See Kuney, *supra* note 24, at 236.

55. 11 U.S.C. § 363(f) (2006) (“The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate . . .”); see also *In re General Motors Corp.*, 407 B.R. 463, 500–05 (Bankr. S.D.N.Y. 2009) (explaining that the debate has focused primarily on whether “interests” within this section implicates “claims” and specifically those claims which may otherwise attach to a purchaser in a reorganization plan under successor liability principles).

There may be strong textual and doctrinal reasons for a narrow definition of “interests” under § 363(f). See Kuney, *supra* note 24; Steinberg, *supra* note 49; see also Christopher M.E. Painter, Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worse of Times*, 36 STAN. L. REV. 1045, 1080–83 (1984) (arguing that the situation of tort creditors as a subclass of unsecured creditors leads to economically inefficient results and that giving such claimants a superpriority may better serve the goals of efficiency and fairness). These arguments have not, for the most part, carried the day. See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–90 (3d Cir. 2003); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 109 n.398 (2004).

56. See Bryant P. Lee, Note, *Chapter 18? Imagining Future Uses of 11 U.S.C. § 363 to Accomplish Chapter 7 Liquidation Goals in Chapter 11 Reorganizations*, 2009 COLUM. BUS. L. REV. 520, 530–31 (2009) (“These objections have begun to approach irrelevancy . . . [T]he volume of this type of disposition of reorganization proceedings has been increasing exponentially in recent years . . .”).

57. 11 U.S.C. § 363(b)(1) (2006) (providing for the power of the trustee to conduct an asset sale outside “the ordinary course of business”).

58. *Id.* §§ 1123, 1141.

59. See generally Kuney, *supra* note 24 (outlining the arguments for and against the use of asset sales outside the context of the reorganization plan and arguing that a limited use of § 363 is more in line with the overall goals of the Code).

60. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1132 (2006)).

61. See *In re White Motor Credit Corp.*, 14 B.R. 584, 589–90 (Bankr. N.D. Ohio 1981); see also *Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways)*, 700 F.2d 935, 943 (5th Cir. 1983).

case of an “imminent loss of all assets.”⁶² That position was softened considerably by the influential decision of the Second Circuit in *In re Lionel Corp.*, which eschewed a bright-line rule for the use of § 363, giving deference to debtors’ decisions by adopting a “business judgment” standard that leaves the propriety of such a sale to a case-by-case judicial determination.⁶³ For the most part, courts have interpreted this business judgment rule liberally, allowing asset sales to proceed on assertions and some evidence of savings in time and money, administrative costs and the preservation of value.⁶⁴ Critics, however, suggest that while the court in *Lionel* loosened the judicial requirements for § 363’s use, it did so by articulating a limiting standard and cautioning against its unfettered use.⁶⁵

The primary textual critique against the use of § 363 centers on the provisions of Chapter 11 itself. Because the Code allows assets to be rendered “free and clear of *claims and interests* through a process of plan confirmation, consummation and post-confirmation vesting,”⁶⁶ and because the “free and clear” provision in § 363(f) explicitly insulates only “*interest[s]* in such property,”⁶⁷ a strict textual interpretation seems to militate for the more limited vision of § 363.⁶⁸

However, courts have generally rejected this textual critique, favoring instead a broad reading of § 363.⁶⁹ Commentators have therefore resorted to more doctrinal critiques of large-scale pre-confirmation asset sales to support their opposition to the use of § 363.⁷⁰ Their main criticism has been that § 363 circumvents a reorganization plan process that is designed to manage the interests of all concerned parties and that allows the debtor to

62. *In re White Motor Corp.*, 14 B.R. at 590.

63. *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2d Cir. 1983) (noting that the language of § 363 in the Bankruptcy Reform Act of 1978 differed from its statutory antecedents and did not explicitly require a showing of emergency or cause for the bankruptcy judge to wield his or her discretionary power in authorizing sales under the section).

64. *See Brege, supra* note 23, at 1653–54; *see also Kuney, supra* note 24, at 242–43 n.30 (discussing the evolution of the soft reading of the *Lionel* standard, citing *In re Delaware & Hudson Railway Co.*, 124 B.R. 169 (Bankr. D.Del. 1991), for one court’s liberal approach in suggesting that avoiding the delays attendant to a bankruptcy proceeding itself could constitute a sufficient business justification for resort to a § 363 asset sale).

65. *See, e.g., Lee, supra* note 56, at 528 (noting that while *Lionel* did, in fact, set forth a limiting standard, that standard was flexible and weak, and bankruptcy courts have, for the most part, required little business justification under it). *See also* DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 249 (4th ed. 2006) (suggesting that *Lionel* has generally been used as a permissive rather than a restrictive standard by the courts).

66. *Kuney, supra* note 24, at 239.

67. 11 U.S.C. § 363(f) (2006) (emphasis added).

68. *See Kuney, supra* note 24, at 238–44.

69. *See id.* at 236.

70. *See id.* at 235, 272–86; *see also* Elizabeth B. Rose, *Chocolate, Flowers, and § 363(B): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 275–84 (2006); Craig A. Sloane, *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 EMORY BANKR. DEV. J. 37, 60–64 (1999).

dispose of assets while ignoring the interests of large classes of creditors.⁷¹ Thus, the debtor is improperly afforded the benefit of Chapter 7's efficient liquidation within the context of Chapter 11 in a way that unfairly favors secured creditors,⁷² and potentially insulates the debtor from the requirements of disclosure, creditor approval, and good faith.⁷³ The result has been, in the words of one critic, the "shift[ing of] Chapter 11 from a process originally focused on the confirmation of a plan of reorganization into one making the bankruptcy courts *the* forum of choice for the sales of businesses, troubled or not."⁷⁴ Despite these condemnations, however, the trend has been toward a broad judicial interpretation of § 363 and a resultant proliferation of its use in the last two decades.⁷⁵

2. The Majority Position: A Broad Reading of § 363

In *In re General Motors Corp.*, Justice Gerber articulated the primary counterattack to the critics' textual argument.⁷⁶ While some provisions of § 1123 mandate how a sale under a reorganization plan must proceed,⁷⁷ § 363 operates within § 1123(b)(4) as a discretionary power.⁷⁸ The idea is that only when the debtor in possession undertakes to sell assets within the context of the reorganization plan must she follow through with the strict requirements laid out in Chapter 11 in order to properly strip those assets of the claims and interests attached to them.⁷⁹ However, the argument goes, Chapter 11 should not be read, and has not been read by substantial authority, to trump the debtor's resort to § 363 to effectuate a sale.⁸⁰ Furthermore, the *Lionel* court observed that § 363 provides no textual impediment to the bankruptcy judge's discretionary power to authorize such sales.⁸¹

Commentators in support of pre-confirmation asset sales also argue that § 363 provides for increased efficiency in the achievement of Chapter 11's goals, namely the extraction of maximum value for corporate assets and the avoidance of the high transactional costs associated with its comprehensive reorganization and confirmation requirements.⁸² The present net value of assets is maximized by freeing them from successor liability and other

71. See Brege, *supra* note 23, at 1643 (discussing the "cynical" perspective of § 363's critics).

72. See Lee, *supra* note 56, at 524 (cataloging some arguments against the use of § 363).

73. See Rose, *supra* note 70, at 257–58.

74. Kuney, *supra* note 24, at 235.

75. See *id.* at 235–36.

76. *In re General Motors Corp.*, 407 B.R. 463, 487 (Bankr. S.D.N.Y. 2009).

77. 11 U.S.C. § 1123 (2006).

78. *In re General Motors*, 407 B.R. at 486.

79. *Id.* at 486–93.

80. *Id.*

81. *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1069 (2d Cir. 1983).

82. See, e.g., Brege, *supra* note 23, at 1655–73.

unsecured claims.⁸³ This is especially true for corporations with such enormous potential liability for those claims, that without insulating the assets, no buyer could be found for them.⁸⁴ Furthermore, the potential transaction costs of a lengthy plan confirmation process can deplete the market value of the assets in a way that may leave creditors worse off than they would be under a more streamlined process.⁸⁵ Finally, contrary to critics who see § 363 as transforming bankruptcy into an auction forum used to improperly insulate potential purchasers from claims attaching to a debtor's assets,⁸⁶ proponents argue that it achieves the Chapter 11 goal of allocating maximum return to creditors with greater economic efficiency.⁸⁷ In this light, § 363 simply compliments Chapter 11, which also, subject to more strict requirements, seeks to sell valuable assets "free and clear" of claims in a way that raises purchase prices and ensures greater returns to creditors.⁸⁸ Most courts have embraced these arguments, and asset sales under § 363 have become common practice, subject to only the most liberal requirements of business judgment: effective notice to interested parties, fair price, and good faith on the part of the purchaser.⁸⁹ Such justifications will serve to insulate the sale from accusations that it improperly "amount[s] to a *sub rosa* plan of reorganization."⁹⁰

83. *Id.* at 1644.

84. *See In re Chrysler L.L.C.*, 576 F.3d 108, 118–19 (2d Cir. 2009), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler L.L.C., 130 S.Ct. 1015 (2009) (discussing how Fiat S.p.A., the only interested buyer for Chrysler, insisted on an expedited transaction).

85. *See Brege, supra* note 23, at 1644.

86. *See, e.g.,* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 787–89 (2002).

87. *See* Miller & Waisman, *supra* note 30, at 194 (arguing that Professors Baird and Rasmussen, by focusing selectively on the procedural aspects of § 363 as supplanting Chapter 11, neglect to recognize that § 363 may function within Chapter 11 and help to achieve its goals more efficiently).

88. *Id.*

89. *See, e.g., In re Decora Indus., Inc.* 2002 WL 32332749, *2–3 (D. Del. 2002) (citing *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176 (D.Del. 1991)).

90. *In re General Motors Corp.*, 407 B.R. 463, 491 (Bankr. S.D.N.Y. 2009); *see also In re Braniff Airways*, 700 F.2d 935, 940 (5th Cir. 1983) ("The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."). While the language in *Braniff* seems to strongly implicate § 363, Judge Jacobs noted in *Chrysler* that the *Braniff* court meant only sales that were specifically designed to "evade or subvert" were impermissible when the terms of the sale specify *ex ante* the terms of a subsequent plan. *In re Chrysler L.L.C.*, 576 F.3d 108, 117–18, 117 n.9 (2d Cir. 2009), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler L.L.C., 130 S.Ct. 1015 (2009). In essence, the court in *Chrysler* (as well as Judge Gerber, who followed the same reasoning in *General Motors*) limited the reach of the *sub rosa* exception to the very narrow set of facts of *Braniff*. *Id.*; *In re General Motors* 407 B.R. at 496–98. Accordingly, the *sub rosa* exception is satisfied by the prongs of the "good business reason" test the bankruptcy court uses to judge the sale as a whole. *See* Motorola, Inc. v. Official Comm. Of Unsecured Creditors & JPMorgan Chase Bank, N.A. (*In re Iridium*), 478 F.3d 452, 466–67 n.21 (2d Cir. 2007).

II. THE GM AND CHRYSLER BANKRUPTCIES

A. THE ROAD TO INSOLVENCY

Perhaps no industry in the United States has been hit as hard by the economic downturn as the automobile manufacturing sector. By late Summer 2008, the *Wall Street Journal* was already reporting that “the U.S. auto industry has slipped into its worst crisis in decades” and that “[a]nalysts have warned [that] GM, Ford, and Chrysler are all in danger of running short of cash.”⁹¹ Debate has since raged as to the core causes of the industry’s woes. Environmentalists and critics of U.S. energy policy have insisted that the rising price of oil in the mid-to-latter part of the decade, as well as the U.S. automakers’ apparent refusal to embrace fuel efficiency, led to the industry’s decline and injured the economy as a whole.⁹² Some have blamed the intransigence of labor unions and the breadth of obligations to current and former employees as severely disadvantaging domestic automakers in an era of free trade and comparative advantage.⁹³ Others have pointed to gross mismanagement in the upper echelons of power at both companies.⁹⁴ All of this took place amid an overall economic downturn that saw a sharp decline in demand.⁹⁵

Of course, there can be no one root cause for a precipitous decline that saw an over 40% drop in sales in 2008 for both Chrysler and GM,⁹⁶ that saw GM’s market share drop from 45% in 1980 to a projected 19.5% in

91. John D. Stoll, Stephen Power & Corey Boles, *Auto Executives to Seek Government Help*, WALL ST. J., Sept. 8, 2008, at A3, available at <http://online.wsj.com/article/SB122083515707008703.html>.

92. Posting of Keith Johnson to the Wall Street Journal Environmental Capital Blog, <http://blogs.wsj.com/environmentalcapital/2009/04/22/oil-shock-did-high-oil-prices-cause-the-recession/tab/article/> (Apr. 22, 2009, 10:48 EDT).

93. Mitt Romney, Op-Ed., *Let Detroit Go Bankrupt*, N.Y. TIMES, Nov. 19, 2008, at A35, available at <http://www.nytimes.com/2008/11/19/opinion/19romney.html>. As of the time it filed for bankruptcy, Chrysler had 38,500 domestic employees (of which 27,600 were covered by collective bargaining) and provided healthcare and other benefits to over 100,000 retirees. *In re Chrysler*, 405 B.R. 84, 88–89 (Bankr. S.D.N.Y. 2009), *aff’d*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom.* *Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S.Ct. 1015 (2009).

94. Steven Rattner, *The Auto Bailout: How We Did It*, FORTUNE, Nov. 9, 2009, at 55. Steven Rattner, head of President Obama’s Task Force, emphasized the more arrogant and defiant aspects of the automakers’ corporate cultures as indicative of a stasis in their organizational management systems that infected every aspect of their businesses, but was particularly harmful to their finance operations. *Id.*

95. See CONG. OVERSIGHT PANEL, *supra* note 3, at 5.

U.S. automobile sales fell to a 26-year low, from a high point of 17.3 million cars and light trucks in 2000 to 13.2 million in 2008. Sales fell much further in the first half of 2009 as a result of deteriorating economic conditions and are projected to be roughly 10.3 million units for 2009 and 11.1 million in 2010.

Id. (citation omitted).

96. See Ortolani, *supra* note 2.

2009,⁹⁷ and that saw, in 2008, the “Big Three”—GM, Chrysler, and Ford Motor Company—account for less than 50% of the total domestic market for the first time since foreign manufacturers began competing with them in earnest in the early 1990s.⁹⁸ Each of these industry problems are worthy of some blame.

B. THE FEDERAL GOVERNMENT’S RESPONSE

In response to the crisis facing the automobile manufacturing industry, Treasury Secretary Paulson announced the government’s intention to bail out the industry with some of the money set aside by Congress to stabilize the imploding financial sector.⁹⁹ Continuing this commitment, President Obama, in the early days of his administration, established the Task Force.¹⁰⁰ Based in part on the Task Force’s findings, the administration developed comprehensive plans for the government-assisted rescue and reorganization of GM and Chrysler.¹⁰¹

While the putative goal of the bailout was to guide the automakers toward long-term financial viability, there was ample evidence that such a mission was possibly quixotic.¹⁰² Indeed, President Obama’s Task Force was deeply torn on the wisdom of saving Chrysler, especially considering the government’s enormous investment in GM, a Chrysler competitor.¹⁰³ However, GM and Chrysler were companies seen as “too big to fail,” in that their insolvency created a potentially disastrous ripple effect in the economy, “impos[ing] great harm on vendors and other interrelated businesses . . . causing cascading business failures and layoffs.”¹⁰⁴ The potential job losses, cited by the court in *GM*, numbered in the hundreds of thousands.¹⁰⁵ In addition to unemployment and interrelated business failures, the possibility of the government having to take over the companies’ pension and healthcare obligations was extremely daunting.¹⁰⁶ Based on these startling projections, it appears the decision to bail out GM

97. *In re General Motors*, 407 B.R. 463, 476 (Bankr. S.D.N.Y. 2009).

98. See Ortolani, *supra* note 2.

99. See Press Release, Secretary Paulson, *supra* note 4.

100. See Rattner, *supra* note 94.

101. See *id.* (claiming that the findings of the Task Force did not necessarily support a conclusion that the automakers’ viability merited what would be a huge government investment in their respective futures, but that other policy considerations militated for the bailout).

102. See *Hearing Part II*, *supra* note 11, at 19–20.

103. Rattner, *supra* note 94.

104. Kuney & St. James, *supra* note 6, at 73 (arguing that Chapter 11 reorganization is ill-suited to the particular problems inhering in too-big-to-fail bankruptcies and that Chapter 10 can and should be amended to solve them).

105. *In re General Motors Corp.*, 407 B.R. 463, 477 n.6 (Bankr. S.D.N.Y. 2009).

106. *Id.* at 483.

and Chrysler was one couched in politics and macroeconomics rather than being based on the real lasting economic viability of either company.¹⁰⁷

GM and Chrysler's paths during the bailout differed in certain salient respects. Due to its smaller size, Chrysler was able to locate, at least in part, a private purchaser in Fiat, S.p.A. (Fiat, operating in conjunction with other purchasers as New CarCo Acquisition LLC, or New Chrysler¹⁰⁸).¹⁰⁹ However, GM's sale, which was between two and three times larger than Chrysler's, could only be accomplished through the creation of a Treasury Department-sponsored purchaser, Vehicle Acquisition Holdings LLC (New GM),¹¹⁰ using TARP funds as an equity investment in New GM rather than encumbering it with a massive debt repayment obligation post sale.¹¹¹

Between December 28, 2008 and July 10, 2009 the federal government loaned or invested nearly \$51 billion in GM.¹¹² Between January 2, 2009 and May 27, 2009, the federal government loaned or invested nearly \$13 billion in Chrysler.¹¹³ While some payments were made prior to the companies' bankruptcy filings, they were predicated on the submission of restructuring reports from both automakers that contemplated resorting to § 363 asset sales from the start.¹¹⁴

III. THE GM AND CHRYSLER BANKRUPTCIES

Sales of substantial portions of company assets—those conducted preplan under § 363(b) as well as those authorized as part of § 1141(c) reorganization plans—generally result in the emergence of two separate

107. The appropriateness of the government's decision to rescue GM and Chrysler is beyond the scope of this Note; however, Part IV will argue that certain consequences and equitable considerations should properly flow from the manner in which these policy choices were effectuated.

108. New CarCo, or New Chrysler, is a limited liability Delaware corporation formed to accomplish the goals of the Fiat Alliance—a term-sheet alliance that initially arranged for certain considerations, such as a distribution network, to flow from Fiat to Chrysler in exchange for a 35% equity stake in Chrysler, but that matured into the purchaser entity for the accomplishment of the § 363 sale. *In re Chrysler L.L.C.*, 405 B.R. 84, 91–92 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot, sub nom. Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S.Ct. 1015 (2009).

109. *Id.*

110. *In re General Motors*, 407 B.R. at 473, 480–81.

111. *See Rattner, supra* note 94.

112. *See ProPublica—General Motors, supra* note 7.

113. *See ProPublica—Chrysler, supra* note 8.

114. *See* Press Release, U.S. Dep't of the Treasury, Fact Sheet: Obama Administration Auto Restructuring Initiative: Chrysler-Fiat Alliance (Apr. 30, 2009), http://www.financialstability.gov/docs/AIFP/Chrysler-restructuring-factsheet_043009.pdf [hereinafter Fact Sheet, Chrysler] (“To execute this agreement, Chrysler will use [§] 363 . . . to clear away the remaining impediments to its successful re-launch.”); Press Release, U.S. Dep't of the Treasury, Fact Sheet: Obama Administration Auto Restructuring Initiative: General Motors Restructuring (June 1, 2009), http://www.financialstability.gov/latest/05312009_gm-factsheet.html [hereinafter Fact Sheet, GM] (“To effectuate its plan, General Motors will use [§] 363 . . . to clear away the remaining impediments to its successful re-launch.”).

corporate entities with their own distinct asset and liability profiles.¹¹⁵ The four companies that emerged from the GM and Chrysler bankruptcy proceedings were Old GM, New GM,¹¹⁶ Old Chrysler, and New Chrysler.¹¹⁷ Since the two deals differed in their details, a brief outline of the ownership of each, with particular attention paid to their legal obligations regarding products liabilities, is called for. It will be beneficial to first discuss GM's bankruptcy and then use it as departure point for comparison with Chrysler's.

A. OLD GM / NEW GM

As the purchaser, New GM emerged from the § 363 sale and subsequent litigation with substantially all the assets of Old GM,¹¹⁸ but shielded from all liabilities not expressly assumed in its Master Sale and Purchase Agreement (MPA).¹¹⁹ New GM assumed liabilities for both companies' recall and warranty commitments, certain employment-related obligations arising from the assumed benefit plans covered under the United Auto Workers (UAW) collective bargaining agreement (CBA), and products liability claims for injuries that occurred after the sale's closing arising from automobiles purchased pre-closing.¹²⁰ These last two categories of liabilities—those related to employee benefits under the CBA and the expansion of products liability for future claims arising from cars purchased not only from New GM, but also Old GM—were assumed at the insistence of both the Treasury Department¹²¹ and the Obama Administration.¹²² The implication, particularly with regard to the

115. This statement is subject to limitations that are beyond the scope of this Note. For further discussions on issues such as successor liability, the propriety of cleaving assets from corporate liabilities, and other concerns, see William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create a New Class of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325 (1996); George W. Kuney, *Bankruptcy and Recovery of Tort Damages*, 71 TENN. L. REV. 81 (2003); George W. Kuney, *supra* note 24; J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand that Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1, 8–9 (1995). See also Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability Asset on Purchasers*, 4 ENVTL. LAW. 435, 493 n.401 (1998) (discussing how the economic benefits of selling assets free and clear of liabilities may implicitly serve the goals of the Code).

116. *In re General Motors Corp.*, 407 B.R. 463, 477 n.6 (Bankr. S.D.N.Y. 2009).

117. *In re Chrysler L.L.C.*, 405 B.R. 84, 91 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom.* *Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S.Ct. 1015 (2009).

118. *In re General Motors*, 407 B.R. at 473, 480–81.

119. *Id.* at 481–82.

120. *Id.*

121. *Id.* at 478 (discussing some of the Treasury Department's prerequisites for GM, such as committing to the provision of funds to support UAW beneficiaries, as well as other commitments to bring its employment-related obligations more in line with industry standards).

122. See Spector, *supra* note 19 (noting GM's willing assumption of future claims products liabilities was not exactly "willing," as it was a result of pressure from the Obama Administration

assumption of products liabilities, is that without this voluntary commitment, these claims would have been reserved to Old GM as standard operating procedure under the “free and clear” provision of § 363(f).¹²³ Indeed, the claims retained by Old GM include, among others, products liability claims (“to the extent they weren’t assumed by reason of the change in the MPA”)¹²⁴ and warranty-of-merchantability-derived liabilities for all cars purchased pre-closing arising from accidents occurring prepetition and during pendency.¹²⁵

Under the MPA, New GM’s common stock would be divided among various parties, with the bulk of ownership reserved to the Treasury Department.¹²⁶ This structure has two unusual aspects. First, the vast majority of ownership in New GM is reserved to an arm of the Federal Government¹²⁷ (with a lesser stake in ownership reserved for an arm of the Canadian Government),¹²⁸ historically an uncommon purchaser in § 363 sales and, arguably, one not envisioned by the Code.¹²⁹ Second, an ownership stake was provided to the debtor, Old GM, for the benefit of its general unsecured creditors.¹³⁰ Although a significant amount of money was

and other interested parties despite GM’s continued insistence that it was not legally required to do so under the rules governing these kinds of asset sales).

123. See discussion *supra* Part I.C.2 (discussing the inclusion of “claims” with the definition of “interests” under jurisprudential interpretations of § 363(f)).

124. *In re General Motors*, 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009) (noting that GM amended its MPA after filing to include claims arising from accidents before closing). The implication is that without New GM assuming these liabilities, they would be part of the broader category of “excluded liabilities” to be retained by Old GM. *Id.*

125. *Id.*

126. *Id.* at 482–83. Atop the hierarchy would sit the Treasury Department, owning nearly 61% of New GM’s common stock, undiluted, as well as just over \$2 billion in Class A Preferred Stock. *Id.* at 482. Of the undiluted common stock, 17.5% would be owned by a New Employees’ Beneficiary Trust, which would also take possession of \$6.5 billion in Class A Preferred Stock, as well as a six-year warrant to purchase an additional 2.5% of the common stock. *Id.* A Canadian Governmental instrument, Export Development Canada, provided additional bailout financing to GM, contributing \$3 billion and committing to an additional \$6 billion in exchange for nearly 12% equity in the form of New GM undiluted common stock and \$400 million in Class A Preferred Stock. *Id.* Finally, Old GM was given, in consideration of the § 363 asset sale to New GM, 10% ownership of New GM undiluted common stock as well as a commitment by New GM for an additional 2% if Old GM’s unsecured claims, of which products liability claims are a subcategory, were to exceed \$35 billion. *Id.* at 483.

127. *Id.* at 482. (stating that the Treasury Department “will own 60.8% of New GM’s common stock on an undiluted basis”).

128. *Id.* (Export Development Canada, a company created by the governments of Canada and Ontario “will own 11.7% of New GM’s common stock on an undiluted basis.”).

129. See *Ramifications of Auto Industry Bankruptcies (Part I), Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 75–81 (2009) (testimony and prepared statement of David A. Skeel, S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania Law School) (arguing that the intrusion of the Federal Government into these bankruptcies combined with the use of § 363 amounted to “sham” sales common in the early days of railroad receiverships, but curtailed by the New Deal reforms).

130. *In re General Motors*, 407 B.R. at 483 (“Old GM will own 10% of New GM’s common stock on an undiluted basis.”).

reserved for this fund in numeric terms, the proceeds from this stake will be divided among all of Old GM's unsecured creditors on a pro rata basis.¹³¹ Given GM's "assumed \$116.5 billion in general unsecured claims,"¹³² the real recovery afforded to excluded products liability claimants under this scheme will, in practice, amount to pennies on the dollar.¹³³ For a seriously injured victim such recovery is functionally meaningless, and a secondary market for these claims has already sprung up with plaintiffs being offered no more than 15–20% of the value of their claims.¹³⁴

B. OLD CHRYSLER / NEW CHRYSLER

New Chrysler's consideration, provided to Old Chrysler in exchange for substantially all of the latter's assets, consisted of \$2 billion in cash and New Chrysler's assumption of "certain liabilities."¹³⁵ An employee-benefit entity created by the UAW union (VEBA) would emerge with roughly 68% of New Chrysler's stock and a membership interest of 55%.¹³⁶ While an additional \$10.96 billion in financing for the deal was provided by the Treasury Department and Export Development Canada¹³⁷ in return for an equity stake in New Chrysler,¹³⁸ such governmental ownership was not envisioned by this agreement to have, as in the case of New GM, lasting effect.¹³⁹ Indeed, the two asset sales differ primarily because a viable purchaser for Old Chrysler's assets emerged from the private sector¹⁴⁰ while GM's liabilities were so great that governmental ownership control was the

131. See *Hearing Part II*, *supra* note 11, at 23 ("Unsecured creditors will receive 10% of the equity in New GM This includes pre-petition product liability claim holders, who will receive their pro-rata share of the disposition of the unsecured creditors' consideration.")

132. *In re General Motors*, 407 B.R. at 481 (noting that this estimate is, in all likelihood, a conservative one that does not account for several classes of potential claims, such as contract rejection and pension termination claims).

133. Interview with J. Kent Emison, Founding Partner, Langdon & Emison, in Lexington, Mo. (Oct. 27, 2009) (on file with author). A hypothetical plaintiff is likely to get between 1 and 10% of the expected value of his claim, in the form of New GM stock, based on his pro rata share of the ownership stake set aside in the agreement. *Id.*

134. *Id.* Plaintiffs often feel compelled to accept settlements from GM and on the secondary market in amounts that are often negligible compared to their injuries. *Id.* This stems from a justifiable fear that the recovery provided to them pro rata under the 10% stake in New GM as general unsecured creditors will be even less. *Id.*

135. *In re Chrysler L.L.C.*, 405 B.R. 84, 92 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler L.L.C., 130 S.Ct. 1015 (2009) (describing some of the terms set out in the April 30, 2009 Master Transaction Agreement (MTA) governing the § 363 sale).

136. *Id.* at 90.

137. *In re Chrysler L.L.C.*, 576 F.3d 108, 112 (2d Cir. 2009) (explaining that these entities agreed to provide \$4.96 billion in sixty-day debtor in possession financing and an additional \$6 billion in senior secured financing).

138. *Id.* (noting that the Treasury Department would emerge with 8% ownership membership interest and Export Development Canada with 2%).

139. See *In re General Motors Corp.*, 407 B.R. 463, 482–83 (Bankr. S.D.N.Y. 2009).

140. *In re Chrysler*, 405 B.R. at 90–92.

only alternative to liquidation.¹⁴¹ To that end, the Chrysler agreement sets out procedures by which Fiat could turn its 20% equity stake in New Chrysler into a 51% holding.¹⁴² This maturation is predicated on New Chrysler repaying, in full, debts it owed to the governmental entities whose ownership stakes would be the first to flow to Fiat, with the remainder deriving from a purchase of shares from VEBA.¹⁴³ This structure is, by design, intended to accomplish the eventual transfer of a controlling ownership share to Fiat through the temporary use of governmental loans providing sustained viability through the transitional period.¹⁴⁴

The prime classes of liabilities assumed by New Chrysler as part of the agreement were warranty, return, and rebate obligations for all Chrysler automobiles purchased prior to the closing.¹⁴⁵ All products liability claims were, under the “free and clear” terms of § 363(f), to be reserved to Old Chrysler.¹⁴⁶ These included all past, pending, and future products liability claims arising from cars purchased before the sale was accomplished.¹⁴⁷ Unlike New GM, which assumed the future claims liability in its asset sale proper,¹⁴⁸ New Chrysler voluntarily assumed such liability well after its asset sale was consummated.¹⁴⁹ While New Chrysler pointed to its unanticipated new viability as the central reason for its assumption of future claims liability,¹⁵⁰ it had previously fought against it.¹⁵¹ GM’s assumption

141. *In re General Motors*, 407 B.R. at 480–81.

142. *In re Chrysler*, 405 B.R. at 92. Fiat’s ownership would mature to 35% “[u]pon the reaching of certain milestones” and to 51% based on a right to purchase the requisite additional 16%. *Id.* at 192 n.11; *see also Hearing Part II, supra* note 11, at 19 (explaining that the administration’s willingness to provide financial assistance to these companies was predicated on them restructuring in such a way as to “not require ongoing government assistance”).

143. *In re Chrysler*, 405 B.R. at 92 n.11.

144. *See id.* (highlighting provisions for the accrual of majority of ownership by Fiat).

145. *See* Todd Blodgett, Nat’l Consumer Law Ctr., *The Status of Product Liability, Warranty and Lemon Law Claims for New GM and Chrysler*, <http://www.consumerlaw.org/autobankruptcies/index.shtml> (last visited Feb. 12, 2010) (reporting that section 2.08(g) of the MTA also provides for New Chrysler’s assumption of liability for actions under state lemon laws and honoring of product safety recalls).

146. *See id.* (“New Chrysler initially disclaimed any liability for product liability claims involving vehicles manufactured and sold by Old Chrysler prior to [the closing date].”).

147. *See id.*

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

149. Letter from John T. Bozzella, Vice President, Chrysler L.L.C., to U.S. Senators Richard Durbin, Patrick Leahy, Arlen Specter & Herb Kohl (Aug. 27, 2009), *available at* <http://www.autosafety.org/sites/default/files/ChryslerLettertoSenators.pdf> [hereinafter *Bozzella Letter*].

150. *Id.* (“Today, Chrysler Group has a much better appreciation of the viability of our business than it did on June 10. As a result . . . the company will accept product liability claims on vehicles manufactured by [Old Chrysler] before June 10 that are involved in accidents on or after that date.”).

151. Brief for Appellee Chrysler Financial Services Americas L.L.C. in Support of Appellees Chrysler L.L.C. et al., *In re Chrysler L.L.C.*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot, sub nom.* *Ind. State Police Pension Trust v. Chrysler L.L.C.*, 130 S.Ct. 1015 (2009) (No. 09-2311-mb) (arguing that § 363 and its jurisprudential interpretation compels a finding that the debtor’s assets

of liability under its MPA was public record and New Chrysler was surely aware of it. Furthermore, it is curious that Chrysler's determination of its present viability resulted in the assumption of liability for an unknowable class of claims,¹⁵² while preserving its protection from prepetition and pendency claims that are more readily identifiable and thus more susceptible to a viability assessment.¹⁵³ These factors suggest that Chrysler's decision was more likely a response to political pressure and the prospect of fighting these claims in multifarious state court actions. Despite the corporate largesse, however, prepetition and pendency claims remain the sole responsibility of Old Chrysler, an entity which, unlike Old GM,¹⁵⁴ has no ownership stake in the new company and thus has even fewer assets to cover such claims.¹⁵⁵

C. THE AFFECTED CLASSES LEFT WITH INSIGNIFICANT RECOVERY

The class of prepetition and pendency products liability claimants left with no meaningful recovery against Old Chrysler is roughly two-fifths the size of Old GM's correlative class.¹⁵⁶ Using estimates derived primarily from historical averages,¹⁵⁷ GM's class consists of roughly 2000 people, 500-600 of whom are likely to have serious claims, with a potential total liability to GM of between \$1 billion and \$2 billion.¹⁵⁸ This puts Chrysler's affected claimant class at roughly 800 people, with 200 to 250 being serious claims, resulting in \$400 million to \$800 million in potential liability.¹⁵⁹ Using the most liberal estimates, the total liability for both companies could fall between \$3 billion and \$4 billion with the class of claimants being between 2800 and 3000 people.¹⁶⁰ While not inconsiderable, these figures represent a fraction of the total government auto bailout.¹⁶¹ The use of § 363 is an unacceptable result given this discrepancy, particularly in light of the

are sold free and clear of all interests and that unsecured claims such as products liability claims fall within the meaning of "interests").

152. See, e.g., Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435, 438-41 (1999).

153. See discussion *infra* Part IV.B (discussing how future claims liability for auto manufacturers with a long history may be more susceptible to actuarial estimation than would be true for companies with a less extensive products liability track record).

154. *In re General Motors Corp.*, 407 B.R. 463, 483 (Bankr. S.D.N.Y. 2009).

155. Interview with J. Kent Emison, *supra* note 133.

156. Interview with Larry Coben, Founding Partner, Coben & Assoc., in Scottsdale, Ariz. (Nov. 2, 2009) (on file with author).

157. *Id.*

158. See Michael Collins, *Auto Liability Shield Sought GM, Chrysler Look to Evade Suits Over Pre-bankruptcy Cars*, JOURNAL-GAZETTE, June 11, 2009, at A1, available at <http://www.allbusiness.com/legal/torts-products-liability/12517354-1.html> (noting that "GM paid \$1.1 billion in products liability claims in 2007 and \$921 million in 2008, according to a filing with the Securities and Exchange Commission").

159. See Interview with Larry Coben, *supra* note 156 and accompanying text.

160. *Id.*

161. See ProPublica—General Motors, *supra* note 7; ProPublica—Chrysler, *supra* note 8.

new companies' assumption of future claims liability for accidents arising from what are, essentially, the same automobiles as those excluded—those purchased prior to closing.

IV. PUBLIC POLICY: CONSIDERATIONS AND CONSEQUENCES

Historically, federal bailouts of private firms have been largely ad hoc government reactions to threats of failure of important private enterprises.¹⁶² Given that a public bailout results from a balance of public and private considerations, the relative weight accorded those interests should be subject to reasoned scrutiny and analysis.¹⁶³ In order to address these policy considerations in context, it would be helpful to first analyze the federal government's approach to the automobile industry bailout of 2008 and 2009.

A. THE GOVERNMENT GETS INVOLVED

In late 2008, it had become clear that the American automobile manufacturing industry was facing imminent insolvency and collapse.¹⁶⁴ By December of that year, the Bush Administration and the Treasury Department announced their intention to provide government financial and oversight assistance to stabilize and ensure the long-term viability of the industry.¹⁶⁵ Congress had ceded broad authority to the Treasury Department in administering TARP¹⁶⁶ under the Emergency Economic Stabilization Act of 2008 (EESA)¹⁶⁷ “to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.”¹⁶⁸ While acknowledging that TARP was originally intended to authorize the Treasury Department to “stabilize our financial sector,” Secretary Paulson suggested that the Bush Administration's position was that the auto industry's insolvency

162. Cheryl D. Block, *Overt and Covert Bailouts: Developing a Public Bailout Policy*, 67 IND. L.J. 951, 1036 (1992) (arguing that a coherent legislative approach to bailout policy should be developed with a more considered approach to economic and non-economic factors, changes to bankruptcy laws and bankruptcy perceptions, the development of strict guidelines for the granting of bailouts, and a stronger regulatory regime to oversee their application).

163. *Id.* at 1037.

164. See, e.g., Terence Corcoran, *Let Detroit Face the Music: Bailout Nothing but Government Nationalization*, NAT'L POST, Nov. 22, 2008, at FP.1, available at <http://www.financialpost.com/scripts/story.html?id=ee7d8c43-d1cf-4d0f-b4ad-eae2087d11a4&k=47803>; Andrew Ross Sorkin, *Begging White House for Help*, N.Y. TIMES, Oct. 28, 2008, at B1, available at http://www.nytimes.com/2008/10/28/business/28sorkin.html?_r=1; Bill Vlasic & Leslie Wayne, *Auto Suppliers Share Anxiety Over Bailout for Big Three*, N.Y. TIMES, Dec. 12, 2008, at B1, available at http://www.nytimes.com/2008/12/12/business/12rescue.html?_r=1&hp=&adxnml=1&adxnmlx=1229057602-FQtrkM/R6yTGgeW1mc9ukg.

165. See Press Release, Secretary Paulson, *supra* note 4.

166. Troubled Asset Relief Program (TARP), 12 U.S.C.A. §§ 5211–5241 (2008).

167. Emergency Economic Stabilization Act (EESA), 12 U.S.C.A. §§ 5211–5261 (2008).

168. *Id.* § 5201(1).

contemplated a “significant [enough] disruption to our economy,” to be within TARP’s mandate.¹⁶⁹ The Treasury Department, under President Obama, reiterated that the provision of government assistance was predicated on the automaker’s willingness “to fundamentally restructure, address prior bad business decisions, and chart a path toward a sustainable future.”¹⁷⁰

One commentator has suggested that as a precondition for the provision of bailout monies, companies should be required to explore bankruptcy options.¹⁷¹ Indeed, the mission of the Task Force was primarily to explore and influence ways to ensure that the automobile companies could restructure efficiently and in a way that optimized the likelihood of long-term financial viability independent of ongoing federal assistance or participation.¹⁷² For example, after determining that the viability plan proposed by Chrysler was inadequate, the Task Force worked with Chrysler to ameliorate the plan’s shortcomings and to ensure the participation of Fiat.¹⁷³ This resulted in a plan in which the Task Force and President Obama determined Chrysler could achieve viability.¹⁷⁴ In short, the government’s requirement that the companies provide plans for long-term viability and its acceptance of those plans were in clear contemplation of the use of bankruptcy, and specifically § 363, to achieve the bailout’s goals.¹⁷⁵

Behind the decision to bailout the automobile manufacturing industry, however, was a consideration of interests outside and beyond the straightforward goal of making GM and Chrysler work better. Two examples are particularly telling with respect to the interests of tort claimants: the Warranty Commitment Program and the “voluntary” assumption of future claims liability by GM within the context of its MPA and by Chrysler well after the conclusion of its sale.

The Warranty Commitment Program was initiated by the Task Force and the Treasury Department in an effort “to give confidence to GM’s and Chrysler’s customers . . . regarding the outlook for the companies.”¹⁷⁶ The program created an account with enough funds to cover 125% of all expected warranty obligations, with the automakers providing 15% in cash

169. Press Release, Secretary Paulson, *supra* note 4.

170. *See Hearing Part II, supra* note 11, at 19.

171. Block, *supra* note 162, at 1010–11 (referring to generic Chapter 11 as a “private bailout” of sorts and one that should be explored before a publicly financed option is considered).

172. *See Hearing Part II, supra* note 11, at 19 (“Our role was to act as a potential investor of taxpayer resources, and not become involved in specific business decisions.”).

173. *Id.* at 19.

174. *See Rattner, supra* note 94. This was, however, not without controversy. The Task Force was essentially even-split on Chrysler’s true long-term potential for financial and commercial viability. *See id.*

175. *See* Fact Sheet, Chrysler, *supra* note 114; Fact Sheet, GM, *supra* note 114.

176. *Hearing Part II, supra* note 11, at 26.

and the government providing 110% in loans.¹⁷⁷ Furthermore, the only warranties guaranteed were those attached to automobiles purchased during the restructuring period.¹⁷⁸ If the “disaster” of liquidation, in bankruptcy terms, is generally thought of as the potential for the less than optimal distribution of value,¹⁷⁹ the fact that warranty commitments for automobiles purchased during pendency would normally, in the context of a § 363 sale, attach only to the debtor¹⁸⁰ demonstrates the Treasury Department’s commitment to circumventing bankruptcy policy when public policy favors a different outcome. Here, that policy was the boosting of consumer confidence in the restructuring companies.¹⁸¹

As discussed in Part III, both GM and Chrysler voluntarily assumed future claims liabilities despite their freedom from such encumbrances under § 363(f) of the Code. This was due, in large part, to the application of political pressure by the Obama Administration.¹⁸² Given the Treasury Department’s trumpeting of § 363 as the primary vehicle for the automakers to “clear away the remaining impediments to its successful re-launch,”¹⁸³ its subsequent application of political pressure to accept some liabilities strongly suggests a grounding in policy considerations. However, the fruits of such considerations should not be meted out arbitrarily.¹⁸⁴

177. See Warranty Commitment Program, *supra* note 15.

178. *Id.*

179. See Brege, *supra* note 23, at 1639; Tene, *supra* note 34, at 295.

180. *In re General Motors Corp.*, 407 B.R. 463, 481–82 (Bankr. S.D.N.Y. 2009) (differentiating between the liabilities New GM “assumed” versus those “retained” by Old GM). The clear inference is that liabilities not so assumed would be retained by the debtor. *See id.*

181. See Warranty Commitment Program, *supra* note 15.

182. See Brett A. Emison Automotive Products Liability Law Blog on Lawyers.com, <http://product-liability.lawyers.com/automotive-products-liability/blogs/archives/2129-General-Motors-Chrysler-Accept-Liability-for-Pre-Bankruptcy-Vehicles.html> (Sept. 16, 2009, 12:40 EST) [hereinafter Emison Blog] (asserting that GM and Chrysler’s assumptions of future claims liability were due, at least in part, to pressure from the federal government).

183. See Fact Sheet, Chrysler, *supra* note 114; Fact Sheet, GM, *supra* note 114.

184. Under *Chevron*, courts review the decisions of administrative agencies in their interpretation of Congressional statutes by looking first at whether the nexus between statutory language and congressional intent is ambiguous. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). If the expressed intent is ambiguous enough to leave room for agency interpretation, such interpretation is to be subject a reasonableness standard, which is designed to cede great deference to administrative agency decisions. See Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 317–18 (1996). While the primary issue here—the application of political pressure for GM and Chrysler to assume liability for future claims but not prepetition or pendency claims—was not, strictly speaking, a Treasury Department “decision,” it may be seen as administrative policy-making. It is at least arguable that the Treasury Department’s authority to stabilize financial markets under EESA, 12 U.S.C.A §§ 5211–5261 (2008), did not impart authority to the agency to ameliorate the disposition of certain (future) tort claims to the exclusion of others in the context of an automaker’s bailout. Even so, the Treasury Department’s actions would likely survive judicial scrutiny since, as Judge Jacobs pointed out in *Chrysler*, Congress ceded broad discretion to the Treasury under the EESA and TARP legislation, provided for a high level of legislative oversight, and thus contemplated a very low level of judicial review. *In re Chrysler L.L.C.*, 576 F.3d 108, 121–23 (2d Cir. 2009), *vacated as moot, sub nom.* Ind. State Police

B. SIMILARLY SITUATED, BUT OUT IN THE COLD

The government's actions and decisions throughout the automotive industry bailout consistently led to disparate treatment of similarly situated owners. Under the Warranty Commitment Program, a purchaser of a GM or Chrysler automobile during the period of restructuring enjoyed a guarantee that the warranties protecting her car would be honored completely and in full.¹⁸⁵ However, if the same purchaser were severely injured in the accident giving rise to the redemption of that warranty, she received no guarantee of her personal recovery, which, as an injury claim during pendency, would remain with the debtor—a functionally insolvent entity.¹⁸⁶ Simply put, the Treasury Department was insuring the cars but not the people who would be injured by them.¹⁸⁷ This is a perverse result, particularly given the Treasury Department's explicit policy rationale for establishing the program was to promote consumer confidence in purchasing these automobiles.¹⁸⁸ Committing over \$640 million to insure the automobiles contemplates a significant likelihood that a number of them would be involved in accidents. It is absurd to imagine that no one would be injured in these vehicles, and capitalizing on the public's failure to recognize this difference is ethically questionable.

Furthermore, the government's application of pressure upon GM¹⁸⁹ and Chrysler¹⁹⁰ to assume future claims liabilities for injuries arising from automobiles purchased prepetition and during pendency produces a similarly arbitrary result. For example, someone suffering an injury arising from a manufacturing defect in an Old GM or Old Chrysler automobile can expect a meaningful recovery if their accident occurred after the sale's closing date. However, someone else injured by the same automobile purchased at the same time and arising from the same defect may not expect recovery if their injury occurred prior to the sale's closing. These people, differentiated only by when their accidents happened, are, through the application and then setting aside of bankruptcy rules, being subjected to radically disparate treatment, with future claimants being afforded full

Pension Trust v. Chrysler L.L.C., 130 S.Ct. 1015 (2009). However, while a judicial remedy for the Treasury Department's decisions seems unlikely, the Court's general attitude toward administrative policy-making militates towards a vision that such policy choices be the product of rationality, and not arbitrarily applied. See U.S. v. Mead Corp., 533 U.S. 218, 231 (2001).

185. See Warranty Commitment Program, *supra* note 15.

186. See Emison Blog, *supra* note 182.

187. See *id.* ("Under the original plans Chrysler and GM would have repaired the defective vehicles under warranty claims, but if that same defect caused injury, the consumer would get nothing. The companies would have fixed the car, but not the people.").

188. See Warranty Commitment Program, *supra* note 15.

189. See Spector, *supra* note 19.

190. See discussion *supra* Part III.B.

potential recovery and prepetition and pendency claimants afforded little to no recovery.¹⁹¹

This unacceptable result is enhanced by the fact that while future claimants represent a contingent and nebulous class,¹⁹² prepetition and pendency claimants are a closed set.¹⁹³ Prepetition and pendency claims are limited to accidents that have already occurred but have not yet been compensated, while future claims arise from accidents for all Old GM and Old Chrysler vehicles still on the road.¹⁹⁴ Therefore, future claims encompass a potentially larger group with a greater encumbrance upon the purchasers' assets than do prepetition and pendency claims. Perhaps the potential volume of such claims explains why the movement to pressure GM and Chrysler to accept future claims liability gained such traction and eventually succeeded. However, leaving prepetition and pendency claimants with either no recovery or meaningless recovery, given the extent of their injuries and the inadequacy of the money set aside for them, while allowing full recovery for future claimants, seems inherently capricious.¹⁹⁵

Admittedly, there are other distinctions to be drawn. For instance, the resale market is strongly implicated by the disposition of future claims but not by prepetition and pendency ones. If the status of future claims is uncertain, the value of used GM and Chrysler vehicles is diminished, thus impairing the new companies' ancillary parts and repair concerns. It may also be argued that the government's policy choices in the warranty and

191. See Interview with J. Kent Emison, *supra* note 133. There are no limitations to either New GM's or New Chrysler's assumption of future claims liability while prepetition and pendency claims are left with either functionally meaningless recovery in the case of GM, or no recovery in the case of Chrysler. *Id.*

192. See Tung, *supra* note 152, at 438–40.

193. See Interview with J. Kent Emison, *supra* note 133. Prepetition and pendency claimants (defined as those who purchased their automobiles before closing and were involved in accidents before closing) had until November 30, 2009 to assert their claims. *Id.* The reason GM claimants would want to file such a claim is for the possibility that they may recover as members of the subclass of unsecured claimants entitled to a pro rata share of the consideration set aside for Old GM in the MPA. *Id.* As discussed previously, however, recovery under this plan amounts to pennies on the dollar. *Id.* This means that claimants in this position are under a great temptation to settle their claims or sell them in the unsecured claims market. *Id.* In either of these scenarios, their expectation of recovery is minimal and often meaningless in relation to their injuries. *Id.*

194. *Id.*

195. See Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367, 382 (1994). “[F]or mass tort bankruptcies that involve serious injuries to at least some claimants, fairness requires equal treatment of claimants regardless of the timing of their claims. This result, I believe, is consistent with the moral intuitions of most people who have reflected on these issues.” *Id.* Professor Smith, in making these comments, was dealing with future tort claimants in the context of confirmation of a bankruptcy plan. See *id.* Given their nebulous status compared to present claimants, future tort claimants are at a comparative disadvantage in the negotiation process and thus more risk averse and likely to accept less recovery in contemplating plan confirmation. *Id.* While the result in the automakers' situation may be inverted (with future claimants representing a potentially larger subclass), the thrust of Professor Smith's argument remains: disparate treatment of future and present tort claimants in the context of bankruptcy is offensive to traditional notions of equity and fairness. *Id.*

products liability arenas were grounded in purely financial considerations. In both situations the promotion of consumer confidence was a central concern.¹⁹⁶ While these distinctions are warranted, the division between future claims and prepetition and pendency claims remains an arbitrary bifurcation of the class.¹⁹⁷ Financial and commercial viability also informed the government's decision to effectuate GM and Chrysler's restructurings through the mechanism of § 363 asset sales so as to insulate the purchasers from cumbersome liabilities.¹⁹⁸ If maximizing the fiscal value of the assets to the purchaser is a core function of § 363, that function is undermined—not enhanced—by some of the government's actions. As noted above, the volume of liability for future claims may plausibly outweigh those for prepetition and pendency ones, suggesting that other considerations were also at play. If policy concerns weighed heavily on the government's choices, then issues of fairness and equitable treatment are proper lenses through which to scrutinize those choices.¹⁹⁹

V. WHERE DO WE GO FROM HERE?

The special treatment of pendency warranty claimants under the Warranty Commitment Program²⁰⁰ demonstrates the federal government's willingness to apply public policy to circumvent the generic application of a § 363 asset sale within Chapter 11. The considerations that led to this and other policy choices in the bailout may have been valid subjects of policy, but to allow GM and Chrysler to continue to use § 363 to shield themselves from liability for people situated so closely to those for whom exceptions have been made renders that policy's application arbitrary and unfair. Given the dangerousness of the precedent set by the government, several solutions should be considered to ameliorate these inequities.

Using liberal estimates, GM and Chrysler's prepetition and pendency products liability claimants represent a total potential class of 2000 people with potential recovery of up to \$4 billion.²⁰¹ While not an inconsiderable sum, this number is dwarfed by what the government has committed to ensuring these companies' long-term viability.²⁰² Because the Treasury Department insisted that New GM assume future claims liability within

196. See Warranty Commitment Program, *supra* note 15.

197. See Tung, *supra* note 152, at 482–83 (“Equal treatment of creditors similarly situated is a central bankruptcy policy.”). Professor Tung acknowledges that equal treatment across entire classes of creditors has been “described as a ‘weak’ bankruptcy norm,” but goes on to argue that fairness requires similar treatment of similarly situated subclasses, such as “current and future tort claimants.” *Id.* at 482–83 n.184.

198. *Hearing Part II*, *supra* note 11, at 21–23.

199. See Tung, *supra* note 152, at 482.

200. See discussion *supra* Part IV.B.

201. See discussion, *supra* Part III.C.

202. See ProPublica–General Motors, *supra* note 7; ProPublica–Chrysler, *supra* note 8.

bankruptcy,²⁰³ and applied pressure to New Chrysler to assume it after its restructuring had been consummated,²⁰⁴ it is not unreasonable for the Treasury Department to make a similar demand for the sake of severely injured prepetition and pendency claimants for whom there exists no recovery under the current scheme.

This total-recovery solution, however, is not the only possibility. Despite Chrysler's insistence that its financial outlook has improved greatly,²⁰⁵ the long-term viability of neither Chrysler nor GM is assured.²⁰⁶ Furthermore, since concerns about the resale market and about the difficulty in assuming all pre-closing products liability claims²⁰⁷ provide at least a plausible rationale for the bisection of the class of claimants, certain mitigations on recovery for prepetition and pendency claims may be justified. Given the fragility of the economy and the disastrous effects a failure of the automakers would wreak,²⁰⁸ more moderate options are available that could both provide significant recovery to victims and prove less of a burden on manufacturers. First, tort law provides precedent for the limitation of recovery to compensatory damages.²⁰⁹ Second, in exchange for the assumption of prepetition and pendency claim liabilities, manufacturers and claimants could insist on a substantial reduction of attorney's fees,²¹⁰ limiting the total amount by which recovery is offset. Third, an interest-bearing investment account, subject to some of the limitations listed above, could be established, funded by the automakers and through Treasury Department loans to provide for products liability claimants.²¹¹ Given tort

203. See Spector, *supra* note 19.

204. See discussion *supra* Part III.B.

205. Bozzella Letter, *supra* note 149.

206. Rattner, *supra* note 94.

Like any patient that undergoes major surgery, a successful recovery is far from assured. For Chrysler, the biggest challenges are its need to regenerate its product line and manage a significantly leveraged balance sheet. In the case of GM, the overarching question is whether, without an infusion of new blood, its management team can implement the massive cultural change that is essential.

Id.

207. See discussion *supra* Part IV.B.

208. See *In re General Motors Corp.*, 407 B.R. 463, 476–77 (Bankr. S.D.N.Y. 2009) (detailing the potentially disastrous fallout that would occur if American automakers collapsed).

209. See Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2006) (limiting the recovery in tort for claims against the United States to compensatory damages only).

210. *Id.* § 2678. The Federal Tort Claims Act places several limitations by percentage on the fees a plaintiff's attorney may collect in tort actions against the government. *Id.* It is conceivable that similar limitations could be justified to provide recovery to claimants for whom no meaningful recovery presently exists.

211. The Warranty Commitment Program provides an excellent precedent for how such an account would function. See Warranty Commitment Program, *supra* note 15. GM and Chrysler have both already repaid the Treasury Department's commitment under that program, totaling roughly \$640 million. ProPublica–General Motors, *supra* note 7; ProPublica–Chrysler, *supra* note 8. While the amount necessary to cover recovery for prepetition and pendency claimants stands to be significantly higher, this total may be mitigated by some of the limitations set out above and by

claimants' arguably unfair priority in bankruptcy,²¹² this fund should be shared only by them and not divided pro rata among all unsecured creditors. If the Treasury Department can justify providing "financial stabilization" TARP monies to cover GM and Chrysler warranties, temporarily funding a recovery trust for prepetition and pendency products liability claimants is surely within their purview.

CONCLUSION

This note has attempted to establish several key facts. First, without significant financial assistance from the Treasury Department, GM and Chrysler would likely have fallen into complete insolvency resulting in liquidation bankruptcies with catastrophic results.²¹³ Second, that assistance primarily took the form of a distribution of bailout funds in debt and short and long-term equity totaling over \$63 billion.²¹⁴ Third, the government explicitly endorsed the use of asset sales under § 363 so that the companies could emerge from bankruptcy free and clear of burdensome liabilities.²¹⁵ Fourth, despite this endorsement, the government, through the Warranty Commitment Program and the application of political pressure, ensured that the emergent purchaser-companies would be responsible for certain liabilities that would not have otherwise attached through such asset sales.²¹⁶

Had the GM and Chrysler restructurings occurred through the normal course of Chapter 7 or 11, or even through the expedited process afforded through a generic § 363 asset sale, all products liability claims arising from automobiles purchased pre-closing would have been either explicitly or effectively rendered moot. Others have argued that this result is unacceptable and that the Code should either be interpreted differently or amended.²¹⁷ Those debates will continue to rage.

However, when the Treasury Department is used as an instrument for the effectuation of public policy, such power must not be wielded capriciously. Principles of fairness and equity should factor into any such decision, particularly when the interests of people with serious injuries are implicated. Because recovery has been provided to some claimants and not

allowing GM and Chrysler more time to repay loans under this program. *See* discussion *supra* Part III.C.

212. *See* Painter, *supra* note 55, at 1046–47.

213. *In re General Motors Corp.*, 407 B.R. at 476–77 (noting that the government's fear that the automakers' failure would likely engender widespread job loss, ancillary business failures, and create a disastrous systemic ripple effect on the U.S. economy was well founded).

214. *See* ProPublica–General Motors, *supra* note 7; ProPublica–Chrysler, *supra* note 8.

215. *See* Fact Sheet, Chrysler, *supra* note 114; Fact Sheet, GM, *supra* note 114.

216. *In re General Motors*, 407 B.R. at 481–82.

217. *See generally* Baird & Rasmussen, *supra* note 86; Kuney, *supra* note 24; Kuney & St. James, *supra* note 6.

to others based on a somewhat arbitrary distinction between accidents that occurred pre- and post-closing, the government must ameliorate the injustice and insist upon a more equitable approach. Either all who merit it should recover or none should.

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