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I. INTRODUCTION

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

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

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


5. See infra pp. 525-27 and notes 87-99.
would lead bankruptcy negotiations that supposedly improperly subordinated the interests of secured creditors to those of unsecured creditors. Yet, contrary to popular criticism, Chrysler’s recent bankruptcy proceeding did not impermissibly subordinate the interests of secured creditors to those of the unsecured creditors. Most importantly, Chrysler’s bankruptcy proceeding did not alter substantive bankruptcy law in a way that hampers secured lending in the United States.

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


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

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


10. See infra pp. 527-34.


12. See infra pp. 539-42.

13. See infra pp. 542-44.
II. CHRYSLER'S JOURNEY TO AND THROUGH BANKRUPTCY

Chrysler, the legendary car company that produces iconic cars such as the Jeep Wrangler and the Dodge Viper, has a history of ups and downs.\footnote{Micheline Maynard, \textit{Chrysler: A Short History}, N.Y. \textsc{Times}, May 1, 2009, http://www.nytimes.com/2009/05/01/business/01history.html.} Founded in 1925, Chrysler successfully navigated the Great Depression and World War II by maintaining innovative technology and strong product offerings.\footnote{Chrysler History, http://www.edmunds.com/chrysler/history.html.} Due in part to the oil crisis and an ineffective overseas expansion, Chrysler suffered dire financial troubles and sought a government bailout in the 1970s.\footnote{See \textit{id.}} After repaying a majority of the government loans by the early 1980s, Chrysler acquired American Motors, the fourth-largest automaker in the United States.\footnote{Maynard, \textit{supra} note 14.} This led Chrysler into another financial crisis and prompted the company to reorganize again.\footnote{\textit{Id.}} In 1998, Daimler-Benz merged with Chrysler to form DaimlerChrysler.\footnote{\textit{Id.}} In 2007, Daimler sold Chrysler to the private investment firm Cerberus Capital Management.\footnote{\textit{Id.}}

In 2007, Chrysler began a global search for a strategic partner who could help Chrysler expand product offerings and retail locations.\footnote{See \textit{In re} Chrysler, LLC et al., 405 B.R. 89, 90 (Bankr. S.D.N.Y. 2009).} Chrysler discussed alliances with a number of competitors including: “GM, Fiat S.p.A. (Fiat), Nissan, Hyundai-Kia, Toyota, Volkswagen, Tata Motors, GAZ Group, Magna International, Mitsubishi Motors, Honda, Beijing Automotive, Tempo International Group, Hawtai Automobiles and Chery Automobile Co.” Despite its efforts, Chrysler was unable to secure a partner by the fall of 2008.\footnote{\textit{Id.} at 90.}

Due to a number of factors, including the company’s inability to find a strategic partner, Chrysler was drastically
affected by the global credit crunch of 2008. In July 2008, amid significant job loss and a lack of consumer confidence in the economy, Chrysler announced that year-to-date sales had plunged twenty-nine percent over the same period in 2007. Chrysler suffered from disastrous liquidity problems and, during 2008, the company suffered a net loss of $16.8 billion. In late 2008, Chrysler received $4 billion dollars in government loans. One term of the loans required Chrysler to submit a plan (Viability Plan) showing that it was able to sustain long-term viability and become a strong competitor in the U.S. marketplace.

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

President Obama’s Auto Task Force, a committee created to assist the President with auto industry related policy, conditionally approved Chrysler’s Viability Plan in March 2009. As a part of this conditional acceptance, Chrysler and Fiat, with the assistance of the Auto Task Force, negotiated a new collective bargaining agreement with Chrysler’s major labor union, the International Union, United Automobile, Aerospace and

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


26. In re Chrysler, LLC et al., 405 B.R. 85 at 90.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
Agricultural Implement Workers of America (UAW), as well as a settlement with Chrysler’s secured lenders. On April 30, 2009, Chrysler and twenty-four of its domestic subsidiaries filed for bankruptcy in New York under Chapter 11 of the United States Code. At the time of the filing, Chrysler’s bankruptcy was the fifth largest in U.S. history.

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

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

37. Id. at 90.
38. In re Chrysler LLC, 576 F.3d at 108.
39. Id.
41. In re Chrysler LLC, 576 F.3d at 112. “New Chrysler” is the newly created company that purchased the assets of “Old Chrysler” and merged with Fiat. See Brief for Appellants Indiana Pensioners, Indiana State Teachers Retirement Fund, at 44, In re Chrysler LLC, 576 F.3d 108 (2d Cir. 2009) [hereinafter Brief for Appellants]; infra pp. 531-32 and notes 128-141.
that regulates the procedure. Under a standard Chapter 11 bankruptcy, a debtor or other party of interest files a plan of reorganization that stipulates how a debtor will be reorganized and covers the repayment of a debtor’s debts. Shareholders and creditors then vote on a plan and, if accepted, the plan is reviewed by a court and either approved or denied. In a § 363 sale, a debtor auctions off assets and allocates the money received to creditors according to seniority. A § 363 sale often occurs prior to the debtor officially entering into a Chapter 11 reorganization plan. Chrysler needed to sell assets quickly so as to maximize asset value, which not only would increase returns for secured creditors but also would maintain jobs and allow for a faster return to profitability for New Chrysler. Therefore, Chrysler chose to use a § 363 sale because it allows for a quicker disposition of assets as opposed to waiting to dispose of assets in a formal Chapter 11 plan.

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


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


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

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

49. *In re Chrysler LLC*, 576 F.3d at 112 (“Financing for the sale transaction-$6 billion in senior secured financing, and debtor-in-possession financing for 60 days in the amount of $4.96 billion—would come from the United States Treasury and from Export Development Canada.”). The Canadian government contributed to the bailout because many Canadians were employed in GM’s manufacturing plants located in Canada. *See* The Canadian Press, *Overcapacity an issue, but Chrysler
Chrysler assumed a number of Chrysler's liabilities. Also, New Chrysler paid $2 billion in return for substantially all of Chrysler's assets. Several parties divided ownership of New Chrysler: 55 percent went to the UAW, 9.85 percent went to the United States Treasury, 2.46 percent went to Export Development Canada (the Canadian government), and 20 percent to Fiat S.p.A.

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

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50. See In re Chrysler LLC, 576 F.3d at 111-112.
51. See id.
52. See In re Chrysler LLC, et al., 405 B.R. 85, 92 (Bankr. S.D.N.Y. 2009). Also, Fiat has the right to earn an additional fifteen percent equity stake in “New Chrysler” if the company meets certain “performance metrics.” See US Treas. Dep't of Public Affairs, supra note 33; In re Chrysler, LLC, 576 F.3d at 112.
53. 11 U.S.C. §507 (2006); see 11 U.S.C. §1129(c)(i) and (ii); 11 U.S.C. § 1129 (“[I]f [a class is] paid less than in full, then no class junior may receive anything under the plan. This codifies the absolute priority rule.”).
55. Id.
58. See In re Chrysler LLC, et al., 405 B.R. at 85.
III. An Explanation of § 363 Sales

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

Federal courts have placed restrictions on court approval of § 363 sales. In order to approve a § 363 sale, a court must identify an express business justification.

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

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

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


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

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

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

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

67. See id. at 1070 (noting that a court must “expressly find from the evidence presented . . . a good business reason to grant such an application.”). While Lionel is a Second Circuit decision, a number of other circuits have adopted this standard. See In re Continental Air Lines, Inc., 780 F.2d 1223, (5th Cir. 1986); In re Air Beds, Inc., 92 B.R. 419, 423-424 (9th Cir. 1988); Stephens Indus., Inc. v. McClung, 789 F.2d 386, 389 (6th Cir. 1986); In re UAL Corp., 443 F.3d 565, 572 (7th Cir. 2006).
case determinations of what constitutes "business justifications." In Community of Equity Security Holders v. Lionel Corp. (Lionel), a landmark decision regarding § 363 sales, the Second Circuit listed several factors a court might consider in determining whether to approve a § 363 sale, including:

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

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

68. See Brege, supra note 59, at 1652-1653 (noting that the courts have created a standard, and not a rule, that courts should examine when deciding whether or not to approve a § 363 sale).
69. 722 F.2d at 1070.
70. Id. at 1071.
71. See, e.g., In re Abbotts Dairies of Pa., Inc., 788 F.2d 143, 149-150 (3d Cir. 1986) ("[W]e hold that when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the "good faith" of the purchaser."); Trans World Airlines, Inc., et al., No. 01-00056(PJW), 2001 WL 1820326, at *3 (Bnkr. D. Del. April 2, 2001) (stating that a purchaser in a § 363 sale must act in good faith).
72. See, e.g., Trans World Airlines, 2001 WL 1820326, at *3 (approving a § 363(b) sale in light of the "substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American"); Stephens Indus., 789 F.2d 386 (6th Cir. 1986) (approving the sale of a radio station that could not meet its operating expense obligations and would lose substantial value if it ceased operations); In re UAL Corp., 443 F.3d 565, 572 (7th Cir. 2006) (approving a § 363(b) procedure modifying a collective bargaining agreement that had an impact on other creditors under Chapter 11); In re Air Beds, Inc., 92 B.R.
The benefits of § 363 sales are numerous for both debtors and creditors. First, as the Second Circuit noted, “the speed of the process can maximize asset value by sale of the debtor’s business as a going concern.” Also, because the assets are sold clear of liens, a § 363 sale often provides for the highest possible return on the asset. This may allow for an otherwise unattainable recovery for junior creditors. Further, § 363 sales in conjunction with a Chapter 11 filing offer substantial cost reduction over a Chapter 11 filing alone. Section 363 sales can quickly address a substantial amount of creditor’s claims on debtor’s assets, thus reducing the administrative cost and complexity of a subsequent Chapter 11 filing. Lastly, a § 363 sale can save a company from liquidating, in turn saving thousands of jobs, which benefits the company, its employees, and the economy as a whole.

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

419, 423-424 (9th Cir. 1988) (approving the sale of various assets under 11 U.S.C. §363(b) but denying the distribution of sale proceeds).
73. In re Chrysler LLC, 576 F.3d at 115.
74. See id. (noting that because assets are “typically burnished (or ‘cleansed’) because (with certain limited exception) they are sold free and clear of liens, claims and liabilities . . . [A] § 363 sale can often yield the highest price for the assets because the buyer can select the liabilities it will assume”).
75. See Brege, supra note 59, at 1655 (noting that junior creditors have the most to gain from the efficient disposition of assets).
76. See James J. White, Death and Resurrection of Secured Credit, 12 AM. BANKR. INST. L. REV. 139, 164 (2004) (noting that § 363 sales are beneficial because they result in a lower priced bankruptcy reorganization); see also Brege, supra note 59, at 1653-4 (stating that “courts have critically considered the alternative costs that would result if a Section 363(b) sale were denied . . . [a]pproval of a sale in this context saves administrative expenses down the road”).
77. See id.
78. See Trans World Airlines, Inc., et al., No. 01-00056(PJW), 2001 WL 1820326, at *14 (Bnkr. D. Del. April 2, 2001) (“There is a substantial public interest in preserving the value of TWA as a going concern . . . [which] includes the preservation of jobs for TWA’s 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets.”).
79. See infra pp. 524-25 and notes 80-86.
of Chapter 11 is that it allows creditors an opportunity to vote on the approval of a proposed reorganization of the debtor company. Critics claim that § 363 sales allow debtors to create and fulfill Chapter 11 plans all the while bypassing the creditor approval requirement of Chapter 11. In turn, there is a strong fear that one class of creditors can “strong-arm” the trustee or DIP into a § 363 sale, skirt Chapter 11 safeguards, and profit at the expense of other equity or debt holders. As a result, critics are concerned that a proliferation of § 363 sales might lead to a mass circumvention of the safeguards of Chapter 11. These criticisms have led some courts to refer to improper § 363 sales as “sub rosa” plans.

IV. OBJECTIONS TO THE BANKRUPTCY PLAN

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

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81. See id. at 114.
82. See In re Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir.1983) (noting that sub rosa 363 plans could “short circuit the requirements of Chapter 11 for confirmation of a reorganization plan”); see also Brege, supra note 59, at 1655 (“[A] section 363 [sale] appears to offer a side door to escape the rigors of the typical bankruptcy plan confirmation.”).
83. See In re Chrysler LLC, 576 F.3d at 116 (recognizing the concern senior creditors could “strong-arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders”).
84. See In re Braniff, 700 F.2d at 940 (“The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with a sale of assets.”).
85. “Sub rosa” is a Latin phrase meaning “under the rose,” and it generally connotes secrecy. BLACK’S LAW DICTIONARY (8th ed. 2004). While courts have questioned the usefulness of the term “sub rosa,” the term generally refers either to a § 363 sale that bypasses the requirements of § 363 sales set out by Lionel and it progeny, or to a § 363 sale that dictates the proceedings of a Chapter 11 proceeding while bypassing Chapter 11 requirements. See In re Chrysler LLC, 576 F.3d at 117 (“The term ‘sub rosa’ is something of a misnomer. It bespeaks a covert or secret activity, whereas secrecy has nothing to do with a § 363 transaction.”).
86. See In re Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007) (“The trustee is prohibited from such use, sale or lease [under 11 U.S.C. § 363(b)] if it would amount to a sub rosa plan of reorganization.”).
attempt to stabilize the auto industry significantly increased the risk of secured lending in the United States. The Objecting Creditor’s objections were mostly legal in nature. Outside observers (Observers), including journalists, legal scholars, and hedge fund managers, who were not senior creditors to Chrysler, voiced concern that ethical barriers were broken and feared the pragmatic ramifications of the supposed subordination of Chrysler’s secured lenders to unsecured creditors.0

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


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

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

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

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

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

94. Id. at 112-113.

95. See Brief for Appellants, supra note 41, at 2, 53 (“The Treasury’s actions also violate the fundamental rules of priority and circumvent statutory protections attendant to a chapter 11 reorganization.”); In re Chrysler LLC, 576 F.3d at 112-113.
The brunt of the Observers’ argument was that the executive branch over-stepped legal and ethical boundaries by negotiating the § 363 sale between Chrysler and its secured lenders. Observers argued that the executive branch upset the United States’ “world leading” bankruptcy procedures by bullying Chrysler’s creditors into accepting a settlement that they would not have accepted without overt pressure from the President. In turn, Observers maintained that the government’s intervention in Chrysler’s bankruptcy set a standard that will dissuade creditors from making fully secured loans to large companies.

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

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

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

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

96. See Visnic, supra note 6.
98. See Frezza, supra note 88.
99. See Brief for Appellants, supra note 41, at 8 (arguing that the court ignored the precedent on § 363 sales set by In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983)).
100. See id. at 49.
One of the primary goals of a § 363 sale is to “maximize asset value by the sale of the debtor’s business as a going concern.”\textsuperscript{102} Maximizing the value of the assets and avoiding liquidation enhances the value of the company, thus increasing the likelihood of recovery for the company’s creditors.\textsuperscript{103}

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

\textsuperscript{104} See \textit{Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)}, 722 F.2d 1063, 1071 (2d Cir. 1983) (noting that a court must “expressly find from the evidence presented . . . a good business reason to grant such an application”).
\textsuperscript{105} \textit{In re Lionel Corp.}, 722 F.2d at 1066-1069.
\textsuperscript{106} See \textit{In re Chrysler LLC}, 576 F.3d at 118-119.
\textsuperscript{107} See \textit{id}.
\textsuperscript{108} See \textit{id}.
\textsuperscript{109} \textit{id}.
Notwithstanding Chrysler’s compliance with Lionell standards, Objecting Creditors claim that the sale so significantly affected any subsequent Chapter 11 proceeding that it is in contradiction to the precedent set by the Fifth Circuit in In re Braniff, Inc.10 The Objecting Creditors, however, based their criticism on a flawed interpretation of the Fifth Circuit’s reasoning in Braniff. In Braniff, the Fifth Circuit rejected a proposed § 363 sale of substantially all of Braniff, Inc.’s assets because the sale agreement improperly dictated many terms of any forthcoming Chapter 11 plan.11 Under the sale, Braniff, Inc. would have transferred its assets in return for unsecured notes and airline ticket vouchers.12 This consideration could only be used in a future reorganization of the company.13 More importantly, the court focused on the fact that the plan would force secured creditors “to vote a portion of their deficiency claim in favor of any future reorganization plan approved by a majority of the unsecured creditors’ committee.”114 The court noted that forcing creditors to vote their claim in a specified manner did not fit within 11 U.S.C. § 363’s approval of a “use, sale, or lease” of assets.115 Therefore, the court found that the sale did not merely influence Braniff’s subsequent Chapter 11 plan, but rather dictated the results of a Chapter 11 plan without approval by the creditors as required by Chapter 11.116 The safeguards of a Chapter 11 proceeding do not strictly limit the authority of a trustee under 11 U.S.C. § 363(b) as much as the Objecting Creditors maintain.117 Citing Braniff, Objecting

10. See Brief for Appellants, supra note 41, at 49-50, 54 (citing In re Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983) in support of their contention that a court should not approve a ruling that “effectively undermines or eliminates the chapter 11 process”).
11. See In re Braniff, 700 F.2d at 939-940.
12. See id.
13. See id.
14. See id. (emphasis added).
15. Id.
16. Id. at 940.
Creditors maintain that a § 363 sale in which substantially all of a company's assets are sold "must scale the hurdles erected in Chapter 11." The safeguards of a Chapter 11 plan include, inter alia, the requirements that the plan was proposed in good faith; that creditors voted and approved of the plan; and that creditors' recovery under Chapter 11 is larger than a recovery under a Chapter 7 liquidation plan would have been. However, a trustee can sell the assets of a firm in a § 363 sale without developing a full Chapter 11 plan. Moreover, the Braniff court never stated that a plan should be denied simply because it involved a sale of a majority of the company's assets. Even outside the context of § 363 sales, commentators have noted that Chapter 11 is rarely "a forum where the various stakeholders in a publicly held firm negotiate among each other over the firm's destiny." Rather, lenders controlling a Chapter 11 proceeding "merely put[] in place a preexisting deal.

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

\footnote{118. Brief for Appellants, supra note 41, at 49-50 (citing \textit{In re Braniff Airways, Inc.}, 700 F.2d 935, 940 (5th Cir. 1983)).}
\footnote{119. 11 U.S.C. §1129.}
\footnote{120. \textit{See} \textit{Fla. Dep't of Revenue v. Piccadilly Cafeterias}, 128 S.Ct. 2326, 2330 n.2 (2008); \textit{see also In re Baldwin-United Corp.}, 43 B.R. 888, 906 (Bankr. S.D. Ohio 1984) (approving the disposition of a major asset prior to the approval of full Chapter 11 plan of reorganization because the "debtors . . . are not dictating the terms of the plan by way of [the] disposition"); Brege, \textit{supra} note 59, at 1640 (noting that one can sell an asset through 11 U.S.C. § 363(b) "without first going through the rigors of developing a reorganization plan disposing of that asset"); Baird & Rasmussen, \textit{supra} note 117, at 787 ("Chapter 11 provides a mechanism for selling assets free and clear of all claims even before a plan of reorganization is put in place.").}
\footnote{121. \textit{See In re Chrysler LLC}, 576 F.3d 108, 113 (2d Cir. 2009), \textit{cert. denied sub nom. Ind. State Pension Trust v. Chrysler LLC}, 129 S.Ct. 2275 (2009); \textit{see also In re Braniff}, 700 F.2d at 939 (refusing to rule on each individual factor of the sale, including the amount of assets sold, because the lower courts did not focus on individual factors but addressed the transaction as a whole).}
\footnote{122. \textit{See} \textit{Baird & Rasmussen, supra} note 117, at 752.}
\footnote{123. \textit{See id.}}
\footnote{124. \textit{See, e.g., In re Chrysler LLC}, 576 F.3d at 117 n.9; \textit{see Comm. Of Equity Sec. Holders v. Lionel Corp. (\textit{In re Lionel Corp.}), 722 F.2d 1063, 1072 n.1 (2d Cir. 1983) (Winter, J. dissenting)} ("[A] reorganization plan affects the rights of the parties as
Braniff, the Chrysler sale does not specifically dictate the terms of a Chapter 11 plan.\textsuperscript{125} Chrysler sold substantially all of its assets in its § 363 sale, but the company will still go through a full Chapter 11 proceeding.\textsuperscript{126} Therefore, Chrysler’s proceedings are consistent with current precedent.\textsuperscript{127}

B. Were the Assets Sold to a New Company?

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

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

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\textsuperscript{125} In re Chrysler LLC, 576 F.3d at 117 n.9 ("But it is not a 'sub rosa plan' in the Braniff sense because it does not specifically 'dictate,' or 'arrange' \textit{ex ante}, by contract, the terms of any subsequent plan.").


\textsuperscript{127} See supra pp. 527-31 and notes 100-126.

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

\textsuperscript{129} See Brief for Appellants, supra note 41, at 44-45.

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

\textsuperscript{131} See id. at 119; Brief for Appellants, supra note 41, at 10.

\textsuperscript{132} See In re Chrysler LLC, 576 F.3d at 112 (noting that Fiat will receive a 20% share of “New Chrysler,” with the right to purchase up to 51% of the company, in return for “provid[ing] ['"]New Chrysler['"] with certain fuel-efficient vehicle
assets has been nicknamed “New Chrysler,” the transaction constitutes more than a simple reorganization of Chrysler itself.\footnote{See supra pp. 530-31 and notes 125-132.}

The Objecting Creditors argue against the sale by emphasizing that the new company would be selling many of the same products as the old company.\footnote{See Brief for Appellants, supra note 41, at at 44 (“[N]ew Chrysler[“] will be [“O]ld Chrysler in essentially every respect. It will be called “Chrysler.” . . . It will manufacture and sell Chrysler and Dodge cars and minivans, Jeeps and Dodge Trucks.”).} This is, however, a common feature and even a purpose of § 363 sales.\footnote{See, e.g., Trans World Airlines, Inc., et al., No. 01-00056(PJW), 2001 WL 1820326 (Bnkr. D. Del. April 2, 2001) (approving Trans World Airlines selling substantially all of its assets, including gates, hubs, slots, routes, planes and an experienced workforce to AMR Corporation (American Airlines)). American Airlines would use these assets to assist in operating its business.} Indeed, one of the primary benefits of a § 363 sale is that it preserves the value of the company as a going concern by keeping the assets together and reestablishing control rights.\footnote{Cf Trans World Airlines, 2001 WL 1820326. The court noted that a § 363 sale would preserve the value of TWA as a going concern and would provide for the transfer of substantially all of TWA’s assets to American, who would use the assets in a manner that would preserve 20,000 jobs. \textit{Id.} at *14. Basically, a substantial majority of TWA’s assets and would now be placed under the control of American; Baird & Rasmussen, supra note 117, at 786 (noting that in the market for selling firms as going concerns “a straightforward path exists for keeping the assets of the firm together and reestablishing coherent control rights”).} In keeping the assets together, the purchaser may well use the assets in a manner similar to the seller’s use.\footnote{See supra note 135.} For example, in Trans World Airlines, Inc., Trans World Airlines (TWA) sold substantially all of its assets (including gates, slots, and routes at hub airports as well as airplanes and staff) to American Airlines.\footnote{See id.} American Airlines’ interest in these assets was to incorporate them into its current business and expand its operations.\footnote{See \textit{id}.}

With regards to business operations, Chrysler’s § 363 sale mirrors TWA’s § 363 sale.\footnote{See Trans World Airlines, Inc., et al., No. 01-00056(PJW), 2001 WL 1820326, at *5, *8 (Bnkr. D. Del. April 2, 2001).} Chrysler transferred the bulk of its assets, including its factories, product offerings, and work force, to platforms, access to its worldwide distribution system, and new management that is experienced in turning around a failing auto company”).
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Fiat, who incorporated them into its business and expanded its automobile manufacturing and sales operations. In short, if Chrysler’s § 363 sale is considered sub rosa, then virtually every § 363 sale would be labeled sub rosa.

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

Objecting Creditors maintained that this particular § 363 sale improperly subordinated the interests of secured lenders to those of unsecured lenders and violated the priority rules of Chapter 11. As the Court of Appeals confirmed, this claim lacks merit. As previously mentioned, the absolute priority rule states that senior secured creditors are to be paid in full before junior creditors receive any payment. Contrary to Objecting Creditors’ claims, the absolute priority rule was followed: unsecured lenders did not receive anything that belonged to secured lenders. Under the sale, all of the proceeds were paid to the secured priority lenders. Any equity stakes in New Chrysler that benefitted unsecured creditors emanated from new sources (e.g., government loans, new technology from Fiat, and new management from Fiat). Because these assets emanated from new sources and were not part of the debtor’s estate, these assets were not subject to liens of the secured lenders. Therefore, the

143. In re Chrysler LLC, 576 F.3d at 112.
144. Id. at 118-119.
145. See supra notes 53-55.
146. See Lubben, supra note 87 (“The consideration for that sale goes to the ‘old’ debtor, and will be distributed according to the absolute priority rule.”).
148. In re Chrysler LLC, 576 F.3d at 118-119.
149. See id. at 118 (“[A]ll the equity stakes in New Chrysler were entirely attributable to new value-including governmental loans, new technology, and new management-which were not assets of the debtor’s estate.”) (citing In re Chrysler,
government did not take assets from the senior lenders and give them to junior unsecured creditors.\textsuperscript{150}

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

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

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

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

\begin{itemize}
\item \textsuperscript{150} Id. at 118.
\item \textsuperscript{151} See In re Iridium Operating LLC, 478 F.3d 452, 463 (2d Cir. 2007) ("When a settlement is presented for court approval apart from a reorganization plan, however, the priority rule of 11 U.S.C. § 1129 is not necessarily implicated."). There are other instances in which the absolute priority rule need not be followed. See generally Clifford S. Harris, Note, \textit{A Rule Unvanquished: The New Value Exception to the Absolute Priority Rule}, 89 Mich. L. Rev. 2301 (Aug. 1991) (detailing several exceptions to the absolute priority rule).
\item \textsuperscript{152} See supra note 151.
\item \textsuperscript{153} See Roe, supra note 3 ("[T]he de facto deal was really that the government bought Chrysler from the creditors, giving it to the UAW, flooding Chrysler with cash, and hiring Fiat to manage it.").
\item \textsuperscript{154} See Lubben, supra note 87.
\item \textsuperscript{155} See id. ("The consideration for that sale goes to the 'old' debtor, and will be distributed according to the absolute priority rule.").
\item \textsuperscript{156} 11 U.S.C. § 1129; see supra pp. 533-34 and notes 145-155.
\end{itemize}
“outstepped legal and ethical boundaries” in negotiating the settlement.\textsuperscript{157}

1. Objections to Negotiations Led by TARP-Funded Banks

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

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

\textsuperscript{157} Visnic, supra note 6; see Statement from Non-TARP Lenders, supra note 96.

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


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

\textsuperscript{161} See Lubben, supra note 87.

\textsuperscript{162} \textit{In re} Chrysler LLC, 576 F.3d at 120.

everyone else buying into this loan, agreed to 'majority rule',” and the majority agreed to the § 363 sale.\footnote{\textit{Lubben}, supra note 87.}

Second, Chrysler’s creditors were reasonable to accept the proposed payment of twenty-nine percent of their original debts.\footnote{\textit{See id.}} Without government assistance, Chrysler was unappealing to investors, and the company would likely have been liquidated.\footnote{\textit{See Roe, supra note 3; Steven Bavaria, \textit{GM, Chrysler and the Secured Loan Market}, LEVERAGED FINANCE NEWS, June 4, 2009, http://www.leveragedfinancelnews.com/blog/your_take/-194063-1.html.}} In liquidation Chrysler would have lost any goodwill value.\footnote{\textit{See Bavaria, supra note 166 (“[Liquidating the company] would mean its assets would have been sold off piecemeal, with whatever goodwill that may have once been included in its valuation lost forever.”).}} Therefore, the dealmakers believed that if Chrysler was liquidated the secured lenders would receive even less than twenty-nine cents per dollar invested.\footnote{\textit{See Roe, supra note 3 ( “[G]overnment deal makers believe that Chrysler’s liquidation value, which is what the secured creditors were entitled to, was even less than what they’re getting in the plan.”).}} Courts have previously approved § 363 sales when there is no evidence that the creditors would be better off going through an extended Chapter 11 proceeding.\footnote{\textit{See Trans World Airlines, Inc., et al., 2001 WL 1820326, 2001 WL 1820326, at *14 (Bnkr. D. Del. April 2, 2001)}.} The secured creditors made a sound business decision in accepting a payout of twenty-nine percent of their original investment and the court made a sound legal decision in approving the sale.

Furthermore, the secured lenders received a payout equal to the loan’s open market trading value.\footnote{\textit{See id.}} In the months leading up to the bankruptcy filing, Chrysler’s secured loans traded between fifteen and seventy-five cents per dollar loaned.\footnote{\textit{See id.}} The Indiana Pension Funds, who led the objections to the § 363 sale, purchased Chrysler debt for forty-three cents per dollar loaned in July 2008.\footnote{\textit{See Richard Mourdock, Treasurer of the State of Ind., Driving in the Wrong Direction, Address to the Cato Institute, (Oct. 15, 2009), http://www.coyote blog.com/coyote_blog/2009/10/government-strongarm-tactics-in-the-chrysler-bankruptcy.html.} These funds purchased approximately $43 million dollars of Chrysler’s secured debt for approximately $17 million. \textit{Id.}} In the month before the filing, the loans were valued
as low as thirteen cents per dollar loaned.\footnote{173} Therefore, the lenders saw twenty-nine cents per dollar loaned as a reasonable offer.\footnote{174} Moreover, recent investors who purchased the debt below twenty-nine cents per dollar loaned could make money at a buyout of twenty-nine cents per dollar loaned.\footnote{175} Most importantly, the fact that the secured lenders received payment comparable to prices offered in open market trading reaffirms the value of secured loans generally.\footnote{176} Creditors were wise to accept the settlement.

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

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

Another major objection to the settlement is premised on the belief that the executive branch crossed “legal and ethical boundaries” while facilitating the deal between Chrysler and its secured lenders.\footnote{180} This claim lacks merit. Observers assert that the executive branch used its power to control the restructuring process of Chrysler and to create a result that the President felt was fair.\footnote{181} While the executive branch, through the Auto Task
Force, was the leader of the negotiations between Chrysler and its creditors, no evidence was brought forth that it improperly exerted its influence on the secured lenders. Though the executive branch did play a large role in Chrysler's debt workout negotiations, the bankruptcy proceedings were subject to review by the judicial branch. The reviewing courts found that Chrysler's § 363 sale was legally valid.

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

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

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


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

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

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

188. See Baird & Rasmussen, supra note 117, at 785.
In the present case, Chrysler was losing millions of dollars a day and the government provided DIP financing through multi-billion dollar loans. Therefore, in its role as Financer, the government was able to influence the bankruptcy process and push for a § 363 sale. Yet the influence exerted by the executive branch was no greater than that exercised by other financers in other transactions. Overall, the Objector’s claims of impropriety in the negotiation of the § 363 sale lacked evidence and failed to stand up to close scrutiny.

V. SECURED DEBT REMAINS SECURE

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

Barring another extreme catastrophic economic event, it is unlikely that the government will further invest in private companies like Chrysler. The government never intended to bail out the auto industry. Originally, the government only provided loans to Chrysler in an effort to spur the company to finding future
funding through other means. Before the bailouts, the government clarified that it did not want to increase aid to the automotive industry. Since the bailouts, the government has stated that it does not intend to provide any additional aid to the auto industry. Thus the government has always been a reluctant investor and only got involved to prevent another sector of the U.S. economy from failing during drastic economic times. Even in the unlikely event of future government intervention, adopting simple measures discussed below would negate this issue.

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

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

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

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

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


200. See Sorkin, supra note 42.

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

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

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

\textsuperscript{203} See id. ("Chrysler was . . . politically well-positioned, with an influential union.").

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

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


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

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

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

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

A. Changes Resulting From Chrysler's § 363 Sale

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

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

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210. See Lubben, supra note 87.
211. See id.
212. See supra note 72; cf. Lubben, supra note 87 ("Chapter 11 now routinely involves a sale early in the case, with the remainder of the case devoted to distributing the proceeds of the sale among the creditors.").
213. See supra pp. 527-31 and notes 100-126.
215. See infra notes 218 and 221.
216. See supra notes 180-181.
could possibly be in the form of poison put provisions. Also, lenders may now decide to purchase political intervention insurance in order to better hedge against the risks of future government involvement. Both of these concepts are in use in American contracts with less developed countries and could be incorporated into lender contracts with companies in the United States.

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

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

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

220. See Anderson, supra note 217.

221. See infra p. 544 and note 225.

222. See Sorkin, supra note 153.

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

224. Cf. Lubben, supra note 87 (arguing that the lenders who bought into the loan agreement voluntarily agreed to majority rule).
negotiate out of majority rule clauses, they can simply choose not to lend to companies borrowing from large TARP backed banks.\textsuperscript{225}

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

VI. CONCLUSION

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

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

\textsuperscript{226} See id. at 18.

\textsuperscript{227} See Anderson, supra note 217.

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

\textsuperscript{229} See supra p. 537 and note 178.


\textsuperscript{231} See supra pp. 528-31 and notes 104-127.

\textsuperscript{232} See supra pp. 533-34 and notes 143-156.
justify them."233 Present criticisms do not stand up to an in-depth review of both the policies and the pragmatic effects of Chrysler's § 363 sale.

SPENCER C. ROBINSON

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