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Introduction

The Chrysler automobile business was reorganized in 42 days. The company filed its Chapter 11 petition on April 30, 2009, and the reorganization transaction closed on June 10, 2009. It was "reorganized" in the sense that the operating business assets—including the Chrysler name and other trademarks—were transferred to a new company that took on many of the old company's liabilities in one form or another. There were substantial exceptions to the new company's assumption of the old company's liabilities, however, primarily among prepetition secured lenders, who received 29 cents on the dollar. The transaction was accomplished through the aggressive use of 11 U.S.C.A. § 363(b) and (f) in the Southern District of New York. On expedited direct appeal from the bankruptcy court to the Second Circuit, the order was summarily affirmed, with an opinion to that effect being issued two months later.[1] When the dissenting creditors petitioned the U.S. Supreme Court for review of the Second Circuit's decision by certiorari, the Court granted the petition, vacated the judgment of the Second Circuit, and remanded the case with instructions to dismiss the appeal as moot, without issuing an opinion.[2] By this time, the Second Circuit's *Chrysler* opinion had already been used to support confirmation of a similar, but less draconian, section 363 transaction in the *General Motors* reorganization case and was being cited in support of similar, fast-track reorganization-by-sale transactions elsewhere.

This article examines the Chrysler section 363 transaction and the opinions that approved it. Chrysler may be merely another example of good facts and a crisis making what is perhaps bad law, which has been a pattern in the evolution of Chapter 11 jurisprudence since the Bankruptcy Code was enacted in 1978. The Supreme Court appears to have recognized this in the *Chrysler* case and took the opportunity created by the petition for the certiorari to attempt to wipe the slate clean and re-establish the pre-Chrysler status quo. If this was the Justices' intent, it is not clear that they succeeded and, if past events are taken as predictive, more likely that they did not.

The Supreme Court did the right thing by vacating the Second Circuit opinion, which endorsed a reorganization process that had broken free of its statutory moorings. However, vacatur of that opinion is unlikely to erase the effects of the *Chrysler* case. The opinion remains on the books, vacated or not, disclosing at least one Second Circuit panel's view on the current state of the *Lionel*[3] 363(b) standard, and the bankruptcy court opinion remains good law, with a strong persuasive, if not strictly binding, effect in the Bankruptcy Court for the Southern District of New York.

I. Prelude to Reorganization: Chrysler and the TARP

In response to the global financial crisis of the late 2000s, Congress passed the Emergency Economic Stabilization Act of 2008 (the Act).[4] The Act authorized the U.S. Treasury to establish a Troubled Asset Relief Program (TARP) designed to purchase troubled or toxic assets from American financial institutions.[5] While it seemed originally intended as a program for financial institutions, that designation turned out to be less than concrete, and there has been some controversy about certain nonfinancial institution recipients of TARP funds. Among those controversial recipients is Chrysler—not a financial institution in the strict sense (although Chrysler Acceptance Corporation did serve as Chrysler's financing wing) but a recipient of TARP funds nonetheless. Chrysler received $4 billion in TARP money toward the end of 2008, which it used to continue operations and carry itself "through the liquidity crunch"[6] that it was then experiencing. It was around this time that Chrysler became dependent on the U.S. government for fiscal life support, and given Chrysler's downward-spiraling financials, it was not surprising that it would need more. Even with this injection of capital, at the end of 2008, Chrysler recorded a net loss of $16.8 billion.[7] It would be only a matter of months before Chrysler would declare bankruptcy.

Chrysler's acceptance of TARP money resulted in conditions and obligations owed to the government. As a condition to the loan, Chrysler was to "submit a plan [to the U.S. Treasury] showing that it was able to achieve and sustain long-term viability, energy efficiency, rationalization of costs and competitiveness in the U.S. marketplace."[8] In January 2009, Chrysler entered into a business relationship with Fiat in the hope of forming a strategic partnership that might allow Chrysler to reemerge as a more viable entity.[9] Between the time that Chrysler entered negotiations with Fiat and its petition date, April 30, 2009, Chrysler worked to produce a viability plan that would be accepted by the government and allow it to obtain another loan.[10] On February 17, 2009, Chrysler submitted its viability plan to the government.[11] At the same time, it also asked for $5 billion more in TARP funds.[12]

After examining Chrysler's submission, the government concluded that the combination of a fundamentally disadvantaged operating structure and a limited set of desirable products make standalone viability unlikely.[13] The government stated that it was, however, willing to provide additional capital to fund a reorganization by partnership with Fiat, setting a fast track for such a transaction.[14] Faced with few viable choices, Chrysler accepted the government's terms and moved forward with Fiat. This also meant "meeting certain other aspects of the Viability Plan and obtaining additional concessions from key stakeholders" that the Treasury had determined were preconditions to its further financial support of Chrysler; Chrysler began negotiations with all the major players concerned.[15]

Chrysler and Fiat formed a new business entity—New CarCo Acquisition LLC (referred to as New Chrysler)—that would acquire Chrysler's assets and operations and serve as an "alliance entity" with Fiat.[16] Upon closing of the sale of Chrysler to New Chrysler, Fiat would retain a 35% ownership interest in New Chrysler for its contribution of its vehicle platforms, technology, and access to its distribution capabilities.[17] New Chrysler then began negotiations with the United Auto Workers Union (UAW) to reach a settlement on Chrysler's cash obligations. On April 26, 2009, New Chrysler and the UAW reached an agreement whereby the UAW would accept a 55% equity interest in New Chrysler and a $4.587 billion note in exchange for releasing Chrysler from half of its $10.6 billion obligation.[18] This equity interest and the note would fund a UAW retirement structure for New Chrysler.[19] Following this

settlement, Chrysler's last hurdle was to persuade its secured creditors to accept the terms dictated by the government, which would require them to take a huge loss.

Chrysler's secured creditors (hereinafter "creditors") numbered 46 in all, ranging from large banks to small hedge funds.[20] The total secured debt for all the lenders was $6.9 billion. The mandated offer to the secured creditors was harsh—for the $6.9 billion Chrysler owed, it would pay only $2 billion (roughly 29 cents on the dollar).[21] The government based this offer on an assessment by Chrysler's valuation expert that $2 billion probably exceeded Chrysler's liquidation value.[22] The offer was made to a steering committee of senior creditors, which served as somewhat of a representative for all the creditors attempting to negotiate with the government.[23] Throughout the negotiations, many of the smaller creditors reportedly felt excluded from dealing with the government.[24] This and the fact that several of the creditors on the steering committee were recipients of TARP money (while many of the smaller creditors were not) created a divisive situation between the creditors, as those who had not received TARP money felt as if those who had were potentially compromised in their negotiations with the government. The tension only increased when the steering committee accepted the government's 29-cents-on-the-dollar offer after the non-TARP lenders had made it clear that such terms were unacceptable. It was obvious to everyone that the desired settlement would not be reached, at least on the government's time table, and a bankruptcy filing would be necessary in order to overcome the opposition of the holdouts.

II. The Chrysler Reorganization Transaction

As should be obvious by this point, the *Chrysler* bankruptcy case (and the later *General Motors* case) involved the most federal government intervention that has ever been present in cases administered under the Bankruptcy Code. Chrysler's debt and equity structure when it filed its bankruptcy petition can be abstracted as consisting of (1) $6.9 billion in debt to its senior secured lenders, secured by a blanket security interest in substantially all of its assets; (2) $2.0 billion owed to affiliates of its equity owners, Cerberus Capital Management, L.P. and Daimler AG, secured by a second priority blanket security interest in its assets; (3) $4.27 billion to the U.S. Treasury and the Canadian government, secured by a third party priority security interest in its assets; (4) $10 billion on unsecured debt owed to the United Auto Workers retiree trust; (5) $5 billion in debts to trade creditors; and (6) an unknown sum owed to dealers and the public for warranty claims and dealer obligations.[25]

The governments of the U.S. and Canada provided prepetition loans of approximately $4 billion, debtor in possession (DIP) financing of $5 billion, and exit financing of $6 billion.[26] Under the terms of the transaction, distributions to creditors were as indicated in Table 1, with some receiving distributions from Old Chrysler, the seller, and some from New Chrysler, the buyer.

<graphic id='jblp192_1'>

The Chrysler transaction has been lauded and vilified by commentators and others.[27] Some embrace the characterization of the transaction adopted by the bankruptcy court and the Second Circuit. These courts found that the 363 sale transaction was entirely appropriate and normal: the only purchaser that came to the table paid the estate in cash and an assumption of debt; the other distributions or obligations that were assumed—the UAW's new note and equity stake, for instance—were part of an independent transaction between the purchaser and the parties involved.[28] Others, collapsing all the separate the transactions into one, view the transaction as

violating the code's priority scheme and as consisting of a de facto plan that stripped the parties in interest of the protections of 11 U.S.C.A. §1129, the confirmation statute.[29] Whichever view one adopts, it was clear to all knowledgeable people who were watching the process that the transaction was going to be approved at every level, either expressly, silently, or as a practical matter, by the reviewing courts. In mega-cases during a financial crisis, a doctrine of necessity often applies and, as Garrison Keillor might put it, "gives people the strength they need to get up and do what needs to be done."

III. The *Chrysler* Opinions

A. The Bankruptcy Court Opinion

The bankruptcy court approved the Chrysler transaction after three days of evidentiary hearings. After carefully laying out the facts of the case as it saw them, the court turned to the objections, the first of which was the sub rosa plan objection.[30] Although § 363(b) of the Code can be used to authorize the use, sale, or lease of estate property outside of the ordinary course of business, many courts have recognized that there must be some limit on this power or else such transactions would often supplant the plan process and the carefully balanced confirmation requirements that protect various parties in interest.[31] In short, if the proposed transaction for which approval is sought under section 363 would short-circuit the plan process, it should not be allowed.[32] However, the prohibition is not absolute; these sales may be approved under the Second Circuit's *Lionel*[33] standard, as the *Chrysler* bankruptcy court stated, if they are supported by an "articulated business justification" for the use, sale, or lease of property outside of the ordinary course of business."[34] In *Chrysler*, the bankruptcy court found that there was such a justification and overruled these objections.

The Second Circuit's *Lionel* standard is a flexible one that appears to have become looser over the years. It is interesting to note that the Second Circuit and the Southern District of New York appear not to have explored or adopted an overlay to the *Lionel* business judgment test that would provide more of a structure for the sub rosa plan analysis. Such an overlay was adopted by the Fifth Circuit in *In re Continental Airlines, Inc*.[35] There, the Fifth Circuit held that:

> [W]hen an objector to a proposed transaction under [section] 363(b) claims that it is being denied certain protections because approval is sought pursuant to [section] 363(b) instead of as part of a reorganization plan, the objector must specify exactly what protection is being denied. If the court concluded that there has in actuality been such a denial, it may then consider fashioning appropriate protective measures modeled on those which would attend a reorganization plan.[36]

In other words, if a sub rosa plan objection is made to a section 363 transaction, under *Continental*, it is up to the objector to identify the specific section 1129 confirmation prohibition or protection that is being denied so that the transaction proponent and the court can create additional measures to ensure that the prohibition or protection is not bypassed. The *Continental* overlay to the basic business judgment standard of *Lionel* thus provides a way to tee up and resolve precisely the sub rosa plan objection in a principled fashion and limits the use of section 363 to instances when plan confirmation protections are not being denied to parties in interest. Because the *Chrysler* case was filed in the Southern District of New York

within the Second Circuit, however, *Lionel* and similar cases controlled, and the bankruptcy court applied the controlling precedent.

Finding that the sale could proceed on section 363(b) grounds, the court then turned to section 363(f), the sale free and clear of claims and interests[37] power of the bankruptcy court. Finding that the first priority secured creditors' lending syndicate documents controlled and that their Administrative Agent and Collateral Trustee under those documents had consented on their behalf to the sale free and clear, satisfying section 363(f)(1), the court approved the sale free and clear over the objection of a vocal minority of secured creditors within the syndicate.[38]

As part of the approval process, the court also examined the sale process, including the bidding procedures, and due process concerns given the speed of the approval of the transaction.[39] The court rather summarily found that there were no problems in these areas, a potentially questionable finding given the size of the transaction at issue, but one that was, again, made in the spirit of necessity.[40] Other objections and requests for clarification were dispensed with in the opinion's final pages.[41]

B. The Second Circuit Affirmance and Opinion

On June 5, 2009, only five days later, on a direct appeal under 28 U.S.C.A. § 158(d)(1), the Second Circuit Court of Appeals affirmed. In doing so, it ruled from the bench at oral argument, and later issued a short order, promising that an opinion would issue in due course in support of its ruling. The opinion, authored by Chief Judge Dennis Jacobs, was handed down two months later.

The Second Circuit opinion adopted the bankruptcy court's statement of the factual and procedural background of the matter and proceeded to group the issues into four categories: (1) the sub rosa plan objection; (2) the 363(f) objection of the dissenting first priority secured creditors; (3) the constitutionality of the use of Troubled Asset Relief Funds to finance Chrysler, as it was not a financial institution; and (4) the ability of the bankruptcy court to see assets free and clear of the claims of present and future tort claimants.[42]

As to the first category, dealing with the sub rosa plan objection, the court reiterated the *Lionel* standard and that case's analysis, both its historical review of the sale standards under the Bankruptcy Act and the Bankruptcy Code as applied in the *Lionel* reorganization case itself. [43] The court characterized the sub rosa plan objection in *Chrysler* as the transaction having violated the priority scheme of the Bankruptcy Code because junior unsecured creditors, chiefly the UAW pension trust, were receiving value in the overall transaction when senior secured creditors were not paid in full.[44] The court rejected that objection, affirming the bankruptcy court's finding that the junior creditors were not receiving their distribution from the estate or from the sale but as part of a separate transaction with the purchaser.[45] Thus by characterizing the transaction as having multiple transactions within it and limiting the application of section 363 to the piece comprised of the sale of assets for $2 billion, there was no "short circuit" of plan confirmation protections and no violation of the priority scheme.[46] This has appeared to some to be disingenuous or at least a very tenuous legal fiction.[47] The court affirmed the bankruptcy court's finding of a good business reason for the sale and moved on to other issues.[48]

On the issue of the effect of 363(f) on product liability claims, the court divided such claims into two categories: (1) known, existing claims; and (2) future claims.[49] With regard to known, existing claims, the court adopted the Third Circuit's analysis from the *Trans World Airlines*

case, finding that section 363(f) sales could be free and clear of both interests and claims, despite the absence of the word "claims" in the statue.[50] As to the future claims, the court refused to rule decisively, stating that "we decline to delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as we are presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law."[51]

C. The Supreme Court's Actions

As noted in the introduction to this article, when the objectors sought review by the Supreme Court, the court granted the petition for certiorari and summarily vacated the Second Circuit's ruling, remanding the case with instructions to dismiss the Second Circuit appeal as moot.[52] 28 U.S.C.A. § 2106, the statue that enables it to vacate a lower court judgment when a case is moot, is flexible, allowing the court to enter an appropriate judgment, decree, or order or to conduct further proceedings as may be just under the circumstances.[53] In a case deemed to be moot, the Court normally vacates the lower court's judgment because this "clears the path for future relitigation of the issues between the parties, preserving the rights of all parties, while prejudicing none by a decision which was only preliminary."[54] It appears that the Court may have recognized the Chrysler case as one that was somewhat sui generis, a political necessity, but one that should not be cited or become part of the fabric of federal bankruptcy law.

IV. What Will Be the Effect of the *Chrysler* Opinions?

The effect of the Supreme Court's disposition is not entirely clear. On the one hand, the Second Circuit's decision has been vacated, and it should have no precedential effect. On the other hand, it can arguably be cited as "vacated on other grounds" due to the remand to dismiss the case as moot. This sort of citation brings to mind the continuing vitality of Judge Leif Clark's opinion in *Fairchild Aircraft* case, dealing with when product liability claims arise,[55] which was later vacated at the request of the parties after they had settled.[56] *Fairchild Aircraft* is often cited and discussed when the issue of the effect of sale or confirmation order on future claims is addressed, despite being vacated.[57] The now-vacated Second Circuit *Chrysler* opinion remains an indication of the thinking of at least one Second Circuit panel on two important issues: (1) the viability and flexibility of the *Lionel* standard and the absence of any *Continental* requirement that objecting parties identify specific plan confirmation prohibitions or protections that they are being denied so that the bankruptcy court may fashion appropriate protective measures; and (2) that section 363(f) sales can be free and clear of both interests and claims.

What is the effect of the bankruptcy court opinion that was not vacated? Some might argue that, as an opinion of a trial court, it has no precedential value and is binding no one, not even the court and judge that issued it. However, it has already been used as a precedent, most notably in the *General Motors* Chapter 11 case, which also involved a fast-paced 363 sale of substantially all the assets of the company.[58] In the *General Motors* case, the bankruptcy court noted that:

> Bankruptcy Courts in this Circuit decide issues of the type now before the Court under binding decisions of the U.S. Supreme Court and the Second Circuit Court of Appeals, each of which (particularly the later) has spoken to the issues here. Bankruptcy courts look to other bankruptcy court decisions, which, in this District and elsewhere, have dealt

> with very similar facts. While an opinion of one bankruptcy judge in this District is not, strictly speaking, binding on another, it is the practice of this Court to grant great respect to earlier bankruptcy court precedents in this District, particularly since they frequently address issues that have not been addressed at the Circuit level.[59]

In support of that statement, the *General Motors* court cited to the *Adelphia Communications* case, which it quoted:

> This Court has been on record for many years as having held that the interests of predictability in this District are of great importance, and that where there is no controlling Second Circuit authority, it follows the decisions of other bankruptcy judges in this district in the absence of clear error.[60]

Thus, despite the Second Circuit's opinion being vacated by the Supreme Court, the bankruptcy court's opinion in *Chrysler* (and now *General Motors* as well) constitutes what sounds like a very strong form of persuasive authority in the Southern District of New York. The Second Circuit opinion remains available for reading, including its endorsement of the narrow view of the section 363 transaction that was approved in *Chrysler* and its endorsement of the practice of ignoring the simultaneous interrelated deals between new Chrysler and some, but not all, of the stakeholders in old Chrysler for purposes of the section 363 analysis. A bell cannot be unrung.

NOTES

1. In re Chrysler LLC, 576 F.3d 108, 111, 51 Bankr. Ct. Dec. (CRR) 254, 62 Collier Bankr. Cas. 2d (MB) 183, 47 Employee Benefits Cas. (BNA) 1513 (2d Cir. 2009), cert. dismissed, 130 S. Ct. 41, 174 L. Ed. 2d 626 (2009) and cert. granted, judgment vacated, 130 S. Ct. 1015 (2009) and judgment vacated, 592 F.3d 370 (2d Cir. 2010).
2. See Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC), 2010 U.S. App. LEXIS 1521 (2d Cir. Jan. 25, 2010) ("PER CURIAM: The Supreme Court of the United States vacated the judgment of this court, recorded at In re Chrysler LLC, 576 F.3d 108 (2d Cir. 2009), and remanded "with instructions to dismiss the appeal as moot." Indiana State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009) ("Accordingly, the judgment of this court is vacated and this appeal is dismissed as moot").
3. In re Lionel Corp., 722 F.2d 1063, 1069, 11 Bankr. Ct. Dec. (CRR) 553, 9 Collier Bankr. Cas. 2d (MB) 941, Bankr. L. Rep. (CCH) P 69510 (2d Cir. 1983).
4. In re Chrysler LLC, 405 B.R. 84, 113, 51 Bankr. Ct. Dec. (CRR) 181 (Bankr. S.D.N.Y. 2009), leave to appeal granted, 2009 WL 1532960 (2d Cir. 2009) and aff'd, 576 F.3d 108, 51 Bankr. Ct. Dec. (CRR) 254, 62 Collier Bankr. Cas. 2d (MB) 183, 47 Employee Benefits Cas. (BNA) 1513 (2d Cir. 2009), cert. dismissed, 130 S. Ct. 41, 174 L. Ed. 2d 626 (2009) and cert. granted, judgment vacated, 130 S. Ct. 1015 (2009) and judgment vacated, 592 F.3d 370 (2d Cir. 2010) and appeal dismissed, 592 F.3d 370 (2d Cir. 2010).
5. 12 U.S.C.A. § 5201.
6. Chrysler, 405 B.R. at 90. In addressing Chrysler's "liquidity crunch," Judge Gonzalez noted in his opinion that:

   > In the fall of 2008, a global credit crisis affecting the liquidity markets impacted the availability of loans both to [auto] dealers and consumers, resulting in the erosion of consumer confidence and a sharp drop in vehicle sales. Chrysler was forced to use cash reserves to compensate for the reduction in cash flow and the resulting losses. The losses eliminated the gains that Chrysler had made early in its restructuring effort. Moreover, other OEM's [Original Equipment Manufacturers] were impacted, forcing them to confront their own liquidity issues.
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   > Chrysler, 405 B.R. at 90.
7. Chrysler, 405 B.R. at 89.
8. Chrysler, 405 B.R. at 91.
9. Chrysler, 405 B.R. at 90.
10. Chrysler, 405 B.R. at 91.

11. Chrysler, 405 B.R. at 91.
12. Chrysler, 405 B.R. at 91.
13. Determination of Viability Summary, available online at: http://www.whitehouse.gov/assets/documents/Chrysler_Viability_Assessment.pdf (last visited April 18, 2009).
14. Chrysler, 405 B.R. at 91.
15. Chrysler, 405 B.R. at 91-92.
16. Chrysler, 405 B.R. at 92.
17. Chrysler, 405 B.R. at 92 n. 11.
18. Chrysler, 405 B.R. at 91-92.
19. Chrysler, 405 B.R. at 92.
20. Neil King, Jr. and Jeffrey McCracken, U.S. Forced Chrysler's Creditors to Blink, http://online.wsj.com/article/SB124199948894005017.html (last visited February 19, 2010).
21. Neil King, Jr. and Jeffrey McCracken, U.S. Forced Chrysler's Creditors to Blink, http://online.wsj.com/article/SB124199948894005017.html (last visited February 19, 2010).
22. Chrysler, 405 B.R. at 97.
23. Chrysler, 405 B.R. at 105-106.
24. Neil King, Jr. and Jeffrey McCracken, U.S. Forced Chrysler's Creditors to Blink, http://online.wsj.com/article/SB124199948894005017.html (last visited February 19, 2010).
25. See A. Joseph Warburton, Understanding the Bankruptcies of Chrysler and General Motors: A Primer, http://ssrn.com/abstract=1532562, 60 Syracuse L. Rev.__(2010) (citing In re Chrysler LLC, 405 B.R. 84, (Bankr. S.D.N.Y. 2009), aff'd, 576 F.3d 108 (2d Cir. 2009), vacated on other grounds; available online at: http://www.supremecourts.gov/docket/09-285.htm (docket entry for December 14, 2009); Mark J. Roe and David A. Skeel, Assessing the Chrysler Bankruptcy, 108 Mich. L. Rev. 727 (2010).
26. Roe and Skeel, 108 Mich. L. Rev. at 727.
27. See, e.g., Stephen J. Lubben, No Big Deal: The GM and Chrysler Cases in Context, 83 Am. Bankr. L.J. 531 (2009) (collecting and responding to editorials by academics and other commentators on the Chrysler bankruptcy).
28. Chrysler, 405 B.R. at 108; In re Chrysler LLC, 576 F.3d at 119-20.
29. See, e.g., Roe and Skeel, 108 Mich. L. Rev. at 727.
30. Chrysler, 405 B.R. at 97-98.
31. In re Lionel Corp., 722 F.2d 1063, 1070, 11 Bankr. Ct. Dec. (CRR) 553, 9 Collier Bankr. Cas. 2d (MB) 941, Bankr. L. Rep. (CCH) P 69510 (2d Cir. 1983); In re Braniff Airways, Inc., 700 F.2d 935, 940, 10 Bankr. Ct. Dec. (CRR) 933, 8 Collier Bankr. Cas. 2d (MB) 522 (5th Cir. 1983); George W. Kuney, Misinterpreting Bankruptcy Code § 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L.J. 235 (2002).
32. In re Chrysler, 576 F.3d,at 117.
33. Lionel, 722 F.2d at 1070.
34. Chrysler, 405 B.R. at 95.
35. In re Continental Air Lines, Inc., 780 F.2d 1223, 1228, 13 Bankr. Ct. Dec. (CRR) 1371, 13 Collier Bankr. Cas. 2d (MB) 1433, Bankr. L. Rep. (CCH) P 70945 (5th Cir. 1986).
36. Continental Air Lines, 780 F.2d at 1228.
37. Despite the wording of section 363(f), which is limited to the sales free and clear of "interests," the dominant interpretation of that section is that it allows sales free and clear of "claims and interests." See In re Chrysler LLC, 576 F.3d 108 (citing In re Trans World Airlines, Inc., 322 F.3d 283, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362, 22 A.L.R. Fed. 2d 809 (3d Cir. 2003); and Kuney, 76 Am. Bankr. L.J. at 267).
38. Chrysler, 405 B.R. at 102.
39. Chrysler, 405 B.R. at 109-13.
40. Chrysler, 405 B.R. at 109.
41. Chrysler, 405 B.R. at 110-13.
42. In re Chrysler LLC, 576 F.3d 108, 112-13.
43. In re Chrysler LLC, 576 F.3d at 113-19.
44. See, e.g., Roe and Skeel, 108 Mich. L. Rev. at 727; see also In re Chrysler LLC, 576 F.3d at 117.
45. In re Chrysler LLC, 576 F.3d at 117.
46. In re Chrysler LLC, 576 F.3d at 117.
47. In re Chrysler LLC, 576 F.3d at 117.

48. The portion of the court's opinion in which it found that the dissenting secured creditors were bound by the actions of their trustee under their loan documents are beyond the scope of this article.
49. In re Chrysler LLC, 576 F.3d at 123-27.
50. In re Chrysler LLC, 576 F.3d at 124-25.
51. In re Chrysler LLC, 576 F.3d at 127.
52. In re Chrysler LLC, 576 F.3d 108 (2d Cir. 2009), vacated on other grounds, http://www.supremecourts.gov/docket/09-285.htm (docket entry for December 14, 2009).
53. Alvarez v. Smith, 130 S. Ct. 576 (2009) (citing U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S. Ct. 386, 130 L. Ed. 2d 233, 26 Bankr. Ct. Dec. (CRR) 253, Bankr. L. Rep. (CCH) P 76170, 30 Fed. R. Serv. 3d 1 (1994)).
54. Alvarez v. Smith, 130 S. Ct. 576 (citing U.S. v. Munsingwear, Inc., 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36 (1950) (internal quotes omitted).
55. In re Fairchild Aircraft Corp., 184 B.R. 910 (Bankr. W.D. Tex. 1995), decision vacated, 220 B.R. 909, 32 Bankr. Ct. Dec. (CRR) 742 (Bankr. W.D. Tex. 1998).
56. In re Fairchild Aircraft Corp., 220 B.R. 909, 32 Bankr. Ct. Dec. (CRR) 742 (Bankr. W.D. Tex. 1998).
57. See In re General Motors Corp., 407 B.R. 463, 51 Bankr. Ct. Dec. (CRR) 225 (Bankr. S.D. N.Y. 2009), certification denied, 409 B.R. 24, 51 Bankr. Ct. Dec. (CRR) 226 (Bankr. S.D. N.Y. 2009) (discussing how some courts have determined that §363(f) provides a basis for selling free and clear of successor liability claims while others have not); Lefever v. K.P. Hovnanian Enterprises, Inc., 160 N.J. 307, 734 A.2d 290, 296, Prod. Liab. Rep. (CCH) P 15662 (1999) (discussing the *Fairchild Aircraft* opinion in depth and its ramifications on the future of §363 sales); In re Hexcel Corp., 239 B.R. 564, 572 (N.D. Cal. 1999) (discussing the possible constitutional problems of preventing future successor liability claims caused by due process considerations); In re National Gypsum Co., 1999 WL 354230 at *3 (N.D. Tex. 1999), judgment rev'd, 219 F.3d 478 (5th Cir. 2000) (stating that a bankruptcy court has jurisdiction to declare and determine the scope and effect of an order entered in prior bankruptcy proceedings, and can rule on the legality of the different aspects of the reorganization plan). But see In re Johns-Manville Corp., 517 F.3d 52, 65, 49 Bankr. Ct. Dec. (CRR) 144, Bankr. L. Rep. (CCH) P 81107 (2d Cir. 2008), cert. granted, 129 S. Ct. 761, 172 L. Ed. 2d 752 (2008) and cert. granted, 129 S. Ct. 762, 172 L. Ed. 2d 752 (2008) and rev'd and remanded, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 51 Bankr. Ct. Dec. (CRR) 210, 61 Collier Bankr. Cas. 2d (MB) 1441, Bankr. L. Rep. (CCH) P 81505 (2009) (discussing how the jurisdiction of the bankruptcy court does have limits concerning the ability to enforce its own previous orders); Baron v. Chehab, 2006 WL 1314149, at *4 (C.D. Ill. 2006) (discussing the *Fairchild Aircraft* finding that a claim does not arise until the harm to the creditor occurred or developed).
58. GM Corp., 407 B.R. at 487.
59. GM Corp., 407 B.R. at 487 (internal footnotes and citations omitted).
60. In re Adelphia Communications Corp., 359 B.R. 65, 72 n. 13, 47 Bankr. Ct. Dec. (CRR) 169 (Bankr. S.D. N.Y. 2007). See also In re DBSD North America, Inc., 419 B.R. 179, 206 (Bankr. S.D. N.Y. 2009) ("I've also stated, repeatedly, that I believe in stare decisis, and that I follow precedents of the bankruptcy judges in this district in the absence of manifest error").