No. ___

IN THE
Supreme Court of the United States

Center for Auto Safety, et al.,
Petitioners,

v.

Chrysler, LLC, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether successor liability under state law for product-liability claims can be eliminated through a sale under Section 363(f) of the Bankruptcy Code.

2. Whether Section 363(f) authorizes a sale that eliminates successor liability for future product liability claims—that is, claims that have not yet accrued because injury has not yet occurred—and, if so, whether such a sale would violate the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners in this case are the Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, Public Citizen, William Lovitz, Farbod Nourian, Brian Catalano, and the Ad Hoc Committee of Consumer-Victims of Chrysler LLC.

In addition to Petitioners, other appellants below were Patricia Pascale, Indiana State Police Pension Trust, Indiana State Teachers Retirement Fund, and Indiana Major Moves Construction Fund.

Appellees below were Chrysler LLC *et al.*, debtors in the Chapter 11 bankruptcy case from which this petition arises; International Union of United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO; Fiat S.p.A. and New CarCo Acquisition LLC; the United States of America; Export Development Canada; Chrysler Financial Services Americas LLC; and the Official Committee of Unsecured Creditors of Chrysler LLC, *et al.*

CORPORATE DISCLOSURE STATEMENT

Petitioners Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and Public Citizen are non-profit corporations that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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INTRODUCTION

The Sale Order affirmed by the Second Circuit below sells substantially all of Chrysler's assets to "New Chrysler" free and clear of "claims," including current and future product liability claims for which New Chrysler would be liable under state successor liability laws if New Chrysler continued (as it has indicated it will) to manufacture the same or similar product lines. At the same time, the proposed sale leaves the bankruptcy estate without funds to cover existing product liability claims and does not even attempt to provide for people who will be injured by defects in Chrysler vehicles in the future.

Section 363 of the Bankruptcy Code, by its plain terms, authorizes the sale of property free and clear only of "interests" in that specific property, and only where one of five enumerated conditions is satisfied. The Sale Order's elimination of successor liability, in disregard of these clearly stated limitations on the bankruptcy court's authority, will harm thousands of people who have been or will be injured by Chrysler's vehicles. In addition, it sets an unlawful precedent that will encourage other debtors to use § 363 quick sales, which lack the procedural and substantive protections afforded by the requirements of a plan of reorganization, to immunize purchasers from damages claims by injured people. The Sale Order also raises a constitutional issue about whether debtors and purchasers constitutionally can, consistent with the Due Process Clause, extinguish future claims—claims that have not yet accrued because the injuries on which they will be based have not yet occurred. People who will one day have such claims cannot have received meaningful notice that the bankruptcy proceeding was resolving their rights or a meaningful opportunity to protect those rights, which

otherwise might allow a state law cause of action for their injuries.

General Motors' recent bankruptcy filing demonstrates the importance of the issues presented by this petition. Given the number of injured people affected by the Sale Order in this case, the likelihood it will be used as a model in the future, and the serious constitutional issue in play, the Court should grant certiorari and make clear that debtors and purchasers cannot extinguish current and future product liability claims through a § 363 sale.

OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Second Circuit is reproduced in the appendix at 1a. The Second Circuit's order indicates that its opinion will follow; as of the time of this filing, that opinion has yet to issue. The bankruptcy court's unpublished order authorizing the sale of substantially all of Chrysler's assets free and clear of liens, claims, interests, and encumbrances is reproduced in the appendix at 3a. The bankruptcy court's opinion granting Chrysler's motion seeking authority to sell, pursuant to 11 U.S.C. § 363, substantially all of its assets, is unofficially reported at 2009 WL 1507547 (Bkrtcy. S.D.N.Y., May 31, 2009) and is reproduced in the appendix at page 64a.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

11 U.S.C. § 363(f) provides:

> The trustee may sell property under [11 U.S.C. § 363(b) or (c)] free and clear of any interest in such property of an entity other than the estate, only if-
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 1141(c) provides:

> Except as provided in [11 U.S.C. § 1141(d)(2) and (d)(3)] and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

STATEMENT OF THE CASE

Millions of Chrysler vehicles are on American roads; in 2008 alone, Chrysler sold approximately 1.5 million vehicles. In 2007, according to the National Highway Traffic Safety Administration's Fatal Analysis Reporting System, 3,703 occupants of Chrysler vehicles were killed in fatal accidents; a total of 5,940 people were killed that year as a result of motor vehicle crashes involving Chrysler vehicles. Many thousands more are injured each year in Chrysler vehicles.

On April 30, 2009, Chrysler and 24 of its subsidiaries ("Chrysler") filed petitions for bankruptcy under Chapter 11 of the Bankruptcy Code. On May 3, 2009, Chrysler filed a motion for an order authorizing the sale under 11 U.S.C. § 363(f) of substantially all of its assets to New CarCo Acquisition LLC ("New Chrysler"). Although in negotiations prior to bankruptcy, it was presumed New Chrysler would assume Chrysler's tort liabilities, *see* May 27, 2009 Bankr. Hearing Tr. at 257:17-22, the motion asked that the sale be "free and clear of all liens, claims (as such term is defined by 101(5) of the Bankruptcy Code), encumbrances, rights, remedies, restrictions, interests, liabilities, and contractual commitments of any kind or nature whatsoever, whether arising before or after the Petition date . . . including all rights or claims based on any successor or transferee liability" other than certain assumed liabilities. The Master Transaction Agreement that accompanied the motion stated that New Chrysler would not assume liability for "Product Liability Claims arising from the sale of Products or Inventory prior to the closing" of the sale transaction.

Petitioners are five organizations that work to protect consumers, three individuals with pending tort cases who have been seriously injured or lost family members because of defects in Chrysler's vehicles, and the Ad Hoc Committee of Consumer-Victims of Chrysler LLC, which has more than 170 members, each of whom has product liability tort claims involving personal injuries (including wrongful death actions) against Chrysler. Petitioners filed objections in the bankruptcy court, arguing that the sale should not be approved "free and clear" of product liability claims because such claims do not fall within the statutory language of § 363(f), the provision under which Chrysler and its purchaser seek to proceed. Section 363(f) allows for the sale of property "free and clear of any interest in such property."

The consumer organization petitioners also asked the bankruptcy court to clarify that future claims—that is, claims that have not arisen because the people who will have them have not yet been injured—were not covered by the sale, both because such claims do not fit within the language of § 363(f) and because due process does not allow the parties to bind people whose injuries have not yet occurred. Those "future claimants," the consumer organizations explained, could not file claims in the bankruptcy proceeding and had no meaningful notice and opportunity to be heard on their not-yet-existent claims.

On June 1, 2009, the Bankruptcy Court for the Southern District of New York issued an opinion granting the relief sought in the sale motion. The opinion stated that tort claims and any potential successor liability claims are "interests in such property" that can be extinguished by § 363(f). Pet. App. 114a. The bankruptcy court also

held that the sale did not violate future claimants' due process rights because "notice of the proposed sale was published in newspapers with very wide circulation," *id.* at 115a, citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950), for the proposition that "publication of notice in such newspapers provides sufficient notice to claimants 'whose interests or whereabouts could not with due diligence be ascertained.'" Pet. App. 115a. The Sale Order entered by the bankruptcy court authorized the sale of substantially all of Chrysler's assets "free and clear of all Claims that are not Assumed Liabilities (including, specifically and without limitation, any products liability claims, . . . and any successor liability claims)." *Id.* at 23a; *see also id.* at 50a-51a (stating that New Chrysler "shall not have any successor, derivative or vicarious liabilities of any kind or character for any Claims, including, but not limited to, on any theory of successor or transferee liability, . . . whether known or unknown as of the Closing, now existing or hereafter arising . . . .").

On June 1, 2009, Chrysler filed a motion for an order certifying the Sale Order for immediate appeal to the court of appeals pursuant to 28 U.S.C. § 158(d)(2). Petitioners filed notices of appeal the next day. Also on June 2, 2009, the Second Circuit granted review under § 158(d)(2), issued a stay, and set an expedited briefing and hearing schedule. The Second Circuit heard argument on June 5, 2009. That afternoon, the Second Circuit entered an order authorizing the sale of substantially all of Chrysler's assets, on the terms stated in the bankruptcy court's order, for substantially the reasons stated in the bankruptcy court's opinion.

On June 7, 2009, Petitioners filed an application for a stay of the sale of Chrysler's assets pending this Court's review. On June 8, 2009, Justice Ginsburg ordered that the bankruptcy court order be stayed pending further action by her or the Court. Although Chrysler and the United States emphasized in their oppositions to a stay that the sale had a June 15 drop-dead date, *see, e.g.*, Chrysler Stay Opp. 32, after Justice Ginsburg entered the stay order, Fiat's CEO announced to the press that Fiat would not seek a release from the transaction if it does not close by June 15. *See* Serena Saitto, *Fiat Will 'Never' Walk Away From Chrysler, CEO Says*, http://www.bloomberg.com/apps/news?pid=20601087&sid=aS_6UyCqIJmA.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Exceptionally Important Questions.

A. Through the Sale Order, Chrysler and New Chrysler are attempting to immunize New Chrysler from all successor liability for Chrysler vehicles that have already been sold, or will be sold prior to the sale closing, even where New Chrysler would have successor liability under state law.[1] And they are doing so although there

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[1]Some states extend product liability to successor companies in certain circumstances based upon the successor's conduct in continuing the "product line." *See, e.g., Ray v. Alad Corp.*, 19 Cal.3d 22 (1977); *see generally Mooney Aircraft, Inc. v. Foster*, 730 F.2d 367, 371-72 (5th Cir. 1984) (discussing history of successor liability as it relates to bankruptcy sales). The Sale Order purports to foreclose this liability. Numerous product liability tort victims,

(continued...)

indisputably will be nothing left in the bankruptcy estate for these claimants. *See* May 28, 2009 Bankr. Hearing Tr. at 402-03.

Allowing Chrysler and New Chrysler to eliminate successor liability for current and future claims for pre-existing vehicles will not only affect the thousands of people injured and to-be-injured by defects in Chrysler vehicles, but will establish a precedent that will encourage debtors to use § 363(f) quick sales (without the protections afforded in a plan of reorganization as would be required under § 1141(c)) as a means of immunizing going concerns from claims—even including claims that do not yet exist—of people who have been injured by defects in the debtors' products. The decision below has enormous consequences both for those injured by Chrysler vehicles, who will be deprived of any remedy for injuries and deaths that Chrysler's products caused, and for victims of other debtors, who stand to be victimized by use of a similar procedure. Because this high-profile bankruptcy action could provide the roadmap for subsequent bankruptcies in this troubled economy, it is essential that this Court ensure that the map designed by Congress is followed. The recent bankruptcy filing of General Motors, another of the big three automakers, in the bankruptcy court below, demonstrates that although the issues presented here have been percolating in the courts for some time, they are

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[1](...continued)
including Petitioner Farbod Nourian, whose claim is pending in the California State Court, would likely have valid causes of action against New Chrysler if it continues to make the same or similar vehicles as Chrysler.

growing in importance and should be decided by this Court now.

B. Apart from the serious consequences this case will have for people who have suffered or will suffer harm from defects in Chrysler vehicles, and the precedent it will set in future bankruptcy proceedings, this case presents an important constitutional issue: whether unknown and unknowable people, who have not yet been injured by a product, can have their future claims eliminated in a bankruptcy proceeding. Many courts of appeals have recognized the constitutional problem caused by attempting to discharge or foreclose future claims in a bankruptcy proceeding. *See In Re Chateaugay*, 944 F.2d 997, 1003 (2d Cir. 1991) (recognizing the "enormous practical and perhaps constitutional problems" that would arise from considering future claims to be "claims" under the Bankruptcy Code); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 944 (3d Cir. 1985) ("[A]n interpretation of 'interests' that included plaintiffs' future tort actions would raise constitutional questions."); *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367, 375 (5th Cir. 1984) ("[L]ack of notice might well require us to find that the bankruptcy court's prior judgment was ineffective as to the [future claimants'] claims."); *Matter of UNR Indus., Inc.*, 725 F.2d 1111, 1119 (7th Cir. 1984) (stating that the difficulties of giving constitutionally adequate notice to the thousands of people exposed to asbestos sold by UNR but who had not yet developed asbestosis were "possibly insurmountable").

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997), this Court recognized "the gravity of the question whether class action notice sufficient under the Constitution . . . could ever be given to legions so

unselfconscious and amorphous" as asbestos-exposed individuals with no perceptible asbestos-related disease. Here, the category of people who will be injured by defects in Chrysler vehicles in the future is also unselfconscious and amorphous. But the problem here is even worse than in *Amchem*, where unknown claimants were being relegated to a class action settlement that would provide them recovery if they were injured in the future. *Id.* at 603-04. Here, by the terms of the sale approved by the courts below, future products liability claimants will receive nothing.

The Court should grant a writ of certiorari to consider this important constitutional question before a sale is approved that purports to eliminate the rights of, likely, thousands of people who will be injured because of defects in Chrysler vehicles sold prior to the bankruptcy sale.

II. The Decision Below Adds to Confusion in the Lower Courts and Is In Tension With Other Court of Appeals Cases.

A. Decisions of the lower courts demonstrate substantial confusion about whether product liability claims can be extinguished in a § 363(f) sale. Based on the plain language of the Bankruptcy Code, many courts have held that § 363(f) does not cover claims. *See, e.g.*, *In re Schwinn Bicycle Co.*, 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997), *aff'd*, 217 B.R. 790 (N.D. Ill. 1997); *Fairchild Aircraft, Inc. v. Campbell*, 184 B.R. 910, 917-18 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998); *Lefever v. K.P. Hovnanian Enters., Inc.*, 734 A.2d 290, 295-96 (N.J. 1999); *cf. In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 & n.23 (6th Cir.

1991). Commentators have agreed that this interpretation is correct. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 236-37 (2002); Michael H. Reed, *Successor Liability and Bankruptcy Sales*, 51 Bus. Law. 653, 665 & n.62 (1996).

Other courts, however, have interpreted the language of § 363(f) more broadly and read "claims" into the section. *See, e.g., In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-90 (3d Cir. 2003); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996); *In re New England Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982); *In re All Am. of Ashburn, Inc.*, 56 B.R. 186, 189-91 (Bankr. N.D. Ga. 1986).

Because 11 U.S.C. § 363(m) limits appellate review of unstayed sale orders, a direct circuit split is less likely to arise under § 363(f) than in other contexts. Given the confusion the section has engendered and the number of people affected by the bankruptcy order below, this Court should grant certiorari to resolve the dispute over the scope of § 363(f).

B. In addition to exacerbating the uncertainty surrounding the scope of § 363(f), the Sale Order's elimination of successor liability claims is in severe tension with other courts of appeals' decisions that have permitted successor liability following bankruptcy proceedings.

In *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), the Seventh Circuit held that a bankruptcy court did not have jurisdiction to enjoin a products-liability suit brought under a theory of successor liability, even though the sale of the debtor to the successor company had

stated it was "free and clear of any liens, claims or encumbrances of any sort or nature." *Id.* at 161. The court pointed out that the plaintiffs had not had the opportunity to be part of the bankruptcy proceeding, "since the accident occurred after the bankruptcy proceeding had wound up," but that even if they did occur before the bankruptcy, they would not have been enjoined from suing the successor because "discharge operates as an injunction, but only against suing the debtor," not the successor. *Id.* at 163.

And in *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1274 (5th Cir. 1994), the Fifth Circuit held that a successor corporation that purchased a company that had gone through Chapter 11 reorganization proceedings could be liable for a wrongful death claim based on a fire that killed two children in a mobile home made by the debtor. The court of appeals concluded that the term "claim" could not be extended to the plaintiffs "whom the record indicates were completely unknown and unidentified at the time [the company] filed its petition and whose rights depended entirely on the fortuity of future occurrences." *Id.* at 1277. *See also* George W. Kuney, *Bankruptcy and Recovery of Tort Damages*, 71 Tenn. L. Rev. 81, 86 (2003) (noting that the "law in this area is unsettled," but that "[u]nder the apparently dominant view," "in the case of future products liability claims, there is no claim to sell free and clear of at the time of the sale.").

Similarly, courts construing prior versions of the bankruptcy statutes have concluded that future claims were not "claims" that were dischargeable in bankruptcy. In *Schweitzer*, 758 F.2d at 944, the Third Circuit concluded that people who were exposed to asbestos prior to their

employer's reorganization but only manifested injury afterwards did not have claims at the time of the bankruptcy. The court stated that a "construction of 'interest' that would include the future possibility of a tort cause of action against a debtor with whom the future victim has no legal relationship relevant to the purported 'interest' would lead to results that we cannot believe were intended by Congress." *Id.* at 943. Likewise, in *Mooney Aircraft Corp.*, 730 F.2d at 375, the Fifth Circuit held that a sale of assets "free and clear of all claims and liabilities" did not divest a claim that arose after the sale. The court explained that "[t]he bankruptcy court could not sell free and clear of claims asserted by the victims of an accident which did not occur until five years later." *Id.*

Because the Sale Order contains language that purports to eliminate "future" claims and state laws of successor liability with respect to such claims, the Order is at odds with cases that have allowed claims to proceed against successors. To be sure, because the language in the Sale Order that purports to eliminate these claims is impermissible as a matter of both statutory and constitutional law, people injured in the future may be able to attack the validity of that provision in future suits. And the courts in those future suits should allow those suits to go forward, notwithstanding the decision below in this case. But injured people's ability to bring suit nonetheless will be hampered by the agreement and the bankruptcy court's decision, as affirmed by the Second Circuit. Because the decisions below purport to eliminate these claims, the Sale Order will create a significant impediment to the ability of these individuals to find lawyers to bring their future cases. And the decision below will have res

judicata affect in the Second Circuit. At the very least, therefore, this Court should clarify that the "free and clear" language will not bind not-yet-injured people in future proceedings.

III. The Decision Below Is Incorrect and at Odds with this Court's Precedent.

A. Chrysler Cannot be Sold "Free and Clear" of Current Product Liability Claims.

The sale of Chrysler was approved pursuant to § 363(f) of the Bankruptcy Code, but § 363(f) does not allow a sale of property "free and clear" of product liability claims. Section 363(f) narrowly permits the sale of property free and clear of any "interest in such property"— if one of five conditions are met—and product liability claims are not "interests in such property."

To begin with, the statute on its face applies only to interests in the specific pieces of property—interests in "such property"—such as liens, easements, and licenses. In personam tort claims are not interests in any particular piece of property of the debtor, and are therefore not included within the statutory language.

Moreover, that "claims," such as product liability claims, are distinguishable from "interests" is shown by another Bankruptcy Code provision, § 1141(c). That section's text—which provides that property "dealt with" by a reorganization plan is "free and clear of all *claims and interests*" (emphasis added)—brings into focus two canons of statutory construction that highlight the bankruptcy court's error.

First, standing alone, § 1141(c) refers to "claims and interests," indicating that the two terms are not synonymous, but mean something different. According to the bankruptcy court, however, a product liability "claim" *is* an "interest," rendering superfluous the statutory term "claim." As this Court has explained repeatedly, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also, e.g., Harbison v. Bell*, 129 S. Ct. 1481, 1487 (2009); *United States v. Hayes*, 129 S. Ct. 1079, 1086-87 (2009); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166 (2004).

Second, this Court has explained that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 24 (1983) (internal quotation marks and alteration omitted); *see id.* ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each."); *see also, e.g., Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498, 1520-21 (2009); *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006). This established canon of statutory construction shows that Congress's omission of "claim" in § 363(f) was intentional and that § 363(f) applies only to "interests"—not claims.

In its opposition to petitioners' motion to stay the Sale Order, Chrysler argued that "there is no basis other than New CarCo Acquisition's ownership of those assets on

which to hold it liable for tort claims allegedly arising from Chrysler's conduct." Chrysler Stay Opp. 34. Many courts, however, have recognized the "the product line exception, which generally provides that a successor who acquires all or substantially all of the assets of another company, and undertakes essentially the same manufacturing operation, may be liable for injuries caused by products that were issued by its predecessor." David J. Marchitelli, Annotation, *Liability of Successor Corporation for Injury or Damage Caused by Product Issued by Predecessor, Based on "Product Line" Successor Liability*, 18 A.L.R.6th 629 (2006) (listing courts that have accepted this doctrine). In other words, the successor liability is based on the purchaser's post-sale conduct, not the assets it has acquired.

Congress's decision to draft § 1141(c) to be more expansive than § 363(f) makes perfect sense. Section 1141(c) provides unsecured creditors with procedural and substantive safeguards that are not available to them under § 363(f). *See In Re Golf, L.L.C.*, 322 B.R. 874, 877 (Bankr. D. Neb. 2004) (noting that "§ 363(b) and (f) control asset sales prior to plan approval and require less notice and opportunity for hearing than § 1123(a)(5)(D) and § 1141(c), which govern sales made pursuant to a plan"); 3 Collier on Bankruptcy ¶ 363.02[3] (stating that "there is some danger that a section 363 sale might deprive parties of substantial rights inherent in the plan confirmation process"). The Court below erred in interpreting "interest in such property" in § 363(f) to include product liability claims.

B. Chrysler Cannot Be Sold "Free and Clear" of Future Product Liability Claims.

The bankruptcy court order approving the sale and the Second Circuit's affirmance of that order are also erroneous in that they approve the sale "free and clear" of product liability claims that have not yet arisen. In this regard, the orders below are doubly incorrect. First, as a statutory matter, future claims are not "interests" within the meaning of § 363(f) or the Bankruptcy Code. Second, as a constitutional matter, due process does not allow the elimination of successor liability for the unaccrued product liability claims of people who are not yet injured and have no way of knowing that they will be injured.

1. As discussed above, product liability claims are not "interests in such property" under § 363(f). But even if current claims could be considered "interests in such property" under that section, claims that do not yet exist cannot be. People who have not yet suffered any injury or loss attributable to Chrysler cannot have an "interest in [its] property" because the injuries that would arguably give rise to such an interest have yet to occur.

Moreover, even if § 363(f) applied to "claims" (as opposed to "interests"), the future causes of actions of people who have not yet suffered a loss or injury due to the defect in their vehicles would not be covered. "The term 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). A person who has not yet suffered a loss or injury has no right to payment of any kind from the

debtor. As the Seventh Circuit stated in *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000), addressing a hypothetical remarkably similar to the case at hand:

> Suppose a manufacturer goes bankrupt . . . . And suppose that ten million people own automobiles manufactured by it that may have the same defect that gave rise to [product liability] suits but, so far, only a thousand have had an accident caused by the defect. Would it make any sense to hold that all ten million are tort creditors of the manufacturer and are therefore required, on pain of having their claims subordinated to early filer, to file a claim in the bankruptcy proceeding? Does a pedestrian have a contingent claim against the driver of every automobile that might hit him? We are not alone in thinking that the answer to these questions is "no."

Cf. Schweitzer, 758 F.2d at 944 (claims for personal injuries that developed after a bankruptcy not dischargeable "claims" or "interests" under prior version of Bankruptcy Act); *see also In re Chateaugay Corp.*, 944 F.2d at 1003-04 ("Accepting as claimants those future tort victims whose injuries are caused by pre-petition conduct but do not become manifest until after confirmation, arguably puts considerable strain not only on the Code's definition of 'claim,' but also on the definition of 'creditor.'"). Indeed, that people with future claims cannot be considered claimants under the Bankruptcy Code in this proceeding is demonstrated by the lack of any attempt to provide for them. *See Zerand-Bernal Group, Inc.*, 23 F.3d at 163 (7th Cir. 1994) ("[I]f, as in some asbestosis cases, unknown future product-liability tort creditors of the debtor, . . . had been treated as claimants (or at least as

parties in interest) in the . . . bankruptcy proceeding, provision would have been made for them there.").

Furthermore, even if future claims did meet the threshold requirement of "interests in property" under § 363(f), Chrysler's property cannot be sold free and clear of them unless one of the five conditions set forth in § 363(f) is met. Here, the bankruptcy court held that tort claims could be released under § 363(f)(5), Pet. App. 114a, which allows sale free and clear of claims that can be "compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." Future claims—causes of action that have not yet even accrued—do not and cannot be made to fit within this paragraph. People with no current claim do not have an interest that can be reduced to a monetary value; they have not yet been injured, so they cannot know the nature or extent of an injury yet to occur. It would be impossible for Chrysler to bring a proceeding against any future claimant to compel him or her to accept money in exchange for a claim that has not yet arisen. The plain meaning of the statute thus forecloses the lower court's effort to make the sale free and clear of these future claims.

2. The sale of Chrysler "free and clear" of product liability claims that have yet to arise also violates due process. Because people who will, but have not yet, suffered injury from defects in Chrysler vehicles do not know that they will be injured in the future, they cannot be given either meaningful notice that their rights are being adjudicated or a meaningful opportunity to be heard. As the Third Circuit stated in *Schweitzer*, it would be "absurd" to expect a "person who had no inkling" that he would be injured by the debtor's product years in the

future to file a claim in the debtor's bankruptcy proceedings to preserve his rights. 758 F.2d at 943; *see also In re Pettibone Corp.*, 151 B.R. 166, 172 (Bkrtcy. N.D. Ill. 1993) ("[T]he argument implies that *uninjured* persons who wish to protect themselves in event of future injuries have the burden of monitoring national financial papers . . . to read notices about businesses they have no claims against because they are on notice of claim bar dates affecting any future injuries caused by such companies. Franz Kafka would have been able to accept such a legal principle in one of his stories; the Bankruptcy Code and the Fifth Amendment to the United States Constitution cannot.") (emphasis in original).

In holding that due process was satisfied, the bankruptcy court relied on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950), for the proposition that publication notice is sufficient for claimants "whose interests or whereabouts could not with due diligence be ascertained." Pet App. 115a. But the problem here is not just that Chrysler has been unable to provide individualized notice to people with future claims; the problem is that people with future claims do not *themselves* know that they will be injured by defects in Chrysler's products. Even if they saw a notice in a newspaper, people who have not yet been injured—some of whom may not even own a Chrysler vehicle[2]—would not know that the sale would affect them. These individuals

[2]Petitioner Nourian provides a good example: Nourian has never owned a Chrysler, but was injured when a Chrysler vehicle backed over him due to a defect that allowed to vehicle to self-shift from park into powered reverse.

have neither claims against nor knowledge that they will ever have a cause of action against Chrysler. *Cf. Amchem Prods.*, 521 U.S. at 628 (discussing the impediments to providing adequate class notice to people who have been exposed to asbestos but have no perceptible injury at the time of settlement).

The bankruptcy court's reliance on *Mullane* was wrong for another reason: The elimination of future claims against New Chrysler is not only a violation of procedural due process in the sense that the future claimants have no inkling of how the sale is treating them; the sale is eliminating all potential product liability claims against New Chrysler even though state law protects those claimants' rights. In its opposition to petitioners' motion to stay the Sale Order, Chrysler contended that people with future claims have received all the process they are due because their claims against Chrysler have no value. Chrysler Stay Opp. 35-36. But what is being eliminated here is not claims against Chrysler; it is claims against *New Chrysler* that would exist under state successor liability laws. These claims—when they accrue—will have value. Those potential causes of action are protected by the due process clause, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985), and could not be eliminated by the Sale Order consistent with due process, even if the future claimants had been provided notice. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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