No. __

IN THE

Supreme Court of the United States

In re CHRYSLER LLC, Debtor,

INDIANA STATE POLICE PENSION TRUST, *et al.*,

Petitioners,

v.

CHRYSLER LLC, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After providing Chrysler interim financing in January 2009, the U.S. Treasury conditioned the additional financing needed for Chrysler's survival on a restructuring that would provide billions to Chrysler's unsecured trade and labor creditors but leave secured creditors with only partial payment. Treasury then directed Chrysler to reorganize in a transaction that would be approved on an emergency basis under section 363 of the Bankruptcy Code rather than through confirmation of a chapter 11 plan. After Chrysler filed for bankruptcy, the court imposed a 15-day deadline for final competing bids, which were required to adopt Treasury's prescribed treatment of Chrysler's unsecured creditors. As expected, no competing bidders came forward, and 31 days after Chrysler commenced its chapter 11 case, the court approved a transaction disposing of nearly all of Chrysler's assets on Treasury's terms. Chrysler's first lien lenders received a liquidation-based recovery while unsecured creditors received over $20 billion of going-concern value in cash, new notes and stock from the reorganized business. Affirming, the Second Circuit declared that "[t]he 'side door' of § 363(b) may well 'replace the main route of chapter 11 reorganization plans.'"

The question presented is whether section 363 may freely be used as a "side door" to reorganize a debtor's financial affairs without adherence to the creditor protections provided by the chapter 11 plan confirmation process.

PARTIES TO THE PROCEEDING

Petitioners include the Indiana State Police Pension Trust, Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund (collectively, the "Indiana Pensioners").

Parties to the appeal in the Second Circuit included Chrysler LLC ("Chrysler," and collectively with its chapter 11 debtor affiliates, "Debtors"); the United States of America through the Department of the Treasury; International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO ("UAW"); Fiat S.p.A.; New Carco Acquisition LLC ("New Chrysler"); Export Development Canada; Chrysler Financial Services Americas LLC; The Official Committee of Unsecured Creditors; Patricia Pascale and The Ad Hoc Committee of Consumer-Victims of Chrysler LLC.

Corporate Disclosure Statement

Pursuant to Supreme Court Rule 29, each of the Indiana Pensioners hereby certifies that it (i) has no corporate parent and (ii) no publicly-owned corporation owns 10% or more of its equity stock.

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PETITION FOR WRIT OF CERTIORARI

The Indiana Pensioners respectfully petition the Court to grant a writ of certiorari to the United States Court of Appeals for the Second Circuit in this matter.

OPINIONS BELOW

The bankruptcy court's Order, issued June 1, 2009, approving the motion for an order (a) Authorizing the Sale of Substantially All of the Debtors' Operating Assets, Free and Clear of Liens, Claims, Interests and Encumbrances, (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (c) Granting Certain Related Relief (the "363 Motion"), is unpublished but reprinted in the appendix to the Petition at 48a. The Opinion relating to the 363 Motion, issued May 31, 2009, is published at 405 B.R. 84 and reprinted in the appendix to the Petition at 116a. The Opinion and Order discussing the Emergency Economic Stabilization Act of 2008 and Troubled Asset Relief Program (together with the above Order and Opinion, the "Transaction Orders"), is unpublished but reprinted in the appendix to the Petition at 177a.

The bankruptcy court's order certifying the Transaction Orders for direct appeal to the Second Circuit is unpublished but reprinted in the appendix to the Petition at 192a.

The June 2, 2009 order of the Court of Appeals accepting jurisdiction under 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8001(f) is unpublished but reprinted in the appendix to the Petition at 188a. The final judgment and mandate issued on June 5, 2009, by the Second Circuit affirming the Transaction Orders and lifting its stay effective at 4:00 p.m., Monday, June 8, 2009, or upon denial of a stay by this Court, is unpublished but reprinted in the appendix to the Petition at 46a. The August 5, 2009, opinion of the Court of Appeals further explaining the June 5 judgment is published at -- F.3d --, No. 09-2311-bk, 2009 WL 2382766 (2d Cir. Aug. 5, 2009), and is reprinted in the appendix at 1a.

On June 7, 2009, the Petitioners filed a petition for an emergency stay. Justice Ginsberg issued a temporary stay on June 8, 2009, which is reprinted at 187a. On June 9, 2009, this Court issued a per curiam opinion denying the application for an emergency stay, which is reprinted in the appendix at 185a. The stay order and the opinion are published at -- U.S. --, 129 S.Ct. 2275 (2009).

JURISDICTION

The Court of Appeals entered final judgment on June 5, 2009. The Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 11 U.S.C. § 363(f), 11 U.S.C. § 506(a)(1), and 11 U.S.C. §§ 1122-1129, are reprinted in the appendix at 201a-221a.

STATEMENT

The sale of Chrysler's assets has closed and the distribution of value to its creditors has occurred, but the issue of the transaction's legality is not dead. The Indiana Pensioners acknowledge that in the absence of a finding of bad faith, section 363(m) of the Bankruptcy Code proscribes undoing the sale of Chrysler's assets, and do not now seek such relief. Nonetheless, this appeal lives because Chrysler's bankruptcy estate remains unresolved and a determination that the transaction was unlawful would—while leaving undisturbed the assets of the purchaser—require entities that improperly received consideration to return it to the estate for redistribution under a proper chapter 11 plan of reorganization.

The decisions below now stand as precedent that disrupts the balance the Bankruptcy Code strikes between promoting the reorganization of troubled businesses and protecting creditors' rights; this precedent has already been followed in other cases and this trend will continue unless the Court intervenes. Accordingly, given the significance of the issues presented here both for the Indiana

Pensioners and for the future of bankruptcy law (not to mention U.S. capital markets), the Court should take this case now, when the passion of Chrysler's economic crisis has ebbed and there is no call to rush the case through the Court's docket.

The background is as follows:

Chrysler's First Lien Financing

The Debtors are parties to an Amended and Restated First Lien Credit Agreement, dated as of November 29, 2007, with JPMorgan Chase Bank N.A. ("JPM"), as administrative agent, and certain lenders party thereto (the "First Lien Lenders"). Pet.App. 120a.

The First Lien Lenders are owed $6.9 billion ("First Lien Debt"), all of which was secured by a first lien on substantially all of the Debtors' assets (the "Collateral"). Pet.App. 120a, 129a.

The Indiana Pensioners are (a) two pension funds that are fiduciaries for the investment of billions of dollars of retirement assets for approximately 100,000 Indiana civil servants, including police officers, school teachers and their families, and (2) an infrastructure construction fund; together they hold approximately $42.5 million of First Lien Debt. Pet.App. 129a-130a.

Events Leading to Bankruptcy

In January, 2009, with a national recession looming and sales trickling, Chrysler found itself on the brink of insolvency. [Bankr. Docket 52].[1] To fend off the shut-down of an iconic American manufacturer that employed over 55,000 union and non-union workers, the United States Department of the Treasury extended to Chrysler a $4 billion dollar loan using funds from the Troubled Asset Relief Program ("TARP"), enacted by Congress through the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201-5241 ("EESA"), ostensibly as a way to keep afloat struggling financial institutions. Pet.App. 119a. While keeping the wolf away from the door with Treasury's bridge financing, Chrysler proposed an out-of-court reorganization plan on February 17, 2009, that contemplated full repayment of the $6.9 billion of First Lien Debt. Pet.App. 124a-125a.

On March 30, 2009, however, Treasury rejected this plan and gave Chrysler 30 days to consummate a transaction that would rid the company of the First Lien Debt entirely, on threatened pain of liquidation. Pet.App. 126a. More particularly, Treasury determined that Chrysler should achieve long-term viability by doing the following: (1) entering into a new collective bargaining agreement

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[1] All citations to the "Bankr. Docket" refer to *In re Chrysler LLC*, No. 09-50002 (AJG) (Bankr. S.D.N.Y.).

with the UAW; (2) granting Fiat an equity stake in exchange for access to certain intellectual property (but no cash or tangible assets); (3) exchanging its existing $10 billion unsecured obligation to its Voluntary Employee Benefit Association (the "VEBA") (which provides health and medical benefits to union retirees) for a new $4.6 billion note and a 68% equity stake in the company; and (4) continuing to pay all other operating obligations (*i.e.*, billions of dollars in trade payables, warranty obligations and pension obligations) in full and in the ordinary course of business. Pet.App. 125a-128a; [Bankr. Docket 660, Ex. H]. Critically, Treasury also determined that substantially all of Chrysler's existing $12.9 billion secured debt—the $6.9 billion of First Lien Debt, plus $2 billion second lien debt owed to its parent, Cerberus, plus $4 billion of third lien debt previously advanced by Treasury under TARP—should be eliminated. Pet.App. 120a-125a.

If and only if all these conditions were satisfied, Treasury promised billions of dollars of additional TARP loans to finance Chrysler's ongoing operations. In late March 2009, however, the First Lien Lenders communicated that they would not agree to waive their lien rights without full payment. *See* David Sanger & Bill Vlasic, *U.S. in Standoff With Banks Over Chrysler, N.Y. Times*, April 22, 2009 at B1.

In response, Treasury devised a scheme to strip the First Lien Lenders' rights as secured creditors. Treasury told Chrysler's creditors that, instead of reorganizing under a chapter 11 plan, Chrysler would sell its assets "free and clear" of all interests under section 363 to a newly created shell corporation that would become the revitalized "Chrysler" Treasury originally envisioned. *See* Micheline Maynard & Michael J. de la Merced, *U.S. Said to Seek a Chrysler Plan for Bankruptcy*, *N.Y. Times*, April 23, 2009, at A1; JA-3765-3766.[2] This scheme would yield *going concern* value for select creditors that would become stakeholders in New Chrysler, but only *liquidation* value for the First Lien Lenders—even though the express purpose of the transaction was to avoid an actual liquidation of Chrysler and preserve Chrysler as a going concern. JA-1568; JA-1624. To impel the scheme on Chrysler's creditors, Treasury announced that it would allow Chrysler to bleed liquidity while conditioning additional TARP-funded loans—the only apparent available source of cash—on the creditors' timely approval of the scheme. *See* Maynard & de la Merced, *supra*, at A1.

2. While Chrysler's cash (and options) dwindled, Treasury pursued its strategy to squeeze out the First Lien Lenders using (a) public pressure and (b) a liquidation analysis showing how lenders would supposedly fare if Chrysler was shut down. Pet.App. 139a-140a.

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[2] All citations to "JA" refer to the Second Circuit Joint Appendix.

a. Public Pressure: One of the Government's main tools for engineering Treasury's preferred outcome was the bully pulpit. On March 30, 2009, the day Treasury rejected Chrysler's stand-alone reorganization plan that would have paid the First Lien Debt in full, President Obama stated that he would allow Chrysler and Fiat 30 days to come to an agreement and that, "if they and their stakeholders are unable to reach such an agreement . . ., we will not be able to justify investing additional tax dollars to keep Chrysler in business." *See* President Obama, Remarks by the President on the Auto Industry (Mar. 30, 2009).

As the 30-day deadline loomed, Treasury negotiated with the First Lien Lenders, and Chrysler attempted "to secure the support of the necessary stakeholders and reach a successful conclusion that the administration and U.S. Treasury deems appropriate." Maynard & de la Merced, *supra*, at A1 (Statement of Chrysler spokeswoman, Lori McTavish). Indeed, while the United States Government was publicly raising the specter of a Chrysler shut-down, privately Treasury was detailing to holders of First Lien Debt how the Government would use an asset sale under section 363 to achieve its desired result, if necessary. JA-3765; JA-3773.

In response to the mounting public pressure and concern regarding liquidation recoveries, the First Lien Lenders' agent, JPM—itself a recipient of $25 billion in TARP funds, *see* Troubled Assets Relief Program, *Transactions Report*, U.S. Treasury Dept. (Aug. 28, 2009)—communicated its willingness to reduce substantially the amount to be recovered by the First Lien Debt. [Bankr. Docket 2778, Ex. L]. Soon thereafter, all four of Chrysler's lenders who had received TARP funding, JPM, Citibank, Goldman Sachs and Morgan Stanley (who together held over 60% of the First Lien Debt), agreed to support settling the entire $6.9 billion amount of the First Lien Debt for a cash payment of $2 billion. *Id.*

Most of the First Lien Lenders (none of whom had received TARP funds), however, balked at the arrangement's obviously unfair treatment of their rights and attempted to engage in separate negotiations, to no avail. *Statement From Non-Tarp Lenders To Chrysler*, BusinessWire, Apr. 30, 2009. Even Chrysler was open to the idea of trying to deliver additional value to its lenders. Its financial advisor, Robert Manzo, mentioned to Matthew Feldman, the President's Auto Administration Taskforce bankruptcy attorney, that he had identified potential ways of providing the First Lien Lenders with more value. JA-3770-71. Feldman responded curtly: "I'm now not talking to you. You went where you shouldn't." *Id.* Manzo hastily apologized. *Id.* Reiterating the Government's control, Feldman responded, "It's over. The President doesn't negotiate second rounds. We've given and lent billions of dollars so your team could manage this properly. . . ." *Id.*

When the parties did not reach an agreement by the deadline, the President vilified the holdout lenders, stating that "[t]hey were hoping that everybody else would make sacrifices, and they would have to make none. I don't stand with them." See Jim Rutenberg & Bill Vlasic, *Chrysler Files to Seek Bankruptcy Protection*, N.Y. Times, Apr. 30, 2009.

b. **Liquidation Analysis:** Robert Manzo, Chrysler's financial expert, fully enabled Treasury's scheme in another way. He prepared a first valuation report purporting to show that the $6.9 billion of first-lien debt could fetch from $654 million to $2.6 billion if Chrysler were liquidated. [Bankr. Docket 52]. Manzo later revised his estimate to suggest that liquidation would bring from $0.00 to no more than $1,378,000,000. [Bankr. Docket 1573].

Manzo, it is worth noting, not only advocated the structure of the Chrysler bankruptcy with Treasury, but also was paid for his liquidation analysis on a contingent fee arrangement providing that he would personally receive $10 million if the 363 Motion succeeded. JA-1765-66. In addition, Manzo testified that his report attributed value to only two of Chrysler's 40 current and projected product lines, relied exclusively on Chrysler's performance in 2008 (the undisputed worst year ever in the auto industry), and utilized low valuation multiples for which he could point to no precedent. For these reasons (and others), the Indiana Pensioners objected to Manzo's testimony, but the bankruptcy court allowed him to testify and credited his valuation. Pet.App. 59a-60a, 140a-141a.

Commencement of Case

When Chrysler's non-TARP First Lien Lenders refused to cave, the Debtors formally filed a chapter 11 bankruptcy petition on April 30, 2009. [Bankr. Docket 1]; Pet.App. 8a. On May 3, 2009, Chrysler began the process of implementing Treasury's scheme to strip the First Lien Debt of its property rights by seeking approval of the Master Transaction Agreement (which incorporated Treasury's requirements regarding creditor recoveries). In the motion the Debtors sought (1) authority to transfer substantially all of their assets to a shell corporation, which would in turn resolve over $20 billion of Chrysler's unsecured debts; (2) emergency approval of highly regulated auction procedures; and (3) a proposed timeline to resolve the entire matter in less than 30 days. [Bankr. Docket 492, Ex. A].

Treasury immediately sought to influence the proceedings by filing a statement telling the bankruptcy court that "its commitment to fund Chrysler's bankruptcy must be contingent on Chrysler achieving the milestones necessary to close a sale in sixty days. Simply put, this time period for a sale is a necessary and critical condition to government funding." [Bankr. Docket 69].

Chrysler's proposed auction rules would give bidders about two weeks to submit final and binding offers (and a non-refundable 10% cash deposit), with no financial or due diligence contingency and on the same terms as the Master Transaction Agreement. JA-1613, 88:7-12, JA-1633, 169:1-7, JA-1638, 189:14-16, JA-1644, 210:8-14. These terms included the substantial burdens of (1) paying over $5 billion in prepetition trade claims, (2) honoring over $4 billion in warranty and dealer incentive obligations, (3) assuming Chrysler's underfunded pension obligation and the new UAW collective bargaining agreement, and (4) providing the agreed treatment of the $10 billion VEBA obligation. [Bankr. Docket 492, Ex. A]. Chrysler also sought to reserve the right to reject the bid after consultation with the UAW, Treasury, and the Creditors Committee. *Id.*

Chrysler offered no explanation as to how requiring bidders to assume or pay substantially all of Chrysler's operating and labor obligations would provide a genuine market test of the liquidation value of the First Lien Lenders' Collateral. Indeed, Chrysler expressly admitted that those terms did not benefit the estate. JA-1638-39, 188:8-192:21; *see also* JA-1636, 179:10-180:13. Chrysler also admitted that the bidding procedures were not likely to produce bids for such a large, complicated transaction in such a short period of time. JA-1615, 97:12-22, JA-1634-35, 171:21-174:4, JA-1638-39, 189:23-190:1. Regardless, the bankruptcy court approved the auction procedures on May 8, 2009. [Bankr. Docket 492].

Unsurprisingly, no other bidders came forward. Pet.App. 141a.

<u>Bankruptcy Hearing and Decision</u>

Following the unsuccessful "auction," the pieces were in place for Treasury finally to impose its scheme to reallocate value from the First Lien Lenders to Treasury's preferred trade and labor-related creditors. The bankruptcy court, at the request of Chrysler and Treasury, set May 20 as the deadline for filing objections to the proposed sale. [Bankr. Docket 492]. It also set May 27, 2009, as the date for a hearing on Chrysler's motion to approve the Master Transaction Agreement. *Id.* Hence, the Indiana Pensioners (and other objecting creditors) had only six days to conduct discovery and prepare for trial on the 363 Motion. [Bankr. Docket 2617].

Between May 21 and May 26, the Indiana Pensioners received more than 87,000 documents, totaling over 385,000 pages, from 39 separate productions. *Id.* The Indiana Pensioners took 23 depositions in a four-day period, most of them within 48 hours of the sale hearing. *Id.* While Chrysler's expert had been preparing for the bankruptcy filing since November 2008, [Bankr. Docket 1573, Ex. A]; JA-1639, 192:22-23, the Indiana Pensioners did not receive detailed information about the financial position of the company until a few days before the hearing to approve the transaction and therefore did not have sufficient time to prepare their own expert testimony. [Bankr. Docket 2617].

After conducting a three-day hearing, the bankruptcy court granted the 363 Motion, approving the Master Transaction Agreement and each of the restructuring terms outlined above. Pet.App. 116a. In approving the $2 billion payment to the First Lien Lenders, the bankruptcy court specifically relied on Manzo's testimony regarding the liquidation value of the Collateral, even though the transaction was premised on the continued operation of the business by New Chrysler and evidence had been presented that the going-concern value of the Collateral was $20-30 billion. Pet.App. 126a-128a. This unprecedented use of liquidation value in assessing the propriety of a going-concern transaction—in obvious violation of section 506(a)(1) as previously construed by this Court in *Associates Commercial Corporation v. Rash*, 520 U.S. 953, 960-62 (1997)—effectively diverted most of Chrysler's value away from the First Lien Lenders and toward the favored unsecured creditors selected by Treasury to receive payments from, and debt or equity in, New Chrysler.

Appellate Proceedings

The parties pursued an expedited appeal from the bankruptcy court's order, resulting in an oral argument before the Second Circuit on June 5, 2009.

After deliberating for ten minutes, the Second Circuit affirmed the bankruptcy court's ruling, but stayed its decision pending a possible review by this Court until June 8, 2009. Pet.App. 46a.

The Indiana Pensioners sought an immediate stay in this Court, and Justice Ginsberg granted a temporary stay of the Transaction Orders on June 8, 2009. Pet.App. 187a. That same day, the CEO of Fiat, Sergio Marchionne, disclaimed any notion of abandoning the Chrysler deal after June 15, 2009, saying that "We would never walk away. Never." Serena Saitto, *Fiat Will 'Never' Walk Away From Chrysler, CEO Says*, Bloomberg.com, June 8, 2009.

The next day the Court issued a per curiam opinion denying the Indiana Pensioners' stay application. Pet.App. 185a. The Court emphasized that "[a] denial of a stay is not a decision on the merits of the underlying legal issues[,]" but found that the Pensioners did not carry their burden of showing that the stay, which is a matter of judicial discretion in every case, was justified. Pet.App. 185a, 186a. The transaction closed on June 10, 2009. Pet.App. 10a.

On August 5, 2009, the Second Circuit issued an opinion relating to its June 5 judgment. Pet.App. 1a. The court stressed the "'apparent conflict' between the expedient of a § 363(b) sale and the otherwise applicable features and safeguards of Chapter 11[,]" as explained in *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). Pet.App. 12a-13a. Although section 363 sales are typically used for "wasting assets" such as perishable commodities, the court found that "an automobile manufacturing business can be within the ambit of the 'melting ice cube' theory[.]" Pet.App. 14a. After collecting authority showing that section 363 is being used more and more by large companies that wish to side-step chapter 11 plan confirmation, the court ruled that under the test set forth in *Lionel*, the transaction was not an illegal *sub rosa* debt reorganization plan because Chrysler had "good business reasons" for effectuating the transaction under section 363. Pet.App. 24a.

REASONS FOR GRANTING THE PETITION

This appeal raises novel issues of bankruptcy law with far reaching consequences. The resolution of these issues will impact capital markets, bankruptcy cases and the way the Executive Branch addresses troubled companies, particularly given how Treasury stretched TARP's definition of "financial institution" to include giving bailout funds to automobile manufacturers. *See* Pet.App. 32a-33a. This case presents a test of whether the economic Zeitgeist discerned by the current Administration may supplant the order of economic rights to the assets of a bankrupt company as set by Congress and relied upon by the market.

Certiorari is warranted because the transaction approved in this case goes well beyond what Congress contemplated when permitting asset sales during the pendency of a chapter 11 reorganization case. In upsetting the procedural and substantive balances of chapter 11, the rulings below not only strip the First Lien Lenders of their constitutionally protected property rights, but they also adversely affect investment markets that depend on the reliability of the rights chapter 11 guarantees creditors. The Court should review whether the Administration may lawfully impose such economic reorganization on the stakeholders of a large, multinational corporation.

I. The Court Needs to Clarify What Limits Exist on Using Section 363 to Avoid Confirming a Chapter 11 Plan

This case raises an important national issue of first impression for the Court: whether, and to what extent, section 363 permits a debtor to deal away substantially all of its assets and provide for the treatment of substantially all of its debts and liabilities without complying with the procedural and substantive protections specified in sections 1122-1129 of the Bankruptcy Code.

As described in detail below, section 363, which authorizes the sale of assets during the administration of a bankruptcy estate, is at tension with chapter 11 of the Bankruptcy Code, which dictates the terms on which a debtor may ultimately reorganize. The circuits have not been successful in resolving this tension with any kind of uniformity or predictability, and even the decision below acknowledged the importance of—and lack of manageable tests to address—the issue. The case is therefore worthy of the Court's attention.

A. The chapter 11 confirmation process is the sole means of restructuring debts, whereas section 363 exists to maximize asset value

In enacting chapter 11 of the Bankruptcy Code, Congress' fundamental goal was to promote the rehabilitation of distressed businesses and thereby maximize value for the benefit of all interested parties. *Toibb v. Radloff*, 501 U.S. 157, 163-64 (1991); *In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 373 (5th Cir. 1987) (*en banc*), *aff'd* 484 U.S. 365 (1988) ("A principal goal of the reorganization provisions of the Bankruptcy Code is to benefit the creditors of the Chapter 11 debtor by preserving going-concern values and thereby enhancing the amounts recovered by all creditors."). Permitting a debtor to continue to operate and reorganize its business preserves its going concern value, which is presumably superior to the value that would be realized in a liquidation. *See* 7 Collier on Bankruptcy ¶ 1100.01 (Resnick & Sommer eds., 15th ed. rev. 2008). Continued operation also preserves commerce, reduces market instability and saves both jobs and tax base. *See Nat'l Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984); *see also* H.R. Rep. No. 95-595, at 220 (1977).

Congress, however, was also cognizant of creditors' constitutionally protected property rights. Thus, the Bankruptcy Code does not permit a debtor to reorganize by unilaterally modifying and discharging the rights of its creditors. Rather, Congress balanced the competing policies of rehabilitating debtors and preserving the property rights of creditors, mainly via the chapter 11 plan confirmation process. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, -- U.S. --, 128 S.Ct. 2326, 2339 (2008).

1. Chapter 11 provides a detailed framework under which a debtor may reorganize while protecting the rights of all stakeholders

The chapter 11 plan confirmation process is the detailed statutory regimen for governing how a troubled company reorganizes its assets and liabilities under chapter 11. It requires that carefully balanced procedural and substantive elements be satisfied before the bankruptcy court may approve a plan. Congress enacted this rigorous process precisely because the reorganization of a debtor's estate, in most cases, will materially transform the rights and remedies that stakeholders held prior to the commencement of the chapter 11 case.

Sections 1122-1129 of the Bankruptcy Code impose a number of substantive requirements that a proponent must satisfy before its plan can be confirmed. First, the Bankruptcy Code explicitly governs the contents of every plan. *See* 11 U.S.C. §§ 1122-23, 1129(a)(1); *see also* S. Rep. No. 95-989, at 126 (1978); H.R. Rep. No. 95-595, at 412 (1977). Section 1123 sets forth what *must* be included in a plan (*e.g.*, setting forth the designation and treatment of classes, that each claim or interest within a particular class is treated the same, and that the debtor has provided for adequate means of implementation), 11 U.S.C. § 1123(a), and what *may* be included (*e.g.*, rejection, assumption and assignment of executory contracts, settlements of claims, sale of substantially all of the estate's assets or modification of certain rights of secured creditors), 11 U.S.C. § 1123(b).

Moreover, stakeholders are entitled to vote on a plan on the basis of "adequate information" regarding the debtor and the contents of the proposed plan. *See* 11 U.S.C. §§ 1125, 1129(a)(2); *see also* S. Rep. No. 95-989, at 126 (1978). Indeed, votes on a proposed plan may not even be solicited unless stakeholders receive "a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b).

Further, before the plan may be confirmed, the proponent must demonstrate that the plan satisfies specific requirements—each designed by Congress to protect stakeholders—and the bankruptcy court must hold an evidentiary hearing in respect of each. 11 U.S.C. §§ 1128-29. For example, the proponent must generally show that: (a) each impaired class of claims or interests has either accepted the plan or will receive not less than it would in a liquidation; (b) each class of claims or interests has accepted the plan or is not impaired by the plan; (c) at least one class of impaired claims affirmatively accepted the plan; and (d) the proposed plan is feasible and not likely to result in another bankruptcy filing. 11 U.S.C. § 1129(a)(7)-(8), (10)-(11).

Finally, if any class of claims or interests does not accept the plan, the court may confirm the plan only if the proponent can satisfy further "cramdown" requirements. The proponent must demonstrate that the plan is "fair and equitable" with respect to, and does not "discriminate unfairly" against, each non-accepting class of claims. 11 U.S.C. § 1129(b)(1). This condition, often referred to as the "absolute priority" rule, requires a proponent to demonstrate that the plan does not violate the relative priority rights of non-consenting classes of secured creditors, unsecured creditors and equity interests. *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-45 (1999);

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988).

Taken together, these requirements provide creditors with a significant level of due process before their property rights may be permanently altered by a debtor's reorganization. In that regard, they provide an important statutory counterweight to the legitimate objective of rehabilitating bankrupt companies.

2. Section 363 is not an alternative to the plan confirmation process

Consistent with the goal of preserving going concern value, the Bankruptcy Code also provides a number of tools that a debtor may use to administer its chapter 11 estate and continue operating its business—pending confirmation of a plan. To fund the costs of its chapter 11 case, a debtor may seek to obtain additional financing after commencing bankruptcy. *See* 11 U.S.C. § 364. A debtor may elect to preserve valuable executory contracts and unexpired leases by curing any defaults and assuming or assigning those agreements for the benefit of its estate. *See* 11 U.S.C. § 365. A debtor may also elect to breach those agreements and thereby provide its counterparties with claims to be treated as part of its chapter 11 plan. *Id.*

Similarly, section 363 authorizes debtors to petition the bankruptcy court to sell assets other than in the ordinary course of business before plan confirmation. *See* 11 U.S.C. § 363 (providing that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]").

Section 363 provides creditors with a number of protections when a debtor seeks to dispose of assets. A section 363 sale requires notice to creditors and the opportunity for a hearing. 11 U.S.C. § 363(b)(1). Typically, security interests survive such a sale, and creditors with interests in the property may prohibit or condition the sale as necessary to ensure they receive adequate protection of their interests. 11 U.S.C. § 363(e). Sales may proceed free and clear of a creditor's interest only in cases where some other law permits the sale, the creditor consents or the creditor's claim is fully paid. 11 U.S.C. § 363(f). Secured creditors also have a right to bid on the property offered for sale and offset the value of their interest against their bid if they are successful in doing so. 11 U.S.C. § 363(k).

These protections, however, are not as comprehensive or substantial as those provided to creditors under the chapter 11 confirmation process described above. Section 363 contains no framework delineating the information that must be provided to creditors, the proper treatment of claims against the estate, or any specific requirements for restructuring debt obligations designed to protect the property rights of creditors, including the principle of creditor democracy so deeply entrenched in the plan process. Unlike sections 1125(g) and 1126(b) of the Bankruptcy Code, and contrary to the observation of the Second Circuit in this case, section 363 has no mechanism for effectuating a "pre-packaged" reorganization of a debtor's estate. Pet.App. 8a.

There is a good reason for this dearth of creditor protections: Congress never intended for section 363 to replace the confirmation process or be used as an alternative reorganization tool. Section 363 may be used to maximize the value of estate assets or otherwise benefit the interests of creditors, but a debtor cannot use this provision to short-circuit the chapter 11 confirmation process or upset the balances otherwise struck between the rehabilitation policy and creditors rights. *See, e.g.*, *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983); *In re WestPoint Stevens, Inc.*, 333 B.R. 30, 52 (S.D.N.Y. 2005). Permitting *ad hoc* reorganizations under section 363 (often referred to as "*sub rosa*" plans) would effectively render this careful balance—a policy both intended by Congress and relied upon by financiers—nugatory.

B. Lacking guidance from the Court, the circuits disagree on the point at which a section 363 sale becomes an impermissible reorganization

The Court has never addressed the point at which a section 363 sale of a substantial portion of a debtor's assets constitutes an improper circumvention of the carefully constructed chapter 11 plan confirmation process. The circuits have provided only vague statements and diverging, imprecise tests for deciding whether to approve a section 363 sale—disharmony that reflects the inherent tensions between chapter 11 and section 363. The existence of competing standards on such a fundamental issue under the Bankruptcy Code requires the Court's attention.

The Second Circuit, in *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), was the first circuit to address the tension between a debtor's ability to sell substantially all of its assets under section 363 and the due process protections provided by the chapter 11 confirmation process. The *Lionel* court acknowledged that, although section 363(b) does not necessarily require an "emergency," "perishability" or a showing of "cause" as a predicate for an asset sale, it does "require[] notice and a hearing"—and, most importantly, "Chapter 11's safeguards" must not be "swallow[ed] up[.]" *Id.* at 1069. Accordingly, the test adopted by the Second Circuit (and applied in this case) is that section 363 sales of all or substantially all of a debtor's assets must be supported by a "good business reason." *Id.* at 1071; *see also In re Iridium Operating LLC*, 478 F.3d 452, 466 & n.21 (2d Cir. 2007).

The potential frailty of the Second Circuit's "good business reason" test was observed by the district court in *In re WestPoint Stevens, Inc.*, 333 B.R. at 30, when it reversed the portion of a section 363 transaction purporting to allocate value between first and second lien debt. There, criticizing the bankruptcy court's application of the test, the court predicted a case like this one:

> Taken to its logical extreme, . . . [the bankruptcy court's analysis] would allow a powerful creditor and a debtor anxious to achieve some value for its favored constituencies to run roughshod over disfavored creditors' rights, so long as a section 363(b) asset sale transaction could be defended as an exercise of reasonable business judgment in the context of dire economic circumstances.

Id. at 49-50.

Nevertheless, the Fourth, Sixth, and Seventh Circuits have all largely adopted *Lionel*'s "good business reason" test. *See, e.g., In re Modanlo*, 266 Fed. App'x 272, 274 (4th Cir. 2008) (affirming a bankruptcy court decision requiring a *Lionel* good business reason for a section 363(b) sale); *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988) (citing the *Lionel* test); *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986) (adopting the reasoning in *Lionel*).

The Third Circuit, however, has held that when a bankruptcy court authorizes a sale of all or substantially all of the assets of a debtor under section 363(b)(1), it is required to make a finding of "good faith." *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147-50 (3d Cir. 1986). According to the *Abbotts Dairies* court, such a finding "prevents a debtor-in-possession or trustee from effectively abrogating the creditor protections of Chapter 11." *Id.* at 150 n.5. This test is in significant tension with the Second Circuit's "good business purpose" test, which by its terms does not preclude (as in this case) a sale that effectively abrogates chapter 11 plan protections.

The Fifth Circuit has adopted what is commonly known as the "*sub rosa*" plan test. In the *Braniff* case, that court held that, regardless of whether a "good business reason" exists, a purported section 363 sale of substantially all of a debtor's assets is generally prohibited as a *de facto* debt reorganization devoid of chapter 11 protections when it "attempts to specify the terms whereby a reorganization plan is to be adopted" such that "little would remain save fixed based equipment and little prospect or occasion for further reorganization." *Braniff*, 700 F.2d at 940. The Fifth Circuit determined that "[t]he 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."

Id.; *see also In re The Babcock & Wilcox Co.*, 250 F.3d 955, 960 (5th Cir. 2001) (noting that a sale cannot "change the fundamental nature of the estate's assets in such a way that limits a future reorganization plan"). The Fifth Circuit thus targets the same problems as the Third Circuit, but in terms at variance with the Third Circuit's nebulous search for "good faith."

Given these diverging tests and the vagueness of their directives, the Court should intervene to provide lower courts with more concrete guidance as to the interplay of chapter 11 plan requirements with section 363 sales. Currently, whether a transaction similar to the one proposed by Chrysler will be approved may depend largely on the jurisdiction in which the chapter 11 case is pending. Had Chrysler filed its bankruptcy case in the Fifth Circuit, the approved transaction most likely would have been denied as an attempt to complete an impermissible "*sub rosa*" reorganization—regardless of any "good business reason" for it. This unavoidable inference provides a powerful rationale for granting *certiorari*.

C. The decision below explained the increasing importance and recurrence of these issues—and the uncertainty surrounding them

In this case, the Second Circuit acknowledged the importance of the issue presented here, as well as the lack of authoritative guidance on how to address it. The court recognized that the increasing use of section 363 sales to avert the formal chapter 11 reorganization process is a serious issue of national importance. Pet.App. 16a-17a. It emphasized that section 363 sales "have become common practice in large-scale corporate bankruptcies[,]" Pet.App. 16a, and collected several scholarly articles discussing, and often criticizing, this phenomenon. Pet.App. 16a-20a.

Indeed, the court observed that "[i]n the current economic crisis of 2008-09, § 363(b) sales have become even more useful and customary." Pet.App. 17a. The court also candidly observed that "[a]s § 363(b) sales proliferate, the competing concerns [between section 363 and chapter 11] have become harder to manage." Pet.App. 20a. Continuing, the court commented that "[d]ebtors need flexibility and speed to preserve going concern value; yet one or more classes of creditors should not be able to nullify Chapter 11's requirements. A balance is not easy to achieve . . . ." Pet.App. 20a. Thus, the court acknowledged that current doctrine is jurisprudentially insufficient to address the emerging phenomenon of section 363 sales that effectively avoid the chapter 11 plan confirmation process.

Most tellingly, the Second Circuit observed that "[t]he 'side door' of § 363(b) may well 'replace the main route of chapter 11 reorganization plans.'"

Pet.App. 17a-18a (quoting Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales*, 92 Va. L. Rev. 1639, 1640 (2006)). The problem is that the Bankruptcy Code provides no such "side door." Section 363 authorizes the sale of assets. It does not provide for the treatment of prepetition claims against the bankrupt entity. To hold otherwise is to undo the balance struck by the Bankruptcy Code between the competing policies of rehabilitating troubled businesses and protecting creditor rights. And the result, as shown by the circumstances of this case, is to permit the debtor and its most influential stakeholders—not the law—to dictate by private agreement which creditors get paid.

As a recent scholarly paper addressing this case put it, "Bankruptcy law . . . was largely in good shape doctrinally *before* [the Chrysler sale]." Mark J. Roe & David A. Skeel, *Assessing the Chrysler Bankruptcy*, Institute for Law & Economics, U. of Penn. Law School, Research Paper No. 09-22 at 7 (Aug. 12, 2009) (emphasis added). The Court should intercede to restore the integrity of the bankruptcy reorganization system.

II. This Case is an Excellent Vehicle for Addressing the Limits of Section 363 Sales

For several reasons, the Chrysler bankruptcy case—perhaps the most publicized and politicized bankruptcy case of all time—provides the best vehicle the Court is ever likely to see for addressing the inherent tensions between chapter 11 plan protections and section 363 sales. First, while other section 363 cases have only fostered uncertainty, the mandatory terms of the "sale" in this case—which defeated any meaningful test of whether the transaction was merely a substitute for a chapter 11 plan—provide a relatively bright line for resolution. If ever a sale crossed the line, this is it. Second, because the world is watching this case, it provides a unique opportunity to reassure capital markets of the integrity of our bankruptcy system. Third, although the sale has closed, the Indiana Pensioners would still benefit from reversal through redistribution of sales proceeds through the as-yet unresolved bankruptcy estate.

A. By failing to require a competitive auction for the "sale," the bankruptcy court exalted form over substance and tainted the validity of the transaction

It is a basic precept of bankruptcy law that "substance will not give way to form." *Pepper v. Litton*, 308 U.S. 295, 305 (1939); *see also In re SubMicron Sys. Corp.*, 432 F.3d 448, 454 (3d Cir. 2006). Bankruptcy courts consider proposed transactions based upon the true substance of the relief requested. *See Int'l Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744, 748 (2d Cir. 1991) ("a court must look to the economic substance of the transaction and not its form") (internal quotations omitted); *see also United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 612 (7th Cir. 2005). By permitting a clever debtor to execute a "sale" using complex agreements, fictive structures, shell corporations and uncompetitive bidding rules, the courts below violated these principles and circumvented the express provisions of the Bankruptcy Code. One reason this case is well-suited for Supreme Court review is that these circumstances lend themselves to crafting useful section 363 sale rules.

1. The bankruptcy court approved, and the Second Circuit affirmed, a "sale" under section 363 that not only transferred substantially all of Chrysler's assets to a "New" Chrysler, but also dictated what creditors would receive for their claims. Under the Transaction Orders, New Chrysler paid $2 billion directly to the First Lien Lenders (approximately 29% of their first priority claims), but then also delivered over $20 billion of cash, debt and stock directly to Chrysler's other junior creditors. The Transaction Orders thus provided only a partial recovery to the First Lien Lenders, while effectively paying in full politically favored unsecured creditors. This "sale" transaction completed a restructuring of Chrysler's debt obligations that could not have been achieved through a chapter 11 plan as such a transaction would have been prevented by the creditor protections contained in sections 1122-1129 of the Bankruptcy Code.

Nonetheless, the bankruptcy court formalistically concluded that none of the transaction's proceeds were distributed outside the bankruptcy estate. In the view of the bankruptcy court, "[n]ot one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders[,]" and the equity stakes in New Chrysler were handed out on account of new investment (Treasury) or new contracts (UAW and the VEBA) rather than prepetition claims. Pet.App. 126a n.10, 139a. To reach this conclusion, the lower courts accepted the fallacy that New Chrysler—a shell company that was created only to provide a "buyer" for the transaction—was the entity making distributions to the UAW and the VEBA using its own property.

2. Looking through form to the substance of the transaction, however, the facts do not bear out the lower courts' holdings. In addition to assuming all of Chrysler's junior unsecured trade, warranty and underfunded pension obligations following the sale, [Bankr. Docket 660, Annex 1], New Chrysler also paid the VEBA for its $10 million junior unsecured claims against Chrysler with 68% of the equity of New Chrysler and a $4.6 billion note, [Bankr. Docket 660, Ex. H, Ex. K]; JA-3651-53. Essentially, the lion's share of Chrysler's going concern value was distributed to favored junior unsecured creditors, while the First Lien Lenders received no more than what was allegedly liquidation value. Moreover, the "auction" procedures approved by the bankruptcy

court *required* that any other bid for Chrysler's assets assume, among other substantial obligations, responsibility for the UAW collective bargaining agreement and afford equity to the UAW and the VEBA. [Bankr. Docket 492, Ex. A]. Thus were the terms of the transaction rigged to protect the interests of junior creditors and to prevent any true market test of the value of the lender's Collateral.

In response to the obvious point that contracts benefiting Old Chrysler's retirees (*i.e.*, the beneficiaries of the VEBA) do not themselves add value to New Chrysler, the bankruptcy court said that these mandatory equity interests were a necessary condition to securing a skilled workforce because the UAW would not have agreed to a new collective bargaining agreement but for the equity infusion to the VEBA. Pet.App. 145a. This holding is facially at odds with the principle announced in *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 199, 202, 204-05 (1988), that a promise to provide services in the future—sweat equity—cannot support the otherwise out-of-order recovery of junior stakeholders.

This use of section 363 to protect a politically powerful ally demonstrates exactly why the transaction was not a legitimate sale of assets. It shows that the transaction was nothing more than a way for the Government to pick winners and losers from among Chrysler's claimants, as opposed to a forthright attempt to maximize asset value subject to market competition and discipline. If the VEBA note and the UAW collective bargaining agreement were actually valuable to New Chrysler as a going concern, an unrestricted auction would have yielded similar terms. But under the terms dictated by Treasury, the transaction "breached appropriate bankruptcy practice in ways that made opaque both Chrysler's value in bankruptcy and the plan's allocation to the company's pre-bankruptcy creditors." Roe & Skeel, *supra*, at 2-3; *cf. 203 North LaSalle*, 526 U.S. at 458 (leaving open, in the reorganization context, the question whether "a market test would require an opportunity to offer competing plans" or would be satisfied by a right to bid on the same terms as the tendered offer).

All we really know is that Treasury, the VEBA and the UAW—the DIP financer and its favored constituents—are junior creditors that ultimately received much more value from the deal than did the First Lien Lenders. On its face, this deal smacks of the sort of insider favoritism that the Bankruptcy Code was designed to prevent. *See, e.g.*, Roe & Skeel, *supra*, at 4 ("the Chrysler reorganization reintroduced the equity receivership's most objectionable attributes, particularly its casual regard for priority"); *see also* Pet.App. 19a-20a (recognizing the "fear that one class of creditors may strong-arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum"). The Government's stratagem in this case represents a return to the bad old days of receivership, when he who had the gold made the rules.

Hence, the transaction was a "sale" in form only. Upon consummation, New Chrysler became Old Chrysler in every important respect, including its name, headquarters, employees, products manufactured and dealer network. The real substance of the transaction is the underlying reorganization it implements. Under the transaction, undesirable assets (and associated contingent liabilities) were set aside for liquidation; a new investor contributed certain technology and other intangibles in exchange for a minority stake in the business; new arrangements were put in place for the financing of the business, including dealer and fleet purchases; old equity retained no interest, and a new board was seated. Perhaps most importantly, the exact treatment of most of the claims against the Debtors was established.

Absent the Court's intervention, section 363 will only grow as a *de facto* fast-track reorganization strategy preferred by debtors to avoid compliance with the chapter 11 plan process. Although flexibility is a hallmark of chapter 11, section 363 sales may not be used as a "side door" restructuring statute, and the Court should grant *certiorari* to settle that question.

B. Given its high profile, this case affords a unique opportunity to clarify rules necessary for the stability of capital markets

Regardless of its outcome, the Chrysler bankruptcy carries profound implications for the Nation's economy. Going forward, nearly everyone will feel the impact, from auto workers and suppliers to pensioners and bondholders to unrelated companies who hope to raise money through the sale of secured debt in the future. This is all the more true because this case is but one of the most extreme manifestations of an increasingly common occurrence—the use of a section 363 sale to bypass the chapter 11 plan confirmation process.

Already, notable economics scholars have cautioned that allowing the Government to manipulate bankruptcies the way it did here will destabilize the investment market. *See* Richard A. Epstein, *The Deadly Sins of Chrysler Bankruptcy*, Forbes.com, May 12, 2009 ("It is absolutely critical to follow these priority rules inside bankruptcy in order to allow creditors to price risk outside of bankruptcy."); Todd J. Zywicki, *Chrysler and the Rule of Law*, Wall Street Journal Online, May 13, 2009 (suggesting that Government intervention with struggling companies will only become more commonplace if the rule of law is disrupted); Mark J. Roe, *Stress-Testing Washington's Chrysler Bankruptcy Plan*, Forbes.com, May 13, 2009 ("This is not a good economic time to disrupt lending to troubled companies.").

In fact, "businesses that might have received financing before . . . now will not, since lenders face the potential of future Government confiscation. In other words, Mr. Obama may have helped save the jobs of thousands of union workers whose dues, in part, engineered his election. But what about the untold number of job losses in the future caused by trampling the sanctity of contracts today?" Zywicki, *supra*.

With these results, it is hard to imagine why other companies facing mounting debt and possible bankruptcy would not take this path, even without Government financing. *See* Roe & Skeel, *supra*, at 26 ("a coalition of creditors, managers, and (maybe) shareholders could present a § 363 'plan' to the court for approval, and the plan could squeeze out any creditor class."); *see also* Micheline Maynard, *Automakers' Swift Cases in Bankruptcy Shock Experts*, N.Y. Times, July 6, 2009 ("For businesses that follow similar legal strategies, the G.M. and Chrysler cases could pave the way for a faster trip through court."). Any struggling company could, after having made side deals with its favorite creditors or equity holders that the bankruptcy court imposes on other potential bidders, use section 363 to "sell" its valuable assets to a shell company at a deflated price, and in so doing eliminate all of its other debt obligations.

Delphi has already threatened to use section 363 as a substitute for a reorganization plan. *See* Jewel Gopwani, *Creditors reject Delphi bankruptcy plan*, Detroit Free Press, July 20, 2009 (stating that if the creditors rejected its reorganization plan, Delphi would pursue the same result through a section 363 sale). Scholars have documented other interests in the Chrysler section 363 model as well. *See* Roe & Skeel, *supra*, at 3. If it catches on, this chapter 11 end-around could do real harm: "[i]f [the Chrysler sale] becomes the pattern, *Chrysler* could displace the traditional chapter 11 process, potentially affecting lending markets and vulnerable nonfinancial creditors adversely." *Id.* Such potentially broad national ramifications underscore the need for review.

The high profile of this case and the extremes to which the courts below went to bless the Chrysler sale have shone a light on issues critical to many bankruptcy cases and the capital markets. There can be little doubt that these issues demand the Court's attention. There will be no better chance to address them than this, the case that most profoundly presents them; and there will be no better time to review them than now, when the urgency of an impending sale has passed and there is time for cool reflection about the implications of what has transpired.

C. Although the Chrysler sale has closed, the Indiana Pensioners may yet recover in the bankruptcy case without affecting the validity of the sale to New Chrysler

As noted, the transaction has closed, and the Indiana Pensioners are aware that section 363(m) provides that "[t]he reversal or modification on appeal of an authorization under [section 363] of a sale . . . of property does not affect the validity of a sale, unless . . . such sale . . . were stayed pending appeal." 11 U.S.C. § 363(m).

The Indiana Pensioners, however, do not seek to unwind that sale by this appeal, and section 363(m), by its express terms, contemplates that a sale order can be reversed—even where a sale has been consummated—so long as "a remedy can be fashioned that will not affect the validity of the sale." *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998). Indeed, the Tenth Circuit has also held that, although section 363(m) "protects the validity of certain sales . . . from the potential consequences of an appeal, . . . where state law or the Bankruptcy Code provides remedies that do not affect the validity of the sale, § 363(m) does not moot the appeal." *In re Osborn*, 24 F.3d 1199, 1203-04 (10th Cir. 1994) (citations omitted) (imposing a constructive trust on sale proceeds would not "affect the validity" of the sale).

The Second Circuit itself has observed that it is not "clear why an appellate court, considering an appeal from an unstayed but unwarranted order of sale to a good faith purchaser, could not order some form of relief other than invalidation of the sale." *In re Gucci*, 105 F.3d 837, 840 n.1 (2d Cir. 1997) (citing *In re Lloyd*, 37 F.3d 271, 273 (7th Cir. 1994); *see also In re Enron Corp.*, 291 B.R. 39, 41, 43 (S.D.N.Y. 2003) (holding that "inherent in the fact that § 363(m) provides only that the *validity* of an unstayed sale cannot be disturbed on appeal is the corollary that other relief may be available," and that the "redistribution sought by appellants does not require invalidation of the sale or prejudice to the buyer," and vacating and remanding for further proceedings) (emphasis in original).

Such is the case here, where the Indiana Pensioners seek reversal of the Transaction Orders only to the extent that the distribution of proceeds was inequitable. The effect of those unwarranted orders could be remedied without disturbing the validity of the sale to New Chrysler, for example, by compelling the VEBA and the UAW to return to the bankruptcy estate the $4.6 billion note and common stock that they received under the transaction to be properly distributed pursuant to a chapter 11 plan of reorganization.

Accordingly, this case, with all the issues that it crystallizes and all the attention it commands, remains vital to the parties concerned. It is therefore an appropriate—if not ideal—vehicle for addressing the limits of section 363 sales.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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