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Are Buyers of Assets Acquired from Debtors in Section 363 Bankruptcy Sales Protected from Debtors' Product Liability Claims?

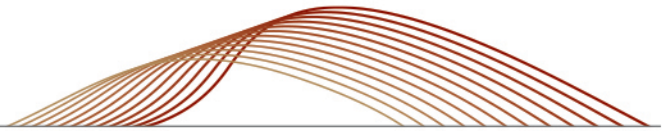
Second Circuit Court of Appeals Decision in GM Cases Casts a Shadow Over Whether Section 363 Sale Orders Insulate Buyers from Debtors' Product Liability Claims.

When buying assets from a debtor in bankruptcy, purchasers have relied for years on the debtor's ability to sell assets "free and clear" in a bankruptcy sale under section 363 of the Bankruptcy Code. The purchaser can then obtain the assets "cleansed" of the debtor-seller's liabilities, including, it was widely assumed, product liability claims against such debtor-seller. However, a recent decision from the Second Circuit Court of Appeals raises questions about the protections offered by such sales depending on the exact circumstances giving rise to the product liability claims. Where the debtor fails to give proper actual notice to known potential product liability claimants, purchasers may be placed at risk of liability for such claims under a "successor liability" or similar theory.

I. Introduction

The Second Circuit Court of Appeals has issued a much anticipated ruling[1] in the General Motors bankruptcy cases, reversing or remanding most of last year's decision of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") that enjoined claims against General Motors Corporation's ("Old GM") successor corporation General Motors LLC ("New GM") based on faulty ignition switches and other defects in Old GM's vehicles. The Bankruptcy Court held that these claims were barred pursuant to the court's sale order issued under section 363 of the Bankruptcy Code in which Old GM sold its business to New GM "free and clear" of claims and interests.

The Second Circuit held, among other things, that the claimants alleging damages based on pre-363 sale injuries and post-sale economic losses arising from the ignition switch defect had not received proper notice of the sale motion and had suffered harm or prejudice as a result; the lack of notice deprived them of due process and the opportunity to take part in the negotiations surrounding the sale. Because these ignition switch claimants had been denied due process and suffered prejudice, the Second Circuit reversed the Bankruptcy Court's decision "insofar as it enforced the Sale Order to enjoin claims relating to the ignition switch defect," stating that "these plaintiffs cannot be 'bound by the terms of the [Sale Order].'"[2]



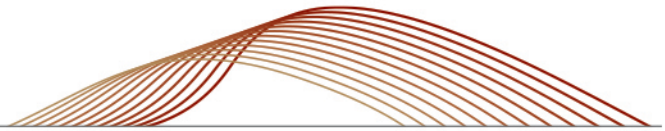
The Second Circuit's opinion raises important issues concerning the finality of sales "free and clear of any interest" under section 363 of the Bankruptcy Code. The opinion should serve as a cautionary tale to buyers of assets in a section 363 sale. In order to get the benefits of a bankruptcy court's "free and clear" order, proper notice is paramount. The purchaser is unlikely to be the party responsible for handling notice of the motion to sell the assets and may lack the knowledge that the debtor has regarding potential claims against the debtor or its property. It is the purchaser, however, that may be saddled with successor liability should the debtor fail to provide proper notice of sale to potential creditors.

II. Background

In 2009, Old GM sought relief under chapter 11 of the Bankruptcy Code, despite receiving billions of dollars of loans from the U.S. Government's Troubled Asset Relief Program (TARP).[3] Old GM's bankruptcy did not involve a traditional plan of reorganization, but instead utilized section 363 of the Bankruptcy Code, a provision which allows a debtor in bankruptcy to sell assets "free and clear" of claims and interests in such property. Old GM's strategy was to use this provision to sell its valuable auto business to a successor corporation, New GM, which could then operate the GM auto business free and clear of the bulk of Old GM's liabilities (other than those liabilities that New GM expressly agreed to assume). The Bankruptcy Court's issuance of a section 363 sale order would then prohibit individuals with claims against Old GM from suing New GM based on Old GM's pre-closing conduct.

The GM sale was planned in several steps. First, Old GM filed for chapter 11, became a debtor-in-possession under the Bankruptcy Code, and sought the Bankruptcy Court's authority to sell portions of its business under section 363. Second, New GM (then named "Vehicle Acquisition Holdings LLC"), owned predominantly by the U.S. Treasury, would acquire Old GM's auto business[4] but would only take on a few of its liabilities; New GM then could operate the GM auto business free of Old GM's debts. Third, Old GM would retain certain assets and the bulk of its old liabilities. Fourth, Old GM would liquidate: it would rename itself "Motors Liquidation Company" and arrange a plan of liquidation to address how its remaining liabilities would be paid.[5]

The sale portion of Old GM's bankruptcy strategy was executed in June and July of 2009. On June 1, 2009, Old GM filed its bankruptcy petition and its motion to sell its assets free and clear of interests. The next day the Bankruptcy Court ordered Old GM to provide notice of the proposed sale order, including notice by direct mail to numerous interested parties and parties who were "known to have asserted any lien, claim, encumbrance, or interest in or on" the assets to be sold, and to post publication notice in major publications, including the *Wall Street Journal* and *New York Times*.[6] The sale notice gave interested parties until June 19, 2009 to submit objections and responses to the proposed sale order, and over 850 objections were heard by the court between June 30 and July 2, 2009, including objections by consumer organizations, state attorneys general, and accident victims objecting to the "free and clear" provision of the sale. The Bankruptcy Court addressed and dismissed the objections and approved the section 363 sale on July 5, 2009. It then issued the final sale order (the "Sale Order"), which rendered effective the final sale agreement between Old GM and New GM. Despite the "free and clear" nature of the sale, New GM voluntarily agreed to assume 15 categories of liabilities, including liabilities for accidents after the closing date for the section 363 sale and the obligation to make repairs pursuant to express warranties issued in connection with the sale of GM cars. Moreover, during negotiations that occurred over the course of the sale hearing between the GM parties, the U.S. Treasury, and state attorneys general, New GM further agreed to assume liability for claims under state Lemon Laws. On July 10, 2009, the section 363 sale officially closed and New GM began operating the GM auto business. The auto business emerged from bankruptcy in forty days, in



accordance with the remarks of President Obama that the solution to GM's troubles was a "quick, surgical bankruptcy."[7]

Old GM, meanwhile, remained in chapter 11 and proceeded along the path to a plan of liquidation. In November 2009, the Bankruptcy Court set a bar date for individuals or entities to file proofs of claim against Old GM, and in March of 2011, the Bankruptcy Court confirmed Old GM's liquidating chapter 11 plan. Under the plan, Old GM would establish the GUC Trust, a trust to be administered by Wilmington Trust Company. The GUC Trust would hold certain Old GM assets, including New GM stock and warrants that could be used to purchase New GM shares at fixed prices, along with other financial instruments. Creditors with unsecured claims against Old GM would receive these New GM securities and "units" of the GUC trust on a pro rata basis in satisfaction of their claims. On February 8, 2012, the Bankruptcy Court ordered that no further claims against Old GM could be filed, unless the claim amended a prior claim, was consented to, or was deemed timely filed by the court. As of March 31, 2014, the GUC Trust had distributed roughly 90 percent of its New GM securities.[8]

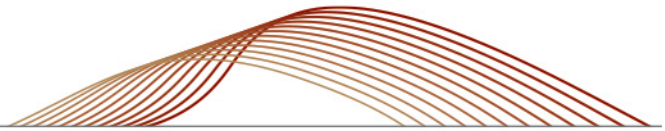
By all appearances, Old GM's quick and surgical bankruptcy appeared to have been carried out as planned via (i) a rapid section 363 sale of the valuable parts of the business to New GM, free and clear of most Old GM liabilities, and (ii) a liquidation and trust arrangement to handle unsecured claims against Old GM.

However, the release sought for New GM from Old GM's liabilities would be tested by the public revelation of a serious defect in GM vehicle ignition switches that could, among other things, cause vehicles to suddenly lose power and could prevent vehicle airbags from deploying in the event of a crash.[9] The defect led to over 60 vehicle recalls between February and October of 2014. Congressional testimony and an extensive report produced by attorney Anton Valukas on behalf of GM, to which the Second Circuit in its opinion cites extensively, indicates that beginning in 2002, Old GM produced cars with an ignition switch that had failed testing, and that GM was aware of the defect and of complaints, accidents, and fatalities related to the defect, but that GM personnel had at that time downplayed the issue and failed to inform customers of the danger prior to the 2014 recalls.

Almost immediately upon the 2014 recalls being announced, individuals filed dozens of class action lawsuits against New GM claiming the ignition switch defect caused personal and economic injuries both before and after the section 363 sale closed.[10] The estimated amount of these claims is between $7 and $10 billion in economic losses alone.[11] In response, New GM raised the section 363 Sale Order, arguing that the Sale Order's "free and clear" provision barred the plaintiffs from pursuing these claims.

III. Bankruptcy Court Opinion

The issue came before the Bankruptcy Court in April 2014, when certain plaintiffs raising ignition switch defect claims initiated an adversary proceeding against New GM, and New GM moved to enforce the Sale Order to enjoin those claims. The proceedings eventually involved multiple classes of individuals, including: (i) individuals who suffered pre-closing (i.e., July 10, 2009) injuries arising from the ignition switch defect in Old GM Cars ("Pre-Closing Accident Plaintiffs"); (ii) individuals alleging economic losses arising from the ignition switch defect ("Ignition Switch Plaintiffs"), a group that included individuals who had purchased Old GM cars on the used car market (i.e., they were not in direct privity of contract with Old GM) after the section 363 sale closed ("Used Car Purchasers"); and (iii) individuals alleging damages arising from defects other than the ignition switch in Old GM cars ("Non-Ignition Switch Plaintiffs").[12]



The Bankruptcy Court ruled against the Pre-Closing Accident Plaintiffs, Ignition Switch Claimants, and Non-Ignition Switch Plaintiffs in a series of three decisions, though it did make an exception for those plaintiffs with claims based on New GM's own wrongful conduct.[13] Most importantly, although the Bankruptcy Court held that the plaintiffs lacked notice of the section 363 sale consistent with procedural due process, it found that the plaintiffs had not been prejudiced by the lack of notice.[14] The Bankruptcy Court reasoned that it would have granted the Sale Order even if the plaintiffs had filed objections, and so the failure of the plaintiffs to receive notice of the proceedings had not changed the outcome. The Bankruptcy Court also held that any claim by the plaintiffs against the GUC Trust was equitably moot because the chapter 11 plan of Old GM had long been substantially consummated. The court issued another decision that the Non-Ignition Switch Plaintiffs would be bound by the judgment against the other parties, though it left an open question as to whether Old GM knew of other defects. On June 1, 2015, the Bankruptcy Court entered judgment against all plaintiffs and issued an order certifying the judgment for direct appeal to the Second Circuit.

IV. The Second Circuit Opinion

The Second Circuit opinion dealt with the appeals of the Bankruptcy Court's ruling enforcing the Sale Order in terms of four issues: (i) the Bankruptcy Court's jurisdiction to enforce the Sale Order; (ii) the scope of the power to sell assets "free and clear" of all interests; (iii) the procedural due process requirements with respect to notice of such a sale; and (iv) the Bankruptcy Court's ruling on the equitable mootness of claims against the GUC Trust.[15]

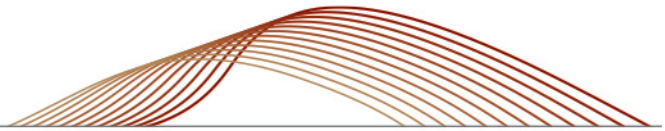
A. Jurisdiction

As to the first of these issues, the Bankruptcy Court's jurisdiction to enforce the Sale Order, the Second Circuit affirmed the Bankruptcy Court's reasoning that bankruptcy courts have jurisdiction to interpret and enforce their own orders. That is precisely what the Bankruptcy Court did when it decided that the "free and clear" provision of the Sale Order barred successor liability claims and then determined whether to enforce that provision.

B. The Scope of the Power to Sell Assets Free and Clear

As to the second issue, the Second Circuit held that a bankruptcy court may approve a section 363 sale free and clear of successor liability claims if those claims "flow from the debtor's ownership of the sold assets."[16] The court explained that "such a claim must arise from a (i) right to payment (ii) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim,"[17] and that, further, "there must be some relationship between the debtor and the claimant such that the claimant is identifiable."[18] These requirements derive from the very definition of "claim" under Bankruptcy Code Section 101(5)[19] and relevant case law, which requires some prepetition "contact" or "relationship" between the claimant and the debtor.[20]

Applying these principles, the Second Circuit held, first, that pre-closing accidents "clearly fall within the scope of the Sale Order."[21] Second, the court held that economic loss claims arising from the ignition switch or other defects also fell within the scope of the order because they were already existing contingent claims—"the ignition switch defect was there but was not yet so patent that an individual could, as a practical matter, bring a case to court."[22] Third, the court held that independent claims based on New GM's post-closing conduct were not based on a right of payment that arose before the bankruptcy case was filed, and therefore were not covered by the Sale Order. Finally, the court held that the claims of Used Car Purchasers who purchased Old GM cars after the closing of the sale without knowledge of the defect were likewise not covered by the Sale Order. The Second Circuit



reasoned that these purchasers had "no relation" (or privity of contract) with Old GM prior to the bankruptcy, and that the Sale Order could not be extended to the "unknown number of unknown individuals" who would one day purchase Old GM vehicles on the used car market.[23] Based on this reasoning, the Second Circuit affirmed the Bankruptcy Court's decision not to enjoin independent claims but reversed its decision to enjoin Used Car Purchasers' claims.

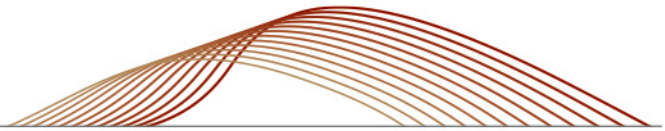
C. Notice and Procedural Due Process

With regard to the third issue, the notice requirements of procedural due process, and the implications of a failure to give such notice, the Second Circuit first agreed with the Bankruptcy Court that the plaintiffs were entitled to actual notice of the bankruptcy sale, not mere notice by publication. The Second Circuit set forth the generally applicable rule: "If the debtor knew or reasonably should have known about the claims, then due process entitles potential claimants to actual notice of the bankruptcy proceedings, but if the claims were unknown, publication notice suffices."[24] In other words "if a debtor does not reveal claims that it is aware of, then bankruptcy law cannot protect it."[25] The Second Circuit went on to affirm the Bankruptcy Court's conclusion that Old GM knew or reasonably should have known about the ignition switch defect and so should have provided direct mail or some equivalent notice to vehicle owners. In such circumstances, notice by publication was not sufficient.

The Second Circuit's opinion, and the underlying Bankruptcy Court opinion, are clear that Old GM should have provided actual (rather than merely publication) notice, but are less clear as to what such notice should have said. Language in both opinions indicates that in these circumstances, in which GM had failed to inform its customers of the product defect, any notice would also have to have included some disclosure of the defect—in essence, information as to the basis of the potential claims. According to the Second Circuit, "[a]t minimum, Old GM knew about moving stalls and airbag non-deployments in certain models, and should have revealed those facts in bankruptcy."[26] And this statement is in keeping with the view of the Bankruptcy Court, which identified the notice obligations of Old GM as being consistent with Old GM's obligations under the National Traffic and Motor Vehicle Safety Act (the "Safety Act"), which mandated that Old GM send out recall notices for vehicles with defective ignition switches: "Because old GM failed to provide the notice required under the Safety Act . . . the Plaintiffs were denied the notice due process requires."[27] In fact, according to the Bankruptcy Court, notice by publication would have been sufficient had Old GM—as required by the Safety Act—issued recall notices prepetition.[28]

Despite these statements from the Second Circuit and the Bankruptcy Court, neither court issued a concrete holding as to the required contents of the notice, and the Bankruptcy Court explicitly stated that it "does not need to decide and does not decide . . . the extent to which a detailed notice describing the types of claims Plaintiffs might assert . . . was required as a matter of due process law."[29]

After agreeing with the Bankruptcy Court on the topic of notice, the Second Circuit addressed the ruling by the Bankruptcy Court that, despite lack of notice, the Sale Order was enforceable because of the lack of prejudice to the plaintiffs, given that, according to the Bankruptcy Court, "in hindsight the outcome would have been the same with adequate notice."[30] Here, the Second Circuit departed from the Bankruptcy Court's logic and reversed in favor of the plaintiffs. The Second Circuit noted that there was division in the case law on whether prejudice actually had to be shown for the Sale Order to be held unenforceable, but declined to decide the issue. Instead, the Second Circuit ruled that the plaintiffs had shown prejudice, even if they could not have presented legal arguments that would have



resulted in a denial of the sale motion, because the outcome of the sale process might have been different had they been given notice and the chance to participate.

Here, the Second Circuit took a moment to explain what it called the "unique challenges for due process analysis" presented in the section 363 sale context.[31] In such a context, it stated, many objections, especially those made against a free and clear provision, "are not likely to be grounded in any legal right to change the terms of the sale, but rather will be grounded in a particular factual context," and will rely on "business reasons" to change the terms of a proposed sale order and not by reference to a legal requirement that the order "*must* be changed."[32] The court explained that prejudice existed because it could not say "with fair assurance" that the outcome of the sale proceedings "would have been the same had Old GM disclosed the ignition switch defect and these plaintiffs voiced their objections to the free and clear provision."[33] This is because the court could not "say with any confidence that no accommodation would have been made for [the plaintiffs] in the Sale Order."[34]

> The bankruptcy court failed to recognize that the terms of this § 363 sale were not within its exclusive control. Instead, the GM sale was a negotiated deal with input from multiple parties -- Old GM, New GM, Treasury, and other stakeholders. The Sale Order and Sale Agreement reflect this polycentric approach: it includes some fifteen sets of liabilities that New GM voluntarily, and without legal compulsion, took on as its own.[35]

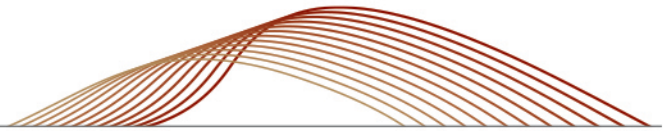
The Second Circuit then described how the state attorneys general had achieved the assumption of liability for Lemon Law claims by negotiation and by raising objections that, "were not particularly *legal* in character" but based on the relationship between Old GM and New GM and the fact that other warranty obligations were already being honored.[36] The court observed that the plaintiffs were denied this opportunity to negotiate and may have been able to obtain concessions given certain facets of the cases, such as the importance of consumer confidence in the auto industry, the role of the federal government (with its policy-based interests) in owning New GM and overseeing the Old GM bankruptcy, and the potential that ignition switch related claims could have disrupted the bankruptcy process and added the potential of burdensome litigation, or even potential criminal charges, to the issues that would need to be resolved for the case to move forward.

In short, the prejudice faced by the plaintiffs was not that they were deprived of the ability to raise a winning legal theory, it was that they were deprived of a seat at the negotiating table at which, given the circumstances of the bankruptcy, they might have been able to leverage their claims to obtain some sort of concession out of the bankruptcy process. Because the ignition switch plaintiffs should have received actual notice and were prejudiced, the Second Circuit reversed the Bankruptcy Court and held that these plaintiffs could not be bound by the terms of the Sale Order.[37]

The Second Circuit went on to note that the Bankruptcy Court had left as an open question whether Old GM knew of the Non-Ignition Switch Plaintiffs' claims. Therefore, it vacated and remanded that issue for the Bankruptcy Court to conduct further proceedings as to the Non-Ignition Switch Plaintiffs.

D. Equitable Mootness

In the last part of the opinion, the Second Circuit addressed the Bankruptcy Court's decision that relief for any claims against the GUC Trust was equitably moot, because the Old GM plan had been substantially consummated. The doctrine of equitable mootness allows appellate courts to dismiss bankruptcy appeals when during the pendency of the appeal events occur that would make the implementation of effective relief inequitable.[38] While the Second Circuit, quoting authority, agreed



that a bankruptcy appeal is presumed equitably moot when the debtor's reorganization plan has been substantially consummated,[39] it held that the Bankruptcy Court's ruling on this issue was merely an advisory opinion, because the plaintiffs had not sought any relief from the GUC Trust, the GUC Trust had protested its involvement in the underlying proceeding, and the Bankruptcy Court was addressing a hypothetical scenario. Therefore, the Second Circuit vacated this part of the Bankruptcy Court's ruling.

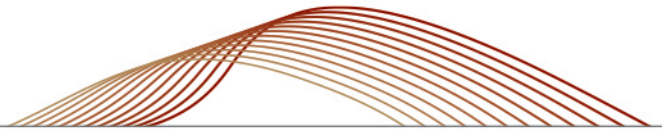
V. Key Lessons

Section 363 of the Bankruptcy Code is a statute that is highly prized for the authority it gives the debtor to sell assets free and clear of claims or other encumbrances. But the Second Circuit's *Motors Liquidation* opinion should serve as a warning to parties involved in these transactions, especially for a purchaser of such assets. Proper notice and due process are essential. A purchaser may not be the party responsible for handling the notice procedures surrounding the motion to sell the assets, and may not have the knowledge that the debtor has regarding claims against the debtor or its property, but it is the purchaser that may be saddled with successor liability should the debtor fail to provide proper notice of sale to potential creditors. If the debtor knows or should know of potential creditors, those creditors should be provided with actual notice. If proper notice (notice that may need to include information as to the undisclosed bases of claims) is not given and a section 363 sale closes, the finality of that sale will be at risk. A creditor can then argue that it has been prejudiced by having been denied the opportunity to participate in negotiations surrounding the sale.

Certainly, Old GM's section 363 sale presented unique circumstances: There was heavy government involvement (including government ownership of New GM, as noted by the court), an entire industry at stake, and egregious failures by Old GM to adequately respond to the ignition switch defect. Moreover, the "sale" from Old GM to New GM involved the same parties on both sides of the table: management of Old GM (with all the knowledge they may have had with respect to product liability claims), became, the day after the closing, management of New GM. It is often said that hard facts make bad law, and it is unclear what impact this continuation of parties and interests had on the Second Circuit's decision, but one wonders whether the identical result would have been obtained had the purchaser been a completely unconnected party—the Second Circuit did state that "**New GM** essentially asks that we reward debtors who conceal claims against potential creditors" and that it "declined to do so" (emphasis added),[40] but there does not seem to be any room in the Second Circuit's opinion to argue that this precedent would not apply to unrelated third party purchasers.

Of particular relevance to unrelated third party purchasers is an open issue that the Second Circuit did not fully address; namely, the question of what the proper actual notice required by the Second Circuit should have said. Essentially, the Second Circuit and Bankruptcy Court opinions are about the method of notice (actual versus publication notice), not the required content of such notice. The opinions therefore do not, in and of themselves, completely foreclose the possibility that Old GM could have satisfied due process had it given actual notice to car owners of the section 363 sale without describing particular defects, and instead, for example, provided only a general description of the likelihood of defects in motor vehicles and injuries or losses arising therefrom along with some description of the fact that the proposed section 363 sale order would foreclose the assertion of certain such claims against New GM as a successor to Old GM.

The distinction between giving actual notice of a proposed sale with a generic disclosure of the risk of product liability claims versus actual notice with particularized disclosure of certain specific types of product liability claims known to the debtor-seller is critical, from the point of view of the acquiring



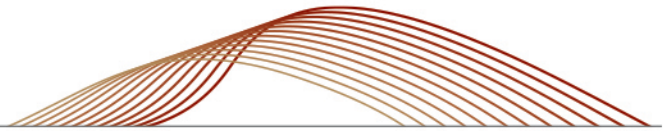
entity, assuming such entity is, unlike the facts in *Motors Liquidation*, an independent third party purchaser. This is because, a true "third party" buyer in a bankruptcy sale will often have no (or limited) information with respect to product liability claims against the debtor-seller and therefore such buyer is not in a position to ascertain the adequacy of the notice of the section 363 sale given to the debtor-seller's contingent product liability claimants.

It is unclear whether the court in *Motors Liquidation* would have accepted an actual but generalized notice if such notice did not contain any disclosure of the known defect. The legal standard for notice under due process is flexible and does not always require disclosure of every detail, as the fundamental test is whether notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[41] For example, it has been held that notice of a proposed settlement "may satisfy due process without setting forth verbatim the full text of a proposed settlement; it may describe the settlement in general terms."[42]

However, case law also indicates that (depending on the circumstances) generalized notice may be insufficient where, for example, the debtor is aware of the existence of a creditor's claim but the creditor is unaware and with reasonable diligence could not become aware of the claim.[43] In these circumstances, due process may require the debtor to give more explicit notice regarding the nature of the claim against it.[44] Thus, the lack of specific content requirements for actual notice in the *Motors Liquidation* opinions should not provide much comfort for parties to section 363 sales. The case law, and the tenor of the *Motors Liquidation* opinions, which are strongly condemnatory of Old GM's failure to disclose the defect as required by law, indicate that debtors should disclose as much as they can and that purchasers should attempt to protect themselves in case debtors fail to do so.

Third party purchasers face fundamental challenges in confronting the distinction between a requirement that actual, but generic notice of the proposed sale be provided to creditors and a more onerous requirement that particularized notice of the types of claims affected be provided to contingent products liability claimants. In the first instance, even the third party purchaser can protect itself by insisting that each buyer of the debtor-seller's products or each party having any type of relationship with the debtor-seller be provided with actual notice. But in the second scenario, a third party purchaser has no such ability, because it does not know the details of a seller's product liability claims, and so cannot know the form of notice that needs to be given to satisfy due process requirements. Of course, in *Motors Liquidation* that was a distinction without a difference; the same people were on both "sides" of the seller-buyer "table."

The rationale set forth by the Second Circuit as to the issue of prejudice—that a creditor may be able to obtain concessions in section 363 negotiations even if it lacks a legal ground to impede the sale, and that the loss of the opportunity to participate constitutes prejudice—is generally applicable to many bankruptcy cases. Until that holding is limited or clarified, parties should be especially mindful to make sure known potential creditors receive actual notice as required by constitutional due process. At a minimum, parties to a sale should insist that the court approve the form of actual notice to be given to minimize the risk of subsequent collateral attack on the notice provided. Another solution may be for third party purchasers to demand that sale proceeds be put into escrow to cover any claims from creditors who were not given notice, but this may not always be practical. For example, what would have been the appropriate amount of an escrow in *Motors Liquidation*? And while one could argue that the result in *Motors Liquidation* should be limited to instances where there is substantial government ownership or involvement, GM is no longer owned by the U.S. government, so



it is unclear how important government ownership was to the Second Circuit's opinion and whether, in a future analogous case, a private-sector entity would fare better.

Another noteworthy point from *Motors Liquidation* stems from its limitation on the types of claims that can be subject to an order under section 363, particularly the notion that the order can only bar a claimant that has some relationship with and is known to the debtor. In *Motors Liquidation*, the application of this rule meant that the section 363 Sale Order did not apply to Used Car Purchasers of Old GM vehicles post-closing without knowledge of the defect, because such purchasers were unknown and lacked any relationship with Old GM. Therefore, if the Second Circuit's logic is correct, the Sale Order might apply (if due process requirements are met) to current owners of Old GM vehicles and enjoin a current owner's claims, but would not enjoin a subsequent purchaser, and a Used Car Purchaser would not be prohibited by the Sale Order from asserting a claim against New GM. Moreover, the same principles that limit the application of a section 363 sale order to a party that has some relationship with the debtor indicate that a party that is unknown to and lacks a relationship with the debtor would not actually have a claim against the debtor's bankruptcy estate in the first place.[45] Such a party's cause of action would essentially be outside the bankruptcy process—it could not be barred by a 363 sale order and the party would not be a creditor at all in the bankruptcy proceeding, because the creditors of a debtor are those with "claims."[46] Therefore, the Second Circuit's opinion indicates that the Used Car Purchasers may not be creditors of Old GM and are not barred by the Sale Order. It does not address, what, if any, causes of action can be asserted by the Used Car Purchasers against New GM. The opinion limits itself to treatment of the enforceability of the Sale Order, not the merits of any particular claims.

Parties to a section 363 sale should proceed with vigilance both to make sure that creditors' procedural due process rights are satisfied, and to clearly understand which claims will be enjoined pursuant to a section 363 sale order.

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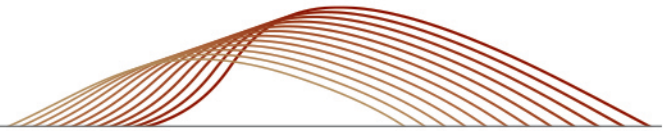

[1] *Elliott v. GM LLC* (*In re Motors Liquidation Co.*), No. 15-2844-BK(L), 2016 U.S. App. LEXIS 12848 (2d Cir. July 13, 2016). Also available as *In the Matter of Motors Liquidation Co.*, No. 15-2844-BK(L), 2016 WL 3766237 (2d Cir. July 13, 2016). Page numbers referenced in citations herein are to the opinion as published by Lexis.

[2] *Id.* at *67-68 (quoting *In re Johns-Manville Corp.*, 600 F.3d 135, 158 (2d Cir. 2010)).

[3] *Id.* at *3.

[4] Old GM received consideration estimated to be worth approximately $45 billion, plus the value of equity interests it received in New GM. *In re Gen. Motors Corp.*, 407 B.R. 463, 482 (Bankr. S.D.N.Y. 2009), *aff'd sub nom. In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom. In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y. 2010), *and enforcement denied sub nom. In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015), *aff'd in part, vacated in part, rev'd in part sub nom. Elliott v. GM LLC In re Motors Liquidation Co.*, 2016 U.S. App. LEXIS 12848 (2d Cir. July 13, 2016). This consideration came in the form of credit bids of their secured claims by the U.S. Treasury and Export Development Canada; assumption of indebtedness by New GM; surrender of a warrant issued by Old GM to the U.S. Treasury in connection with the U.S. Treasury's prepetition loan; 10% of the post-closing outstanding shares of New GM, plus an additional 2% if the estimated amount of allowed prepetition general unsecured claims against Old GM exceeded $35 billion; warrants to purchase 7.5% of the post-closing outstanding shares of New GM; and the assumption of certain liabilities. *Id.*

[5] *See Motors Liquidation Co.*, 2016 U.S. App. LEXIS 12848, at *11-12.

[6] *Id.* at *13.

[7] *Id.* at *3 (quoting *Remarks on the United States Automobile Industry*, 2009 Daily Comp. Pres. Doc. 2 (June 1, 2009)).

[8] *See id.* at *15-16.

[9] The ignition switch's torque threshold was too low. A bump of a knee could rotate the key's position from "on" to "accessory" or "off" and cut off engine power, power steering, braking systems, and airbag deployment. *Id.* at *19, 21.

[10] Those class actions are consolidated before a district judge in the United States District Court for the Southern District of New York in an action titled: *In re General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (S.D.N.Y.) (Furman, *J.*). *Id.* at *24 n. 16.

[11] *Id.*

[12] *Id.* at *26 (citing *In re Motors Liquidation Co.* ("*MLC II*"), 529 B.R. 510, 560-574 (Bankr. S.D.N.Y. 2015)).

[13] *Id.* at *26-28 (citing *In re Motors Liquidation Co.* ("*MLC I*"), 514 B.R. 377 (Bankr. S.D.N.Y. 2014); *MLC II*, 529 B.R. 510; *In re Motors Liquidation Co.* ("*MLC III*"), 531 B.R. 354 (Bankr. S.D.N.Y. 2015).

[14] *Id.* at *26.

[15] *Id.* at *29-30.

[16] *Id.* at *37.

[17] *Id.* at *39.

[18] *Id.* at *40.

[19] *Id.* at *37-38 (citing, *In re Chrysler LLC*, 576 F.3d 108, 125 (2d Cir.), *cert. granted, judgment vacated sub nom. Indiana State Police Pension Trust v. Chrysler LLC*, 558 U.S. 1087, 130 S. Ct. 1015, 175 L. Ed. 2d 614 (2009), *and vacated sub nom. In re Chrysler, LLC*, 592 F.3d 370 (2d Cir. 2010) (for proposition that concept of claim should be harmonized between section 101(5), which defines claim, and section 363(f)., which allows for sales free and clear of interests)).

[20] *Id.* at 38 (citing, inter alia, *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995)).

[21] *Id.* at *40.

[22] *Id.* at *41.

[23] *Id.* at *42.

[24] *Id.* at *46 (citing *Chemetron Corp. v. Jones*, 72 F.3d 341, 345-46 (3d Cir. 1995)).

[25] *Id.* at *46-47.

[26] *Id.* at *50.

[27] *MLC II*, 529 B.R. at 559.

[28] *Id.* The Second Circuit did not comment on this hypothetical.

[29] *Id.* at 574 n. 214.

[30] *Motors Liquidation Co.*, 2016 U.S. App. LEXIS 12848, at *52.

[31] *Id.* at *53.

[32] *Id.* at *54 (italics in original).

[33] *Id.* at *56-57.

[34] *Id.* at *57.

[35] *Id.* at *58.

[36] *Id.* at *58-59 (italics in original).

[37] The Second Circuit also criticized the view of the Bankruptcy Court that the only alternative to the section 363 sale as approved was liquidation, commenting that "accommodations could have been made" had the ignition switch claims been raised. *Id.* at *65-66.

[38] *Id.* at *67-68 (quoting *In re Chateaugay Corp.*, 988 F.2d 322, 3254 (2d Cir. 1993)).

[39] *Id.* at *68 (quoting *In re BGI, Inc.*, 772 F.3d 102, 108 (2d Cir. 2014)).

[40] *Id.* at *50.

[41] *Id.* at *45 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

[42] *In re Drexel Burnham Lambert Grp. Inc.*, 995 F.2d 1138, 1144-45 (2d Cir. 1993).

[43] *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 153 (2d Cir. 2014) (in case where creditor received notice of bankruptcy but not of antitrust claim against debtor, remanding to district court to determine knowledge of creditor and debtor as to potential antitrust claim); *see also In re Barton Indus., Inc.*, 104 F.3d 1241, 1245 (10th Cir. 1997) (creditors entitled to notice that specified treatment of their class of claim); *MLC II*, 529 B.R. 510, 544-546.

[44] *DPWN Holdings*, 747 F.3d at 153.

[45] *See Motors Liquidation Co.*, 2016 U.S. App. LEXIS 12848, at *37-38; *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995) (requiring pre-confirmation relationship between an identifiable claimant or group of claimants and a debtor's prepetition conduct as basis for "claim" under section 101(5)); *see also In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 705 (S.D.N.Y. 2012) (refusing to enforce section 363 sale order against future claimants).

[46] 11 U.S.C. § 101(10) (defining "creditor").