No. 09-2311-bk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN RE: CHRYSLER LLC, AKA CHRYSLER ASPEN, AKA CHRYSLER TOWN & COUNTRY, AKA CHRYSLER 300, AKA CHRYSLER SEBRING, AKA CHRYSLER PT CRUISER, ET AL.,

Debtor-Plaintiffs-Petitioners.

APPEAL FROM FINAL SALE ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF LIMITED OBJECTORS-APPELLANTS William Lovitz, Farbod Nourian, Brian Catalon, Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and Public Citizen

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DISCLOSURE STATEMENT

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

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PRELIMINARY STATEMENT

This appeal is from the "Opinion Granting Debtors' Motion Seeking Authority to Sell, Pursuant to 11 U.S.C. § 363, Substantially All of the Debtors' Assets" entered by Judge Arthur A. Gonzalez of the United States Bankruptcy Court for the Southern District of New York on May 31, 2009, and the "Order (I) Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief" entered on June 1, 2009. The opinion and order are not yet published.

JURISDICTION

The order and opinion of the bankruptcy court were entered on June 1, 2009, and May 31, 2009, respectively. This Court has jurisdiction under 28 U.S.C. § 158(d). Court granted leave to appeal pursuant to 28 U.S.C. § 158(d) and announced an expedited briefing and hearing schedule on June 2, 2009.

ISSUES PRESENED

1. Whether product liability claims and State-law rules of successor liability can be eliminated through a Section 363(f) sale.

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2. Whether the bankruptcy code and due process allow elimination of future products claims–that is, claims that have not yet accrued because injury has not yet occurred–through a Section 363(f) sale.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Prior to the Debtors' bankruptcy filing, the United States Treasury and the Debtors negotiated a sale under which New CarCo Acquisition, LLC ("New Chrysler") would retain all of the current obligations of the Debtors. These obligations included obligations under State law to consumers who purchased the Debtors' vehicles and whose Chrysler vehicles have reliability or mechanical issues not covered under warranty and to individuals—both the Debtors' customers and bystanders—who have suffered or will suffer injury resulting from defects in the Debtors' products.

In its Sale Order under Section 363 of the Bankruptcy Code, entered and approved by the bankruptcy court below, Debtor proposes to sell all of its valuable assets for $2 billion. The $2 billion will all go to secured lienholders—leaving, as Chrysler's CEO Mr. Nardelli and CFO Mr. Kolka candidly admitted at the hearing on the Debtor's motion, *nothing* for tort claimants and consumers. The sale agreement purports to bar successor liability under state law—where it applies based on the purchaser's conduct under the "product line" successor liability rule—for both currently injured consumers and people who may in the future be

injured by Chrysler vehicles sold prior to the bankruptcy, but who have yet to sustain any injury may be in the future.

This outcome is not appropriate as to current product liability claimants, let alone individuals who are not even claimants at all because they have not yet been injured as a result of defects in the Debtors' vehicles and have no way to know whether they will be. The sale of the Debtors' assets to New Chrysler should have been subject to the retention of liability for current and future product liability claims that arise out of alleged defects in the vehicles sold by Debtors, and this Court should not approve the sale "free and clear" of such claims under Section 363(f) of the Bankruptcy Code. Given the widespread sale and presence of Debtors' vehicles in the United States, as well as the Debtors' superior knowledge regarding potential problems with the vehicles, it would be inequitable to transfer the liability for defects in these consumer products to consumers and the public at large.

ARGUMENT

I. STANDARD OF REVIEW

"[T]he proper construction of the bankruptcy code by a bankruptcy court or a district court is a matter of law. The interpretations are subject to *de novo* review." *U.S. v. Verdunn*, 89 F.3d 799, 800 (11th Cir. 1996); *accord Matter of Edgeworth*, 993 F.2d 51, 53 (5th Cir. 1993); *In re Mejer*, 373 B.R. 84, 87 (9th Cir.

BAP 2007); *In re Bethlehem Steel Corp.*, 2003 WL 21738964, *12 (S.D.N.Y. 2003); *see also In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2nd Cir. 1990) ("we review conclusions of law *de novo*").

II. THE BANKRUPTCY COURT ERRED IN CONSTRUING SECTION 363(f) TO AUTHORIZE A BAR TO CURRENT AND FUTURE TORT CLAIMS WHERE STATE LAW MAY IMPOSE SUCCESSOR LIABILITY BASED ON THE PURCHASER'S CONDUCT.

As Appellees noted in their Objection below (doc # 1197, attached hereto), Section 1141(c) of the Bankruptcy Code (11 U.S.C. § 1141(c)) allows, under a plan of reorganization, with all of the proceedings and due process protections that affords, a court to find that "the property dealt with by the plan is free and clear of *all claims and interests* of creditors, equity security holders, and of general partners in the debtor." *Id.* (emphasis added).

The Bankruptcy Code defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. §101(5). Prior decisions of this and other courts have made clear that current tort claimants have "claims" within the meaning of the Bankruptcy Code. *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997, 1003-04 (2nd Cir. 1991); *In re White Motor Credit Corp. v. Chambersberg Bev., Inc.*, 75 B.R. 944, 948 (N.D.

Ohio 1987).[1]

The Sale Order at issue here, however, is based on Section 363(f), not Section 1141©. Bankr. Op. 42-43. And perhaps because Section 363(f) provides objectors with fewer rights than they would have in the plan process, its reach is more limited reach Section 1141(c). Under Section 363(f), a bankruptcy court can approve the sale of property "free and clear of *any interest in such property* of an entity other than the estate," but not of any "claim." 11 U.S.C. § 363(f) (emphasis added).

"By placing the term "claim" in Section 1141(c) ("claims and interests") but not in 363(f) ("interests in property"), Congress intended that 363(f) not cover "claims" such as tort claims. As has been oft noted, had Congress intended the the two provisions to have the same reach, it would have used the same terms in both sections. *See*, *e.g., Bob Jones University v. United States*, 461 U.S. 574, 586-87 (1983); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 497 (1992) (Blackman, J. dissenting).

Relying on *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3rd Cir. 2003) ("*TWA*"), to support its holding that Chrysler can be sold free and clear of tort

[1] As discussed in part III below, *future* tort claimants do not have "claims" under the Bankruptcy Code, nor are claims made against successor entities claims subject to the bankruptcy laws. *In re Chateaugay Corp.*, 944 F.2d at 1004; *Zerand-Bernal Group, Inc.*, 23 F.3d 159, 162 (7th Cir. 1994).

claims, *see* Bankr. Op. 42, the court below failed to address the fact that Section 1141(c) includes "claims," while 363(f) does not. *TWA* involves paragraph (3) of Section 363(f), which addresses satisfaction of "liens." Based upon this section, the *TWA* found that "interests in property" must be more than liens. 322 F.3d at 290. Objectors do not disagree with this analysis (as far as it goes); however, this reasoning does not support the outcome here. That certain interests in property—easements, reversionary interests, restrictive covenants—are broader than liens does not mean that the term "interests" encompasses "claims," a *defined term* that, as Section 1141(c) shows, is distinct from "interests." *TWA* reads "claims"—a defined term—out of the Code.[2]

Numerous courts have held that unsecured claims are not within the reach of Section 363(f). *See, e.g., Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147 n.23 (6th Cir. 1991); *see also In re White Motor Credit Corp.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio

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[2] Certain States have extended product liability to successor companies based upon the successor's *conduct* in continuing the same "product line." *See generally Mooney Aircraft, Inc. v. Foster*, 730 F.2d 367, 371-372 (5th Cir. 1984) (discussing history of successor liability); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). The Sale Order below purports to foreclose such liability. However, in *TWA* the bankruptcy court found that there was no similar basis for successor liability. 322 F.3d at 286. The Third Circuit did not address the issue of whether such liability existed and simply assumed it did (contrary to the bankruptcy court below it's findings).

1987) (holders of tort claims "have no specific interest in a debtor's property"; therefore, "section 363 is inapplicable")[3]; *In re New England Fish Co.*, 19 B.R. 323, 326 (Bankr. W.D. Wash. 1982) (unsecured claimants "do not have an interest in the specific property of the estate being sold ... which is contemplated by 11 U.S.C. § 363(f)").

The court below erred in its construction of the Bankruptcy Code by expanding Section 363(f) beyond its statutory language. According to testimony by numerous witnesses before the bankruptcy court, Fiat and the U.S. Department of the Treasury had agreed to a sale by Debtors outside of bankruptcy and to "assume" the Debtor's liability. Debtor and Fiat should not be permitted to use the bankruptcy to effect an immunity from product liability. If they want to attempt to foreclose tort claimants, they must either use the Section 1141(c) process or petition Congress for a change in the Bankruptcy Code.

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[3] In *White Motor Credit Corp.*, the purchaser (Volvo) had "assumed" the debtor's product liability for a period of ten years. 75 B.R. at 947. Having found Section 363(f) did not bar claims, the court nonetheless enjoined a suit on what appears to have been an equitable theory. Such a theory has not advanced in this case by Debtor or the bankruptcy court below. Moreover, because no indemnity has been provided, and the purchasers have structured the sale transaction so that no money will remain in the bankruptcy estate for tort claimants, this case is not one in which equity suggests providing a windfall to the buyers at the expense of injured individuals.

III. CHRYSLER CANNOT BE SOLD "FREE AND CLEAR" OF SUCCESSOR LIABILITY FOR *FUTURE* TORT AND PRODUCT LIABILITY CLAIMS.

The Sale Order, as signed by the bankruptcy court, sells substantially all of Chrysler's assets free and clear of products liability and successor liability, including any claims that may arise in the future. For two reasons, the bankruptcy court erred in stating that Chrysler was being sold free and clear of damages claims that have not yet arisen. First, such future claims are not "claims" within the meaning of § 363(f) or the Bankruptcy Code. Second, due process does not allow the elimination of successor liability for the unaccrued product claims of people who are not yet injured and have no way to know that they will be injured. These "future claimants" have not received and cannot be given meaningful notice that their rights in a future suit are being lost, and thus they have had no opportunity to seek to preserve those rights.

To begin with, as discussed in Section II above, product liability claims are not "interests in such property" under the opening sentence of § 363(f). As explained, Section 363(f) allows the sale of property free and clear only of any "interest in such property." But even if current claims could be considered "interests in such property" under that section, future claims cannot. People who have not yet suffered any injury or loss attributable to Chrysler cannot have an interest in its property because the injuries that would lead them to have such an

interest have not yet occurred.

Moreover, even if Section 363(f) applied to "claims" (as opposed to "interests"), the future causes of actions of people who have not yet suffered a loss or injury due to the defect in their vehicles would not be covered. "The term 'claim' means . . . right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101. A person who has not yet suffered a loss or injury has no right to payment of any kind from the debtor. Thus, in *Schweitzer v. Consolidated Rail Corp*. (3d Cir. 1985) 758 F.2d 936, 944, the Third Circuit held that claims for personal injuries that developed after a bankruptcy were not dischargeable "claims" under a prior version of the Bankruptcy Act. Similarly, in *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367 (5th Cir. 1984), the Fifth Circuit held that a bankruptcy court's order authorizing the sale of a debtor's assets free and clear of all claims and liabilities did not disallow future wrongful death actions against the purchaser of the assets based on an accident that occurred after the assets were sold because the actions were not claims that existed at the time of the sale and thus were not claims under the prior version of the Bankruptcy Act. *See also In re Chateaugay Corp.*, 944 F.2d at 1003-04 ("Accepting as claimants those future tort victims whose injuries are caused by pre-petition conduct but do not become manifest until after

confirmation, arguably puts considerable strain not only on the Code's definition of 'claim,' but also on the definition of 'creditor.'"). Indeed, that people with future claims cannot be considered claimants under the Bankruptcy Code in this proceeding is demonstrated by the lack of any attempt to provide for them. *See Zerand-Bernal Group, Inc. v. Cox* (7th Cir. 1994) 23 F.3d 159, 163 ("[I]f, as in some asbestosis cases, unknown future product-liability tort creditors of the debtor, . . . had been treated as claimants (or at least as parties in interest) in the . . . bankruptcy proceeding, provision would have been made for them there.").

Furthermore, even if future claims did meet the threshold requirement of "interests in property" under Section 363(f) (which they do not), Chrysler's property cannot be sold free and clear of them unless one of the five conditions set forth in Section 363(f) is met. Here, the bankruptcy court held that tort claims could be released under § 363(f)(5), which allows sale free and clear of claims that can be "compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." Bankr. Op. 24, 42. Future claims–causes of action that have not yet even accrued–cannot be made to fit within this paragraph. People with no current claim do not have an interest that can be reduced to a monetary value; they have not yet been injured, much less can they know the nature or extent of an injury yet to occur. It would be impossible for Chrysler to bring a proceeding against any future claimant to compel him or her to accept money in exchange for

a claim that has not yet arisen.

In stating that tort claims fall within § 363(f)(5), the bankruptcy court relied on *In re TWA*, 322 F.3d at 291. There, the Third Circuit explained that "[h]ad TWA liquidated its assets under Chapter 7 of the Bankruptcy Code, the claims at issue would have been converted to dollar amounts and the claimants would have received the distribution provided to other general unsecured creditors on account of their claims." Here, in contrast, people who do not currently have any claim would not, in a liquidation, be unsecured creditors who could receive a distribution. Uninjured people could not receive distributions just because they happened to own a Chrysler—or because they sometimes travel on roads with Chrysler cars—yet those same currently uninjured people may be injured by Chrysler products in the future. *TWA* does not consider the issue of *future* claimants, and it provides no support for the sale order entered below as to those claimants.

Second, that people who will suffer future injuries or losses do not and cannot know who they are also raises serious due process problems with the sale of Chrysler "free and clear" of their interests. Because such people do not know that they will be injured in the future, they cannot receive either meaningful notice that their rights are being adjudicated or a meaningful opportunity to be heard. As the Third Circuit stated in *Schweitzer v. Consolidated Rail Corp.* (3d Cir. 1985) 758

F.2d 936, 943, it would be "absurd" to expect a "person who had no inkling" that he would be injured by the debtor's product years in the future to file a claim in the debtor's bankruptcy proceedings to preserve his rights. Notably, Judge Newman cited *Schweitzer* and its comment about the absurdity of this argument in his opinion for this Court in *In re Chateaugay Corp.,* 944 F.2d at 1003. *See also In re Pettibone Corp*., 151 B.R. 166, 172 (Bkrtcy. N.D. Ill. 1993) ("[T]he argument implies that *uninjured* persons who wish to protect themselves in event of future injuries have the burden of monitoring national financial papers . . . to read notices about businesses they have no claims against because they are on notice of claim bar dates affecting any future injuries caused by such companies. Franz Kafka would have been able to accept such a legal principle in one of his stories; the Bankruptcy Code and the Fifth Amendment to the United States Constitution cannot.") (emphasis in original).

Below, the bankruptcy court cited *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950), for the proposition that publication notice is sufficient for claimants "whose interests or whereabouts could not with due diligence be ascertained." Bankr. Op. at 43. But the problem here is not just that Chrysler has been unable to provide individualized notice to people with future claims; the problem is that people with future claims do not *themselves* know that they will be injured by defects in Chrysler's products, and, therefore, any notice is

simply a sham. Thus, even if they saw notice in a newspaper, they would not know that the sale would affect them because, currently, they have neither claims nor knowledge that they will ever have a cause of action against Chrysler. *Cf. Amchem Prods. v. Windsor* (1997) 521 U.S. 591, 627 (discussing the impediments to providing adequate class notice to people who have been exposed to asbestos but have no perceptible injury at the time of settlement).

Although some courts have sought to address the inability of people with future claims to be heard in court on those claims by providing for those people in the bankruptcy proceeding, Chrysler has not done so here, nor could it: As Robert Nardelli, Chairman and C.E.O. of Chrysler explained at the hearing in front of the bankruptcy court, there will be essentially no value left in Chrysler if the sale goes through. *Cf. Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (holding that post-1994 asbestos claimants were not bound by settlement that purported to settle future claims but did not provide for recovery for injuries discovered after 1994), *aff'd by an equally divided court*, 539 U.S. 111 (2003) (per curiam).

In short, the sale order eliminates the claims of people who have not yet been injured and who neither had nor could have had meaningful notice or opportunity be heard before their rights were extinguished. Such a result is not permitted by either § 363(f) or the Constitution.

CONCLUSION

Appellants respectfully request that this Court reverse the bankruptcy court's order approving under Section 363(f) the sale of Chryslers free and clear of present and future tort claims.

Dated: June 4, 2009

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief contains 2,984 words.

/s/
Allison M. Zieve