

Bankruptcy: Views from the Bench Automaker Bankruptcies: Overview and Key Issues

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This year witnessed the chapter 11 bankruptcy filings of two of the “Big Three” U.S. automakers, Chrysler and General Motors (“GM”). Facing a liquidity crisis triggered by the severe economic downturn and freeze up of credit markets last fall, Chrysler and GM each turned to the U.S. government in December 2008 for emergency loans. Working with the President’s Auto Task Force, the automakers ultimately sought to use the provisions of the Bankruptcy Code to implement their restructuring plans. On April 30 and June 1, 2009, Chrysler and GM filed their respective bankruptcy cases in the U.S. Bankruptcy Court for the Southern District of New York.

When they initially sought government assistance, the automakers resisted filing for bankruptcy, citing concerns that consumers would be unwilling to buy cars and rely on warranties from a company in bankruptcy, and that the resulting collapse in revenues would doom the companies to liquidation. The bankruptcy strategies Chrysler and GM ultimately adopted thus placed a premium on minimizing the time spent in bankruptcy and assuring the public that the automakers would emerge from bankruptcy as viable companies. A key component of this strategy was to complete an expedited sale of the automakers’ “good” assets under section 363 of the Bankruptcy Code to a “New Chrysler” and a “New GM”, respectively. The hope was that a quick sale would allow the car businesses to resume operations outside of bankruptcy, freed from most of the liabilities of “old” Chrysler and GM, which would be left behind for resolution in the bankruptcy case.

Thus far, that strategy has appeared to succeed. On June 1, 2009, Judge Arthur J. Gonzalez approved the sale of substantially all of Chrysler’s assets to New CarCo Acquisition LLC (“New Chrysler”), a new entity formed by Fiat. On June 5, 2009, the Second Circuit affirmed the sale order “for substantially the reasons stated in the opinions of Bankruptcy Judge Gonzalez, entered May 31, 2009,”¹ and the Supreme Court subsequently denied a stay of the sale order, allowing the sale to close on June 10, 2009. Similarly, on July 5, 2009, Judge Robert E. Gerber approved the sale of the bulk of GM’s assets to Vehicle Acquisitions Holdings LLC (“New GM”), a purchaser sponsored by the U.S. Department of Treasury, and following the District Court’s denial of a stay pending appeal, the sale closed shortly thereafter on July 10, 2009. Thus, Chrysler and GM each completed sales within approximately 40 days of their bankruptcy filings, allowing their core businesses to carry on as restructured enterprises, outside of bankruptcy.

Among other things, the automaker bankruptcies demonstrate the prominence of section 363 in chapter 11 reorganizations. While a sale or other disposition of the debtor’s assets under a plan of reorganization approved by creditors may be the route traditionally contemplated by

¹ *In re Chrysler LLC*, Docket No. 09-2311-bk, (2d Cir. June 5, 2009). The docket entry states that “[a]n opinion (or opinions) of this Court will issue in due course.”

Chapter 11, the need to preserve the value of rapidly depreciating assets, the unavailability of DIP financing for extended stays in bankruptcy, and the desire of purchasers to avoid the entanglements of the plan-confirmation process are all factors that have tended to favor the use of section 363 to transfer the debtor's business assets earlier in the process. An examination of the Chrysler and GM sale decisions² reveals how section 363, together with section 365's provisions authorizing the assumption and assignment of contracts, have been used as important tools in the restructuring of a significant segment of American industry. Key aspects of these decisions are discussed below.

Chrysler

1. *The Transaction.* The sale provided for the transfer of substantially all of Chrysler's operating assets to New Chrysler, in exchange for the assumption of certain liabilities of Chrysler and \$2 billion in cash. As part of the transaction, New Chrysler would be assigned a re-negotiated collective bargaining agreement with the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (the "UAW"). In addition, New Chrysler would enter into a modified settlement regarding Chrysler's retiree health obligations, in which New Chrysler would issue 55% of its equity and a \$4.5 billion note to the voluntary employees' beneficiary association ("VEBA") that had previously been established to fund such obligations. Fiat would contribute manufacturing platforms, technology and distribution channels to New Chrysler. The U.S. and Canadian governments would provide a \$6 billion senior secured financing facility to support New Chrysler's post-sale operations. New Chrysler would be owned 55% by the VEBA, 8% by the U.S. Treasury, 2% by the Canadian government, and 20% by Fiat, whose share would increase to 35% upon reaching certain milestones (Fiat would have the right to acquire a majority interest once the U.S. and Canadian government debts are paid in full).

Chrysler owed approximately \$6.9 billion to pre-petition lenders (the "First Lien Lenders") under a first-lien credit facility, which was secured by a security interest in substantially all of Chrysler's assets. It also owed \$4 billion in pre-petition debt to the U.S. Treasury, secured by a junior lien. Furthermore, the U.S. and Canadian governments provided DIP financing for 60 days to facilitate the sale in the amount of \$4.96 billion.

2. *Authority to Sell Major Assets Outside of a Plan.* In approving the sale, Judge Gonzalez first ruled that section 363(b) of the Bankruptcy Code authorizes the sale of substantially all of a debtor's assets outside of a Chapter 11 plan.

The court relied on the legal standard set forth in the Second Circuit's decision in *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1066 (2d Cir. 1983). There, Judge Gonzalez wrote, the Second Circuit "eschewed a literal interpretation [of section 363] which would have permitted unfettered . . . sale . . . of estate property." Slip. Op. at 14. "The Second Circuit viewed such an interpretation as undermining 'the congressional scheme' established for corporate reorganization," which contained "statutory safeguards . . . provid[ing] for creditors and equity holders to have a vote on approval of a proposed plan of reorganization

² *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009); *In re General Motors Corp.*, No. 09-50026, 2009 WL 1959233 (Bankr. S.D.N.Y. July 5, 2009).

after having been provided with meaningful information concerning such plan.” *Id.* Nonetheless, the Second Circuit also recognized that “if a favorable business opportunity is presented that is only available if acted upon quickly, the court has to have the ability to authorize what is best for the estate.” Thus, “the Second Circuit sought to strike a balance between a debtor’s ability to sell assets and a constituent’s right to an informed vote on confirmation of a plan.” *Id.* at 15. Accordingly, the Second Circuit held that a court may approve a sale of a major asset outside of the plan process only if it finds from the evidence that there is “a good business reason” supporting the sale. *Lionel* set forth a nonexclusive list of factors to consider, including:

- the proportionate value of the asset to the estate as a whole
- the amount of elapsed time since the filing
- the likelihood that a plan of reorganization will be proposed and confirmed in the near future
- the effect of the proposed disposition on future plans of reorganization
- the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property
- which of the alternatives of use, sale or lease the proposal envisions, and
- whether the asset is increasing or decreasing in value, which was described as the “most important” factor

Id. at 15-16. Thus, Judge Gonzalez concluded that where it is necessary to “preserve the going concern value because revenues are not sufficient to support the continued operation of the business and there are no viable sources for financing,” a “debtor may sell substantially all of its assets as a going concern and later submit a plan of liquidation providing for the distribution of the proceeds of the sale.” *Id.* at 16 (citing *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2331 n.2 (2008)).

Applying this standard, Judge Gonzalez determined that Chrysler had established a “good business reason” for the expedited sale of its assets. He found that “the Fiat Transaction is the only option that is currently viable,” and that the “only other alternative is the immediate liquidation of the company,” since the commitments by the U.S. and Canadian governments and Fiat to finance and consummate the sale transaction were about to expire. *Id.* at 16-18. Judge Gonzalez rejected arguments by certain objectors that those deadlines were artificial and that the government would not “walk away from exploring other options if the Fiat Transaction did not close quickly,” given their “substantial interest in preserving automobile-industry jobs and retiree benefits.” *Id.* at 18 n.15. He concluded that “gambling on the possibility that the government was bluffing, and risking the potential for a lesser recovery in a resulting liquidation, would have been a breach of the Debtors’ fiduciary duty” and was “simply not a viable option.” *Id.*

3. “*Sub Rosa*” Plan. Judge Gonzalez next addressed objections that the sale transaction was an improper “*sub rosa*” plan of reorganization.” *Id.* at 18. Among the objectors were three Indiana retirement funds holding less than 1% of the secured First-Lien debt (the “Indiana Funds”), which argued that the sale effectively circumvented the absolute priority rule and unfair-discrimination requirements that would protect dissenting creditor classes at confirmation under section 1129(b) of the Bankruptcy Code, because the sale would assertedly impair their secured claims while distributing value to junior lienholders (the U.S. and Canadian governments) and unsecured creditors (the UAW and VEBA). Judge Gonzalez agreed that, as a

legal matter, a sale cannot be approved under section 363 if it “would amount to a *sub rosa* plan of reorganization’ or an attempt to circumvent the chapter 11 requirements for confirmation of a plan of reorganization.” *Id.* at 16 (quoting *Motorola v. Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 278 F.3d 452, 466 (2d Cir. 2007) and citing *In re Braniff Airways*, 700 F.2d 935, 940 (5th Cir. 1983)). But he disagreed that the sale transaction constituted such a *sub rosa* plan.

He explained that the sale merely provided for a sale of the debtors’ assets, with the First-Lien Lenders’ liens attaching to the sale proceeds, resulting in an immediate distribution of the \$2 billion cash sale price to the First-Lien Lenders. Thus, “[n]ot one penny of value of the Debtors’ assets is going to anyone other than the First-Lien Lenders,” who Judge Gonzalez found were receiving more than they would recover in a liquidation. He further found that the sale documents did not otherwise dictate the terms of a plan of reorganization governing the classification of claims and the distribution of the debtors’ remaining assets. *Id.* at 18-21.

Furthermore, while New Chrysler would assume some—but not all—of “old” Chrysler’s contracts, including agreements with the UAW, dealers, suppliers and others, “parties to contracts that are assumed . . . are entitled to cure payments and adequate assurance of future performance” under section 365(b) of the Bankruptcy Code. “Therefore, it is recognized that such creditors may receive more favorable treatment than other creditors either in their class or a higher priority class. Nevertheless, such treatment is not considered a violation of the priority rules nor does it transform a sale of assets in to a *sub rosa* plan.” *Id.* at 21.

Judge Gonzalez also rejected arguments that the value flowing from New Chrysler to various creditors through assumed contracts or equity interests in New Chrysler constituted “a diversion of value from the Debtors’ assets [] or an allocation of the proceeds from the sale of the Debtors’ assets.” *Id.* at 22. He explained that “New Chrysler negotiated with various constituencies that are contributing and essential to the new venture, including Fiat – contributing technology and expertise; the Governmental Entities – contributing billions of dollars in funding; and Chrysler’s employees – contributing a skilled workforce with a more competitive cost structure.” *Id.* Thus, “the UAW, VEBA, and the Treasury are not receiving distributions on account of their prepetition claims,” but “[r]ather, consideration to these entities is being provided under separately-negotiated agreements with New Chrysler,” and “any of the obligations under those agreements are satisfied by New Chrysler and do not constitute a distribution of proceeds from the Debtors’ estates.” *Id.* at 22 & n.18. Accordingly, the VEBA was obtaining a 55% equity interest and a \$4.5 billion note from New Chrysler because the UAW insisted that New Chrysler take over “old” Chrysler’s obligations under the VEBA (as modified) in exchange for the UAW’s agreement to make “unprecedented modifications to the collective bargaining agreement.” *Id.* at 23. Similarly, the U.S. and Canadian governments were receiving equity in New Chrysler as consideration “for making the \$6.2 billion loan to New Chrysler to fund the purchase of Old Chrysler’s business and its ongoing operations.” *Id.* at 23.

4. *Sale “Free and Clear” of Interests.* Judge Gonzalez also ruled that Chrysler could sell its assets “free and clear” of liens and other interests pursuant to section 363(f) of the Bankruptcy Code. He determined that the assets could be sold free and clear of the First-Lien Lenders’ security interests pursuant to section 363(f)(2), because the sale had been consented to by the Collateral Trustee for the First-Lien credit facility, acting at the direction of the

Administrative Agent following approval by holders of 92% of the principal amount of the First-Lien debt. *Id.* at 24-30. He overruled objections by the Indiana Funds, determining that under the terms of the credit agreements, the Indiana Funds had contracted away their right to object to a sale of the collateral and were bound by the decision of the Administrative Agent and Collateral Trustee to give their consent to the sale. Judge Gerber later observed in the GM sale decision that “the *Chrysler* case never really concerned, as some asserted, an assault on secured creditors’ rights,” but rather “dissident minority participants in a secured lending facility being bound by the actions of their agent.” GM slip op. at 28 n.21.

Judge Gonzalez also determined that Chrysler’s assets could be sold free and clear of personal injury claims, “including those which have not yet occurred.” *Id.* at 42. He stated that “such tort claims are interests in property such that they are extinguished by a free and clear sale under section 363(f)(5) and are therefore extinguished by the Sale Transaction.” *Id.* at 42 (citing *In re Trans World Airlines*, 322 F.3d 283, 289, 293 (3d Cir. 2003)). “[I]n *personam* claims, including any potential state successor or transferee liability claims against New Chrysler, as well as *in rem* interests, are encompassed by section 363(f).” *Id.* at 43 (citing *In re White Motor Credit Corp.*, 75 B.R. 944, 949 (Bankr. N.D. Ohio 1987) and *In re All Am. Of Ashburn, Inc.*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986)). Judge Gonzalez further overruled objections “touching upon notice and due process issues, particularly with respect to potential future tort claimants,” reasoning that publication notice of the sale was sufficient with respect to claimants who could not be identified with reasonable diligence. *Id.* at 43 (citing *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 317 (1950)).

5. “*Good Faith*” Purchaser. Finally, in an important step to facilitating an expedited sale, Judge Gonzalez found that New Chrysler was a “good faith” buyer entitled to the protections of section 363(m) of the Bankruptcy Code, which provides that a reversal or modification on appeal of the approval of a sale does not affect its validity unless the order is stayed pending appeal. *Id.* at 35-37. The court rejected arguments that the U.S. government was an “insider” in control of the Debtors, purportedly on “both sides” of the transaction, and thus not entitled to such “good faith” findings. Judge Gonzalez explained that in the “absence of other entities coming forward to fund any transaction,” “the Governmental Entities, as lenders of last resort, are dictating the terms upon which they will fund the transaction, thereby leaving the Debtors with few options.” “[B]ut such is the harsh reality of the marketplace,” and the Government’s resulting leverage did not transform it into a controlling insider of the Debtors. *Id.* at 32-37.

GM

1. *The Transaction.* The sale transaction provided for the U.S.-sponsored Purchaser (or “New GM”) to acquire substantially all of GM’s assets, excluding interests in Saturn, certain employee benefit plans and other miscellaneous assets. The Purchaser also agreed to assume liabilities for (1) warranty and recall obligations, (2) employment-related liabilities under assumed employee benefit plans relating to current and former employees covered by the UAW collective bargaining agreement, and (3) product-liability claims for all accidents occurring after confirmation (whether the vehicle was sold pre- or post-confirmation).

In exchange, the Purchaser would provide GM's bankruptcy estate ("Old GM") consideration stated to be worth approximately \$45 billion, plus equity interests in the New GM. This consideration included: (1) a credit bid by the U.S. and Canadian governments for the majority of their indebtedness under the secured DIP facility and the U.S. Treasury's pre-petition loan agreement; (2) the assumption of liability by New GM for approximately \$7.8 billion advanced under the DIP facility, including proceeds to wind down Old GM; (3) a 10% equity interest in New GM (increasing to 12% if general unsecured claims exceed \$35 billion), and (4) two warrants to purchase up to 15% additional equity in New GM.

As a result of the transaction, New GM's common stock would be owned by the U.S. Treasury (60.8%), the Canadian government (11.7%), a New Employees' Beneficiary Association Trust ("New VEBA") that would fund retiree health benefits (17.5%), and Old GM (10%). New GM would also issue preferred stock to the U.S. and Canadian governments and the New VEBA.

As part of the transaction, New GM would offer employment to GM's employees (including those represented by the UAW), and it would be assigned a re-negotiated collective bargaining agreement with the UAW (which included an agreement to contribute equity and debt to the New VEBA in settlement of the \$20 billion obligation GM owed to the VEBA Trust). New GM would also be assigned most of GM's supplier contracts. In addition, autodealer franchise agreements relating to approximately 4,100 of GM's 6,000 dealerships would be assumed and assigned to the Purchaser, on modified terms. The remaining dealership agreements would not be assigned to the Purchaser, but rather would be rejected, or assumed by Old GM on modified terms providing for termination after approximately 17 months' notice.

GM owed the U.S. Treasury \$19.4 billion in pre-petition senior secured loans. The U.S. and Canadian governments also agreed to provide DIP financing to GM, but only if the sale transaction was approved under section 363 by July 10.

2. *Sale of Assets Outside of a Plan.* As did Judge Gonzalez in *Chrysler*, Judge Gerber first held that the sale could be approved outside of the plan process. Citing *Chrysler*, *Lionel* and other Second Circuit cases, he stated that "it is now well established that a chapter 11 debtor may sell all or substantially all its assets pursuant to section 363(b) prior to confirmation of a chapter 11 plan, when the court finds a good business reason to do so." *Id.* at 35. In assessing whether a sale is supported by a "good business reason," Judge Gerber suggested additional factors to consider, in addition to those listed in *Lionel*:

- "Does the estate have the liquidity to survive until confirmation of a plan?"
- "Will the sale opportunity still exist as of the time of plan confirmation?"
- "If not, how likely is it that there will be a satisfactory alternative sale opportunity, or a stand-alone plan alternative that is equally desirable (or better) for creditors?"
- "Is there a material risk that by deferring the sale, the patient will die on the operating table?"

Id. at 33-34.

Applying these standards, Judge Gerber concluded that “this is exactly the kind of case where a section 363 sale is appropriate and indeed essential,” under which “GM’s businesses can be sold, and its value preserved, before the company dies.” Slip op. at 2. He explained that “GM cannot survive with its continuing losses and associated losses of liquidity, and without the governmental funding that will expire in a matter of days. And there are no options to this sale—especially any premised on the notion that the company could survive the process of negotiations and litigation that characterizes the plan confirmation process.” *Id.* at 2-3. As he put it, “the notion that a reorganization with a plan of confirmation could be completed in 90 days in a case of this size and complexity is ludicrous.” *Id.* at 24.

Like Judge Gonzalez in *Chrysler*, Judge Gerber also rejected arguments that “the U.S. Government’s July 10 deadline [for approval of a sale] was just posturing, and that the Court should assume that the U.S. Government cares so much about GM’s survival that the U.S. Government would never let GM die.” *Id.* at 36. Noting that delay could cause customer confidence to plummet and increase GM’s bankruptcy funding needs, Judge Gerber explained that “the Court would have to gamble on the notion that the U.S. Government didn’t mean it when it said that it would not keep funding GM. There is no reason why any fiduciary, or any court, would take that gamble.” *Id.* at 37-38. He added that “[t]his is hardly the first time that this Court has seen creditors risk doomsday consequences to increase their incremental recoveries, and this Court—which is focused on preserving and maximizing value, allowing suppliers to survive, and helping employees keep their jobs—is not of a mind to jeopardize all of those goals.” *Id.* at 38.

2. “*Sub Rosa*” Plan. Judge Gerber likewise rejected arguments by dissident bondholders that the sale constituted an impermissible *sub rosa* plan. He found that the sale “does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of the creditors of this estate. It merely brings in value. Creditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court.” *Id.* at 42-43. He concluded that the “objectors’ real problem is with the decisions of the Purchaser, not with the Debtor.” *Id.* at 44. While the Purchaser designated certain contracts with suppliers, dealers and the UAW that it wished to be assumed and assigned to it, “that is merely an example of an element of almost every 363 sale,” and any resulting disparate treatment of creditors is “a Code-authorized ‘more favorable treatment’ required by section 365(b), ‘not an attempt by the debtor to circumvent the distribution scheme of the Code.’” *Id.* at 44-45 (quoting *Chrysler*, 405 B.R. at 99, and *In re Trans World Airlines*, 2001 WL 1820326, at *11 (Bankr. D. Del. Apr. 2, 2001)). Likewise, the offer of employment to GM’s employees and the agreement to contribute value to the New VEBA to fund retiree medical benefits were “actions by the Purchaser,” “and “the purchaser’s allocation of value in its own enterprise . . . did not affect the debtor’s interest.” *Id.* at 44-46 (citing *Chrysler*, 405 B.R. at 99-100).

3. *Credit Bid of Government Secured Debt*. Judge Gerber further held that the secured debt owed to the U.S. and Canadian governments could be used as the basis for a credit bid for GM’s assets. He reasoned that the government entities were free to assign their secured debt to the Purchaser, which the Purchaser could then credit bid pursuant to section 363(k) of the Bankruptcy Code. He rejected arguments by dissident bondholders that such debt should be recharacterized as equity or equitably subordinated (which would disqualify such debt from forming the basis of a credit bid). *Id.* at 47-50.

4. *Sale “Free and Clear” of Successor-Liability Claims.* In Judge Gerber’s view, “the only truly debatable issues in this case” concerned “how any approval order should address *successor liability*.” *Id.* at 3. Various tort claimants asserting injuries from car accidents or exposure to asbestos objected to provisions of the proposed sale order that would limit New GM’s potential “successor liability”—i.e., liability it might face under state law, as successor in ownership to Old GM’s assets, for alleged wrongful acts of Old GM. *Id.* at 50. While New GM would agree to assume liability for product-liability claims for persons injured after confirmation (regardless of when the vehicle was manufactured), the sale order proposed to enjoin all other claims against the Purchaser “based on any successor or transferee liability.”

Judge Gerber held that the sale order could enjoin such successor-liability claims. He found that “textual analysis” was “inconclusive.” While section 363(f) authorizes a sale free and clear of “interests” in property, he concluded that the Code “tells us that ‘interest’ means more than a lien, but it does not tell us how much more”; as such, an “interest” could be read to include, or exclude, rights that exist against a party solely by reason of a transfer of the property, such as successor liability claims. *Id.* at 56. But turning to case law, while acknowledging a split among the circuits,³ Judge Gerber concluded that the controlling law in the Second Circuit, as reflected in the Second Circuit’s affirmance of Judge Gonzalez’s *Chrysler* sale order “for substantially the reasons stated” in his opinion, provided that successor-liability claims are “interests” that can be extinguished through a free and clear sale under section 363(f). Accordingly, he concluded the order could enjoin successor-liability claims against the Purchaser for injuries occurring prior to confirmation. He also held that GM’s assets could be sold free and clear of successor-liability claims for environmental claims, although “New GM will be liable from the day it gets any properties for its environmental responsibilities going forward.” *Id.* at 63-66.

Judge Gerber did require, however, that the “free and clear” sale order include language providing that the injunction against successor-liability claims is enforceable only “to the fullest extent constitutionally permissible.” He required the addition of this language to address concerns about the due process rights of *future* asbestos claimants, who may have been exposed to asbestos but who may have no knowledge of any injury that may only manifest in the future, after approval of the sale order and confirmation of any plan. *Id.* at 61-63.

5. *Retiree Benefits.* Addressing objections by retirees whose medical and insurance benefits were not being assumed by New GM, Judge Gerber held that section 1114 of the Bankruptcy Code does not require a purchaser to assume the debtor’s retiree benefit obligations.

Section 1114 generally provides that the debtor may not modify or fail to pay retiree insurance benefits unless the debtor has complied with a specified negotiation process and the court has approved such modification or termination of payments on grounds that it is “necessary to permit the reorganization of the debtor,” “assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably,” and “is clearly favored by the balance of the equities.” *See* 11 U.S.C. § 1114(g).

³ *See id.* at 57 nn.100-101 (citing *In re Trans World Airlines*, 322 F.3d 283, 288-90 (3d Cir. 2003) and *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 581-82 (4th Cir. 1996) as holding that section 363(f) permits sales free and clear of successor-liability claims, and *In re Wolverine Radio Co.*, 930 F.2d 1132, 1147-48 (6th Cir. 1991) and *In re Qualitech Steel Corp.*, 327 F.3d 537, 545-46 (7th Cir. 2003) as holding that section 363(f) does not).

Judge Gerber acknowledged the reality that Old GM “will be liquidating, and it will not be able to keep making these payments very much longer,” while New GM had declined to assume such obligations (valued in excess of \$3 billion). *Id.* at 68-69. But he concluded that section 1114 posed no bar to the sale transaction, determining that it imposes the duty to continue retiree benefits only on the *debtor*, not a purchaser at a 363 sale. *Id.* at 70-71. Thus, while the retirees might have grounds to object if Old GM later fails to comply with the requirements of sections 1114 or 1129(a)(13) (which requires a plan to continue payment of § 1114-determined retiree benefits), those requirements did not prohibit the sale of assets under section 363 to New GM. *Id.* at 71-72. And while the UAW retirees “will get a better result, . . . that is not by reason of any violation of the Code or applicable caselaw,” but the “reality” that “the Purchaser needs a properly motivated workforce to enable New GM to succeed, requiring it to enter into satisfactory agreements with the UAW—which includes arrangements satisfactory to the UAW for UAW retirees”; “the Purchaser is not similarly motivated, in triaging its expenditures, to assume obligations for retirees of unions whose members, with little in the way of exception, no longer work for GM.” *Id.* at 72-73.

6. *Dealer Issues.* Judge Gerber also rejected objections to GM’s efforts to restructure its dealer network.

In connection with the sale, GM offered to assume and assign to New GM approximately 4,100 of its dealership agreements, on modified terms (the “Participation Agreements”). For the remaining 1,900 dealership agreements, it offered to assume modified agreements, providing for termination of the franchises after approximately 17 months (“Deferred Termination Agreements”). The agreements of both types included waivers of certain rights dealers would have in connection with their franchises. The Participation and Deferred Termination Agreements were signed by approximately 99% of dealers. Although the objections of 45 State Attorneys General and an unofficial committee of dealers were resolved consensually, one New York-based dealer association objected that the Participation and Deferred Termination Agreements were “coerced and unlawful.” *Id.* at 5-6, 73-74.

Addressing this objection, Judge Gerber initially questioned the association’s standing, observing that it appeared to be objecting on behalf of GM’s *competitors*, asserting that the modified GM dealership agreements “ignore[d] state dealer laws [and] upset[] the competitive balance among GM and every other automotive manufacturer.” *Id.* at 74.

But turning to the merits, Judge Gerber rejected the argument that the Participation and Deferred Termination Agreements were improperly “coerced.” He explained that “[f]or decades, counterparties to executory contracts with bankrupt debtors have known that their agreements could be rejected, and debtors and contract counterparties have negotiated deals as alternatives to that scenario,” which “has never been regarded as unlawful coercion.” “Rather, it has been recognized as an appropriate use of leverage that Congress has given to debtors for the benefit of all of the other creditors who are not contract counterparties, and for whom the restructuring of contractual arrangements is important to any corporate restructuring.” *Id.* at 77.

Moreover, to the extent that state franchise laws prohibit such contract modifications, Judge Gerber stated that such laws would be preempted by the provisions of section 365 authorizing the debtor (with approval of the court) to assume or reject its executory contracts. *Id.*

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at 78-79. He added that while the dealers association may object that “GM gets a ‘competitive advantage over others not in bankruptcy,’ that likewise is a complaint with respect to federal bankruptcy policy, which gives companies a chance to reorganize and shed burdensome obligations to achieve a greater good. That GM’s reorganization will make New GM and GM dealers more competitive is not a bad thing; it is exactly the point.” *Id.* at 80.