UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
CHRYSLER LLC, *et al.*,	Case No. 09-50002 (AJG)
Debtors.	(Jointly Administered)

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OBJECTION OF TORT CLAIMANTS AND CONSUMER ORGANIZATIONS TO NOTICE OF PROPOSED SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES AND FINAL SALE HEARING RELATED THERETO

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Prior to the Debtors' bankruptcy filing, the United States Treasury and the Debtors negotiated a sale that would have paid the secured creditors $0.31 on the dollar (using $2.2 billion in Treasury funding to retire the secured debt) and sold all of the Debtors' assets to New CarCo Acquisition, LLC ("**New Chrysler**"). New Chrysler would have retained all of the current obligations of the Debtors. These included obligations under State law to consumers ("**Consumers**") who purchased the Debtors' vehicles who have reliability or mechanical issues with their vehicles and those individuals—both the Debtors' customers and bystanders—who are unfortunately injured by what are alleged to be defects in the Debtors' products ("**Personal Injury Victims**").

Despite New Chrysler's earlier willingness to take over the Debtors' obligations to millions of individuals to whom Debtors have sold vehicles, the Debtors now propose that their

only valuable assets be sold, "free and clear," to New Chrysler,[1] leaving both Consumers and Personal Injury Victims without recourse against New Chrysler. Such a sale is not only inequitable, but in the unusual circumstances of a mass market manufacturer of automobiles, it would have unfortunate consequences for the public, the economy, the Debtors' employees and business partners, and New Chrysler's ability to survive as a going concern:

- It would leave both Consumers and Personal Injury Victims without recourse against the products' manufacturer, the entity which is best situated to address their complaints in a fair and reasonable manner;

- Many of these Consumers and Personal Injury Victims, in turn, will sue others in the chain of production and sale, including dealers and suppliers—the very entities that New Chrysler will rely upon for its survival. Transferring consumer and personal injury liability (where dealers and others can be reached) to third parties who are less able to address that litigation, will in the longer term endanger the survival of New Chrysler;

- For those individuals who are unable to reach dealers or suppliers, the cost of their injuries, and Consumers losses, will be borne by them, the government, or insurers in the form of uncompensated care;

- The current owners of Chrysler vehicles (New Chrysler's future customers) will be left with vehicles devalued by the lack of anyone standing behind them, devastating resale and trade-in values further; and

- New Chrysler will then be confronted by a slew of articles in the press and complaints on the Web about how those who bought Chrysler vehicles, *or might buy them in the future*, are left out in the cold. This will cause Consumers to think long and hard about ever

[1] The current $2 Billion offer is 28% of the $6.9 Billion in Secured Debt.

buying a vehicle from New Chrysler, damaging the brand and making the survival of New Chrysler difficult, if not impossible.

These results are not appropriate as to current claimants (both Consumers and Personal Injury Victims), let alone those individuals who are certain to suffer injury and losses in the future as a result of defects in the Debtors' vehicles, and who, as discussed below, obviously cannot come forward in this Court and file claims. As such, the sale of the Debtors' assets to New Chrysler should be subject to the retention of liability to Consumers and Personal Injury Victims that arise out of alleged defects in the vehicles sold by Debtors, and this Court should not find the sale "free and clear" 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 any issues with these vehicles, it would be inequitable and unwise to attempt to transfer the liability for defects in these consumer products to third parties and the public at large.

II. INDIVIDUALS AND ORGANIZATIONS MAKING OBJECTIONS

The personal injury victim objectors include William Lovitz, who is the plaintiff in *Lovitz v. Daimler North America Corp., et al.*, Case No. 1:08cv0629 (N.D. Ohio, O'Malley, J.) for the death of his mother due to a defect in a Dodge Neon; Farbod Nourian, who is the plaintiff in *Nourian v. Chrysler, LLC; Chrysler Motors, LLC; Daimler A.G.; and Walker Motor Co. d/b/a Buerge Chrysler-Jeep*, Case No. SC098902 (Los Angeles Sup. Ct.) for personal injuries he suffered as result of a defect in a 1998 Jeep Cherokee; and Brian Catalano, who is the plaintiff in *Catalano v. Chrysler, LLC, et al.*, Case No. 08-32664-NP (Sanilac County, Mich. Cir. Ct.) for the death of his mother due to a defect in a 1997 Chrysler Town and Country Mini Van. Each of these plaintiffs has a direct interest in whether Chrysler, LLC is able to sell its assets "free and clear" to New CarCo Acquisition, LLC.

The consumer organization objectors all work to protect Consumers who will be affected by the outcome of the bankruptcy proceedings. These objectors include the following.

1. The Center for Auto Safety (the "**Center**") is a non-profit consumer advocacy organization that, among other things, works for strong federal safety standards to protect drivers and passengers. The Center was founded in 1970 to provide Consumers a voice for auto safety and quality in Washington, DC, and to help "lemon" owners fight back across the country. The Center advocates for auto safety before the Department of Transportation and in the courts.
2. Consumer Action is a national nonprofit education and advocacy organization serving more than 9,000 community based organizations with training, educational modules, and multi-lingual consumer publications since 1971. Consumer Action serves Consumers nationwide by advancing consumer rights in the fields of credit, banking, housing, privacy, insurance and utilities.
3. Consumers for Auto Reliability and Safety ("**CARS**") is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS has worked to enact legislation to protect the public and successfully petitioned the National Highway Traffic Safety Administration for promulgation of regulations to improve protections for Consumers. The United States Congress has repeatedly invited the President of CARS to testify on behalf of American Consumers regarding auto safety practices and policies.
4. National Association of Consumer Advocates ("**NACA**") is a non-profit association of attorneys and advocates whose primary focus is the protection and representation

of Consumers. NACA's mission is to promote justice for all Consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and Consumers in the ongoing struggle to curb unfair or abusive business practices that affect Consumers.

5. Public Citizen, a consumer advocacy organization, is a nonpartisan, non-profit group founded in 1971 with members nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts for strong and effective health and safety regulation, and has a long history of advocacy on matters related to auto safety. In addition, through litigation and lobbying, Public Citizen works to preserve Consumers' access to state-law remedies for injuries caused by consumer products, such as state product liability laws.

III. ARGUMENT

A. The claims of the Consumers and Personal Injury Victims are not "interests in property" under 11 U.S.C. § 363 (f).

Although the memorandum of law in support of the sale motion does not directly address successor liability issues, and the notice provided by Debtors is less than clear on the point, the accompanying motion and sale order do appear to provide for the sale to be free and clear of all successor liability claims. Section 363(f) of the Bankruptcy Code narrowly permits the sale of property of the estate free and clear of any "interest in such property" if one of five conditions are met. While the Bankruptcy Code does not define "interest in property," manifestly the claims of Personal Injury Victims and Consumers do not qualify. Accordingly, New Chrysler cannot purchase Chrysler's assets free and clear of successor liability for such claims.

Successor liability analysis involves consideration of "three principal factors": (1)

continuity in operations and work force; (2) notice to the successor of its predecessor's legal obligation; and (3) inability of the predecessor to provide adequate relief directly. *Criswell v. Delta Air Lines, Inc.*, 868 F.2d 1093, 1094 (9th Cir.), cert. denied, 489 U.S. 1066 (1989); *see also EEOC v. G-K-G, Inc.,* 39 F.3d 740, 747-48 (7th Cir. 1994). These factors are all present in the case at bar, suggesting that successor liability will exist for New Chrysler. As such the issue is if that liability can be cut off under Section 363(f).[2]

Where the language of a statute is plain, and the context supports giving effect to that plain language, the statue must be applied. See *Holloway v. United States*, 526 U.S. 1, 7 (1999) ("the meaning of statutory language, plain or not, depends on context") (internal quotation marks omitted); accord, *Raygor v. Regents of Univ. of Minn.*, 122 S.Ct. 999, 1007 (2002) (reiterating that statutory language must be analyzed in context); *Owasso Indep. Sch. Dist. v. Falvo,* 122 S.Ct. 934, 939-40 (2002), vacated in part on other grounds, 288 F.3d 1236 (10th Cir. 2002) (same); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (same).

Here, the language of Section 363(f), read in conjunction with other provisions of the Bankruptcy Code, is clear. It establishes that "interests in property" which can be foreclosed under Section 363(f) are liens, mortgages, money judgments, writs of garnishment and

[2] Preliminarily, it is worth noting that the availability of successor liability will likely be decided outside the bankruptcy proceeding and on the basis of state law. And, courts have held that successor liability may obtain even despite a § 363(f) sale. *See Lefever v. Hovnanian Enterprises, Inc.*, 734 A.2d 290, 298-301 (N.J. 1999); *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995). Because many states recognize the "product line" theory, see *Lefever*, 734 A.2d at 293-95 (citing *Ray v. Alad Corp.*, 19 Cal. 3d 22, 136 Cal. Rptr. 574 (Cal. 1977)), and because of the evident continuity of the former and proposed new Chrysler entities, there is good reason to believe successor liability will be available to consumers and personal injury claimants. At any rate, the fact that this issue will be decided by the state courts responsible for interpreting their respective laws, irrespective of a purported "free and clear" sale under § 363(f), counsels against issuing such an order at this time.

attachment, and the like, and cannot encompass unliquidated successor liability claims. *See Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 258, 259-60 (3d Cir. 2000) (stating that "[u]nder the rule of ejusdem generis, the term 'other interest' would ordinarily be limited to interests of the same kind as those enumerated, i.e., 'liens, mortgages, security interests, encumbrances, liabilities, [and] claims"'; that "[m]ortgages, security interests, encumbrances and liabilities possess characteristics similar to a lien"; and that "[a] lien is distinct from the obligation it secures ...").

Supporting this conclusion, the Code's definitions suggest that "liens" and "interests in property" are interchangeable, as a "lien" is defined to mean a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37) (emphasis added). *See also*, *In re Schwinn Bicycle Co*., 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997), *aff'd*, 217 B.R. 790 (N.D. Ill. 1997); *In re Fairchild Aircraft Corp.,* 184 B.R. 910, 917-19 (Bankr. W.D. Tex. 1995), vacated on other grounds, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

Moreover, the language of Section 1141 of the Bankruptcy Code confirms the propriety of a narrow reading of Section 363(f). Section 1141, which governs the disposition of estate property in a plan of reorganization, broadly states that property dealt with in a plan is free and clear of all "claims and interests of creditors." 11 U.S.C. § 1141(c). This language is much broader than that of Section 363(f) by including "claims", not just "interests in property," i.e. liens. Accordingly, the drafters of the Code did not intend to include "claims and interests" within the reach of Section 363(f) because that statute addresses only "interest[s] in property" i.e. liens. Section 363(f) therefore must be limited by its terms to "interest[s] in property" and can not be expanded by construction to attempt to capture the claims of Personal Injury Victims and Consumers that a debtor might *try* to foreclose under the broader Section 1141(c)

Yet, courts have even permitted successor liability claims under sales pursuant to the broader protections afforded a purchaser under Section 1141(c), a section which, as the Court is well aware, is much broader than Section 363(f). *See Zerand-Bernal Group. Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994); *R.C.M. Executive Gallery Corp. v. Rols Capital Co*., 901 F. Supp. 630, 636-37 (S.D.N.Y. 1995). Because successor liability claims have survived plans in the face of the more inclusive reach of Section 1141 (c), *a fortiori* such claims should survive the more limited scope of Section 363(f) which only reaches "interest[s] in property" not "claims and interests" as with Section 1141(c).

As such, several 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), cert. dismissed 503 U.S. 978 (1992). *See In re White Motor Credit Corp.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (holders of tort claims "have no specific interest in a debtor's property"; therefore, "section 363 is inapplicable"); *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)").

This conclusion makes eminently good sense. A general unsecured claim is not an interest (like a lien) against property that the Code transfers to the proceeds of a sale under Section 363(f). Instead, it is a charge against the general assets of the estate. Accordingly, a general unsecured claim such as a common law successor liability claim cannot be readily transferred to the proceeds of an asset sale as it is not an "interest in property" within the meaning of Section 363(f). This Court should therefore not allow the sale free and clear of any successor liability claims that Consumers and personal injury claimants might possess under

state law.

B. Even if the claims at issue do qualify as "interests in property, " the conditions under Section 363(f) have not been satisfied.

Even if this Court were to conclude that the consumer and personal injury claims at issue are "interests in property" within the meaning of Section 363, none of the requisite conditions found in the subsections of Section 363(f) has been met. The primary exceptions that might conceivably apply to the claims at issue are Sections 363(f)(1) and (5), but neither is applicable here. Without limitation, as further discussed above, "applicable nonbankruptcy law" prohibits the sale of the assets free and clear of the claims at issue, without consideration of successor liability principles. Accordingly, Section 363(f)(1) is not satisfied. Further, Section 363(f)(5) presupposes that a creditor's claim will be fully satisfied. *See Collier on Bankruptcy*, II 363.06[6c] ("Applicable nonbankruptcy law may recognize a monetary satisfaction when the lienholder is to be paid in full out of the proceeds of the sale or otherwise."). That is not the case here.

Simply put, this "quick sale" under Section 363(f) is not the appropriate mechanism to attempt to make the type of carefully reasoned decisions about questions of state law successor liability and whether to foreclose tort claimants. This Court should not expand the meaning of Section 363(f) beyond the clear statutory text which only allows "interests in property", i.e. liens, to be foreclosed.

C. Any Sale Of The Property "Free And Clear" Would Be Inequitable, And Would Undermine The Ability Of Chrysler To Survive As A Going Entity By Undercutting Consumers' Willingness To Purchase New Vehicles From New Chrysler

Missing from the Debtors' memorandum is any discussion of the effect of its plan (never clearly stated in the notice) to tell millions upon millions of its past customers that New Chrysler

will not stand behind their vehicles beyond the limited warranty protection it says it will "assume" in the Section 363(f) sale. Chrysler certainly cites no case studies, let alone legal authority, for a consumer business continuing to exist and prosper after leaving its entire prior customer base out in the cold.

Chrysler's proposed "free and clear" sale begs the question of why anyone would buy a used car which lacked anyone standing behind it, for either durability or safety issues. This is not merely an academic question–a 6% drop in the resale value of Chrysler vehicles less than 3 years old was observed after Chrysler's bankruptcy announcement. See *Resale values fall 6% for Chrysler vehicles*, Detroit Free Press May 11, 2009 (available at http://www.freep.com/article/20090511/BUSINESS01/905110423/, last visited May 18, 2009). Given that this fall occurred in the face of statements of President Obama himself that the United States itself would stand behind Chrysler vehicles, one can only assume that the fall in resale values will be yet greater once Chrysler owners realize that no one is standing behind their vehicles, and that if they are injured or their vehicle has a defect, they are on their own as Chrysler has sought to leave them without any realistic remedy.

Yet, those who currently own Chrysler vehicles (who would all suffer if resale and trade in values fall), not to mention their social networks which form an important referral base, are precisely the future customers Chrysler most needs to survive. Customer retention is key in the automobile industry, and as JD Powers noted in reporting a horrible 32.8% retention rate for Chrysler in 2008 (compared to over 50% for Ford and Chevrolet), "Customer retention will become even more critical to automakers in the coming year, as new light-vehicle sales in 2009 are projected to decline to below 12 million units." J.D. Power and Associates: Honda Ranks Highest in New-Vehicle Buyer Retention, *As New-Vehicle Sales Continue to Fall, Customer*

Retention Becomes Critically Important (available at http://www.jdpower.com/corporate/news/releases/pressrelease.aspx?ID=2008265, last visited May 18, 2009).

The factors J.D. Powers noted were most important to customer retention were "creating safe vehicles with high resale value." Id. It is hard to see how the Debtors' plan to turn itself into a new company which destroys its prior customers' vehicle values and at the same time refuses to compensate its customers if they are injured by its defective vehicles is likely to be successful.

Of course, if Chrysler is willing to abandon customers with defective or lemon vehicles, including customers who have been physically injured, one would question why anyone in the market for a new vehicle would buy a car from Chrysler's successor company, which now aims to leave its prior customers holding the empty bag. Simply put, Chrysler's proposed "free and clear" sale adversely affects its prior customers, and all but guarantees in this day of web and media savvy buyers that New Chrysler will not survive long.

The damage done to New Chrysler's ability to survive would be further magnified by the ability of some injured Consumers and Personal Injury Victims to reach Chrysler's dealers and suppliers for compensation under the laws of the several States. Yet, if Chrysler is to have any chance of surviving, and not simply to be liquidated at enormous costs to taxpayers a few months hence, it must have a healthy dealer and supplier base. Shifting tort liability to these third parties, as Chrysler proposes to do, does not help achieve this goal. Moreover, these dealers and suppliers are likely far less able to address the underlying issues with Chrysler's vehicles than is Chrysler with its greater technical and managerial resources.

D. New Chrysler Should Not Be Released from Liability for Future Consumer and Personal Injury Claims

The organizational objectors further object to the "free and clear" clause insofar as it purports to release future claims of people who have not yet been injured because, although they have purchased a Chrysler vehicle that has a defect or is a lemon, that defect or other problems have not yet become manifest. As the Third Circuit stated in *Schweitzer v. Consolidated Rail Corp*., 758 F.2d 936, 943 (3d Cir. 1985), cert. denied 474 U.S. 864 (1985), 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. Because their claims have not yet arisen, and thus they cannot know of them, future consumer and personal injury claimants have not and cannot receive meaningful notice that their rights in a future suit are being lost, and thus they have no opportunity to seek to preserve those rights.

As discussed above, *supra* page 7, Section 363(f) narrowly allows the sale of property free and clear of any "interest in such property," rather than free and clear of all "claims and interests," as does Section 1141(c). But even under the broader language, 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 from the debtor. *Cf. Schweitzer*, 785 F.2d at 944 (holding that claims for personal injuries that developed after a bankruptcy were not dischargeable "claims" under prior version of the Bankruptcy Act); *Mooney Aircraft Corp. v. Foster*, 730 F.2d 367 (5th Cir.1984) (holding that a bankruptcy court's order of a 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 prior version of the Bankruptcy Act); *see also In re Chateaugay Corp*., 944 F.2d 997, 1003-04 (2d Cir. 1991) ("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.'").

Although *Schweitzer* and *Mooney* relied on language of Section 101 of the Bankruptcy Act that has since been amended, they also discussed the due process issues that would arise from considering future claims to be dischargeable. Recognizing "that a sale free and clear is ineffective to divest the claim of a creditor who did not receive notice," the Fifth Circuit noted that, "were it necessary to reach this question, this lack of notice might well require [the court] to find that the bankruptcy court's prior judgment was ineffective as to" the later arising wrongful death claims. *Mooney*, 730 F.3d at 375. And explaining the "the general rule is that all known creditors must receive personal notice," the Third Circuit in *Schweitzer* stated that considering future tort claimants to be creditors whose claims could be discharged would raise "thorny constitutional issues." *Schweitzer*, 758 F.2d at 944 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950)). Here, too, the Court should avoid the difficult constitutional questions that would arise from clearing New Chrysler of liability for claims that do not yet exist, and make clear that the sale does not release the claims of Consumers who will be injured or suffer losses in the future as a result of defects in Chrysler vehicles sold by Chrysler before the bankruptcy proceeding.

IV. CONCLUSION

For the foregoing reasons, the Objectors hereby request that the Court decline to approve

any sale "free and clear" under Section 363(f) of product liability claims by either Consumers or Personal Injury Victims, and leave the issue of successor liability to state law.

Dated this 19th day of May, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing has been served upon the following by facsimile, email and/or U.S. Mail, this 19th day of May, 2009:

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