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General Chapters:

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Continued Overleaf

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Country Question and Answer Chapters:

In re Motors Expands Future Claimants' Rights at Expense of 363 Purchasers

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I Introduction

In the six years since the bankruptcy filing of General Motors Corporation (herein "Old GM"), most commentators have explored Old GM's novel use of section 363 of the Bankruptcy Code, rather than the Code's more elaborate chapter 11 plan process, to accomplish a reorganisation. Indeed, the novelty of the 363 sale of Old GM's most profitable assets to the newly formed "General Motors LLC" (herein "New GM") elicited across-the-spectrum reactions from the bankruptcy bar.[1]

In the wake of New GM's admission that certain Old GM-manufactured cars suffer from ignition switch defects, and reports that Old GM knew about the defects prior to the 363 sale, several plaintiff classes have emerged to challenge the finality of the sale order and impose successor liability on *New* GM – the good-faith purchaser. These plaintiffs won a major victory in July when the Second Circuit in *In re Motors Liquidation Company*[2] reversed the bankruptcy court's decision to block their claims and held that New GM could be liable.

This article discusses the ramifications of the Second Circuit's decision for the certainty of the sale order's "free and clear" provisions – those provisions that allowed for New GM to take the assets free and clear of any liens or interests, including successor liability claims. The article also explains how the principles underlying the decision could affect the integrity of large-scale 363 sales more generally.

In this article, we do three things. First, we provide background on the 363 sale, including describing the interaction of state-law successor liability claims and the sale order's "free and clear" protections for 363 purchasers. Second, we describe how the revelation in 2014 of ignition switch defects that were known to Old GM prior to giving notice of the 363 sale gave rise to the current litigation between a series of plaintiff classes and New GM over the enforceability of the free and clear protections. Finally, we analyse the Second Circuit's recent ruling, which narrowed their enforceability based on an expansive procedural due process legal theory. This article is intended for bankruptcy M&A practitioners involved in 363 sales generally, and we seek to provide practical observations and insights relevant to that group throughout.

II Background

Old GM's decision to sell its assets under section 363 represented the "zenith" of a trend toward large-scale 363 sales.[3] Although the trend has subsided recently, section 363 is still commonly used for sales of significant assets, such as subsidiaries or business lines.[4] Some background on the typical structure is helpful.

First, prepetition, a soon-to-be debtor typically negotiates a stalking horse agreement with a potential acquiror for the sale of its assets. Next, the soon-to-be debtor simultaneously files a chapter 11 petition in bankruptcy court and moves for approval of the asset sale to the stalking horse, subject to marketing the assets and providing notice of the proposed sale order to all stakeholders. The proposed sale order commonly includes protections for the proposed acquiror to enhance the marketability of the assets to be sold, including provisions ordering that the assets be transferred "free and clear" of all "interests" therein, such as liens or other claims. Finally, once notice has been provided, objections have been heard and resolved and the marketing process has been concluded, the bankruptcy court approves a sale to the highest bidder. At that point, the winning bidder closes the transaction, takes the assets free and clear and begins operating the acquired assets or line of business. In contrast to a traditional chapter 11 plan process – or even a "prepack" plan process – a 363 sale can be completed in a matter of days, not months or years.

a. Road to Old GM Bankruptcy Filing

Old GM chose the 363 sale process for its speed. By the close of 2008, Bear Stearns, Lehman Brothers, Merrill Lynch and AIG were either sold, liquidating or very close to liquidating. The financial markets were in disarray, with commercial credit markets frozen. Consumer credit markets froze up as well, sending car sale revenue into a prolonged free fall. Old GM's financial statements later revealed it had lost $30.9 billion in 2008, and the deterioration was only accelerating in 2009.

During the crisis, the U.S. Treasury provided Old GM with emergency cash infusions to keep it afloat. In March 2009, however, Treasury conditioned any further cash infusion on the submission by Old GM of a viable out-of-court restructuring plan within 60 days. But it quickly became apparent that no out-of-court solution would be forthcoming. Instead, Old GM and Treasury opted to move forward with an unprecedented bankruptcy approach: a 363 sale of Old GM's most profitable assets and brands to a new Treasury-owned entity (*i.e.*, New GM).[5] On June 1, 2009, Old GM filed a chapter 11 petition in the Southern District of New York and simultaneously moved for approval of the 363 sale, proposing a sale order containing free and clear provisions that would allow the assets to be transferred to New GM free and clear of any liens, claims or other interests (including successor liability claims) that it did not voluntarily assume. Around the same time, the federal government announced that it would backstop all warranty obligations of Old GM.

b. Successor Liability & Sale Order Free and Clear Protections

Paragraph 7 of the sale order proposed by Old GM set forth these "free and clear" provisions, granted pursuant to section 363(f):

> "Except for the Assumed Liabilities . . . , the Purchased Assets . . . shall be free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever . . ., including rights or claims based on any successor or transferee liability. . ."[6]

Some background on section 363(f) is helpful.

Although the general rule under state law is that an asset purchaser takes assets free of the seller's liabilities, there are several important exceptions that provide for imposing "successor liability" on asset purchasers. These exceptions include, among others, situations where the asset purchaser is a mere continuation of, or continues essentially the same operations or product lines as, the asset seller. For any large-scale asset sale of business lines or manufacturing operations, these exceptions present a significant concern for a potential purchaser uncertain of whether it might constitute a successor and, if so, what liabilities it might unknowingly assume. The allure of the "free and clear" 363 sale is here: in circuits and districts that allow it, 363(f) displaces applicable state law by eliminating the successor liability exceptions to the general rule and enabling debtors to transfer assets without risk of later successor liability. (Although courts across the U.S. are split on whether 363(f) can cleanse assets of successor liability claims, the Southern District of New York and many others have held that it can.)

Given that the sale from Old GM to New GM was to be a sale of substantially all its assets, there was considerable risk that New GM would constitute a successor to Old GM under applicable state law. Accordingly, New GM sought and obtained a sale order that contained broad 363(f) "free and clear" protections and only a limited carve out of liabilities that it voluntarily agreed to assume, leaving all residual liabilities exclusively with Old GM. It is worth noting, despite frequent reports to the contrary, that New GM voluntarily assumed liability for claims relating to post-sale accident-related deaths, personal injuries and property damage caused by Old GM cars.

c. Notice and Objections

Following submission of the proposed sale order to the bankruptcy court, Old GM proceeded to notice it to relevant stakeholders. Actual notice was provided to 25 categories of parties, including those parties known to have asserted any lien, claim, encumbrance or interest in the assets to be transferred, those parties who were vehicle owners involved in actual litigation with Old GM and all other parties whom Old GM considered "known" creditors. Publication notice was provided to all other parties by a notice published in six major American newspapers and four major Canadian newspapers.

After the sale motion was noticed, the bankruptcy court heard over 850 objections, including to the free and clear provisions' elimination of successor liability, all of which were overruled or otherwise resolved. On July 10, 2009 – merely 40 days after Old GM's bankruptcy filing – the court entered the sale order with the free and clear provisions intact, and New GM received the assets and took over operation of the company.

III Ignition Switch Defect & Emergence of the Plaintiff Classes

In early 2014, New GM informed the National Highway Traffic Safety Administration that it would be recalling vehicles under a number of models dating back to 2005 on account of an ignition switch defect. The defect was a low torque threshold on the ignition switch: only a small amount of force, such as the bump of a knee, could move the switch from "on" to "accessory" or "off". The problems this defect caused were manifold. If the switch moved while the vehicle was in motion, the vehicle could stall, the engine could shut off, the power steering and braking could cut out and/or the airbag deployment system could be deactivated.

Because New GM agreed at the time of the sale order to assume liability for death, personal injury and property damage actions arising post-sale from defects in Old GM-manufactured cars, New GM's liability to plaintiffs injured or killed as a result of the ignition switch defect after the sale was never in question. After the New GM's announcement of the recall, however, numerous other class action plaintiffs filed suit against New GM, nearly all asserting economic damages based on successor liability legal theories.

IV Litigation

Nearly every suit filed rested on claims of the successor liability of New GM for Old GM's actions. Notably, neither the bankruptcy court nor the Second Circuit expressly held that New GM would in fact be a state-law successor to Old GM but for the 2009 sale order's 363(f) protection. But in light of the business and manufacturing continuity between Old GM and New GM, each court's silence more likely reflects that the assumption that New GM was a state-law successor. After the suits were filed in 2014, New GM moved to enforce the sale order's 363(f) protections to block the successor liability claims. The plaintiffs, meanwhile, argued that they were entitled to, but failed to receive, adequate notice of the sale order. Because of that failure, they argued, enforcing the sale order's 363(f) provisions to block their successor liability claims would violate their constitutional due process rights.

In the bankruptcy court, New GM first countered that, because a 363 sale does not extinguish the plaintiffs' claims but rather redirects them toward the proceeds of a value-maximising asset sale, the 363 sale does not result in a deprivation of property triggering procedural due process. The bankruptcy court dismissed this argument by holding that, at least here, "[t]aking away the right to recover from [an] additional defendant (where such a right otherwise exists under [state law])" – implicitly suggesting that New GM was a successor under state law – constituted a deprivation of a property right.[7] In so holding, the bankruptcy court distinguished 363 sales where the purchaser would be a successor but for 363(f) from those where the purchaser would not be a successor regardless of 363(f). The holding seems to leave open the possibility that 363 sales not involving state-law successor purchasers may not raise the due process concerns at issue in the GM litigation.

Next, New GM countered that Old GM had nonetheless fulfilled its procedural due process notice requirements. On this issue, though, the court made a key factual finding that undercut Old GM's procedural due process argument: Old GM, the court found, had knowledge of the ignition switch defect at the time of the sale order. The court found that at least 24 engineers, senior managers and attorneys knew that Old GM was required under the National Traffic and Motor Vehicle Safety Act to send recall notices to owners of vehicles affected by the defect and imputed the knowledge of

those 24 employees to Old GM as a whole. That finding rendered every owner of an affected vehicle (records of whom the Safety Act required Old GM to keep) a "known" claimant for procedural due process purposes, which meant that they were entitled to *actual* notice, as opposed to *publication* notice, of the 363 sale order. Because the plaintiffs did not receive actual notice, the court held that notice was inadequate.

Finally, New GM countered that, even if Old GM failed to provide sufficient notice, a notice failure did not ripen into a procedural due process violation unless it prejudiced the plaintiffs' claims. The plaintiffs could not establish such prejudice, it continued, because the bankruptcy court already heard and dismissed in 2009 the very same successor liability objections to 363(f) that the plaintiffs now raised; because the objections were heard, the plaintiffs were not denied an opportunity to be heard and therefore suffered no prejudice from the notice failure. We call this theory herein the "adequate representation" theory of prejudice.

In response, the plaintiffs asserted that no prejudice need be shown at all to prove a due process violation. Alternatively, if prejudice was necessary, showing it did not require challenging the "propriety as a matter of bankruptcy law" of the sale order's 363(f) injunction,[8] but rather required showing only that the plaintiffs could conceivably have defeated the injunction either through legal challenge *or through public pressure or otherwise*. We call this theory herein the "conceivable alternative" theory of prejudice.

Here, the bankruptcy court agreed with New GM, holding that prejudice was indeed required and here could not be shown. It analysed prejudice by determining whether any plaintiffs now asserted claims that had not already been argued and disposed of when the sale order was entered in 2009. With respect to most of the plaintiffs' claims, the court answered no. The plaintiffs not only failed to bring new legal attacks not previously represented at the sale hearing, the court said, they did not even "argue that when the Court barred successor liability back in 2009, it got it wrong".[9] As to the plaintiffs' more relaxed "conceivable alternative" theory of prejudice, it wrote:

> "[The plaintiffs] ask the Court to accept the likelihood that by reason of public outrage or public pressure, they could have required Old GM or Treasury to rewrite the deal to accede to their desires. . . . [T]hey know, or should, the fundamental principle of bankruptcy law that a buyer of assets cannot be required to take on liabilities it doesn't want."[10]

It thereafter dismissed all the plaintiffs' claims (except a certain small minority of claims that were based solely on New GM's actions independent of Old GM).

The bankruptcy court certified its ruling to be reviewed directly by the Second Circuit. That court heard the case in March of 2016 and entered its decision on July 13, 2016. Its decision overturned the dismissals, holding that the plaintiffs were permitted to bring suit against New GM on all their claims.

First, the Second Circuit affirmed that extinguishing a legal claim constituted a property deprivation triggering due process, implying once again that New GM was a successor under state law.

Next, on the sufficiency of the notice provided, the Second Circuit under deferential review affirmed the bankruptcy court's factual finding that the plaintiffs were "known" and therefore entitled to actual notice. In fact, the court held that actual notice was required for holders not only of "known" claims but also of claims that "reasonably should have been known".[11] On that record, it affirmed that the publication notice provided to the plaintiffs was not sufficient.

On whether the lack of prejudice cured the notice failure, however, the Second Circuit reversed. It held that, regardless of whether prejudice was a necessary component of a due process violation, the plaintiffs demonstrated prejudice here. It reasoned that 363 sales are "private transactions" concerning primarily business judgment matters controlled by the buyer and seller, not the court. For example, on objections to 363 sales in general, the court wrote:

> "A bankruptcy court reviews a proposed § 363 sale's terms only for some minimal 'good business reason'. [Citations omitted]. Many sale objections will thus sound in business reasons to change the proposed sale order, not by reference to some legal requirement that the order *must* be changed" [emphasis in original].

The preclusion (by virtue of notice failure) of these non-legal-based objections – objections from the plaintiffs sounding in business reasons, not in legal requirements – is where the Second Circuit found prejudice. It reasoned that if such objections could have altered the business dynamics of the sale – even if affording the plaintiffs only an opportunity to negotiate with New GM – then the notice failure that prevented the plaintiffs from lodging them caused prejudice. It wrote:

> "Opportunities to negotiate are difficult if not impossible to recreate. We do not know what would have happened in 2009 if counsel representing plaintiffs with billions of dollars in claims had sat across the table from Old GM, New GM, and Treasury. Our lack of confidence, however, is not imputed on plaintiffs denied notice but instead bolsters a conclusion that enforcing the Sale Order would violate procedural due process."[12]

Thus, the Second Circuit embraced the plaintiffs' relaxed "conceivable alternative" theory of prejudice. It ruled that, to assert successor liability on a 363 purchaser relying on 363(f), a notice-deficient plaintiff need only plead a "particular factual context" that gives rise to doubt that the sale would be "negotiated and approved exactly as it was" if notice had been provided. Concluding that insufficient notice prejudiced the plaintiffs, the court held the plaintiffs suffered a due process violation. To remedy it, the court "vacate[d] the bankruptcy court's decision to enjoin [the plaintiffs'] claims",[13] allowing the plaintiffs to proceed against New GM. Although the court provided no analysis to support it, this remedy would follow naturally from the assumption that New GM was a state-law successor to Old GM in the absence of the sale order's 363(f) protections.

The relaxation of the prejudice requirement will potentially touch all 363 sales relating to the sale of a business or business unit. If the Second Circuit intended that merely depriving a plaintiff of the opportunity to negotiate constitutes prejudice, that is a low bar – after all, multi-party negotiations (often in courthouse hallways) are a hallmark of nearly every corporate bankruptcy case. There are two takeaways from this observation. First, 363 purchasers should not assume that adequate legal representation for all contingent claimants at the time of the sale order will cure notice defects. Second, if the 363 purchaser would be a state-law successor but for 363(f), the remedy for the notice violation may be to impose successor liability on the purchaser, its good faith notwithstanding. The combined effect is that 363 purchasers should consider investigating the seller's factual history not only for known but also for reasonably knowable claimants prior to a purchase. Of course, there can be no certainty that this diligence will uncover the wrongdoing (if any) from which later claims spring. As such, large-scale 363 sales involving the sale of substantially all assets of a business may, depending on how the jurisprudence develops, require not only increased diligence costs, but also a new fixed quantum of risk that no amount of diligence can mitigate.

V Conclusion

Undoubtedly, *Motors* has myriad unusual facts that distinguish it from the normal 363 sale and may limit its reach. For example, the seller "knew" of the product defect pre-sale. It had the names and addresses of the potential claimants due to a regulatory requirement, so could provide actual notice. The purchaser was likely a successor under state law, so triggered heightened due process. The business sold was manufacturing costly, long-lived consumer products, so the court may have been uniquely disinclined to permit liability cleansing as to such products. The U.S. government may have agreed to assume the seller's liability pre-sale had it been disclosed (as it did other warranty obligations), so the non-disclosure arguably caused unique prejudice to the claimants. And the list could go on.

Even so, *Motors* introduces uncertainty that may chill the market for large-scale 363 sales. The depth of the chill will depend on how the case law develops from here.

Endnotes

1. *See, e.g.*, Barry E. Adler, *Chapter 11 at the Crossroads: Does Reorganization Need Reform?: A Reassessment of Bankruptcy Reorganization after Chrysler and General Motors*, 18 Am. Bankr. Inst. L. Rev. 305 (2010); Robert M. Fishman and Gordon E. Gouveia, *What's Driving Section 363 Sales after Chrysler and General Motors?*, 19 J. Bankr. L. & Prac. 4 Art. 2 (2010); Daniel Keating, *Automobile Bankruptcies, Retiree Benefits, and the Futility of Springing Priorities in Chapter 11 Reorganizations*, 96 Iowa L. Rev. 261 (2010).
2. *In re Motors Liquidation Company*, 829 F.3d 135 (2d Cir. 2016).
3. *See* 3 Collier on Bankruptcy ¶ 363.02[3] (Alan N. Resnick & Harry J. Sommer eds., 16th ed. 2013).
4. *See, e.g.*, *In re SunEdison, Inc.*, Case No. 16-10992 (SMB) [D.I. 1002] (Bankr. S.D.N.Y. Aug. 16, 2016) (order authorising 363 sale of certain businesses).
5. *See In re Motors Liquidation Company*, 529 B.R. 510, 529–530 (Bankr. S.D.N.Y. 2014).
6. *In re General Motors Corp.*, Case No. 09-50026 (REG) [D.I. 2968] at ¶ 7 (Bankr. S.D.N.Y. 2009).
7. *In re Motors Liquidation Company*, 529 B.R. at 555.
8. *In re Motors Liquidation Company*, 529 B.R. at 567.
9. *In re Motors Liquidation Company*, 529 B.R. at 567.
10. *In re Motors Liquidation Company*, 529 B.R. at 568.
11. *In re Motors Liquidation Company*, 829 F.3d at 159.
12. *In re Motors Liquidation Company*, 829 F.3d at 165.
13. *In re Motors Liquidation Company*, 829 F.3d at 166.

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