General Motors and Chrysler: The Changing Face of Chapter 11

By Stephen B. Selbst

What two marquee bankruptcies tell us about the evolving use of the Bankruptcy Code.

The highly publicized Chapter 11 cases of Chrysler LLC and General Motors Corporation (GM) have changed existing bankruptcy practice. The trend toward using Chapter 11 to effect the sale of a debtor's business has literally received the federal government's seal of approval. The *Chrysler* and *GM* cases have proven that even enormous and complicated industrial businesses can be reorganized at lightning speed and the attendant risks to the business limited and contained. The sale of Chrysler to an alliance in which Fiat took over the management occurred in just 42 days, including the appeals to the Second Circuit and the Supreme Court. The GM case was even faster. The Chrysler and GM cases were unique in that the federal government played a dominant role in shaping those sales, and, as this article explores, the asset sales that occurred in those cases were in many ways atypical.

Despite the unusual aspects of these cases, however, it is undeniable that the *Chrysler* and *GM* cases have changed forever traditional thinking about what Chapter 11 can accomplish—and the pace at which a restructuring of a debtor's business can be put in place. The chief executive of every business that is considering Chapter 11 should ask counsel: Why can't we accomplish the same result? And every lawyer who contemplates filing a new Chapter 11 case should consider how to apply the lessons learned from these cases. Those lessons apply with equal force to lenders, who should insist that their borrowers use the same discipline to resolve their cases quickly and inexpensively and avoid the risks of protracted cases and the attendant risks of litigation and high legal fees.[1]

The *Chrysler* Case

Although Chrysler had been a laggard performer in the auto industry for many years, its descent into Chapter 11 began in 2008. From the start, auto industry sales had been off sharply from 2007 levels, and by June, Chrysler sales were down 22 percent compared to 2007, the worst of the three domestic automakers.[2] These pressures on Chrysler only intensified in the fall, as the entire U.S. auto industry reeled from the impact of the financial system meltdown and the deepening recession. By November, Chrysler's sales were off 28 percent compared to 2007.[3] In December 2008, both Chrysler and GM had sought and obtained emergency loans from the federal government to prevent them from running out of cash and being liquidated by the end of the year. After an intense debate in Congress about the wisdom of providing aid to the automakers, Chrysler received $4 billion in emergency aid and GM received $9.4 billon.[4] In February 2009, the Obama administration appointed a task force to oversee the restructuring of the ailing automakers.[5] As a condition to receiving the aid, both Chrysler and GM were required to submit viability plans to the federal government by February 17, 2009.[6]

In Chrysler's case, the auto task force quickly determined that Chrysler was not viable as a stand-alone entity.[7] After making that decision, the federal government began to lead a multiparty negotiation among Chrysler, the United Auto Work-

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ers (UAW), Fiat and the government of Canada to assemble a joint venture that would carry on Chrysler's business. Beginning in March, the parties engaged in furious nonstop negotiations that did not end until shortly before Chrysler's Chapter 11 filing on April 30, 2009.[8]

At the time of the Chapter 11 filing, Chrysler and its subsidiaries comprised one of the world's largest manufacturers and distributors of automobiles and other vehicles, together with related parts and accessories. When the case commenced, Chrysler had 32 manufacturing and assembly facilities and 24 parts depots worldwide and a network of 3,200 independent dealerships in the United States, with 72 percent of Chrysler sales occurring in the United States.

Prior to the bankruptcy filing, Chrysler had a worldwide annual production of approximately two million vehicles under the Chrysler, Dodge and Jeep® brands. Chrysler and its subsidiaries employed approximately 55,000 hourly and salaried workers, with approximately 70 percent, or 38,500, of that workforce based in the United States. Approximately 70 percent, or 27,600, of the domestic workforce was covered by a collective bargaining agreement. In addition, Chrysler made payments for health care and related benefits to more than 106,000 retirees. For 2008, Chrysler had revenues of more than $48.5 billion, with assets of approximately $39.3 billion and liabilities of $55.2 billion. For that same period, the net loss was $16.8 billion.

To conserve cash, Chrysler, which was losing $100 million per day, idled its production facilities in Chapter 11.[9] Despite fears that Chapter 11 would destroy sales, Chrysler's sales, although somewhat affected, did not shrivel to zero.[10]

The main points of the Chrysler transaction follow:[11]

- The federal government provided $3.5 billion in debtor-in-possession (DIP) financing.
- The UAW restructured its wage and benefit claims and received a note for $4.6 billion and 55 percent of the equity in the new entity. The UAW also granted some wage concessions.
- Fiat received a 20-percent equity stake, which could be increased to as much as 51 percent if performance thresholds were met. Fiat also took over the management of Chrysler. Fiat contributed no cash but did grant the new alliance the right to manufacture small vehicles using Fiat technology.
- The banks holding first liens on Chrysler's assets received $2 billion in cash for their claims of approximately $7 billion.
- Chrysler used Section 365 of the Bankruptcy Code to reject and terminate approximately 800 of its dealers.
- Approximately 95 percent of Chrysler's supplier contracts were assumed, meaning that the prebankruptcy claims of those creditors were paid in full.

The *Chrysler* case Section 363 sale was unusual in many respects. The bank lenders, who had liens on all of Chrysler's assets and who had a first claim to be repaid in a liquidation of Chrysler's assets, received less than 30 cents on the dollar. The UAW's $9.6 billion in unsecured pension and benefit claims received a note for $4.6 billion and 55 percent of the equity of reorganized Chrysler. Fiat obtained management control, a sizable equity stake and the right to obtain majority ownership of Chrysler, despite the fact that it contributed no cash to the deal and only modest technological support to the new joint venture. Finally, most unsecured supplier creditors had their claims paid in full.

By contrast, the holders of other unsecured claims were relegated to claims against "Old Chrysler," meaning the assets not sold to the new alliance, and are likely to receive little or no payment on their claims. Because Fiat put up none of the purchase price and because the government insisted on key elements of the deal, the reality is that the federal government used the value of its prepetition emergency loans and its DIP loan and political power to buy Chrysler and distribute its value as it saw fit among the creditor constituencies.[12] For all these reasons, the Section 363 sale in the *Chrysler* case did not look like a typical sale of a business and, in fact, had many of the characteristics of a *sub rosa* plan.[13]

Because the Chrysler sale was so extraordinary, it was the subject of a brief but furious legal fight, which started in the U.S. Bankruptcy Court for the Southern District of New York (bankruptcy court) and ended in the Supreme Court of the United States, which ultimately decided not to hear the case, paving the way for the sale to be closed. In the bankruptcy court litigation, a group of Indiana pension funds, which were among the holders of the first-lien debt, argued that by virtue of the sale, they were being illegally stripped of their rights to their collateral, which, they argued, was worth substantially more than the payments they were receiving. They also argued that their deficiency claims (the difference between the face amount of their claims and the payments they were receiving) would not be paid while unsecured supplier debt was being paid in full, which, they argued, violated the Bankruptcy Code. They opposed the UAW deal, arguing that it violated the priority rules of the Bankruptcy Code, because the UAW's unsecured claims were being paid nearly in full, while they were receiving just $0.28 on the dollar. They also opposed giving Fiat its stake and management role without it making a more meaningful contribution to the alliance. They also complained about the speed with which the sale was conducted, arguing that creditors had been deprived of the right to investigate whether there was a better possible sale than the Fiat deal. Finally, they contended that the entire transaction was a prohibited *sub rosa* plan of reorganization. The sale transaction was also opposed by a coalition of Chrysler dealers whose contracts had been terminated, putting them out of the business of selling Chrysler vehicles. The termination of the Chrysler dealers, some of whom had sold Chryslers since the beginning of Chrysler's business, was controversial, with Congressional hearings later called to explore the circumstances of the terminations.

At the trial, Chrysler was well prepared, with expert and fact witnesses who testified at length about the risks to the business if the Fiat sale were not approved immediately, about Chrysler's efforts over the prior two years to find another partner and about the liquidation value of its assets. By contrast, the opponents presented no expert testimony, relying primarily on cross-examination of Chrysler's witnesses. As the summary of the trial shows, that was a dangerous tactical decision because it is very difficult to present a strong case solely through cross examination. Lenders who seek to oppose a debtor's Section 363 sale or plan of reorganization should consider whether the debtor will present expert testimony and be prepared to rebut it through their own expert testimony.

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In an opinion issued on May 31, 2009, Judge Arthur Gonzalez rejected all of the objections and approved the sale.[14] Under Section 363 of the Bankruptcy Code and the case law that interprets it, a sale of substantially all of a company's assets outside of a plan of reorganization can only be approved if there are valid business reasons for pursuing that course. That rule was first laid down in the *Lionel* case in 1983, and subsequent cases have added further conditions to permitting such sales.[15] In Chrysler's case, Judge Gonzalez identified two principal bases for approving the sale. The first was Chrysler's extreme financial distress; unless the sale was approved in short order, Chrysler would run out of cash and liquidate, with results that would be worse for all creditors.[16]

The second was Judge Gonzalez's assessment of the likelihood that Chrysler would find an alternative buyer. The cases on Section 363 sales teach that in a sale of a debtor's business, creditors should be given a reasonable period of time to search for better alternative transactions. In the *Chrysler* case, Chrysler presented extensive testimony at trial that it had looked for two years for merger partners and that the Fiat transaction was the only true alternative. Judge Gonzalez cited that testimony as an additional reason for approving the sale, adopting Chrysler's argument and ruling that the creditors were highly unlikely to find an alternative buyer before Chrysler would run out of cash.

As to the objections that the first-lien lenders were being improperly stripped of the value of their liens, Judge Gonzalez rejected their contentions for two reasons. First, he found that the bank lenders were receiving far more than they would in a liquidation. Second, he noted that the vast majority of the banks who were party to the first-lien credit agreement had voted in favor of the deal. Thus, he ruled, the dissenting Indiana pension funds were bound by the majority rule of the banks and could not seek contrary legal remedies. Dealing with the *sub rosa* plan objection, Judge Gonzalez found that the federal government and Fiat had negotiated the terms of the transactions. Pointing to other cases, he said, it is legally permissible for a buyer to assume contracts in connection with a sale. Thus, the restructuring of the UAW pension and benefit plans and the payments to the trade suppliers were protected. By the same logic, he rejected the contention that the transaction violated the priority rules of the Bankruptcy Code.[17] Thus, he ruled, the payments to the UAW and the trade suppliers were permissible, even though the bank creditors were receiving substantially less for their claims.

After the bankruptcy court trial, all parties agreed that the issues raised by the case were so important and the consequences of delay were so dire that they determined to make a direct appeal to the U.S. Court of Appeals for the Second Circuit. The usual appeal path for a bankruptcy court decision is the U.S. District Court or the Bankruptcy Appellate Panel. Cases usually reach the circuit courts after the intermediate courts have ruled. Judge Gonzalez agreed with the idea and signed an order authorizing the direct appeal.

The Second Circuit heard argument on the *Chrysler* case on June 5, 2009. Later that day, Chief Judge Dennis Jacobs affirmed Judge Gonzalez's opinion, although the Second Circuit did not issue its opinion until several weeks later.[18] But the litigation did not end there; the Indiana funds filed a petition with the Supreme Court of the United States, asking that Chrysler not be permitted to close the sale to Fiat until the Supreme Court could consider whether to take the case. On June 8, Justice Ruth Bader Ginsburg issued a stay, briefly injecting a note of uncertainty into the case. The next day, however, the stay was dissolved, meaning that the Supreme Court would not take the case, and the Chrysler sale to Fiat closed on June 10, 2009.

The *GM* Case

GM was and is a substantially larger company than Chrysler, but its Chapter 11 case was even faster. GM completed its sale approximately five weeks after it commenced its Chapter 11 case on June 1, 2009. When GM filed for Chapter 11, it was the largest industrial bankruptcy ever and third largest overall.

GM is the largest automaker in the United States and the second largest in the world. It operates in virtually every country in the world. As of March 31, 2009, GM employed approximately 235,000 employees worldwide, of whom 163,000 were hourly employees and 72,000 were salaried. Of GM's 235,000 employees, approximately 91,000 are employed in the United States. Approximately 62,000 (or 68 percent) of those U.S. employees were represented by unions as of March 31, 2009. The UAW represents by far the largest portion of GM's U.S. unionized employees, representing approximately 61,000 employees. As of March 31, 2009, GM had consolidated reported global assets and liabilities of approximately $82 billion, and $172 billion, respectively. GM also had responsibility for approximately 500,000 retirees.[19] GM had incurred $70 billion in losses in 2007 and 2008.

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The background to GM's path to Chapter 11 was similar to Chrysler's; GM was overwhelmed by the sharp decline in sales in 2008 and its rapidly dwindling cash. As late as March 2008, then-CEO Rick Wagoner had declared that "Bankruptcy is not an option."[20] He and others at GM had expressed fear that consumers would balk at purchasing vehicles from a carmaker in Chapter 11. A year later Wagoner had departed as CEO.[21]

By November 2008, GM was in desperate shape; its November sales year-to-date were down 22 percent, and in its 10-Q filed with the Securities and Exchange Commission (SEC), it warned that it might run out of cash by the end of the year.[22] In December, it joined Chrysler in seeking aid from the federal government, subject to the condition that it file a viability plan by February 17, 2009.

But unlike Chrysler, there was no buyer in the traditional sense for GM. When it filed for Chapter 11 on June 1, 2009, it also announced that it would be pursuing a Section 363 sale to a buyer (New GM). But in essence what it did was take its most valuable assets and transfer them to

New GM while leaving its unwanted assets and liabilities behind at the original seller (Old GM). Like Chrysler, GM also reduced its dealerships in Chapter 11, although it did so in a somewhat less contentious manner.[23]

The key points of the GM sale follow:

- GM planned to close or idle 14 manufacturing plants, all of which would be retained by Old GM. The rest would be transferred to New GM.
- With the consent of the UAW, GM restructured its obligation to make pension and benefit contributions on behalf of existing and retired employees.
- GM was seeking to reduce its UAW workforce by 21,000 employees.
- The federal government provided $30 billion in DIP financing; the government of Canada provided $9.5 billion.
- The ownership of New GM would be UAW, 17.5 percent; Old GM, 10 percent; Canadian government, 12.5 percent; U.S. government, 60 percent.[24]
- Supplier claims were generally paid in full.

The consideration for the sale was $1.175 billion in cash, 10 percent of the shares of New GM, two warrants to purchase up to an additional 15 percent of New GM, the assumption by New GM of $6.7 billion in DIP indebtedness and the assumption by New GM of any product liability claims that arose after the sale closed, irrespective of when the product had been sold. Old GM retained the liability for product liability claims in existence prior to the sale.

As was the case in *Chrysler*, the financial creditors, in the form of unsecured GM bondholders, were the lead opponents, joined by a large contingent of tort claimants, who asserted that leaving them with claims for prepetition injuries against Old GM violated bankruptcy and state successor liability laws. The dissident GM bondholders were in a more tenuous legal position than the Chrysler first-lien banks because they had no liens on GM's assets.[25] However, unlike Chrysler, which had only bank debt and no public bondholders, the GM bondholders were the largest financial creditors of GM.

This coalition of sale opponents raised many of the same arguments to the GM transaction that had been raised in the *Chrysler* case: that the deal was not a *bona fide* sale; that it constituted a *sub rosa* plan; and that certain constituencies, such as the UAW and the suppliers, had been overcompensated relative to the bondholders and the tort claimants. In the *GM* case the argument that there was a sale was even weaker than in the *Chrysler* case because there was no new management team, nor was there a true third-party buyer. Again, the federal government, acting through its task force, essentially designed and pushed through the GM plan, using a combination of its pre-petition and DIP loans and its political capital.

The legal results were similar. Judge Robert Gerber of the U.S. Bankruptcy Court for the Southern District of New York approved the sale in a lengthy opinion dated July 5, 2009. His analysis was similar to Judge Gonzalez's; indeed, he partly relied on the *Chrysler* decision to buttress his conclusions. He first found that GM's financial circumstances were unremittingly bleak and that, without the sale transaction and its support from the U.S. Treasury, GM faced an immediate and disastrous liquidation, which would likely result in little—if any—recovery for unsecured creditors.[26] Accordingly, he found that there was a sound business justification for the sale and no alternative.

Judge Gerber then examined the specifics of the sale transaction and found that the consideration to be received by Old GM was adequate and fair in light of the value of the assets being transferred and the fact that such value substantially exceeded the liquidation value of GM. He also ruled that the treatment of the tort claimants was fair under the circumstances and that the GM sale did not constitute a *sub rosa* plan.

The GM tort claimants and the bondholders sought to take an appeal directly to the Second Circuit, but Judge Gerber denied that request. The claimants also sought a stay from the U.S. District Court, but that request was denied on July 9, 2009, and GM closed the sale on July 10, 2009, ending its 38-day trip through Chapter 11.

The Chapter 11 Debate

Over the past decade, even before the *Chrysler* and *GM* cases, traditional Chapter 11 reorganizations had declined in favor of using Chapter 11 as a means for selling a business, either as a going concern or through a series of sales. In a traditional Chapter 11 reorganization, the debtor uses Chapter 11 to restructure its business to ensure its future viability. The Bankruptcy Code provides debtors with a number of tools to accomplish this result. For example, debtors can terminate or amend unfavorable contracts, including real estate leases and collective bargaining agreements; they can modify or terminate pension and retirement plans; and they can sell or close unprofitable plants or lines of business.[27] In a traditional Chapter 11, the management of the debtor also remains in place, referred to as the debtor in possession, or DIP.[28]

After the business has been operationally restructured, the debtor develops a plan of reorganization, which is usually the result of consensual negotiations with its creditor constituencies. The plan is a contract that details how the company's debts are to be restructured.[29] The debtor then prepares a disclosure statement, which is similar to a prospectus or 10-K, which the bankruptcy court must approve as containing "adequate information" to enable creditors to make an informed decision to vote whether to accept or reject the plan.[30] The plan is then sent out for a vote among creditors.[31] Assuming that the plan is approved by the requisite classes of creditors and meets certain legal criteria contained in the Bankruptcy Code, the plan is then confirmed by the Bankruptcy Court.[32]

The benefits and detriments of the trend have been the subject of a long and lively debate among legal scholars and practitioners. To summarize, scholars opposed to existing Chapter 11 practice have argued that the length and inefficiency of the practice have made it obsolete and unnecessary. Although there are a number of academic theorists in this camp, the most prominent have been Douglas Baird and Robert Rasmussen, who assert that traditional Chapter 11 reorganizations have become rare as Chapter 11 is increasingly used for asset sales or liquidations.[33] They have argued for forcing the sale of a distressed business as a going concern or, if such a sale cannot be effected, to allow creditors to enforce their contractual remedies to assume control of the business.[34] But critics of Baird and Rasmussen argue that bankruptcy law will still be needed as a collective forum for resolving litigation claims, such as mass torts.[35]

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The supporters dispute both the factual premises and the theoretical underpinnings of the critics' assault. Professor Lynn LoPucki has marshaled evidence to demonstrate that, contrary to the claims of Baird and Rasmussen, corporate reorganizations are booming, at least for large publicly held corporations.[36] Harvey Miller, the most prominent bankruptcy practitioner of this era, has also disputed Baird and Rasmussen's criticisms. [37] Miller has written that the traditional argument for Chapter 11, namely that it gives the distressed firm time and the opportunity to maximize the value to be paid to creditors, remains relevant in the modern economy.[38]

Supporters of Chapter 11 and its continuing role in bankruptcy cases argue that the balance of power between debtors and creditors has been tipped in favor of creditors for a variety of reasons. One prominent reason, they argue, is the rise of distressed claim investors, many of which are hedge funds or specialized investment funds designed solely to invest in these types of claims. These investors buy up bank loans, bonds and trade debt from the original holders of those claims, usually at discount from the face amount. Because these investors are interested in maximizing the return on their claims, the argument goes, they want to make bankruptcy cases as short as possible, so as to increase the rate of return on their investments.[39] Thus they favor quick Section 363 sales over traditional plans of reorganization. Some argue that DIP lenders also exert a greater influence now than in the past and have used that influence to make DIP loans available on terms that lead to Section 363 sales and discourage reorganizations.[40] Many practitioners have identified these distressed investors as the motive force behind the rise in the use of Chapter 11 as a forum for selling a debtor's business.[41] While that argument probably overstates the case, there is no question among bankruptcy lawyers that distressed investors have become a major force in business bankruptcies and that the balance of power has shifted to creditors.

History of Federal Bankruptcy Law

The modern era of bankruptcy practice has its origins in the late 19th century. That era, much like the dot.com era, saw the rapid proliferation of many start-up businesses, in this instance railroads, many of which quickly failed. Because lawyers and courts recognized that the physical assets of the railroads were difficult to liquidate and worth preserving, federal district courts developed the idea of using traditional equity receiverships, which had previously been used primarily for real estate cases, to assume control of a defaulting railroad and its assets. The equity receivership also provided a central federal forum for claims against the railroad, as opposed to the possibility of conflicting state court litigation. In the equity receivership, the railroad, its creditors and shareholders developed a recapitalization plan. In the railroad receivership cases, protective committees were formed to represent the interests of creditors and shareholders, and these committees began to function with the assistance of lawyers and investment bankers.[42]

Distressed investors have become a major force in business bankruptcies.

Many of the central principles of current bankruptcy law have their origins in the railroad receiverships, including the following:

- The concept of the DIP[43]
- Liquidation value of a business is less than its going-concern value.
- Notice to creditors and full disclosure of relevant facts and law were necessary to enable creditors to determine whether to approve a plan of reorganization.[44]
- Receivers and creditors and equity committees have fiduciary duties to maximize the value of a debtor's estate.
- Application of the absolute priority rule[45]
- Nationwide jurisdiction over a debtor, its assets and claims against the debtor[46]
- Suspension of legal claims and remedies against the debtor during the pendency of the reorganization[47]
- Confirmation of a plan of reorganization binds dissenting creditors and shareholders.[48]
- The development of legal criteria for confirmation of a plan of reorganization[49]

The Great Depression and the financial aftermath of the Roaring Twenties saw the next major revision of the bankruptcy laws.[50] The large number of business failures led to a congressional determination that the principles developed in the railroad receiverships should apply to a broader spectrum of distressed businesses. At the same time, concern mounted that the protective committees and their advisors were favoring management and influential insiders at the expense of unrepresented creditors and shareholders. Congress asked the SEC to develop a comprehensive legislative response and the result was the Chandler Act of 1938. The Chandler Act had two chapters relevant to business reorganizations—Chapter X, which dealt with public company cases, and Chapter XI, which was intended to deal with smaller business cases. In Chapter X, a trustee was mandatory and the SEC had a major role. These changes were designed to reduce the power of the protective committees and their lawyers and investment bankers. Notably, Chapter XI also formalized the role of creditors committees.[51] However, the more rigid rules of Chapter X discouraged businesses from using it, and by the 1960s, most reorganization cases were being filed as Chapter XI cases, which became a source of controversy.

The growing use of Chapter XI for large public company cases led academics and government officials to consider another set of reforms to the bankruptcy laws in the late 1960s and 1970s.[52] The result was the Bankruptcy Reform Act of 1978, the current Bankruptcy Code. The primary reform of the Bankruptcy Code was to develop a single chapter, today's Chapter 11, which would deal with all sorts of business bankruptcies and eliminate the differences between Chapter X and Chapter XI. The Bankruptcy Code attempted to balance the interests of debtors and creditors; it gave debtors the exclusive right to propose a plan of reorganization at the outset of the case. It also gave debtors enhanced power to obtain financing in Chapter 11, while at the same time developing the concept of "adequate protection" for secured creditors and other interests. It made formal the idea that the goal of Chapter 11 was to develop a plan of reorganization. In the new Chapter 11, the power of the SEC in business reorganization cases was limited and the appointment of a mandatory trustee in public company cases was eliminated. The Bankruptcy Reform Act of 1978 became effective on October 1, 1979.

This historical evolution demonstrates that the nation's bankruptcy laws have been a flexible tool for more than 100 years, being modified as the business and social conditions change. Although the reasons for the current changes in bankruptcy practice are still being debated, there is a broad consensus that the practice has changed. As the discussion of the *Chrysler* and *GM* cases shows, both companies, their counsel and the federal government chose to use Section 363 sales to reduce the time, expense and risk to the business of traditional Chapter 11 cases.

Bankruptcy Law Should Acknowledge Present Practice

The *Chrysler* and *GM* cases show that bankruptcy reorganizations need not be lengthy, expensive or put a business at risk. Sales of a business under Section 363 are becoming more prevalent because they offer clear advantages over traditional Chapter 11 plans of reorganization. Yet, the use of these asset sales fits uneasily in the existing framework of the Bankruptcy Code. The history of the federal bankruptcy laws is one of innovation and adaptation when underlying social and business conditions change. The law needs to recognize the growing primacy of Section 363 sales as replacement for traditional plans of reorganization and to modify the bankruptcy laws accordingly. It is time once more to take up the task of bankruptcy reform.

Endnotes

[1] *See The Determinants of Fees in Large Bankruptcy Reorganization Cases*, J. Empirical Leg. Studies (2004), at 111–141. Professor LoPucki found that, after controlling for asset size of the debtor, the number of days in Chapter 11 was the most important variable in predicting legal and other professional fees.

[2] *Automakers Post Major Drop in Sales*, Automotive News, July 1, 2008, *www.autonews.com/apps/pbcs.dll/article?AID=/20080701/ANA02/597291192&AssignSessionID=273366351651621* (accessed Sept. 10, 2009).

[3] *Ford, GM, Toyota, Honda Sales Fall More Than 30 Percent*, Automotive News, Dec. 2, 2008, *www.autonews.com/apps/pbcs.dll/article?AID=/20081202/ANA05/812029986&AssignSessionID=173366351870835* (accessed Sept. 10, 2009).

[4] *Bush Aids Detroit, but Hard Choices Wait for Obama*, N.Y. Times, Dec. 19, 2008, *www.nytimes.com/2008/12/20/business/20auto.html* (accessed Aug. 31, 2009).

[5] *Panel to Advise Obama on Carmakers*, *CNNMoney.com, http://money.cnn.com/2009/02/16/news/companies/obama_auto_task_force/index.htm* (accessed Sept. 4, 2009).

[6] *GM Gets First $4 Billion; Chrysler Does Not, Yet*, Automotive News, Jan. 1, 2009, *www.autonews.com/apps/pbcs.dll/article?AID=/20090101/ANA02/812319988&AssignSessionID=273366347775583* (accessed Sept. 7, 2009).

[7] *Key Findings of the Administration Auto Task Force*, Automotive News, Mar. 30, 2009, *www.autonews.com/article/20090330/ANA01/903300287 (accessed Sept. 5, 2009).*

[8] *Drive-Through Bankruptcy*, Am. Law., Sept. 2009, at 77–80.

[9] *Id.*

[10] *Chrysler Shoppers Shrug Off Chapter 11*, Automotive News, May 11, 2009, *www.autonews.com/apps/pbcs.dll/article?AID=/20090511/ANA06/305119984&AssignSessionID=273366439559551* (accessed Sept. 13, 2009).

[11] *See In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (*Chrysler*), and 405 B.R. 79 (Bankr. S.D.N.Y. 2009) (Gonzalez, J.), *aff'd for substantially the reasons stated in the opinions below*, No. 09-2311-bk (2d Cir. Jun. 5, 2009) (*Chrysler-Circuit*), *temporary stay vacated and further stay denied*, 129 S.Ct. 2275 (Jun. 9, 2009). The *Chrysler* opinion states that the UAW did not receive its stock and note in exchange for its prepetition claims but as a result of independent negotiations with New Chrysler. *Chrysler* 405 B.R. at 98. That explanation appears to ignore the economic reality of the transaction.

[12] *Chrysler*, 405 B.R., at 98–99.

[13] A *sub rosa* plan is a Section 363 sale that impermissibly dictates the treatment of all creditors in addition to selling the assets. The problem with *sub rosa* plans is that they circumvent the creditor safeguards of the plan confirmation process. *See, e.g., Contrarian Funds LLC v. Westpoint Stevens, Inc.*, 333 B.R. 30 (Bankr. S.D.N.Y. 2005).

[14] *Chrysler, supra* note 11.

[15] *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1066 (2d Cir. 1983).

[16] *Supra* note 12, at 97.

[17] *Supra* note 12, at 98.

[18] *Chrysler-Circuit*, *supra* note 11.

19 *In re General Motors Corporation*, no 09-50026, ___ B.R. ____, ECF #2985 (Bankr. S.D.N.Y. July 5, 2009) (Gerber, J.).

20 *From "Not an Option" to Chapter 11—A Bankruptcy Timeline*, Automotive News, June 1, 2009, *www.autonews.com/apps/pbcs.dll/article?AID=/20090601/ANA02/906019992&AssignSessionID=273366357240782* (accessed Sept. 4, 2009).

21 *Id.* Wagoner was asked to resign by the auto task force in late March 2009.

22 *Supra* note 3; GM Corporation Form 10-Q for the quarterly period ended Sept. 30, 2008, *www.sec.gov/Archives/edgar/data/40730/000095015208009040/k46806e10vq.htm* (accessed Sept. 13, 2009).

23 Approximately 1,900 of GM's 6,000 dealers were terminated, although GM offered terminated dealers the option of a deferred termination agreement, which delayed termination for up to 17 months to allow dealers to pare their inventory of new and used vehicles and spare parts and otherwise take steps to minimize their losses.

24 *Supra* note 20.

25 Although GM had approximately $50 billion of secured bank debt when it filed for Chapter 11, that bank debt was effectively assumed by New GM. For that reason, the bank lenders did not oppose the sale in the GM case.

26 *In re General Motors Corp.*, slip opinion at 15–16. Judge Gerber cited a liquidation analysis prepared by turnaround firm Alix Partners that the net liquidation value of GM's assets would be $6 billion to $10 billion, as against at least $116 billion in unsecured liabilities.

27 11 USC §363(b); 11 USC §365(a); 11 USC §1113.

28 11 USC §1107(a).

29 Chapter 11 debtors do not have to be paid in full; the plan can provide for partial payment or no payment to a class of creditors (the senior class) so long as no class that is junior to the senior class receives a payment or the senior class consents to such treatment. 11 USC §1129(b)(2)(B)(ii).

30 11 USC §1125(b).

31 11 USC §1126.

32 11 USC §1129.

33 *See* Baird and Rasmussen, *Chapter 11 at Twilight*, 56 Stan. L. Rev. 611 (2004).

34 *See* Baird and Rasmussen, *The End of Bankruptcy*, 55 Stan. L. Rev. 751 (2003).

35 Miller and Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses in the Twenty-First Century?* 78 Am. Bankr. L. J. 153 (2004).

36 LoPucki, *The Nature of the Bankrupt Firm*, 56 Stan. L. Rev. 645 (2004).

37 Miller and Waisman, *The Future of Chapter 11: Is Chapter 11 Bankrupt?* 47 Bost. Coll. L. Rev. 129 (2005). Mr. Miller has handled many of the largest and most complex Chapter 11 cases ever filed, including *Continental Airlines, Eastern Airlines, Macy's* and *Texaco.* Among his current cases, he is representing Lehman Brothers Holding, Inc. and GM in their Chapter 11 proceedings.

38 *Supra* note 35.

39 *Supra* note 37, at 152–53.

40 *Id.*, at 153–54.

41 *Id.*, at 153.

42 *See* David A. Skeel, Jr., Debt's Dominion, A History of Bankruptcy Law in America, at 48–70, 131–41 (2001).

43 11 USC §1107.

44 11 USC §1125.

45 11 USC §1129(b)(2)(B)(ii).

46 28 USC §1334.

47 11 USC §362.

48 11 USC §1141.

49 11 USC §1129.

50 *Supra* note 37, at 165–66.

51 *Supra* note 29, at 168–70.

52 Following congressional hearings in 1970, a National Bankruptcy Commission was established. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 Mich. L. Rev. 47 (1997). In 1973, the National Bankruptcy Commission issued its report and put forth a legislative draft. *Supra* note 42, at 57.