

No. 09-2311

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

IN RE CHRYSLER LLC

On Appeal from the Order Issued June 1, 2009, by the
United States Bankruptcy Court for the Southern District of New York,
Case No. 09-50002 (AJG)

**BRIEF OF APPELLANT THE AD HOC COMMITTEE OF
CONSUMER-VICTIMS OF CHRYSLER LLC**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
SUMMARY OF THE ARGUMENT	7
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Chicago Truck Drivers v. Tasemkin, Inc.</i> , 59 F.3d 48 (7th Cir. 1995)	12-13
<i>Fairchild Aircraft, Inc. v. Campbell</i> , 184 B.R. 910 (Bankr. W.D. Texas 1995), <i>vacated on other grounds</i> , 220 B.R. 909 (Bankr. W.D. Tex. 1998).....	10
<i>Forde v. Kee-Lox Manufacturing Co., Inc.</i> , 437 F. Supp. 631 (W.D.N.Y. 1977).....	11
<i>In re Beker Indus. Corp.</i> , 63 B.R. 474 (Bankr. S.D.N.Y. 1986).....	9
<i>In re Schwinn Bicycle Co.</i> , 210 B.R. 747 (Bankr. N.D. Ill. 1997), <i>aff'd</i> 217 B.R. 790 (N.D. Ill. 1997)	10
<i>In re Trans World Airlines, Inc.</i> , 322 F.3d 283 (3d Cir. 2003) (“TWA”)	passim
<i>In re Wolverine Radio Co.</i> , 930 F.2d 1132 (6th Cir. 1991)	10
<i>Kattula v. Republic Bank</i> , 2009 U.S. Dist. LEXIS 17852, Case No. 08-121 (W.D. Ky. Feb. 12, 2009)	10
<i>Lefever v. K.P. Hovnanian Enters., Inc.</i> , 734 A.2d 290 (N.J. 1999).....	10
<i>Riverkeeper, Inc. v. U.S. Eenvtl. Prot. Agency</i> , 475 F.3d 83 (2d Cir. 2007).....	9
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	9
<i>Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.</i> , 456 F.3d 54 (2d Cir. 2006).....	9

STATUTES

11 U.S.C. § 101 *et seq.*.....3
11 U.S.C. § 363(f)..... passim
11 U.S.C. § 506(a).....9
11 U.S.C. § 1015(5)8
11 U.S.C. §1141(c)..... 8-10
28 U.S.C. § 1571
28 U.S.C. § 158 1, 2

OTHER AUTHORITIES

George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235 (2002)..... 10
Michael H. Reed, *Successor Liability and Bankruptcy Sales*, 51 Bus. Law. 653 (1996)..... 10

PRELIMINARY STATEMENT

This is an appeal from an order of the United States Bankruptcy Court for the Southern District of New York (Hon. Arthur J. Gonzalez), authorizing the sale of substantially all of the Debtors' assets free and clear of all liens, claims, interests, and encumbrances.

JURISDICTIONAL STATEMENT

The Bankruptcy Court had subject matter jurisdiction under 28 U.S.C. § 157. This Court has jurisdiction under 28 U.S.C. § 158(d) because the Bankruptcy Court certified the matter for review and on June 2, 2009, this Court granted the petition for leave to appeal. The appeal is timely because the order was entered on June 1, 2009, and the notice of appeal was filed on June 2, 2009.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Bankruptcy Court erred in holding that product liability personal injury claims are "interests in property" within the meaning of 11 U.S.C. § 363(f) and, as such, are extinguished by the Sale Transaction, leaving more than 170 injured persons and their estates with no recovery, remedy, or recourse whatsoever.

STATEMENT OF THE CASE

This is an appeal from the June 1, 2009 Order of the United States Bankruptcy Court for the Southern District of New York. The Order (I) authorizes the sale of substantially all the Debtors' assets free and clear of all liens, claims, interests, and encumbrances, (II) authorizes the assumption and assignment of certain executor contracts and unexpired leases in connection therewith and related procedures, and (III) grants related relief (the "Sale Order").

By Order dated June 2, 2009, the Bankruptcy Court certified the Sale Order for immediate appeal to this Court under 28 U.S.C. § 158(d)(2). By Orders dated June 2, 2009, this Court then granted the Debtors' petition for leave to appeal under 28 U.S.C. § 158(d), and further granted a motion by appellants Indiana State Teachers' Retirement Fund, *et al.* for a stay and expedited appeal.

Appellant the Ad Hoc Committee of Consumer-Victims of Chrysler LLC ("Ad Hoc Committee") filed its Notice of Appeal from the Sale Order on June 2, 2009, and now files this Brief in accordance with the briefing schedule set forth in the Court's June 2, 2009 Order.

STATEMENT OF FACTS¹

On April 30, 2009, Chrysler, LLC and 24 of its direct and indirect subsidiaries (the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* Bank. Ct. Op. at 1-2. Chrysler is one of the “Big Three” U.S. automakers. Each year it sells millions of vehicles to American consumers. Some of those consumers have suffered injuries, sometimes catastrophic, or been killed as a result of manufacturing defects and other legally culpable conduct on the part of the Debtors.

The Ad Hoc Committee was formed before the Debtors filed for bankruptcy protection to advance the mutual interests of its members and others similarly situated with regard to the financial reorganization of Chrysler. The Ad Hoc Committee has more than 170 members, each of whom has tort claims involving personal injuries (including derivative claims and wrongful death actions) against Chrysler. The members of the Ad Hoc Committee are individuals who reside throughout the country. Chrysler estimates the value of products

¹ Cognizant of the number of briefs that likely will be filed in this appeal and limited by the constraints of time, the Ad Hoc Committee sets forth in this Brief only those facts relevant to the narrow issue that it brings to this Court with regard to whether the Bankruptcy Court was correct that its claims are extinguished under 11 U.S.C. § 363(f).

liability claims against it to be approximately \$615 million. May 29, 2009 Hearing Tr. at 174:21-175:5. Chrysler makes annual cash payments on products liability claims between \$200 and \$250 million. *Id.* at 175:2-175:9.

The Debtors sought Bankruptcy Court approval of a Master Transaction Agreement dated as of April 30, 2009, by and between Chrysler, Fiat S.p.A. (“Fiat”) and New CarCo Acquisition, LLC (“New Chrysler”), a Delaware limited liability company formed by Fiat (the “Purchase Agreement”). The Purchase Agreement contemplates the sale of substantially all of the Debtors’ assets to New Chrysler.

Under the Purchase Agreement, New Chrysler will assume certain liabilities, including liabilities for all product warranties, product returns, and rebates on vehicles sold pre-closing. Op. at 9-10. However, New Chrysler will not assume any liability for product liability personal injury claims arising from vehicles purchased by consumers prior to the closing of the proposed sale; the Purchase Agreement specifically excludes all such claims arising from the sale of

Chrysler products prior to the closing.² Bankr. Ct. Order at 2-3.

Not only will New Chrysler not assume liability for these product liability personal injury claims, but also, as Chrysler's CEO, Robert Nardelli, testified, after the remaining assets of the Debtors' estates are liquidated, no funds will be available from the former Chrysler entities for distribution to tort claimants.³

Mr. Nardelli testified as follows:

Q. Did you also seek to do anything to protect the rights of owners of Chrysler vehicles who are also tort claimants?

A. I'm not sure what your question is.

Q. My question is those who own Chrysler vehicles or who have owned Chrysler vehicles, who have suffered injuries because of a defect in the vehicle and brought suit, have you done anything to protect their rights?

² Robert Manzo, Chrysler's financial advisor, testified that before Chrysler contemplated filing bankruptcy, Fiat had agreed to assume tort liabilities. May 27, 2009 Hearing Tr. at 252:1-4.

³ Chrysler is self-insured against personal injury claims based on products liability up to \$25 million per occurrence. May 29, 2009 Hearing Tr. at 174:11-20. As a result, it is unlikely that any insurance proceeds will be available to satisfy the tort claims either.

- A. If you're referring to, as I — product liability will stay with OldCo.
- Q. And what kind of recovery would you project for those people?
- A. I have no idea.
- Q. What kind of recovery would you project for the entire pot for the creditors of OldCo.?
- A. I don't know how to answer the question. I'm not — when you talk about creditors, are you talking about first lien creditors and —
- Q. I'm talking about all the creditors of OldCo. How much money do you think will be left in OldCo. after it is liquidated?
- A. I'm not sure how to answer the question, is that OldCo. will pay two billion dollars out to the first lien and, as I understand it, the liquidation of the assets would then go to the government to offset the DIP funding, except for what remains for some liabilities. But I —
- Q. So, essentially there would be no value left?
- A. I think that's fairly correct.

May 28, 2009 Hearing Tr. at 402-03.

In short, the members of the Ad Hoc Committee — each of whom (or whose decedent) has suffered catastrophic injury or even death as a result of alleged defects in Chrysler products — will be left with no recovery, remedy, or recourse whatsoever. Notwithstanding this clear and undisputed fact, the Bankruptcy Court approved the transaction and entered the Sale Order.

SUMMARY OF THE ARGUMENT

The appeal by the Ad Hoc Committee presents a narrow legal issue: whether product liability personal injury claims are “interests in property” under 11 U.S.C. § 363(f). The Bankruptcy Code does not define the term “interest.” Nor has this Court had occasion to interpret the term in this context. The Bankruptcy Court relied on a Third Circuit opinion, *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003) (“*TWA*”), to hold that claims can constitute “interests in property,” and accordingly, concluded that they could be extinguished by a sale under § 363(f). However, *TWA* ignored the plain meaning of the statutory language, and provided no policy justifications for its ruling. This Court should decline to follow *TWA* and should hold that product liability personal injury claims do not constitute “interests in property” within the meaning of § 363(f).

ARGUMENT

Section 363(f) of the Bankruptcy Code,⁴ which governs sale of a debtor’s property outside the ordinary course of business, provides that, in certain

⁴ Section 363(f) provides as follows:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if —

...Continued

circumstances, “the trustee may sell property . . . free and clear of any interest in such property.” 11 U.S.C. § 363(f). Meanwhile, another provision of the Code, § 1141(c),⁵ which governs confirmed plans of reorganization, permits property “dealt with” by a plan of reorganization to vest “free and clear of all claims and interests.” 11 U.S.C. § 1141(c). Thus, § 363(f) extinguishes “interests,” while § 1141(c) extinguishes “claims and interests.”

This distinction is critical. While the Code does not define the term “interest,” § 1015(5) of the Code defines “claim” as “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.”

Continued from previous page

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

⁵ Section 1141(c) provides as follows:

Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

Tort claims, such as the ones the Ad Hoc Committee asserts here, fall squarely and indisputably within this definition of “claim.”

The Bankruptcy Court read the term “claim” into § 363(f), even though the term is *excluded* from § 363(f), and *included* in § 1141(c). “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 24 (1983) (internal quotation marks and alteration omitted); *see also id.* (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each.”). In accordance with this rule, this Court has concluded that the use of the word “practicable” in one section of a statute and its omission in another part was “significant.” *Riverkeeper, Inc. v. U.S. Env'tl. Prot. Agency*, 475 F.3d 83, 102 (2d Cir. 2007); *see also Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 71 (2d Cir. 2006) (“Therefore, that Congress, in enacting § 1307, omitted language similar to the language in § 1312 is persuasive evidence that Congress did not wish for period of responsibility clauses to have the force of statute with the capability to supersede federal law.”); *cf. In re Beker Indus. Corp.*, 63 B.R. 474, 475 (Bankr. S.D.N.Y. 1986) (interpreting “value” as set forth in § 363(f)(3) of the Code *in pari materia* with “value” as used in § 506(a) of the Code).

This well-established canon of statutory construction shows that Congress's omission of "claim" in § 363(f) was intentional and that § 363(f) therefore applies only to "interests" — not claims. Numerous courts have limited § 363(f) to its plain meaning. *See In re Wolverine Radio Co.*, 930 F.2d 1132, 1147, n.23 (6th Cir. 1991); *Kattula v. Republic Bank*, Case No. 08-121, 2009 U.S. Dist. LEXIS 17852, at *13-*14 (W.D. Ky. Feb. 12, 2009); *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); *Fairchild Aircraft, Inc. v. Campbell*, 184 B.R. 910, 917-18 (Bankr. W.D. Texas 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998); *Lefever v. K.P. Hovnanian Enters., Inc.*, 734 A.2d 290, 295 (N.J. 1999). Commentators have agreed that this interpretation is correct. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 236 (2002); Michael H. Reed, *Successor Liability and Bankruptcy Sales*, 51 Bus. Law. 653, 665 & n.62 (1996).

Moreover, this interpretation of the relevant statutory provisions makes perfect sense. Congress drafted § 1141(c) to be more expansive than § 363(f) because the former provides unsecured creditors with procedural and substantive safeguards that are not available to them under § 363(f).

The Bankruptcy Court, relying on *TWA*, however, held otherwise. In *TWA*, the Third Circuit considered whether various discrimination claims filed with the EEOC constituted “any interest in property” under § 363(f). The Court stated that “the term ‘any interest’ is intended to refer to obligations that are connected to, or arise from, the property being sold.” 282 F.3d at 289. With that broad definition, the Court had little trouble concluding that the discrimination claims were covered by § 363(f) because “they arise from the property being sold.” *Id.* at 290.⁶

The reasoning of the *TWA* Court is flawed because it ignores the distinction between § 363(f) and § 1141(c). The Court provides no grounds for ignoring this basic tenet of statutory construction, nor does it provide a compelling policy rationale for its interpretation of § 363(f). Other courts that have reached decisions similar to that of *TWA* rely on two policy reasons to explain why claims should be extinguished by bankruptcy. These reasons are summarized by *Forde v. Kee-Lox Manufacturing Co., Inc.*, 437 F. Supp. 631, 633-34 (W.D.N.Y. 1977): (1)

⁶ District court and bankruptcy court cases have reached the same conclusion as *TWA*. This brief focuses on *TWA* because the Bankruptcy Court relied on that case. *See Op.* at 43. In any event, the other decisions suffer from the same infirmity as *TWA*: they fail to interpret § 363(f) consistent with its plain language.

it is necessary to transfer title free and clear of claims to ensure that purchasers will “pay a fair price for the property”; and (2) it would frustrate the scheme of the Bankruptcy Code to permit claimants to “assert their claims against purchasers of the bankrupt’s assets, while relegating lienholders to the proceeds of the sale.”

However, those policy rationales — which, in any event, should not be permitted to supersede the plain language of the statute — have been discredited. The first argument pertains equally to all financially troubled companies, and “there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation that is unavailable to ailing but not yet defunct entities.” *Chicago Truck Drivers v. Tasemkin, Inc.*, 59 F.3d 48, 50 (7th Cir. 1995). Further, as the Seventh Circuit explained, this issue should be of no concern to courts: “purchasers can demand a lower price to account for pending liabilities of which they are aware, and under federal successorship principles they will not be held responsible for liabilities of which they had no notice.” *Id.* at 50-51; *see also R.C.M. Executive Gallery Corp.*, 901 F. Supp. 630, 637-38 (S.D.N.Y. 1995) (adopting reasoning from *Chicago Truck Drivers*).

The second rationale is no more compelling. A lawsuit that proceeds after a bankruptcy is completed “cannot possibly affect the amount of property available for distribution to [the] creditors; all of [the debtor’s] property has

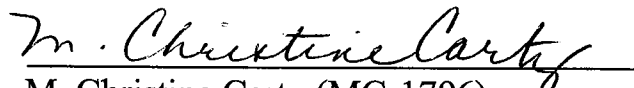
already been distributed.” *Chicago Truck Drivers*, 59 F.3d at 51 (quoting *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994)). Thus, permitting a tort claimant to proceed against a successor will not disrupt the scheme provided by the Bankruptcy Code.

Accordingly, the Court should decline to follow *TWA* and should instead adhere to the plain language of § 363(f), which applies only to “interests” and does not extinguish “claims” such as the ones that the members of the Ad Hoc Committee possess here.

CONCLUSION

For these reasons, the Ad Hoc Committee respectfully requests that the Court remand the matter to the Bankruptcy Court with instructions to deny approval of the Sale to the extent that the Sale Order authorizes the transfer of assets free and clear of product liability personal injury claims and granting such further relief as the Court deems just and equitable.

Respectfully submitted,



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