

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

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In the Matter of:

GENERAL MOTORS CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

July 1, 2009

7:59 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

1 national manufacturer deep pocket or against a local dealer. I  
2 think I have covered my arguments as to good faith. I think I  
3 have covered my arguments as to sub rosa plan and I will let  
4 others cover the 363 arguments as to why claims and not just  
5 interests should not be release under these circumstances.

6 THE COURT: Okay. Thank you very much.

7 MR. BRESSLER: Thank you, Your Honor.

8 THE COURT: Jakubowski, are you up next?

9 MR. JAKUBOWSKI: Yes, thank you, Your Honor. Your  
10 Honor, Steve Jakubowski for five product liability claimants,  
11 Callan Campbell, Mr. Junso, Mr. Chadwick, Mr. Agosto and, I'm  
12 sorry, Mr. Berlingieri. First, Your Honor, I would like to say  
13 that it has been a great pleasure to be here. I teach mock  
14 trial at a local high school in Chicago and I'm going to use  
15 this transcript as a way of teaching them some of the  
16 evidentiary rules, some of the mistakes that can be made and  
17 some of the proper ways to address the Court in terms of  
18 evidence and I appreciate that.

19 I also would like to thank the lawyers from Weil  
20 Gotshal, the -- from the U.S. attorney's office. We have been  
21 acting under extreme time pressures. I personally got involved  
22 in the case because of my shock at the Chrysler decision. I'm  
23 from the Southern Circuit and we look at things differently out  
24 there.

25 THE COURT: Especially certain of your circuit

1 judges.

2 MR. JAKUBOWSKI: Exactly. And in fact Your Honor, so  
3 within that short time frame I can say that while Gotshal has  
4 been fantastic in terms of responding to document requests  
5 promptly, providing thirty-five gig data -- document production  
6 that had a full concordance index that was fully OCR-ed that  
7 enabled us to quickly get to the heart of the issues and I  
8 think that's why the trial was as speedy as it was and again  
9 the same for the U.S. attorney's office.

10 So, I went to school with Judge Posner and he was my  
11 professor and now he's my Circuit Court judge. And again, we  
12 look at things differently out there. To us, successor  
13 liability is a matter of statutory interpretation and it is not  
14 a constitution that we are expounding but a statutory scheme  
15 that we are interpreting. And while TWA represents one circuit  
16 view, and it's unclear, based on your discussion and what we  
17 know from what's happened in the Second Circuit, it's unclear  
18 what exactly the Second Circuit holds as to successor liability  
19 claims.

20 And so, we also have the Sixth Circuit. And the  
21 Sixth Circuit says in the Michigan Wolverine case which is  
22 cited in the long footnote in my brief, that case says that  
23 363(f) does not allow for in personam claims to be treated as  
24 interest in property; they're just not. So, I recall at one of  
25 the national conference of bankruptcy judges that -- yes, Your

1 Honor?

2 THE COURT: You think that Michigan Wolverine  
3 therefore should be regarded as overruling the White Motor  
4 which agrees with you on one of your points but disagrees with  
5 you on the bottom line?

6 MR. JAKUBOWSKI: Well, what I think that what White  
7 Motor does is -- it agrees with White Motor on the 363(f) point  
8 that White Motor says which is that 363(f) does not provide for  
9 in personam claims to be treated as interest in property. It  
10 says that very clearly and it's --

11 THE COURT: And then issues a free and clear order  
12 anyhow.

13 MR. JAKUBOWSKI: And why? And I don't mean to ask  
14 you questions but that's rhetorical.

15 THE COURT: I think that we agree there's an  
16 implication of 105(a).

17 MR. JAKUBOWSKI: Exactly. And that was in 1986, well  
18 before a number of Supreme Court decisions came out which  
19 significantly constrained the ability of Bankruptcy Courts to  
20 use Section 105 as a roving manner of equity and that's the  
21 Raleigh case.

22 THE COURT: We're rolling on the textual analysis and  
23 I agree with you that that's where an analysis would start.  
24 Let's -- the dance with the textual analysis --

25 MR. JAKUBOWSKI: Okay.

1 THE COURT: -- dance for as long as you can.

2 MR. JAKUBOWSKI: Okay. I dance for a while.

3 THE COURT: But I -- I beg your pardon?

4 MR. JAKUBOWSKI: I can dance for a while on that  
5 issue.

6 THE COURT: All right. We still have to stay within  
7 the --

8 MR. JAKUBOWSKI: I will. Well, I'm not sure I will.

9 THE COURT: Claims is defined in 101 of the code but  
10 interest is not --

11 MR. JAKUBOWSKI: Sure. Right.

12 THE COURT: -- nor is the expression interest in  
13 property

14 MR. JAKUBOWSKI: Right.

15 THE COURT: And we're going to come back to stare  
16 decisis because of -- I might come to the view that 363(f) when  
17 combined with an undefined interest in property under 101 is  
18 ambiguous. That stare decisis might be the way that one needs  
19 to go.

20 MR. JAKUBOWSKI: I'm sorry, Your Honor. Stare --

21 THE COURT: Forgive me.

22 MR. JAKUBOWSKI: Okay. I'm sorry.

23 THE COURT: But I guess my question to you is when  
24 the reason by which a tort litigant can go after a New Co, a  
25 purchaser, is solely by reason of the transfer of the property

1 or the acquisition of the property, isn't that something as to  
2 which the code is silent and leaves us with a hole that  
3 requires judicial interpretation?

4 MR. JAKUBOWSKI: I think the answer to that is no,  
5 obviously. That's why I'm here. And the reason I think it's  
6 no is for several reasons. First we start with Butner, in  
7 terms of what is an interest in property. And Butner says  
8 interest in property defined --

9 THE COURT: Well, Butner speaks as property rights.

10 MR. JAKUBOWSKI: Property interests and that's -- and  
11 that's no different than interest in property.

12 THE COURT: Doesn't Butner deal with what is  
13 property?

14 MR. JAKUBOWSKI: No. It deals with who has the  
15 authority -- that where -- how are those rights determined.  
16 Under what law are those rights determined. And those rights  
17 are state law rights; they're founded in state law. And the  
18 problem with Chrysler in determining that all tort liabi -- all  
19 product liability claims of all fifty states are interest in  
20 property that can be rejected as -- they can be sold free and  
21 clear is that it doesn't recognize that that determination is a  
22 state law determination and unless Chrysler has gone out and  
23 examined every single one of the fifty states to determine  
24 whether or not it is an interest in property in that state, I  
25 think it erred. And worse than that, I don't think it even had

1 the jurisdiction to be able to do that because at the end of  
2 the day, Your Honor, this is a question -- this is a case of  
3 boundaries. And the questions are from a statutory perspective  
4 or from a jurisdictional perspective, how far can we go here?  
5 And I think we're limited by the jurisdiction of 157.

6 THE COURT: Well, the problem I have with 157 is that  
7 distinguishes between a lowly bankruptcy judge, like me, can  
8 decide and the higher level Article 3. But wouldn't the same  
9 issue exist at district judge who are asked to make the same  
10 decision that I'm asked to make?

11 MR. JAKUBOWSKI: Yes.

12 THE COURT: All right.

13 MR. JAKUBOWSKI: Yes, it would. But they still could  
14 at least apply the law of the state. And determine whether or  
15 not it's an interest in property under the law of the  
16 particular state. In some states it may be and some states it  
17 may not be. The general tendency among the states that are  
18 surveyed in my brief in the long footnote, is that from a  
19 statutory perspective, these are not interest in properties.  
20 So, in a way, we just have to get beyond that and see -- well  
21 and so -- and deal with the policy issue of whether or not from  
22 a policy perspective it makes sense to sell the assets free and  
23 clear. In most of the cases it doesn't really matter. But  
24 when you're dealing with a case where there's sixty-nine  
25 million vehicles on the road and we know there's nine

1 hundred -- well let's take out the future claims -- there's  
2 five hundred, six hundred, something like that, million dollars  
3 worth of reserves out there for future claims, I think we -- I  
4 think we have to step back and see whether or not the policy --  
5 you know, how to deal with the policy issues that are  
6 applicable here. And one of the -- one of the things that was  
7 raised in the reply brief from Weil Gotshal is it cites all  
8 these string cites that of cases that successful liability  
9 orders were entered.

10 Now, I have two problems with that. One is a  
11 procedural problem and that is that your case management order  
12 said very specifically, that when they string cite orders that  
13 have not -- that are not in books that we can find on LexLaw,  
14 that they have to go forward and lay out the procedural  
15 background and the context and why that's relevant. They  
16 didn't with respect to any of those. And I don't think the  
17 burden should be on the parties to figure out what the  
18 relevance of each one of these is or whether it's even  
19 distinguishable. So, I would ask, and I think that the case  
20 management order says that you will not consider those cases  
21 and I ask that you not consider them.

22 THE COURT: Well, I hear you on that.

23 MR. JAKUBOWSKI: That's --

24 THE COURT: But since I know the cases of that  
25 character that was --

1 MR. JAKUBOWSKI: Um-hum.

2 THE COURT: -- decided on my watch --

3 MR. JAKUBOWSKI: Okay. True. Which ones were those,  
4 Your Honor?

5 THE COURT: I'd have to go back in your brief but I  
6 suspect it was Bearing Point --

7 MR. JAKUBOWSKI: Okay.

8 THE COURT: -- perhaps Adelphia.

9 MR. JAKUBOWSKI: Okay.

10 THE COURT: And perhaps one or two others. I do know  
11 that for the most part 363(f) has not been disputed and ruled  
12 upon by the judge but at least in one exception, when using  
13 corporation of America, I think Mr. Smolinsky's in the  
14 courtroom, I ruled against your opponent, the United States  
15 government on that when their local U.S. attorney's office was  
16 representing the EPA and was asking for successor liability  
17 when I felt the environmental disaster was being sold from one  
18 -- from the debtor to the purchaser.

19 MR. JAKUBOWSKI: Um-hum.

20 THE COURT: And I ruled in that case after a 363  
21 analysis that from day one the purchaser would be liable for  
22 the mess and for continuing duties from then on to keep it  
23 clean and/or to clean it up --

24 MR. JAKUBOWSKI: Um-hum.

25 THE COURT: -- but that it wasn't liable for the

1 original debtor's liabilities to the U.S. government for  
2 penalties and for prepetition duties to comply with orders to  
3 clean it up. That U.S. attorney wasn't very happy with me then  
4 but they did not appeal.

5 MR. JAKUBOWSKI: Um-hum.

6 THE COURT: Now, I guess they're very happy they  
7 didn't appeal. But you're quite right that the practice in  
8 this district and in Delaware, and maybe in other parts of the  
9 country, are just throwing out a bunch of orders with -- where  
10 something was done without the judge ruling on it ain't the  
11 most persuasive precedent.

12 THE COURT: Right. So --

13 THE COURT: -- but what they're doing has been ruled  
14 upon by a Bankruptcy Court affirmed by the Second Circuit,  
15 which is where I really need your help --

16 MR. JAKUBOWSKI: Okay, and I will be --

17 THE COURT: -- because --

18 MR. JAKUBOWSKI: Um-hum.

19 THE COURT: -- I don't like to cross the circuit.

20 MR. JAKUBOWSKI: I understand that.

21 THE COURT: And --

22 MR. JAKUBOWSKI: And I can't blame you.

23 THE COURT: Earlier this evening. I politely  
24 suggested to the circuit that it reconsider something because I  
25 thought it was really very wrong but until the circuit told me

1 I could, I did what the circuit tells me to do.

2 MR. JAKUBOWSKI: Okay. So, here's -- obviously, I've  
3 thought of that issue and I don't necessarily have the greatest  
4 answers in the world, but I think I have good answers. First,  
5 the circuit has not come out with his opinion yet and so we  
6 don't really know what they've held with respect to this issue.  
7 They've said substantially the reasons but these have different  
8 facts and we'll go through some of the facts that are  
9 different, that particularly make this different from a ruling  
10 on a policy grounds as in TWA and Chrysler. Because at the end  
11 of the day, TWA and Chrysler were decided on policy grounds.  
12 If you throw away the statutory, they were decided in the  
13 alternative. And you throw away the statutory ground and you  
14 say, okay, well, we got it wrong on the statutory ground but it  
15 doesn't matter because it's affirmed on the policy ground.  
16 Here I think that the policy grounds are different, and I'll  
17 get into that in a little bit. So, that's the first thing.

18 The second is -- and that -- the fact is there is a  
19 split in the circuits. I mean, my circuit comes down very  
20 strongly in this issue and Judge Posner is very articulate on  
21 this and he's no patsy to the plaintiff's bar by any stretch of  
22 the imagination. And when he comes down and says there are  
23 boundaries to 363(f), this decision came down two weeks after  
24 TWA. And he specifically cites to that and says, it's -- this  
25 is not a lien we're talking about, this is possessory interest.

1 It's not anything but it is an interest. It is -- it has  
2 something tangible and it has a right to that property.

3 So, I think that -- so let me get to the pot -- let  
4 me get to the facts here and why I think this is  
5 distinguishable from Chrysler. And so, I don't know if you  
6 have the Chrysler opinion in front of you, if you don't, Your  
7 Honor, I'd be happy to certainly read through what I think are  
8 the key aspects of it.

9 THE COURT: Give me a second. I'm not sure if I  
10 brought it out with me or not.

11 UNIDENTIFIED SPEAKER: If Your Honor would like a  
12 copy.

13 THE COURT: Yes, thank you. Just hold on a second.  
14 I found my White Motors so maybe there's something funny --

15 MR. JAKUBOWSKI: Okay.

16 THE COURT: I have a TWA. I have the Chrysler  
17 opinion.

18 MR. JAKUBOWSKI: Okay.

19 THE COURT: Go ahead.

20 MR. JAKUBOWSKI: All right. So, I start at -- I  
21 don't know if you have the West version of it --

22 THE COURT: I have the West one.

23 MR. JAKUBOWSKI: I start at headnote 14, which starts  
24 with Category 3 consists of tort and consumer objections. It  
25 says, the leading case on this issue --

1 THE COURT: Time out.

2 MR. JAKUBOWSKI: I'm sorry. The page number?

3 THE COURT: You have a jump cite --

4 MR. JAKUBOWSKI: Yeah. I do --

5 THE COURT: Mine actually has page references  
6 already.

7 MR. JAKUBOWSKI: Okay. It's -- I think it's 110 --  
8 111. And it starts Headnote 14.

9 THE COURT: Okay.

10 MR. JAKUBOWSKI: Okay. So, I'd like to start with  
11 first, however, the leading case on this issue, In re: TWA.  
12 So, I guess as long as we'll do a little exegesis here. First,  
13 I don't think that's a leading case on this issue. It may be  
14 the leading -- it may have -- it may be -- Collier says it's  
15 kind of a trend, but if you look at even the quote in the  
16 omnibus reply from the debtor and you actually read what  
17 Collier says, it doesn't say that everybody follows TWA now.  
18 And in fact, when you look at the case law, when it comes to  
19 363(f), nobody follows TWA. Policy is another story. We'll  
20 talk about policy. But in terms -- I don't think it's a  
21 leading case. That's number one. Number two -- and you've  
22 got Fairchild -- I mean there are a whole bunch of cases that I  
23 cited in my brief that go against what TWA says with respect to  
24 the statutory 363(f). And then the next sentence, the code  
25 court overrules TWA, overrules the objections. Even so --

1 THE COURT: No, it says the court follows TWA --

2 MR. JAKUBOWSKI: -- follows --

3 THE COURT: -- and overrules the objections.

4 MR. JAKUBOWSKI: I'm sorry. I apologize, Your Honor,  
5 that's correct. And then it goes on, and I would like to  
6 criticize this next line. Even so, in personam clients,  
7 including any potential successor, state successor or  
8 transferring liability claims against New Chrysler, as well as  
9 in rem interest are encompassed by 363(f) and are therefore  
10 extinguished by the sale transaction, okay, citing White Motor  
11 which we've already talked about, does not hold that at all.  
12 And Ashburn was decided on policy grounds. It doesn't even  
13 mention 363(f) from a statutory perspective. So you can't say  
14 don't --

15 THE COURT: By that you mean, it was a 363(f)  
16 decision but it didn't engage in textual analysis --

17 MR. JAKUBOWSKI: None.

18 THE COURT: -- of the type that you think should be  
19 engaged in.

20 MR. JAKUBOWSKI: Has to be. The court says that --  
21 the Supreme Court says Ron Pair, BFP -- I mean one after the  
22 other, just start with the text. And you branch out and I  
23 wanted to get to Judge Waldron. I mean, he at the NCBJ, right  
24 after BAPCPA rule came down -- everybody's pulling their hair  
25 out -- how do you determine this stupid statute? And so they

1 say, you have a toolbox. And the toolbox, you start with plain  
2 meaning. And after -- and you look. Is it plain? Is it  
3 clear? And you -- okay. Well maybe it is. Maybe it's not.  
4 But then you look at Piccadilly and you look at some of these  
5 other cases and they say, well look at how else it's being used  
6 in the code. So that's why I attached to the brief the forty  
7 times that the words "interest in property" are used in the  
8 code. And there's not a single time that you can replace the  
9 word interest with claim and have it make any sense at all.

10 And then you look at -- and then you say, okay, well  
11 are there any Supreme Court cases that have looked at interest  
12 in property. Look at Barnhill head. Barnhill's a great case.  
13 You know -- it's known for when -- when is the date of  
14 transfer. It's not when is the date of transfer. It's when  
15 did the interest in property -- when was the interest in  
16 property transferred? And the interest in property was  
17 transferred when there was an interest in the property. And  
18 the claim against the debtor for a dishonored check, for a  
19 bounced check, is not an interest -- or for a check, for the  
20 right under a check, is not an interest in the property in the  
21 debtor's account. That is a critical case.

22 Now, the other case that's a great case is BFP, which  
23 Judge Scalia is looking at the tortured definition of  
24 reasonable equivalent value and says you just -- you can't  
25 torture the language of the bankruptcy code to cut -- you know,

1 this left-handed, around your back, you know, to scratch your  
2 nose. You just can't do that. Because you'll give no meaning  
3 to what the code is. And that's what TWA did. Because by  
4 saying that they had to elevate -- that basically, if the  
5 debtor had never used the assets in the way the way they used  
6 it, the claim never -- would have never come up in the first  
7 place. Well that's -- then anything is a property in interest.  
8 It has -- that's why Judge Scalia said in -- it needs to be the  
9 majority, not the dissent but the majority in BFP, he said, you  
10 know, that would be infinitesimal -- to put reasonable and  
11 equivalent value the way that you wanted to -- you may as well  
12 have reasonable infinite value. You may as well mean anything.  
13 And it's the same here. If you're going to say that an  
14 interest in property is any -- arises with respect to any claim  
15 as to which there's -- from simple deployment of the debtor's  
16 assets, then you're basically saying there's nothing that's  
17 not an interest in property. So, anyway, that's kind of my  
18 response to that issue.

19           The second -- the next point kind of leaves the  
20 statute and goes to policy. Now before leaving the statute and  
21 going to policy, there are other tools in the toolbox that I  
22 think are important, that I raised in my brief and I'm not  
23 going to explain them here, but that are important to look at.  
24 And the first tool after you go through the language, and you  
25 look at interest in property, you then go to Congressional

1 intent. And so how do you determine it here? And there's  
2 three basic rules. First, you look at the other use in the  
3 code. And 1141(c) is a perfect example of how Congress could  
4 have structured 363(f) to read exactly the way everybody who's  
5 a proponent for the sale wants to read it, because it includes  
6 interest in property whereas 363 -- claims and interest in  
7 property and not just interest. And so I've cited to this  
8 footnote of the National Bankruptcy Review Commission. It was  
9 chaired by Marcia Goldstein, where they specifically -- this  
10 was the precursor to BAPCPA. This was the 1997 --

11 THE COURT: Yeah, but -- time out here, because she  
12 pointed out that Congress could have said it a lot clearer.  
13 But the fact that Congress has not said things as clearly as it  
14 could, and I don't want to be disrespectful of Congress, but  
15 they're a bucketful and --

16 MR. JAKUBOWSKI: I --

17 THE COURT: -- especially messy. But across the  
18 code, where Congress could have said stuff a lot better to  
19 express itself.

20 MR. JAKUBOWSKI: And --

21 THE COURT: I mean, the Catapult rule. Do you think  
22 for half a second that Congress intended that a reorganized  
23 debtor couldn't use his own intellectual property?

24 MR. JAKUBOWSKI: No. But again, we're not talking  
25 about Supreme Court case law. There are Supreme Court cases

1 that say, that Congress meant what it says and it says what it  
2 means. And that is -- I mean if anything's binding on you,  
3 Your Honor, it's the Supreme Court. And that is the rule that  
4 it follows through the Second Circuit. And we saw the Groom  
5 versus United States case, where you -- you mention something,  
6 it's you know, it assumes that it's not there. And it's not  
7 like this is -- it's not like this is BAPCPA but it's not  
8 BAPCPA. It was identified in '97. And it would -- nothing  
9 could have been a more pro-business change to the code than  
10 2005. And it's not there.

11 So, I think you can't presume that Congress, you  
12 know, was lazy or didn't know what it was doing. I think in  
13 this instance, I don't think that's a fair presumption and I  
14 think in that respect, you're better off sticking with the  
15 Supreme Court guidelines that say, as in *Decone v. Dela Cruz*  
16 (ph.) case, cited *Gratzluf* (ph.) and all the ones that I've  
17 cited, that you're better off -- you're safer assuming that  
18 Congress says what it meant and meant -- and knows how to do  
19 that.

20 The next -- and then, of course, you look at pre code  
21 law. Pre code law was actually cited in the Second Circuit  
22 case in *Manville*. And so you ask, what is the Second Circuit's  
23 view on this? And until -- until *Chrysler*, I assumed the  
24 Second Circuit's view on all of this was the *Johns-Manville*  
25 case that just reversed by the Supreme Court, the *Traveler's*

1 case. But it got reversed by the Supreme Court on such a  
2 narrow ground that it didn't reverse it at all on any of the  
3 other issues which were, you know -- which were, I think,  
4 controlling in this case. You can't condition financial -- you  
5 can't condition releases on financial participation. That's an  
6 abuse. And it cites the Carta case. And it cites the  
7 Combustion Engineering. I mean, you -- the idea that you  
8 can -- that you can condition a major transaction in a  
9 bankruptcy, whether it's a sale or whether it's a plan on the  
10 financial participation, the do or die conditioning of the  
11 purchaser, is an abuse. That's what the Second Circuit calls  
12 it. An abuse.

13 And you look at the transcript in Travelers.  
14 There's -- you don't find a justice on the Supreme Court that  
15 disagrees with what Justice Stevens and Justice Ginsberg said  
16 in their dissent that when it comes to jurisdiction and  
17 releases of non-debtor parties that -- that you can't do that  
18 in a bankruptcy case without extreme, extreme protections. The  
19 Court just doesn't have that power. Doesn't -- it's beyond the  
20 boundaries. Out of bounds. So, I think, Your Honor, that  
21 maybe this is the time, before the Second Circuit rules, to get  
22 it right. You have the opportunity, as nobody else will after  
23 you, to tell -- to give the Second Circuit some guidance as it  
24 comes down with that opinion.

25 THE COURT: Usually it goes the other way around.

1 MR. JAKUBOWSKI: Usually it does but here's -- but  
2 here you do have that opportunity because they haven't ruled  
3 yet. And my guess is that they're pulling their hair over this  
4 issue. And as I read the news reports about what happened in  
5 the transcript was -- should we just let the Supreme Court hear  
6 it? Okay, let's take it over there. Everybody said, yeah,  
7 let's go there. But the Supreme Court does --

8 THE COURT: I lost you.

9 MR. JAKUBOWSKI: I thought that -- I thought that the  
10 expedited nature of that process was so fast, that I'm not sure  
11 that the Second Circuit had the opportunity to give it the kind  
12 of serious consideration, with respect to this issue, the other  
13 issue I don't have any quarrels with. But this issue, I don't  
14 think that that was the focus.

15 THE COURT: Is that the kind of judgment that I, as a  
16 Court, two levels below the Circuit, am I allowed to make?

17 MR. JAKUBOWSKI: Yes. I think that --

18 THE COURT: Yes?

19 MR. JAKUBOWSKI: I think so.

20 THE COURT: Meaning --

21 MR. JAKUBOWSKI: Here today.

22 THE COURT: -- assuming arguendo that I agree with  
23 you on textual analysis, I mean, I don't think I'm going to  
24 lose my job if they disagree with me but I -- I really think  
25 I've got to follow my Circuit.

1 MR. JAKUBOWSKI: I don't -- I don't know what they  
2 said on that issue. I don't know what they said. And I don't  
3 how they applied it to this case.

4 THE COURT: If anything, Judge Gonzales, where I'm on  
5 record in four, five, six decisions as saying that -- in  
6 believing in stare decisis and that the interest of consistency  
7 and predictability for the financial community, certainly in  
8 this district but nationwide since so many people look to law  
9 out of our district, is that we should follow each other's  
10 decision. I'm not talking about district judges; I'm talking  
11 bankruptcy judges who know bankruptcy.

12 MR. JAKUBOWSKI: Okay. And you know what?

13 THE COURT: Forgive me.

14 MR. JAKUBOWSKI: I'm sorry.

15 THE COURT: And we follow each other's decisions in  
16 the absence of manifest error. And assuming without now  
17 deciding that I agreed with you on textual analysis, and/or  
18 believing that Fairchild is a better reading than somebody  
19 else's reading of 363(f) and its related provisions, I sure  
20 don't think Judge Gonzales' decision is fine here.

21 MR. JAKUBOWSKI: Well, I'll tell you why I think it's  
22 distinguishable. Because let's assume that it's error on part  
23 A but who cares because you can decide in the alternative. And  
24 so let me explain why I think this case differs from Chrysler  
25 on policy grounds and therefore is -- will fit within the

1 Second Circuit's ruling on policy -- on policy grounds. And  
2 for that, let's turn to the next Headnote 15, 16 and 17. The  
3 first -- there're two basic policy grounds in Chrysler. One  
4 is -- well, excuse me. The two basic policy grounds in TWA.  
5 The one of them is picked up in Chrysler. But let me talk to  
6 TWA's -- both of their policy arguments because I think they're  
7 both important in terms of being able to ground your decision  
8 here.

9 And let me deal with the easy one. The easy one is  
10 TWA decided the way it did in large measure because of the fact  
11 that they were unwilling to accept the idea that some creditors  
12 would do better than others. They were unwilling to upset the  
13 relative priorities among the creditors by giving one a leg up  
14 and a second bite at the apple as Judge Posner said is fine,  
15 TWA said is not fine. They weren't -- they just weren't  
16 comfortable with that idea. Well, that, as we know, does not  
17 apply here. The relative priorities were irrelevant to the  
18 purchaser and there's -- the relative priorities are being  
19 undermined at every single level of debt.

20 So some creditors are getting paid in full, some  
21 aren't and everything depends on one issue. One issue only.  
22 And that is, as Mr. Wilson well stated, is the -- any liability  
23 was assumed that was necessary to advance the commercial  
24 interests of the successor. That was it. That was the sole  
25 basis for the decision. Not relative priorities, that actually

1 didn't matter and the reason that it didn't matter because  
2 nobody was getting anything in this case anyway so they could  
3 do whatever they wanted. That was the whole point of why it  
4 wasn't sub rosa and all that stuff.

5           So, the question then is okay, let's put issue A from  
6 TWA aside and now let's look at the other issue. And this is  
7 the key issue and Judge Gonzalez touches on it in the first  
8 sentence of Headnote 15. And he says other objections are  
9 premised on the category that a free and clear sale would be  
10 fundamentally unfair, inequitable or in bad faith. The  
11 policy -- that I really highlight that word; the policy, not  
12 the law -- the policy underlying 363(f) is to allow a purchaser  
13 to assume only the liabilities that promote its commercial  
14 interests. See Fish -- New England Fish And White Motor. That  
15 is true. That's what those cases hold. It's policy.

16           But the question is can you decide -- can you hold  
17 here that the policy applies. In Chrysler, there was a real  
18 issue on whether or not the buyer would really actually  
19 continue would the successor liab -- if the successor  
20 liabilities were in place. Here, I don't think the evidence  
21 shows that. And I think you need to make a factual finding on  
22 this. And the reason I don't think -- and that's what I think  
23 will distinguish this case from the ones before you or the ones  
24 to the side of you or above you and the factual finding is  
25 this. The debtor and the treasury sat down and they split up

1 the liabilities and they had this -- there were pensions that  
2 were being assumed, and credit bids of secured debt and other  
3 secured debt would be assumed and they went through the whole  
4 laundry list.

5 And there was -- if you look at Exhibit 6 to the  
6 Henderson deposition, there were 176 billion dollars of  
7 liabilities on the balance sheet of GM at 12/31/08. And they  
8 took six billion and put them in a bucket on the side and said  
9 these are our politically sensitive assets and liabilities.  
10 We've got environmental product liability, asbestos, splinter  
11 unions and some other miscellaneous. Add total, six billion  
12 dollars. So, those were politically sensitive in the sense  
13 that nobody really knew, as of May 7th, how they wanted to deal  
14 with those yet because of the ramifications of them from a  
15 business perspective and from a political perspective; that's  
16 the testimony. And so they had continuing discussions about it  
17 and continuing phone calls and letters from senators as to all  
18 this stuff. And as time went on, decisions were made as to  
19 whether to assume them or reject them or visa versa.

20 And as of -- and when Mr. Henderson went to the board  
21 on May 29th, they reached a decision as to what that  
22 segregation would be. And you look at the PowerPoint that's  
23 attached to his deposition as Exhibit 31 which I know it's been  
24 designated. You will see that at page, I believe, 8, it's the  
25 section that's entitled liabilities to be assumed at closing.

1 So, at the bottom there's a bullet; No purchase price  
2 adjustment regardless. And what that meant was that there  
3 would be no segrega -- that once that decision was made as to  
4 the liabilities that would be segregated in that politically  
5 sensitive bucket, there would be no further adjustment to the  
6 purchase price either a higher purchase price for the purchaser  
7 or a diminution in the estate -- to the estate in terms of  
8 proceeds, if subsequent decisions were made that changed that  
9 allocation as to that bucket.

10 And how do we know that that's true? Because there  
11 were two changes that were made with respect to product  
12 liability claims and neither of them resulted in a change of  
13 the consideration. There's not a single case out there that  
14 holds that if there's no change in consideration that TWA  
15 analysis doesn't apply. Because in all those cases, there's --  
16 in TWA, there's a possibility of a discounted bid. Every case  
17 where there's an issue with respect to the effect of the estate  
18 because of the diminution in consideration, then you had a TWA  
19 issue and that's why they were able to approve the sale and  
20 that's what Chrysler was about. But that's not the case here  
21 with respect to this bucket.

22 THE COURT: I understand. Continue.

23 MR. JAKUBOWSKI: Okay. So, I guess --

24 THE COURT: And forgive me Mr. Jakubowski. I've been  
25 hearing a lot --

1 MR. JAKUBOWSKI: I know and I --

2 THE COURT: -- that you've got the most important  
3 issue on the motion today.

4 MR. JAKUBOWSKI: Thank you, Your Honor.

5 THE COURT: But try to --

6 MR. JAKUBOWSKI: Believe me, I think I've said just  
7 about everything -- I've danced just about as far as I can  
8 here. Obviously, I have other things that I say in my brief  
9 but I would like --

10 THE COURT: Which I've read and I'll read again.

11 MR. JAKUBOWSKI: Thank you. I would like to raise a  
12 couple of issues with respect to the argument of counsel.  
13 First, maybe other parties want more. This is really not a  
14 question, in my view, of giving some -- of simply giving  
15 somebody more. This is a question of what can you do? What  
16 does the law -- what are your boundaries? What does the law  
17 allow you to do? And that's different. That's why we're here.  
18 You know, bankruptcy is what it is and you roll the dice with  
19 the way they are but there are issues -- this isn't just a  
20 question of wanting more. This is a question of what you can  
21 do.

22 Now, one of the things that I haven't heard yet that  
23 I think is critical here and that surprises me is that the idea  
24 that if you change this bucket and say look with respect to  
25 this bucket that's politically sensitive, that there was no

1 change in consideration, I'm not going to allow -- I don't  
2 think I have the authority under TWA or any other case to allow  
3 those not to be assumed, I'm sorry. You know, you challenge  
4 lenders -- they want to be a commercial lender, come into  
5 court -- how many times have you told a commercial lender you  
6 can't do it, I'm sorry. Go back, come back with something  
7 else. That's what they want to be, I think that's what you  
8 have to do here. And there's a number -- there's a lot in  
9 Second Circuit authority about telling lenders to go home and  
10 come back with a new proposal.

11 But more importantly, let's say they were --

12 THE COURT: DIP lenders overreach all the time.

13 MR. JAKUBOWSKI: Well, exactly. Okay, but --

14 THE COURT: But I don't know if there's the same  
15 basis for conclusion that the United States government is  
16 trying to avoid a systemic risk that's going to affect not just  
17 a couple of hundred thousand North American employees or maybe  
18 the couple of hundred thousand is beyond North America, I'm not  
19 sure but many, many employees. And as importantly, the  
20 supplier community that needs GM to survive so they could  
21 survive and the communities that look to GM for their economic  
22 health. You really think that's analogous to the way that  
23 commercial lenders behave?

24 MR. JAKUBOWSKI: Well, in this instance with respect  
25 to this issue, yes. And the reason is for -- twofold. First,

1 Mr. Wilson, if he didn't say anything, he said I am a  
2 commercial lender. That's one thing -- in this case I'm a  
3 commercial lender, it's a commercially reasonable, I'm going to  
4 do what a lender's going to do.

5 THE COURT: Wasn't the context of that where people  
6 were trying to say that forty-nine million bucks of taxpayer  
7 money should be converted to --

8 MR. JAKUBOWSKI: No. No, it wasn't. It was in  
9 response to my questions. It was a response to the question of  
10 does the lender -- why are you reject -- why are you not  
11 assuming these? Because I'm a purchaser. I'm basically -- I'm  
12 a credit bid lender. I'm not interested in this stuff. I have  
13 no -- what obligation do I have to pick these up? That's what  
14 every lender in the world that comes in with a credit bid says.  
15 So, with respect to this issue, they're acting like a  
16 commercial lender and I think they should be treated as such  
17 and that's the way they want to be treated and that's why  
18 they're being so hardnosed here.

19 Now, the other thing is that if they were -- let's  
20 say they were to come in and say, Your Honor, congratulations,  
21 you just killed GM. I would turn to the Creditors Committee  
22 and say, when are you filing the complaint for breach of  
23 contract? They have a contract here. They have a contract  
24 that they are required to act commercially reasonable under.  
25 They can't walk because of -- because there's a few -- for

1 62,000 bucks in some bucket. They can't do that. And I'm sure  
2 the Creditor's Committee would jump on that.

3 So, I think it's different. I don't think they can  
4 come in here and just walk away. They signed a contract. They  
5 put us all through a significant amount of work and toil with  
6 respect to this. And they can't just walk away from that  
7 contract without exercising commercial reasonableness. And  
8 walking away from a bucket that is inappropriate as a matter of  
9 law to walk away from, that there's no effect on the estate if  
10 they're required to take it, is commercially unreasonable  
11 breach of contract were they to take that position. And they  
12 would be, in my view, responsible for all the damage to the  
13 estate for that, whether it's a -- whether it's a subordination  
14 that they're in, so you subordinate their debt. You know the  
15 good thing is? You make that decision.

16 THE COURT: I would think the Court of Claims would

17 MR. JAKUBOWSKI: Well, I don't know. In Court of  
18 Claims of Chicago it's about a two hundred and fifty dollar  
19 limit. That's why I'm laughing.

20 THE COURT: A court -- a Federal Court?

21 MR. JAKUBOWSKI: Ok. That's -- I guess that's right.

22 THE COURT: That's suffering from any --

23 MR. JAKUBOWSKI: Well that's right.

24 THE COURT: -- issue that's subordinated --

25 MR. JAKUBOWSKI: Well, no I think it is.

1 THE COURT: -- and --

2 MR. JAKUBOWSKI: I don't think it is here because  
3 they came in. They're acting like a commercial lender. They  
4 signed a contract they're subject to. They're subject to the  
5 normal laws of contract. If you're a defense contract, the  
6 U.S. breaches the contract, they come before a Court of Claims  
7 and get sued and pay up if they have to.

8 THE COURT: Go on.

9 MR. JAKUBOWSKI: Now the other thing is that there is  
10 no -- there is no factual basis in the record to say that they  
11 will -- they will walk. In fact, I think, because I don't have  
12 the transcript, but I think when we see the transcript of Mr.  
13 Wilson's testimony, he will say that there were an infinite  
14 number of possibilities of what could happen. And he did go  
15 through all the scenarios of what they might do and how they  
16 might respond. So, I don't think it's -- this is -- they are a  
17 commercial lender and they're not a commercial lender. Right.  
18 They're a commercial lender in the way they're acting but  
19 they're not a commercial lender in the sense that they're in --  
20 it's a national priority -- and Mr. Wilson himself said that we  
21 will respond. We don't know how they're going to respond.  
22 They don't know how they're going to respond. But that's why  
23 it's in your hands.

24 Now, what's interesting is that just the way the  
25 world is set up here, they negotiated with everybody but they

1 can't come to the Court and say, Your Honor, what's acceptable  
2 to you? We'll make this part of the deal. They said -- Mr.  
3 Wilson said, we paid the least amount we could possibly pay for  
4 this. It turned out to be ninety billion dollars. Okay, so  
5 they paid ninety billion dollars for the company. But that was  
6 the least amount they had to pay to get the deal done, because  
7 it was so important to them to get the deal done, that's what  
8 they paid. Now what is this -- so -- but they couldn't come to  
9 you and say, Your Honor we think -- we talked to counsel, we  
10 think we know what the law is and there's been a lot of  
11 precedent in the Circuit, there's Chrysler, there's all these  
12 other decisions. But they can't come to you -- they didn't  
13 even know you -- who -- whether you were going to be the judge,  
14 and negotiate out what would be an appropriate resolution in  
15 advance.

16 So, we had to go through all of this and come here  
17 and they say to you, okay negotiations are over, this is what -  
18 - take it or leave it. How fair is that? I mean, it's only  
19 because of the way it's set up that they didn't come to you in  
20 advance. But they went to everybody else in advance, they got  
21 everybody else's agreement so why don't make them come back to  
22 you with the right response and get the right answer and follow  
23 the law and respect the boundaries and do the right thing?

24 I have nothing else, Your Honor.

25 THE COURT: Thank you. Okay. I'll hear other people