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Automotive Bankruptcy Panel Discussion - November 16, 2009

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AUTOMOTIVE BANKRUPTCY PANEL DISCUSSION—NOVEMBER 16, 2009

DAVID G. HEIMAN, STEPHEN KAROTKIN, STEPHEN D. LERNER, THOMAS MOERS
MAYER, GEOFFREY MEARNs, AND G. CHRISTOPHER MEYER

GEOFFREY MEARNs:¹ Well, good afternoon, everyone. Welcome to Cleveland-Marshall. My name is Geoff Mearns. I am the Dean of the Law School here, and it is my pleasure to welcome you to this very interesting and topical program.

First, I want to express my appreciation to Chris Meyer. Chris is the Sixth Circuit representative to the Education Committee of the American College of Bankruptcy. Chris was the brainchild behind this program, and we're delighted that he and the American College of Bankruptcy have selected Cleveland-Marshall as the location for this very interesting conversation.

We are also delighted that you are with us today. We have an extraordinarily distinguished group of panelists. I'm sure it's going to be an interesting and lively conversation. Thank you. And Chris, I'll turn it over to you.

[Applause]

G. CHRISTOPHER MEYER:² Thank you, Dean Mearns. I'd also like to welcome everybody on behalf of the American College of Bankruptcy. The College is a membership-by-invitation group of about six hundred. It's comprised of lawyers, judges, professors, and insolvency-related professionals.

As Dean Mearns mentioned, I've been involved with the Education Committee of the College as the representative from the Sixth Circuit. The College has a strong commitment to the idea of giving back to the community-at-large, through both pro bono and educational efforts. This event is part of that process. Happily, we have with us both the current Chair and the current President of the College. The Chair of the College is David Heiman from Jones Day, who is on the panel, and the President— aspiring Chair—is Paul Singer from Reed Smith, who is out there in the audience. So, we welcome you on behalf of the College, and we hope you all enjoy this afternoon's interchange.

I'm going to introduce the panelists very briefly. I could probably do ten or fifteen minutes on each of them, but that would consume the time for the panel itself. I'm also going to do this in alphabetical order. I'm not going to take anyone first for any reason other than the alphabet.

Our first panelist is David Heiman. David is a graduate, both undergrad and law school, of the University of Cincinnati. He is, as I said, a partner with Jones Day,

¹ At the time of this panel, Geoffrey Mearns was the Dean of the Cleveland-Marshall College of Law at Cleveland State University in Cleveland, Ohio. Currently, he is serving as the Provost of Cleveland State University. This panel discussion took place in the Joseph W. Bartunek III Moot Court Room on the campus of the College of Law on November 16, 2009 beginning at 5:00 p.m.

² G. Christopher Meyer is a partner in the Cleveland office of the law firm of Squire, Sanders & Dempsey L.L.P. Mr. Meyer served as the moderator for the panel discussion.

and active in their restructuring and reorganization practice. Also as mentioned, David is the current Chair of the American College of Bankruptcy. Among the cases in which David has been involved are *Federated Department Stores*,³ *Boskov's Department Stores*,⁴ *LTV*,⁵ *Oglebay Norton*,⁶ *Pillowtex*,⁷ *USG*,⁸ *White Motor*,⁹ as well as *Chrysler*,¹⁰ which is the particular item that recommended him for tonight.

Second, to David's right—your left—is Stephen Karotkin. Stephen is a partner at Weil, Gotshal & Manges. He is a graduate with high honors from Union College and, also, with high honors from NYU law school. As a partner in Weil, Gotshal, he has been involved in many Chapter 11 cases, including *Aleris International*,¹¹ *Texaco*,¹² *Revere Copper & Brass*,¹³ *Formica*,¹⁴ *Loral Space & Communications*,¹⁵ *Eagle-Picher Industries*,¹⁶ and Stephen was one of the attorneys for the debtor in the *General Motors* case.¹⁷

Third is my partner, Stephen Lerner, from Cincinnati. Stephen has a B.A., M.A. and J.D., all from the University of Pennsylvania. Stephen has practiced in the area of bankruptcy in such cases as *Chrysler*,¹⁸ *Enron*,¹⁹ *Mesaba Aviation*,²⁰ *Eagle-Picher*,²¹ *WCI Steel*,²² *All American Semiconductor*,²³ and others. Stephen was the

³ *In re Federated Dep't Stores, Inc.*, No. 1-90-00130, 1992 WL 605483 (Bankr. S.D. Ohio Jan. 10, 1992).

⁴ *In re Boscov's, Inc.*, No. 08-11637 (KG), 2008 WL 4975882 (Bankr. D. Del. Nov. 21, 2008).

⁵ *In re LTV Steel Co.*, No. 00-43866, 2001 WL 965044 (Bankr. N.D. Ohio Mar. 30, 2001).

⁶ *In re Onco Invest. Co.*, 222 F. App'x 100 (3d Cir. 2007).

⁷ *In re Pillowtex Corp.*, 349 F.3d 711 (3d Cir. 2003).

⁸ *In re USG Corp.*, No. 01-2094 (RJN), 2003 WL 845571 (Bankr. D. Del. Feb. 19, 2003).

⁹ *In re White Motor Credit Corp.*, 14 B.R. 584 (Bankr. N.D. Ohio 1981).

¹⁰ *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009).

¹¹ *In re Aleris Int'l Inc.*, No. 09-10478 (Bankr. D. Del. filed Feb. 12, 2009).

¹² *In re Texaco Inc.*, 84 B.R. 893 (Bankr. S.D.N.Y. 1988).

¹³ *In re Revere Copper & Brass, Inc.*, 60 B.R. 892 (Bankr. S.D.N.Y. 1986).

¹⁴ *In re Formica Corp.*, 305 B.R. 147 (S.D.N.Y. 2004).

¹⁵ *In re Loral Space & Comm'n Ltd.*, 313 B.R. 577 (Bankr. S.D.N.Y. 2004).

¹⁶ *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256 (S.D. Ohio 1996).

¹⁷ *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

¹⁸ *In re Chrysler LLC*, 405 B.R. 84. (Bankr. S.D.N.Y. 2009).

¹⁹ *In re Enron Corp.*, 298 B.R. 513 (Bankr. S.D.N.Y. 2003).

²⁰ *In re Mesaba Aviation, Inc.*, 350 B.R. 105 (Bankr. D. Minn. 2006).

²¹ *In re Eagle-Picher*, 203 B.R. at 256.

²² *In re WCI Steel, Inc.*, 313 B.R. 414 (Bankr. N.D. Ohio 2004).

counsel for the ad hoc committee of affected Chrysler dealers and also advised dealers similarly situated in connection with the *GM* case.²⁴

Last, and certainly not least, Thomas Moers Mayer is a partner with the Kramer Levin Naftalis & Frankel firm in New York. Tom received his undergraduate degree from Dartmouth, *summa cum laude*. He received his J.D. *magna cum laude* from Harvard, where he served as an editor on the *Harvard Law Review*. He also clerked for Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit. Tom and his firm represented the official creditors' committee in both the *Chrysler*²⁵ and *General Motors*²⁶ cases.

As you see, each panelist has a special relationship to automotive. Some of them have a substantial history outside just the OEM²⁷ cases that we are going to talk about. With that, we can begin. The first thing that I would like to ask everybody on the panel: These cases involve the unique participation of the Department of Treasury. What's it like to have the government as a major player in your bankruptcy case? Why don't we start with Steve?

STEPHEN KAROTKIN:²⁸ First of all, when Chris alluded to the government—I am sure everyone here is familiar with the TARP program, and the TARP loans, and how they were made available to both Chrysler and General Motors. But I'm not sure that everyone really knows what the definition of TARP is. You may have heard it in the newspapers, but the *Wall Street Journal* recently had the most appropriate definition of TARP, which I'd like to share with you. "TARP. An acronym; a synthetic device designed to cover up an unsightly mess or to protect perishable goods (e.g., firewood, banks) from the ravages of the elements, typically costing somewhere between \$12.99 and \$700 billion dollars."²⁹ [Laughter.]

In any event, dealing with the government was interesting, and I think, from my perspective, somewhat refreshing because—and I'm sure that my colleagues will agree with me—the people who worked in Treasury and who were assigned to deal with the automotive manufacturers—as well as the parts suppliers—were an incredibly talented and hardworking group of people. And you can be sure that your tax dollars were well spent in this regard. They worked day and night; on many occasions they worked harder than we did, and they certainly had the interest of the American people in the forefront of their minds.

Now I will say, in dealing with the government, if you're putting up \$50 billion to help reorganize a company, it's pretty easy to dictate the terms under which the

²³ *In re All Am. Semiconductor, Inc.*, No. 07-12963 (Bankruptcy), No. 09-01469 (Adversary), 2010 WL 1544417 (Bankr. S.D. Fla. Apr. 19, 2010).

²⁴ *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

²⁵ *In re Chrysler LLC*, 405 B.R. 84. (Bankr. S.D.N.Y. 2009).

²⁶ *In re General Motors*, 407 B.R. at 463.

²⁷ OEM stands for Original Equipment Manufacturer, meaning an automotive manufacturer and distinct from subsidiaries or suppliers of such a manufacturer.

²⁸ Stephen Karotkin is a partner in the New York office of Weil, Gotshal & Manges LLP.

²⁹ Matthew Rose, *The Devil's Dictionary—Financial Edition: The Wall Street Crisis of 2008 Changed the Business Lexicon, Conjuring a Cloud of Acronyms, Neologisms and Euphemisms*, WALL ST. J. (Sept. 15, 2009), at A17.

reorganization or the sale will take place. But again, a lot of people talk about or suggest that these cases, both the *Chrysler*³⁰ and the *General Motors*³¹ cases, were different, or unique, or there were elements that had never been addressed before in Chapter 11 cases, and I would disagree with that. I totally disagree with that.

And I think that the only difference between the cases in which we were involved and traditional Chapter 11 cases was the size of the liabilities, the size of the problems, the number of people involved, and the number of contracts involved. However, in dealing with those issues, it was no different. And alluding again to the government, the government was the DIP lender. It happened to be, as I said, a DIP lender of extraordinary amounts in these cases. But like every other DIP lender in every other case in which I've been involved, and in particular more recently, the DIP lender dictates the terms of what happens, typically, in the reorganization case. It was no different in *Chrysler*,³² it was no different in *GM*,³³ it's no different in the smaller cases—

MEYER: David Heiman, what is your perception? How did you find it to deal with the Treasury?

DAVID G. HEIMAN:³⁴ Well, first of all, I agree and disagree with Steve—

MEYER: Good.

HEIMAN: —on whether this is like every other case. I agree in terms of the legal issues, but the presence of the government was a major distinction that, in a political sense, makes the cases *sui generis*.

At Jones Day, we started working on *Chrysler*³⁵ just over a year ago. We were instructed very clearly that management believed that bankruptcy is death and that we will do everything within our power to avoid it. In fact, as we prepared for bankruptcy, we were instructed to prepare only for a shut-down, liquidating bankruptcy, not a reorganization or sale of assets—some war stories about that if we have time later.

But as it relates to the government, I found their presence both positive and, I don't want to say negative, but different to an extreme. The positive was the fact that we were not able to prepare for a reorganization. In fact, most of you may know that it's very difficult, if you're representing a company, to ever convince them that Chapter 11 is nirvana, and those of us who do this work actually believe it is. [Laughter.] For many reasons, including our livelihoods. But it's very difficult to convince business managers that there's—that it may be the best way. It's a psychological and strategic approach in dealing with management, at least in my experience.

³⁰ *In re Chrysler*, 405 B.R. 84.

³¹ *In re General Motors*, 407 B.R. 463.

³² *In re Chrysler*, 405 B.R. 84.

³³ *In re General Motors*, 407 B.R. 463.

³⁴ David G. Heiman is a partner in the Cleveland office of Jones Day.

³⁵ *In re Chrysler*, 405 B.R. 84.

When the government got involved—and by the way, they got involved first under the Bush administration. I think it's an important political point that after Paulson told the Detroit Three that TARP funds were not available to the Detroit Three because the TARP funds were available only to financial institutions, the Detroit Three together went to Congress to ask for \$25 billion and, after some very contentious hearings, were repelled. And so, the Bush administration did step up at the end.

Those were very intense times for Chrysler, particularly because Steve's client [GM] was first on the government's plate, so we were down to December 31st without having funds advanced. So, very intense times, but they did give us—loan us—\$4 billion to help us get through the next phase, and the idea was that there be strings attached: There was a maturity of April 30th; we had to submit a business plan and a restructuring plan by February 17th, and then go from there—one that satisfied the government. The presence of the government clearly made this different. We submitted a three-pronged business and restructuring plan to the car czars who had not even yet been put into place—and we had an April 30th deadline to fix all this.

So I agree with Steve, that people there, especially their counsel, worked day and night to try to make this all go in the right direction. But they were also some of the most frustrating times in terms of how to deal with the government to get things done.

Even today, although we sold Chrysler and closed the sale on June 10th, and we were supposed to have our wind-down plan funded and ready to go within thirty days thereafter. We're still not there on that, and it's just a very difficult political process for us right now with the government.

MEYER: Switching gears a little bit, Tom Mayer has represented a number of unsecured-creditors' committees. Tell us a little bit about the composition of these two committees. Also, were there special challenges in beginning to represent a group in the *Chrysler*³⁶ or *GM*³⁷ cases where the timeframes were so tight?

THOMAS MOERS MAYER:³⁸ And you're depriving me of my chance to spout about the government, huh? [Laughter.]

MEYER: Well, if you'd like to do that, you can do that as well.

MAYER: I'll hold that until the end. Each of these cases, the committees in these cases were not like anything I'd ever seen before. First, they were huge. The *Chrysler* committee was eleven, I think, and *GM* started out at fifteen. So they were enormous. And second, each was a United Nations. You had suppliers, most of whose contracts were being assumed—in *Chrysler*, almost everybody got assumed; in *GM*, most got assumed, not all—you had dealers—

³⁶ *Id.*

³⁷ *In re General Motors*, 407 B.R. 463.

³⁸ Thomas Moers Mayer is a partner in the New York office of Kramer Levin Naftalis & Frankel LLP.

MEYER: Please tell the group a little bit about what happens when a contract is being assumed?

MAYER: If a contract is assumed, the buyer ends up performing under the contract and it's as if the bankruptcy never happened. That's a little bit of an exaggeration because the buyers, especially Chrysler/Fiat, took the opportunity to try to renegotiate certain terms of the contracts. Less—I think, true to a lesser extent for New GM. But it's as if the bankruptcy never happened, and life goes on for the supplier and for the OEM.

So that was one species of constituency, and their concerns were mostly how do we keep the production line going? How do we know our contract is going to be assumed? How do we invest in tooling? How do we invest in inventory without knowing whether we're going to get paid back for it?

The problem was diminished somewhat by the fact that both companies went dark. There weren't—there wasn't actual production going on at the time with these cases. But this is a supply line that works day-to-day, and those processes were very difficult.

In *Chrysler*, we had the—for those of you who know him, this will—this will, I think, cause some amusement—I had, as a trade creditor on my committee, Magna represented by Bob Weiss. Those who have been involved in Tier 1 or Tier 2 auto bankruptcies know that Bob Weiss represents General Motors most of the time, and his nickname in Detroit is “The Godfather” because he has power of life and death over the suppliers. And to have him as a supplier representative in *Chrysler* was very interesting.

He came up with a checklist of ten things he wanted Chrysler to do for suppliers, and I looked at them, and I looked up at Bob, and I looked down at the list, and I said, “If you were on the other side, as you usually are, would you agree to any of this?” And Bob looked down at the list, and he looked up at me, and he looked down at the list, and then he looked up at me again, and he said, “Depends on how hard I was going to jam the other guy.” [Laughter.]

So that was one part of it that was interesting. We had dealers on the committees—I'll never pass another dealership and look at it the same way. We should really let Steve Lerner talk about dealers because the dealers are the ones who really got shafted in this process. Two constituencies got shafted in this process that you do not hear about as much as you should. One is the dealers—and I'll let Steve talk about that—and the other, which was the final constituency on my committee in *Chrysler*—in *GM*, we also had some bondholders; in *Chrysler*, there was no public debt—were the tort claimants.

And lest you think this is all a bunch of tort lawyer make-up, I had a woman call me up and say that her house had burnt down because her pickup had exploded in the garage, and her insurance company had paid her and sued the car company and won, and her lawsuit was still pending when the bankruptcy filed, and all through the pending nature of the lawsuit, the car company was calling up and saying, “We're going to settle, we understand we're at fault, we don't want you to sue us.” And then bang-o, bankruptcy; and she gets nothing. *She* got shafted.

MEYER: We'll come back a little later and talk more about that. Stephen Lerner, tell us about the committee that you represented.

STEPHEN D. LERNER:³⁹ Our firm represented the largest group of dealers in the *Chrysler* case whose franchise agreements were going to be terminated by Chrysler. There were just shy of eight hundred dealers whose agreements were going to be terminated. We represented about four hundred from forty-seven different states, so we really had coverage of every type of dealer that Chrysler had.

MEYER: How do you represent a group of four hundred?

LERNER: Not very easily. But what we did is, we created an executive committee that had nine dealers from a cross-section of states, and they basically made all the decisions. We were funded by every dealer who joined in the group, and they basically, as part of the agreement, allowed the executive committee to make decisions on their behalf.

HEIMAN: You just picked the nine craziest people you could find.

LERNER: We picked the—well, that was for the witnesses. [Laughter.] We picked the most sympathetic witnesses one could have, but Tom is exactly right. I mean, the dealers here really got shafted—I think that’s putting it mildly—and let me go back to the first question, which is the U.S. government’s involvement. I, for one, believe the government was motivated to do the right thing here, but, in so doing, if anybody thinks that it wasn’t ninety-five percent political, they’re wrong, and as part of the politics, it was clear to us that the dealers were simply not going to be protected.

We met with the Automobile Task Force, Steve Rattner and Matt Feldman, and while we had a very polite meeting at the outset of bankruptcy, it was clear that the dealers were simply not one of the groups that the government, frankly, cared about. For one, the employees were obviously taken care of. The unions did very well. The suppliers, as Tom said, almost all the suppliers had their contracts assumed and assigned.

MAYER [gesturing to Meyer for the floor and causing Lerner to stop speaking, then urging Lerner to continue]: Keep going. I want—you can finish, and then I want to—

KAROTKIN: Hold on a minute. Hold on a minute. Why is it different from any other Chapter 11 case?

I mean, Tom, you say that the dealers got shafted and the tort claimants got shafted. It’s no different than any other [Mayer begins to interrupt]—let me finish. It’s no different than any other Chapter 11 case where a debtor rejects contracts, or a purchaser decides what contracts it wants to take, what employees it wants to take—

LERNER: But that’s not what happened in *Chrysler*.

KAROTKIN: That’s exactly what happened in *General Motors*. Exactly.

³⁹ Stephen D. Lerner is a partner in the Cincinnati and New York offices of Squire, Sanders & Dempsey L.L.P.

MEYER: Well, Stephen [Kerotkin], in *Eagle-Picher I*, did you shaft the asbestos claimants? There were a lot of asbestos claimants in that case. [Laughter.]

KAROTKIN: No, you did. [Laughter.]

MAYER: I really do want to address the political issue here because I disagree with Steve, and I—both Steves I disagree with, as follows:

Number one, I think there was remarkably little politics. You want to talk about politically powerful constituencies who got shafted? One, there is a dealer in every Congressional district. The dealers were able to mobilize press and Congressional support to an unprecedented degree, and the reason the unions did as well as they did is that you need union labor to operate the plants. And they didn't need the dealers, and they didn't need the minority banks, and they didn't need the tort claimants.

You want to talk—

KAROTKIN: So what's wrong with that?

MAYER: —about who got shafted? One, it's dealers who had a dealer in every Congressional district. Two, the tort lawyers, who are major contributors to the Democratic Party, they got nothing. The people who benefited? Yes, the auto workers benefited, but that's because they needed the workers to run the plants.

HEIMAN: Can I ask a question? Who in the audience has gone into a dealership to buy a car? Of all of you, does anybody here feel sorry for the dealers? [Laughter.]

MAYER: No, but wait—

LERNER: Well, you know, but that's really not—look, you had—

MAYER: But wait a second, that's not fair. That's not—

LERNER: We had a dealer on our committee whose grandfather received his franchise from the Dodge brothers.

HEIMAN: Uh-oh, the violins are coming out.

LERNER: They have been in business for a hundred-and-one years, and if the market didn't put them out of business, then there are good arguments as to why it shouldn't have happened.

Now to Steve's point, *Chrysler* and *General Motors* were different in this respect—and David, you and I talked about this at a similar program over the weekend. Steve's comment is that—

HEIMAN: We do this—

LERNER: Every—every three days.

HEIMAN: —virtually every five or six days—

MEYER: This is a road show. [Laughter.]

LERNER: Today is my turn to win, by the way. [Laughter.] I haven't won one of them.

The difference is this: In an asset sale—and these were asset sales, which, by the way, Chapter 11 no longer consists of reorganizing debtors. Pretty much every company is liquidated or it's sold in an asset sale. But in an asset sale, buyers do get to pick the assets they want to buy. You can't force somebody to buy an asset they don't want to buy. So ordinarily—

MAYER: Although you try.

LERNER: Well, the buyer says, "I want these contracts. I don't want these contracts." Well, who was the buyer in *Chrysler*? Well, it was effectively Fiat, okay? Fiat became the entity that managed New Chrysler. On the witness stand, the best witness, as far as I was concerned, was the Fiat representative, who, in cross-examination, said, "We don't need to get rid of any dealer agreements as part of the bankruptcy. We can do it later."

So what's—what makes the difference? The difference is if the buyer doesn't say, "Don't assign all the contracts to me," then I think Chrysler's management had a fiduciary duty to maximize the value of Old Chrysler—that's who they work for, not New Chrysler—and they should have forced Fiat, if that was their legal position, to acquire all of the dealer agreements.

HEIMAN: Number one, that guy didn't know what he was talking about. [Laughter.]

Number two, he's the same guy, after we got the bankruptcy court to approve this sale and it was on appeal, and then the Supreme Court—

LERNER: He's not been seen since. [Laughter.]

HEIMAN: He's affiliated with the same company who said, "Oh, we—"

You know, there was a June 15th closing deadline, so if we didn't close by June 15th, maybe the deal would go away. I don't think anybody believed it, but in approaching the appellate process, obviously time was of the essence, and we had to convince everybody that we couldn't continue the stay beyond the twelfth or thirteenth in order to close the deal in time.

And that same company, Fiat, the people who bought the Chrysler assets, said, "Oh, we'll close no matter what." [Laughter.] You can't rely on those guys, the people from Europe to—

MAYER: What happened to the dealers, though, was peculiarly awful, especially *Chrysler* in particular. And Steve hasn't yet mentioned this, but the story that really stuck a lot of dealers—and I had three on my committee, including one who was incredibly vocal and seems to know every Congressperson there is—

LERNER: Tamara Darvish.

MAYER: Tamara Darvish. If you go on to darcars.com, you can see Tammy selling cars. She's very forceful. What happened in *Chrysler* is that, in the months leading up to bankruptcy, a guy named Press, who I've forgotten what his title is—

LERNER: Jim Press.

MAYER: Jim Press. He's head of North American Sales?

LERNER: Right.

MAYER: He went to the dealers around this country. He said, "Buy more, buy on credit, borrow, we need you to pump up the volume—"

LERNER: "And if you don't, we are going to remember who does this." This was three months before the bankruptcy.

MAYER: And people who didn't want to borrow hocked their assets to help out Chrysler. And then Chrysler filed and rejected their dealerships.

HEIMAN: Hey, you know, this is bankruptcy, Tom. You're not—you're not trying to react to what the debtor did wrong in the past.

I would acknowledge to you that it seems like they took that too far, but the question is: What's in the best interest of all the constituencies? What do you do to maximize the value of the estate? How are you going to assure the best possible result and recovery?

It's not by going back and taking one guy who said, you know—doing what he thought he was supposed to do in convincing people they need to spend more money on their showrooms, and so forth. That is a raw deal for those people, but you can't let that push—in the wrong direction—what the best result is.

MAYER: David, in another case—

MEYER: Ordinarily, if I were a buyer and was ready to take a lot of—

HEIMAN: Thank you for cutting him off, by the way.

MEYER: Ordinarily, if I were a buyer and willing to take a lot of executory contracts, wouldn't the estate analysis be: "Give them everything so that there won't be claims against the residual estate?"

KAROTKIN: Sure.

HEIMAN: Yes, and you're saying, "So why are the dealers—"

MEYER: So why did Chrysler take a different position?

HEIMAN: Because what Steve [gesturing to Karotkin] said is only part of the equation. It is—whether you agree with it or not, it is the absolute uniform view among car manufacturers that fewer dealers is better. And while the guy at Fiat who

was on the stand may have testified otherwise, there is no question that Fiat expected a streamlined dealer organization.

MEYER: Steve Karotkin, when did you start to prepare for the bankruptcy filing? David said he started about a year ago to prepare. When did you get involved?

KAROTKIN: We got involved, actually, about this time last—

LERNER: Ten years ago? [Laughter.]

KAROTKIN: No, about—actually, about this time last year, right before Thanksgiving in November, 2008.

Although my firm has represented General Motors on a regular basis prior to that time, we really got involved with contingency planning around this time in 2008. And of course, at that time, no one really believed a Chapter 11 would happen.

That's a time that David alluded to, when the General Motors executives approached the United States government for emergency financing. And everybody thought that they would come through with the financing before the end of the year. And, as David mentioned, it was hardly easy, and we actually had to be prepared to file for relief under Chapter 11 by January 1st in case they didn't get the money by the end of December when they actually would run out of cash. And they closed on the loan from the government on New Year's Eve at about midnight, and . . .

The numbers—[to Meyer] just two minutes—the numbers with respect to General Motors are absolutely staggering. They have annual payments to suppliers of \$50 billion; they are paying suppliers about \$5 billion every month and if they didn't get that money at the end of December, they had no money to pay the suppliers at the beginning of January.

MEYER: And the standard arrangement is those payments go out in the first days of each calendar month.

KAROTKIN: That's correct. Right. And they have approximately eleven thousand suppliers.

HEIMAN: Ours was different with the suppliers. We had a different timing, but, you know—

MEYER: The same basic idea.

HEIMAN: Yeah.

MEYER: David Heiman, some of us saw you on the front page of the *New York Times*—

HEIMAN: Just once? [Laughter.]

MEYER: Well, aside from the reprints that you were distributing. [Laughter.]

HEIMAN (laughing): Very good.

MEYER: How did you come to land on the front page of the *New York Times*?

HEIMAN: Well, it cost me a lot of money. [Laughter.] Actually, first of all, you know that my name was not below my picture, right? It was just a spontaneous picture by the photographer.

We had been preparing—and I assume Steve was going through the same thing with Rick Wagoner—we had been preparing Bob Nardelli virtually twenty-four-seven from the day we got involved in the case for these hearings. And it was as though we were going into the most serious trial, preparing this witness for cross-examination.

And, of course, because of that, he wanted to have his senior lawyers with him. We had gone the day before to the Senate hearings, which, by the way, were very impressive in my mind. They were—there's the decorum, and while politics were clearly at play, there was respect and thoughtfulness, I thought.

The way you get into these hearings is, at least the ones where there are crowds of people who want to go, that you have to stand in line.

It's a mad rush. There are people demonstrating and picketing and yelling and screaming, "This is bad, the government is bad, the OEMs are bad, everybody's bad." And so, it's just chaotic. So we get into this room—you rush in and grab whatever seat you can. So we picked a seat. We were a half hour before the hearing started, I gave my newspaper to my partner, and I got a call in this hearing room, and, at that moment in time, they took a photograph, unbeknownst to us.

And more importantly, unbeknownst to us, there was a sign in front of both of us that said: "Reserved for Chrysler." And keep in mind; this was at a time when no one, but no one, was supposed to know that there was any contingency planning for bankruptcy. [Laughter.] So when I was in my breakfast room the next morning and opened the paper, I was a bit horrified. [Laughter.]

KAROTKIN: By the picture? [Laughter.]

HEIMAN: Yeah, by the—

MEYER: The picture was very nice. And there were those of us that knew what it meant when he was in that picture sitting behind that Chrysler sign.

HEIMAN: I did get a number of calls and emails saying, "Gee, I didn't realize you weren't well." [Laughter.]

MEYER: Tom Mayer, you described the composition of your committee as a United Nations. How did you, in the timeframe that you had, come forward with a position when some of the constituencies on your committee were probably in deep disagreement, one with the other.

MAYER: Sometimes it just comes down to a majority vote. You try to craft a consensus.

At *Chrysler*, everything was compressed, and the consensus on the committee was very clearly in favor of having the deal go through, even though there were people on the committee who were getting close to nothing based on the deal, and felt distinctly aggrieved.

In *General Motors*, it was more interesting. The U.S. Trustee, which is the Department of Justice official that puts people on the committees, had assembled a committee that was very finely balanced. You had the UAW, the United Auto Workers, that wanted the deal to go through, but you had the United Steel Workers and the International Union of Engineers, which were getting nothing out of the deal. Those of you who think this was just a payoff to organized labor, you should talk to a steelworker or an engineer whose retirees got virtually nothing out of *GM*.

You had three suppliers—two suppliers who didn't know whether their contracts were being assumed. You had dealers who didn't know whether their contracts were being assumed. You had the PBGC⁴⁰ that wanted the deal to go through very badly. So you had a very finely balanced committee, and we were initially opposed to the sale going through unless certain changes were made. And in fact, certain changes were made, and on the basis of those changes, the critical votes on the committee flipped, and the committee ended up supporting the sale.

MEYER: One of the more controversial aspects about the two cases was the use of section 363 asset sales⁴¹ to accomplish what looked to some like a reorganization plan. What's the current standard—and I'll let anybody who wants to respond—what do you think the current standard is for when you have to have a plan of reorganization and when you can accomplish the same thing with an asset sale?

HEIMAN: Why don't you let Steve do it, since he took the losing position? [Laughter.]

KAROTKIN: You can lose again. [Laughter.]

LERNER: I'm with the judge. What Chris is referring to is commonly referred to as a *sub rosa* plan. And the principle here is really one that's more process, and that's important. In both cases, there was an asset sale, and there are really two ways you can accomplish an asset sale in a Chapter 11 case.

One is to do what Chrysler and General Motors did, which is file a motion, ask the court for permission, and apply a very-easy-to-satisfy standard, which is the debtor's business judgment. And that is not controversial, if what you are doing is truly simply selling assets so there are assets sold and there is a purchase price paid in return.

The question that was presented in these cases was whether the sale was really more than that, more than simply selling assets for a purchase price. And if it's more than that, meaning that you're now determining, for example, how creditors' pre-bankruptcy claims are going to be paid, then that is a plan. Because what a plan of reorganization is, at essence, is the contract pursuant to which creditors' claims are paid. Typically, when you get into the treatment of claims, it's a different process that is—takes more time generally, but also gives creditors greater rights: More disclosure, rights to vote, and rights to object. So if you're a debtor, and you want something to happen quickly, and you don't want to have a creditor vote, then you

⁴⁰ Pension Benefit Guaranty Corporation.

⁴¹ 11 U.S.C. § 363 (2006) (covering administrative powers related to the use, sale, or lease of the debtor's property).

want to construct it as part of a section 363 sale, because it's faster, easier, and cheaper.

HEIMAN: More important if you're a buyer—

LERNER: True—

HEIMAN: Because if you—

LERNER: But in this case, who are the buyers? We did not have a market of buyers. There was only one buyer, and that was the U.S. government, principally driving—and of course, in *GM*, I think they were literally the only owner of the business of New GM; and Chrysler with some other constituents.

But here is the argument that we and the Indiana Pension Funds, who were a very, very small minority of the first secured-creditor group in *Chrysler*—the argument was that this was not a sale only, but it was a disguised plan for the following reasons. There were several pre-petition claims that we argued—and we lost, more so on a factual finding than, I think, legal principle—where we thought this was really a plan.

And this is what was argued: One, the owners of New Chrysler were the U.S. government, the UAW through what's called a VEBA trust, but let's call it, just for ease, union claims of about \$10 billion, the U.S., the Canadian government, and Fiat. Those were the four owners. Fiat didn't pay anything in cash. They contributed technology—that's what they paid in consideration for the stock.

MAYER: Technically, they received about four hundred million in cash, but we'll pass over that.

LERNER: The company did or Fiat?

MAYER: Fiat. Well, Newco received \$400 million in cash.

LERNER: From Fiat?

MAYER: No, from Oldco in the form of a tax refund.

LERNER: Okay, well, that—well, that didn't actually come out—

HEIMAN: There you go being technical again.

LERNER: The U.S. government and the UAW, we argued, as the Indiana Pensioners did, that they received their equity in New Chrysler, not for new contributions of equity, but as treatment of their pre-petition claims.

And the reason we argued it was as follows: the U.S. government was—as David said earlier, had contributed \$4 billion in a third-lien secured claim. But, as we know, the assets of Chrysler were worth in the end, pursuant to the sale, to be two billion in cash plus the assumption of liabilities. But that was only enough to pay partially the first secured creditor, so the U.S. government's loan was completely unsecured. They made a loan to New Chrysler as well, I don't remember what the

exact loan was, \$10 billion-“ish” in terms of the exit financing. But the question is, “What did the U.S. government pay—”

HEIMAN: Six billion.

LERNER: —what did the U.S. government pay to get their equity? Well, it was our view that they converted their unsecured claim, okay, their \$4 billion, and that was—they were given equity for that, and therefore you treated a pre-petition claim.

Now some would say, “Well, wait a minute, they got their equity in respect of the loan they made to New Chrysler.” But the loan that they made to New Chrysler was debt, and they were getting paid a hundred percent of the debt. It wasn’t like they made a \$6 billion loan and were only getting repaid four billion and two billion credited equity. They were getting all of their debt repaid.

The union claim was \$10 billion, rounded, against Old Chrysler, and after the deal was constructed, Old Chrysler didn’t owe the VEBA claim anything. And what was converted was the equity piece that the union claim got, plus debt of New Chrysler. Again, our argument was, “You didn’t just sell the assets, you treated these claims.” Then why is that a problem?

MEYER: Did both of those groups forgive their claims against Old Chrysler?

MAYER: Technically, the—

LERNER: The testimony was—

HEIMAN: UAW—

MAYER: UAW technically maintains some claim against Old Chrysler.

HEIMAN: No, they basically gave it up. The government did not give up the DIP loan.

LERNER: But the pre-petition loan went away.

HEIMAN: Yes.

LERNER: And that was our argument, that—and what’s important about the case is—I mean, some people said, “Has the law changed?” I don’t know that the law’s changed. I think it’s harder to prove a *sub rosa* plan, but Judge Gonzalez in *Chrysler* didn’t say, “Well, this is a *sub rosa* plan, but because of the magnitude of Chrysler and the so-called ‘melting ice cube,’ and if I don’t approve this sale, I’m going to liquidate Chrysler.” He actually found—and he’s an excellent judge and I’ve worked with him a lot, but I don’t understand how he made the factual finding that the ownership interest in New Chrysler was not in respect of the pre-petition claims.

KAROTKIN: Let me ask you a question. If your clients or the Indiana Pension Fund got more money out of that so-called *sub rosa* plan in *Chrysler*, would it still have been a *sub rosa* plan? It would have been fine with you—

LERNER: No, no—

KAROTKIN: You wouldn't have objected, right?

LERNER: No.

KAROTKIN: If the Indiana Pension Fund got another two or three billion dollars, they would have had no objection to the whole process.

LERNER: But that wasn't—

MEYER: That's a question for Tom Lauria—

LERNER: But that wasn't—that was not our—

KAROTKIN: Hold on a minute, hold on a minute—

LERNER: I didn't represent the Indiana Pension Fund, but that wasn't our position.

KAROTKIN: Okay, but if you got more money for your clients, it would have been fine. No problem with the 363 sale if you got more money, right?

LERNER: Are you—let me just—can I ask you a question?—

KAROTKIN: And by the way—by the way, who was going to finance this case for the period necessary to get to a Chapter 11 plan? Were your clients going to finance it?

LERNER: Here is the answer—

KAROTKIN: Yes or no?

LERNER: Of course not. The dealers—

KAROTKIN: Okay. So how was it going to get to a plan?

LERNER: We've all done plans that can be consummated—

KAROTKIN: Not in—not in sixty days.

LERNER: Well—

KAROTKIN: I haven't—I haven't. Maybe you have.

LERNER: Here's the—here's the trouble I have. The U.S. government, who put in \$50 billion to General Motors and ten billion-ish to Chrysler to save the industry, to save fifty thousand jobs, says, "I'm going to do all that—I'm going to put that amount of money in, and I'm going to save the industry, but if you don't do it in thirty days, I'm going to, you know, turn it all into dust."

KAROTKIN: Exactly the argument the bondholders made in *General Motors*.

LERNER: Yeah, but it's not credible—

HEIMAN: Why is—why is that different than any other case where either the buyer or the DIP lender says, “You have thirty days?” That—that happens. And you even alluded to it earlier. You said—

LERNER: Nothing remarkable about it.

HEIMAN: —and I'm not going to agree with this—you said that there is no more Chapter 11. It's all sales, and the sales are all in the first six months of a case, right? So—

LERNER: But here—but here's the difference, okay, and then I'll yield to Tom, who hopefully will agree with me,—if not, I won't.

MEYER: Why should everyone agree?

LERNER: No, but here's the difference, and I made this point Saturday at our other session.

What's happening today is boards of directors are waiting until the ice cube is melting, and they're pointing a gun at judges' heads. And I can't imagine being in the shoes of either Judge Gerber in *General Motors* or Gonzalez in *Chrysler* and being faced with the situation that if I try to give more time, and I call the U.S. government's bluff, that I'm not going to liquidate, so I understand that. But I am waiting for the day when somebody goes after the directors on the issue of “Why didn't you act sooner? Why did you wait until the point where there was no choice, and, therefore, you could put a gun to a judge's head?”

HEIMAN: By the way, just to be clear—and I'll say it up front, you make some very good points about whether or not this is *sub rosa*, and I think it takes a lot more discussion. My own view is, it doesn't really matter, basically, because *sub rosa*'s sort of a creation of an old case in Texas⁴² that, to me, has no application to this situation. And the role of a bankruptcy court is to basically apply the laws available to it to get the best result for the creditors and to maximize the value of the estate.

[Gesturing at Karotkin] This is Steve's point. There's absolutely no question in your mind, in Tom's mind, in anybody else's mind, that this thing would have gone kaplooeey and everybody would have lost zillions of dollars if the government, the court—forget about the government, that's a political issue. They dictated it, that's a political issue. But that's what we had to deal with—everything would have melted into nothingness if this didn't happen.

And I don't find—to talk about *sub rosa* is a—you know, a dead end. It doesn't take you anywhere. What we need to talk about is whether the bankruptcy laws support what happened, and I think clearly they did. Also, I want to be clear that Judge Gonzalez gave the best performance I have ever seen by a judge at any level—he was fantastic.

⁴² See *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983).

KAROTKIN: That's because you won. [Laughter.]

HEIMAN: Right.

MEYER [to Karotkin]: Yeah, but you won, too.

HEIMAN [to Karotkin]: I've won other cases. Not the first win, Steve. [Laughter.]

KAROTKIN: Are you sure? [Laughter.]

HEIMAN: But I want to make this point, so it's clear at least. If you read the opinion,—if you haven't read the opinion—Judge Gonzalez basically said, “The estate, the debtors, did not contribute one penny of anything to any of the people that were taking out of Newco.”

[to Lerner] And you contest that, maybe, but that's his finding—that the UAW is getting their value from Newco. Didn't matter where that money came from—whether it came from the government or Citibank. That's where they were getting their money, or their recovery. The same is true of the first-lien creditors, *et cetera*. And that's what the decision rests on, and I think it's solid.

MAYER: I think that's an important point. The question that I like to pose to people, especially those that read the *Wall Street Journal* and are terribly upset about what happened to secured banks—which I think is ridiculous—the question is: If Wilbur Ross had done this deal instead of the government, what would have been different?

I'll tell you what would have been different. One, the banks would have gotten less. The liquidation value of their collateral was a billion-six in *Chrysler*. They got two. So the banks didn't get hurt. Number two, the same dealers, maybe a slightly different population, would have gotten rejected. Number three, the unions would have gotten less.

Who would have gotten that value? Not the banks, not the dealers, not the asbestos creditors. Wilbur Ross would have put it in his pocket. So whatever the unions got, they didn't get out of someone else's pocket. They got it out of [gesturing at the audience] *our* pockets. [Laughter.] They got it out of—the government made a decision: Union retirees will get a chance to have some health insurance.

Now you can criticize that on political grounds. There's a legitimate political debate over whether the United States Treasury should get involved in a bankruptcy case in order to allocate taxpayer value to union retirees. That's a legitimate political debate. But it didn't come out of anyone else's pockets in the bankruptcy case. And people who natter on about how this is a violation of senior-secured-creditors' rights, and it's a distortion of bankruptcy law, and this, and that? That's just wrong.

Steve is right that, procedurally—Steve Lerner is right that, procedurally, this pushed the outer edge of the envelope on “Should have this been a plan? Should it not have been a plan?” But Steve Karotkin is also right that the basic complaint here is that “I just didn't get enough, and if I had gotten more, then all these procedural complaints would have gone away.”

In the Second Circuit, Tom Lauria, the counsel for the dissenting banks, was asked by one of the Second Circuit judges, “Wait a second, Mr. Lauria. I don’t get this. At twenty-nine cents, this is completely invalid; but if you got forty cents, then everything would be fine. Can you please explain to me how you justify the legal positions you were taking?” And Mr. Lauria really had no answer to that question.

MEYER: David made a comment in our panel over the weekend that he thinks that business drives the law, and not the law drives business. Would you explain that thought and how you think it has a bearing?

HEIMAN: One of the great things about bankruptcy is that there’s—there is a definitive set of statutory law. Case law, I would say, is far less than definitive. But there is so much flexibility that the courts have. And they need it, because there’s—every situation is different, and it takes some common sense, some business sense, and so forth.

So for me to say that is a luxury, perhaps, that maybe other practitioners in other areas do not have, but I really believe it, that when you go in to see a client—and this is true in *Federated*,⁴³ and I’ll just give you an example in a second—and these are strong managers who know their business and know what’s best for their business. That’s an assumption, but a lot of times it’s actually true, believe it or not.

And if that’s the case and they come to you and say, “This is what we want to do,” and you say, “Well, let me think: Is it immoral? Is it unreasonable? . . . No, but we have this statute in the Bankruptcy Code that says maybe you can’t reject that contract,” or whatever. Then should you say to the client, “I don’t think so?”

No, I don’t believe so. I think one of the great things about bankruptcy is you’re supposed to do what’s best for the business—in Chapter 11 at least. So it’s a great system, and I believe that what’s best for the business should drive the legal analysis. And you should find ways—and obviously, there are exceptions to this—but you should try to find ways to fit the law into what’s best for the business.

And I’ll just give you one extreme example, quickly, and this is in *Federated*.⁴⁴ Early on in the case, our guys came to me and said we needed a financial advisor. So they interviewed everybody at Goldman, Lazard, whomever, and they came up with Shearson Lehman. And I said, “Uh-oh.”

Shearson Lehman, they had done the underwriting of the debt, and, as you may recall, before the statute changed,—last year, I think—if you had done an underwriting as an investment banker within three years prior to the filing, you were automatically disqualified, basically. I don’t remember the specific language, but—“You are not disinterested,” I think was the language.

And so they came to me, and they said this is who they want. And I said, “Hmm. Well, okay.” I explained to them that we have a problem. They said that they’d still like to make a stab at it. And you know, this is extreme, but I said, “Because you believe in this so strongly, we’ll take a shot at it.” I mean, it was directly contrary to the statute. And we went to court and basically—

[Kerotkin whispering to Heiman]

⁴³ *In re Federated Dep’t Stores, Inc.*, No. 1-90-00130, 1992 WL 605483 (Bankr. S.D. Ohio Jan. 10, 1992).

⁴⁴ *Id.*

HEIMAN [to Karotkin]: Hmm?

KAROTKIN [*sotto voce* to Heiman]: It was overturned.

HEIMAN: Excuse me; I'm not—[Laughter]

MAYER: We have got the punch line, David.

MEYER: Yes, you've got the punch line, Stephen. We'll come back to you.

KAROTKIN: I just wanted to make sure I had time.

HEIMAN: I'm just giving you an example, you know, so if Steve wants, I'll take the punch line away.

Well, the court obviously accepted Shearson Lehman, and based on our arguments that "Look, we know what the statute says. We're not going to try to tell you anything other than what the statute says, but the overriding policy of bankruptcy, blah, blah, blah." You know, it was really like pulling it out of thin air, [laughter] and the judge accepted it.

And so we went with Shearson Lehman, and the client was happy, the creditors were happy, everybody was happy but the U.S. Trustee, who appealed it up to the Sixth Circuit. And that's a well-known case right now where he got it reversed. But the client got what they wanted, they got Shearson Lehman for the duration of the—

KAROTKIN: For free. [Laughter.]

HEIMAN: For free. It's even better, see? [Laughter.]

MEYER: Steve Karotkin, GM got to watch Chrysler's case for about a month before they filed themselves. How did you go to school on what you saw taking place, and what kind of adjustments did you make in your plans as a result of what you saw happen in *Chrysler*?

KAROTKIN: We had someone at every single *Chrysler* hearing, we reviewed copies of all of their pleadings as they were filed, and, obviously, we were pleased with what was happening because they were proceeding about thirty days ahead of us.

There were different issues. We didn't have the issues with the secured creditors that they had in *Chrysler*. But certainly, watching what happened with Judge Gonzalez and the precedent that he was establishing with *Chrysler* made it much easier for us when the *General Motors* case was filed. And we were certainly appreciative of all the hard work that David—[to Heiman] I don't want to swell your head more, David, but—that David and his colleagues had done.

And if you read Judge Gerber's opinion in approving the sale in *General Motors*, he does cite to Judge Gonzalez with respect to virtually every single issue that was contested. So we were—as I said, we monitored *Chrysler* day-to-day and got—in fact, got all the transcripts as they were coming out as well.

MEYER: In *Chrysler*, David at least was able to say that he had a titular buyer in Fiat—although, as we heard, they didn't actually put any money into the deal. In *GM*, there wasn't even a titular buyer, was there?

KAROTKIN: Sure—New General Motors. [Laughter.]

MEYER: Which was created in order to become the acquirer, right?

KAROTKIN: It was.

MAYER: One of the sort of “funny ha-ha” moments of the *GM* case was when, at the beginning of the case, we realized that the buyer was a limited liability company, which meant the Treasury, as holders of fifty-five percent of the equity, would pay taxes to itself. [Laughter.] That changed, but it was a fun observation.

KAROTKIN: But again, I'm not sure that's different from any secured creditor credit bidding for the assets of its borrower. I know Steve Lerner would disagree with that.

LERNER: No, I—I—it's no different.

MAYER: The other fun observation—the funny line; will be funnier to some of you than others—is why the government didn't take eighty percent of the equity of General Motors. Because then it would have been liable for the pension plan. [Laughter.]

MEYER: This is for everyone—what conclusions do we draw from these two cases? Are these just a large example of common principles? Is there something unique about them?

What does this mean, in Cleveland, Ohio, when somebody comes in and wants to sell the business on the thirty-fifth day of a Chapter 11 case? Are we going to be able to use the same precedents and have the same outcomes as what you had in *GM* and *Chrysler* when we don't have the government standing there saying, “Do it or I'll shoot you”?

KAROTKIN: I'll be—look, I started out on this subject. It is no different from any other Chapter 11 case, where the secured creditor says, “I'm not funding this enterprise in Chapter 11 unless you sell it in thirty days.” The standard for rejection of contracts was the same. As I said earlier, the only difference was the numbers were huge—that's all.

LERNER: I would say that the things that I would point to as being unique about these cases will render it *sui generis*, as David said. I don't think we're going to see the combination of facts and circumstances here—whether you think it was a remarkable set of circumstances or not, we're not going to see it. I think it's going to be difficult for people to stand up and say that *Chrysler* or *General Motors* holds a lot of precedential value for those reasons.

MAYER: There are a couple of things about these cases that make them different. And they're around the edges, but they may prove to be important.

First, in another case, a bankruptcy judge may very well ask, “Well, what happens next? Am I left with nothing, and a bunch of creditors that I have to deal with, and no estate at all?”

And in *Chrysler* there was, I would say, an implicit promise by the government to see that there was, in fact, a plan. And whether or not that promise is fulfilled, we will know probably in three days. There’s a hearing.

HEIMAN: We’re going to get it done.

MAYER: Side—

HEIMAN: It’s hard.

MAYER: Side comment. For those of you dealing with government, it’s very different—very different—from dealing with a private party. You sign almost nothing. There are almost no agreements to enforce.

LERNER: No negotiation.

MAYER: There’s almost no negotiation. The concept of estoppel virtually doesn’t exist. The issue of authority is fascinating. One of the things that really never got litigated is—

HEIMAN: By estoppel, do you mean that a promise is not always a promise, or what?

MAYER: Well, you know . . .

HEIMAN: I know what you’re referring to.

MAYER: What, you want me to tell my story?

HEIMAN: Sure. Go ahead. I think it’s important.

MAYER: Really? . . . Alright . . . One of the odd things about *Chrysler* was that there was very little investigation done of the parties that brought you this mess, namely its private-equity owner, Cerberus, and its preceding owner, Daimler. The unsecured-creditors’ committee sought the ability to investigate both of these parties and was told by the government, in no uncertain terms, that it would not be allowed to investigate Cerberus.

Why not? Well, Cerberus needed to give a release to Daimler, whom it was accusing effectively of having defrauded it into buying Chrysler in the first place. And it needed to give a release to Daimler because Daimler wouldn’t fund the pension plan at Chrysler without a release from Cerberus. And you won’t find that dynamic in any other case. So as a result, Cerberus walks.

Incidentally, it is my firm belief, confirmed by a subsequent investigation, that the only thing Cerberus ever wanted out of Chrysler was its financing subsidiary, which Cerberus now owns free and clear of any entanglements with Chrysler and whose debt is now trading close to par. There’s an interesting story here—go

forward a year and see if the press covers it. It will be interesting to see whether Cerberus declares an enormous victory out of the *Chrysler* process.

The process that David is referring to, and which shows you the difficulties of dealing with government—after the government told me I couldn't investigate Cerberus, they gave me the right to investigate Daimler for forty-five days. That was specifically negotiated, and the government was thoroughly involved in all of those negotiations.

And I went off and I investigated Daimler and determined that there were, in fact, causes of action to bring against Daimler. At which point, the government came in, and said, "We're reserving our rights to grab those claims against Daimler, and we're going to object to the fees that you incurred in investigating—in conducting the investigation."

HEIMAN: They had the right because of the DIP loan, so—

MAYER: If you were dealing with a private party, a bankruptcy court would not allow that to happen. It might still not allow it to happen.

But when you're dealing with the government, the government has rights and statuses that a private party doesn't have, and it's very scary. Hobbes called it "Leviathan" for a reason.

MEYER [to Lerner]: Stephen, did you have something to add there?

LERNER: One other outcome—and I know most people around the table here today say that the secured creditors weren't mistreated and that there was no change in the priority scheme in the Bankruptcy Code. And I think you can make that argument.

But as a practical matter, if you talk to hedge-fund managers and distressed-debt buyers and pension-fund managers around the country, they have a perception—which sometimes is more important than reality—that the rules have, in fact, changed. And I've talked to people at conferences who say that they think twice now about their investment strategy in companies that are unionized, or companies that have underfunded pensions, for fear that what happened in *Chrysler*, in their view—again, you can argue that nothing untoward happened and the priority scheme was observed, but there are a lot of people out there investing a lot of money whose views have changed on that score.

HEIMAN: We heard the same thing when we busted the LTV special-purpose vehicle: "Oh my god, they'll never be financing to those again." And they say, "Well, they'll think twice."

Yeah, they'll think once, and they'll think twice, and when the credit lines open up, they'll do the same thing they always have. I'm not the least bit worried about it, and I especially don't—I'm not very sympathetic to the hedge funds who think it's a problem.

MAYER: I mostly represent hedge funds. These people are not paying attention, okay? How many cases have we seen? *LTV*⁴⁵—the assets got sold for a song, and a

⁴⁵ See *In re LTV Steel Co.*, No. 00-43866, 2001 WL 965044 (Bankr. N.D. Ohio Mar. 30, 2001).

couple of years later, Wilbur Ross gives the union and its retirees a retiree medical-benefit plan on account of what were pre-petition claims. Same thing happens in *Bethlehem Steel*,⁴⁶ *Republic Technologies*⁴⁷—two different bankruptcies, the last one a liquidation in which the banks got less than their borrowing base for their current assets. And the union gets a retiree medical plan. It happens. Unionized labor and pensioners do better than other unsecured creditors. And they're supposed to do better than other unsecured creditors. That's what the Bankruptcy Code says. That's why we have 1113 and 1114.⁴⁸

I'm sorry. I represent a lot of hedge funds, and people who think that investing in a unionized company or a company with a big pension plan is a—is not subject to the dangers of those instruments, they just haven't been paying attention.

MEYER: One final topic, and Tom mentioned it earlier in the discussion about product-liability claimants. The *Chrysler* sale order purported to deal not only with people who had existing claims pending against Chrysler, but also people who might have a claim in the future by virtue of an accident with a car that they bought years before.

The Second Circuit didn't really rule on that issue and said they'd wait and see. Can a bankruptcy court deal constitutionally with the claim of a creditor who doesn't yet exist? On a claim that doesn't yet exist?

HEIMAN: Let me first ask you the question: would you, when you address the sale order—if you were standing in front of Judge Gonzalez—would you use the word “purportedly”?

MEYER: No.

HEIMAN: Okay.

MEYER [laughing]: I can answer that one easily.

HEIMAN: First of all, I take my learning more from the *USG*⁴⁹ case, a large asbestos case in which I was debtor's counsel. The section involved is 363(f),⁵⁰ or

⁴⁶ See *In re Bethlehem Steel Corp.*, Nos. 01-15288 (BRL), 01-15302 (BRL), 01-15308 (BRL), 01-15315 (BRL), 2004 WL 601656 (Bankr. S.D.N.Y. Mar. 22, 2004).

⁴⁷ See *In re Republic Techs. Int'l, LLC*, Nos. 01-5117 (Bankruptcy), 01-5122 (Adversary), 283 B.R. 483 (Bankr. N.D. Ohio Sept. 20, 2002).

⁴⁸ 11 U.S.C. § 1113 (2006) (defining the specific conditions that the debtor-in-possession must meet to assume or reject a collective bargaining agreement); *id.* § 1114 (restricting significantly the debtor-in-possession's ability to modify or cease payment of retiree benefits such as pensions and health-care benefits).

⁴⁹ See *In re USG Corp.*, No. 01-2094 (RJN), 2003 WL 845571 (Bankr. D. Del. Feb. 19, 2003).

⁵⁰ 11 U.S.C. § 363(f)(1) (2006) (permitting a trustee or debtor-in-possession to sell property of the debtor free and clear of an interest in that property only upon satisfaction of one of five exceptional conditions, the first of which is that “applicable nonbankruptcy law permits sale of such property free and clear of such interest”).

the argument that people use is 363(f), which refers to a sale that is “free and clear of an interest in property.” And it doesn’t use the word claim—which, as you know, is a defined term in the Bankruptcy Code—whereas under 1141,⁵¹ for the discharge or the free-and-clear order there, the word—term is “claims and interests,” so people have gotten all excited about whether it was intended by Congress under 363(f) that you can eliminate a claim, or not eliminate, but transfer assets free and clear of the claim.

MEYER: I’m not really focusing on the statute. I’m focusing on the idea that you’ve got somebody who hasn’t had an accident yet.

HEIMAN: Okay, well, let me—let me—

MAYER: What about future claimants?

HEIMAN [good-naturedly to Meyer]: I was just doing a little bit of a backdrop, Chris—give me a break.

MEYER: Okay.

HEIMAN: So I take my learning, frankly, from the asbestos cases. There’s a reason why 524(g)⁵² exists, right? It’s because the U.S. Supreme Court said, “Anyone who doesn’t have an existing claim today”—and we’re all in this category potentially—unfortunately—because everybody has been exposed to asbestos. But the disease, hopefully for all of us here today, has not manifested in our systems. So the Supreme Court said in the nineties, in rejecting a countrywide global settlement for the disposition of asbestos claims, that everybody gets their day in court, including those who have no manifestation of the disease.⁵³ So, in my mind, notwithstanding whatever confusion there is in *Chrysler*, I don’t—I think that the Supreme Court has spoken to that and that you cannot eliminate a future unknown claim.

MAYER: This was a piece of judicial brinkmanship by Fiat. They had no business trying to put this in the order.

There was a case called *Piper Aircraft*⁵⁴ in the Eleventh Circuit about a decade—two decades ago, in which the bankruptcy court tried to appoint a representative for future claimants. And the Eleventh Circuit said, “Oh, no, a baby not yet born who

⁵¹ *Id.* § 1141(c) (providing that, upon confirmation of a debtor’s Chapter 11 plan of reorganization, the property of the debtor’s estate is rendered “free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor”).

⁵² *Id.* § 524(g) (explicitly permitting the establishment of a trust for future claims that survives the bankruptcy case and against which the bankruptcy court may require all asbestos-liability claims against the debtor that arise after the bankruptcy case to be brought). *See also* Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

⁵³ *See* Johns-Manville Corp. v. United States, 489 U.S. 1066 (1989).

⁵⁴ *See* Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995).

ends up in a Piper aircraft which crashes ten years after the bankruptcy case due to a design defect in that Piper aircraft—you cannot, in this court, enter an order that binds that baby. That goes too far.”

That’s what Fiat tried to do in its form of order. And it had the usual arguments: “Judge, if we don’t get this order entered in exactly the form that it states, we’re not going to close this deal and the company is going to disappear in a pile of ash.”

And so the Second Circuit punts. The Second Circuit says, “We’ve looked at this, and we’re not going to rule on it. We’re going to wait for somebody to come around with a future claimant, then we’ll rule.”

HEIMAN: By the way, Fiat did, post-sale, agree to pick up all claims that had not yet arisen for automobiles that were sold pre-sale.

MAYER: And why did they do that, David?

HEIMAN: I think they did it because they felt it was good for business.

MAYER: Let me translate that.

KAROTKIN: No, they did it because GM did it.

HEIMAN: There you go. That’s probably right, there.

MAYER: The states’ attorneys general showed up, and said, “We’re going to force you to sticker every used car, so that people who buy it know that they have no claim if they get into an accident.” And faced with that damage to all the brands that they had “acquired,” Chrysler decided to do the right thing, and, in due deference to Mr. Karotkin, the major change in the *GM* order was this change. [to Karotkin] Right? That’s the basic change you made in order to get the committee on board.

KAROTKIN: Yes.

MEYER: Okay, we have passed our appointed time. The panel had agreed that we would entertain questions, if there are questions from the audience.

[A twenty-minute question-and-answer period followed. Those remarks are omitted in deference to the privacy of the audience participants, whose consent could not be requested.]