



Chrysler Opinion Reaffirms Flexible Standards Governing Section 363 Sales

Posted by Scott K. Charles, Wachtell, Lipton, Rosen & Katz, on Tuesday August 11, 2009 at [2:53 pm](#)

(Editor's Note: This post relates to the decision of the Court of Appeal for the Second Circuit in [In re Chrysler LLC, Case No. 09-2311 \(2d Cir. Aug. 5, 2009\)](#).)

This post was written together with my colleagues [Richard G. Mason](#) and [Austin T. Witt](#).

The Second Circuit Court of Appeals has issued an extensive opinion setting forth the reasoning behind its previous approval of the sale of substantially all of Chrysler LLC's assets to a newly-formed, Treasury-backed and Fiat-managed entity under section 363 of the Bankruptcy Code. *In re Chrysler LLC* (*ibid.*). The opinion in this closely watched case reaffirms that judicial assessment of section 363 sale transactions should be governed by a multi-faceted analysis with flexibility to meet the needs of individual situations.

Section 363(b) of the Bankruptcy Code permits a debtor, after notice and hearing, to sell its property outside the ordinary course of business. Courts have long held that a section 363 sale of all or substantially all of the debtor's property is impermissible if it circumvents, to the detriment of creditors, the more comprehensive requirements of Chapter 11 for confirmation of a plan of reorganization. However, courts also have recognized that in certain cases (especially those involving wasting or deteriorating assets) the relatively quick procedures for a section 363 sale may be superior to a plan of reorganization. Indeed, the Chrysler court expressly recognized that this need is heightened in today's constrained credit environment, where liquidation may be the sole alternative to a proposed section 363 transaction due to the debtor's lack of financial wherewithal to survive the substantially longer process of confirming a Chapter 11 plan.

Reaffirming the standard it enunciated two decades ago in [In re Lionel Corp., 722 F.2d 1063 \(2d Cir. 1983\)](#), the Court of Appeals noted that as section 363 sales proliferate in the current downturn, the balance between a debtor's need for flexibility and speed and the protections for creditors of a Chapter 11 plan of reorganization "is not easy to achieve, and is not aided by rigid rules and prescriptions." *In re Chrysler* at *21. The Second Circuit explained that the size of the transaction and the residuum of corporate assets are factors that a bankruptcy court must consider, but are "just one consideration . . . along with an open-ended list" of other issues, such as whether the sale was on terms advantageous to the estate and whether a plan of reorganization might be proposed and confirmed in the near future. *Id.* at *21. If after reviewing all relevant factors, a bankruptcy court concludes that there is a "good business reason for the sale," the bankruptcy court may approve the transaction. *Id.* at *24. Moreover, the Chrysler court specifically held that section 363(f) of the Bankruptcy Code allows a debtor to sell assets free and clear of "successor liability" for pre-petition tort claims.

The Second Circuit's decision serves as a reminder that flexibility is a hallmark of transactions under the Bankruptcy Code and that, for substantial bankruptcy sales, there is no "onesize-fits-

all” rule to determine whether the sale may go forward under section 363 or must await a reorganization plan.