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HOW THE CHRYSLER REORGANIZATION DIFFERED FROM PRIOR PRACTICE

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ABSTRACT

Chrysler, a failing auto manufacturer, was reorganized in a controversial chapter 11 in 2009. Financial creditors were paid a quarter of the amount owed them, while other creditors were paid more. The reorganization's defenders asserted, among other things, that the proceeding and the sale structure was typical of prior practice. To see if this view fits the evidence, we examine all prior large section 363 sales for key financial ratios that can show whether a priority distortion is very unlikely. For example, in a cash sale with the buyer not assuming any debt of the bankrupt, the sale itself cannot ordinarily disrupt standard priorities. The Wilcoxon signed-rank test for these ratios indicates that Chrysler significantly differed from prior practice. It used less cash and the buyer assumed more debt than has been typical. Examining restricted samples, such as prior section 363 sales of firms with high unfunded pension obligations, yields similar results. The evidence here thus does not support the claim that the Chrysler reorganization fit the preexisting pattern of section 363 sales.

1. INTRODUCTION

The automotive reorganizations during the 2008–2009 financial crisis were controversial. Washington injected major resources into the failing automotive manufacturers, Chrysler and General Motors, fearing that if the two manufacturers further shuttered operations their failure would deepen the ongoing financial and economic crisis, either by a cascade of supplier failures throughout the automotive industry or by further sapping economy-wide manufacturer and consumer confidence. Questions nevertheless arose whether subsidizing a weak producer in an industry with substantial over-capacity could be justified other than as a political necessity, whether the financial concepts of too-big-to-fail

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were escaping from their usual financial bailiwick into new industrial terrain in the USA, and whether the automotive industry was benefiting from government largesse despite having had a long history of managerial error and poor management–labor relations.

The mechanics and distributions in the bankruptcies themselves, particularly those in the Chrysler reorganization, also proved to be controversial transactions, apart from the issue of whether government funding was sound policy. Several major financial creditors insisted that priority in bankruptcy was not respected in the Chrysler bankruptcy. Despite the fact that they had security on the bulk of Chrysler's assets, the secured creditors received 29 cents for each dollar on their $6.9 billion claim. Other unsecured, but government-favored, claims, although not entitled to priority under the bankruptcy law, were promised to be paid in the court-sanctioned reorganization plan.

One hedge fund manager, George J. Schultze, said that creditors "will think twice about secured loans due to the risk that junior creditors might leap frog them if things don't work out. [This Chrysler deal] puts a cloud on capital markets . . . ." Hals (2009). Warren Buffett said that the Chrysler plan will "disrupt lending practices in the future." "We don't want to say to somebody who lends and gets a secured position that that secured position doesn't mean anything" (Whiteman 2009). One study indicates that the cost of capital for similarly situated firms did rise, Blaylock, Edwards & Stanfield (2012, 19), although another indicates that the subsidy effect offset any other distortionary effect, Anginer & Warburton (2012, 25).

Defenders of the Chrysler reorganization stated that the process did not differ from other bankruptcy sales, that the new lender in a chapter 11 proceeding (the so-called "DIP lender,"[3] which the government became) typically is empowered to decide not just on how it will be repaid itself but also can determine the distributional results to others, such as those in the Chrysler reorganization. Defenders saw the Chrysler bankruptcy process to have been both sound in its overall structure and sound in its particulars. As one prominent bankruptcy lawyer said, reflecting the view of many of the lawyers representing players pushing the Chrysler reorganization forward: "It didn't turn anything upside down" (Braithwaite 2009). The bankruptcy judge approving the Chrysler transaction began his opinion by stating that: "[t]he sale transaction . . . is similar to that presented in other cases in which exigent circumstances warrant an expeditious sale of assets prior to confirmation of a plan" (Chrysler Bankruptcy Opinion, 2009, 87).

3 The phrase describes the lender to the "debtor-in-possession," the Bankruptcy Code's term for a bankrupt whose management, as opposed to a bankruptcy trustee, runs the bankrupt firm's operations. The DIP lender lends new money to the bankrupt firm.

And, in a post-mortem on the Chrysler bankruptcy, the congressional evaluation committee indicated that the government was acting in the role of the typical debtor-in-possession lender and that, as such, it had a wide ambit for action. The debtor-in-possession (DIP) lender's power, said a major official congressional review of the Chrysler transaction, "is extremely high. Some refer to DIP lenders as following the Golden Rule: Those with the gold make the rules. There are no statutory limits on the conditions that DIP lenders may impose on the business" (Congressional Oversight Panel 2009a, 44). The implication is that since the government filled the role of the DIP lender in Chrysler, it got to make the rules, distributional and otherwise. Academic testimony at Congress's oversight panel on the auto bailouts was similar: "[D]espite . . . commentary to the contrary, the basic structure used to reorganize both GM and Chrysler was . . . entirely ordinary."[4] "[T]he government was nothing more than a debtor-in-possession (DIP) lender in an otherwise typical bankruptcy reorganization."[5]

* * *

The Chrysler transaction of course differed from other section 363 sales: Chrysler was sold during a severe financial and economic downturn, when the entire American auto industry was in trouble with two of the big three bankrupt. The government bailed out the auto industry and bankruptcy was a central mechanism in the bailout. But a main strain of bankruptcy opinion was that Chrysler was a mainstream section 363 sale in terms of doctrinal precedent, structure characteristics, and financial basics. Mainstream analysis, including that of the deciding bankruptcy court and the Second Circuit Court of Appeals, saw the structure as well within the parameters of section 363 sales. Prior bankruptcy work has addressed the first two issues of precedent and statutory fidelity, with analysts on both sides of the issue. We here address the question of whether the financial structure of Chrysler's section 363 sale resembled that of the bulk of prior section 363 sales. It did not. On multiple key financial characteristics, Chrysler was well outside the mainstream, in the company of only the most controversial of prior 363 sales. On several major measurements, it was unique.

4 Auto Industry Financing Program; Senate Congressional Oversight Panel, CQ Cong. Testimony, July 27, 2009b (testimony of Professor Stephen J. Lubben). Cf. Lubben (2009, 3) (Chrysler § 363 sale "was entirely within the mainstream of chapter 11 practice for the last decade.").

5 Anginer & Warburton (2012, 8), who were summarizing a standard view, not endorsing it.

* * *

Hence, we here address whether the Chrysler reorganization resembled the typical process that has developed in the past decade or so for entire-firm sales in bankruptcy. We conclude that the best evidence available indicates that it did not. We demonstrate two aspects of bankruptcy relevant to the Chrysler reorganization. First, we show how a so-called section 363 sale can lead to priority deviation and how a straight sale for cash should not. Second, we show how the Chrysler reorganization was in the range in which a priority deviation would have been easy. It was also at the far end of the range of prior practice in that few reorganizations were as deeply into the risk-of-deviation zone as was Chrysler's.

Less new cash flowed into the reorganized Chrysler, proportionate to the liabilities assumed by the buyer, than is typical; much more old pre-bankruptcy debt was assumed by the purchaser than is typical. (The purchasing entity's assumption of pre-bankruptcy debt was the mechanism by which priority might have been violated, as explained below in detail: some major debts were assumed by the reorganized operating entity, some were not. If the assets ended up primarily in the purchasing entity and not in the original firm, creditors of the purchasing entity would be favored over those left behind in the original firm. Those creditors that were left behind to assert their claims on the shell from which the automotive assets had been transferred did poorly relative to those who moved over to the purchasing entity.) DIP lenders have wide-reaching authority, but the evidence here indicates that courts do not regularly approve 363 sales that allow them to favor selected pre-bankruptcy creditors.

Specifically, we compute several ratios for all large firm bankruptcy sales from all available data and compare them to those of the Chrysler reorganization. The potential for priority distortion rises to the extent that the deal structure differs substantially from a pure sale of the bankrupt's assets and operations for cash. If, instead of just cash, the deal structure has a significant amount of pre-bankruptcy debt carrying through the reorganization to the exiting entity, the opportunity for priority distortion is higher than if the sale is of all the bankrupt's assets for cash and only cash. It's the size of the carry-over of pre-bankruptcy debt to the buying entity that can distort priority. For the carried-over debt, the purchasing entity promises to repay the creditor from the value transferred out from the original debtor and into the purchasing entity. The debt that is not carried through can only obtain value from the assets left behind, if any assets are left behind.

The potential priority problem can be easily described: Consider a bankrupt firm with claims coming from a high-priority creditor and a junior creditor. If all of the assets are transferred to the purchasing entity, with none left behind, but the purchaser only picks up the bankrupt's obligations to the junior creditor and picks up none of the obligations to the senior creditor, then statutory priorities would be fully reversed.

If the assets remaining behind are insufficient to pay off the remaining senior debt, as they were in Chrysler, that left-behind debt is paid less than in full. This ratio of assumed debt to the liabilities existing at the time of the bankruptcy filing (or, expressed differently, the ratio of debt left behind to total original liabilities) is thus a critical number for understanding the potential for priority distortion. We compare this ratio for the Chrysler reorganization to that of typical section 363 sales. In the Chrysler reorganization, nearly half of the pre-existing balance sheet liabilities (mostly of pension and health trust claims) were assumed by the exiting entity. For the 63 large firm bankruptcy sales prior to Chrysler's with data available, the mode of the debt assumed as a proportion of the total liabilities of the bankrupt is zero. The median is also zero. This result is summarized in column (3) of Table 2. Although the Chrysler result—with half of the pre-bankruptcy debt assumed by the purchasing entity—was not unprecedented, it was only matched in a handful of prior reorganizations, such as Trans World Airlines (TWA), itself a controversial reorganization. In the other instances where the Chrysler ratios are matched, the assumed debt was secured by assets integral to the firm's operations (while in Chrysler it was the secured debt that was left behind and unsecured debt that the buying entity assumed) or the court oversaw a strong auction process, or both.

We also calculate the portion of debt assumed to the total purchase price, as this similarly indicates the potential for priority distortion. Before Chrysler, the mode for debt assumed as a proportion of the purchase price was zero, the median only 2 percent, and the mean 21 percent, as column (2) of Table 2 indicates. Yet, in Chrysler, the debt assumed amounted to more than 90 percent of the purchase price, a result that is more than two standard deviations from the pre-Chrysler mean. The Wilcoxon signed-rank test indicates that the Chrysler result significantly differs from pre-Chrysler section 363 sales, with a p-value of less than 0.01.

These results strongly suggest that in section 363 sales prior to the Chrysler reorganization major debts were not moving from the pre-bankrupt entity to the post-bankrupt entity to the extent that they did in Chrysler. Prior reorganizations accordingly were typically not accomplished in ways that risked significant priority violation.

Chrysler had major obligations to its employees and retirees. Although these obligations do not have a generalized priority over financial creditors, perhaps courts have been constructing a de facto priority for them. There are bankruptcy doctrines, such as critical vendor doctrine, that could justify such results. To examine whether the Chrysler section 363 sale was one more of a line of pension-based section 363 sales, we also examined a restricted sample of prior large section 363 sales of firms with a high level of pension liabilities, similar to that of Chrysler's. We did so to see if courts have been fashioning a de facto priority for pension liabilities. But the data shows that these prior section 363 sales of firms with pension liabilities as high as Chrysler's had relevant ratios that did not significantly differ from the low-pension section 363 sales. Pension obligations did not seem to be gaining a de facto priority. Only Chrysler among the high-pension firms differed significantly from prior practice.

Other ratios also evidence that Chrysler was different. Cash was an overwhelmingly large portion of the purchase price in most pre-Chrysler section 363 sales. A third-party pays cash for the bankrupt's assets; those assets exit the core bankruptcy proceeding and the cash that the bankrupt entity obtains for those assets is then used to pay the bankrupt's creditors. Cash is hard to misvalue or misdistribute, while deciding which liabilities stay behind and which move to the new entity can distort priority in ways that are hard to detect. But for the 63 post-2000 sales on which full data is available, the mode for cash consideration for an asset purchase was 100 percent, the median 94 percent, and the mean 75 percent. In Chrysler, most of the purchase was not paid for by cash, but paid for via gifts to some creditors and via exchange of some but not all of the preexisting debt. With only 10 percent paid in cash, the Chrysler reorganization again differed significantly from prior section 363 sales on this metric, with the Wilcoxon signed-rank test yielding a p-value of less than 0.01. Finally, we aggregated the ratios via factor analysis and re-ran the test, which yielded similar results, again with a p-value <0.01.

As far as this evidence indicates, Chrysler, indeed, was different.

2. THE CHRYSLER REORGANIZATION

Chrysler, at one-time the tenth largest industrial company in the USA, suffered a multi-decade decline whose nadir came with its chapter 11 filing on April 30, 2009. Its cars were poorly received by consumers. Consumer Reports (2009, 15; 2010, 15) rated Chrysler's cars as the least reliable of the 15 automotive companies with a substantial U.S. presence. Its market share had deteriorated, and it suffered losses of $2.9 billion in 2007 and $9.1 billion in 2008 (Daimler Benz 2008; Annual Report 2009). It had gone through one government-sponsored billion-dollar bailout in 1979–1980, was sold to Daimler-Benz in the 1998, and then re-sold and taken private in 2007 by the private equity firm Cerberus, which was unable to turn around Chrysler's operations. Initial reports of the government's thinking during the financial and economic crisis of 2008–2009 were that Chrysler could not be saved at any reasonable cost and that it would be allowed to close (Lizza 2009).

The government changed its view, however, and injected significant resources into both Chrysler and General Motors. The decision to save Chrysler was hotly debated in the White House and the executive branch (Lizza 2009). One view was that Chrysler's failure would boost GM, which would pick up much of Chrysler's market share. But the sense that the economy would be damaged by a Chrysler failure reportedly dominated in policy circles. Major costs from Chrysler's failure, including those from unemployment benefits and government guarantees of pension payments, were thought to offset much of the losses or distortions that a bailout might cause (Rattner 2009).[6]

The initial pre-bankruptcy cash infusions were accomplished as ordinary loans from the government to the car companies. Thereafter Chrysler filed for reorganization under chapter 11 of the U.S. Bankruptcy Code. It quickly proposed that its principal automotive assets be sold for $2 billion in cash. But the sale would not be an arms-length sale to a fully separate third-party. The car company's assets were sold within a month and a half to the government-sponsored and government-financed entity. The government loaned cash to the new Chrysler entity, which purchased the automotive assets from old Chrysler. The cash that went to the old Chrysler entity (which no longer owned the main automotive assets) was used to settle out the $6.9 billion in pre-bankruptcy debt at 29 cents on the dollar.

The sale was not to an arms-length, true third-party buyer, but to an entity that would be owned by the government, preexisting creditors, and FIAT. The latter paid no cash as consideration for the purchase, but agreed to manage the new entity. There was little opportunity for a true arm's-length auction in which third-parties would bid for the assets to be sold, as the transaction moved rapidly. The bidding period was short and the formal terms required that any qualified bid conformed to the priority structure of the government-sponsored deal—bids would only be qualified if the purchase structure would have the favored creditors move with the assets and would leave the disfavored creditors behind to be paid out of any available residual assets. Such conditions would be likely to deter new bidders, if there were any interested in buying Chrysler or its assets.[7] Regardless, no alternative bids came in. Chrysler was, in effect, sold to itself, or rather to a subset of its prior owners.

6 Chrysler has been profitable since the bailout. It did not fail, as some policymakers feared might happen even if bailed out (Rattner 2009).

7 Nonqualified bids could have been made, but the debtor was required to consult with both the government and the union—the architects of the proposed deal—on such nonqualified bids. The process would not encourage potential bidders who wanted to buy the assets away from the company to bid.

2.1. The Section 363 Sale

2.1.1. The Statutory Background

Chapter 11 of the U.S. Bankruptcy Code provides a framework for reorganization that roughly corresponds to the conceptualization of strict priority in the finance literature (with some deviations, to be discussed below). Secured creditors are entitled to the value of their security, with any insufficiency in collateral typically entitled to claim as an ordinary unsecured creditor on the bankrupt's unsecured assets. Ordinary unsecured creditors must be paid ratably, unless they voluntarily accept a deviation from proportionate treatment. Priorities among creditors, via contractual seniority and subordination agreements, are respected as written. (Consent to deviation from the statutory priority is done by a vote among the creditors, with a minimal value that any creditor can insist upon, even if the class consents to a deviation. Oftentimes what seems to be consent to a deviation is really a settlement, as asset values and future cash flows are uncertain and often there are intercreditor claims for wrong-doing.) Equity holders are not entitled to receive anything in the reorganization until creditors are paid in full (or unless creditors consent to the payment, to settle a claim or to just speed up the proceeding).

While the overall chapter 11 structure conforms to the conceptual sense of strict priority, substantial variations are embedded in the Code and in bankruptcy practice. Creditors, for example, are not generally entitled to the time value of money for a delay in the proceedings. Exceptions to the no-interest rule are available, but they are incomplete (Roe 2011, 395–428). The firm's value may change substantially during the course of a bankruptcy reorganization, injecting a market-based element of uncertainty and some optionality for the out-of-the-money claimants, which they might use strategically. And values of assets and of the enterprise overall are ultimately determined by judges, not markets. If the creditors cannot settle differences, and if judges are not expert in valuation, distortions are likely to occur (Gilson 2010; Roe 1983, 570).

Secured creditors cannot generally seize their assets without judicial permission in a bankruptcy, which often is not given if the asset is useful to the bankrupt's operations. The creditor is promised that it will ultimately obtain the value of the security (without interest, usually), but it's the judicial process that determines the value of that asset, not the market, and, if there's a payment failure at the end of the reorganization (because the business completely fails), the court does not make up any shortfall.

In addition, there are priority jumps that are hard to evaluate, one of which is relevant in the Chrysler reorganization. Debts due for unpaid bills from the bankrupt's pre-bankruptcy suppliers can, if the suppliers are judicially determined to be critical for the bankrupt—presumably because they are supplying crucial parts that debtor cannot obtain otherwise — be jumped ahead of other creditors and paid immediately in the bankruptcy proceeding. Conceptually, if such payments enable the bankrupt's operations to be more valuable than if the extra payments were not made (Easterbrook opinion, *In re* Kmart (2004, 868)), then all creditors should benefit from the priority jump. But judges may not be adept at making such judgments of net value to the bankrupt and many do not even bother to estimate the costs and benefits of such priority jumps to the non-favored creditors.

2.1.2. The Chrysler Section 363 Sale

The Bankruptcy Code, passed in its original form in 1978, did not contemplate that a business's bankruptcy would lead to the business's operations being sold, with the cash distributed to the pre-bankruptcy creditors. Rather, it contemplated that the bankrupt's creditors, management, and, if the firm was marginally solvent, equity holders would negotiate a plan of reorganization. If the negotiation failed, parties—initially the bankrupt's management—would propose a reorganization plan to the judge, who would determine the value of the bankrupt firm and whether the plan met the priority and other requirements of the Code. Creditors could be excluded from receiving any payment in the reorganization, if their level in the business's priority structure had no value (ignoring any option value). If the plan conformed to the Code's priority structure, the judge would confirm the reorganization plan. A confirmed plan binds all creditors and stockholders to the plan's terms.

Critics saw the Code's failure to contemplate sales of firms in their entirety, or even sales of new securities, to be a major failure of the Code. Well-developed financial markets, including well-developed merger markets in the 1980s, made market-based reorganizations plausible and superior to the structure enacted in 1978 (Roe 1983, 571–575; Baird 1986, 141).

Although the Code did not contemplate whole-firm sales, it did contemplate sales of wasting assets. The archetypal case was that of fruit crates sitting in a bankrupt, closed fruit store. The managers of the bankrupt needed authority to sell the crates of fruit before the fruit rotted and lost value. Section 363 of the Code was the relevant section. While the phrase "363 sale" eventually became prominent in business and financial circles and came to be understood as an operational sale of a bankrupt firm, the phrase was not well-known or even used in this way in the early years of the Code, because such full-firm operational sales did not occur.

Section 363 allowed the bankrupt to sell its assets out of the ordinary course of business, but only with prior judicial approval. It would be under that authority that the managers of the bankrupt fruit seller would ask the court to approve a quick sale of the crates of fruit in inventory, to avoid further losses.

The Code, however, provided no standard for that judicial approval and courts initially saw whole-firm sales to be a stretch, or even a mis-use, of that section, in part because the section had no mechanism for determining whether priorities were respected. The early judicial decisions dealing with such whole-firm sales were hostile to their occurrence. In *In re Lionel* (1983), a decision of the New York based federal circuit court of appeals, a court that is prominent in financial law, sought to impede section 363 sales of whole firms, by requiring that there be an articulated business justification and requiring bankruptcy courts to weigh a number of offsetting factors before approving a whole firm sale under section 363.

2.1.3. The Market Test

But, beginning in the 1990s, bankrupts increasingly asked courts to approve a sale, under section 363, of firms' operations in their entirety. The usual method has been for the sale proponent to come to court with a potential buyer (called the "stalking horse") and a proposed bidding procedure (when, how long, what general terms). After the court accepts the final bidding procedure, the assets are put up for sale and, if no new bidder tops the old bidder's price, the sale is made. The money paid for the assets flows into the bankrupt and that money is subjected to all of the priority protections and rules embedded in the Code. This sales method became favored in chapter 11 practice during the latter part of the 1990s and the subsequent decade (Baird & Rasmussen 2003, 675; Eckbo & Thorburn 2008, 404–405).

Courts regularly stated that the sale itself could not have terms that determined the distributional structure of the proceeds among creditors, because that would risk deviation from the priority mechanisms supported by the Bankruptcy Code. A sale for cash was justified, if the cash was then used to satisfy the creditors according to the Code's priority mandates. If there were deviations from the pure sale for cash, particularly if the terms of the sale determined important distributional results, then some judicial or other check was needed. Roe & Skeel (2010, 736–741) examine in detail the pre-Chrysler appellate judicial decisions' standards for a section 363 sale.

Courts were uncertain of their own expertise in verifying the appropriateness of the price paid in a sale. To check the sale proponents' terms, a market test became a core check on the bona fides of the section 363 sale. The statute contemplated a reorganization plan that the creditors consented to, via a vote of each creditor group. (Or, if the creditors did not approve, the court would value the firm and then verify that the plan's terms respected priority.) Because neither creditor approval nor judicial testing of the overall plan would typically occur, the market test was important to validate section 363 sales.

It must be emphasized that courts regularly held that the sale could not be a reorganization plan in disguise. *In re* Braniff (1983). The sales terms could not determine how the sales proceeds would be distributed. Distributions of the proceeds needed to be done in accordance with the Code's priorities. If the proposed sale had strings attached so that the proceeds would be distributed in ways that clashed with the Code's priority structure, courts said they would not approve the proposed section 363 sale.

2.2. How the Chrysler Section 363 Sale Put Priority in Play

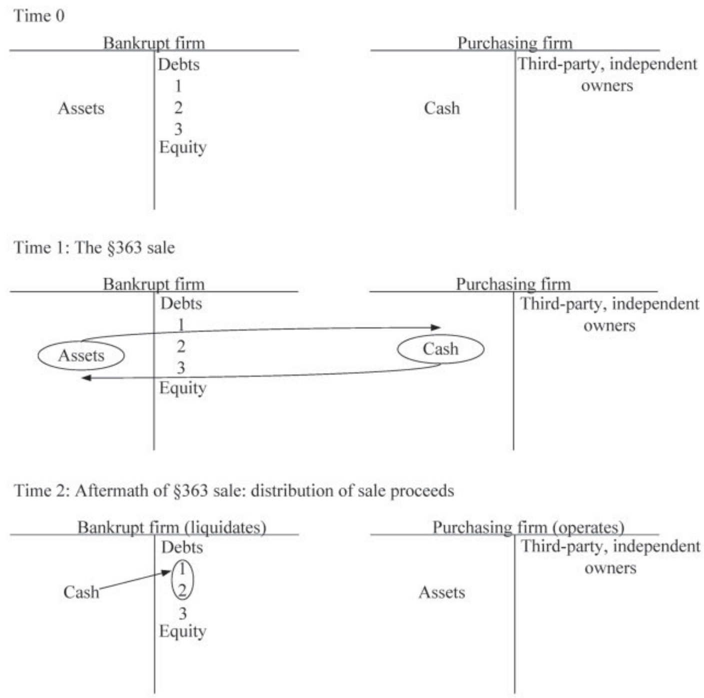
The Chrysler sale was not a clean sale of automotive assets for cash. Alternative bidders were not offered a clean opportunity to outbid the government-sponsored buyer. In these two dimensions, the Chrysler section 363 sale was atypical. That is, the sale did not solely transfer Chrysler's assets for cash, nor was it even a transfer of Chrysler's assets with some minimal liabilities attached. It was instead a sale of Chrysler's assets for $2 billion in cash, but the assets transferred were coupled, as a package deal, with the purchasing entity assuming and agreeing to pay more than $17 billion of Chrysler's pre-bankruptcy $36 billion of liabilities.[8] Additionally, the amounts that new Chrysler, the purchasing entity, promised to repay in full greatly exceeded the cash paid for the assets. The purchasing entity's owners included one major preexisting Chrysler creditor and the government, along with FIAT, which provided no new cash but was tasked with running the company.

Much of Chrysler's preexisting liabilities moved over from the pre-bankruptcy Chrysler to the purchasing entity, while much of Chrysler's pre-bankruptcy liabilities stayed behind. It's there that the potential disparity in priority could have arisen: if the amounts available to the stay-behind creditors were less than (or more than) their normal bankruptcy entitlement, they could have been short-changed (or over-compensated) as compared with what the carry-through creditors received.

Because the purchase price for the assets was $2 billion in cash, but $17 billion of Chrysler's ongoing liability moved to the purchasing entity, the sale was far from a pure sale of operations for cash. Much of the transaction, in percentage terms, involved squeezing out the $6.9 billion in old secured

8 In addition, pre-bankruptcy debt of $5.4 billion received 55 percent of the stock of new Chrysler. To be conservative, we value this at zero, although the stock had value. By not counting it as assumed, we diminish our calculated size of the Chrysler debt assumed in the § 363 sale from $23 billion to $17 billion, biasing the results against a finding that Chrysler differed from prior reorganizations in the buying entity's heavy assumption of pre-bankruptcy debt. A worksheet detailing the numbers for the Chrysler § 363 sale is in the unpublished appendix, as Appendix Table A1.

Figure 1. A clean section 363 sale.



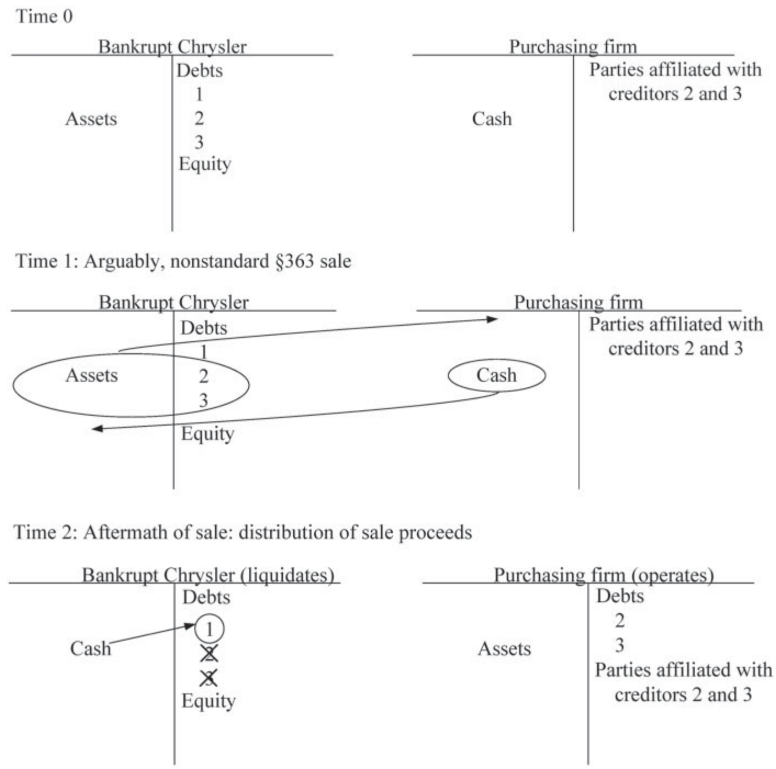
creditors for $2 billion and moving $17 billion in claims over to the new entity.[9] It was not a simple sale for cash.

Figure 1 shows what such a straight cash sale might look like. Figure 2 shows the Chrysler transaction.

This analytic does not depend on whether the section 363 sale contemplates keeping the firm going (a "going concern sale") or liquidating the firm (and thereby shutting down operations but redeploying its assets. Either way, the sale in Figure 1 is one for which priority distortions will be unlikely and a sale structured as in Figure 2 will have more distortion potential, because some major debts traveled with the assets, while other major debts did not. A substantial view is that Chrysler had no standalone going concern value at the time of the sale (see, e.g. Baird (2012, 274)), at least if the company's labor arrangements persisted, that the secured creditors were entitled only to the liquidation value of Chrysler's assets subject to the security, and that as long as that liquidation value was not above $2 billion, then priority was not implicated. Rather,

9 Significant pre-bankruptcy liabilities to Cerberus, Chrysler's pre-bankruptcy owner, stayed behind, as did the first large government-funded $4 billion TARP bailout loan.

Figure 2. The Chrysler section 363 sale.



the government bestowed a gift to some of the players in Chrysler and pumped in enough value to make Chrysler a going concern.

The possibility that Chrysler had no going concern value at the time of its 2009 sale is plausible, but undermines nothing in the analytics thus far. Reexamine Figure 2. Posit that the liquidation value of Chrysler was \$5 billion. After all, Chrysler did have a \$1 billion new auto body stamping plan and there was talk that the Jeep brand and associated value had \$2 billion in value. If the remaining assets had the \$2 billion liquidation value the debtor asserted, but had that value in addition to Jeep's posited value and the new stamping plant's cost, we have a \$5 billion number. As Baird (2012, 280) notes, a rule of thumb for liquidation is to expect 10 percent of book value, which would have been several billion dollars above the \$2 billion paid for Chrysler. If this was the liquidation value of Chrysler (a fact on which we have no special expertise), the section 363 sales mechanism illustrated in Figure 2 would not have ascertained whether it was. The assets—\$5 billion in value in this hypothesis—would have been transferred to the New Chrysler for \$2 billion in cash. That would have moved \$3 billion in value for the transferred creditors to enjoy. Regardless of whether the firm is functionally liquidating or reorganizing in a section 363 sale, the distortion is unlikely if no debt moves over as in Figure 1, in a proper auction. But for Chrysler, the process and the court could not legitimately ascertain whether the liquidating value was the $2 billion the company asserted or some other number, like the $5 billion in the example.

2.3. Government Subsidy and the Consequential Lack of Clarity on Priority

One cannot ascertain solely by examining the terms of the Chrysler transaction itself whether the transaction respected priorities. The $6.9 secured credit line was paid $2 billion in cash. Other, unsecured creditors carried over to the new entity in full, or received a package of new debt and new equity. Whether the take-out of the secured line at $2 billion and whether the consideration given to the carried over creditors conformed to statutory priority are neither demonstrated by, nor contradicted by, the transaction itself. If Chrysler's automotive assets were not worth more than the $2 billion when sold, and if there was no additional value in Chrysler to pay for the deficiency in security (a $6.9 billion claim with $2 billion in security would yield a $4.9 billion deficiency), then these creditors were paid their full bankruptcy entitlement. Although the carried-over, unsecured creditors did better than the 2/6.9 that the secured creditors received, the government poured significant resources into the new Chrysler entity; the secured creditors were not entitled to the value that the government gave the new entity. The government may have made gifts, but the secured creditors were not entitled to a share of the gifts. The analytical difficulty is in ascertaining whether that $2 billion receipt is the right value for the assets or whether the secured creditors were entitled to more.

Judges in section 363 sales typically test a sale against market values, by putting the firm up for bids. Information packets are made available and outsiders can bid on the assets. The problem with the Chrysler auction—and it's a big one—is that the court-approved bidding procedures effectively *required* that the bidder pick up the $17 billion in obligations that was part of the core Chrysler sale, as only bids that did so were qualified. Since qualified bidders were *required* to do so, we cannot know whether some outsider valued the assets more highly if separated from these liabilities. Maybe no one valued the assets more highly. But the auction was not designed to ascertain whether anyone would bid more than $2 billion for the assets alone.[10] One might criticize the Chrysler procedure for not really being an auction at all.

10 While most courts would feel obligated to examine a bid that did not conform to the bidding procedures it had approved—i.e., a bid that did not contemplate assuming the $17 billion in liabilities required in the government-sponsored plan, any outside bidder had to be aware that the insiders and court would have been hostile to such a nonconforming bid. The documents clearly

To reiterate: What made the Chrysler sale so hard to assess was that a large fraction of its liabilities moved over to the purchasing entity. If liabilities regularly moved over to purchasing entities in 363 sales, then Chrysler was in this dimension in the mainstream of the prior decade of 363 sales. But if liabilities rarely move over to the degree that they did in Chrysler (in which half of its pre-bankruptcy liabilities moved in the sale), then Chrysler was, indeed, different. Finally, the result was not validated by a strong auction procedure that would have allowed others to bid the assets away from the inside buyer.

Furthermore, the government's involvement and cash infusion complicates the judge's capacity to assess whether priorities were respected. While some Chrysler creditors did much better than the financial creditors, it's unclear who paid for the nonfinancial creditors' good fortune. Some financial creditors, as well as some observers, asserted that the financial creditors were under-paid and, hence, they paid for some of the favored creditors' good fortune. But whether they did subsidize favored creditors is unclear from the transaction's structure. The government put much money into Chrysler directly and more indirectly by making loans at noncommercial, concessionary rates into the automotive supply chain. This governmental largesse alters our capacity to assess compliance with priority, because the government was not pouring the cash into Chrysler as a commercial investment. Yes, the carried-over creditors did better than the left-behind secured creditors, but if their upgrades came at *government* expense, it's hard to see how this was a priority violation, if the government decided to make gifts to some creditors (those associated with the United Automotive Workers and the automotive supply chain) and not to others (the financial creditors). Bankruptcy law does not bar gifts from outsiders to the creditor priority hierarchy. It does, though, typically require that the court ascertain the adequacy of what's paid to creditors, if the creditors ask the court to check the transaction's bona fides. This the court did not do, and some legal analysts criticized its failure to do so (Adler 2010, 307; Baird 2012, 280–81; Roe & Skeel 2010, 730).

While it is plausible that some of the transaction reflected such a gift from the government, the difficulty is that we cannot ascertain how much. The Treasury estimated that "[a]pproximately $5.4 billion of the loans extended to the old Chrysler company are highly unlikely to be recovered" (Congressional Oversight Panel (2009a, 4)); the Treasury also extended $6 billion to the

show that the deal presented to the court by the government and the key Chrysler players, such as the UAW, would have required that the bidder assume these liabilities, respect Chrysler's collective-bargaining agreements, and leave the $6.9 billion secured facility behind in the Chrysler shell. Nonqualified bids might come in, but the bidding procedures contemplated UAW and government input into whether such bids would be considered.

purchasing firm, the "new" Chrysler. If some of that $6 billion was at concessionary rates such that the government was giving away $8 billion overall ($5.4 billion before and $2.6 billion after) to the $17 billion of creditors that were favored, that meant that the favored obtained more than half of their value from reorganization and somewhat less than half from government largesse. But since the secured creditors received 2/7 of their claim, the numbers still would not match up nicely to priority rules without a more complicated understanding of the transaction.[11] The government's gifts in this analysis would still leave the source of several billion dollars in compensation unaccounted for.

* * *

This discussion raises multiple entry-points for analyzing the Chrysler transaction. One might question whether the Code's priorities are right, *i.e.* whether accrued, unpaid pension liabilities should come before financial and secured creditors as a matter of fairness or operational efficiency, whether priority was in fact respected in the Chrysler reorganization, whether any lender consents were adequate to support a priority deviation, whether the Chrysler reorganization was sufficiently opaque to obscure whether priority was respected or whether there were deviations, and whether the U.S. inflows in gross made up for any deviation from absolute priority.

The government's involvement in the reorganization also raises general policy and political economy considerations: Would the macro-effects of

11 We offer one below, in Section 3.3., based on the impact of the UAW's terms on the value of the assets and its fit with bankruptcy doctrine's critical vendor theory.

In addition, defenders of the Chrysler transaction could point to the consent of many of the secured creditors to the sale. That is, if the sale had indeed gone through normal bargaining channels, they say, the creditors would have approved the deal, even with its purported priority issues. Critics indicate that the Code protects dissenting creditors and promises them at least the liquidation value of their collateral. They also argued that the consent of the lending syndicate's leaders was far from clean and could be challenged because several of the secured creditors were heavily dependent on government support during the financial crisis of 2008–2009. (Citigroup received $45 billion in TARP loans; J.P. Morgan, $25 billion; and Goldman Sachs and Morgan Stanley received $10 billion each.) While the White House forbade the auto team from using TARP as leverage over the banks, members of Congress did not feel this constraint. For example, Michigan Congressman Gary Peters highlighted the TARP loans when asking the bank CEOs to forgive the Chrysler debt (King & McCracken 2009). Whether banks would have felt conflicted even without pressure is an open question.

Because some lenders received government aid via the TARP program, and because the government was an interested party in the Chrysler reorganization, while other lenders received no TARP aid, bankruptcy law might have demanded that the two groups (TARP-recipients and non-TARP lenders) vote separately in any full-scale Chrysler reorganization. Separate voting would have given the dissenting creditors veto power over the deal, unless a judge found they had received the absolute priority value of their claims. Roe & Skeel (2010, 743–746) discuss and analyze the consent issue, whose resolution, were it fully litigated on the merits, is not an obvious one.

auto company failures have cascaded through the economy in the way that financial failures can? Would consumer and business confidence have been sapped? From a crude political economy perspective, was the Administration repaying a supportive interest group that had helped it carry one or more key states (Ohio, Indiana) during the prior election? Or, in a more nuanced political economy perspective, was the Administration—then under media and popular attack for bailing out Wall Street during the financial crisis—building political support for vital financial rescues by also bailing out visibly distressed firms that employed thousands of blue-collar workers? More prosaically, once an automotive bailout was in the cards, one might ask whether the bankruptcy process could have been put to better use in implementing that bailout.

All those questions are worthy of inquiry. Our task here is narrower, to assess whether the Chrysler section 363 sale substantially differed in structure and distortionary potential from previous large-firm section 363 sales. It may have differed, but still have complied with the statute; it may have differed and nevertheless have been good economic and political policy. It may have differed and some readers may interpret that as indicative even if not determinative that it did not conform to the bankruptcy rules. We do not directly address such considerations, although one of us has done so elsewhere (Roe & Skeel 2010). But we do conclude that the data, which we examine next, indicate it did substantially differ in crucial financial respects from the range of prior large firm section 363 sales.

3 THE DATA

3.1. Testing Whether Chrysler Was Different

The case that Chrysler did not differ from ordinary bankruptcy practice lies in an assessment of how section 363 sales were typically structured. If section 363 sales typically have had large carryovers of pre-bankruptcy creditors into the purchasing entity, then the Chrysler reorganization would have fit the typical transactional form. (Even if such carryovers are common and large, Chrysler might still have differed from typical section 363 sales transactions if previous carryovers conformed to normal priorities. Chrysler's section 363 sale might also have differed from the typical, if Chrysler's fidelity to priority was impossible to ascertain from the terms and structure of the transaction, while priority distributions in other transactions were transparent because, say, of a strong auction effort. We do not reach this inquiry, because we conclude that Chrysler's level of carryovers significantly differed from prior large firm section 363 sales.)

One source of evidence is event studies of unexpected occurrences during the Chrysler recapitalization. If unexpected shifts in judicial approval or disapproval of the Chrysler deal arose, researchers could see whether those shifts were associated with shifts in financial market characteristics of similar firms. A few of these are available, but their proper interpretation is not obvious, because the Chrysler deal's impact on financial markets is hard to assess: First, many market players may have viewed Chrysler as sharply differing from prior practice, but they could well have concluded that it would be a one-off deviation that, absent another severe financial crisis, would not be repeated. Second, financial market players may have had a negative view of the Chrysler deal as presaging a European-style industrial policy that would bail out weakened industrial firms. If the market reached this conclusion during the Chrysler deal, however, market players could have reached either one of two contradictory assessments for the deal's impact on financial market pricing of outstanding debt. They might have expected that future government largesse to heavily blue collar firms would on balance benefit bondholders of such firms or, to the contrary, the market might have concluded that the government might strong-arm financial creditors into taking a poor deal. Perhaps because of these deep ambiguities, two event studies of the Chrysler transaction have yielded contrary indications of its impact. One concluded it buttressed blue collar firms' bonds, while the other concluded that it hurt those bondholders. Compare Anginer & Warburton (2012, 25) with Blaylock, Edwards, & Stanfield (2012, 19).

Hence, another methodology could be useful in assessing whether Chrysler was typical or atypical bankruptcy practice, as event studies cannot give us assurance that the market was interpreting the Chrysler sale as typical or atypical. One way to ascertain whether the Chrysler transaction was within the existing norms of section 363 practice is to measure the levels of pre-bankruptcy debt that carried over to the purchasing entity. In the Chrysler transaction half of the pre-bankruptcy debt was carried over. How does this level compare to that in the other major section 363 sales of the prior decade?

3.2. The Prior Decade's Section 363 Sales

To start, we needed to identify the large firm section 363 sales prior to the Chrysler transaction. Professor Lynn LoPucki of UCLA Law School maintains the UCLA-LoPucki Bankruptcy Research Database of large firm bankruptcies. The database indicates whether the bankrupt sold its principal assets in a section 363 sale, with sufficient information for most sales to construct the ratios we sought for most observations.[12]

12 The database can be accessed at http://lopucki.law.ucla.edu/bankruptcy_research.asp.

We sought to include all bankruptcy cases filed under Chapters 7 and 11 of the U.S. Bankruptcy Code in which the debtor had $100 million or more of assets (in 1980 dollars) as of the last-filed 10-K prior to the bankruptcy filing. We do so for the time period ending with the Chrysler section 363 sale in June 2009, for those reorganizations in the LoPucki database as of January 4, 2011. We identified 110 filings that were large filings by these criteria.[13]

For our primary test, we sought data on the total purchase price for the assets and the portion of preexisting liabilities that moved over to the new entity. Where the LoPucki database lacked sufficient information, we consulted the court-filed reorganization plans and the relevant affidavits, typically from the selling company's chief financial officer, describing the section 363 sales plan. We typically obtained supplemental information from Pacer and SEC filings via Edgar. We discarded small sales of less than $15 million. Sixty-three observations had complete information. The chief financial officers' bankruptcy affidavits do not always provide complete information; indeed, parties sometimes file some relevant information under seal with the court, keeping it confidential from the public. Twenty-nine additional section 363 sales had incomplete information and 13 had deal structures that failed to fit our data structure. We have no reason to see the missing data as anything other than "missing at random."[14]

Table 1 lists the 363 sales and the dates of sale in columns 1 and 2. In columns 3 and 4, we list the total purchase price and the amount paid in cash. Columns 5 and 6 list the liability amounts assumed in the sale and the bankrupt's financial liabilities before the sale. Columns 7 and 8 indicate pre-sale pension liabilities and assumed pension liabilities. Inspection of column 5 shows that in 31 of the 63 reorganizations, no liabilities moved over with the sale and in many others

13 Whole-firm sales can be done under a § 1129 plan as well. The LoPucki database does not generally include § 1129 sales and, hence, our data generally does not. However, we would expect § 1129 sales to more closely hew to standard priorities and be less likely to have Chrysler-level transfer ratios, as § 1129 provides more formal avenues by which creditors can object. Hence, the absence of § 1129 sales, if there are many, is likely to bias our results away from the paper's conclusion that Chrysler was different.

14 In addition, there were four deals in which credit bidding played a major role.

A measurement issue is in play, although our sampling, described below in Section 3.3.2., indicates it is small. Sometimes the bankrupt has failed to perform on a contract. That failure is a debt of the bankrupt. A third-party, arms-length buyer may pick up that obligation and make good on it, to keep relations with that supplier smooth. That becomes an assumed debt in our tests. But if the bankrupt cures the failure before selling, the debt isn't picked up as transferred debt. Our sampling indicates the differences here are small. In Chrysler, however, the debts assumed were huge obligations to Chrysler's labor suppliers. In some ways, what made Chrysler different was that the cure to a supplier was of a size that would eat up the company's remaining value. That's where the controversy was.

Table 1. Descriptive data on 63 prior section 363 sales compared with Chrysler's

Company name	Date of 363 sale	Total purchase price (in $ millions)	Amount paid in cash	Total liabilities assumed by the purchasing entity	Total financial liabilities upon filing for bankruptcy (including pension liabilities)	Total pension liabilities	Assumed pension liabilities	Pension liabilities/total liabilities > 0.5
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
ABC-NACO, Inc.	12/11/2001	67	67	0	239	8	0	No
ACT Manufacturing, Inc.	7/2/2002	45	30	15	324	1	0	No
Adelphia Communications Corp.	6/28/2006	18,000	12,500	0	16,187	0	0	No
Allegiance Telecom Inc.	2/20/2004	707	325	71	1,128	0	0	No
ANC Rental Corp	8/21/2003	3694	233	3,251	3,426	0	0	No
Asia Global Crossing, Ltd.	1/29/2003	791	90	701	1,111	0	0	No
AT&T Latin America Corp.	11/4/2003	207	171	36	893	0	0	No
BearingPoint, Inc.	4/17/2009	504	498	7	1,135	122	0	No
Best Products Company, Inc. (1996)	5/29/1997	410	410	0	220	0	0	No
Bethlehem Steel	4/22/2003	1053	872	166	7,561	7,100	35	Yes
BMC Industries Inc.	10/31/2004	66	66	0	154	24	0	No
Budget Group Inc.	11/8/2002	2910	110	2,800	3,563	18	0	No
Builders Transport Inc.	7/10/1998	42	42	0	193	0	0	No
Cambridge Industries, Inc. of DE	6/23/2000	337	337	0	380	27	0	No
Casual Male Corporation	5/7/2002	215	170	45	214	0	0	No
Coho Energy, Inc. (2002)	8/14/2002	223	223	0	299	0	0	No
Cone Mills Corp	2/10/2004	85	45	39	183	11	4	No
Costilla Energy, Inc.	6/9/2000	126	126	0	228	0	0	No
Derby Cycle Corp	10/2/2001	43	20	23	207	0	0	No
Divine, Inc.	5/12/2003	60	48	12	80	0	0	No
DTI Holdings, Inc.	2/13/2003	39	39	0	355	0	0	No
e.spire Communications, Inc.	6/4/2002	68	18	50	994	0	0	No
Einstein Noah Bagel Corp.	6/1/2001	190	160	30	184	0	0	No
Flooring America	12/15/2000	59	59	0	248	0	0	No
FoxMeyer Health Corp.	11/15/1996	598	23	575	433	65	0	No

(continued)

Table 1. Continued

Company name	Date of 363 sale	Total purchase price (in $ millions)	Amount paid in cash	Total liabilities assumed by the purchasing entity	Total financial liabilities upon filing for bankruptcy (including pension liabilities)	Total pension liabilities	Assumed pension liabilities	Pension liabilities/total liabilities > 0.5
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Geneva Steel Holdings Corp. (2002)	2/6/2004	40	40	0	2,132	2,000	0	Yes
Genuity Inc.	1/24/2003	460	144	322	2,826	0	0	No
Grand Union (2000)	12/8/2000	302	302	0	342	63	0	No
GST Telecommunications, Inc.	9/21/2000	689	647	42	1,243	0	0	No
Impath, Inc.	4/7/2004	215	215	0	98	0	0	No
International Fibercom, Inc.	4/16/2002	20	20	0	114	0	0	No
IT Group, Inc.	4/25/2002	252	53	147	759	0	0	No
Just For Feet, Inc.	3/7/2000	70	67	3	379	0	0	No
Kellstrom	6/13/2002	96	96	0	360	0	0	No
Mid-American Waste Systems, Inc.	3/11/1997	201	152	49	243	0	0	No
Monaco Coach Corporation	5/22/2009	55	50	5	75	0	0	No
National Steel Corporation	4/21/2003	1050	850	200	3,693	2,600	30	Yes
Network Plus Corp.	3/20/2002	16	16	0	196	0	0	No
New Century Financial Corporation	2007 (various)	254	254	0	33,350	0	0	No
Noble International, Ltd.	5/29/2009	107	4	103	120	2	0	No
Oakwood Homes Corp.	4/20/2004	373	373	0	325	0	0	No
Payless Cashways, Inc. (2001)	9/19/2001	85	85	0	293	0	0	No
Phar-Mor, Inc. (2001)	7/18/2002	134	134	0	97	2	0	No
Pillowtex Corp. (2003)	10/7/2003	121	121	0	356	147	0	No
Polaroid Group	7/5/2002	450	250	200	957	49	0	No
Pope & Talbot, Inc.	2008 (various)	106	106	0	446	91	68	No
Propex, Inc.	3/27/2009	82	82	0	430	50	0	No
Read-Rite Corp.	7/24/2003	172	95	77	67	0	0	No
Refco Finance Inc.	11/14/2005	319	282	37	1,041	0	0	No
Rouge Industries, Inc.	12/22/2003	296	286	10	212	117	0	Yes
Silicon Graphics, Inc. (2009)	4/30/2009	43	43	0	157	0	0	No
SONICblue, Inc.	2003 (various)	41	41	0	190	0	0	No

(continued)

Table 1. Continued

Company name	Date of 363 sale	Total purchase price (in $ millions)	Amount paid in cash	Total liabilities assumed by the purchasing entity	Total financial liabilities upon filing for bankruptcy (including pension liabilities)	Total pension liabilities	Assumed pension liabilities	Pension liabilities/total liabilities > 0.5
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Stone & Webster, Inc.	7/14/2000	594	38	450	46	0	0	No
Thorn Apple Valley, Inc.	8/26/1999	112	110	2	140	0	0	No
Trans World Airlines, Inc. (2001)	5/23/2002	2496	430	1,332	1,495	767	734	Yes
Tweeter Home Entertainment Group, Inc.	7/13/2007	38	38	0	46	0	0	No
U.S. Aggregates, Inc.	5/23/2002	141	141	0	216	0	0	No
Ultimate Electronics, Inc.	4/18/2009	47	47	0	70	0	0	No
Velocita Corp.	11/7/2002	37	2	0	638	0	0	No
VeraSun Energy Corporation	3/16/2009	556	556	0	1,536	0	0	No
Weirton Steel Corp.	4/22/2004	237	158	79	699	350	0	Yes
Wherehouse Entertainment, Inc.	9/29/2003	41	36	5	64	0	0	No
Winstar Communications, Inc.	12/19/2001	43	30	0	3,653	0	0	No
Non-Chrysler mean		650	366	173	1,572	216	14	
Non-Chrysler median		141	106	2	325	0	0	
Non-Chrysler mode		215	38	0	—	0	0	
Non-Chrysler standard deviation		2316	1565	562	4,679	976	93	
Chrysler	6/10/2009	11,300	2000	17,400	26,767	13,500	8,100	Yes

This table describes data on 63 large sales under section 363 of the Bankruptcy Code. The table provides data in column (3) on the total purchase price, the amount paid in cash in column (4) (which was often 100 percent of the purchase price), the total liabilities of the bankrupt that the purchaser assumed in column (5) (which were often at, or near, zero), the bankrupt's total financial liabilities upon filing in column (6), the bankrupt's total pension liabilities in column (7), and the size of the pension liabilities assumed in column (8). High-pension liability bankruptcies are noted in column (9). We then use several of these values to construct the ratios in Table 2.

The purchase price (column (3)) is generally the sum of the cash paid (column (4)) and the total liabilities assumed (column (5)). But for seven observations, equity in the purchasing entity or an affiliate was part of the purchase consideration and, hence, for these seven column (3) does not equal the sum of columns (4) and (5).

the liability transfer was minimal in relation to the total purchase price and the total pre-sale liabilities.

The total purchase price summed up the cash consideration paid, the value assigned to any equity consideration transferred, and the liabilities assumed. The size of the liabilities assumed was typically disclosed in the 8-K announcement of the sale, the filings made with the plan of reorganization, or, occasionally, in the buyer's 10-K.

Table 2 displays the calculated ratios. Column 1 again lists the reorganizations examined. Column 2 shows the ratio of the liabilities assumed to the purchase price. In many reorganizations, no or minimal liabilities were assumed. The mode for the sample is zero. In the Chrysler 363 sale, the ratio of liabilities assumed to total purchase price was 0.90. The extent of the liability assumption is the central distributional aspect of the Chrysler sale. Debts assumed had claims on Chrysler's core operations; debts left behind did not. Pre-Chrysler practice showed a mode of no assumed liabilities, with a mean of 0.21 and a median of 0.02. Chrysler's 0.90 ratio of liabilities assumed to purchase price was more than two standard deviations above the mean ratio of debt assumed to purchase price. As such, that sale had much more room to deviate from priority than prior section 363 sales. Because the underlying distribution is not necessarily a normal distribution, we used the non-parametric Wilcoxon rank-sum test. The test measures the likelihood of Chrysler's ratio being a random draw from the pool of 63 prior section 363 sales. The test rejects the possibility that it could come from the prior sales, with a p-value of it being consistent with the prior sales being less than 0.01. Figure 3 illustrates.[15]

We also calculated the portion of pre-bankruptcy liabilities that rode through the section 363 sale into the emerging entity. These are displayed in column 3 of Table 2. While any amount above zero that moves could mask a priority violation, the potential for gross priority violations is higher when a large portion of the pre-filing debt moves and a significant level stays behind. All of the moving debt is left free from the ordinary chapter 11 controls on priority (or creditor approval and judicial inquiry). In Chrysler's reorganization 48 percent of the pre-bankruptcy debt moved over, with 52 percent correspondingly left behind. A 50 percent move rate would presumably be the most susceptible to priority distortion. But for the large majority of reorganizations in the sample, less than 10 percent of the pre-bankruptcy liabilities moved over. The median is

15 To generate the graphic, which is for illustrative purposes, an underlying Weibull distribution was assumed.

Table 2. Liabilities assumed in Section 363 sales as a percentage of purchase price, total liabilities, and cash paid, and cash paid as a percentage of total purchase price

Company name (1)	Total assumed liabilities (inc. pension) as a portion of purchase price (2)	Total assumed liabilities (inc. pension) as a portion of total liabilities (inc. pension) (3)	Total assumed liabilities (inc. pension) to cash paid in 363 sale (4)	Cash as a portion of purchase price (5)
ABC-NACO, Inc.	0.00	0.00	0.00	1.00
ACT Manufacturing, Inc.	0.33	0.03	0.50	0.67
Adelphia Communications Corp.	0.00	0.00	0.00	0.69
Allegiance Telecom Inc.	0.10	0.05	0.22	0.46
ANC Rental Corp	0.88	0.55	13.95	0.06
Asia Global Crossing, Ltd.	0.89	0.27	7.80	0.11
AT&T Latin America Corp.	0.17	0.03	0.21	0.83
BearingPoint, Inc.	0.01	0.00	0.01	0.99
Best Products Company, Inc. (1996)	0.00	0.00	0.00	1.00
Bethlehem Steel	0.16	0.01	0.19	0.83
BMC Industries Inc.	0.00	0.00	0.00	1.00
Budget Group Inc.	0.96	0.64	25.45	0.04
Builders Transport Inc.	0.00	0.00	0.00	1.00
Cambridge Industries, Inc. of DE	0.00	0.00	0.00	1.00
Casual Male Corporation	0.21	0.18	0.26	0.79
Coho Energy, Inc. (2002)	0.00	0.00	0.00	1.00
Cone Mills Corp	0.49	0.19	0.94	0.51
Costilla Energy, Inc.	0.00	0.00	0.00	1.00
Derby Cycle Corp	0.53	0.06	1.15	0.47
Divine, Inc.	0.19	0.06	0.24	0.81
DTI Holdings, Inc.	0.00	0.00	0.00	1.00

(continued)

Table 2. Continued

Company name	Total assumed liabilities (inc. pension) as a portion of purchase price	Total assumed liabilities (inc. pension) as a portion of total liabilities (inc. pension)	Total assumed liabilities (inc. pension) to cash paid in 363 sale	Cash as a portion of purchase price
(1)	(2)	(3)	(4)	(5)
e.spire Communications, Inc.	0.74	0.04	2.78	0.26
Einstein Noah Bagel Corp.	0.16	0.14	0.19	0.84
Flooring America	0.00	0.00	0.00	1.00
FoxMeyer Health Corp.	0.96	0.40	25.00	0.04
Geneva Steel Holdings Corp. (2002)	0.00	0.00	0.00	1.00
Genuity Inc.	0.70	0.08	2.24	0.31
Grand Union (2000)	0.00	0.00	0.00	1.00
GST Telecommunications, Inc.	0.06	0.03	0.06	0.94
Impath, Inc.	0.00	0.00	0.00	1.00
International Fibercom, Inc.	0.00	0.00	0.00	1.00
IT Group, Inc.	0.58	0.14	2.80	0.21
Just For Feet, Inc.	0.04	0.01	0.04	0.96
Kellstrom	0.00	0.00	0.00	1.00
Mid-American Waste Systems, Inc.	0.24	0.10	0.32	0.76
Monaco Coach Corporation	0.09	0.02	0.10	0.91
National Steel Corporation	0.21	0.04	0.27	0.79
Network Plus Corp.	0.00	0.00	0.00	1.00
New Century Financial Corporation	0.00	0.00	0.00	1.00
Noble International, Ltd.	0.96	0.22	25.12	0.04
Oakwood Homes Corp.	0.00	0.00	0.00	1.00
Payless Cashways, Inc. (2001)	0.00	0.00	0.00	1.00
Phar-Mor, Inc. (2001)	0.00	0.00	0.00	1.00
Pillowtex Corp. (2003)	0.00	0.00	0.00	1.00
Polaroid Group	0.48	0.23	0.92	0.52

(continued)

Table 2. Continued

Company name (1)	**Total assumed liabilities (inc. pension) as a portion of purchase price** (2)	**Total assumed liabilities (inc. pension) as a portion of total liabilities (inc. pension)** (3)	**Total assumed liabilities (inc. pension) to cash paid in 363 sale** (4)	**Cash as a portion of purchase price** (5)
Pope & Talbot, Inc.	0.45	0.14	0.82	0.55
Propex, Inc.	0.00	0.00	0.00	1.00
Read-Rite Corp.	0.45	0.43	0.81	0.55
Refco Finance Inc.	0.12	0.00	0.13	0.88
Rouge Industries, Inc.	0.03	0.01	0.04	0.97
Silicon Graphics, Inc. (2009)	0.00	0.00	0.00	1.00
SONICblue, Inc.	0.00	0.00	0.00	1.00
Stone & Webster, Inc.	0.76	0.82	11.84	0.06
Thorn Apple Valley, Inc.	0.02	0.01	0.02	0.98
Trans World Airlines, Inc. (2001)	0.53	0.56	3.10	0.17
Tweeter Home Entertainment Group, Inc.	0.00	0.00	0.00	1.00
U.S. Aggregates, Inc.	0.00	0.00	0.00	1.00
Ultimate Electronics, Inc.	0.00	0.00	0.00	1.00
Velocita Corp.	0.01	0.00	0.17	0.05
VeraSun Energy Corporation	0.00	0.00	0.00	1.00
Weirton Steel Corp.	0.33	0.04	0.50	0.67
Wherehouse Entertainment, Inc.	0.12	0.02	0.14	0.88
Winstar Communications, Inc.	0.00	0.00	0.00	0.71
Pre-Chrysler mean	0.21	0.09	2.04	0.75
Pre-Chrysler median	0.02	0.00	0.04	0.94
Pre-Chrysler mode	0.00	0.00	0.00	1.00
Pre-Chrysler standard deviation	0.30	0.17	5.78	0.33

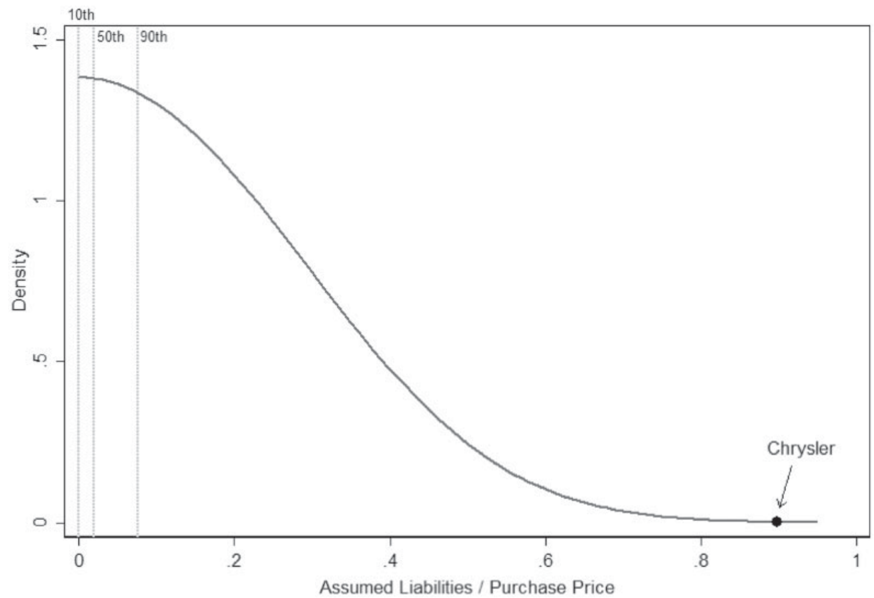
(continued)

Table 2. Continued

Company name (1)	Total assumed liabilities (inc. pension) as a portion of purchase price (2)	Total assumed liabilities (inc. pension) as a portion of total liabilities (inc. pension) (3)	Total assumed liabilities (inc. pension) to cash paid in 363 sale (4)	Cash as a portion of purchase price (5)
Chrysler ratios	0.90	0.48	8.70	0.10
2 standard deviation range from the mean	0.81	0.44	13.60	0.09
Chrysler values' deviation from the mean	2.30	2.26	1.15	1.96
Wilcoxon test of Chrysler as draw from prior 363 sales	$p < 0.01$	$p < 0.01$	$p < 0.01$	$p < 0.01$
Unpaid pension subsample:				
Pre-Chrysler high unpaid pension mean	0.14	0.07	0.26	0.83
Pre-Chrysler high unpaid pension median	0.09	0.02	0.14	0.88
Pre-Chrysler high unpaid pension mode	0.00	0.00	0.00	1.00
Pre-Chrysler high unpaid pension standard deviation	0.17	0.17	0.34	0.18
Wilcoxon test of pre-Chrysler high pension as not drawn from full sample	$p > 0.35$	$p > 0.36$	$p > 0.36$	$p > 0.58$
Chrysler values' deviation from the high-pension median	4.66	2.35	24.82	4.38

In this Table 2, we construct basic ratios for the 63 sales under section 363 of the Bankruptcy Code, prior to Chrysler's. In column (2), we construct the ratio of assumed liabilities to the purchase price, a number that is often at, or near, 0. In column (2), we construct the ratio of liabilities assumed by the purchasing entity to all liabilities of the bankrupt at the filing for bankruptcy. Column (3) shows the ratio of assumed liabilities to cash paid in the section 363 sale. Column (4), which is largely reciprocal to column (2), shows the ratio of cash paid to purchase price. For each ratio, the Chrysler result significantly differs from the prior mean, with the p-value on the Wilcoxon test less than 0.01. We also report the mean, median, and mode for prior section 363 sales of bankrupt firms having, like Chrysler, pension liabilities in excess of 50 percent of all financial liabilities. The ratios for these prior high-pension section 363 sales did not significantly differ in Wilcoxon tests from the other pre-Chrysler section 363 sales.

Figure 3. Total assumed liabilities as a portion of purchase price in section 363 sales.



zero. Chrysler's ratio of liabilities moved to total pre-bankruptcy liabilities is well above the mean, and indeed is about two standard deviations above the mean, although with a half-dozen sales showing high assumption ratios, the size is not unprecedented, as Figure 4 illustrates. (We examine these six section 363 sales below.) The Wilcoxon signed-rank test again yields a p-value of less than 0.01.

We also calculated the ratio of assumed liabilities to cash paid. In Chrysler's case, the liabilities assumed were more than 8 times the $2 billion in cash paid. As column 4 of Table 2 indicates, that ratio is less than 1 for 50 of the decade's other 63 sales, although a few sales had a ratio that exceeded Chrysler's. But although the Chrysler ratio of cash paid to liabilities assumed is not wholly unprecedented, it remains well outside the norm, as illustrated in Figure 5. Once more, the Wilcoxon test shows the p-value of Chrysler being drawn from the prior sample was again less than 0.01.

The last column in Table 2 shows the portion of the purchase price that was paid in cash. For Chrysler, 10 percent of the purchase price was paid in cash. On average, 75 percent is paid in cash and the mode is at 100 percent. Again, Chrysler's cash paid as a proportion of purchase price was much lower than the mean, median, and mode, coming in at nearly two standard deviations below the mean, as illustrated in Figure 6. And again the p-value of the Wilcoxon test was less than 0.01.

Figure 4. Total assumed liabilities as a portion of total liabilities in section 363 sales.

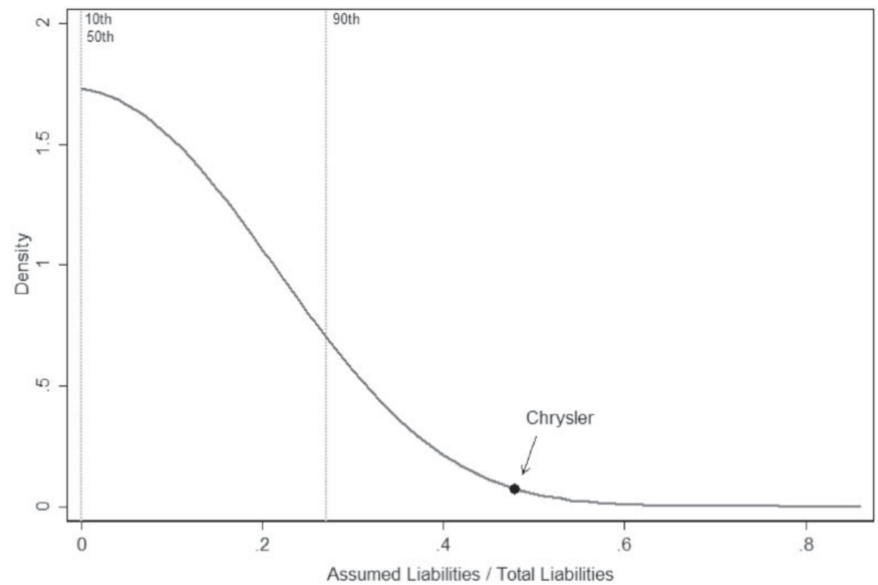


Figure 5. Total assumed liabilities to cash paid in section 363 sales.

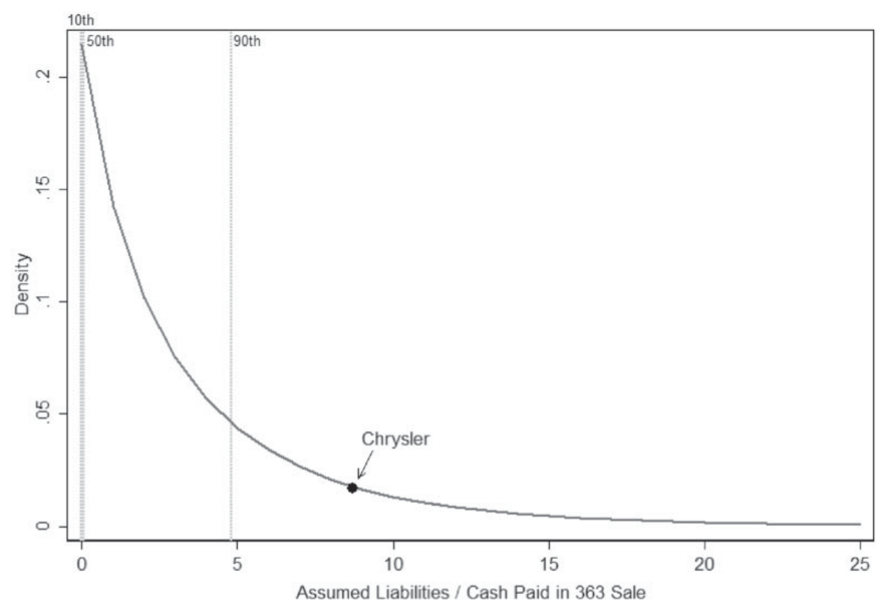
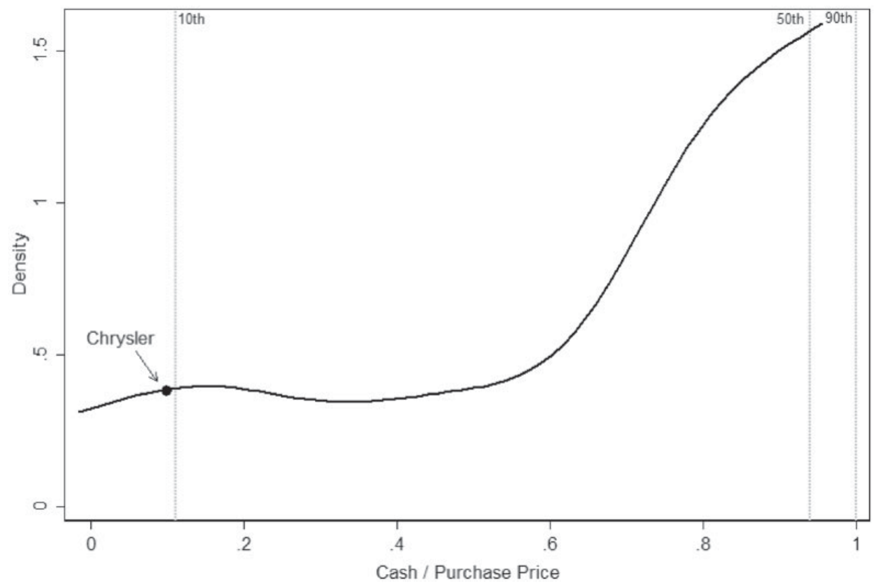


Figure 6. Cash paid as a portion of purchase price in section 363 sales.



3.3. The Chrysler Debt Assumed

Another aspect of the Chrysler debt assumed demonstrates how Chrysler was different. The debt assumed was not just any financial debt of the company, but was largely the company's pension and health care obligations to its union and its employees. Could courts have established a de facto priority for unpaid, unfunded pension plans?

3.3.1. Critical Suppliers in Bankruptcy

Bankruptcy courts sometimes award payment in full to the bankrupt's critical suppliers, even though bankruptcy law's baseline distribution rule is that they should share ratably with the bankrupt's other unsecured creditors. The theory is that such suppliers, if they withheld their patronage, could damage the other creditors more than the extra value accorded them by the special payment. As Judge Frank Easterbrook has analyzed, however, judges should make that analysis, or at least reach an explicit judgment. And, he concluded, it will be rare that a rational supplier would refuse profitable future sales because of sunk losses. Hence, in Easterbrook's analysis in a leading circuit court opinion (Easterbrook opinion, *In re* Kmart (2004, 873)), such priority jumping should rarely be permitted and, when permitted, a bankruptcy court following Easterbrook's analysis must find the critical supplier payment will benefit the bankrupt's other creditors, by increasing the total value of the bankrupt business. It is unclear, however, whether bankruptcy courts are carefully implementing Judge Easterbrook's concepts.

The Chrysler bankruptcy could be seen, though, as an instance of paying off a large, critical supplier. The United Auto Workers could confer significant advantages on the operation (and, hence, to the other creditors) by being cooperative and could inflict significant losses on the bankrupt's operations by being uncooperative. The UAW could also be seen as having been able to bring extra value to the enterprise by obtaining investment from an outside source (Washington) at favorable terms that only it could obtain. By this logic, the UAW should get the value of those favorable investment terms.

All this is potentially correct analytically. The typicality or atypicality of Chrysler helps to assess whether the government payments, and only the government payments went to the favored creditors. That is, one argument justifying the Chrysler reorganization is that no financial creditor lost, because the government subsidized the sale, with the UAW obtaining a large finder's fee. Another argument is that the Chrysler reorganization largely conformed to pre-Chrysler bankruptcy practice. It's the second argument that we are examining in this study. Perhaps the owners of the pension and health debts of Chrysler received extra benefits because they, and they alone, could bring to Chrysler new investment on favorable terms from Washington. But the question for consistency with good bankruptcy practice should be whether the pension and related claimants got even more than credit for obtaining a concessionary investment in Chrysler, *i.e.* whether they *also* got value out from the secured claims. That question is not answered by simply invoking the gift quality of the government's investment.

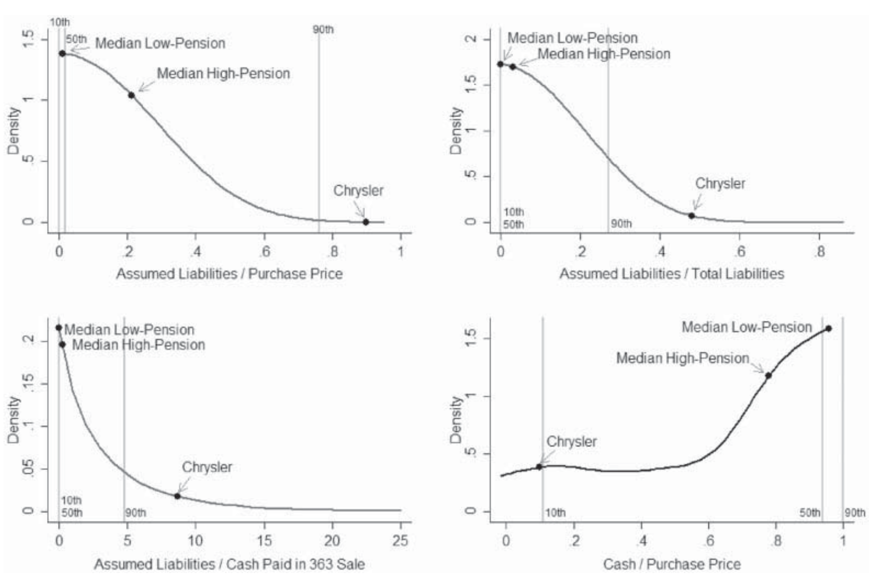
The possibility that the UAW received more than their priority entitlement could be largely excluded if the deal structure conformed to typical pre-Chrysler practice, which would have made priority distortions difficult to engineer. But we cannot exclude that possibility, as Chrysler's deal structure differed sharply from the norm.

3.3.2. Previous High-Pension Section 363 Sales

Let's examine the possibility that courts regularly pay off pension and similar liabilities in full, perhaps without fully articulating a distributional justification or a justification similar to the critical vender doctrine. To see if such a de facto priority was in play before Chrysler's reorganization, we identified the reorganizations with large unpaid pension liabilities, using firms in which unfunded pension liabilities exceeded one-half of the firm's total financial liabilities at the date of filing. (The Chrysler ratio here was 0.5.) The results were substantially similar to those for the entire sample of large reorganizations. The mean for assumed liabilities as a portion of purchase price for heavy pension bankruptcies was 0.21 and the median was 0.19. Chrysler's was 0.90, more than three standard deviations from the mean for the high-pension subsample. For assumed liabilities to total liabilities, the high-pension mean was 0.11 and the median was 0.03. The Chrysler assumption level was 0.48, two standard deviations from the high-pension firms' mean.

We ran Wilcoxon rank-sum tests for high-pension bankruptcies, defining high-pension bankruptcies as those in which the ratio of pension liabilities to all financial liabilities when the firm entered bankruptcy exceeded 0.5 (again, 0.5 was the ratio for Chrysler). The goal was to see whether bankruptcy typically had strong pension carryovers in section 363 sales or whether the pre-Chrysler high-pension firms had carryovers not significantly differing from firms with ordinary pensions. The four ratio results, reported in Table 2 and detailed in the unpublished Appendix Table A2, had Wilcoxon p-values in the 0.35–0.58 range, indicating that the high-pension bankruptcies, unlike Chrysler's, did not significantly differ from other large-firm bankruptcies. Again, we emphasize that these firms had pension liabilities of the same size as, or larger than, Chrysler's. Yet their carryover ratios in their section 363 sales resembled the low-pension section 363 sales more than they resembled Chrysler's (Figure 7).

Figure 7. Pre-Chrysler section 363 sales of firms with pension liabilities>0.5 total liabilities.



* * *

For several of our ratios, Chrysler had company at the far end of the measured spectrum. But in most instances, its companions at the far end differed from ratio to ratio. Hence, we sought to test whether combining the tests would change any of the results. Factor analysis combined the variables into a single scalar. As we anticipated, a single factor with an eigenvalue over 1 emerged, with all four variables loading highly on the single dimension; the rotated loadings ranged in absolute value from a high of 0.97 (the first ratio) to a low of 0.81 (the third). The result for the Wilcoxon sign-rank test here supports the hypothesis that the Chrysler results significantly differed from the sample, with a p-value <0.001.

Similarly, the results could have been subject to a "multiple testing problem." Holm's sequential Bonferroni procedure was used to ascertain any adjustment needed to the required p-values (Simes 1986). The Bonferroni procedure results (unpublished) show significance persisting across the 4 tests.

Finally, we checked whether variation in industry could be a factor. To check, we restricted the sample to manufacturing firms, by using the government's Standard Industrial Classification (SIC) codes, and then repeated the sign-rank test on the manufacturing sample. Results were again significant for all four ratios, with significance at $p < 0.001$. These results, recorded in Appendix Table A3, indicate that Chrysler differed from the typical manufacturing firm section 363 sale.

* * *

Thus, the results indicate that Chrysler differed sharply from prior practice. We also reviewed the 14 post-Chrysler 363 sales for which full data is available. While this data is insufficient to accurately measure Chrysler's impact on bankruptcy practice, these preliminary results indicate that Chrysler may be a one-off deviation from bankruptcy practice. Results are tabulated in Appendix Table A4.

Recall that more debt was carried over to the purchasing firm in the Chrysler sale than was typical beforehand. An analysis of the limited post-Chrysler data indicates that the Chrysler transaction remains atypical. Before Chrysler's, the mean debt assumed as a portion of total purchase price was 0.21 (Chrysler was 0.9). The average debt assumed amounted to 11 percent of the total purchase price for the 14 post-Chrysler 363 sales, which is not far from the pre-Chrysler average. And in Chrysler, nearly half of the pre-bankruptcy debt was assumed by the purchasing entity, a ratio much higher than the pre-Chrysler average of 0.09. The post-Chrysler data indicates that on average, only 14 percent of pre-bankruptcy liabilities were carried over to the purchasing entity, again suggesting that Chrysler was unique. Several years from now, when we have a larger dataset of post-Chrysler 363 sales, one will be able to better ascertain whether Chrysler's atypicality had a detectable impact on bankruptcy practice. Indications now are that it was a one-off deviation from general practice.

* * *

The interaction between supplier debt assumed and supplier debt paid during the reorganization could muddy some of the data ratios. For some reorganizations, the bankrupt could pay off pre-bankruptcy debt to suppliers. For other reorganizations, the 363 buyer sale could assume that debt and pay it off. To the extent that the bankrupt's trade creditors are always paid, but are typically paid by the bankrupt not by the buyer, then the Chrysler numbers could appear to be different only because of a secondary transactional transformation in who pays off that trade debt.

To assess how likely this possibility was, we revisited the bankruptcy filings for a random sampling of about one-quarter of the firms reported in Tables 1 and 2 to obtain the proportion of liabilities on the filing date that were accounts payable. The average accounts payable level at filing was only 0.1. Hence, even if payables prior to Chrysler were always paid off during the chapter 11 proceeding (which we do not know to be so) instead of being assumed by the 363 buyer, and even if we then attributed that full payoff of payables to the debt assumption numbers, the assumption level could change by a maximum of only 10 percent, closing the two standard deviation gap between the Chrysler level and the pre-Chrysler average by only half of a standard deviation. Hence, trade debt payoff by the bankrupt (instead of by the buyer) does not drive the large difference between the Chrysler and pre-Chrysler 363 sale characteristics.[16]

3.3.3. Other High Assumed-to-Total Debt Section 363 Sales

Finally, although the data presented supports the proposition that Chrysler's structure deviated from the prior practice in the vast bulk of section 363 sales, six reorganizations had assumed-to-total ratios similar to Chrysler's. But our

16 Details are in the unpublished appendix, in Appendix Table A5. This sampling does not in itself eliminate the logical possibility that courts arrange for all trade creditors and especially for all labor-associated creditors to be paid in full, with Chrysler's difference then being that its labor-based claims were just very high. However, the fact that the pre-Chrysler high-pension arrearage firms (see p. 24) had much less arrearage assumed by their 363 buyers than did Chrysler's is a result sharply inconsistent with full payoff being a strong pre-Chrysler practice in this dimension.

examination of the available information for these six (ANC Rental, Budget, FoxMeyer, ReadRite, Stone & Webster, TWA) indicates that they generally presented fewer risks of priority distortions than did Chrysler's: either the bankruptcy courts oversaw strong auctions or the debt assumed was secured debt that had to move with the assets, or, for several sales, both. Two of the six, Budget and ANC, were car rental companies. In their bankruptcies, the debt assumed was the leases on the rental fleet; a buyer had to assume that secured debt to take over the business and, as long as the cars were worth more than the debt secured, priority would not be violated. Because a third-party was buying the rental fleet, subject to the security interest, at least one marketplace actor was convinced that the value of the security was equal to or in excess of the amount owed. (In Chrysler, it was the secured debt that was left behind, while the unsecured debt was assumed.) In ANC and Stone & Webster, there appeared to have been significant auctions. (The auction terms in these section 363 sales, for example, were not limited to the basic deal, as they were in Chrysler, and there were multiple bidders.) In Stone & Webster, the bankrupt was bid away in the section 363 sale from the bankrupt's preferred bidder; in ANC, there were 35 prospective bidders, 29 executed confidential agreements, 22 bidding groups, and 4 second-round bidders. In FoxMeyer and Read-Rite, the court information was not as detailed, but the discussion implies that a competitive auction occurred. Only TWA's 363 sale, itself quite controversial, (Eckbo 2001) did not evince such protections.

Hence, these results for prior reorganizations with high assumed debt ratios, summarized with their sources in the unpublished appendix, in Appendix Table A6, support the idea that Chrysler's section 363 sale structure deviated from prior practice.

4. CONCLUSION: HOW AND WHY CHRYSLER WAS DIFFERENT

The Chrysler reorganization attracted significant media attention and discussion. Financial players, such as Warren Buffet, saw it as a sharp rejection of normal bankruptcy creditor priorities, while transactional and government policy defenders argued that the transaction was typical for bankruptcy practice.

To ascertain where Chrysler fit with prior practice, we first examined the mechanisms of the potential priority distortions. Those potential distortions would have come from the transactional structure of the sale, which carried large preexisting liabilities from old Chrysler over to the purchasing entity. That large carryover had the potential to under-pay or over-pay one side or the other: If considerable cash flowed into the old Chrysler, the left-behind creditors could do better than the carried-over creditors. If little cash flowed in, but the operational value largely shifted into the emerging operations, the left-behind creditors could have done worse, perhaps much worse, than the carried-over creditors. The left-behind creditors were paid 29 percent of their claims, while in form the carried-over creditors were promised to be paid a range, with a low promise of 46 percent of their claim to a high promise of 100 percent. The true value of their claims depends on the likelihood of eventual realization at the time of the transaction.

In Chrysler, the assumed liabilities were 90 percent of the total purchase price. The pre-Chrysler mean for liability carryover was only 21 percent of the purchase price. Chrysler was more than 2 standard deviations above the prior mean.

Accordingly, since the carried-over debt was usually light in section 363 sales, both as a percentage of the sales price and as a percentage of the pre-bankruptcy liabilities, then the potential for priority distortions had been limited. In Chrysler, however, the size of the carried-over liabilities was more than 8 times the amount of cash paid. The pre-Chrysler mode for carried-over liabilities is zero and the mean 2. These results suggest that Chrysler was different and that the terms of its section 363 sale increased the potential for priority distortion.

Similarly, 48 percent of Chrysler's pre-bankruptcy liabilities were carried over to the new entity in the Chrysler reorganization; before Chrysler, the mean carryover was only 9 percent. In Chrysler, only 10 percent of the Chrysler purchase was paid in cash, the rest in assumed liabilities; pre-Chrysler cash paid had a mode of 100 percent, a median of 94 percent, and a mean of 75 percent. For each of the four ratios, the Wilcoxon rank-sum test yields a p-value of less than 0.01, indicating a substantial likelihood that the Chrysler section 363 sale structure would not have normally drawn from the pre-Chrysler section 363 sales. Finally, there's no statistically significant evidence that pre-Chrysler courts were de facto according pension and labor claims priority over other creditors.

Hence, the evidence here is that the Chrysler sale indeed largely differed from prior practice in section 363 sales. That result raises some larger questions. If Chrysler was different, then the media and financial negative reaction to the purported priority deviations may have been a one-off event that is unlikely to be repeated, because government involvement in a bankruptcy reorganization of an industrial company during a financial and economic crisis is rare. The results also raise the larger question of the malleability of judicial proceedings. If the judiciary was willing to approve section 363 sale procedures and results that were largely outside of the norm, political economists may want to consider the strength of the judiciary's independence from the other two branches when the executive and legislative wish to shape a transactional outcome for public policy reasons.

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