AN ANALYSIS OF § 363(B) SALES: JUSTIFIED DEVIATIONS OR JUST DEVIATIONS?

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ABSTRACT

The use of 363(b) asset sales as a deviation from the traditional Chapter 11 form is recurrent amongst modern reorganizations. Section 363(b) functions as a quick sale mechanism provided by the Bankruptcy Code, in which a debtor may sell assets, or even entire firms, outside of a reorganization plan. In doing so, such sales, conducted outside of the ordinary course of business are not subject to the procedural requirements set forth by section 1129 of the Code. As a result, 363(b) sales can occur hastily—lacking the procedural hurdles that plan confirmation requires under the Chapter 11 form. The ability to quick-sell estate assets outside the parameters of a reorganization plan has sparked consistent controversy, mainly due to the various agency costs associated with 363(b) sales. As these sales continue to increase in size and frequency amongst modern Chapter 11 cases, it is important to discuss the risks that such agency costs pose to creditors and capital markets.

This Comment presents three cases—Enron, Lehman Brothers, and Chrysler—to evidence the rising trend for supplanting traditional reorganization mechanisms in favor of quick sales throughout the early 2000s. This Comment will analyze each case's incremental deviation from the traditional Chapter 11 form, as well as critique their individual uses of 363(b) sales. This Comment asserts that these cases are significant because they uniquely demonstrate the various risks and benefits yielded by section 363(b). Further, this Comment utilizes these case studies as arguments for when, and in what circumstances, the use of 363(b) sales as a deviation from the traditional Chapter 11 form, are justified. This Comment discusses the

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various dangers of approving 363(b) sales when they are premised on representations that exaggerate or misinform exigent circumstances—thus impairing the rights of creditors as well as the value of their underlying claims. Without valid, unexaggerated demonstrations of exigency, the various costs yielded by 363(b) sales cannot be appropriately counterbalanced, therefore allowing their improper use to continue virtually unchecked.

INTRODUCTION

The birth of the Chapter 11 form, emerging from the 19th century equity receiverships of America's major railroads,[1] proved to be a pivotal moment for bankruptcy law in the United States. The ability to reorganize and sell corporate assets via negotiations between debtors and creditors revolutionized the way in which companies dealt with issues of insolvency. Through the Chapter 11 form, debtors are able to rehabilitate a distressed firm, while still possessing the means to allocate losses amongst different players throughout the reorganization process.[2] Although a Chapter 11 reorganization is premised on a debtor's ability to apply insider expertise when reorganizing their business,[3] Chapter 11 provides various procedural safeguards to ensure that the rights of creditors remain intact before a

1. For more detailed information regarding the evolution of Chapter 11, beginning with the equity receivership, *see* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA, 48–69 (2001) (discussing the "the growth of an organized creditor lobby; the countervailing pressure of pro-debtor ideological currents whose influence is magnified by American federalism; and the emergence of an increasingly powerful bankruptcy bar").; Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 925–36 (2001).

2. Michelle J. White, *Corporate Bankruptcy as a Filtering Device: Chapter 11 Reorganizations and Out-of-Court Debt Restructuring*, 10 J.L. ECON. & ORG. 268, 269 (1994).

3. H.R. REP. NO. 95-595 at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179; *see also* Lynn M. LoPucki, *Chapter 11: An Agenda for Basic Reform,* 69 AM. BANKR. L.J. 573, 576–78 (1995) (noting that many Chapter 11 reorganizations are controlled by the debtor—usually incumbent management).

reorganization plan is confirmed.[4] Further, the structure of the Chapter 11 form, in many cases, is preferable to a Chapter 7 liquidation, which could result in less value for the distressed firm's creditors as well as lower economic output for the firm as a whole.[5] Therefore, for large firms with a substantial amount of assets and various kinds of creditors, the Chapter 11 form would seem to be the most effective and efficient mechanism for resolving complex issues of insolvency. However, as evidenced by some of the largest and most impactful bankruptcies of the 21st century, this notion does not hold true. Due to a sale mechanism provided by section 363(b) of the Bankruptcy Code, by which a debtor may speedily sell assets "free and clear" of all other claims "outside of the ordinary course of business,"[6] the traditional Chapter 11 form has now been criticized as outdated, costly, and exhaustingly lengthy.[7] Some have even gone as far as to argue that the traditional Chapter 11 form should be completely supplanted by 363 sales, due to their speed and ability to preserve firm value.[8] As a result of such aversions to lengthy reorganization processes, the use of 363 sales in lieu of traditional Chapter 11 plans has increased substantially since the 1990s.[9]

4. *See* 11 U.S.C. § 1129 (providing sixteen requirements that must be satisfied before a reorganization plan is approved. A debtor's ability to "cram-down" under § 1129(b) may only circumvent one of such requirements.).

5. *See* Jason Brege, *An Efficiency Model of Section 363(b) Sales*, 92 VA. L. REV. 1639, 1662–68 (2006) (discussing the expected value outputs of Chapter 7 liquidations versus Chapter 11 reorganizations, in various circumstances); *but see* Elizabeth B. Rose, *Chocolate, Flowers, and Sec. 363(B): The Opportunity for Sweetheart Deals without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 251–52 (2006) ("Traditionally, business reorganizations were seen as superior to liquidation because assets used in a particular industry for which they were designed were more valuable than the liquidation value of those same assets. . . . Today, the theory that assets are worth more within their existing industry does not have the same strength with twenty-first century, service-oriented industries, and dhebtors have increasingly altered their use of chapter 11 protections.").

6. 11 U.S.C. § 363 ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . .") ("The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate . . . .").

7. Luigi Zingales, *Why Paulson is Wrong*, ECONOMIST'S VOICE, Sept. 2008, *available at* https://www.degruyter.com/downloadpdf/j/ev.2008.5.5/ev.2008.5.5.1407/ev.2008.5.5.1407.pdf [https://perma.cc/BC88-LHXV] (arguing that Chapter 11 is too slow and financially burdensome on the American taxpayer).

8. Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002).

9. *See* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 12–13 (2007) ("In the 1990s, changes in bankruptcy practice and economic ideology combined to increase both the parties' preferences for sales and the likelihood that bankruptcy courts would approve sales.") (further noting that "[o]ne practice widely adopted by competing courts [in the 1990s] was to permit sale of the debtor's business as a going concern

This rise in popularity of so called "quick-sales"[10] has not only changed the way large-scale bankruptcies are conducted in the United States, but it has also called into the question the effectiveness and legitimacy of the Chapter 11 form. Instead of preserving and distributing asset value through negotiation, insolvent companies are quickly selling corporate assets via 363(b)—leading, in certain cases, to the disappearance of a company entirely as a going concern.[11] However, despite the speed and efficiency of 363 sales, there are also various costs associated with their use—costs which can prove harmful to creditors and other parties if left unchecked.[12] One notable cost is the ability to execute a 363 asset sale without many of the procedural safeguards that Chapter 11 provides, including disclosure and voting requirements.[13] Because of this, 363(b) sales have been referred to as the "side door" to Chapter 11,[14] and have elicited contentious commentary regarding their use. This Comment seeks to contribute to such discussions by presenting three Chapter 11 case studies that utilize section 363 distinctly, and in varying circumstances. This Comment presents such cases to evidence the rising trend of 363 sales in place of reorganization plans, and further discuss whether such uses of 363 sales were a justifiable, if not beneficial, deviation from the traditional Chapter 11 form, or whether they were used as a way to circumvent Chapter 11 safeguards for the sole purpose of speed.

The primary goal of corporate reorganizations, via Chapter 11 of the Bankruptcy Code, is to "rehabilitate fundamentally viable companies that face [. . .] a liquidity crisis."[15] Historically, a Chapter 11 reorganization was

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under section 363 of the Bankruptcy Code").

10. Stephanie Ben-Ishai & Stephen J. Lubben, *Sales or Plans: A Comparative Account of the New Corporate Reorganization*, 56 MCGILL L. J. 591 (2011) (using the term).

11. *See* LoPucki & Doherty, *supra* note 9 and accompanying text (discussing going-concern sales).

12. *See* Brege, *supra* note 5, at 1643–44 (discussing the various agency costs associated with 363 sales) (noting that "[the 363 sale] administrative process does not rise to the same level of detail as a full-blown plan confirmation proceeding, thus potentially leaving the door open for hard-to-detect misbehavior by the debtor-in-possession") (noting further that "managers may be pressured by creditors into a hurried sale of assets at less than the best price possible, robbing other creditors of the benefit of that best price").

13. Brege, *supra* note 5, at 1643–44.

14. Brege, *supra* note 5, at 1640 (noting that "Section 363(b) appears to offer a side door to escape the rigors of the typical bankruptcy plan confirmation").

15. Benjamin A. Berringer, *It's All Just a Little Bit of History Repeating: An Examination of the Chrysler and GM Bankruptcies and Their Implications for Future Chapter 11 Reorganizations*, 7 N.Y.U. J.L. & BUS. 361, 371 (2010); *See also* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY, § 1.2, at 6–8 (1997) (providing the goals of corporate reorganization); *but see* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576–80 (1998) (discussing the divergence between traditionalists and proceduralists

preferable to a Chapter 7 liquidation, because reorganizations helped to preserve "jobs and assets."[16] Reorganizations achieve these goals by allowing distressed debtors to remain in control of their business' operations while attempting to restructure their debt and return to financial stability.[17] This is primarily due to the value that an experienced debtor can provide, whether it be industry-specific or otherwise, when deciding how best to reorganize a distressed business.[18] However, in recognizing that there may be a misalignment between the incentives of debtors and creditors while undergoing reorganization, Congress included various provisions within the Bankruptcy Code to safeguard the balance between a debtor's control over a reorganization plan and the rights of creditors while negotiations take place.[19] On part of the debtor, the Code provides the following: the ability for a debtor-in-possession ("DIP") to remain in control of business operations throughout a reorganization,[20] an exclusivity period in which only the DIP can propose a reorganization plan,[21] the ability for the DIP to organize claims into various classes,[22] and the DIP's ability to "cramdown" a nonconsenting voting class when attempting to approve a plan.[23] These provisions are the primary ways in which the Code secures the debtor's control over when and how a reorganization plan is confirmed. However, to check this control, the Code, on part of creditors, provides for: the requirement of a disclosure statement and plan summary before voting occurs,[24] the requirement of creditor approval before a plan is confirmed,[25] and a requirement of "good

regarding the primary goals of reorganization).

16. H.R. Rep. No. 95-595 at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

17. Tabb, *supra* note 15, at 6–8; *See also* Brege, *supra* note 5, at 1639 (noting that Chapter 11 "involves voting rules and other sophisticated mechanisms for assembling a satisfactory plan of reorganization that seeks to preserve the operation of the corporation to some extent, while satisfying specific classes of claims and discharging others").

18. Richard F. Broude, Reorganizations Under Chapter 11 of the Bankruptcy Code, § 3.03, at 3–38 and 3–39 (Law Journals Seminars-Press 1986) (2005).

19 19. Rose, *supra* note 5, at 251.

20. *Contra* 11 U.S.C. § 1107(a) (providing for the appointment of a trustee, usually due to fraud or gross mismanagement).

21. 11 U.S.C. § 1121(b) (stating that "only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter").

22. Subject to the requirement that DIPs classify claims that are "substantially similar" within the same class. *Id*. § 1122(a). Debtors can strategically classify claims into various voting classes, to help ensure plan confirmation.

23. *Id*. § 1129(b)(1).

24. Usually containing asset valuation projections. *Id*. § 1125(b).

25. *Id.* § 1126(c) (requiring creditors who hold claims for "at least two-thirds in amount," and creditors possessing claims of "more than one-half in number" to accept the plan before it may be confirmed).

faith" when proposing a plan.[26] These provisions help ensure that creditors are well-informed and treated fairly[27] throughout the reorganization process. They further ensure that certain creditors are not "unfairly" favored, in regard to distributional concerns, above other creditors.[28] In a perfect world, all corporate reorganizations would proceed through this structure, thereby reducing baseline agency costs that may arise, as well as ensuring that final decisions regarding a plan are achieved somewhat cohesively. However, despite the Code's efforts to ensure that assets are dealt with consensually (or almost consensually) amongst creditors and debtors,[29] asset sales can occur outside the parameters of a reorganization plan, thereby not subject to the Code's procedural requirements. These include: sales occurring within the "ordinary course of business,"[30] and sales effectuated via section 363(b) of the Code (herein referred to as "363 sales").[31] The focus of this Comment is on the latter—via discussion of this distortion of the procedural safeguards that Chapter 11 provides.

Section 363(b) of the Bankruptcy Code allows a debtor to sell estate assets outside of a reorganization plan, "free and clear" of all obligations,[32] following notice and a hearing.[33] Through the mechanism provided by

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26. *Id*. § 1129(a)(3) (requiring that the "plan has been proposed in good faith and not by any means forbidden by law").

27. When determining whether the good faith requirement of § 1129(a)(3) is met, courts usually implement judicial discretion, and assess the totality of the circumstances involved in a given plan's confirmation. *See In re Coram Healthcare Corp*., 271 B.R. 228, 234 (Bankr. D. Del. 2001) (discussing a court's analysis of the good faith requirement of § 1129(a)(3)).

28. Known as the Absolute Priority Rule. *Id*. § 1129(b)(2) (requiring that a plan must be "fair and equitable" with respect to each class of claims. Further, it ensures the order of priority amongst creditors, whereby senior creditors are paid in full before any junior creditor can be paid, unless the secured creditors consent to subordinate any of their claims. After the junior creditors are paid, any remaining value is distributed amongst the equity holders, and so on.).

29. Such efforts include the fact that any proposed sale or liquidation of an asset within the bankruptcy estate is subject to § 1129's procedural requirements.

30. 11 U.S.C. § 363(c). Section 363(c)(1) provides:

> [i]f the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

31. 11 U.S.C. § 363(b) (2000) (amended 2005) (providing, in part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . .").

32. 11 U.S.C. § 363(f) (2000).

33. *Id*. § 363(b).

section 363(b), permissible asset sales include single asset sales, multiple asset sales, substantially-all asset sales, and even entire firms.[34] Rule 2002 requires that notice of such sales, outside of the ordinary course of business, be served to all creditors, or the unsecured creditors' committee, and must contain a detailed description of the sale's terms as well as define a time-frame by which objections may be filed.[35] However, some courts have held that general forms of notice, e.g. media or news outlets, can constitute sufficient notice, particularly when a case is widely publicized.[36] Thus, one of the few procedural hurdles that 363(b) sales require may be easily set aside by a bankruptcy judge.[37] The second procedural hurdle imposed by 363(b) is the presence of a hearing, which does little to prevent a quick sale from approval, as the judicial rubber-stamping of 363 sales has become commonplace in today's bankruptcy system.[38] Further, a given creditor's ability to object to a quick sale is also incredibly limited and often too costly to pursue following court approval.[39] Therefore, these relatively minimal procedural requirements, as compared to the hurdles provided by section 1129, increase the speed at which 363 sales can occur. In fact, distressed debtors often prefer 363(b) sales because they can be executed very quickly and without the burden of complying with the Chapter 11 requirements for plan confirmation.[40] While it is difficult to ascertain why the drafters of

34. Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 874 (2014).

35. Fed. R. Bankr. P. 2002 (as amended 2019).

36. *In re Lehman Bros. Holdings, Inc*., 415 B.R. 77, 80 (S.D.N.Y. 2009).

37. Fed. R. Bankr. P. 2002(a)(2) (stating that notice is sent within 21 days of a proposed sale outside of the ordinary course of business "unless the court for cause shown shortens the time or directs another method of giving notice").

38. *See* LoPucki & Doherty, *Bankruptcy Fire Sales, supra* note 9, at 40 (arguing that, following their empirical study, "we know of no modern case in which a large public company debtor proposed a sale and the court refused to approve it. Hearings are held and arguments made, but in the end the debtor that wants to sell gets its way."); *see also* Donald S. Bernstein, *U.S. Chapter 11 Today: A Funny Thing Happened on the Way to the Courthouse*, GLOBAL LEGAL GROUP, THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CORPORATE RECOVERY AND INSOLVENCY, at 5, 6 (2007), http://www.iclg.co.uk/khadmin/Publications/pdf/1215.pdf [https://perma.cc/24ZY-HUQA] (noting that "bankruptcy judges are more willing than ever to entertain the sale of the debtor's entire business").

39. *See* LoPucki & Doherty, *Bankruptcy Fire Sales*, *supra* note 9, at 38–39 (discussing the various obstacles for creditor objections of 363 sales, including: "[to]know that the sale price is inadequate, a party may need to spend millions of dollars for an independent valuation. Few unsecured creditors have a stake in the sale large enough to warrant such an expense.") (noting further that "the bankruptcy courts are unlikely to rule in the creditors' favor even when their objections are well taken").

40. Ben-Ishai & Lubben, *supra* note 10, at 596; *see also* George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 106 (2004) (arguing that debtor's using 363 sales may reap the benefits of speed without "having to satisfy the requirements for plan acceptance

section 363(b) allowed this provision to shirk such safeguards, it is nonetheless important to recognize that such safeguards are, in fact, being circumvented. Further, this procedural circumvention is primarily why 363 sales have encountered substantial criticism within the bankruptcy community, particularly with respect to agency costs. One primary agency cost associated with 363 sales is the potential for an over-secured creditor to use financial leverage to force a debtor into executing a quick sale before sufficient information as to the asset's value is acquired—potentially leading to an inefficient "fire sale."[41] By threatening to withhold financing, such that the distressed firm will be forced to shut down operations and deplete cash flow, DIP lenders can exert substantial control over debtors and, functionally, take charge of the reorganization process.[42] By forcing a quick sale to occur too soon, controlling creditors may recover their value in full, while disregarding further efforts to accurately value estate assets.[43] Because 363 sales do not require detailed disclosures as to an asset's value prior to a sale,[44] junior creditors may then receive less value than they otherwise would have during a reorganization.[45] Further, unsecured creditors are perhaps the most vulnerable to such harms, as they often lack the means to detect when a sale price is insufficient or, if they are able to determine price inefficiency, are otherwise unable to present adverse valuations in court.[46] Thus, 363(b) sales clear a path for controlling creditors to extend DIP lending long enough to force a quick sale, or may condition such lending upon the execution of a quick sale, with relative ease.[47] A related agency cost associated with 363(b)

contained in §§ 1121 through 1129 of the Bankruptcy Code").

41. *See* Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759, 761 (2011) ("[S]enior creditors' have an incentive to sell [a] company in a quick sale even when reorganization has a higher expected return for the estate. Thus, when senior creditors are exercising control – which they do in most cases – the result is an inefficient fire sale of the debtor's assets."); *see also* Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts*, 35 J. CORP. L. 469, 482 (2010) (noting that "[t]he 'fire sale' of valuable assets at depressed prices in a bankruptcy reduces creditor recoveries").

42. Jacoby & Janger, *Ice Cube Bonds*, *supra* note 34, at 906 (noting that "early sales, coupled with restrictive financing, facilitate the use of transactional leverage for individualized benefit, particularly by creditors holding prepetition undersecured claims").

43. *Id*.

44. As required by 11 U.S.C. § 1129.

45. LoPucki & Doherty, *supra* note 9, at 37; Brege, *supra* note 5, at 1643.

46. *See supra* note 9 and accompanying text; LoPucki & Doherty, *Bankruptcy Fire Sales*, at 37 ("When companies are sold for less than they are worth, the unsecured creditors are usually the losers. Typically, they will recover less than they would have in reorganization.").

47. Jacoby & Janger, *supra* note 34, at 901 ("An oversecured creditor that would like to exit the case quickly may be indifferent to maximizing value beyond its own payment. Such a creditor may extend debtor-in-possession financing just long enough for a quick sale."); *see also* Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter*

sales is the risk by which managers may be pressured, from controlling creditors, to disregard sale opportunities that would otherwise provide more value to the estate.[48] Therefore, section 363(b) provides a mechanism to avoid the procedural safeguards regarding voting, valuation, and disclosure that a traditional reorganization plan requires. Further, these agency costs are exacerbated in cases where entire firms are sold too quickly via 363(b) of the Code.[49] In certain cases, however, the use of 363(b) sales, even in light of such agency costs, is preferable to a formal reorganization—particularly where extremely exigent circumstances outweigh the costs of section 363(b).[50] Such exigent circumstances are often found when a firm's assets pose a substantial risk of rapid devaluation—likened to a "melting ice cube."[51] Given such circumstances, conducting a 363(b) sale may be the optimal solution for preserving firm value, by providing an efficient mechanism to structure and execute a sale. This Comment, thus, does not argue that the use of 363(b) sales are inherently impermissible, nor does it call for the provision's eradication from the Code entirely.[52] Rather, in cases where the costs of 363(b) sales are outweighed by *validly* exigent circumstances, their deviation from the traditional Chapter 11 form is justified—primarily by maximizing creditor recoveries that would have been lost.

Since the provision's addition to the Bankruptcy Code in 1977, 363(b)

11, 1 J. LEGAL ANALYSIS 511, 528 (2009) (discussing the misaligned incentives between senior secured creditors and junior creditors).

48. *See* Brege, *supra* note 5, at 1643 (outlining the various agency costs facing managers during a Section 363(b) sale).

49. This leaves disadvantaged creditors with little remedy for retrieval on the basis of mootness. *See e.g*. Ira L. Herman, *Finality Through Mootness: Protecting Capital Providers in Bankruptcy Cases*, ASSET SALES COMM. NEWSLETTER, Apr. 2007, at 7, *available at* https://www.abi.org/committee-post/finality-through-mootness-protecting-capital-providers-in-bankruptcy-cases [https://perma.cc/7N2F-PXDU].

50. *See* Melissa B. Jacoby & Edward J. Janger, *Bankruptcy Sales* in HANDBOOK ON CORPORATE BANKRUPTCY (B. Adler, ed., E. Elgar Publishing, Working Paper No. 2809764, forthcoming 2017), https://ssrn.com/abstract=2809764 [https://perma.cc/Q3NT-TBNW] (arguing that "363 sales make sense only when the benefits of speed outweigh such risks").

51. *See* Fred N. David, *Interpreting the Supreme Court's Treatment of the Chrysler Bankruptcy and Its Impact on Future Business Reorganizations*, 27 EMORY BANKR. DEV. J. 25, 36 (2010) (citing *Ind. State Police Pension Tr. v. Chrysler LLC*, 576 F.3d 108, 111 (2d Cir. 2009)) ("[T]he 'melting ice cube theory' could be applied to justify asset sales in any situation in which present circumstances rendered an asset's value certain to decrease in the near future.").

52. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 287 (2002) (presenting such an alternative if 363 sales are not adjudicated more narrowly).

sales have continuously increased in popularity.[53] What began as the Delaware court's attempt to attract the filings of the biggest, most complex restructuring cases,[54] is now a widespread industry practice in modern Chapter 11 reorganizations.[55] Prior to the 1990s, 363(b) sales were largely avoided or approved under very narrow circumstances.[56] However, the 1990s heralded a new era for quick sales, Professor Lynn LoPucki explains:

> [b]eginning in 1990, the Delaware bankruptcy court adopted a variety of practices that appealed to the "case placers"—the lawyers, executives, and DIP lenders who choose courts for bankrupt companies. By 1996, the Delaware bankruptcy court had a near-national monopoly on large public company bankruptcies, attracting thirteen of the fifteen such cases filed that year (87%). In the late 1990s, other courts responded by copying many of Delaware's practices, thus joining in the competition.
>
> One practice widely adopted by competing courts was to permit sale of the debtor's business as a going concern under section 363 of the Bankruptcy Code. Prior to the competition, courts had required "good business reason[s]" for selling a company without plan formalities and disclosures. Routine section 363 sale approval appealed to case placers because it was essentially an option for them to sell the company. If they chose to exercise the sale option, they could sell on short notice, without giving creditors either the opportunity to vote or the extensive disclosure statement required by reorganization law in connection with voting.[57]

Following this trend in the early 1990s, the use of 363 sales increased in both size and frequency, veering away from simple asset sales to quick

53. *See* H.R. REP. NO. 95-595, at 181–82 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6301–03 (presenting the legislative intent of the provision).

54. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 49–76 (2005) (discussing the various, forum-specific incentives that Delaware courts provided for large companies entering bankruptcy).

55. Jacoby & Janger, *supra* note 34, at 878–81 (citing a lengthy series of case law and empirical studies demonstrating the common use of 363(b) sales in modern reorganizations).

56. Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 730–31 (2009) (explaining that 363 sales were only approved in "exceptional situations" during the provision's earlier uses, as compared to modern cases, where they are much more common).

57. LoPucki & Doherty, *supra* note 9, at 12–13.

sales of substantially all of a firm's operations.[58] An empirical study of large, public companies filing for Chapter 11 demonstrated that one hundred and fifty filings, between 1978 and 2012, implemented 363 sales of substantially all operational assets.[59] As early as 2002, Professors Douglas Baird and Robert Rasmussen recognized the sharp increase in 363 asset sales, and discussed their potential ability to supplant the traditional Chapter 11 reorganization altogether.[60] The trend proved to continue. In 2009, an empirical study demonstrated that roughly two-thirds of all large bankruptcies resulted in the sale of an entire firm rather than a traditional reorganization plan.[61] By 2013, 363 quick sales involving sales of entire firms became "the norm" for modern Chapter 11 filings.[62] For modern reorganizations, it also is common for debtors to file for Chapter 11 after announcing an intended going-concern sale—consequently filing sale motions within days of entering Chapter 11.[63] Further, some Chapter 11 reorganizations, as a result of 363 sales, occur at seemingly lightning speed—entering and exiting bankruptcy in fewer than forty-five days.[64] Thus, the rise in 363 quick sales since the 1990s follows a rapid progression, beginning with single asset sales to full-scale, going-concern sales by the early 2000s. However, this continuous rise in 363(b) sales consequently begs a rise in potential agency costs, which could prove harmful to various creditors and the capital markets. Empirical studies have demonstrated that 363(b) sales generally provide less value than traditional reorganizations,[65]

58. Baird & Rasmussen, *supra* note 8, at 756 ("Today, both small and large firms can be sold as going concerns, inside of bankruptcy and out. The ability to sell entire firms and divisions eliminates the need for a collective forum in which the different players must come to an agreement about what should happen to the assets.").

59. *UCLA-LoPucki Bankruptcy Research Database,* UCLA SCH. L., http://lopucki.law.ucla.edu [HTTPS://PERMA.CC/5QTC-A2WT] (last visited Feb. 21, 2020).

60. Baird & Rasmussen, *supra* note 8, at 751 (beginning their work with the phrase, "[c]orporate reorganizations have all but disappeared," the authors further argue that debtors "use Chapter 11 merely to sell their assets and divide up the proceeds" rather than as a mechanism for reorganization).

61. Ayotte & Morrison, *supra* note 47, at 520 ("A traditional reorganization—in which the distressed firm's creditors retain stakes in the firm and, often, become its new owners—occurred in only 32 percent of the cases.").

62. ROBERT E. GINSBERG, ROBERT D. MARTIN & SUSAN V. KELLEY, GINSBURG & MARTIN ON BANKRUPTCY § 5.05 (4th ed. 2013) (noting that 363 "sales have become the norm").

63. Jacoby & Janger, *supra* note 34, at 879.

64. Jacoby & Janger, *supra* note 34, at 879.

65. Jacoby & Janger, *supra* note 34, at 869 ("After finding that 363 sales yielded a substantially lower percentage of book value than reorganizations in large public company bankruptcies, [LoPucki and Doherty] concluded that quick all-asset sales were working to the benefit of purchasers (and senior creditors), but to the detriment of other claimants and the bankruptcy estate.") (citing LoPucki & Doherty, *supra* note 9, at 44–45).

therefore justifying concerns that 363(b) sales may unfairly disadvantage creditors by lessening their recoveries for the sake of speed. Thus, while 363(b) sales may be beneficial in particularly exigent circumstances, they nonetheless pose the risk of harming creditors when they occur too early and without proper valuation information.

In what follows, this Comment presents three of the most widely publicized Chapter 11 cases in history—Enron, Lehman Brothers, and Chrysler—and analyzes their distinct uses of section 363(b) of the Bankruptcy Code. These cases prove significant because they evidence a larger trend for supplanting traditional reorganization processes with 363(b) asset sales throughout the early 2000s. Beginning with Enron's Chapter 11 filing in 2001, this Comment presents three case studies in a chronological progression—emphasizing their individual, incremental deviations from the traditional Chapter 11 form, until ultimately concluding with Chrysler's controversial, all-asset sale in 2009. Upon demonstrating such incremental deviations, this Comment further utilizes these case studies as arguments for when, and in what circumstances, the uses of 363(b) sales as deviations from the traditional chapter 11 form are justified. This Comment also discusses the various dangers of allowing 363(b) sales to occur when they are premised on representations that exaggerate or misinform a firm's exigent circumstances—thus impairing the rights of creditors as well as the value of their underlying claims. Without valid demonstrations of extreme exigency, the various costs associated with section 363(b) cannot be appropriately counterbalanced, therefore allowing their improper use to continue virtually unchecked. It is the view of this Comment that the included cases present perhaps the strongest demonstrations of the benefits of 363 quick sales as well as their potential dangers.

THE CASE OF ENRON

When Kenneth Lay founded Enron in 1985, following a merger with Houston Natural Gas and InterNorth, he found himself in a promising position.[66] As a result of the merger, Enron now possessed an extensive network of natural-gas pipelines, making it the owner of the largest gas pipeline network in the country.[67] Centering the firm's business on hard, old-economy assets proved to be a reliable strategy for Enron, as "take-or-pay"

66. PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON: EVERYONE'S GUIDE TO THE LARGEST BANKRUPTCY IN U.S. HISTORY 11 (2002).

67. *Id.*; *see also* Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSP. 3, 4–5 (2003) (noting that Enron, at this point, "owned 37,000 miles of intra- and interstate pipelines for transporting natural gas between produces and utilities").

contracts, customary in the market during the early 1980s, ensured the long-term stability of natural gas prices.[68] However, in addition to Enron's lucrative mergers, and the assets that came with them, the firm's initial success was facilitated by another, more substantial, factor: federal deregulation. In 1985, the Regan administration began deregulating the natural gas industry by removing the price regulations that had previously stunted its growth.[69] Deregulation allowed for more flexibility—both in the way natural gas was delivered to consumers and in the structures of contracts between producers and pipelines.[70] As a result, gas prices became increasingly more volatile. Enron stood well to benefit from these changes by "locking" consumers into private, price-fixed contracts for natural gas that spanned over prolonged periods of time.[71] To further ensure the success of these contracts, Enron also arranged long-term, price-fixed contracts with natural gas producers themselves.[72] As deregulation continued and natural gas prices fluctuated more drastically, Enron became the optimal intermediary between gas suppliers and consumers, thus occupying the space for growth in the industry that deregulation created.

However promising Enron's business model appeared to be, particularly in light of widespread federal deregulation, its success proved crucial to the company's survival in the short-term. Lay needed to pay off the sky-high interest rates on the junk bonds[73] he used to finance Enron's creation.[74] After its merger with Houston Natural gas and InterNorth, Enron had accrued approximately \$4.2 billion in debt.[75] Enron's initial infirmities, however, were not uncommon relative to the corporate landscape in which it

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68. *See* Healy & Palepu, *supra* note 67, at 5 ("In the early 1980s, most contracts between natural gas producers and pipelines were 'take-or-pay' contracts, where pipelines agreed either to purchase a predetermined quantity at a given price or be liable to pay the equivalent amount in case of failure to honor that contract. In these contracts, prices were typically fixed over the contract life or increased with inflation.").

69. FUSARO & MILLER, *supra* note 66, at 9.

70. Healy & Palepu, *supra* note 67, at 5; *See also* Douglas G. Baird & Robert K. Rasmussen, *Four (or Five) Easy Lessons from Enron*, 55 VAND. L. REV. 1787, 1794 (2002) (discussing how Enron benefitted from deregulation of the energy industries); *see generally* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42, 408, FERC Order No. 436 (Oct. 18, 1985) (providing the new regulation of interstate pipelines).

71. Healy & Palepu, *supra* note 67, at 5.

72. Healy & Palepu, *supra* note 67, at 6.

73. *See* FUSARO & MILLER, *supra* note 66, at 6 (defining junk bonds as "corporate bonds that the ratings agencies did not consider worthy of gaining their seal of approval in the form of an investment-grade rating").

74. FUSARO & MILLER, *supra* note 66, at 6.

75. Baird & Rasmussen, *supra* note 70, at 1793 (citing Loren Steffy & Adam Levy, *Enron's Original Sins: Lies Began Long Before Current Crisis*, BLOOMBERG NEWS, Mar. 20, 2002).

operated. The issuance of junk bonds to finance corporate control maneuvers was a common industry practice throughout the mid-1980s and 1990s and rose to greater prominence as hostile takeovers and leveraged buyouts became increasingly more commonplace.[76] As a result, Lay, who purchased these bonds to retain control of Enron and keep corporate raiders at bay,[77] made the decision to sell Enron's "unnecessary" corporate assets and retain the assets that would create the most value.[78] These asset sales not only reduced Enron's enormous debt, but they also "added to Enron's apparent earnings growth."[79] Thus, the objective success of Enron's enterprise, paired with the federal deregulation of energy and natural gas,[80] allowed Lay to ride Enron's successes high enough to execute a pivotal shift in the company's business model—from pipelines to energy trading.[81]

Energy trading rose to unprecedented heights during the mid to late 1990s as a result of federal deregulation and the massive influx of private, power marketers into the industry.[82] With Lay's fervent support, paired with his Texas-grown, political affiliations,[83] Enron began pushing for more favorable regulation on energy, particularly the "unbundling of vertically integrated utilities."[84] In doing so, Enron sought to move the energy industry towards a flexible, free-market system by lobbying federal and state regulators to allow energy companies to privately search for customers.[85]

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76. John C. Coffee Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 273 (2004) (noting that "[j]unk bond financing made the conglomerate corporate empires of the prior decade a vulnerable and tempting target for the financial bidder, who could reap high profits doing a bust-up takeover").

77. Irwin Jacobs, who possessed a substantial stake in InterNorth before its merger with Enron, sought to bid for Enron and attempt to take control of the company. Lay countered Jacobs' attempt by buying back his stock at a high premium. FUSARO & MILLER, *supra* note 66, at 5.

78. *See* FUSARO & MILLER, *supra* note 66, at 12 (detailing Lay's strategy to "keep [Enron's] pipelines and, as money was needed, sell off the oil wells").

79. FUSARO & MILLER, *supra* note 66, at 12.

80. Wendy Zellner, et al., *Enron's Power Play*, BUS. WK., Feb. 12, 2001, 70, 74 (noting that the "FERC finally changed the rules starting in 1985, freeing utilities to shop for gas and the pipelines to search for customers. Enron embraced the changes with gusto, rapidly becoming the largest buyer and seller of gas in North America.").

81. *See* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1278 (2002) (noting that Enron's "primary business, energy trading, only came into existence in the wake of deregulation of electricity and natural gas production and supply").

82. Alexia Brunet & Meredith Shafe, *Beyond Enron: Regulation in Energy Derivatives Trading*, 27 NW. J. INT'L L. & BUS. 665, 679 (2007).

83. *See* Zellner, *supra* note 80, at 78 (noting that "Enron was . . . [President] . . . Bush's leading patron in Austin").

84. Bratton, *supra* note 81, at 1278.

85. Andrea M.P. Neves, *Wholesale Electricity Markets and Products After Enron,* in

Enron succeeded in twenty-four states,[86] thereby positioning themselves as leading energy wholesalers in the markets their political efforts helped create.[87] Enron profited immensely from these new markets, as energy was both bought and sold internally through the firm and delivered to consumers.[88] Enron continued these political maneuvers for deregulation in the wholesale and retail electricity markets, much to the same success.[89] Consequently, these political and financial triumphs earned Enron its reputation as "the high-tech future of the power industry,"[90] and when Enron's stock price reached its peak in August of 2000, it was the largest energy trading company in the world and the seventh-largest firm in the United States.[91] Because of Enron's profitability and steady commitment to entrepreneurship and innovation, there seemed to be no frontier that they could not cross—no market that could not be made.

Although Enron held its position as the dominant energy trading firm in the United States, they were not the only corporation that profited from becoming a versatile, energy market-maker.[92] As a result, Enron's

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CORPORATE AFTERSHOCK: THE PUBLIC POLICY LESSONS FROM THE COLLAPSE OF ENRON AND OTHER MAJOR CORPORATIONS 91 (Christopher L. Culp & William A. Niskanen eds., Wiley, 2003); Zellner, *supra* note 80, at 74.

86. *See* Bratton, *supra* note 81, at 1278 (citing Leslie Wayne, *Enron, Preaching Deregulation, Worked the Statehouse Circuit,* 4 N.Y. TIMES, Feb. 9, 2002, at B1).

87. *See* Brunet & Shafe, *supra* note 82, at 679–80 (discussing Enron's role in creating the market for both buying and selling energy); *See also* Zellner, *supra* note 80, at 74 (providing the history of Enron's deregulatory efforts).

88. Brunet & Shafe, supra note 82, at 679 (noting that "[t]rading began with traders buying and selling forward contracts over the phone to energy companies looking to hedge against price volatility and it increased with the development of the internet").

89. Zellner, *supra* note 80, at 74 (noting that Enron "pushed just as aggressively to open wholesale and retail electricity markets, to the chagrin of the nation's entrenched utilities").

90. Brunet & Shafe, *supra* note 82, at 680 (citing BETHANY MCLEAN AND PETER ELKIND, SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (Penguin Books 2003)).

91. Bratton, *supra* note 81, at 1276; *see also* Bratton, *supra* note 81, at 1276 (noting that "[a]mong the energy trading companies and in the business community, Enron rose to dominance—becoming the seventh-largest corporation in the United States and the largest energy trader in the world").

92. Healy & Palepu*, supra* note 67, at 7 ("Skilling believed that the major barrier to entry in gas trading was Enron's market knowledge achieved through its dominant market position. However, many other firms were well positioned to challenge Enron's dominance, including large gas producers, such as Mobil, gas marketers such as Coastal and Clearinghouse and financial firms such as Phibro, AIG, Chase and Citibank. . . . The Internet [also] provided a low-cost platform for existing or potential competitors to develop energy markets that could compete with EnronOnline."); Baird & Rasmussen, *supra* note 70, at 1791 (noting that "[o]nce [an] entrepreneur creates the market, others can follow the example at little cost. As soon as buyers and sellers can choose among a number of different market-makers, profits are competed away.").

succeeding CEO, Jeffrey Skilling, saw a need to expand Enron's business model and transform the firm into a hybrid corporate conglomerate that functioned like a financial institution.[93] By 2001, Enron became a buzzing center for market making, offering a platform to trade everything which could be traded.[94] Once again, Enron expertly diversified its enterprise, this time by applying its energy trading model to "become a financial trader and market maker in electric power, coal, steel, paper and pulp, water and broadband fiber optic cable capacity."[95] Enron also expanded its skill for energy market-making by moving beyond domestic markets to deregulated, international, power and energy markets.[96] Enron thus distinguished itself from its competitors by operating as an international, "virtual corporation,"[97] whose most valuable asset lied not within a particular industry, but rather with the expertise they possessed and the talent they employed.[98] Enron's

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93. Bratton, *supra* note 81, at 1288 (". . . Enron was in a process of transformation, determined to leave behind its original business, an asset-laden producer and transporter of natural gas, to become a pure financial intermediary."); Neves, *supra* note 85, at 92–93; *Special Report: FT Comment After Enron: A Fresh Look at Rules for Energy and Finance, Trading and Bank Supervision,* FIN. TIMES, Jan. 19, 2002, *available at* 2002 WLNR 6710945 (describing Enron as "a huge, unregulated trading company—in effect, an investment bank that escaped all the normal prudential and conduct of business rules").

94. Bratton, supra note 81, at 1288 (noting the exclusion of unique products, or "knickknacks," which could not feasibly be traded in Enron's marketplace).

95. Healy & Palepu, *supra* note 67, at 5 (detailing Enron's strategy in acquiring new, target markets by "acquir[ing] physical capacity in each market and then leverag[ing] that investment through the creation of more flexible pricing structures for market participants, using financial derivatives as a way of managing risks").

96. Neves, *supra* note 85, at 92 ("In 1988, the United Kingdom deregulated its own power industry, and Enron opened its first oversees office there.") ("In 1992, Enron expanded its existing reach for pipeline business into South America through the purchase of Transportador de Gas del Sur. In the meantime, an Enron-owned power plant in England began operations.") ("In addition, Enron Europe established a trading center in London in 1995, marking the company's first entry into the European wholesale power market . . .").

97. For more information about Enron's novel, virtual trading platform, EnronOnline, *see* Bratton, *supra* note 81, at 1288, n. 55 ("Enron had just started up an exemplary online operation which made access to its market cheap and user friendly,") ("The site is said to have handled 550,000 transactions with a notional value of $345 billion in its first year.") (citing *A Survey of Energy: A Brighter Future*, ECONOMIST, Feb. 10, 2001, at 57, available at 2001 WL 7317640); Neves, *supra* note 85, at 93 (describing EnronOnline as " . . . an Internet-based global transaction system that allow[ed] participants to view real-time prices from Enron's traders and transact instantly online").

98. *See* ENRON CORP., ENRON ANNUAL REPORT 2000 5 (2001), available at https://picker.uchicago.edu/Enron/EnronAnnualReport2000.pdf [https://perma.cc/8YK5-WYL2] (last visited Jan. 27, 2020) ("We have metamorphosed from an asset-based pipeline and power generating company to a marketing and logistics company whose biggest assets are its well-established business approach and its innovative people."); *see generally* Bratton, *supra* note 81, at 1293 (describing the trials and tribulations that "Enron's whiz kid recruits"

management believed, and advertised, that they could apply their superior knowledge for market-making to practically any industry, including those that were wholly unrelated to power and energy.[99] As a result, Enron was seemingly unstoppable. However, the early 2000s would prove to be a turning point for Enron, and the energy industry as a whole. Despite their objective, financial prowess,[100] their ability to skirt past skepticism and accusations[101] regarding their business practices, and the never-ending praise they received, no one came to Enron's rescue when they filed for Chapter 11 in December of 2001.[102] With surmounting allegations of fraud, stock price manipulation, book-cooking, mismanagement of corporate funds, and self-dealing,[103] Enron's collapse was devastating to the world that watched it unfold and forever changed the industry that Enron itself revolutionized.

The culmination of factors that led to Enron's swift collapse have been theorized and discussed by countless scholars and economic theorists. However, the ultimate cause, or causes, of Enron's demise is beyond the scope of this Comment. This Comment seeks to use Enron as a case study, evidencing how the traditional Chapter 11 process was, in many ways, disregarded—particularly in a case whose corporate infirmities were arguably the kinds of issues that Chapter 11 was designed to resolve. Having briefly charted Enron's decline and ultimate state of insolvency, this Comment will focus on what happened *after* Enron failed—its complex and confounding bankruptcy proceeding. I argue that Enron serves as an early

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underwent to ensure their optimal value to the firm).

99. Baird & Rasmussen, *supra* note 70, at 1791 (". . . Enron sold investors on the notion that it could translate its success to international energy markets and to all commodities alike. After colonizing one market, Enron believed it could transport its expertise to other, undeveloped markets.").

100. Bratton, *supra* note 81, at 1276 (". . . its stock price peaked at close to ninety dollars in August 2000 . . . .").

101. Zellner, *supra* note 80, at 72 (noting that Enron, who fervently denied the accusations, was being "sued by consumers amid accusations of profiteering and market manipulation"); Brunet & Shafe, *supra* note 82, at 681 (noting the accusations surrounding Enron's involvement in California's energy crisis, and stating that "Enron . . . vigorously denied wrongdoing, nothing that price increases were none other than the inevitable result of the state's power shortage").

102. Bratton, *supra* note 81, at 1280 (noting that "none of Enron's political friends came forward when it approached the Treasury for a bailout in late 2001").

103. Bratton, *supra* note 81, at 1305, 1307 (describing arguably the most famous of Enron's wrongdoings, "[t]he disclosures . . . of side deals involving two limited partnerships of which Enron's CFO, Andrew Fastow, was the manager of the general partner. These arrangements put $30 million into Fastow's pocket, and resulted in an overstatement of Enron's earnings over four years of at least $591 million.") ("Fastow's entities served as the outside equity investor . . . for SPEs, which served no economic purpose other than to pump-up Enron's accounting earnings.").

example of an industry practice that is now more commonplace than traditional Chapter 11 reorganization—the "quick sale."[104] Enron's haphazard adherence to the Chapter 11 form serves as early evidence of a growing preference for speedy asset sales and an aversion to lengthy reorganization processes. This preference, I contend, is attributable to various policy and economic considerations that arguably justify such deviations from Chapter 11—in certain circumstances. It is through this lens that the gradual deviation from the traditional Chapter 11 form to the modern trend of all-asset quick sales can be more effectively understood and delineated.

Enron Corporation[105] filed for Chapter 11 protections on December 2nd, 2001.[106] At the time of filing, the company's once-lofty stock price had greatly depreciated in value—trading at a price of $0.26 a share.[107] Despite the steep dip in stock price and the rapid depletion of the firm's going-concern value,[108] Enron's executives assured their creditors that they intended to waste no time and reorganize swiftly—seeking to preserve and restore as much value as possible.[109] Thus, as early as the 6th of December, Enron's formal bankruptcy proceeding began to take shape.[110] Judge Arthur Gonzalez, a well-known jurist with a plethora of experience in complex reorganization cases, was appointed to oversee Enron's bankruptcy proceeding.[111] The Office of the U.S. Trustee organized a creditors meeting

104. Baird & Rasmussen, *supra* note 70, at 1806 ("Many large modern Chapter 11 cases begin only after those in control have already decided to sell the firm's assets. Shortly after bankruptcy is filed, the bankruptcy judge oversees the sale of the firm's assets . . . ."); Ben-Ishai & Lubben, *supra* note 10 (using the term "quick sales").

105. As well as 13 of its affiliate entities. THEODORE F. STERLING, THE ENRON SCANDAL 23 (2002).

106. *In re Enron Corp*., No. 01-16034, 2001 LEXIS 159 (Bankr. S.D.N.Y. Dec. 2, 2001); Rebecca Smith et al., *Enron Units Seek Bankruptcy Protection; Firm Sues Dynergy Over Aborted Merger*, WALL ST J., Dec. 3, 2001, https://www.wsj.com/articles/SB1007327663941686760 [https://perma.cc/8DLN-W8VU].

107. Healy & Palepu, *supra* note 67, at 12.

108. Wendy Zellner, *The Fall of Enron*, BUS. WK., Dec. 17, 2001, at 30 (". . . hundreds of creditors, from banks to telecoms to construction companies, [we]re trying to recover part of the billions they're owed.") ("Now Enron is frantically seeking a rock-solid banking partner to help maintain some shred of its once-mighty trading empire.").

109. Mitchell Pacelle et al., *Enron Unveils a One-Year Restructuring Plan Centered on 'Core' Businesses, Sales of Assets*, WALL ST. J., Dec. 13, 2001, https://www.wsj.com/articles/SB1008181357847808200 [https://perma.cc/5N9T-RVJX] (quoting Enron's founder, Kenneth Lay, regarding "his desire to 'stabilize' the company and 'maximize value' for all creditors") (quoting Lay: "I will use every ounce of my energy, intellect and persuasion to restore as much of the value as possible.").

110. *A Chronology of Enron's Recent Woes,* WALL ST. J., Jan. 22, 2002, https://www.wsj.com/articles/SB1007079046380185440 [https://perma.cc/7MCU-4HEP].

111. Richard B. Schmitt, *Bankruptcy Judge for Enron Case Is Known as a Stickler for*

the following week, which resulted in the appointment of 15 firms that would oversee negotiations with Enron for an effective reorganization plan.[112] All of the procedural pieces were in place, and Enron's players were accounted for.[113] But with time working against them, how could Enron reorganize quickly enough to preserve going-concern value and pay off their surmounting debt if the traditional Chapter 11 form is a notably lengthy process? The answer is clear—they did not adhere to the traditional Chapter 11 form. Instead, Enron engaged in a series of large asset sales shortly following their filing, while attempting, I argue haphazardly, to "reorganize."

As noted, Enron needed to move quickly. With corporate assets worth close to $49 billion on the line,[114] Enron desperately needed to gain the support of their creditors to avoid liquidation and eventual dissolution.[115] To help mollify their creditors' growing concerns, Enron announced that it had received up to $1.5 billion in debtor-in-possession financing from Citigroup and J.P. Morgan Chase.[116] The following week, Enron executives and advisers officially announced their proposed reorganization plan.[117] The plan centered around a series of asset sales, totaling around $6 billion, and included "a reorganization around Enron's 'core' businesses, including pipelines and power assets."[118] Enron assured its creditors that this strategy would get them out of bankruptcy within a year.[119] Sales proposed through a traditional reorganization plan, as here, are one way that debtors may sell corporate assets while in bankruptcy.[120] In addition to these proposed asset sales, Enron also filed early petitions to sell assets outside of the reach of its bankruptcy proceeding,[121] arguing that "its ability to reorganize successfully

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Detail, WALL ST. J., Dec. 7, 2001, https://www.wsj.com/articles/SB1007686046276035680 [https://perma.cc/LL4X-FWXK].

112. Pacelle, *supra* note 109.

113. *See* Pacelle, *supra* note 109 (noting that Enron's top executives held several conferences shortly following the filing. One in particular was held by Andrew Fastow and his attorney, David Boies, in the attempt to "squelch rumors that the former Enron chief financial officer had fled the country.").

114. J. Michael Anderson, SELECT CHRONOLOGY OF CONGRESSIONAL, CORPORATE, AND GOVERNMENT ACTIVITIES, Summary (updated Mar. 18, 2003).

115. *See* Pacelle, *supra* note 109.

116. Enron needed such financing to stay afloat during its reorganization. STERLING, *supra* note 105, at 23 (noting that Enron made the announcement the day after filing for Chapter 11).

117. This plan proved to be the first of many. Pacelle, *supra* note 109.

118. Initially, Enron intended to sell the assets that deviated from the firm's original, and successful, old-economy business model. Pacelle, *supra* note 109.

119. Pacelle, *supra* note 109.

120. 11 USC § 1123(b)(4) (2006).

121. Christina Cheddar, *Enron Asks Bankruptcy Judge to Allow Asset Sales Worth Hundreds of Millions*, WALL ST. J., Dec. 30, 2001, https://www.wsj.com/articles/SB10095

[was] connected to its ability to sell the assets owned by its units that remain outside its bankruptcy case."[122] Such sales were proposed and sought authorization within the first month of filing, due to concerns of depleting value.[123] These types of sales depict another manner by which a debtor-in-possession may sell corporate assets during bankruptcy, outside of the ordinary course of business—a 363 sale.[124] These sales provide a mechanism for debtors to maximize value for a particular asset by hastily selling it to a potential bidder—functionally liquidating the asset to pay off certain creditors.[125] The arguments for such sales usually involve concerns about time as it relates to the expected devaluation of a particular asset, or the company as a whole.[126] Under such sales, a debtor may "sell on short notice, without giving creditors either the opportunity to vote or the extensive disclosure statement required by reorganization law in connection with voting."[127] Because 363 sales do not need to "jump" through the procedural "hoops" that a sale proposed under a reorganization plan requires, they can be executed at a much faster rate.[128] But, by relying on section 363 in lieu of reorganization, a debtor-in-possession may demean the interests of junior creditors, or equity holders, by securing the "maximum" value[129] of a

64892904411320 [https://perma.cc/9Z4W-VFEE] (noting Enron's attempt to sell "two wind-power generating facilities in West Texas for $175 million to American Electric Power Inc") (". . . Enron also want[ed] the court to approve Enron Canada Power Corp.'s plan to sell its interest in electricity generated by the Sundance power generation plant in Alberta, Canada, to a partnership operated by AltaGas Services Inc. and TransCanada Pipelines Ltd.'s TransCanada Energy unit.").

122. *Id.*

123. *Id.* (noting that the buyer, AEP, "said the deal must be completed by Friday. Otherwise, the total value of the transaction will be reduced by at least $6 million . . . .").

124. 11 U.S.C. § 363(b) (2000) (amended 2005) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.").

125. Jacoby & Janger, *Bankruptcy Sales*, *supra* note 50, at 4.

126. Jacoby & Janger, *Bankruptcy Sales*, *supra* note 50, at 3, 6 ("If the debtor is selling . . . early in the case, one wishes to see value maximized . . . .") (discussing the rationale for value maximization—usually underlying a 363(b) sale, "[v]alue maximization sometimes depends on an accelerated process because the debtor is a 'melting ice cube'"); *see also* Jacoby & Janger, *Ice Cube* Bonds, *supra* note 34, at 866 ("Pleas for quick 363 sales frequently feature the melting ice cube argument—a "strong assertion of non-viability" because of an alleged rapid wasting of assets—as a justification for short-circuiting the Chapter 11 plan process.").

127. LoPucki & Doherty, *Bankruptcy Fire Sales*, *supra* note 9, at 13.

128. Jacoby & Janger, *Ice Cube Bonds*, *supra* note 34, at 865 (noting the "procedural shortcuts" taken to accomplish 363 sales under a melting ice cube theory).

129. There are numerous reasons why "maximum value," in this context, may be disputed. Secured creditors are arguably incentivized to support a 363 sale because such a sale would hasten the full recovery, or most of the recovery, of their secured claims. They are also likely to argue that a particular asset's current sale price is the maximum value that can be realized

particular asset before a plan for such asset is properly negotiated.[130] Here, Enron attempted to sell off assets worth several billions of dollars within a very short time-frame, while exercising marginal, if not abysmal, regard to the appointed creditors committee.[131] Enron also attempted to sell off larger assets immediately before filing for Chapter 11, providing arguably more evidence of a lack of consideration for certain creditors' interests.[132] For many commentators in bankruptcy and corporate law, this ability to circumvent effective negotiations with creditors is one of the primary concerns associated with 363 sales.[133] Some have argued that the agency costs associated with 363 sales,[134] and the opportunity for a debtor-in-

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from the asset, usually due to a concern that the asset will depreciate in value over time. Creditors with inferior claims to secured creditors are likely to object to these sales, albeit with little luck, by arguing that preserving the option value of a given asset and negotiating a realization strategy regarding such asset would best maximize value and benefit multiple claimants. *See* Ben-Ishai & Lubben, *Sales or Plans*, *supra* note 10, at 621 (noting that "[s]ecured creditors can be expected to engage in excessively pessimistic valuations; unsecured creditors and shareholders will tilt in the opposite direction, leaving the judge to divine the true value. This creates a risk of the manipulation of the bankruptcy process, a risk that [. . .] is more extreme in the United States because courts will now allow a section 363 sale to replace a plan in almost every case."); *see also* Brege, *supra* note 5, at 1643, 1657 (". . . managers may be pressured by creditors into a hurried sale of assets at less than the best price possible, robbing other creditors of the benefit of that best price.") (". . . senior creditors, who will normally recover fully, have different incentives from creditors on the margin who care about the exact amount recovered.").

130. LoPucki & Doherty, *Bankruptcy Fire Sales*, *supra* note 9, at 37 ("When companies are sold for less than they are worth, the unsecured creditors are usually the losers. Typically, they will recover less than they would have in reorganization.").

131. The creditor's committee is charged with protecting the interests of unsecured creditors. 11 U.S. Code § 1102. However, it is worth noting that members of the creditors committee often possess their own incentives and agendas that may conflict with those of the creditors they are responsible for representing. *See e.g.*, Lynn M. LoPucki & Christopher R. Mirick, *Strategies for Creditors in Bankruptcy Proceedings § 10.07(A)* (5th ed. 2006) (noting several conflicts that might exist between members of a creditors committee and unsecured creditors).

132. Baird & Rasmussen, *supra* note 70, at 1810 ("Just before it filed for bankruptcy, Enron agreed to sell its wholly owned subsidiary Portland General Electric to Northwest Natural Gas Company for $1.9 billion. While this sale ultimately was not completed because of complications arising from the bankruptcy proceeding . . .").

133. *See* Ben-Ishai & Lubben, *Sales or Plans*, *supra* note 10, at 621–22; *see also* Brege, *supra* note 5, at 1643 (noting that "[a]lthough such sales require notice and a hearing before the bankruptcy court, [. . .] [the] administrative process does not rise to the same level of detail as a full-blown plan confirmation proceeding, thus potentially leaving the door open for hard-to-detect misbehavior by the debtor-in-possession").

134. *See supra* notes 12, 41, 129 and accompanying text. *See also* Jacoby & Janger, *Ice Cube Bonds*, *supra* note 34, at 867, 869, 905 (presenting certain commentators' interpretation of LoPucki and Doherty's empirical results on 363 sales, concluding that the results show "that § 363 allows senior secured creditors to push for "inefficient fire sale[s]") (noting also

possession to favor the interests of certain secured creditors over others,[135] justify the provision's narrow enforcement, or total elimination from the Bankruptcy Code.[136] Others argue that the benefits of 363 sales are so substantial that they should supplant the Chapter 11 form altogether.[137] However, despite the rich controversy over the costs and benefits of 363 sales, there proves to be instances where such sales should not only be permissible on grounds of policy, but are necessary for preserving going concern value. This is especially true of financing institutions.[138] In other words, 363 sales do present certain agency costs that are cause for concern, however, they also seem to be particularly beneficial for companies who are arguably not well-suited for Chapter 11 reorganizations.

It is undisputed that Enron engaged in a series of quick sales at the start of its bankruptcy.[139] It successfully sold off its most valuable corporate assets—including its widely coveted trading platform and large pipelines—within the first few months of its filing.[140] However, from a hindsight,

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that 363 sales "force the court (not to mention potential objecting creditors and potential alternative bidders) to make a key 'reorganize/liquidate/hurry-up sale' decision prior to the optimal moment. Engineers of a sale increase their leverage by using the melting ice cube argument to make it seem dangerous to collect more information and explore other options.") (proposing that "[i]t is . . . crucial to distinguish a case in which the court and claimants have good information about the company's value and the costs of delay, from a case in which sale proponents are seeking to exploit information asymmetries and crisis-created leverage to strong-arm a deal that opportunistically appropriates value") (continuing by noting that "[t]he melting ice cube argument is, thus, a tool that can be used to lock-in or strong-arm a particular deal").

135. *Id*.

136. Kuney, *supra* note 40, at 287; Jacoby & Janger, *Ice Cube Bonds*, *supra* note 34, at 871–73.

137. Robert K. Rasmussen & Douglas G. Baird, *Chapter 11 at Twilight* (John M. Olin Program in Law and Economics, Working Paper No. 201, 2003), at 675 ("[Wlhatever value exists is usually best preserved through a sale."); Baird & Rasmussen, *supra* note 8, at 756 (arguing that "[t]he ability to sell entire firms and divisions eliminates the need for a collective forum in which the different players must come to an agreement about what should happen to the assets"); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 71 (2004) ("Today, creditors of insolvent businesses . . . no longer need a substitute for a market sale. Instead of providing a substitute for a market sale, chapter 11 now serves as the forum where such sales are conducted.").

138. Jacoby & Janger, *Ice Cube Bonds*, supra note 34, at 866 ("A going-concern sale may be the best, or only, option [in certain cases], but, [. . .] these cases often involve non-public companies . . . .") (noting that, in these particular cases, "[a]cting quickly will benefit all stakeholders").

139. Baird & Rasmussen, *The End of Bankruptcy*, *supra* note 8, at 751–52.

140. On January 14th, 2002, Judge Gonzalez approved the sale of Enron's highly profitable trading platform to UBS, a Swiss financial service conglomerate. *See* FUSARO & MILLER, *supra* note 66, at 178; Anderson, *supra* note 114, at 21. Enron sold its major pipeline to Dynergy within the first months of filing. *See Dynergy to Pay Enron a $25 Million Settlement*,

economic standpoint, Enron's strategy does not come as a surprise, given the unique type of firm that Enron made itself to be. Although at first glance, Enron seemed like a "paradigmatic case for an old-fashioned Chapter 11," this was not the case.[141] While Enron operated as a corporation that generated enormous profits from energy market-making, it also functioned, as I have noted, as a pseudo-financial institution that relied upon the trust and capital of its consumers, who actively engaged in its trading platform.[142] Enron, I argue, can thus be likened to a "systematically important financial institution," whose downfall could not have been diminished by the traditional protections of the Bankruptcy Code.[143] This likening is significant, given that the traditional Chapter 11 reorganization is not well-suited for financial institutions, as their going-concern value sharply declines the moment that a filing occurs.[144] Further, it is precisely in these particular cases that the arguments in favor of 363 sales hold the most weight. By executing a series of quick sales after a Chapter 11 filing, a financial institution can acquire the maximum value for its assets even as its going-concern value plummets.[145] As a result, 363 sales present debtors with a way

N.Y. TIMES, Aug. 16, 2002, at C4, https://www.nytimes.com/2002/08/16/business/dynegy-to-pay-enron-a-25-million-settlement.html [https://perma.cc/44SM-UZQM]. Enron also successfully sold off other assets throughout the course of its bankruptcy, before a final confirmation plan was approved. *See* BLOOMBERG NEWS, *G.E. to Buy Enron Wind-Turbine Assets*, N.Y. TIMES, Apr. 12, 2002, https://www.nytimes.com/2002/04/12/business/ge-to-buy-enron-wind-turbine-assets.html [https://perma.cc/88C6-RZZE]; Margot Habiby, *Enron CEO Says Debt, Other Claims May Total $100 Bln,* BLOOMBERG NEWS, Apr. 12, 2002. On April 10th, 2002, Judge Gonzalez approved the sale of Enron España. *See* Anderson, *supra* note 114, at 17. By the end of 2002, plans were in place to sell what remained of Enron to generate cash for settlement payouts. *See* Neela Banerjee, *Enron to Sell Major Units to Raise Cash for Settlements,* N.Y. TIMES, Aug. 28, 2002, at Cl, https://www.nytimes.com/2002/08/28/business/enron-to-sell-major-units-to-raise-cash-for-settlements.html [https://perma.cc/7Q2T-D8XR].

141. Baird & Rasmussen, *supra* note 70, at 1792.

142. *See* Bratton, *supra* note 81, at 1299, 1310 (noting that "[t]he credibility of Enron's projections . . . depended on a strong assumption about the trustworthiness of the . . . marketplace. [. . .] Enron's market was not a free public space . . . . It was instead an intermediary space owned and controlled by a single corporate entity. Such a market's viability as an alternative to ownership entirely depends on the corporate proprietor's financial health, validated by an investment-grade credit rating.") (emphasizing that Enron's "survival depended on its trading operations, the success of which required trust and confidence among Enron's counterparties").

143. Thomas H. Jackson & David A. Skeel, Jr., *Dynamic Resolution of Large Financial Institutions*, 2 HARV. BUS. L. REV. 435, 447 (2012).

144. *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO- 11-707, COMPLEX FINANCIAL INSTITUTIONS AND INTERNATIONAL COORDINATION POSE CHALLENGES 48 (2011), available at http://www.gao.gov/products/GAO-11-707).

145. *Id.* (noting that "a substantial portion of a financial institution's assets are often sold

to secure value in a short amount of time, thus preserving the interests of creditors that would otherwise be lost during reorganization. Given that the underlying rationale and use of 363 sales is the relatedness between time and value, it can thus be argued that Enron's use of quick sales was their best chance at satisfying their numerous liabilities.[146] This does not, however, take away from the fact that Enron deviated from the traditional Chapter 11 form. While attempting to reorganize, Enron, *functionally*, sold as a going concern—making use of the problematic "backdoor" to Chapter 11 that 363 sales provide.[147] But, when analyzing Enron through the lens of its unique hybridity, I argue that the economic benefits associated with Enron's quicks sales outweighed the costs of such sales, arguably justifying their deviation from the traditional Chapter 11 form.

Enron's large asset sales evidence early signs of a preference for quick sales among modern Chapter 11 reorganizations. Following the sharp increase of 363 sales throughout the 1990s,[148] Enron demonstrates an early step in the incremental deviation from the Chapter 11 form that these sales achieved. Although Enron did attempt to "reorganize," numerous successions of asset sales were orchestrated while their reorganization plan was amended, time again and again.[149] It was not until 2004 that Enron's final reorganization plan was approved by the bankruptcy court.[150] By this point, Enron was a shell of its former self, leading directly to its dissolution once the final, agreed-upon payouts were concluded.[151] In effect, Enron sold

very early in the case, because their value to the debtor will evaporate otherwise").

146. Banerjee, *Enron to Sell Major Units to Raise Cash for Settlements*, *supra* note 140, at C1 (noting that Enron needed to pay off "more than $50 billion in claims against it"). Other sources place Enron's total liabilities closer to $60 billion. *See* Rebecca Smith, *Enron's Reorganization Plan is Cleared by Bankruptcy Judge*, WALL ST. J., Jul. 16, 2004, https://www.wsj.com/articles/SB108989933501064646 [https://perma.cc/N7T7-7M3V] (placing Enron's debt at "$63 billion in claims").

147. *See supra* note 75 and the accompanying text detailing how Enron sold as a going-concern, albeit not all at once.; Brege, *supra* note 5, at 1640.

148. *See supra* notes 55–59 and accompanying text.

149. Smith, *supra* note 146; *In Re Enron*, No. 01-16034, ORDER CONFIRMING SUPPLEMENTAL MODIFIED FIFTH AMENDED JOINT PLAN OF AFFILIATED DEBTORS PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND RELATED RELIEF, (U.S. Bk. Ct. S.D.N.Y. 2004).

150. *Id.*

151. *See Id.*; *see also* Linda Sandler, *Enron Creditors Get 53 Percent Payout, Aided by Lawsuit Accords*, BLOOMBERG, Jan. 14, 2004, https://www.bloomberg.com/news/articles/2012-01-13/enron-creditors-pocket-21-8-billion-in-cash-stock-1- [https://perma.cc/GW6M-47XF] (discussing the details of Enron's approved reorganization plan—which created the Enron Creditors Recovery Corp. (ECRC) for the sole purpose of liquidating "the company's remaining operations and assets").

as a going-concern[152] by using 363 sale mechanisms rather than executing a successful reorganization plan—a practice that became industry-wide by 2002.[153] However, Enron's use of quick sales, I argue, do not merit the same concerns, both regarding agency costs and the subversion of the Chapter 11 form, that are present in other cases—one of which will be discussed in what is to follow. Because of Enron's unique disposition as a corporate conglomerate and a financial institution, its use of 363 sales present functional, economic justifications for their deviation from the Chapter 11 form—at least as far as Enron did indeed function as a pseudo-financial institution. Without such sales, Enron's creditors would have been worse-off if they had not occurred, thus arguably outweighing the agency costs associated with section 363 sales. I argue that the rise in quick sales amongst modern bankruptcies does not involve such unique entities, and it becomes increasingly problematic in those cases where there is a deviation from the Chapter 11 form. Thus, in what follows, I provide further commentary as to when and how 363 sales are best utilized—particularly when related to the bankruptcies of financial institutions.

THE CASE OF LEHMAN BROTHERS

Unlike Enron's swift story of birth, boom, and collapse, Lehman Brothers' roots trace back over a century, as it was one of the oldest investment banks in the United States.[154] Founded by three German-born immigrants, Lehman Brothers began as a modest grocery shop in Montgomery, Alabama.[155] Given Montgomery's prime geographic location, the city quickly became a hub for cotton trading—making cotton "the dominant element in Montgomery's economy" at the time.[156] Lehman Brothers was introduced to the growing industry by way of their habitual customers—local cotton farmers.[157] In exchange for selling their "general merchandise" to these farmers, Lehman Brothers often accepted payment in the form of cotton, which facilitated their entry into the cotton industry as

152. Again, it was not all at once.
153. *See supra* note 58 and accompanying text.
154. OONAGH MCDONALD, LEHMAN BROTHERS: A CRISIS OF VALUE (2016).
155. A CENTENNIAL: LEHMAN BROTHERS, 1850–1950 2–4 (Lehman Brothers 1950) (discussing Henry Lehman, Emanuel Lehman, and Mayer Lehman's arrival to the United States from Rimpar, Germany, and the official founding of "Lehman Brothers" in 1850) (noting Lehman Brothers' initial business model as "grocers," who generally sold "commodities and consumer goods of all types").
156. *Id.*, at 4.
157. *Id.*

traders.[158] In seeking to expand their nascent cotton trading business, Lehman Brothers opened a flagship office in the "true center of the South's economy," New York.[159] There, Lehman acted a commodities broker by facilitating the purchase and sale of cotton between farmers, manufacturers, and exporters—a role that granted the firm invaluable footing in New York's financial community.[160] After overcoming the trade blockades imposed during the Civil War and establishing fruitful partnerships within the cotton industry,[161] Lehman Brothers emerged as a prominent player within the commodities industry by 1868.[162] In 1870, they aided in founding the New York Cotton Exchange—the first commodities futures trading venture of its kind.[163] Later, Lehman Brothers' commodities trading business came to include goods other than cotton, including sugar, grains, coffee, and petroleum.[164] Although Lehman inched closer and closer to dominance within the commodities trading market, the firm did not rest on their successes. While the firm continued to expand its business model, both in the North and in the South, Lehman actively built on their reputation within the financial community and broadened their clientele.[165] As a result, the firm gained substantial sociopolitical capital, culminating in the appointment of the Montgomery branch of Lehman Brothers as Fiscal Agent to the State of Alabama.[166] This appointment proved vital to Lehman's long-term

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158. *Id.* ("Almost as a matter of course, the Lehmans extended long-range credits in trading with the planters, and settled accounts in bales more often than in dollars."); *see also Lehman Brothers: A History, 1850–2008*, HARV. BUS. SCH., at 4 (2018), https://www.library.hbs.edu/hc/lehman/content/download/58912/file/Lehman_cat_web.pdf [https://perma.cc/5J2F-VQ7K] (noting that this particular payment "arrangement [. . .] gave impetus to their entry into the business of bQuote uying and selling cotton for planters in the local Montgomery area").

159. A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 8 (discussing the opening of Lehman's first New York office in 1858. The Lehmans chose New York because it was a financial hub for cotton trading, as "[c]rops were sold largely through factors and commission houses dealing with Northern or English buyers" and involved New York banks.).

160. *Lehman Brothers: A History, 1850–2008*, *supra* note 158, at 4; MCDONALD, *supra* note 154, at 1.

161. *See* A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 9–10 (discussing the obstacles Lehman faced when President Lincoln issued a trade blockade in April 1861, as well as noting the strategy Lehman pursued to strengthen its cotton operations—a partnership with prominent cotton merchant, John Wesley Durr); *see also Lehman Brothers: A History*, *supra* note 158, at 5 ("Lehman Brothers devised several strategies to circumvent the blockade, including sending cotton from the South to England and then from England to New York. Despite the devastation [. . .], business for Lehman Brothers picked up after 1865.").

162. *Lehman Brothers: A History*, *supra* note 158, at 5.

163. MCDONALD, *supra* note 154, at 1.

164. A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 19.

165. *Lehman Brothers: A History*, *supra* note 158, at 6.

166. A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 19.

success, as it allowed the firm to engage in enterprises outside of the commodities market[167]—notably, investment banking.

After the first generation of Lehmans officially conferred the partnership to their sons, Lehman Brothers gradually directed its business model away from commodities trading and towards investment banking.[168] Prior to the transition, Lehman Brothers had already engaged in numerous stock and bond transactions as a result of the substantial increase in capital that the firm's successes provided.[169] Lehman Brothers officially acquired a seat on the New York Stock Exchange in 1887, as the firm's engagement with securities continued to grow.[170] The second generation of Lehmans focused on the inclusion of securities, in the form of stock, into the firm's primary business model and sought to make Lehman Brothers a "modern house of issue."[171] This goal was actualized in 1899, when Lehman Brothers underwrote its first public stock offering for the International Steam Pump Company.[172] This was just the start. Beginning in 1906, Lehman Brothers gradually solidified its role as an investment bank, underwriting more than one hundred issuances of securities to the public within the first two decades of the 20th century.[173] Lehman conducted many of these underwritings jointly with Goldman Sachs & Co., as they "enjoyed a mutually productive working partnership for many years."[174] The only thing that proved able to halt Lehman Brothers' energetic offerings was the commencement of the First World War.[175] However, even the War amounted to a mere temporary obstacle. Almost immediately following the end of the war, Lehman's underwritings proceeded at an even faster pace, "and in the three years prior

167. After Lehman Brothers Montgomery's appointment, the firm ventured into new territory—municipal financing. *See Id.*, at 19–20 (noting that "[t]he Lehmans not only sold the State's bonds [. . .] but serviced Alabama's debts, interest payments and other obligations"); *see also Lehman Brothers: A History, supra* note 158, at 6 (noting that "Lehman Brothers activities at this time also centered on the industrialization of the South, including railroad, textile, mining, and real estate enterprises").

168. A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 26 ("After Mayer Lehman's death in 1897 and Emanuel Lehman's retirement shortly thereafter, [. . .] Phillip Lehman, and his cousins [. . .], constituted the partnership. It was they who directed Lehman Brothers toward a new orientation: investment banking.").

169. A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 19.

170. A CENTENNIAL: LEHMAN BROTHERS, *supra* note 155, at 19.

171. *Lehman Brothers: A History*, *supra* note 158, at 7.

172. *Id.*; *see also* A CENTENNIAL, *supra* note 155, at 30 (noting that the first time Lehman Brothers acted as a house of issue was "in March, 1899, when it underwrote its first public offering—the preferred and common stock of the International Steam Pump Company . . . .").

173. A CENTENNIAL, *supra* note 155, at 32.

174. A CENTENNIAL, *supra* note 155, at 32.

175. A CENTENNIAL, *supra* note 155, at 33.

to 1925 they took place at the rate of one corporate issue per month."[176] Many of Lehmans' early underwritings[177] achieved immense success and eventually became household names—the most notable being those belonging to America's emerging retail businesses.[178] Initially, Lehman Brothers[179] was the only investment bank who saw opportunity in underwriting retail securities, as other established banks were hesitant to invest in the emerging industry's risky business models.[180] This hesitation made room for Lehman Brothers to capitalize on retail securities, and further expand its investment banking operations to include public utilities.[181] Lehman Brothers' early involvement with the retail industry proved significant, as it established the firm's reputation as an investor in innovation.[182] Thus, within one generation, Lehman Brothers successfully solidified their status as a power-house investment bank with a knack for recognizing potential, and as Lehman continued to profit from its successful underwritings, the firm further capitalized on emerging industries as the 20th century progressed.

The third generation of the Lehman Brothers partnership, headed by Robert Lehman,[183] continued the firm's focus on innovation by investing in various up-and-coming industries.[184] Lehman Brothers constantly looked for technological and commercial developments that could potentially create new fields of productivity.[185] For example, Lehman Brothers was an early investor in the aviation industry.[186] The firm played a vital role in establishing the Aviation Corporation (AVCO)—later known as American

176. A CENTENNIAL, *supra* note 155, at 33.

177. Occurring between 1906 and 1925.

178. Lehman Brothers underwrote Sears, Roebuck & Co.'s public stock offering in 1906. F. W. Woolworth Co., May Department Stores Co., Gimbel Brothers, Inc., R. H. Macy & Co., Inc., Brown Shoe Co., and Endicott Johnson Corp. provide further examples of the breadth and success of Lehman Brothers' underwritings in the retailing industry. A CENTENNIAL, *supra* note 155, at 36–37.

179. As well as Goldman Sachs, jointly.

180. *Lehman Brothers: A History, supra* note 158, at 8.

181. *Lehman Brothers: A History, supra* note 158, at 8.

182. MCDONALD, *supra* note 154, at 2 ("Lehman Brothers continued to be an innovative firm, willing to take the risks of investing in new areas of commerce.").

183. Robert was Phillip Lehman's son, and took lead of the partnership in 1925. *Lehman Brothers: A History, supra* note 158, at 9.

184. A CENTENNIAL, *supra* note 155, at 53–55.

185. A CENTENNIAL, *supra* note 155, at 53 ("Lehman Brothers has participated as investment bankers in the rise of several [. . .] primary expressions of the extraordinary fecundity of the American spirit.").

186. A CENTENNIAL, *supra* note 155, at 53 ("Robert Lehman's confidence in the importance of aviation led the firm to appreciate at an early date the need for, and opportunities of, an American aviation industry.").

Airlines, Inc.—and maintained close banking relationships with other major players in the industry, such as Pan American Airways Corporation and Continental Airlines, Inc.[187] In addition to aviation, Lehman Brothers also saw potential in the television, broadcasting, and motion picture industries.[188] In 1932, Lehman Brothers invested in the Columbia Broadcasting System.[189] In the late 1930s, the firm underwrote the initial public offering for Allan B. DuMont Laboratories, Inc., a leading manufacturer for the Radio Corporation of America (RCA).[190] Lehman also provided banking services for motion picture moguls—including Paramount Pictures, Inc., Twentieth-Century Fox Film Corp., and Radio-Keith-Orpheum Corp..[191] After accumulating steady profits from the emerging tech and entertainment industries, Lehman went on to be an early supporter of IBM and the Digital Equipment Corporation, which would later prove more profitable during the computer age.[192] In the 1950s, Lehman also issued securities for the Hertz Corporation and underwrote the initial public offering for the Ford Motor Company.[193] Once again, Lehman Brothers took the risk of investing in profitable, yet nascent, industries that other established banks were reluctant to engage with.[194] Lehman's investments, however, were not confined to technological developments. The firm also invested heavily in oil—financing TransCanada Pipelines Ltd., the Pennzoil Company, the Halliburton Oil Well Cementing Company, and Kerr-McGee Oil Industries, Inc.[195] As a result of these strategic investments, by the mid 20th century, there was virtually no leading industry that Lehman Brothers had not engaged with. In the 1960s, Lehman further expanded its enterprise to a global scale by opening its first overseas offices, and by 1966, it was ranked amongst the largest investment banks in the United States.[196] This large network of enterprises, however, proved problematic, as the end of the century brought significant financial distress amongst the industries in which Lehman was heavily invested.

187. A CENTENNIAL, *supra* note 155, at 54.
188. A CENTENNIAL, *supra* note 155, at 54–55.
189. A CENTENNIAL, *supra* note 155, at 54.
190. *Lehman Brothers: A History, supra* note 158, at 10.
191. A CENTENNIAL, *supra* note 155, at 55.
192. *Lehman Brothers: A History, supra* note 158, at 11.
193. *Lehman Brothers: A History, supra* note 158, at 11.
194. Much to their success. *See e.g. Lehman Brothers: A History, supra* note 158, at 9–10 ("While the more established investment banking houses considered film studios a risky venture, by the late 1920s, movie attendance had skyrocketed to the millions, transforming the motion picture business into a major industry.").
195. *Lehman Brothers: A History, supra* note 158, at 11.
196. *Lehman Brothers: A History, supra* note 158, at 11.

The fourth and final generation of the Lehman Brothers partnership began with the death of Robert Lehman in 1969.[197] Robert's death resulted in the first instance of non-familial leadership at the firm.[198] Under the stewardship of Frederick Ehrman, the firm suffered substantial losses as a result of the oil crisis in 1973.[199] Ehrman was later replaced by Peter Peterson, who successfully restructured the firm[200] and, in the last 5 years of his leadership, made Lehman Brothers extremely profitable.[201] As the 1980s ushered in a new era of high-tech research and startups, particularly relating to computer technology, the competitive landscape of the investment banking industry changed dramatically.[202] Swift technological advances and a sudden rise in merger and acquisition transactions made the investment banking business increasingly more competitive due to "the potential for increased algorithmic trading strategies, volume of business, and potential commissions."[203] This changing landscape, combined with further transitions in leadership, brought about periods of upheaval at Lehman Brothers throughout the 1990s, as Lew Glucksman[204] sought to move the firm away from investment banking in order to refocus on trading.[205] After

197. *Lehman Brothers: A History, supra* note 158, at 14.

198. Beginning with Frederick Ehrman, who assumed control of the partnership in 1969. This shift in leadership structure would forever change the future of the company. *Lehman Brothers: A History, supra* note 158, at 14–15.

199. As noted, Lehman invested heavily in oil throughout the 1960s. *Lehman Brothers: A History, supra* note 158, at 14.

200. *Lehman Brothers: A History, supra* note 158, 14 (noting that such restructuring included "reducing the number of employees and expanding [. . .] [Lehman's] financial services") (noting that Peterson also facilitated a profitable merger between Lehman Brothers and Kuhn, Loeb & Co., which resulted in the firm's expansion of "its global financial markets, [by] opening offices in Europe and Asia and serving in a financial advisory capacity in U.S. and foreign transactions").

201. MCDONALD, *supra* note 154, at 4; *Lehman Brothers: A History, supra* note 158, at 15 (noting that Peterson successfully led the partnership until 1983).

202. *Lehman Brothers: A History, supra* note 158, at 15.

203. *Lehman Brothers: A History, supra* note 158, at 15 (noting that the investment banking industry was becoming increasingly more of a "transaction-by-transaction industry"); *see also* ALAN D. MORRISON & WILLIAM J. WILHELM, JR., INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW 232–33 (2007) (discussing such technological trends as well as the sharp increase in trading volume in the 1980s. Noting that, "[a]verage daily trading volume in 1960 was about three million shares; the figure then nearly quadrupled by 1970, and then quadrupled again by 1980.").

204. Glucksman was a partner at Lehman Brothers since 1966. He was formerly the head of Lehman's trading operations until he assumed control of the partnership in 1983. *Lehman Brothers: A History, supra* note 158, at 15; *see also* MCDONALD, *supra* note 154, at 2 (noting that Glucksman often "regarded the bankers (as opposed to the traders) with disdain").

205. *Lehman Brothers: A History, supra* note 158, at 15 (noting that, due to the tensions caused by Glucksman's emphasis on trading, "[t]he firm experienced a decline in profits").

a merger and later initial public stock offering on the NYSE,[206] the new entity, Lehman Brothers Holdings, Inc., came under the leadership of Richard Fuld in 1994.[207] Fuld led Lehman Brothers to enormous financial success, as he engaged in a slew of acquisitions that doubled the size and revenue of the firm.[208] However, despite these successes, some of Fuld's acquisitions proved detrimental to the company in the short-term. In 2000, the Commodities Futures Modernization Act exempted financial derivatives from being subject to federal regulation by the CFTC.[209] As a result, investment banks began to invest heavily in derivatives—particularly subprime mortgages.[210] Lehman Brothers followed this profitable trend by acquiring several subprime mortgage-lending companies, including BNC Mortgage and Aurora Loan Services.[211] These acquisitions were initially extremely profitable, and by 2007, Lehman Brothers was "the largest issuer of mortgage-backed securities among the country's leading investment banks."[212] However, the firm's success was short-lived. In hindsight, it is unsurprising that Lehman Brothers suffered a precipitous fall during the financial crisis, as the mortgage-backed securities in which it had heavily invested[213] plummeted in value when the housing-bubble burst.[214] With mounting high-yield debt, overleveraged loans, and no promise of returns, Lehman Brothers' stock fell almost 90% between February 2007 until its

206. Due to the firm's declining profitability, Shearson, the securities division of American Express, bought Lehman Brothers in 1984, creating a new entity called Shearson Lehman American Express. However, in 1994, American Express divested its financial services, resulting in a new, independent public stock offering for Lehman Brothers Holdings, Inc. *Id.*

207. *Id.* at 16.

208. In 2003, Fuld facilitated numerous acquisitions in order to reduce Lehman's dependency on fixed-income trading. One notable acquisition was the purchase of Neuberger Berman in 2003. *See* MCDONALD, *supra* note 154, at 7 (noting that, by engaging in such acquisitions Fuld sought to "rescue Lehman from the volatility of the bond trading market and to establish its position as a leading Wall Street firm").

209. *Lehman Brothers: A History*, *supra* note 158, at 16.

210. *Lehman Brothers: A History*, *supra* note 158, at 16.

211. MCDONALD, *supra* note 154, at 9.

212. Lehman was also praised as the "Most Admired Securities Firm" in 2007. *Lehman Brothers: A History*, *supra* note 158, at 17.

213. *See Lehman Brothers: A History*, *supra* note 158, at 19 (noting that Lehman's "pursued an aggressive strategy of borrowing from the capital market at low rates and investing in mortgage-backed securities (MBS) and other speculative securities (including commercial MBSs, high yield debt, and leveraged loans) with the expectation of receiving a higher rate of return").

214. Lehman's investment strategy, particularly when related to MBSs, contributed to its decline as the housing market collapsed in 2008. *See generally Lehman Brothers: A History*, *supra* note 158 (noting that Lehman's " high amount of borrowing in proportion to its assets and large portfolio of mortgage securities placed it in an increasingly vulnerable position").

collapse in 2008—posing the risk of taking the industries in which it had invested down with it.[215]

As a result of several investment strategies that proved detrimental to the firm's success, Lehman Brothers' long history as one of America's oldest investment banks came to an end in 2008. As with Enron, the many factors that led to Lehman's demise are beyond the scope of this Comment. Instead, Lehman Brothers' brief journey through Chapter 11 will serve as a case study, evidencing another use of 363 sales to circumvent the traditional reorganization process. However, unlike Enron, Lehman Brothers' bankruptcy proceeded in a somewhat predictable, arguably heroic, manner given its business model and role as a systematically important financial institution. Although Lehman Brothers' dissolution came as a shock to the global financial community, its swift sale as a going-concern was a logical and economically justifiable maneuver in its distressed state. I argue that cases like Lehman provide perhaps the most persuasive arguments in favor of 363 sales. Because Lehman Brothers was an extremely interconnected financial institution, the risks of attempting to reorganize via the traditional Chapter 11 form would have been substantial, if not detrimental to the global economy.[216] Instead, the bankruptcy code, via section 363(b), provided an organized forum for Lehman Brothers to sell its assets quickly enough to recover as much value as possible. In Lehman's case, sales that would normally be perceived as unsettling, due to the agency costs associated with section 363(b), were perceived as herculean efforts to secure firm value. Put simply, the sales that raised considerable concerns throughout Enron's bankruptcy were received as welcomed and intended solutions in Lehman Brothers' bankruptcy. I intend to address this discrepancy as it is largely attributed to the particular circumstances pertaining to the cases at issue. Further, through the analysis of Lehman Brothers' Chapter 11 proceeding, I assert that the optimal and most justifiable uses of 363 sales are more clearly evidenced.

On September 15, 2008, Lehman Brothers Holdings, Inc. filed for bankruptcy protections in the Southern District of New York—initiating the largest and most complex Chapter 11 filing in U.S. history.[217] Shortly

215. *Lehman Brothers: A History*, *supra* note 158, at 20; *see also* Edward Morrison, *Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions?,* 82 TEMP. L. REV. 449, 450 (2009) (noting the systemic risk that Lehman's Chapter 11 filing could have prompted, as a "debtor's failure [would] infect other financial market participants, causing a chain reaction of insolvencies that destabilizes markets").

216. *See* Morrison, *supra* note 215, at 451–52 (discussing the mechanisms by which the failure of "systemically important institutions" harm credit markets).

217. Stacey Steele, *The Collapse of Lehman Brothers and Derivative Disputes: The*

thereafter, Lehman Brothers' subsidiaries and affiliates also filed bankruptcy or insolvency proceedings in their respective jurisdictions.[218] With roughly 26,000 employees world-wide and over 209 subsidiaries in twenty-one countries, Lehman Brothers was thought to be "too big to fail."[219] At the time of filing, the firm's assets were valued at roughly $639 billion, evidencing its status as the fourth-largest investment bank in the United States.[220] Some of Lehman's largest creditors included Citigroup Inc. and Bank of New York Mellon Corp., which held claims of up to $138 billion.[221] While many believed that the federal government would rescue a firm as large as Lehman Brothers from impending insolvency, as had previously been done with Bear Stearns in March 2008, no such bailout came to fruition.[222] Instead, the Federal Reserve and the U.S. Treasury announced that they would no longer back the private transactions of distressed banks by securing loans with public funds.[223] This came as a shock to the company, given that Lehman's strategy for avoiding insolvency was primarily focused on receiving a loan from the Federal Reserve and later executing an out-of-court sale to Barclays Capital, Inc. ("Barclays").[224] Yet, the refusal for bailout assistance by the federal government, paired with the firm's inability to find a willing buyer, left Lehman Brothers with no choice but to hastily, and unpreparedly, file for Chapter 11 bankruptcy.[225] Some have argued that

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Relevance of Bankruptcy Cultures to Roles for Courts and Attitudes of Judges, 30 LAW CONTEXT: A SOCIO-LEGAL J. 51, 54 (2014).

218. *Id.* ("The list of related debtors include[d] 19 companies which filed between 16 September 2008 and 23 April 2009. [. . .] [F]or example, Lehman Brothers Australia Limited filed for voluntary administration in late September 2008.").

219. Michael Fleming & Asani Sarkar, *The Failure Resolution of Lehman Brothers*, 20 ECON. POL'Y REV. 175 (2014); Steele, *supra* note 217, at 54.

220. Lehman's liabilities totaled roughly $613 billion. Steele, *supra* note 217, at 54.

221. Sam Mamudi, *Lehman Folds with Record $613 Billion Debt*, MARKETWATCH.COM, (Sept. 15, 2008), https://www.marketwatch.com/story/lehman-folds-with-record-613-billion-debt [https://perma.cc/ZHC7-D9GN].

222. *See* Morrison, supra note 215, at 449 ("[M]arket participants were surprised that the government would permit a massive market player to undergo a costly Chapter 11 proceeding. A very different policy had been applied to other systemically important institutions such as Bear Steams, Fannie Mae, and Freddie Mac.").

223. Steele, *supra* note 217, at 54–55 (citing *Q&A: Lehman Brothers Bbank Collapse*, BBC NEWS (Sept. 16, 2008), http://news.bbc.co.uk/2/hi/7615974.stm.).

224. David N. Crapo, *Lehman Brothers Dismantles in Bankruptcy*, 4 PRATT'S J. BANKR. L. 702, 702 (2008); *see also* Fleming & Sarkar, *supra* note 219, at 179 (noting that Lehman's "[m]anagement did not seriously consider bankruptcy until a few days before filing" because "Lehman continued to believe that it would be rescued").

225. *See* Rosalind Z. Wiggins, et al., *The Lehman Brothers Bankruptcy A: Overview*, 1 J. FIN. CRISES 39, 50 (2014), (noting that "[d]espite interest from Bank of America and Barclays, the discussions [about Lehman's purchase] at the NYFED failed in part because of the government's refusal to assist with funding Lehman's toxic assets"); Ayotte and Skeel, *supra*

Lehman's lack of pre-bankruptcy planning amounted to significant losses for the firm that would not have occurred, given proper foresight.[226] Others argue that the Bankruptcy Code, and the Chapter 11 forum in particular, provided a useful mechanism for Lehman to quickly sell its assets and preserve the going-concern value that it otherwise would have lost.[227] However, despite disagreements as to what Lehman's losses might have been if another wind-down method was implemented, I nonetheless argue that Lehman Brothers' use of 363 sales was a successful and economically justifiable strategy given the firm's insolvent state.

After Lehman's filing on September 15, concerns about the firm's financial health quickly turned to frenzy. When Lehman Brothers filed for bankruptcy, they were a party to over 1.5 million transactions with roughly 8,000 counterparties.[228] Due to their size, Lehman Brothers' goal in filing for Chapter 11 protections was to ensure that "its operations [would be] dismantled in an orderly fashion overseen by a bankruptcy court."[229] The need for judicial oversight proved particularly important in Lehman's case, as many of its derivative contracts—composing a large portion of the company's business—were exempt from the automatic stay.[230] As a result, several of Lehman's counterparties cancelled these contracts and engaged in fire sales of Lehman's assets to protect their investments.[231] Thus, within

note **Error! Bookmark not defined.**, at 481 ("Lehman could hardly have been less prepared for Chapter 11."); Alla Raykin, *Section 363 Sales: Mooting Due Process*, 29 EMORY BANKR. DEV. J. 91, 95 (2012) ("[T]here were no more lenders, Lehman could not find a buyer, and the U.S. government denied the company federal bailout funds. Lehman had no choice but file chapter 11.").

226. *See* Fleming and Sarkar, *supra* note 219, at 179 (noting that the "abruptness of LBHI's filing is reported to have reduced the value of Lehman's estate by as much as $75 billion. For example, 70 percent of derivatives receivables worth $48 billion were lost that could otherwise have been unwound.").

227. *See* Ayotte and Skeel, *supra* note 41, at 481 (refuting the notion that Chapter 11 is too costly and time-consuming to produce successful results, and arguing instead that "[t]he Lehman case shows exactly the opposite: faced with extreme time pressure, buyers materialized, and Lehman quickly sold its viable subsidiaries, allowing them to remain in business under different ownership").

228. Linda Sandler, *Lehman Liquidation Cost May Swell $200 Million as 480 Are Hired*, BLOOMBERG (Oct. 30, 2008), http://www.bloomberg.com/apps/news?pid=20601087&sid=aUWNysWfYZY&refer-home.

229. Wiggins, *supra* note 225, at 50.

230. Thus, they were vulnerable to creditor claw back. *See id.* ("[L]arge blocks of [. . .] [Lehman's] business, such as its estimated 900,000 derivatives contracts, were not subject to bankruptcy supervision. Counterparty efforts to protect themselves resulted in fire sales amounting to the loss of billions of dollars."). For more information about why these fire sales resulted in significant losses for Lehman, see Morrison, *supra* note 215, at 460.

231. Wiggins, *supra* note 225225, at 50; *see also* Ayotte and Skeel, *supra* note 41, at 494 ("When Lehman filed for bankruptcy, its counterparties canceled more than 700,000 of its

two weeks of filing, over 80% of Lehman's transactions were effectively liquidated.[232] Lehman was losing value quickly—as is expected for a financial institution undergoing bankruptcy.[233] The company was in dire need of cash to pay off its various debt instruments and sustain business operations. Systematic risk was also a primary concern in Lehman's case.[234] With these various considerations in mind, it became clear that Lehman had no time to waste—their assets were losing value as the public continued to doubt the firm's ability to stay afloat. Therefore, just 2 days after filing, Lehman Brothers proposed the sale of its North American brokerage and trading operations to Barclay's Capital Inc., via section 363 of the Code.[235] As consideration for the sale, Barclays would provide roughly $1.3 billion in cash as well as assume a portion of Lehman's debt obligations.[236] Lehman Brothers' Chief Operating Officer urged the court to approve the sale, arguing that "if the sale [was] not approved immediately, the company would likely disappear as a going concern."[237] Lehman Brothers also raised concerns about potential changes to the sale transaction, particularly a purported $30 million drop in asset value between September 15 and September 19.[238] Shortly thereafter, the bankruptcy court approved the sale, despite due process concerns.[239] Here, as in Enron, a temporal argument was

over 900,000 derivatives contracts.").

232. Morrison, *supra* note 215, at 451.

233. *See* Jackson & Skeel, *supra* note 143, at 447 (explaining that "a substantial portion of a financial institution's assets are often sold very early in the case, because their value to the debtor will evaporate otherwise").

234. *See* Morrison, *supra* note 215, at 450 (defining "systematic risk" as "the risk that one debtor's failure will infect other financial market participants, causing a chain reaction of insolvencies that destabilizes markets"); *see also* Ben-Ishai & Lubben, *supra* note 10, at 623 (noting that the bankruptcy court "was presented with testimony that a failure to sell Lehman Brothers' key assets would result in a worldwide financial panic, with obvious consequences for the value of Lehman Brothers").

235. Stephen Lubben, *The Sale of the Century and Its Impact on Asset Securitization: Lehman Brothers*, 27 AM. BANKR. INST. J., Dec.–Jan. 2009, at 58, 58(2009); *see also* Crapo, *supra* note 224, at 703 ("LBHI filed a motion to sell its U.S. and Canadian capital markets and investment banking businesses, including the fixed income and equities cash trading, brokerage, trading and advisory businesses, investment banking operations and LBI's business as a futures commission merchant [. . .] to Barclays.").

236. Crapo, *supra* note 224, at 703 (noting that Barclays "agreed to assume approximately $45 billion in Lehman Brothers obligations and has agreed to fund $2.5 billion necessary to cure defaults under contracts assumed and assigned to Barclays"); After giving consideration for the sale, Barclays also provided Lehman with a debtor-in-possession loan in the amount of $450 million, meant to fund their operations until the sale was finalized. Ayotte and Skeel, *supra* note 41, at 481.

237. Raykin, *supra* note 225, at 95–96.

238. Crapo, *supra* note 224, at 703.

239. Raykin, *supra* note 225, at 96.

presented to the court as it related to asset value. The justifications for the use of 363 sales were mainly to preserve value, in order to best serve the interests of Lehman Brothers' creditors. Further, Lehman's going-concern value was undoubtedly jeopardized, leaving the firm with two viable options: sale or liquidation—the latter of which would have extracted considerably less value and economic output.[240] Thus, with time-sensitive assets and a need for an efficient forum to effectuate a sale, Lehman Brothers presents the optimal circumstances for the use of section 363—even when taking related agency costs into account.

Judge James Peck approved the sale of Lehman Brothers' brokerage and trading enterprises on September 19, 2008.[241] Shortly thereafter, Lehman's overseas operations were also successfully sold.[242] As a result of the sales, Lehman Brothers was now liquid enough to sustain operations and composedly discern a course of action for its remaining corporate assets.[243] These outcomes exemplify the goal and purpose of 363 sales. As previously discussed, Section 363 provides an efficient sale mechanism for debtors seeking to dispose of time-sensitive assets without requiring lengthy negotiations for a reorganization plan.[244] This ability to circumvent the Chapter 11 reorganization process has, as I have noted, raised considerable concerns about Section 363—particularly when related to the interests of junior creditors and equity holders. Criticisms of 363 sales usually flow from the agency costs associated with their use including: the potential power that a large, secured creditor has over a sale, the disregard for appointed creditor committees and their interests, and the lower standard of disclosure when

240. *See* Raykin, *supra* note 225, at 96 (noting that "[w]ithout cash, the company could not continue operations; the only alternative to the sale was immediate liquidation, which would elicit fewer funds for the estate and decrease overall economic output").

241. Order Under 11 U.S.C. §§ 105(a), 363, and 365 and Federal Rules of Bankruptcy Procedure 2002, 6004 and 6006 Authorizing and Approving (A) the Sale of Purchased Assets Free and Clear of Liens and Other Interests and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases, *In re* Lehman Brothers Holdings, Inc., Case No. 08-13555(Bankr. S.D.N.Y. Sept. 19, 2008).

242. Ayotte and Skeel, *supra* note 41, at 481–82 ("[Lehman's] [. . .] operations in Europe, the Middle East, and Asia were bought by Nomura, a large Japanese brokerage firm.").

243. Jackson & Skeel, *supra* note 143, at 447 (noting that after a quick sale occurs, the debtor can engage in a "more leisurely decision-making process with the institution's other assets").

244. 3 COLLIER ON BANKRUPTCY ¶363.02 (Alan N. Resnick & Henry J. Sommer eds.,16th ed. 2011); *see also* Joseph J. Wielebinski, et al., *Recurrent and Developing Issues Encountered in Sales Pursuant to Section 363 of the Bankruptcy Code*, ADVANCED BUSINESS BANKRUPTCY CONFERENCE, May 1–2, 2008, Austin, Texas, Chapter 2, at 1, www.munsch.com/files/1610223_1.pdf [https://perma.cc/KV9W-LC7M] (noting that Section 363 sales also reduce administrative costs, as compared to a Ch. 11 reorganization).

compared reorganization plans.[245] However, these agency costs are counterbalanced by the need to preserve going-concern value or acquire cash-liquidity to sustain business operations.[246] This tension between preserving value and policing agency costs is evidenced in Lehman's case, as Judge Peck, despite due process concerns, concluded "that heavy media coverage of Lehman's bankruptcy proceedings served as ample notice to creditors to act to protect their rights."[247] Further, because Lehman Brothers was a financial institution not suited for a traditional Chapter 11 reorganization, the court went as far as to retroactively praise the sale as "an admirable, even heroic, achievement that helped to salvage jobs, preserve going concern values and provide for the orderly transition of many thousands of brokerage accounts to a financially secure firm with the resources to manage and service the financial assets held in those accounts."[248] Thus, the bankruptcy court, in effect, decided that the justifications for allowing the sale to occur[249] outweighed the potential agency costs associated with section 363. Despite divergent commentary as to the use of these sales,[250] I nonetheless argue that Lehman Brothers provides a prime example of the exigent circumstances that call for the use of section 363. Because Lehman Brothers was a financial institution, its rapidly depleting assets required a forum for quick sale, a forum which Section 363 successfully provided.

Despite their deviation from the traditional Chapter 11 form, and the agency costs they undeniably bring about, 363 sales are the optimal and most efficient solution in cases involving extremely exigent circumstances. These

245. LoPucki & Doherty, *Bankruptcy Fire Sales*, *supra* note 9, at 31; *see also* Raykin, *supra* note 225, at 93 ("Section 363 sales offer great advantages but have less protection for creditors than the plan process. The procedure relies heavily on the debtor's judgment to assess the exigency of the situation, and puts creditors at a disadvantage because they must act quickly, despite an informational disadvantage, to successfully object to a motion for sale.").

246. Ben-Ishai & Lubben, *supra* note **Error! Bookmark not defined.**, at 622–23 (". . . where preplan sales provide real benefits is a case where the debtor has going-concern value, but is unlikely to survive long enough to complete a formal reorganization process.").

247. Raykin, *supra* note 225, at 96 (citing *In re Lehman Bros. Holdings, Inc.*, 415 B.R. 77, 80 (S.D.N.Y. 2009)).

248. *In re Lehman Bros.*, 445 B.R 143, 153 (Bankr. S.D.N.Y. 2011) (evidencing that the court agreed with this conception of the sale and stated that "[n]othing in the voluminous record presented to the Court in these protracted proceedings has done anything to change that undeniably correct perception").

249. Notably, the risk that Lehman would disappear is a going concern, resulting in further financial turmoil for related markets and the loss of multiple creditor claims. Also, if Lehman chose to liquidate out of necessity instead of sell, considerably less value would have been actualized—further harming creditor's interests.

250. *See supra* notes 8, 9, 40 and accompanying text.

circumstances, as I have noted, are primarily related to rapidly depleting asset, or firm, value, and the threat that such losses pose to creditors and residual owners. Section 363 provides an efficient mechanism to effectuate sales in such circumstances and provides a solution to the infamous "melting ice cube" problem. These sales, I argue, prove particularly beneficial in a case such as Lehman, due to its role as a largely-interconnected financial institution—the arguable epitome of the "melting ice cube." Although such a solution may be economically efficient, section 363 also proves potentially worrisome, due to the agency costs they produce. Therefore, it is important to counterbalance these agency costs against economic justifications when determining whether a 363 sale should occur. I further argue that it is also vital to determine whether the particular company seeking the sale is in need of the 363 mechanisms, given exigent circumstances. Despite the concerns that their quick sales raised, Enron's use of section 363 as a mechanism to sustain operations throughout reorganization was a justifiable strategy, given the firm's unique hybridity as a corporation and a pseudo-financial institution. Lehman's status as a systematically important financial institution provides an even stronger justification for the use of section 363(b). However, few modern Chapter 11 reorganizations involve entities like Enron or Lehman Brothers—who present strong evidence of almost instantaneously depleting asset value. Therefore, the increasing use of 363(b) sales in modern reorganizations, not involving such entities, proves to be a problematic trend. Lehman's case is also significant in that it informs this trend, by demonstrating a further deviation from the traditional Chapter 11 form, when compared to Enron. Lehman quickly sold substantially-all of its operational assets shortly after filing—rather than attempting to haphazardly "reorganize." This progression from a series of smaller asset sales, seen with Enron in 2001, to quick, all-asset sales, seen with Lehman in 2008, reflects the rising trend of larger 363(b) sales, in lieu of plans, throughout the early 2000s. However, if reorganizations that should otherwise proceed as traditional Chapter 11 cases are instead supplanted by rubber-stamped 363 sales, the agency costs associated with such sales are not being effectively counterbalanced by valid economic justifications—therefore undermining the interests of junior creditors and potentially resulting in a loss of value due to inefficient sales.

THE CASE OF CHRYSLER

Despite its recognition as one of "the Big Three" historic, American manufacturers in the automotive industry, Chrysler arose from modest beginnings.[251] The Chrysler Corporation, formally established by Walter P. Chrysler in 1925, was initially a mid-sized entity—born as result of a merger between the Maxwell Motor Corporation and the Chalmers Company.[252] In addition to their relatively small size, as compared to other industry giants,[253] Chrysler also had substantial ground to cover, due to their entry into the industry nearly two decades after the Ford Motor Company and the General Motors Corporation.[254] However, under the visionary leadership of Walter Chrysler, the company became enormously profitable within its first three years of operation.[255] Chrysler successfully increased its sales by frequently releasing "new and improved" models, touting modern auto features not offered by other major producers.[256] The company also had a knack for strategic advertising, which contributed to their growing profits.[257] As a result, by 1927, the Chrysler Corporation was the fourth-largest, American automobile producer.[258] The Chrysler brand had also grown to become a household-name in the United States, due to the publicity that the company's unique models attracted.[259] The demand for Chrysler cars—particularly the luxurious Chrysler Imperial—increased so rapidly between 1924 and 1928, that Walter Chrysler struggled "to increase manufacturing and assembly capacity to meet the growing demand."[260] Therefore, through its use of effective advertising strategies and unwavering focus on innovative engineering,[261] the Chrysler Corporation earned its reputation for "producing technically advanced, attractively styled cars that offered excellent

251. CHARLES K. HYDE, RIDING THE ROLLER COASTER: A HISTORY OF THE CHRYSLER CORPORATION xiii (2003).

252. *Id*. at xv.

253. *Id.* at xiii (noting that General Motors "started off as a giant combination of dozens of automobile producers and suppliers").

254. *Id*. (describing Chrysler as "a relatively small late-comer into an industry dominated by General Motors and Ford").

255. *Id*.

256. *Id*. at 40 (quoting a brochure for the Chrysler 58, declaring that the model offered "[t]hree qualities combined in no other car—58 Miles Per Hour, 5 to 25 Miles in 8 seconds, 25 miles to the gallon").

257. *Id*. at 39 ("Effective advertising . . . helped generate sales as well.").

258. In terms of sales. *Id.*

259. *Id*. at 40 (discussing the "rare reviews" that the Chrysler Imperial received at the New York Automobile Show, notably that "[the] Chrysler was . . . the center of almost mob scenes. Viewed from the gallery, the space A-2 appeared [to be] a lodestone drawing itself a large percentage of the passers-by.") ("The new luxury car also benefited from publicity coming from racing. A Chrysler Imperial 80 roadster served as the pace car at the 1926 Indianapolis 500 race . . . .").

260. *Id*. at 38.

261. *Id.* at 109 (noting that Walter Chrysler "emphasiz[ed] [the] innovative engineering of automobiles").

performance."[262] These successes, however, proved only the beginning of Chrysler's enterprise, as the year 1928 would bring about structural change and growth that would take the company to new heights within the auto industry.

By 1928, the Chrysler Corporation realized that its relatively small size would limit its ability to survive in the increasingly competitive auto industry.[263] Chrysler was hard-pressed to increase production, minimize costs, and maximize manufacturing capacity, but lacked the means to do so on its own.[264] Thus, after thorough consideration,[265] Walter Chrysler pursued a solution that would help ensure the long-term success of the company, as opposed to simply increasing profit margins.[266] In 1928, the Chrysler Corporation acquired Dodge Brothers, a successful automobile producer who had recently merged with truck manufacturer, Graham Brothers.[267] This acquisition proved immensely beneficial to Chrysler, as it provided the company with the means of production that it desperately needed to remain competitive within the industry.[268] Dodge possessed an efficient network of automotive dealers and distributors as well as "large, modern foundries and forges."[269] These new additions to the Chrysler Corporation were immediately put to use, as the company had already begun manufacturing two new models—the Plymouth and the DeSoto—prior to the merger.[270] Due to Chrysler's innovative designs, and the mass-manufacturing capacity that Dodge provided, the Plymouth and DeSoto became household brands by 1929.[271] As a result, the combined Chrysler-Dodge enterprise[272] yielded soaring production and sales rates—earning the company its recognition as one of "the Big Three" auto manufacturers in the United States.[273] Chrysler

262. *Id*. at 42.

263. One major factor contributing to this increase in competition was General Motors' ability to mass-produce automobiles and sell them domestically and overseas, while maintaining low costs. *Id*. at 68–69.

264. *Id*. (noting that "[n]either of the two major [Chrysler] plants . . . had significant casting or forging capacity") (noting further that "Walter Chrysler [. . .] desperately needed more manufacturing capacity because of his well-advanced plans to expand his automobile offerings").

265. *Id*. at 69 (discussing Walter Chrysler's initial consideration of a merger with Willys-Overland).

266. *Id*.

267. *Id*. at xv.

268. *Id*.

269. *Id*. at 68–69.

270. *Id*.

271. *Id*. at 70.

272. Possessing roughly 12,000 domestic outlets and 3,800 outlets overseas. *Id*.

273. *Id*. at 71 (noting the coining of the term, "The Big Three," by an *Automotive Daily News* editorial. The other two companies included in the title were General Motors and Ford.).

consistently maintained its success, until it was affected by the lows of the Great Depression between 1930 and 1933.[274] However, despite such losses, and further losses to come,[275] the company remained strong under Walter Chrysler's inspirational leadership.[276] However, Walter Chrysler's death in early 1940 heralded a new era of leadership for the company—an era that would prove tumultuous for Chrysler, albeit profitable at certain junctures.

After navigating the struggles of wartime production throughout the Second World War,[277] and experiencing steep losses after the war,[278] Chrysler emerged under the new leadership of Lester Lum Colbert in 1950.[279] The beginning of Colbert's presidency proved challenging for the already distressed company—evidenced by a 1954 sales crisis that decreased the firm's market share to nearly 12% (from its usual 20%).[280] As a result of these troubling losses, Colbert sought to reinvent the Chrysler Corporation by modernizing its operations.[281] In doing so, Colbert implemented "greater vertical integration of manufacturing, decentraliz[ed] automobile assembly, and [effectuated] more component interchangeability."[282] Colbert also refocused the company's efforts on producing stylish and innovative auto designs—resulting in the 1955 debut of the Forward Look model, much to

274. *Id*. (noting that Chrysler "experienced a roller-coaster ride of exhilarating successes in 1928 and 1929, followed by lost sales and profits from 1930 to 1933").

275. *Id*. (noting that Chrysler nonetheless bounced back from these losses, by surpassing the sales margins it achieved in 1929 by the close of 1933). Chrysler also suffered a series of losses in the mid and late 1930s, including the failure of its Airflow model, loss in productivity due to organized labor strikes at Chrysler plants, and a steep drop in sales between 1938 and 1939. *Id.* at 87 and 111.

276. *Id*. at xiv (noting that, under Walter Chrysler's leadership, "the company grew prodigiously in 1925–40 and was arguably the most successful American automaker of that era").

277. Chrysler began to manufacture various types of military equipment throughout WWII, and by 1942, the company devoted its operations solely to such efforts. The transition toward wartime production proved challenging for the company, even as the period yielded fairly steady profits due to wartime demand. *Id*. at 127.

278. *Id*. at 149 (discussing the problems Chrysler faced following the conclusion of the war, including "difficulties in returning to civilian production; unimaginative, unappealing new products [. . .]; an aging management and an outdated corporate structure; and continuing adversarial and destructive labor relations").

279. Following K.T. Keller's retirement. *Id*. at 159.

280. *Id*. at 161–62, 164 (depicting Chrysler's sales and market share in Table II.I) (noting further that the contributing factors to Chrysler's decline were primarily "poor decisions with regard to [. . .] design, styling, [. . .] marketing . . ." and assembly).

281. Following a report by McKinsey & Co. on Chrysler's operations, Colbert adopted many of the provided recommendations to improve Chrysler's diminished profitability—as it lagged far behind the other members of "the Big Three." *Id*. at 165.

282. *Id.*

Chrysler's success.[283] However, despite these changes and brief spikes in sales, the company saw little success from 1955 to 1961.[284] Following Colbert's resignation in the summer of 1961, the Chrysler Corporation experienced another change in leadership, under the presidency of Lynn A. Townsend.[285] Townsend, like Colbert, attempted to modernize Chrysler by improving product styling,[286] expanding the firm's salesforce, and reinventing the company's image, in order to combat Chrysler's continuous loss in market share.[287] As a result of such changes, Chrysler pioneered a new market for "muscle cars" in the auto industry, by producing high-performance models like the Chrysler 300 and the Dodge Charger.[288] Chrysler also broadened its overseas operations by acquiring several European auto companies throughout the 1960s, including: Simca in France, Rootes Moors Ltd. in the UK, and Barreiros Diesel in Spain.[289] However, as with Colbert, Townsend's improvements did not yield the long-term effects he had planned for. After another series of sales drops,[290] spikes in oil prices throughout the early 1970s,[291] and yet another shift in leadership,[292]

283. The Forward Look model was a success for the business from 1955–57, however, the success proved fleeting as the model's appeal decreased over time. Evidencing Chrysler's temporary success, in 1958, the company experienced their lowest sales drop (nearly 50%) in a single year. *Id*. at 174–75.

284. *Id*. at 177 ("With the exception of the 1955–57 models, Chrysler's product lines from 1949 to 1961 were largely unappealing to the average American buyer. Chrysler's cars were dull, dated, stodgy, and otherwise out of step with that consumers wanted . . . .").

285. A role he would occupy from 1961 to 1966, followed by his role as chairman of the board until 1975. *Id*. at 187.

286. Townsend replaced Virgil Exner, Chrysler's vice president of styling, with acclaimed Ford stylist, Elwood Engel, in 1961. *Id*. at 191.

287. Chrysler's overall market share continued to decline—reaching a low point in 1962, at 8.3 percent. Ford maintained its 25 percent market share, while GM's share increased from 43 percent to 47 percent. *Id.* 187–88, 190.

288. *See* Lee Iacocca, *Chrysler*, ENCYC. BRITANNICA (Jan. 22, 2014), https://www.britannica.com/topic/Chrysler [https://perma.cc/VQB8-NX5B] (discussing the success of these models throughout the 1960s).

289. *Id*. (noting the renaming of these companies to "Chrysler France, Chrysler United Kingdom, and Chrysler España, respectively"); *see also* HYDE, *supra* note 251, at 197 (noting that "Lynn Townsend's greatest single achievement at Chrysler was changing the company into a multinational automobile producer").

290. The demand for Chrysler's "muscle cars" all but disappeared by the late 19 60s, as consumer interest veered towards fuel efficient, compact models. Chrysler was slow to adapt to these trends, particularly when compared to Ford and GM's compact models, which dominated the market. Chrysler did not produce its first subcompact model, the Plymouth Horizon, until 1978. HYDE, *supra* note 251, at 210–11.

291. See Iacocca, *supra* note 288 (discussing that Chrysler and the auto industry as a whole, was "caught off guard by a serious challenge from small fuel-efficient Japanese cars after the oil crisis of 1973").

292. By this point, Chrysler once again came under new leadership, as Lee Iacocca was

the ailing company had no choice but to seek government assistance in 1979.[293]

By 1980, the Chrysler Corporation was a weak representation of the empire that Walter Chrysler built. Townsend's vision of Chrysler as a major player in the global auto industry disappeared, as Chrysler sold its European operations to Peugeot-Citroen in 1978.[294] Between 1979 and 1982, Chrysler struggled to survive in the auto industry due to "soaring energy prices, gasoline shortages, double-digit inflation, and automobile loans at 20 percent and higher."[295] The company also suffered from negative consumer perception, as Chrysler had gained a reputation of producing shoddy, unattractive, and out-of-touch models since their decline in the 1950s.[296] In response to these problems, Chrysler's new president, Lee Iacocca, sought to drastically overhaul Chrysler's operations and management structure, much like his predecessors.[297] However, unlike prior leadership, Iacocca's efforts revived the company and increased profitability, even in the wake of a depressed economy.[298] Under Iacocca's watch, the renown Chrysler K-car debuted at a success, Chrysler acquired the coveted American Motors Corporation,[299] sales spiked and returned to healthy margins, and, as a result of such profits, Chrysler was able to repay its federal loans in full—seven years ahead of schedule.[300] Chrysler also pioneered a new market for so-

appointed president and chairman of the company in 1978. HYDE, *supra* note 251, at 233.

293. Iacocca, *supra* note 288 ("In 1979, in the midst of the second oil crisis in a decade, Iacocca made the bold move of appealing to the U.S. Congress for a loan guarantee of $1.5 billion. He overcame strong resistance on Capitol Hill by producing a list including each congressional district with an estimate of the number of jobs that would be lost if Chrysler failed. The strategy worked. Congress approved the deal, and in January 1980 Pres. Jimmy Carter signed the Chrysler Corporation Loan Guarantee Act.").

294. HYDE, *supra* note 251, at 230.

295. HYDE, *supra* note 251, at 230.

296. HYDE, *supra* note 251, at 239 (noting that "a major area of major concern was Chrysler's rightly deserved reputation for poor manufacturing quality, which hurt sales and produced high warranty costs").

297. Iacocca replaced the upper echelons of Chrysler's incumbent management with outside professionals (mainly from Ford) during the first year of his presidency. Iacocca also replaced and revamped Chrysler's marketing and advertising departments by hiring industry giants like E.F. Laux and Kenyon & Eckhardt. Further, Iacocca also restructured Chrysler's manufacturing department by hiring top manufacturers from GM and Volkswagen. HYDE, *supra* note 251, at 238–39.

298. HYDE, *supra* note 251, at 254 (noting that Chrysler's successes were "an impressive result in a seriously depressed economy where U.S. automakers [. . .] [experienced] the lowest sales in 21 years").

299. Chrysler sought the acquisition because of the company's profitable Jeep division. HYDE, *supra* note 251, at 275.

300. HYDE, *supra* note 251, at 254–55.

called "minivans,"[301] a model that would "become [an] automotive sales leader for the next 25 years."[302] However, despite the record successes of Iacocca's Chrysler from 1981 to 1984, the company reverted to its old habits, and slipped into a lull of producing dated models that were met with "lukewarm reception from the public."[303] After Iacocca's retirement, Robert Eaton succeeded as chairman of the Chrysler Corporation in 1993—seeking to diversify Chrysler's enterprise by once again looking overseas.[304] During Eaton's tenure, Chrysler enjoyed the upside of its usual oscillations by producing stylish sports cars that achieved wide-spread popularity in the United States.[305] As a result of soaring profits, and a desire to enhance Chrysler's presence in European markets, Chrysler announced its merger with Daimler-Benz A.G. in 1998—creating the new entity, DaimlerChrysler A.G..[306] Although Chrysler marketed the merger as a "merger of equals," it became clear that Chrysler was the junior partner within the combined enterprise.[307] Chrysler was, nevertheless, optimistic about the merger and the growth that the company would achieve as a result.[308] However, despite such optimism, Chrysler's dark clouds followed them into the new partnership—reporting losses of nearly $4 billion in 2001[309] and $1.5 billion in 2006.[310] In response to such losses, Daimler-Benz divested Chrysler from the partnership, and sold the group to Cerberus Capital Management in 2007.[311] Chrysler's ultimate collapse occurred after the onset of the financial crisis in 2008, evidenced by President Bush's proposed "emergency financial rescue plan" for the failing "Big Three."[312] After securing federal funding to maintain operations,[313] Chrysler attempted to conduct an out-of-

301. Following their launch of the Dodge Caravan and the Plymouth Voyager. Iacocca, *supra* note 288.

302. Iacocca, *supra* note 288.

303. HYDE, *supra* note 251, at 264.

304. HYDE, *supra* note 251, at 295.

305. HYDE, *supra* note 251, at 295.

306. HYDE, *supra* note 251, at 308 (noting that the new entity consummated its legal relationship by trading its shares on the New York Stock Exchange).

307. HYDE, *supra* note 251, at 309 (noting that the "merger of equals was in fact a takeover [by the German company]").

308. HYDE, *supra* note 251, at 308 (discussing DaimlerChrysler's new status as "the fifth largest automaker in the world").

309. HYDE, *supra* note 251, at 310.

310. Iacocca, *supra* note 288.

311. Iacocca, *supra* note 288 (". . . Daimler cut [Chrysler] loose, selling the Chrysler Group to the American private equity firm Cerberus Capital Management in 2007. The new firm was named Chrysler LLC.").

312. Iacocca, *supra* note 288 (noting that President Bush proposed the rescue plan "to prevent the collapse of the country's struggling auto industry").

313. Iacocca, *supra* note 288 (noting that "[t]he plan made immediately available $13.4

court sale for a large stake in its operation to the Italian auto company, Fiat S.p.A..[314] However, the sale was ultimately abandoned due to creditors' refusal to restructure Chrysler's debt.[315] Thus, as March 2009 tolled with no buyer in sight, Chrysler concluded its fluctuating history with an ultimate low—its Chapter 11 filing in April of 2009.[316]

As a result of tumultuous leadership changes, declines in sales due to a lack of ingenuity, and shoddy manufacturing, the auto empire that Walter Chrysler built in the 1920s came to an end in 2009. However, it is not the purpose of this Comment to deep-dive into the complex, corporate infirmities that led to Chrysler's ultimate state of distress. Instead, this Comment uses Chrysler as a case study, evidencing the modern practice of forgoing a reorganization plan in Chapter 11 proceedings, and instead selling entire firms as going-concerns via section 363 of the Code. Chrysler is perhaps more significant because it set a troubling precedent for when, and in what circumstances, the use of 363 sales are merited. Unlike Lehman Brothers, and partially unlike Enron, Chrysler was not a financial institution undergoing bankruptcy, nor did it demonstrate a strong likelihood (or at least not as strong as they purported) of disappearing as a going-concern. In fact, Chrysler's risk of disappearing proved incomparable to a situation like Lehman's, whose status as a financial institution caused its going-concern value to plummet almost immediately upon filing. However, despite obscurity as to the true exigency of their circumstances, Chrysler nonetheless argued that their value was akin to a "melting ice cube," therefore meriting a quick sale of substantially all of their assets. While commentary varies regarding the validity of this argument, of which will be briefly discussed herein, I nevertheless assert that it is cases like Chrysler that demonstrate the most apparent dangers of circumventing the traditional Chapter 11 form, via 363(b) sales. This Comment has argued that without extreme economic justifications to outweigh the agency costs of 363 sales, the costs of these sales cannot be appropriately counterbalanced, thus exposing creditors and equity holders to various harms. It is not the view of this Comment that all 363 sales are inherently impermissible, however, as I have noted, they can yield significant harm when executed earlier than they otherwise should. Further, a bankruptcy court's finding of uniquely exigent circumstances that may negatively affect firm value is largely dependent upon the justifications

billion in government loans" and "[t]he loans would allow the auto companies to continue operating through March 2009, when they were required to either demonstrate "financial viability" or return the money").

314. Iacocca, *supra* note 288.

315. Iacocca, *supra* note 288.

316. Iacocca, *supra* note 288.

presented by the debtor in court. In Chrysler's case, these justifications proved largely exaggerated—therefore leading to the approval of a 363(b) sale on the basis of faulty claims. Further, the dangers of 363 sales are exacerbated by the periodic approval of sale plans by bankruptcy judges as well as the limited opportunities that objecting creditors have for appealing such sales.[317] Therefore, when faulty 363 sales are approved, there is very limited room for remedy. Thus, through an analysis of Chrysler's Chapter 11 proceeding, I argue that their use of 363(b) sales were not appropriately counterbalanced by validly exigent circumstances, thereby increasing the likelihood that such sales would result in loss of value and compromised creditor rights. Further, I argue that Chrysler set a dangerous precedent for the rubber-stamping of 363 sales, approved under the guise of exaggeration.

Chrysler LLC, and its accompanying subsidiaries, filed for Chapter 11 protections on April 30, 2009.[318] From start to finish, Chrysler's journey through Chapter 11 was one of the briefest, large-scale corporate bankruptcy proceedings of its time—lasting a mere forty-two days.[319] The haste was not surprising, given the Obama administration's goal for the proceeding to be as "quick and surgical" as possible.[320] Quite unconventionally, the federal government exerted a substantial amount of control over Chrysler's filing, due, in part, to the rescue loan extended to the ailing auto manufacturer—in the amount of $4 billion—during the financial crisis.[321] As a condition to

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317. *See supra* note 38, 49 and accompanying text.

318. A. Joseph Warburton, *Understanding the Bankruptcies of Chrysler and General Motors: A Primer*, 60 SYRACUSE L. REV. 531, 533 (2010) (citing Voluntary Petition, *In re* Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009) (No. 09-50002)).

319. Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 728 (2010).

320. One of the primary reasons behind the Administration's push for a swift restructuring of Chrysler was the amount jobs that the company provided to the American workforce. The government feared that Chrysler's collapse would worsen the recessed economy. *See* Press Release, Office of the White House Press Secretary, Fact Sheet: Obama Administration New Path to Viability for GM & Chrysler (Mar. 30, 2009), *available at* https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Documents/autoFactSheet.pdf [https://perma.cc/K4KH-FUJZ] (noting that a "structured" proceeding would allow "Chrysler to clear away old liabilities so they can get on a path to success while they keep making cars and providing jobs in our economy").

321. *See* Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375, 1380 (2010) (noting that "[i]n the case of Chrysler, governmental assistance came in the form of a $4 billion loan from the U.S. Department of the Treasury (U.S. Treasury)"); *see also* Robert M. Fishman & Gordon E. Gouveia, *What's Driving Section 363 Sales After Chrysler and General Motors*, 19 J. BANKR. L. & PRAC. 4 Art. 2 (2010), *available at* WESTLAW, 19 J. Bankr. L. & Prac. 4 Art. 2 (discussing that "[w]hile in both General Motors and Chrysler the extent to which the DIP lenders dictated the terms and conditions of the sales was significant and uncommon, so too was the government's role as lender of last resort").

extending the loan, the U.S. government required Chrysler to submit a "long-term viability plan,"[322] subject to review by the Administration's Automotive Task Force.[323] Chrysler submitted their restructuring plan on February 17, 2009—proposing three alternatives: 1) a "stand-alone" restructuring, 2) a strategic alliance with their almost-buyer, Fiat, and 3) an orderly wind-down of the company's operations.[324] The government issued their response on March 30, concluding that the proposed plan was not sufficiently viable.[325] Further, the Task Force granted Chrysler an additional thirty days to draft a new plan, or risk cutoff from future financing.[326] Despite the rejection, the Task Force nevertheless recognized that an alliance with Fiat was likely Chrysler's best chance at long-term viability.[327] The Task Force also suggested that they would be willing to provide funding to facilitate a transaction between Fiat and Chrysler, executed through a brief Chapter 11 proceeding.[328] Following such encouragement, Fiat and Chrysler negotiated their terms throughout April of 2009, resulting in a sale agreement submitted just in time for the government's deadline.[329] Later that day, Chrysler filed for Chapter 11—consequently setting the Task-Force-approved plan in motion. It is my assertion that this level of pre-petition control, exerted by the federal government, demonstrates a particularly concerning relationship between a lender and a debtor at the brink of filing for bankruptcy—a relationship that will prove leveraged in what follows.

The U.S. government's controlling role in Chrysler's restructuring did not conclude once a viability plan was approved. After their filing, the U.S. Department of the Treasury and the Canadian government provided Chrysler with $5 billion in DIP financing, contingent upon the execution of a 363 sale

322. Demonstrating Chrysler's future ability to pay back the loan. Brubaker & Tabb, *supra* note 321, at 1381.

323. Brubaker & Tabb, *supra* note 321, at 1381 (noting that "[i]n late February, President Obama appointed his Auto Task Force to evaluate Chrysler's viability options and to negotiate with Chrysler constituencies").

324. CHRYSLER, CHRYSLER RESTRUCTURING PLAN FOR LONG-TERM VIABILITY 11 (2009), http://graphics8.nytimes.com/images/2009/02/17/business/ChryslerRestructuringPlanFull.pdf [https://perma.cc/J7FE-7K45].

325. David, *supra* note 51, at 30 (noting that the Task Force rejected Chrysler's initial plan because "Chrysler had not taken sufficient steps to renegotiate its labor contracts or reduce its debt burden to ensure the company's long-term viability").

326. David, *supra* note 51, at 30.

327. Brubaker & Tabb, *supra* note 321, at 1381 ("The Task Force . . . ultimately concluded that the Fiat alliance was Chrysler's most advantageous alternative.").

328. Brubaker & Tabb, *supra* note 321, at 1381.

329. Chrysler submitted their alternative plan on April 30, 2009. Brubaker & Tabb, *supra* note 321, at 1381.

of Chrysler's operational assets.[330] The governmental entities imposed such a condition as a result of various economic considerations related to the global financial crisis.[331] In light of such considerations, the lenders desired a sale, and a quick one at that. Surprisingly, Fiat S.p.A. would not directly assume the role of "Purchaser" in the required sale.[332] Instead, and perhaps most notably, the U.S. government created[333] a shell company—a subsidiary of Fiat herein referred to as "New Chrysler"—that would purchase substantially all of Chrysler's assets.[334] As a further result of the deal, Fiat S.p.A., the U.S. and Canadian governments, and a trust of unionized Chrysler retirees would obtain equity stakes in New Chrysler, post-sale.[335] Therefore, just two days after its Chapter 11 filing, Chrysler proposed a sale of substantially all of its operational assets to New Chrysler, in exchange for $2 billion in cash and a limited assumption of Old Chrysler's liabilities.[336] With

330. Brubaker & Tabb, *supra* note 321, at 1382 (noting that Chrysler acquired funding from the "U.S. and Canadian governments, through $5 billion of postpetition debtor-in-possession (DIP) financing for a period of 60 days"); *see also* Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531, 536 (2009) (noting that the governmental entities provided "DIP financing on the condition that a sale of each debtor's assets occur on an expedited basis").

331. *See generally supra* note 293 and accompanying text (discussing the number of Americans who were employed by Chrysler); *see also* Lubben, *No Big Deal*, *supra* note 330, at 536 (explaining that the government's quick-sale condition was enforced "to preserve the value of the business, restore consumer confidence, and avoid the costs of a lengthy chapter 11 process"); Press Release, Office of the White House Press Secretary, *supra* note 320 and accompanying text.

332. Master Transaction Agreement, Fiat S.p.A., Master Transaction Agreement Among Fiat S.p.A., New CarCo Acquisition LLC, Chrysler LLC and the Other Sellers Identified Herein, at 1 (Apr. 30, 2009), *available at* https://www.nclc.org/images/pdf/autobankruptcies/chryslermta.pdf. [https://perma.cc/6Y7E-KB3F].

333. And wholly financed. Roe & Skeel, *supra* note 321, at 733 (noting that the government extended an additional $6 billion to finance New Chrysler).

334. *See* Master Transaction Agreement, *supra* note 332, at 1 (formally identifying the new entity as "New CarCo Acquisition LLC, a Delaware limited liability company and an indirect wholly-owned subsidiary of Fiat"); *see also* Roe & Skeel, *supra* note 319, at 733 ("The government created and funded a shell company that, through a § 363 sale from Chrysler, bought substantially all of Chrysler's assets . . . ."). The U.S. and Canadian governments also loaned New Chrysler roughly $6.2 billion to purchase Chrysler's assets. *See* David, *supra* note 51, at 32.

335. Fiat obtained 20% ownership in New Chrysler, with the possibility of ultimately achieving 51% if certain conditions were met. The U.S. and Canadian governments each obtained 9.85% and 2.46%, respectively. Finally, a trust of unionized workers, established to fund healthcare benefits for Chrysler retirees, obtained 55% ownership in New Chrysler, as well as a $4.587 billion note. *See* Brubaker & Tabb, *supra* note 321, at 1382, fn. 39 (presenting the equity distributions for New Chrysler).

336. *See* Master Transaction Agreement, *supra* note 332, at 1, 8–10 (setting forth the terms of the agreement); *see also* Roe & Skeel, *supra* note 319, at 733 (noting that New Chrysler

the government's goals in mind, Chrysler argued that the quick sale was its last resort—presenting: testimony that its liquidation value was less than the proposed cash consideration, estimated daily losses of roughly $100 million, and threats that Fiat would walk away from the deal if the sale did not occur before June 15.[337] Shortly thereafter, Bankruptcy Judge Arthur Gonzalez approved the sale, noting:

> if a sale has not closed by June 15th, Fiat could withdraw its commitment. Thus, the Debtors were confronted with either (a) a potential liquidation of their assets which would result in closing of plants and layoffs, impacting suppliers, dealers, workers and retirees, or (b) a government-backed purchase of the sale of their assets which allowed the purchaser to negotiate terms with suppliers, vendors, dealerships and workers to satisfy whatever obligations were owed to these constituencies. The Debtors focused on maintaining the integrity of the operation and exercised their fiduciary duty by electing the only option available other than piecemeal liquidation.[338]

Thus, the bankruptcy court accepted, and relied upon, Chrysler's demonstrations of exigency, in approving the 363 sale. The court further reasoned that Chrysler's sale merited approval because it "was conducted in good faith and at arm's length and [was] in the best interest of the Debtors' estates."[339] However, despite the court's optimism, certain creditors felt that the sale was conducted too rashly—disregarding various procedural safeguards provided by the Code. Apart from the secured claims of the aforementioned governmental entities,[340] Chrysler's pre-sale debt was structured as follows: a first-priority secured claim in the amount on $6.9 billion owed to its largest creditors, a second-priority secured claim in the amount of $2 billion owed to Chrysler's equity holders[341] and their affiliates, an unsecured claim in the amount of $10 billion owed to a UAW[342] retiree

provided Old Chrysler with $2 billion and "then assumed the old company's debts to the retirees, most dealers, and trade creditors").

337. *See* Warburton, *supra* note 318, at 542 (discussing that "the sales price of $2 billion exceeded Chrysler's liquidation value which, according to unrefuted expert testimony, ranged from zero to $800 million") ("The court believed any delay of the sale would erode Chrysler's going concern value by an estimated $100 million per day. Fiat had also threatened to walk away from the deal if the sale did not close by June 15, 2009.").

338. *See In re Chrysler LLC*, 405 B.R. at 97 (granting the sale motion).

339. *Id.*

340. Warburton, *supra* note 318, at 534 (noting that the U.S. Treasury and the Canadian government's claims were "secured by a third-priority security interest in Chrysler's assets").

341. Daimler AG, owning 19.9% and Cerberus, owning 80.1%. David, *supra* note 51, at 31.

342. The UAW, or United Automobile Aerospace and Agricultural Implement Workers

trust, an unsecured claim in the amount of roughly $5 billion owed to several trade creditors, and unsecured claims worth several billions in "warranty and dealer obligations."[343] Despite assurances that most of Chrysler's senior creditors approved of the quick sale,[344] a group of secured creditors[345] quickly filed an objection—alleging violations of the Absolute Priority Rule[346] and the existence of a sub rosa plan.[347] These objections arose primarily out of the unsecured retirees' potential gain of "well over 50 cents on the dollar," in addition to a 55% stake in New Chrysler, while pre-sale, senior secured lenders would only earn 29 cents on their $6.9 billion claims.[348] Further, the Indiana Funds alleged that the U.S. government exerted an inappropriate amount of control over the transaction by threatening to withdraw funding if a quick sale was not effectuated.[349] The Indiana Funds also alleged that the Treasury was engaged in self-dealing, as it was exerting control on both sides of the deal.[350] However, despite these objections, the sale was affirmed by the Second Circuit[351] with no further stays for appeal—thus establishing positive precedent for Chrysler's arguments and justifications "meriting" the sale.[352]

While it is not the goal of this Comment to opine on whether Chrysler's circumstances truly merited a 363 sale in place of a reorganization plan, or

of America, is a worker's union that Chrysler possessed strained relationships with. *See supra* note 275 and accompanying text discussing a notable UAW strike; *see also* Warburton, *supra* note 318, at 534 (noting that "Chrysler's $10 billion commitment to the UAW Trust arose out of a litigation settlement reached in 2008").

343. Warburton, *supra* note 318, at 534.

344. Emily Chasan, *Pension Funds Lose Chrysler Fight in District Court,* REUTERS, May 26, 2009, https://www.reuters.com/article/us-chrysler-indiana/pension-funds-lose-chrysler-fight-in-district-court-idUSTRE54O4M320090526 [https://perma.cc/JF23-MS7C] (noting that J.P. Morgan Chase, lead lender for the unsecured creditor's committee, asserted that "[a]bout 92 percent of Chrysler's senior lenders support the government's plan with Fiat").

345. Lubben, *No Big Deal*, *supra* note 330, at 537 (noting that "certain Indiana pension funds, which held about $42.5 million of the $6.9 billion secured debt . . . filed an objection to the sale motion").

346. 11 U.S.C. § 1129(b)(2).

347. A "sub rosa" plan is a sale disguised as a plan that is prohibited by the Bankruptcy Code. They are often used to circumvent the requirements for confirming a plan in Chapter 11. Jacoby and Janger, *Ice Cube Bonds*, *supra* note 34, at 905; *see In re Chrysler LLC*, 405 B.R. at 113 (listing such allegations).

348. Roe & Skeel, *supra* note 319, at 733.

349. *In re Chrysler LLC*, 405 B.R. at 106–07.

350. *Id.* (alleging self-dealing "because [the Treasury] is controlling both the Debtors and New Chrysler").

351. *See In re Chrysler LLC*, 576 F.3d 108 (2d Cir. 2009) (affirming the sale).

352. After the Second Circuit affirmed the sale, it extended a short stay period, pending review by the Supreme Court. The appeal was consequently deemed moot by the Court. *Indiana State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009).

whether the U.S. government possessed valid justifications for requiring an expedited sale of Chrysler's assets, this Comment nonetheless argues that Chrysler's case is significant on the basis that it established a troubling precedent about when, and under what demonstrated circumstances, 363 sales are permissible. Prominent scholarship discussing the long-term precedential effects of Chrysler differ in large part. Some scholars argue that Chrysler's quick sale demonstrates nothing more than a common, well-established industry practice that will bear minimally on future cases.[353] Other scholars present views in favor of Chrysler's sale, arguing that their execution did not disadvantage junior creditors nor causally impair value.[354] By contrast, some scholars fear that the precedential effects of Chrysler's quick sale will result in substantial financial harm, to both creditors and capital markets, and a rampant derailment of the traditional Chapter 11 form.[355] This Comment supports the position of the latter, and further argues that the approval of Chrysler's 363(b) sale set a dangerous precedent, due to the misleading and exaggerated claims upon which such approval was based. Amongst various arguments presented to the court regarding their rapidly "melting" value, Chrysler's primary justification for requiring a 363 sale was the threat that Fiat would walk away from the transaction if the sale was not conducted quickly enough.[356] Given that Fiat did not have any value, cash or otherwise, at stake in the sale, this argument proves unfounded.[357] Fiat had no reason to walk away from the sale because they had nothing to lose. The U.S. Treasury and the Canadian government provided all of the funding and financing for the transaction. Even Fiat's executives themselves admitted that they would never have walked away from the sale.[358] Further, if for whatever reason, Fiat did decide to walk away, "Chrysler and the Treasury could have used the GM template, without a figurehead outsider as a purchaser that provides no cash."[359] Therefore, the bankruptcy court's

353. Lubben, *No Big Deal*, *supra* note 330.

354. Jared A. Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591 (2012).

355. Barry E. Adler, *A Reassessment of Bankruptcy Reorganization after Chrysler and General Motors*, 18 AM. BANKR. INST. L. REV. 305 (2010); Roe & Skeel, *supra* note 319; Brubaker & Tabb, *supra* note 321.

356. Warburton, *supra* note 318, at 542.

357. Raykin, *supra* note 225, at 108 ("Fiat was the asset buyer, but it had no money at stake: the U.S. government provided financing for the deal. Since Fiat had nothing to lose, it would never have walked away from the deal.").

358. Serena Saitto, *Fiat Will 'Never' Walk Away From Chrysler CEO Says*, BLOOMBERG.COM, June 8, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aS-6UyCqlJmA [https://perma.cc/V3BZ-MRLE] (this was presented to the court for review, during the sale hearing).

359. Roe & Skeel, *supra* note 319, at 750.

reliance on Chrysler's exaggerated claim that Fiat's withdrawal would lead solely to their "piecemeal liquidation" was groundless. Chrysler also argued that the U.S. Treasury would pull away from the sale if it was not executed quickly.[360] Despite this concern, it is highly unlikely that the Treasury would have allowed Chrysler to fail, given the large portion of the American workforce that Chrysler employed at the time of the financial crisis.[361] Further, the Treasury would likely not have abandoned the transaction due to the substantial amount of value that had already been extended to ensure that the sale occurred.[362] Therefore, this claim further exaggerated Chrysler's need for an immediate sale, as their risk of disappearing as a going-concern was far less severe than was presented to the court.

In addition to these faulty premises, Chrysler also presented uncontested liquidation valuations to the bankruptcy court in order to further justify their 363(b) sale. Initially, Chrysler's financial advisors reported their liquidation value as "near[ly] $2 billion, although with a range that went as high as $3.2 billion."[363] However, this range was revised shortly before the sale hearing—presenting a new valuation between $0 and $1.2 million.[364] As no further valuations were considered by the court, Chrysler's 363 sale was approved without an appropriate inquiry as to the company's value.[365] Therefore, the sale was approved upon yet another faulty premise—a potentially arbitrary representation of Chrysler's liquidation value. Thus, the fallibility and unreliability of the underlying claims that led to the court's approval of Chrysler's sale evidence the true danger of Chrysler's precedent—the danger that future creditor's relying on Chrysler can make similarly exaggerated arguments and pressure courts into approving sales on the basis of "rapid devaluation."

Chrysler also presents a troubling precedent due to the court's approval of a 363(b) sale in which a substantially leveraged creditor was controlling the pace and terms of the sale. In Chrysler's case, the federal government exerted an inappropriate amount of control over the sale, given its role as a lender of last resort as well as its influential power as an authoritative entity. Because Chrysler's sale was approved while exhibiting such a leveraged relationship between a debtor and a creditor, the court established a positive

360. *In re Chrysler LLC*, 405 B.R. at 108.

361. *See supra* notes 293, 320 and accompanying text.

362. Roe & Skeel, *supra* note 319, at 728 (noting "the government's cash infusion of $15 billion [. . .] into a company whose assets were valued at only $2 billion").

363. Roe & Skeel, *supra* note 319, at 742.

364. Roe & Skeel, *supra* note 319, at 742.

365. Roe & Skeel, *supra* note 319, at 742–43 (discussing the court's lack of an independent judicial valuation, perhaps due to time constraints and the inability of objecting creditors to present alternative valuations).

precedent for the allowance of sales with overly controlling creditors. A singular creditor's ability to exert excessive control over a sale represents a primary agency cost of section 363(b), as discussed herein. Therefore, Chrysler's precedent facilitates a controlling creditor, who may not be the federal government, to force a quick sale of substantially all assets and disadvantage junior creditors with relative ease. Further, because their sale was approved under such exaggerated circumstances and without proper valuation, Chrysler set a dangerous precedent for future leveraged creditors that desire untimely 363 sales. Thus, deviations from the traditional Chapter 11 form, via 363(b) sales that follow Chrysler's precedent, are not justifiable because they are founded upon faulty and uninformed premises.

CONCLUSION

The use of 363(b) sales, as a deviation from the traditional Chapter 11 form, has become a widely recognized industry practice within modern reorganizations. The various goals of a traditional Chapter 11 reorganization involve rehabilitating a business while it continues operations, preserving firm value, effectively restructuring debt while avoiding certain classes of claims, and, ultimately, placing distressed businesses back on a path towards financial well-being. Despite such goals, the traditional Chapter 11 form has, instead, been denounced as slow, costly, and inefficient. The cynical view on Chapter 11 suggests that various disputes between debtors and creditors can turn a reorganization into a seemingly never-ending, battle for control—all the while, costs continue to rise and the possibility of certain payout inches further away. However, in recognizing the complicated relationship between a debtor and a creditor, Congress included various procedural safeguards within the Bankruptcy Code, via section 1129, to balance the rights of creditors against the debtor's control over a reorganization process. While the incentives of creditors and debtors may be inherently misaligned, due to a creditor's desire to possess agency over securing recovery and a debtor's desire to rehabilitate their ailing business through their own decision-making, the Bankruptcy Code counterbalances such incentives, so as to reduce agency costs that may arise throughout the course of negotiations. For debtors, such protections include: the general ability to maintain control of a business throughout reorganization, the provision of a 120-day exclusivity period by which only a debtor may propose a reorganization plan, the ability to classify various claims, and the ability to "cramdown" a dissenting voter class to ensure the approval of a proposed reorganization plan. For creditors, the Code requires: a disclosure statement and plan summary—detailing value and the terms of the sale—

before a plan is confirmed, various voting requirements which must be satisfied before a plan is confirmed, and the requirement of good faith when a given plan is proposed. Thus, the Code provides a mechanism by which debtors and creditors may negotiate the terms of reorganization and decide how best to valuate and distribute assets in a somewhat consensual manner. However, section 363(b) of the Bankruptcy Code allows a distressed debtor to execute an asset sale outside of the parameters of a reorganization plan. By allowing debtors to sell assets outside of the ordinary course of business, free and clear of all claims, without a reorganization plan, section 363(b) provides a side door by which a debtor may evade the procedural requirements of Chapter 11. 363(b) sales may only be executed after proper notice is given and a hearing takes place. However, the procedural requirement for proper notice is heavily subject to judicial discretion and can thereby be waived or reduced with relative ease. The second procedural requirement for proposing 363(b) asset sales is the requirement of a hearing before a sale is confirmed. However, holding a hearing proves to bear minimally on whether a 363(b) sale is approved—as bankruptcy judges have a tendency to rubber-stamp these sales, even when an objecting creditor can financially afford to assess a disclosure statement carefully, let alone present contrary evidence in court. Objecting creditors, thus, have very limited avenues for recovery once a sale is proposed and approved—primarily due to cost and time. The procedural requirements for proposing a 363(b) sale are therefore not safeguards at all, allowing debtors to easily circumvent the procedural requirements provided by section 1129 of the Code. Further, they barely provide recovery mechanisms for disadvantaged creditors due to issues of mootness. Therefore, the use of 363(b) sales in corporate reorganizations has been heavily criticized, primarily due to the agency costs they yield.

One notable agency cost is the ability of a controlling creditor to condition, or threaten to withhold, financing in order to force a debtor into executing a quick sale, thereby ensuring their individual recovery. As a consequence of this agency cost, an asset, or the firm as a whole, may sell for less than the best price due to an untimely sale, resulting in a substantial loss of value for junior creditors and equity holders. The 363(b) sale form grants controlling creditors the ability to assume control of the debtor and, by consequence, manipulate the proceeding to ensure that their incentives are the ones that prevail—often adversely to those of junior creditors. Thus, without the procedural safeguards that Chapter 11 provides, the use of 363(b) sales can harm the rights of creditors and cause substantial financial loss. Conversely, in cases such as Lehman Brothers, the use of 363(b) provided the most efficient mechanism to effectuate a sale of assets that demonstrated severely exigent circumstances, threatening their rapid devaluation. The purpose of 363(b) sales, speed and value preservation, were successfully met in Lehman—to their creditor's overall benefit. Thus, it is not the view of this Comment that the use of section 363(b) is inherently impermissible on grounds of policy, nor does it argue for the provision's removal from the Bankruptcy Code altogether. Rather, this Comment asserts that if the agency costs associated with the use of section 363(b) are properly and validly counterbalanced by competing economic justifications demonstrating exigency, such a sale is justified—even as a deviation from the Chapter 11 form.

During the early days of section 363(b)'s addition to the Bankruptcy Code, the provision was rarely enforced, and when enforced, done so in very narrow circumstances. However, due to the Delaware court's desire to adjudicate the biggest and most complex restructuring cases, the various incentives for filing in Delaware increased competition amongst other bankruptcy courts in the 1990s. This competition lead to a rise in approval rates for 363(b) assets sales, used to incentivize debtors with forum-specific advantages for selling their companies. These approval rates continued to increase throughout the 1990s and the early 2000s, culminating in substantially-all asset sales as "the new norm" in modern reorganizations. Case by case, the assets sales grew both in frequency and in size. What began as a mechanism to liquidate singular assets to increase operational cash flow, resulted in the eventual sale of entire firms as going-concerns via 363(b) of the Code. By 2002, two-thirds of all large bankruptcies resulted in substantially-all asset sales. Thus, the rise in 363 quick sales since the 1990s follows a rapid progression, beginning with single asset sales to full-scale, going concern sales by the early 2000s. However, this continuous rise in going-concern 363(b) sales further exacerbates and amplifies the various agency costs wrought by section 363(b). Therefore, more creditors run the risk of diminished recovery as each case culminates in an all-asset quick sale. Professor LoPucki's empirical studies demonstrate that 363(b) sales, generally, provided less value than traditional reorganizations, therefore justifying concerns that 363(b) sales may unfairly disadvantage creditors by lessening their recoveries for the sake of speed. Further, while 363(b) sales may be beneficial in particularly exigent circumstances, they nonetheless pose the risk of harming creditors when they occur too early and without proper information regarding asset value.

This Comment first presented the case of Enron, a corporate conglomerate that executed various 363(b) sales while attempting to confirm a reorganization plan. Although a plan was ultimately confirmed and executed, it served as a structured liquidation mechanism for the remainder of Enron's assets. By the time such a plan was confirmed, Enron's most valuable assets had been sold off via section 363(b) of the Code. Thus, while attempting to "reorganize," Enron, functionally, sold as a going concern—making use of the problematic side door to Chapter 11 that 363 sales provide. This Comment suggests that Enron's large asset sales evidence early signs of a preference for quick sales amongst modern Chapter 11 reorganizations. Enron deviated from the traditional Chapter 11 form by periodically selling all of its assets before a plan was successfully confirmed. This mirrors the rising trend of larger asset sales occurring throughout the early 2000s, as noted by Baird and Rasmussen's work. Enron's case, however, does make an attempt, albeit haphazard, to conform to the traditional Chapter 11 form by "attempting" to reorganize. As Enron is the earliest case presented, this unwillingness to sell as a true going-concern perhaps evidences Enron's attempt to conform to Chapter 11 requirements, at least objectively. This Comment also asserts that, despite their deviation, Enron's asset sales were nonetheless justified by the exigent circumstances Enron presented. In addition to their size and interconnectedness, Enron's trading operations relied upon the trust of their consumers who actively engaged in its trading platform. These factors likened Enron to a financial institution undergoing bankruptcy. This likening is significant, given that the traditional Chapter 11 reorganization is not well-suited for financial institutions, as their going-concern value sharply declines the moment that a filing occurs. Given that the underlying rationale and use of 363 sales is the relatedness between time and value, this Comment has argued that Enron's use of quick sales was, thus, their best chance at satisfying their liabilities because of their corporate hybridity. But, when analyzing Enron through the lens of its unique hybridity, this Comment has argued that the economic justifications associated with Enron's quicks sales vastly outweighed the costs of such sales. Therefore, Enron itself makes a case in favor of 363(b) sales when a distressed company possesses validly exigent circumstances that require them to sell assets quickly. Without such sales, Enron's creditors would have been worse-off than if they had not occurred, thus outweighing the agency costs associated with section 363(b).

In the case of financial institutions undergoing Chapter 11, Lehman's use of section 363(b) provides perhaps the most convincing case for the use of a quick sale, despite its deviation from the traditional Chapter 11 form. Although Lehman Brothers' dissolution came as a shock to the world, its swift sale as a going-concern was a logical, and necessary, maneuver in the firm's distressed state. Because financial institutions are not suitable for a traditional Chapter 11 reorganization, Lehman's use of 363(b) successfully preserved asset value that was rapidly depleting in order to preserve the claims of as many creditors as possible. Further, because the various agency costs associated with section 363(b) were outweighed by such extreme circumstances, Lehman's use of 363(b) sales were a justified deviation from the traditional Chapter 11 form. However, Lehman's case also proves significant because it evidences the gradual deviation from the traditional Chapter 11 form, via 363(b) sales, throughout the early 2000s. Lehman Brothers deviated further from the structure of traditional reorganizations than Enron did. Lehman did not "attempt" to reorganize nor did they provide assurances to their creditors that a plan would soon come. Instead, Lehman engaged in a quick sale of substantially all of its most valuable assets in order to preserve depleting firm value. Therefore, this Comment suggests that Lehman Brothers' use of 363(b) evidences the incremental deviation from reorganization processes—beginning with single asset sales to eventual going-concern sales.

This Comment lastly presented the case of Chrysler in order to demonstrate the various dangers associated with 363(b) sales. Chrysler, unlike Lehman and partially unlike Enron, was not a financial institution undergoing bankruptcy. As such, Lehman Brothers' likelihood of disappearing as a going-concern was substantially greater than Chrysler's—even in the wake of a global financial crisis. In fact, Chrysler's going-concern sale was entirely funded by governmental entities that would not allow the company to fail, thus arguably providing more evidence that Chrysler was not likely to disappear. Further, given that such governmental entities created the shell company that would purchase Chrysler as a going-concern, the likelihood that Chrysler would disappear proved minimal, relative to a case such as Lehman. However, despite these factors, Chrysler nonetheless argued that their value was akin to a "melting ice cube," threatening to substantially devalue by the day. To demonstrate their exigent circumstances, Chrysler presented: uncontested valuations to the court, evidence that Fiat would walk away from the sale if not executed by June 15, evidence that the U.S. Treasury would walk away from the transaction if the sale did not occur quickly, and a reported loss of over $100 million per day. In reliance upon such representations of exigency, the bankruptcy court quickly approved the sale.

This Comment first asserts that Chrysler is representative of the larger trend to forgo reorganization plans in favor of 363(b) sales throughout the early 2000s. Chrysler deviated further from the traditional Chapter 11 form than Enron or Lehman because they engaged in a going-concern sale more quickly than the other cases. Further, Chrysler was not a financial institution and therefore lacked the economic considerations that such institutions possess while undergoing bankruptcy. Thus, Chrysler marks the climax of the incremental aversion to reorganization processes throughout the early 2000s by engaging in an all-asset quick sale, while lacking the exigency of a financial institution. This Comment further argues that Chrysler set a troubling precedent for when, and in what circumstances, 363(b) sales merit approval. As discussed herein, Chrysler's arguments for demonstrating its extreme circumstances proved faulty, uninformed, and exaggerated. Further, Chrysler's sale was functionally conducted by a secured creditor that exerted an inappropriate amount of control over how and when their going-concern sale was executed—depicting a primary agency cost of 363(b) sales. Therefore, in approving such a sale, the court set a positive precedent for cases in which a controlling creditor hijacks the debtor's control over a reorganization and leverages financing in order to force a sale. Further, such precedent also validates the arguments that Chrysler presented to the court which demonstrated their "extreme need" for a quick sale. The precedential effects of Chrysler's case, thus, are concerning because the judicial rubber stamping of 363(b) sales, particularly those that are inherently faulty, can cause substantial harm for distressed creditors and can result in overall losses in capital markets. Therefore, because their sale was approved under exaggerated circumstances and without proper valuation, Chrysler set a dangerous precedent for future leveraged creditors that desire untimely 363(b) sales. Deviations from the traditional Chapter 11 form, via 363(b) sales that follow Chrysler's precedent, are therefore not justifiable—as they are based on a desire to circumvent Chapter 11 safeguards for the sole purpose of speed.