THE FLIP OF A SWITCH: DUE PROCESS IMPLICATIONS FOR BANKRUPTCY SALE ORDERS AFTER THE GM IGNITION SWITCH CASE

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The U.S. Court of Appeals for the Second Circuit recently held that auto manufacturer General Motors—which had undergone a chapter 11 bankruptcy in the wake of the Great Recession—could potentially be held liable for hundreds of personal injury claims resulting from product defects that existed prior to the bankruptcy sale. This case stands in stark contrast to a long history of bankruptcy cases generally disallowing personal injury claims when corporations have sold their assets to a buyer "free and clear" of all potential liabilities. This Note attempts to examine this long history and the due process implications of barring claims when individuals who were harmed had no reason to know of any potential danger at the time of the company's bankruptcy sale. Further, this Note suggests that future decisions ought to mirror the Second Circuit's analysis in order to ensure that potential claimants are not arbitrarily stripped of their opportunity to be heard in court.

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I. INTRODUCTION

Should a "new corporation" that has purchased the assets of an existing company through a chapter 11 bankruptcy sale order be held liable for potentially hundreds of personal injury claims? What if many of those claims arose as a result of incidents connected to products manufactured entirely prior to the sale? According to the Second Circuit's decision in *Elliott v. General Motors LLC (In re Motors Liquidation Co.)*[1] ("the GM Ignition Switch case"), the new company *should* be held liable, even if the terms of the sale order specifically indicated that the business would be sold "free and clear" of liabilities against it.[2] Although in this instance General Motors ("GM") unsuccessfully petitioned the Second Circuit to stay the court's mandate[3]—and recently found its writ of certiorari denied by the Supreme Court[4]—this recent decision nevertheless stands as a significant development in the area of bankruptcy law.[5] But, what exactly are the probable consequences of such a holding, both positive and negative?

In analyzing the appeal, the Second Circuit ultimately weighed the procedural due process concerns of those affected by GM's ignition switch flaw against the potential costs of liability to the purchasing corporation.[6] In this particular instance, the court held that those due process concerns overshadowed the costs to "New GM," particularly because the creditors seeking to bring personal injury suits were entitled to notice of the ignition switch flaw prior to the completion of the sale order.[7] But will those concerns always outweigh the potential costs to a purchasing corporation?

This Note argues in favor of the Second Circuit's decision on the facts specific to that case, noting that the evidence showed that the creditors affected by the ignition switch flaw were significantly less culpable than either "Old GM" or "New GM." Additionally, this Note argues that the Second Circuit's decision gives new hope to creditors looking to raise due process concerns in

1. 829 F.3d 135 (2d Cir. 2016).

2. *Id.* at 156–58.

3. *See* Emily Field, *GM Asks 2nd Circ. to Pause Bankruptcy Shield Ruling*, LAW360 (Sept. 21, 2016, 4:10 PM), http://www.law360.com/articles/842776/gm-asks-2nd-circ-to-pause-bankruptcy-shield-ruling ("GM asked for a stay of the appeal panel's mandate, saying that the case raises substantial constitutional law questions—primarily, whether the due process clause imposes obligations of notice to creditors of a bankruptcy sale that go beyond what the U.S. Bankruptcy code requires.").

4. Gen. Motors LLC v. Elliott, 137 S. Ct. 1813 (2017).

5. *See* Stephen J. Lubben, *Court Rules Tort Claims Can Proceed in G.M. Ignition Switch Case*, N.Y. TIMES (July 13, 2016), http://www.nytimes.com/2016/07/14/business/dealbook/court-rules-tort-claims-can-proceed-in-gm-ignition-switch-case.html (discussing how the Second Circuit's decision appears to contrast with various state court bankruptcy sale decisions).

6. *Gen. Motors LLC*, 829 F.3d at 158–70.

7. *Id.*

court, which for too long have remained absent from consideration in bankruptcy law.[8] Specifically, the decision is praiseworthy for its refusal to defer to the United States Bankruptcy Court for the Southern District of New York, which would have barred *all* potential tort claims arising from GM's ignition switch flaw on the grounds of equitable mootness and lack of prejudice.[9] Going forward, courts ought to construe the GM Ignition Switch case liberally and use it as a stepping stone to further incorporate due process concerns into their analyses. Doing so will ultimately ensure that known and unknown creditors at the time of the sale are still given a later opportunity to be heard, and it will hopefully allow bankruptcy law to remain "a kind of 'super' foreclosure system for large corporations"[10] without sacrificing the rights of those who otherwise would have no legal remedy for the harms they have suffered.

Part II of this Note begins with an overview of the history of procedural due process in the United States as a means to understand the issues at stake. It then continues with an examination of due process in bankruptcy law specifically to highlight how the two terms coexist historically.[11] Once that necessary groundwork has been laid, this Note delves more narrowly into the history of both General Motors's bankruptcy sale[12] and the timeline of its alleged knowledge regarding the ignition switch flaw exhibited by many of its automobiles.[13] Part III analyzes the Second Circuit's decision in greater depth by first weighing the benefits of due process against the costs to companies like New GM—companies that have come to rely on bankruptcy sale orders to shield asset purchasers from liability for claims that arose before the sale ever occurred. Part III also analyzes the ways in which various other courts have interpreted the "free and clear" provision found in many bankruptcy sale orders,[14] as well as how courts have dealt with the due process requirement of notice. Part IV goes on to recommend that courts continue to build upon the framework set forth in the Second Circuit's GM decision to ensure that "bankruptcy law" and "due process" are no longer viewed as contradictory.[15] Finally, Part V briefly summarizes the heart of the argument before concluding.

8. *See, e.g.*, Russell A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 BANKR. DEV. J. 47 (1993).

9. *See In re* Motors Liquidation Co., 529 B.R. 510, 526, 528 (Bankr. S.D.N.Y. 2015).

10. Lubben, *supra* note 5 (arguing that the Second Circuit's decision "means that in cases where the selling company is not hiding anything, the bankruptcy process will be able to maximize the value of the debtor's assets, as those assets will be sold free from the anchor of state law tort claims").

11. *See* Eisenberg & Gecker, *supra* note 8, at 49 (arguing that "due process [has been] largely ignored in bankruptcy caselaw . . . .").

12. *See generally Timeline: GM Emerges from Bankruptcy*, REUTERS (July 10, 2009, 10:05 AM), https://www.reuters.com/article/us-gm-bankruptcy-sb/timeline-gm-emerges-from-bankruptcy-idUSTRE56946X20090710.

13. *See* Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NPR (Mar. 31, 2014, 4:33 PM), http://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect (noting that more than 2.6 million cars had been recalled due to the same type of ignition switch flaw as of 2014).

14. *See* 11 U.S.C. § 363(f)–(g) (2012).

15. *See* Eisenberg & Gecker, *supra* note 8.

II. BACKGROUND

In order to truly understand the Second Circuit's decision, it is important to realize the history of the facts leading up to the case as well as appreciate the history of procedural due process in the United States and its place within the context of bankruptcy law. This Part will take up each subject in turn, beginning with procedural due process.

A. Procedural Due Process

The history of the United States cannot be fully understood without an examination of the concept of due process. This concept is directly embedded within the United States Constitution, and it is the only command that the document states twice.[16] Specifically, the Due Process Clause can be found within both the Fifth and Fourteenth Amendments.[17] The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.[18]

In creating the Fifth Amendment, the Framers of the Constitution derived the Due Process Clause from the English *Magna Carta*,[19] which itself dated back to 1215.[20] The Constitution, however, does not specifically define "due process of law," and thus the duty of determining the constraints of due process has largely fallen to the courts.[21] The courts, in turn, have attempted to define those parameters on a case-by-case basis. As Justice Frankfurter once put it:

> "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, due process cannot be imprisoned within the treacherous limits of any formula. Representing a

16. *Due Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/due_process (last visited May 20, 2018).

17. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

18. U.S. CONST. amend. V (emphasis added).

19. *Fifth Amendment: An Overview*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fifth_amendment (last visited May 20, 2018).

20. *Id.*

21. Obviously, while the legislature has the authority to codify the specific procedures to be followed in any particular case, only the courts can truly rule on the constitutionality of those procedures. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards.'" (quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (Powell, J., concurring))).

> profound attitude of fairness between man and man, and more particularly between the individual and government, due process is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.[22]

"Due process of law" as a phrase has been subject to several interpretations throughout the years.[23] It is now generally understood, however, that due process can appear in three different forms: substantive, structural, and procedural.[24] While both substantive and structural due process play incredibly significant roles in American jurisprudence,[25] it is procedural due process that remains the focus of this Note.

Procedural due process addresses the adversarial process and focuses on the procedural requirements given to an individual before enduring a loss as a result of some government action.[26] Throughout American history, procedural due process has primarily been concerned with ensuring that individuals are afforded the constitutional requirements of "notice" and an opportunity for a "hearing."[27] Generally, the concept of notice contains both a time and a content element.[28] Since notice is a natural precursor to the opportunity to be heard, that notice must give the individual enough time and information to properly prime themselves for the upcoming hearing.[29]

1. Notice

Under the Due Process Clause, individuals are constitutionally entitled to notice of a hearing before it commences.[30] The Supreme Court has also stated that the Constitution requires that the method used to give notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[31] What the Constitution does *not* require, however, is that an affected

22. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).

23. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 663–64 (2d ed. 1988).

24. *Id.* at 553–86, 629–32, 673–87, 1673–87.

25. Eisenberg & Gecker, *supra* note 8, at 52–53.

26. *Id.*

27. *See* TRIBE, *supra* note 23, at 732.

28. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance[.]") (citation omitted).

29. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'").

30. *Id.* at 13.

31. *Mullane*, 339 U.S. at 314.

party actually *receive* notice, so long as a court can find that the method of providing notice met the "reasonably calculated" standard.[32]

In terms of the actual method of providing notice, the concept generally follows a reasonableness test utilizing a totality of the circumstances.[33] It is understood that "[t]he traditional manner of providing notice is 'personal service'—in hand delivery of the summons to the defendant by a sheriff, marshal or someone similarly authorized by law."[34] When the circumstances prove difficult for personal service, however, the Court has permitted "substituted service,"[35] which can include "leaving the process at the defendant's home, mailing the process to him, or, under very limited circumstances, publishing the content of the summons in a newspaper . . . ."[36] Regardless, the Court has stated that a method certain to provide actual notice is the constitutionally required minimum, when the name and address of an affected individual is reasonably detectable.[37]

Notice under procedural due process is also required to be timely and contain sufficient content.[38] In terms of content, there is no legal standard to determine what is sufficient, but the notice must at the very least "inform the recipient of the impending loss . . . in terms which the layman can understand."[39] This ensures that the affected individual can properly prepare himself or herself for any impending hearing, and thus, that his or her procedural due process rights are protected.[40]

2. An Opportunity to Be Heard

In addition to the notice requirement, procedural due process has also been interpreted to guarantee to individuals the right to receive a fair, just, and orderly judicial proceeding.[41] This differs significantly from English law—from which the concept of due process originated—which does not require that individuals be given an opportunity to be heard through a judicial hearing.[42] In the United States, however, there is an understanding that "[e]ven the best notice will not help unless one receiving such notice can act to protect his or her

32. Eisenberg & Gecker, *supra* note 8, at 54.

33. *Id.*

34. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 170 (2d ed. 1993).

35. *Mullane*, 339 U.S. at 317 ("Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits . . . .").

36. FRIEDENTHAL, *supra* note 34, at 170.

37. *See, e.g.*, Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable.").

38. *Mullane*, 339 U.S. at 314.

39. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 25 (1978) (Stevens, J., dissenting).

40. *See id.* at 14 (majority opinion).

41. *Fifth Amendment: An Overview*, *supra* note 19.

42. *See* Geoffrey Marshall, *Due Process in England*, *in* DUE PROCESS: NOMOS XVIII 69, 69–90 (J. Roland Pennock & John W. Chapman eds., 1977).

interests."[43] The opportunity to be heard alleviates the concern that an individual will be unable to protect his or her rights by providing a method to defend what someone else is attempting to take away.[44]

Although "notice" and an opportunity for a "hearing" remain the touchstones of procedural due process, courts have also held that the hearing must be neutral and impartial.[45] Additionally, courts have determined that due process requires that an affected party be given the right to confront adverse witnesses[46] and be given the reasons for a decision on the record, based on all of the evidence presented.[47] These additional requirements simply clarify what due process requires when an individual is given his or her opportunity to be heard.

This entire concept of procedural due process "embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of [the American] people as to be deemed fundamental to a civilized society . . . ."[48] As such, although the Fifth Amendment guarantees due process only as to the federal government, the Fourteenth Amendment—ratified in 1868[49]—adopts the same language and creates a legal obligation applicable to the states as well.[50] It has mainly been heralded as a right essential to the American way of life because it "comports with the deepest notions of what is fair and right and just."[51] Thus, it is safe to say that where process is due, denial of such a right would stand in the face of those principles that the United States holds most dear.[52]

43. Eisenberg & Gecker, *supra* note 8, at 60 n.77 ("The delivery of notice and an opportunity to be heard logically go hand in hand, as the former tends to trigger the latter: the entire idea of notice is to give one the opportunity to protect his interests.").

44. *Id.*

45. *See In re* Murchison, 349 U.S. 133, 136 (1955).

> [O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. . . . This court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Such a stringent rule may sometimes bar trial by judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

Id. (citation omitted).

46. *See* TRIBE, *supra* note 23, at 736.

47. *See* Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 40 (1979) (Marshall, J., dissenting) ("[A]n inability to provide any reasons suggests that the decision is, in fact, arbitrary.").

48. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

49. *Due Process*, *supra* note 16.

50. *Id.*

51. *Solesbee*, 339 U.S. at 16 (Frankfurter, J., dissenting). It is also important to note that due process is considered to be violated if a particular rule or practice "offends some principle of justice so rooted in the traditions and conscience of [the American] people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

52. *See Solesbee*, 339 U.S. at 16 (Frankfurter, J., dissenting).

B. History of Due Process in Bankruptcy

Although procedural due process rights apply to all areas of law and equity,[53] history shows that the unique nature of bankruptcy law sometimes leaves these rights high-and-dry.[54] Bankruptcy law is unique in that it is often crisis-oriented, and as such it often requires that actions be taken immediately in order to avoid the collapse of businesses and the loss of jobs.[55] This is particularly noticeable in the context of § 363 sales,[56] which have increasingly been utilized by companies to quickly dispose of bankruptcy petitions in their entirety.[57] Specifically, § 363 allows debtors-in-possession to "use, sell, or lease all or substantially all of the property of the estate, outside the ordinary course of business, provided there is notice and hearing of the sale."[58] Increasingly, these types of sales have been utilized by companies both to receive cash to help fund their reorganization, and to sell certain assets of the company—or the entire company itself—and dispose of the bankruptcy without following the typical bankruptcy process.[59]

The issue is that the finality of § 363 sales—especially the fact that under § 363(m)[60] appeals of authorized sales must be found moot—poses the risk that the due process rights of creditors to be heard will not always be satisfied.[61] Thus, courts must be cognizant of balancing the efficiency to the organizations—both buyer and seller—against the protections that are owed to creditors through the Due Process Clause.[62] As this Note argues, the Second Circuit helped alleviate these concerns and showed why § 363 sales are not inherently bad for creditors, provided, of course, that those creditors have the following: (1) sufficient notice of the bankruptcy, either directly or through a class representative; (2) a chance to participate in the chapter 11 sale; and (3) a provision made for creditors in the chapter 11 plan.[63]

The concept of due process in bankruptcy is not entirely absent, however. The idea of "notice," in particular, occupies much of courts' discussions when

53. *See* Eisenberg & Gecker, *supra* note 8, at 50–51 ("The basic hierarchy of law pertaining to due process is both simple and important. The Fourteenth Amendment Due Process Clause trumps the Bankruptcy Code. In turn, the Code trumps the Federal Rules of Bankruptcy Procedure ('Rules').").

54. *See id.* at 48 ("There is a widespread belief that, because bankruptcy is rooted in equity, due process has limited relevance in a bankruptcy setting.").

55. *Id.*

56. 11 U.S.C. § 363 (2012).

57. Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 91 (2012).

58. *Id.* at 92.

59. *Id.*

60. 11 U.S.C. § 363(m).

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Id.

61. Raykin, *supra* note 57, at 92–93.

62. *Id.* at 93–98.

63. *See infra* Part III.

it comes to litigation like the GM Ignition Switch: cases that deal with creditors suing in tort for harm caused to them either before or after the bankruptcy.[64] Although not a tort case, in *City of New York v. New York, New Haven & Hartford Railroad*,[65] a railroad that was reorganizing sent out notice of its reorganization to all creditors with liens on the property (and gave notice to all other creditors via publication).[66] The city of New York, however, did not receive notice, despite owning several liens, and thus sued.[67] Writing for the Court, Justice Black stated:

> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.[68]

Thus, regardless of whether or not a creditor already knows of the impending bankruptcy, notice is required to protect their due process rights.[69]

Additionally, the right to be heard is *generally* respected and enforced in the context of bankruptcy law.[70] The case of *In re Wildman*,[71] however, provides an example of how bankruptcy *can* deny due process rights with impunity. There, a trustee and one other party alleged that a real estate agent had taken a bribe for the sale of a debtor's apartments.[72] Despite holding several hearings on the matter, the bankruptcy court never allowed the real estate agent to cross-examine witnesses or present any evidence in his defense.[73] On appeal, the Seventh Circuit held that the real estate agent was not allowed to participate in the court's reconsideration.[74] Ultimately, the court held that he was not entitled to due process, although it cited no authority for its holding.[75]

One other area where bankruptcy law still struggles with due process is "timing."[76] While the Supreme Court has stated that individuals must receive "some kind of hearing prior to the deprivation of a significant property interest,"[77] most bankruptcy cases have held that there is no due process violation

64. *See supra* Subsection II.A.1.
65. 344 U.S. 293 (1953).
66. *Id.* at 294.
67. *Id.*
68. *Id.* at 297.
69. Eisenberg & Gecker, *supra* note 8, at 56.
70. *Id.* at 61.
71. *See generally* 793 F.2d 157 (7th Cir. 1986).
72. *Id.* at 158–59.
73. *Id.* at 160.
74. *Id.*
75. *Id.*
76. Eisenberg & Gecker, *supra* note 8, at 61.
77. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978).

when there are "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[78]

Inevitably, these types of due process concerns arise because bankruptcy as a concept is "distinct from other areas of the law."[79] Thus, "bankruptcy is a process which, among other things, preserves value in a business in order to maximize its worth. . . . This approach results in a myriad of different hearings to solve the individual problems."[80]

C. History of GM's Bankruptcy Sale

After examining the importance of due process to the American way of life, and understanding the stakes at issue in the GM Ignition Switch case,[81] we must next come to understand *how* the case came to pass. To do so, we must examine the historical facts surrounding GM's bankruptcy sale during what has been termed "The Great Recession."[82]

On June 1, 2009, General Motors Corporation—which the Second Circuit termed "Old GM"[83]—filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York.[84] The company, which at the time was considered the nation's largest manufacturer of automobiles (with such brands as Chevrolet and Cadillac to their name), had posted net losses of $70 billion dollars in 2007 and 2008.[85] The possibility of GM's collapse—especially a disorderly collapse—alarmed many, including President George W. Bush.[86] After Congress declined to act, President Bush specifically announced that the executive branch would provide Old GM with emergency loans to allow the company time to revamp its business model.[87] As a result, Old GM was given approximately $13.4 billion dollars from the U.S. Department of the Treasury on the condition that it submit a plan for viability to the

78. Boddie v. Connecticut, 401 U.S. 371, 379 (1971); *see also* 11 U.S.C. § 362(f) (2012).

> Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

11 U.S.C. § 362(f) (2012).

79. Eisenberg & Gecker, *supra* note 8, at 82.

80. *Id.*

81. *See generally* Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135 (2d Cir. 2016).

82. *See* Catherine Rampell, *'Great Recession': A Brief Etymology*, N.Y. TIMES (Mar. 11, 2009, 5:39 PM), http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/ (discussing the rising trend in the use of the term "Great Recession" within media articles). For a more general history of both the definition of the term and its meaning within the period of 2007–2009, see *The Great Recession*, INVESTOPEDIA, http://www.investopedia.com/terms/g/great-recession.asp (last visited May 20, 2018); Robert Rich, *The Great Recession*, FED. RES. HIST., https://www.federalreservehistory.org/essays/great_recession_of_200709 (last visited May 20, 2017).

83. *Gen. Motors LLC*, 829 F.3d at 143.

84. *Id.*

85. *Id.*

86. *Id.* at 144.

87. *Id.*

President no later than February 2009.[88] In March 2009, however, President Barack Obama officially deemed Old GM's business plan not viable.[89] While he continued to pledge loan money to the company, it was clear by May 2009 that Old GM could not continue in this manner, and bankruptcy became the subject of conversation.[90]

On June 1, 2009—the same day that Old GM filed for chapter 11 bankruptcy—it also filed a motion to sell itself to a company named NGMCO, Inc.; what came to be known as "New GM."[91] This sale was to proceed in several steps: Old GM would first become a "debtor-in-possession" under the bankruptcy code, allowing it to continue operating while selling off portions of its business.[92] Second, New GM—the majority of which was owned by the U.S. Department of the Treasury—would acquire nearly all of Old GM's assets but would *not* acquire all of Old GM's liabilities.[93] Third, Old GM would remain with some assets, including interests in the Saturn brand, until it could liquidate those assets and officially disband.[94] Finally, Old GM would continue to undergo the traditional liquidation process typical of bankruptcy sales, while New GM would quickly emerge to begin operation of the business.[95]

All of these events eventually came to pass, leaving New GM with operation of the business assets and allowing it to remain "free and clear" of any liabilities of Old GM under the express terms of the Sale Agreement.[96] On July 10, 2009, the sale officially closed, and to the public eye, GM had emerged from bankruptcy in a remarkably short forty days.[97]

D. History of GM's Ignition Switch Flaw

The story of Old GM was not over, however. In February of 2014, New GM first announced to the National Highway Traffic Safety Administration that it would be recalling several vehicle brands due to a defect in the ignition switch.[98] Specifically, this defect could cause the vehicle's airbags not to properly deploy in the event of a crash.[99] Over the course of the next nine months, New GM would issue over sixty different recalls affecting over 25 million vehicles.[100] Evidence then began emerging that Old GM knew or should have known about the existence of the ignition switch defect as early as 2001

88. *Id.*
89. *Id.*
90. *Id.* at 144–45.
91. *Id.* at 145.
92. *Id.* at 145–46 (citing 11 U.S.C. § 1101 and 11 U.S.C. § 363(b)(1)).
93. *Id.* at 146; *see also* 11 U.S.C. § 363(f) (2012) (allowing for sale orders to be completed "free and clear of any interest in such property").
94. *Gen. Motors LLC*, 829 F.3d at 146.
95. *Id.*
96. *Id.* at 146–47.
97. *Id.* at 147.
98. *Id.* at 148.
99. *Id.*; *see also* Basu, *supra* note 13.
100. *Gen. Motors LLC*, 829 F.3d at 148.

during preproduction testing of a new Saturn vehicle.[101] Despite complaints from customers about times where their vehicle's engine, power steering, and braking would cut off while the car was in motion, Old GM in 2002 classified these complaints as "non-safety issue[s]."[102] In late 2005, reports of fatalities began to emerge after a sixteen-year-old from Maryland crashed into a tree when the ignition switch in her Chevrolet Cobalt shut down the car's electrical system, causing the airbags to fail.[103]

An independent report eventually emerged that detailed the general attitude of Old GM regarding the ignition switch defect.[104] In the report, it specified that Old GM knew about the ignition switch flaw, but Old GM's corporate culture was to shrug responsibility for ensuring that it would be fixed.[105] After the bankruptcy sale in 2009, New GM then continued to sell vehicles to the public that exhibited the ignition switch defect up until its first official recall in 2014.[106]

After said recall, individuals filed dozens of class action suits claiming that the defect caused both economic losses and personal injuries and that those injuries occurred both before and after GM's bankruptcy sale.[107] New GM argued that the Sale Order, which contained an express "free and clear" provision, should be invoked to shield it from liability.[108] The estimated amount of barred liabilities was between $7 and $10 billion just for the claims of economic losses, which does not factor in potential damages from presale accidents.[109]

III. ANALYSIS

A. The Holding and Reasoning of the Bankruptcy Court

The Bankruptcy Court for the Southern District of New York first heard the case against GM on April 15, 2015.[110] In the case, New GM specifically argued that due process requirements did not apply to bankruptcy sale orders under 11 U.S.C. § 363.[111] In fact, New GM argued that § 363's language allowing for sales "free and clear" of liabilities trumped state law that would otherwise impose successor liability on the purchasing company.[112] Wisely, the court began by dismissing that claim as unpersuasive.[113] Instead, the court held that the plaintiffs *were* entitled to due process "in the context of each of the sale and

101. *See* Basu, *supra* note 13.
102. *Gen. Motors LLC*, 829 F.3d at 149.
103. *Id.*; Basu, *supra* note 13.
104. *Gen. Motors LLC*, 829 F.3d at 150.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *In re* Motors Liquidation Co., 529 B.R. 510, 520 (Bankr. S.D.N.Y. 2015).
111. *Id.* at 550.
112. *Id.*
113. *Id.*

claims processes."[114] The court did not, however, concede that a due process violation for the deprivation of property had actually occurred.[115]

The bankruptcy court was even willing to concede that the notice requirement of due process was insufficient in this case.[116] Specifically, the court held that while notice by publication—which Old GM did provide—is typically sufficient to alleviate due process concerns, owners of vehicles with ignition switch flaws had "known" claims against Old GM at the time of the bankruptcy sale.[117] Thus, Old GM was required to give *more* notice because of its knowledge of the existence of the ignition switch flaw prior to their sale to New GM; this is because it was found to be culpable.[118]

From that point forward, however, the bankruptcy court began its descent away from reason. Despite the fact that the Second Circuit had not ruled on the issue, the court ultimately adopted a test utilized by several other circuit courts to determine whether a denial of the notice that due process requires meant that the plaintiffs were, in fact, "denied due process."[119] This test required a showing that the plaintiffs were in fact prejudiced by the lack of notice.[120] Here, the bankruptcy court applied the question of prejudice to the various types of plaintiffs based on their respective claims: the economic-loss plaintiffs (including used car purchasers) and the preclosing-accident plaintiffs.[121] Ultimately, the court concluded that the Sale Order, and thus the "free and clear" provision, was to be enforced against both the economic-loss plaintiffs and the preclosing-accident plaintiffs, barring their claims for successor liability against New GM.[122] The only plaintiffs that *could* continue to bring their claims under the court's ruling were those economic-loss plaintiffs that had claims against New GM for causes of action arising solely from their own, independent, post-closing actions.[123] All others were given no remedy for their violation of the notice that due process requires since the court determined that it did not equate with a true "due process violation."[124]

In addition, the bankruptcy court wrongly concluded that even if the plaintiffs could show prejudice due to their lack of actual notice with regard to the bankruptcy filing, the doctrine of equitable mootness[125] prevented it from modifying the plan confirmation order so as to allow the creditors to receive payment on those claims from a trust established for the benefits of other par-

114. *Id.* at 555.

115. *Id* at 550–55. Instead, the court simply acknowledges that "a prepetition right that the Plaintiffs had to at least try to sue a successor was taken away from them, without giving them a chance to be heard as to whether or not that was proper." *Id.* at 552.

116. *Id.* at 560.

117. *Id.*

118. *See id.*

119. *Id.* at 560–61.

120. *Id.* at 560.

121. *Id.* at 565–74.

122. *Id.* at 598.

123. *Id.*

124. *Id.*

125. *See* 11 U.S.C. § 363(m) (2012).

ties.[126] The court stated that allowing such claims would add another $7 to $10 billion in liability, which would fundamentally alter the funding assumptions made when the trust was established.[127] This was supposedly inequitable, despite the fact that it ultimately barred creditors from protecting their due process rights to bring claims and be heard.[128]

B. The Second Circuit's More Tempered Approach

On appeal, the Second Circuit chose to right the wrongs created by the bankruptcy court below.[129] Specifically, the court reversed the decision to enforce the Sale Order against plaintiffs with claims relating to the ignition switch defect, which included economic loss claims and pre-closing accident claims.[130] In doing so, the Second Circuit's ruling became a victory for those wrongfully injured due to Old GM's unwillingness to fix a problem known to them for over a decade.[131] Regardless of whether or not New GM was equally culpable, the rights of the plaintiffs to bring suit overshadowed such a concern, especially considering the fact that the bankruptcy sale had taken away the plaintiffs' opportunity to sue Old GM.[132] Essentially, the court rightly punished both Old GM and New GM for not providing adequate notice to their creditors since it was clear that those creditors would have opposed the bankruptcy sale order as written—that is, with the clause that New GM would be considered "free and clear" of all future liability—had the full extent of the ignition switch defect been disclosed in a timely manner.[133] And in doing so, the Second Circuit firmly established that the due process rights of creditors could not simply be swept to the side when it inconvenienced the dealings of big businesses.[134] Rather, the court took a stand and acknowledged that due process was, in fact, "based on moral principles so deeply imbedded in the traditions and feelings of

126. *See In re* Motors Liquidation Co., 529 B.R. at 585–92.

127. *Id.*

128. *See id.* at 585–92.

129. *See* Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135, 170 (2d Cir. 2016).

130. *Id.*

131. *See* Aaron Boschee, *The Second Circuit's General Motors Decision Defines Limits to "Free and Clear" Sales*, SQUIRE PATTON BOGGS (July 14, 2016), http://www.esquireglobalcrossings.com/2016/07/the-second-circuits-general-motors-decision-defines-limits-to-free-and-clear-sales ("The Second Circuit's ruling is certainly a victory for the plaintiffs who are seeking damages for personal injuries arising out of product defects and redress for lost economic value for defective vehicles."); Erik Larson & Margaret Cronin Fisk, *GM Can't Avoid Up to $10 Billion in Switch Suits, Court Says*, BLOOMBERG (July 13, 2016, 9:33 AM), http://www.bloomberg.com/news/articles/2016-07-13/gm-lawsuits-over-ignition-switches-used-cars-revived-by-court ("The appeals court's ruling today solidifies something that we have known from the very beginning of this suit—GM's bankruptcy filing was a calculated move in its effort to conceal and cover-up its actions . . . .").

132. *See In re* Motors Liquidation Co., 529 B.R. at 552 ("[A] prepetition right that the Plaintiffs had to at least try to sue . . . was taken away from them, without giving them a chance to be heard as to whether or not that was proper.").

133. *See* Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135, 170 (2d Cir. 2016).

134. *Id.* at 158.

[the American] people as to be deemed fundamental to a civilized society . . . ."[135]

Additionally, the Second Circuit's decision highlights the fact that not all § 363 sale orders utilizing the "free and clear" language are invariably bad for creditors. While Raykin's concerns that § 363 sales generally afford creditors less protection than with a more typical bankruptcy plan[136] remain valid, the decision alleviates some of the concern surrounding whether creditors could be barred from exercising their due process rights in certain—albeit limited—circumstances. Although some economists believe that the Second Circuit's decision actually highlights the ease with which corporations may bar creditors under normal circumstances—that is, as long as there is proper notice[137]—that is not necessarily negative. Indeed, as long as creditors are given sufficient notice and afforded an opportunity to participate in the sale order prior to its execution, there is nothing inherently unfair in then allowing future claims to be barred, because due process *has* been given to those creditors.[138] And where buyers and sellers are able to forecast class claims at a certain dollar amount and then set that aside as a remedy for aggrieved creditors, it ultimately benefits all parties.[139]

C. Bankruptcy's Cavalier Approach to "Unknown Creditors"

1. The Fifth Circuit in Placid Oil

Many bankruptcy courts could still afford to mirror the Second Circuit's mindfulness with regard to due process concerns, however. This is especially true in cases that deal with supposedly *unknown* creditors. For example, in 2014 the Fifth Circuit dealt with just such an issue.[140] There, Jimmy Williams, Sr.—a former employee of Placid Oil Co. ("Placid Oil")—and his children brought tort claims against the company for the death of his wife as well as for various asbestos-related illnesses.[141] Placid Oil moved for summary judgment, which the bankruptcy court granted and the district court affirmed.[142]

Placid Oil had filed for bankruptcy in 1986, and January 31, 1987 was the date set by the bankruptcy court as the "bar date by which potential creditors were required to file claims."[143] During January 1987, Placid Oil published no-

135. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

136. *See* Raykin, *supra* note 57, at 96–98.

137. *See* Boschee, *supra* note 131 (addressing how "the court's ruling also underscores the broad scope of 'free and clear' sales under normal circumstances").

138. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) ("Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.").

139. *See* Keith Charles Owens, *Bankruptcy Sales: A Banker's Guide*, 121 BANKING L.J. 22, 26 (2004).

140. *See generally* Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151 (5th Cir. 2014).

141. *Id.* at 152.

142. *Id.*

143. *Id.* at 153.

tice of the bar date in the *Wall Street Journal* on three occasions, after which point all claims against the company were discharged except for those obligations specifically included in the bankruptcy plan, which did not mention any future asbestos liability.[144] While Mr. Williams had testified that he was "generally aware" of the company's bankruptcy, he was unable to remember any meetings or newspaper notices about it.[145]

Although the record stated that Placid Oil was aware of the dangers of exposure to asbestos by the early 1980s, *and* that the company was specifically aware of Mr. Williams's exposure during the course of his employment, the Fifth Circuit ultimately affirmed the judgment of the district court.[146] Specifically, the court held that despite the company's knowledge about Mr. Williams's exposure, the bankruptcy court's determination that Mr. Williams was an unknown creditor for the purposes of the bankruptcy plan was *not* a clear error.[147]

In the court's analysis, it specifically addressed the difference between known and unknown creditors and the level of notice required for each to satisfy due process concerns.[148] At the heart of the analysis was the Fifth Circuit's interpretation of the rule first outlined in *In re Crystal Oil Co.*, which also dealt with the distinction between known and unknown creditors.[149] In *Crystal Oil*, the Louisiana Department of Environmental Equality brought claims of environmental damage against the defendant oil company after its bankruptcy plan had been completed.[150] After a close examination of the facts, the court conceded that the decision was a close one, but it ultimately held that the Louisiana Department of Environmental Equality was an *unknown* creditor and as such was only entitled to constructive notice of the bankruptcy.[151] The court came to this conclusion despite the fact that: (1) Crystal Oil was a company that had dealt with state environmental agencies in the past, and (2) the Louisiana Department of Environmental Equality had previously contacted Crystal Oil about the very site upon which the environmental damage claims were based.[152] Specifically, a representative of the Louisiana Department of Environmental Equal-

144. *Id.*

145. *Id.*

146. *Id.* at 153, 159.

147. *Id.* at 157.

148. *Id.* at 154 ("Known creditors include both claimants actually known to the debtor and those whose identities are 'reasonably ascertainable.'"). Additionally, the court stated that "[a] claimant is 'reasonably ascertainable' if he can be discovered through 'reasonably diligent efforts.'" *Id.* (citation omitted). The court further described the meaning of "reasonably ascertainable" by stating that it requires "the debtor [to] have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable." *Id.* at 154–55 (quoting La. Dep't of Envtl. Quality v. Crystal Oil Co. (*In re* Crystal Oil Co.), 158 F.3d 291, 297 (5th Cir. 1998)). Finally, the court discussed the requirements for notice to unknown creditors: "By contrast, the debtor need only provide 'unknown creditors' with constructive notice by publication. . . . Publication in a national newspaper such as the *Wall Street Journal* is sufficient." *Id.* at 155.

149. *Id.*; *see also Crystal Oil Co.*, 158 F.3d at 297.

150. *Crystal Oil Co.*, 158 F.3d at 293–95.

151. *Id.* at 297–98.

152. *Id.* at 297.

ity had sent a memorandum to the defendant oil company prior to the completion of the bankruptcy sale that warned the defendant to "use caution . . . as there could be environmental problems [with the site]."[153] The court held that this information was not sufficient to place Crystal Oil on notice that a claim may have been forthcoming (or at least that the lower court's findings were not clearly erroneous under a "clear error" standard of review).[154] Thus, by the court's analysis, the Louisiana Department of Environmental Equality could not have been a "reasonably ascertainable" claimant entitled to actual notice of the bankruptcy as a known creditor.[155]

The Fifth Circuit in *In re Placid Oil Co.* then utilized the faulty precedent set by *Crystal Oil* to come to its own decision.[156] There, the court placed a significant amount of weight on the rule that a "debtor must possess 'specific information' about a manifested injury, to make the claim more than merely foreseeable."[157] The court reasoned that while some would view this as too high of a threshold, this interpretation of the holding in *Crystal Oil* was ultimately "informed by several authorities and by our sensitivity to the policy concerns underlying bankruptcy law."[158] Namely, the court emphasized the importance of efficiency in bankruptcy proceedings and cited to the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.* as evidence that it should be one of the judiciary's main concerns in cases like the one at issue.[159] The court then continued by looking to the distinction between known and unknown creditors as defined by other circuit courts.[160] Through this analysis, the court confirmed the viability of the language used in *Crystal Oil* that a debtor is required to have "specific information" before a creditor can become "known."[161] Thus, the court concluded: "Information, however specific, that makes a claim only foreseeable or conjectural is insufficient."[162]

153. *Id.* at 298.

154. *Id.*

155. *Id.*

156. *See* Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 155 (5th Cir. 2014).

157. *Id.*

158. *Id.*

159. *Id.* at 155–56.

> First, the Supreme Court's opinion in *Mullane* . . . teaches that unknown creditors are those whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the debtor." The Court specifically declined to impose upon the debtor "ordinary standards of diligence," given countervailing concerns for efficiency.

Id. (citation omitted).

160. *See, e.g.*, Arch Wireless, Inc. v. Nationwide Paging, Inc. (*In re* Arch Wireless, Inc.), 534 F.3d 76, 81–82 (1st Cir. 2008) (holding that the bankruptcy court did not clearly err when it found a creditor to be "known," citing certain emails that were sent by the creditor to the debtor prior to the completion of the bankruptcy, and stating that the emails "could reasonably be understood to assert an entitlement to affirmative compensation"); Zurich Am. Ins. Co. v. Tessler (*In re* J.A. Jones, Inc.), 492 F.3d 242, 251–52 (4th Cir. 2007) (holding that the estate of an accident victim was a known creditor to the defendant general contractor because an employee of the company was fully aware of the accident, even though no pre-petition claims were actually filed); Chemetron Corp. v. Jones, 72 F.3d 341, 348 (3d Cir. 1995) (holding that known claimants must be "reasonably ascertainable", *not* "reasonably foreseeable").

161. *Placid Oil Co.*, 753 F.3d at 156–57.

162. *Id.*

In addition to concerns about efficiency, the court also weighed other policy concerns unique to the bankruptcy setting in reaching its conclusion. Specifically, the court noted that "[b]ankruptcy offers the struggling debtor a clean start. In the interests of facilitating this recovery and balancing due process considerations, the courts have established a practical limit to the debtor's duty to notify creditors: Actual notice is required only for 'known' creditors."[163] As such, the court declined to change the limit it believed had been set forth.[164]

After analyzing the justification behind the rule, the Fifth Circuit then proceeded to explain exactly how the facts in Mr. William's case applied.[165] Specifically, the court stated: "Although Placid knew of the dangers of asbestos and Mr. Williams's exposure, such information suggesting only a risk to the Williamses does not make the Williamses known creditors. Here, Placid had no specific knowledge of any actual injury to the Williamses prior to its bankruptcy plan's confirmation."[166] Essentially, the court was unwilling to allow Mr. Williams to be considered as a known creditor, even though the significant risk of injury *was* known by Placid Oil prior to completion of the bankruptcy and despite the fact that Mr. Williams surely would have brought a claim before the bankruptcy had the timing of his asbestos-related illness simply been more immediate.[167]

Unfortunately, this type of ruling essentially gives big companies—those that are weighing the option of filing bankruptcy and that are aware of the likelihood of injuries resulting from negligent or reckless behavior—incentives to quickly move forward with bankruptcy proceedings.[168] These companies are then able to immunize their harmful behavior at the expense of those that are otherwise innocent.[169] This incentive is only exacerbated in the context of § 363 bankruptcy sales, like the one utilized in the GM Ignition Switch case, because use of § 363 often means that a bankruptcy petition can be disposed of altogether, thus making the process even speedier than a typical chapter 11 bankruptcy.[170] This showcases the importance of the Second Circuit's decision in the GM Ignition Switch case in combating these concerns and also helps to explain why other courts like the Fifth Circuit should reconsider the faulty reasoning behind their recent decisions.

Although it certainly is no consolation to those claimants seeking to bring tort suits against companies who have already completed the bankruptcy pro-

163. *Id.* at 157.

164. *Id.*

165. *Id.*

166. *Id.* The court then continued by stating that "no instances of asbestos-related injury or illness were known to Placid prior to confirmation. . . . Press clippings about widely-known, but general, risks of asbestos exposure do not establish that Placid knew of any specific injury to its employees or any asbestos-related claim." *Id.*

167. *See id.*

168. *See* Raykin, *supra* note 57, at 92.

169. *Id.* at 98.

170. *Id.* at 91 ("The primary benefit of § 363 sales is their speed . . . [which] provides an efficient mechanism to obtain cash without confirming a reorganization plan, but [which] also leaves creditors vulnerable to due process violations because of the condensed time frame.").

cess, at least the Fifth Circuit in *Placid Oil* was not unanimous in its decision.[171] In his dissent, Judge James L. Dennis stated:

> The underlying legal issue in this case is whether a bankruptcy court may, consistent with the Constitution's guarantee of due process, hold that a state-law wrongful-death claim based on the death of a housewife, who fatally contracted mesothelioma from asbestos fibers on her husband's work clothes, was discharged in a bankruptcy filed by her husband's former employer fifteen years before she developed or was aware of any symptom of the disease. In my view, the bankruptcy court in this case erred in failing to recognize that such a result would violate the constitutional guarantee of due process of law.[172]

Additionally, Judge Dennis acknowledged that several courts as well as commentators have expressly stated that constructive notice given to unknown future claimants (that are also unaware of their injury or of any symptoms) "fails to comport with the guarantee of due process."[173] For example, the United States District Court for the Northern District of California in *In re Hexcel Corp*.[174] stated that notice by publication—*i.e.*, constructive notice—may be sufficient for those creditors "*who could contemplate that they might have a claim*[,]"[175] but that it would be difficult to see "how the announcement of a bankruptcy proceeding published in the Wall Street Journal could possibly satisfy due process concerns for a potential creditor who had no way of knowing that it may have a claim against the debtor some time in the future."[176] The dissent also focused its argument on the dicta in the Supreme Court case *Amchem Products v. Windsor*,[177] which stated that "[e]ven if they fully appreciate the significance of [the] notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether" to participate in the bankruptcy proceedings.[178]

After acknowledging the abundant issues with constructive notice in situations like that in *Placid Oil*, Judge Dennis suggested a solution that he be-

171. *See Placid Oil Co.*, 753 F.3d at 159 (Dennis, J., dissenting).

172. *Id.*

173. *Id.* at 161.

174. 239 B.R. 564 (N.D. Cal. 1999).

175. *Id.* at 571.

176. *Id.*; *see also* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339, 354 (2004) ("If they are alive and actually see the notice, [future claimants] could not recognize themselves as affected in any way by the bankruptcy court case and will, therefore, take no action to ensure their interests are represented."). Bartell also states: "[W]hen an individual cannot recognize that he or she has a claim in a bankruptcy case and, therefore, cannot make a decision about how to assert that claim, that person is functionally or constructively 'incompetent' for purposes of the bankruptcy case." *Id.* at 366. "These claimants . . . have no ability to represent their own interests in the bankruptcy case because they cannot be given the information necessary to enable them to make decisions about those interests." *Id.* at 370. Therefore, Bartell argues, "[c]onstructive notice cannot reach [them because they] do not know of their claims." *Id.* As a result, "[p]ublication is not notice at all." *Id.*

177. 521 U.S. 591, 628 (1997).

178. *Id.*

lieved would help alleviate some of those concerns.[179] Specifically, he noted that "'a bankruptcy court may appropriately appoint a guardian *ad litem'*—or, stated differently, a future-claims representative—'to represent their interests in an adversary proceeding under Bankruptcy Rule 7017.'"[180] By appointing future-claims representatives as part of bankruptcy proceedings, Judge Dennis claimed that the vast majority of due process concerns with respect to claimants that are unaware of their risk of injury would be satisfied.[181]

While some commentators have criticized both the majority opinion and the dissent for refusing to delve into additional issues concerning these types of future claimants,[182] the dissent's proposed solution does at least attempt to rectify a situation that is in dire need of balancing. As it currently stands, the Fifth Circuit has essentially stated that the concerns of the company seeking bankruptcy—namely its need for efficiency and speed—categorically outweigh the due process concerns of potential claimants who have been or are likely to be adversely affected by the company's actions.[183] While this author is certainly cognizant of the tenuous circumstances surrounding many large corporate bankruptcies—*i.e.*, that the company must move quickly if it is to survive and continue to employ its workforce[184]—there must be some balancing between those needs and the needs of creditors who may be barred from bringing suit simply because they were unaware of the risk of injury prior to the completion of the bankruptcy. As it stood, the Fifth Circuit's cavalier treatment of these future claimants as unknown creditors set a dangerous precedent that threatened to destroy due process for entirely innocent tort victims.

2. Delaware and Energy Future Holdings

Unfortunately, the Fifth Circuit was not the only court to hold that certain creditors who *should* have been entitled to actual notice were considered unknown creditors at the time of the bankruptcy.[185] In *In re Energy Future Holdings Corp.*, for example, the United States Bankruptcy Court for the District of Delaware faced a similar set of facts as the Fifth Circuit.[186] There, the case also

179. Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 160–62 (5th Cir. 2014) (Dennis, J., dissenting).

180. *Id.* at 162 (quoting Laura B. Bartell, *supra* note 176, at 351–52). Judge Dennis additionally cites to FED. R. CIV. P. 17(c), which specifically states that "a general guardian," "a committee," "a conservator," or "a like fiduciary" is permitted to "sue or defend on behalf of a minor or an incompetent person." Further, the rule provides that "[t]he court must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." *Id.*

181. *Id.*

182. *See, e.g.*, Amir Shachmurove, *Remembrance of Claims Past: The Due Process Owed to Unknown and Unknowable Future Claimants in Light of* Williams v. Placid Oil Co. (In re Placid Oil Co.), NORTON BANKR. L. ADVISER, Feb. 2015, AT 1, 6–9 (deriding the court for not addressing the larger issue of what constitutes a "claim" that may be brought against a debtor by a creditor either before or after completion of the bankruptcy).

183. *Id.*

184. *See* Raykin, *supra* note 57, at 94–96.

185. *See, e.g.*, *In re* Energy Future Holdings Corp., 522 B.R. 520 (Bankr. D. Del. 2015).

186. *See generally id.*

dealt with exposure to asbestos; the claimants in *Energy Future Holdings*, however, had not yet manifested any illness prior to the date of petition for the bankruptcy in question.[187]

Specifically, the debtors in this case had filed a motion to establish a bar date for the filing of proofs of claims by potential claimants who had allegedly been exposed to asbestos during the course of their work, and which was claimed to be the result of the debtors' conduct. A number of personal injury law firms that represented those potential claimants objected to the motion.[188] According to the factual history, many of the clients represented by the personal injury law firms were workers at nuclear or electric power plants, which often "produce[] extreme amounts of heat."[189] Due to this heat, the plants had to be insulated in various locations, including the "walls, wires, pipes, boilers and generators," which in turn meant that much of the plants were laden with asbestos and similar materials.[190] Additionally, the workers themselves were often required to wear insulated clothing and equipment that contained asbestos as part of their day-to-day duties.[191] Indeed, one of the debtors in the case was even "at one time known as Ebasco, which was at various times affiliated with Boise Cascade, Halliburton, and Raytheon Corporation (all of which have had asbestos-related personal injury liability)."[192]

In their motion to set the bar date, the debtors stated that they believed that "litigation and settlement expenses incurred in connection with asbestos claims against [them were] not material."[193] They sought to set October 27, 2014 as the bar date for all claims, including potential future ones, as a hearing had been scheduled for October 28th on that bar date.[194] The personal injury law firms, in response, objected to "any bar date that would apply to [u]nmanifested [c]laims."[195] Specifically, the law firms attempted to establish that the due process concerns of those creditors that had no knowledge of any

187. *Id.* at 523.

188. *Id.* at 523–24.

189. *Id.* at 524.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 525. The motion continued:

> The Debtors estimate that their asbestos expenses average up to $3 million annually. The Debtors further believe that their restructuring is unlikely to be driven by asbestos claims or result in a channeling injunction under section 524(g) of the Bankruptcy Code. The Debtors assert that the purported asbestos claims . . . reflect a point of due diligence for parties participating in the ongoing marketing process of EFH Corp. Thus, the Debtors and potential bidders seek to use the tools available in the Bankruptcy Code to gather information regarding their outstanding liabilities and to bar all 'claims' that are not properly and timely filed.

Id.

194. *Id.*

195. *Id.* In their objection, the personal injury firms raised two main arguments: (1) that "because asbestos-related injuries may not be diagnosed for up to 50 years after exposure, publication notice does not satisfy the requirements of due process for an *entire class of claimants that are so unknown as to be unknown even to themselves*;" and (2) that the best course of action for dealing with asbestos liability is "through the creation of an asbestos personal injury trust." *Id.*

injury prior to the bankruptcy would be hampered by the creation of a bar date that would relieve the debtors of all future liability once that date had passed.[196]

In its legal analysis, the court first feigned unease about the due process concerns of the claimants by stating that while the personal injury law firms did not have standing to object to the Bar Date Motion under 11 U.S.C. § 1109(b),[197] the court would still exercise its independent review to at least consider and rule on the objections brought forth.[198] As a result, the court limited its holding only to those unmanifested claims for which clients of the personal injury law firms had an interest.[199]

The court began its analysis by addressing the policy behind the existence of bar dates:

> A bar date serves the important purpose of enabling the parties to a bankruptcy case to identify with reasonable promptness the identity of those making claims against the bankruptcy estate, and the general amount of the claims, a necessary step in achieving the goal of successful reorganization. It is akin to a statute of limitations, and must be strictly observed. This rule contributes to one of the main purposes of bankruptcy law, securing, within a limited time, the prompt and effectual administration and settlement of the debtor's estate.[200]

The court further explained that "the objectives of finality and fixing the universe of claims permeate the law of bankruptcy, and in achieving those ends, the setting of a bar date is no more unfair, *assuming reasonable notice*, than is a statute of limitations, a finality concept firmly embedded in our legal system generally."[201]

Next, the court chose to examine an issue the Fifth Circuit neglected to consider in *Placid Oil*: what constitutes a "claim" under the Bankruptcy Code.[202] Here, the court made one of its only redeemable decisions. Specifically, the court cited to a definition put forth by the Third Circuit which stated that "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code."[203] The Third Circuit had previously utilized this rule to

196. *Id.*

197. *Id.* Section 1109(b) states that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b) (2012).

198. *Energy Future Holdings*, 522 B.R. at 526 ("Although the PI Law Firms do not have standing to object . . . given the due process concerns in play, the Court, in exercising its independent review, will consider the PI Law Firms' arguments in determining whether to establish a bar date for Unmanifested Claims.").

199. *Id.*

200. *Id.* at 526–27 (citations omitted). The court continued its policy considerations by stating that without setting a bar date, "a Chapter 11 case could not be administered to a conclusion. There would be no time established for the filing of claims." *Id.* at 527. The court then tempered its analysis with a realization that due process must also play a role: "[I]t is essential . . . that notice be given to creditors consistent with the demands of due process, for as provided in Rule 3003(c)(2), a creditor who fails to file a claim within the time allowed is precluded from being treated as a creditor . . . ." *Id.*

201. *Id.* (emphasis added) (citations omitted).

202. *Id.* at 527–28.

203. *Id.* (quoting Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010)).

hold that pre-petition exposure to a substance or product, like asbestos, could still give rise to a claim even if the injury did not manifest until after completion of the bankruptcy or reorganization.[204] Thus, "due process concerns could revive a claim" that otherwise would have been discharged by completion of the bankruptcy plan, and "inadequate notice would *preclude* discharge of a claim in bankruptcy."[205]

Despite acknowledging the Third Circuit's stance, however, the court ultimately held that publication notice to an "unknown" creditor could be sufficient to satisfy due process, and thus a claim *could* be discharged after establishing a bar date.[206] In reaching this conclusion, the court examined a number of cases from other circuits, including the Fifth Circuit's erroneous decision in *Placid Oil*.[207] Thus, with the improper belief that "some or all of the Unmanifested Claims [could] be available to the Debtors," the bankruptcy court then turned to whether a bar date should be established under the debtors' motion.[208]

In its analysis of the motion, the court stated: "These are the claims of persons that were exposed to asbestos pre-petition but have not yet manifested any signs of illness. These are claimants that do not know that they have an asbestos related injury. Indeed, they are *unknown* to themselves, let alone the Debtors."[209] While acknowledging that the workers were, in fact, exposed to asbestos prior to the petition date set forth by the debtors—and thus theoretically had claims under the definition set out by the Third Circuit[210]—the court distinguished the facts at issue with those of the cases it had previously considered.[211] Because the main issue before the court was the establishment of a bar date under the reorganization plan, the court was "not looking back to determine if adequate due process was given to an unknown claimant."[212] Instead, the focus was solely on whether the court should be *required* to establish the

204. *Id.* at 528; *see also Grossman's Inc.*, 607 F.3d at 125.

205. *Energy Future Holdings*, 522 B.R. at 528 (emphasis added).

206. *Id.* at 537 (acknowledging that "the case law reaches disparate conclusions" about whether due process can be satisfied by publication notice, but ultimately holding that the scales tipped in favor of believing publication notice *could* be sufficient to allow for the discharge of claims).

207. 753 F.3d 151, 158 (5th Cir. 2014); *see also* Wright v. Owens Corning, 679 F.3d 101, 107–08 (3d Cir. 2012) ("As the District Court noted, we generally hold that for unknown claimants, like the Plaintiffs, notice by publication in national newspapers is sufficient to satisfy the requirements of due process, particularly if it is supplemented by notice in local papers."); *In re* New Century TRS Holdings, Inc., 528 B.R. 251, 257 (Bankr. D. Del. 2014) ("It is well settled that constructive notice of the claims bar date by publication satisfies the requirements of due process for unknown creditors. . . . Publication in national newspapers is regularly deemed sufficient notice to unknown creditors . . . ."), *vacated*, 612 Fed. App'x 147 (3d Cir. 2015); *In re* Chemtura Corp., 505 B.R. 427, 431 (Bankr. S.D.N.Y. 2014) ("In short, as the Bankruptcy Court found, the Notice was 'reasonably calculated, under all the circumstances, to apprise [Appellants] of the pendency of the action and afford them an opportunity to present their objections.'").

208. *Energy Future Holdings*, 522 B.R. at 537.

209. *Id.*

210. *See* Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010).

211. *Energy Future Holdings*, 522 B.R. at 537 ("The posture of these cases is different, however, from much of the case law discussed above."). The court continued: "Here, the Debtors are seeking a bar date. No plan has been filed and no discharge is being sought. The ultimate treatment of the Unmanifested Claims is not before the Court. The sole issue is whether to establish a bar date for those claims." *Id.*

212. *Id.*

bar date or whether it had the discretion to allow claimants to file claims indefinitely, provided that their injuries were the direct result of the debtors' conduct prior to the petition for reorganization.[213]

The argument presented by the personal injury law firms was that there was no requirement that the court establish a bar date for unmanifested claims.[214] Instead, the firms insisted that the court should utilize a "channeling injunction" under section 524(g) of the Bankruptcy Code[215] to deal with the claims.[216] The bankruptcy court, however, found this argument unpersuasive.[217] Specifically, the court utilized a statutory construction analysis, and stated that the plain meaning of section 524(g) of the Bankruptcy Code gave discretion to the court to create a channeling injunction,[218] whereas Bankruptcy Rule 3003(c)(3) *required* the court to establish a bar date for all claims, including those that were considered to be unmanifested.[219] In fact, the court held that because section 524(g) was permissive in nature, consideration of its application could "not [be] undertaken until confirmation of a plan of reorganization."[220] As a result, the court found that "a bar date must be established for all claims, including Unmanifested Claims, even though the Court may later extend such bar date for cause shown."[221]

Finally, the United States Bankruptcy Court for the District of Delaware reconsidered the policy concerns at play and whether their decision fell in line with those particular considerations.[222] Ultimately, the court decided that section 1121 of the Bankruptcy Code[223] did not allow the court—or the personal injury law firms and their unmanifested claimants, for that matter—to "dictate

213. *Id.* The United States Bankruptcy Court for the District of Delaware clarified the difference between this case and others by stating that "[i]n the look-back cases, courts have the benefit of knowing the contents of the notice, the number of times the notice was published, and in which publications the notice was published." *Id.* Additionally, "in a look-back scenario, courts have the benefit of knowing the terms of the plan and whether, in fact, there are Unmanifested Claimants." *Id.* The court then concluded: "Obviously, this Court does not have this information (as above stated, the Debtors agreed to narrow the issues herein to whether a bar date may be established for Unmanifested Claimants; the issues related to content and scope of the notice have been continued)." *Id.*

214. *Id.* at 538.

215. Section 524(g) states: "After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section." 11 U.S.C. § 524(g)(1)(A) (2012).

216. *Energy Future Holdings*, 522 B.R. at 538.

217. *Id.*

218. The court's focus was on the use of the word "may" in section 524(g). *See* 11 U.S.C. § 524(g)(1)(A) (2012) ("After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 *may* issue . . . .") (emphasis added).

219. FED. R. BANKR. P. 3003(c)(3) ("The court *shall fix* and for cause shown may extend the time within which proofs of claim or interest may be filed. . . . [A] proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), (c)(4), and (c)(6).") (emphasis added).

220. *Energy Future Holdings*, 522 B.R. at 539.

221. *Id.*

222. *Id.*

223. 11 U.S.C. § 1121(a) (2012) ("The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case."). Essentially, § 1121 gives debtors the *exclusive* right to both solicit and propose a bankruptcy plan or a plan for reorganization. *See id.*

plan terms, including whether to forego discharge of the Unmanifested Claims or to require a section 524(g) injunction."[224] Thus, in the end, due process was once again unfortunately stripped from those potential future claimants, as they were prohibited from bringing any tort suits after the bar date against the debtors, even though their injuries could be directly linked to the debtors' negligent conduct prior to the petition for reorganization.[225]

D. How the Second Circuit GM Case Could Turn the Tide

These cases in the Fifth Circuit and the United States Bankruptcy Court for the District of Delaware share one important quality with the Second Circuit's GM Ignition Switch case: in all instances, the company undergoing bankruptcy proceedings maintained a higher level of knowledge than the creditors regarding the risk of harm from their faulty products or working conditions.[226] This imbalance of power *should* have placed the onus on the corporations to more diligently seek out information regarding creditors with potential future claims. But with the exception of the Second Circuit decision in the GM Ignition Switch case, the courts' concern for the companies' need to ensure a speedy bankruptcy process appears to have overshadowed those due process concerns.

One author supported the *Placid Oil* decision in this way:

> At that time, as a gas and oil company, Placid's knowledge of its workers' exposure to asbestos was theoretical, while the urgency of its reorganization, essential for both enhancing the return to the greatest number of creditors and ensuring its long-term survival, was paramount. To its known creditors, Placid provided actual notice; to its unknown creditors, it resorted to the only means of notice—publication—found suitable for reaching the unidentifiable in a rather sprawling body of law.[227]

This statement, however, overlooks the fact that the potential future claimants had *no* knowledge of the risk of harm from the company's negligent actions.[228] There is no denying that providing a means of notice other than publication to those "unidentifiable" claimants would have burdened the struggling corporation, but it was far from an impossible task. In this instance, the company could have easily given actual notice to the vast majority of "unknown" creditors simply by sending a letter to all of its employees outlining both the details of the reorganization and the extent of its knowledge regarding the risks of asbestos exposure. That the company did not do so clearly shows that it valued its own survival and sustainability over the survival of its employees and their fundamental due process rights. Because Placid Oil had more knowledge than its employees at the time of its reorganization, the Fifth Circuit, in this case, should not have held that notice by publication was sufficient.

224. *Energy Future Holdings*, 522 B.R. at 539.
225. *See id.* at 540.
226. Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 154–55 (5th Cir. 2014).
227. Shachmurove, *supra* note 182, at 5.
228. *See generally Placid Oil Co.*, 753 F.3d at 151.

If the Fifth Circuit had been required to utilize the reasoning of the Second Circuit in the GM Ignition Switch case, however, the outcome could very well have been different. Like the creditors in *Placid Oil*, the claimants in the GM Ignition Switch case were completely unaware of the risk of harm from the various vehicles' ignition switch defects prior to the completion of the bankruptcy sale order.[229] Thus, although the claimants were given *constructive* notice of the sale, they had no reason at that time to challenge the sale order.[230] As the Second Circuit noted, however, "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."[231] Thus, the court held that if "the debtor knew or reasonably should have known about the claims, then due process entitles potential claimants to actual notice of the bankruptcy proceedings . . . ."[232]

Under the Second Circuit's reasoning, evidence of knowledge regarding the risk of injury (and thus of the potential for future claims) would be sufficient to require *actual* notice to those creditors to satisfy due process.[233] This appears to be the case even where the names and addresses of those claimants would be difficult to ascertain since GM surely did not possess information about every person that had purchased a vehicle model known to exhibit evidence of the defect. That is, however, what the Second Circuit believed that due process required under the circumstances, regardless of the significant burden it would have placed on GM.[234]

Surely, if the Fifth Circuit had utilized the same reasoning, the court's holding would have differed. Since Placid Oil's knowledge of the risk of harm from asbestos exposure—although certainly not as in-depth as GM's knowledge regarding its ignition switch defect—outweighed the knowledge possessed by its employees, it "reasonably should have known" that claims would be forthcoming had proper notice been given to those exposed. Thus, notice by publication was clearly insufficient, especially since the employees' names and addresses were reasonably ascertainable—they would be on the company's payroll, after all.

This analysis simply highlights the importance of the Second Circuit's decision within the law's constant struggle to maintain balance between the purposes to be served by bankruptcy and the due process concerns implicated by that process. It is important to note that many bankruptcy courts will likely continue to interpret the distinction between known and unknown creditors similarly to the Fifth Circuit and the United States Bankruptcy Court for the District of Delaware unless the Supreme Court takes on the issue directly and

229. *See* Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135, 148–50 (2d Cir. 2016).
230. *See id.* at 146–47.
231. *Id.* at 159 (quoting Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962)).
232. *Id.*
233. *See id.*
234. *See generally id.*

upholds the Second Circuit's decision on a writ of certiorari.[235] This is because the Supreme Court in *Mullane*[236] set the standard for what constitutes an "unknown creditor," and lower courts have interpreted that standard very narrowly over the years.[237]

In *Mullane*, the Supreme Court specifically defined an unknown creditor as one "whose interests are either conjectural or future or, *although they could be discovered upon investigation*, do not in due course of business come to knowledge of the [debtor]."[238] This standard clearly benefits the company seeking to reorganize or sell their assets through a bankruptcy proceeding since it appears to shield companies from liability by allowing them to not spend time and resources investigating risks that could otherwise have come to their attention through taking reasonable precautions. In the GM Ignition Switch case, the Second Circuit must have found that there was sufficient evidence that the defect came to GM's knowledge through the regular course of business, thus allowing its holding to remain consistent with *Mullane*.[239] If other courts, however, are to follow in the footsteps of the Second Circuit—which they are arguably required to do to satisfy due process—they will need to construe more liberally what a company should be able to find out about the risk of certain harms during the regular "due course of business," or the Supreme Court will have to clarify its position in a separate holding.

IV. RECOMMENDATION

Some critics have stated that despite being praiseworthy for reversing the decision of the bankruptcy court, the Second Circuit's decision leaves a lot to be desired when it comes to due process concerns for plaintiffs in the future.[240] Although the court's decision does focus on the fact that a lack of notice violates due process regardless of whether or not that violation leads to prejudice,[241] it is also quick to point out that *proper* notice satisfies due process.[242] Thus, under *normal* circumstances—that is, if GM had not culpably attempted to hide the existence of their ignition switch flaw—the plaintiffs' claims would have been barred as a matter of bankruptcy law.[243] According to the critics, therefore, "[t]he practical takeaway for parties and bankruptcy practitioners is

235. Gen. Motors LLC v. Elliott, 137 S. Ct. 1813 (2017) (denying the Second Circuit's petition for writ of certiorari).

236. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950).

237. *See, e.g.*, Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 157 (5th Cir. 2014); *In re* Energy Future Holdings Corp., 522 B.R. 520, 537 (Bankr. D. Del. 2015).

238. *Mullane*, 339 U.S. at 317 (emphasis added).

239. *See generally id.*

240. *See* Boschee, *supra* note 131 ("[T]he court's ruling also underscores the broad scope of 'free and clear' sales under normal circumstances."); Lubben, *supra* note 5 ("But the appellate court's broader point makes quite clear that sale orders can normally bar most categories of 'successor liability' claims. That is, bankruptcy sale orders can protect the buyer from claims arising out of the bad acts of the seller.").

241. *See* Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135, 163 (2d Cir. 2016).

242. *See id.* at 158–61.

243. *See generally id.*

[simply] to reinforce the need for debtors to fully disclose all potential liabilities in their bankruptcy proceedings, so that no creditors are left unbound by the process."[244] Additionally, it is important for a potential purchaser "to ensure that proper notice is provided in order to avoid later being saddled with liabilities it thought were left behind."[245]

For those critics, then, the issue remains that corporations under the current rule are able to abuse the bankruptcy system by selling their business "free and clear" of all liabilities, thus maximizing the value of their assets while leaving innocent victims with no recourse.[246] This is simply not reflective of the American view of due process as a concept "based on moral principles so deeply embedded in the traditions and feelings of [the American] people as to be deemed fundamental to a civilized society . . . ."[247] While these concerns are entirely valid, the critics overlook just how important the Second Circuit's holding *could be* for the future of bankruptcy law should its holding be applied liberally.

Specifically, the Second Circuit's decision showcases how even the most exigent of circumstances (the extreme danger to the economy should one of the most prominent corporations in the United States fail) can be treated as secondary to the due process concerns of those claimants who have been blindsided by willfully negligent actors and thus wronged in tort when they had no reason to contemplate the possibility of an injury before the completion of the company's bankruptcy. In those circumstances where the creditor has no knowledge of the injury or of its risk and the debtor has reason to believe that the injury *could* occur—even if it is not "specific information" rising to the level needed to become a known creditor in the eyes of the Fifth Circuit[248]—the company is in the better position of knowledge. In the interest of fairness to all parties, the company should at *least* ensure that *actual* notice of the impending bankruptcy reaches those potential claimants as otherwise those claimants have no reason to seek out the information, which through constructive notice would likely be posted only in a newspaper or magazine. If the creditor receives the notice and chooses not to challenge the bankruptcy petition, only then should the company be free to discharge that future liability.

Again, one of the main purposes of bankruptcy should be to ensure that the process is as fair as possible to all potential parties. Incentivizing large, struggling corporations not to perform their due diligence and instead encouraging them to move as quickly as possible through the bankruptcy proceedings heavily benefits one side, often to the extreme detriment of the other. The Supreme Court's definition of unknown creditors in *Mullane* only helps to exacerbate that imbalance.[249] Inexorably, some commentators may argue that failing

244. Boschee, *supra* note 131.
245. *Id.*
246. *See* Lubben, *supra* note 5.
247. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).
248. Williams v. Placid Oil Co. (*In re* Placid Oil Co.), 753 F.3d 151, 154–55 (5th Cir. 2014).
249. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 317 (1950).

companies in need of filing bankruptcy should not be required to expend the last of their waning resources on research and investigation in an attempt to identify everyone who may be a potential future claimant. Under certain circumstances, this point remains valid. As the decisions of the Fifth Circuit and the United States Bankruptcy Court for the District of Delaware show, however, claimants who fall into the category of "known creditor" are still too often left high-and-dry by a system that undervalues their rights compared to the interests of the companies seeking bankruptcy. Those due process rights are vital to our society, however, and they need to be looked upon more favorably.

As discussed in Part III, the Fifth Circuit's decision in *Placid Oil* showcased the inherent unfairness of allowing creditors with no knowledge of their potential claims to be given only constructive notice as "unknown" creditors in the eyes of the debtor.[250] The Second Circuit's reasoning in the GM Ignition Switch case should change that analysis going forward because those claimants shared similar circumstances: they were unaware of the risk of injury prior to completion of the bankruptcy sale order and thus, while given constructive notice, had no reason at that time to challenge the sale order.[251] That situation was made even worse by the fact that GM's bankruptcy specifically dealt with a § 363 sale, which typically move more quickly than a standard chapter 11 bankruptcy.[252]

Truthfully, the distinction between known and unknown creditors simply does not appear to be useful when it comes to potential tort claims. The fact that bankruptcy law has long viewed these categories as a mutually exclusive dichotomy simply does not serve the interests of all parties. Instead, those interests would be better served (and due process rights would be more consistently recognized) if the courts would utilize a sliding scale to determine the sufficient level of notice required in a given situation based on a totality of the circumstances. Thus, in a case where the future claimants themselves are unaware of any manifestation of injury, but the company is aware of the likelihood of injury, the onus should rightly be on the company to take action. The company could then explore any number of potential avenues: it could estimate the damages that could result from future liability claims and forecast that number as part of the bankruptcy plan; it could allow the court to establish a future-claims representative; it could establish a trust under 11 U.S.C. § 524(g); or it could simply investigate the identities of future claimants and provide them with actual notice of the bankruptcy sale. Regardless, due process requires more than what the current system allows, and the Second Circuit's decision currently indicates that perhaps bankruptcy law is finally moving in the right direction.

250. *See supra* Part III.
251. *See* Elliott v. Gen. Motors LLC (*In re* Motors Liquidation Co.), 829 F.3d 135, 148–50 (2d Cir. 2016).
252. Raykin, *supra* note 57, at 91.

V. CONCLUSION

As this Note shows, the tenuous relationship between due process and bankruptcy law has existed for centuries. Perhaps due to their often-competing interests, that relationship will inevitably and indefinitely remain a balancing act. Regardless, the balance has for too long weighed in favor of failing businesses, and as a result, those companies have been given incentives to quickly immunize themselves from future liability at the expense of innocent victims. The Second Circuit's decision in the GM Ignition Switch case should be lauded as a significant step in remedying that imbalance, and future courts would be wise to heed their reasoning.