

2018

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Recommended Citation

Sally McDonald Henry, *The \$1.5 Billion General Motors Recalls at the Dangerous Intersection of Chapter 11, Article 9, and TARP*, 85 U. Cin. L. Rev. (2018)
Available at: <https://scholarship.law.uc.edu/uclr/vol85/iss1/4>

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THE \$1.5 BILLION GENERAL MOTORS RECALLS AT THE DANGEROUS INTERSECTION OF CHAPTER 11, ARTICLE 9, AND TARP

Sally McDonald Henry*

I. INTRODUCTION: THE COMPACT VERSION

This article discusses how, in the General Motors Corporation (General Motors or GM)¹ chapter 11 case, a group of creditors—mostly collateralized loan obligations, hedge funds, pension, and other funds²—(the Funds or the Lenders³) were paid in full, in cash, even though they had no right to the payment, which amounted to almost \$1.5 billion. Not only were the Funds paid in full, but in addition, their collateral agent, JPMorgan Chase Bank, N.A. (JPMorgan), is being reimbursed for millions of dollars of legal fees, even though it has no legal right to the reimbursement.⁴ These improper payments occurred (and continue to occur) even though many other creditors—unsecured bondholders,⁵ tort creditors, mom and pop business whose existence depend on being paid

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1. The General Motors bankruptcy case has generated a great deal of commentary. For articles that examine the GM case, see generally Douglas G. Baird, *Lessons from the Automobile Reorganizations*, 4 J. OF LEGAL ANALYSIS 271 (2012); Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM*, 2010 U. ILL. L. REV. 1375 (2010); Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531 (2009). After the sale of substantially all its assets, General Motors changed its name to “Motors Liquidation Corp.” For ease of understanding, I nevertheless refer to the chapter 11 debtor as “GM” or “General Motors.”

2. The term “Fund” is used loosely herein—as it has come to be used in popular parlance—to mean investment vehicle.

3. Although the secured creditors sometimes are referred to herein as “Lenders” as shorthand, in fact a large number of these creditors may have bought their positions long after the Term Loan was made to General Motors. See generally Anne Maars Huber & Thomas H. Young, *The Trading of Bank Debt In and Out of Chapter 11*, 15 J. BANKR. L. & PRAC. 15, 1, 3 (2006).

4. As of December 31, 2015, the JPMorgan fees already exceeded \$10 million. *In re General Motors Corp.*, No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009) [hereinafter *GM Chapter 11 Case*]; Motors Liquidation Co. GUC Trust Quarterly GUC Trust Reports as of Dec. 31, 2015 at 10, *GM Chapter 11 Case*, No. 09-50026 (Feb. 12, 2016), ECF No. 13605. As of December 31, 2016, the totaled \$31.1 million. Motors Liquidation Co. GUC Trust, Quarterly Report (Form 10-Q) (Feb. 13, 2017) at 9.

5. The bondholders allegedly were owed close to \$28 billion and were “the largest unsecured creditor group in this case.” Transcript re Hearing Held on June 1, 2009 at 86, *GM Chapter 11 Case*, No. 09-50026 (June 3, 2009), ECF No. 374.

for their goods and services—are being paid only a portion of their claims, having received mainly rights to small amounts of equity in the transferee of the debtor’s assets, General Motors Company (New GM).⁶

How did this happen? The Funds were part of a syndicate of lenders that had loaned roughly \$1.5 billion (the Term Loan) to General Motors about three years before General Motors filed for bankruptcy in 2009. The loan was supposed to have been secured by equipment and fixtures. However, the perfection of the security interest in equipment was accidentally terminated roughly eight months before General Motors filed for chapter 11 relief.⁷ Because the Second Circuit Court of Appeals ultimately held that the accidental termination was legally effective, the Funds were effectively unsecured in the bankruptcy case, except to the extent of any value of their fixture collateral, which the bankruptcy judge understood “would make most of the \$1.5 billion indebtedness unsecured.”⁸ Because the rule in bankruptcy is that, with very limited exceptions, an unperfected creditor is treated the same as any other unsecured creditor and oftentimes receives only pennies on the dollar,⁹ payments to those Funds were a windfall for the favored creditors.

The \$1.5 billion raced out the door in the first weeks of the GM case even though by the time the Funds were paid the weaknesses of their position had been discovered (but disclosed neither to the court nor on the public docket that could have been examined by the legions of GM

6. The General Motors disclosure statement contained no estimation of value of the distribution to unsecured creditors, likely because GM couldn’t predict the value of the shares creditors would receive. Disclosure Statement for Debtors’ Amended Joint Chapter 11 Plan at 4, *GM Chapter 11 Case*, No. 09-50026 (Dec. 8, 2010), ECF No. 8023 [hereinafter Disclosure Statement].

7. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N.A. (*In re Motors Liquidation Co.*), 755 F.3d 78, 82 (2d Cir. 2014) (noting termination was “erroneous”).

8. The Bankruptcy Judge characterized the lien securing the equipment as having been the “principal lien” and opined that if the equipment lien were unenforceable in bankruptcy it would “make[] most of the \$1.5 billion in indebtedness under the Term Loan unsecured.” Official Comm. v. JPMorgan Chase Bank, N.A. (*In re Motors Liquidation Co.*), 486 B.R. 596 (Bankr. S.D.N.Y. 2013), *rev’d on other grounds*, 777 F.3d 100 (2d Cir. 2015). Although the Bankruptcy Judge stated in his opinion that the fixture collateral was worth very little, that matter is still to be determined. Nevertheless, in all the collateral reports that General Motors delivered to the Lenders’ Agent, none of the collateral securing the \$1.5 billion loan specifically was identified as having been fixtures. Affidavit of Richard W. Duker in Support of Defendant JPMorgan Chase N.A.’s Motion for Summary Judgment at Ex. O at 6, *GM Chapter 11 Case*, Adv. No. 09-00504 (Mar. 1, 2013), ECF No. 40 [hereinafter Duker Aff.] (Summary Collateral Value Certificate; describing collateral as “M&E” (presumably machinery and equipment) and “Special Tools”). The Lenders also had a security interest in equipment and fixtures of Saturn Corporation, which apparently is of little value given the Funds’ hard-fought litigation over the GM equipment financing statement.

9. *See, e.g.*, 11 U.S.C. §§ 544 (trustee may avoid unperfected security interest), 1122(a) (all claims classified together must be similar), 1129(b)(2012) (plan must not discriminate unfairly against nonconsenting classes of claims and must comply with the fair and equitable rule as to nonconsenting classes of claims).

creditors). Among the inner circle that did know, however, was the United States Department of Treasury, which had negotiated the deal to repay the purportedly secured lenders at the outset of the GM case and continued to require that the Funds be paid immediately even after it learned the critically important perfection document had been terminated.¹⁰ Now that the Second Circuit Court of Appeals has determined that the key security interest was unenforceable, there is a scramble to determine how much, if any amount, the Funds actually should have been paid so that some of the money might be recovered for the General Motors' creditors. Because over seven years have passed since the Funds were paid, some of the Funds may be unable to satisfy any judgment against them; many of the Funds may not even still exist.¹¹ Other recoveries may have to be tracked down—at great expense—in foreign countries. Huge sums in legal and advisory fees have been and may continue to be spent trying to recover the cash,¹² and at the end of the day, it may be that the Funds and JPMorgan will retain money that they never had a right to in the first place.

This article focuses not on the unfortunate error that terminated perfection of the key lien securing the \$1.5 billion Term Loan, but rather on the payment to the Funds and JP Morgan, notwithstanding their lack of security. Why would one group of creditors be paid before other creditors with the same legal claims against the estate? Was this

10. The Department of Treasury loaned GM most of the money necessary to finance its bankruptcy case under the Troubled Asset Relief Program (TARP). Some funds were provided by Economic Development Canada (EDC). THE FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS 375 (2011). The credit agreement with the Department of Treasury and the EDC, which was approved in the GM Chapter 11 case, provides that only “Permitted Liens” on GM property are allowed. The liens of the pre-petition lenders are not Permitted Liens under the documentation and thus the loan from the Department of Treasury to GM was conditioned on paying off the Term Loan Lenders. Mot. of Debtors for Entry of Order Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364 (1) Authorizing the Debtors to Obtain Postpetition Financing, Including on an Immediate, Interim Basis; (ii) Granting Superpriority Claims and Liens; (iii) Authorizing the Debtors to Use Cash Collateral; (iv) Granting Adequate Protection to Certain Prepetition Secured Parties; (v) Authorizing the Debtors to Prepay Certain Secured Obligations in Full within 45 Days; and (vi) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001 at Ex. A at 24, *GM Chapter 11 Case*, No. 09-50026 (June 1, 2009), ECF No. 64 [hereinafter DIP Financing Motion].

11. Indeed, the GM disclosure statement specifically warns, “[T]here is a risk that any judgment against the lenders under the Prepetition Term Loan Agreement will not be collectible in full because some of the more than 400 lenders may lack the financial capability to satisfy their respective portion of any judgment or award. Therefore, there is no assurance that the Term Loan Avoidance Litigation with result in any recovery from JMCB or the other lenders under the Prepetition Term Loan Agreement.” Disclosure Statement, *supra* note 6, at 58–59.

12. *In re Motors Liquidation Co.*, 555 B.R. 355, 360, 369 (Bankr. S.D.N.Y. 2016) (approving settlement under which liquidating creditors’ trust prosecuting action to recover payments from Funds could receive up to a \$15 million non-interest bearing loan from the debtor-in-possession lenders in return for a portion of the litigation recovery; noting trust had already been allocated over \$15 million to prosecute litigation and maintain trust created under GM reorganization plan to prosecute litigation).

payment appropriate, both procedurally and practically? Or, rather, was it the inappropriate result of a snowballing practice under which the typical bankruptcy court orders give secured creditors incredible benefits and preferences over all other creditors, whether they have established their rights to this Cadillac treatment or not?

This article, then, joins other articles¹³ that have examined the power of secured creditors in mega-chapter 11 cases¹⁴ and proposes reforming long-standing practices. Rather than take a theoretical, big-picture approach to the role of secured creditors in chapter 11 cases, this article takes a close look at one extraordinarily successful case¹⁵ in which a \$1.5 billion issue went terribly wrong. To understand what happened here, I have read thousands of pages of pleadings, exhibits, and hearing transcripts from the General Motors chapter 11 case relating to the Term Loan. What I conclude is that the typical provisions of mega-case debtor-in-possession financing, which evolved at a time when the law regarding security interests was dramatically different than it is now and when lending syndicates were oftentimes dramatically different than they are now, are antiquated, dangerous models that need to go back to the shop before more unfairness takes place in chapter 11 cases.

In order for us to understand the need for change, Part II of the article will review the perfection and termination of security interests and the importance of perfected security interests in chapter 11 cases. Part III of this article will discuss the extraordinary “First Day” and debtor-in-possession financing orders entered in the GM case and the subsequent litigation to recover the money. Part III will also address the continuing

13. E.g., Jay Lawrence Westbrook, *Illinois ABI Symposium on Chapter 11 Reform: Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831, 833–34 (2015) (“Our data suggest that secured creditor control is indeed important, but not as pervasive as many have assumed.”); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 895 (2014) (noting how uncertainty of debtor’s valuation enhances secured creditor control); George Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 30 (2004); Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and Into the Future*, 81 AM. BANKR. L.J. 375, 388 (2007). The late Mr. Miller, a renowned bankruptcy lawyer, opined, “The chapter 11 process, as contemplated in 1978, has been overwhelmed by marginalization of the debtor-in-possession [and] expansion of creditor (particularly secured creditor) control . . .” *Id.* at 385.

14. Professor Westbrook has reminded us that the vast majority of chapter 11 cases are not the mega cases, such as General Motors, and has criticized academia’s “myopic focus on very large cases.” Westbrook, *supra* note 13, at 832. Although I have not followed his suggestion regarding appropriate academic inquiries, I have been guided by his admonition that, in examining chapter 11 cases, we may need to “look deeper but less statistically.” *Id.* at 845.

15. The success of the GM case may be perceived differently depending on its direct effect on the individual assessing the case, but at least two scholars have concluded the case was a success: while of course there were losers—retirees health care was cut, for example—“the automakers got back on their feet, which helped the recovery of the U.S. economy. Indeed, the auto industry’s outsized contribution to the economic recovery had been one of the unexpected consequences of the governmental intervention.” Austin D. Goolsbee & Alan B. Krueger, *A Retrospective Look at Rescuing and Restructuring General Motors and Chrysler*, 29 J.ECON. PERSP. 3, 22 (2015).

controversies regarding the effect of the First-Day orders on the distributions to creditors. Part IV will set forth modest proposals to make it less likely that favored creditors will walk away with a windfall to which they are not entitled.

We start with an overview of the perfection of security interests.

II. THE PERFECTION AND TERMINATION OF SECURITY INTERESTS

Few legal tasks are simpler than perfecting and maintaining perfection of a security interest in equipment, which was the main collateral for the Term Loan. Article 9 of the Uniform Commercial Code (U.C.C.) was revised in the late 1990s to make what had been at times a tricky endeavor about as easy as legal practice can get.¹⁶

A. *Perfecting a Security Interest in Equipment*

“Perfection” is a key concept in the law of security interests and bankruptcy. If a security interest is properly “perfected” in a timely fashion, the security interest is enforceable in bankruptcy.¹⁷ If the security interest is perfected, the secured creditor generally is entitled to the value of its collateral, over time, even if no other creditor receives a penny in the bankruptcy case.¹⁸

Most security interests are perfected in a few steps. The debtor (who has the right to grant a security interest in the collateral) agrees in an authenticated document to grant a security interest in exchange for value.¹⁹ The creditor, the debtor, or one of their agents, files a one-page form (with the permission of the debtor) called a financing statement or U.C.C.-1—which does not even need the debtor’s signature—in a state filing office.²⁰ For most collateral, the form must be filed where the debtor is located; corporations are deemed to be located where they are incorporated, so for corporations, “location” is an easy matter to determine.²¹ Here in Texas, the filing costs \$15.00 and can be completed online in a few minutes.²² Perfecting a security interest is

16. The revision process is described in the official comments to U.C.C. § 9-101(West, Westlaw through 2015 ann. meetings of the Nat’l Conf. of Comm’r on Unif. State Laws and Am. Law Inst.).

17. U.C.C. §§ 9-312, 9-317(a); 11 U.S.C. §§ 502, 506(a) (2012).

18. *See, e.g.*, U.C.C. §§ 9-102(a)(52)(C), 9-317(a), 9-322(a) (2010); 11 U.S.C. § 1129(b)(A) (2012).

19. U.C.C. § 9-203(b).

20. U.C.C. §§ 9-310(a), 9-520(a). *See generally*, Charles Cheatham, *Changes in Filing Procedures Under Revised Article 9*, 25 OKLA. CITY U. L. REV. 235 (2000).

21. U.C.C. § 9-307(e).

22. TEXAS SECRETARY OF STATE, *About the Corporations Section*, <http://www.sos.state.tx.us/corp/index.shtml> (last visited July 2, 2016).

similarly inexpensive and easy throughout most of the country.²³ The form has to have the debtor's correct name;²⁴ again, this information is easily available from the corporate debtor's certificate of incorporation. The financing statement also has to set forth the name and address of the secured creditor, but it may list only the name of a collateral agent, and it need not set forth the email address, phone number, or other details regarding whom to contact at the office of a secured creditor regarding the security interest.²⁵ When the creditor gives value, the loan is perfected.²⁶

Once these few steps are taken, the filing is generally good for five years.²⁷ In the six-month window before the fifth anniversary of the filing, the filing needs to be extended (again, with the simple one-page form)²⁸ if the loan has not yet been repaid. Of course, the filing should not be terminated before the obligation that is secured is repaid. Assuming these steps are followed, the holder of the perfected security interest has the right to be paid the value of its collateral before everyone else: the sickly retirees, the person crippled for life by the debtor's faulty products, many taxing authorities, and the vendor whose business will be ruined by its not having been paid.²⁹ But that is the rule of the priority of security interests. It is justified on the theory that society as a whole benefits from the availability and the lower pricing of secured loans.³⁰

23. Margit Livingston, *A Rose by Any Other Name Would Smell as Sweet (or Would It?): Filing and Searching in Article 9's Public Records*, 2007 BYU L. REV. 111, 113 (2007) (detailing how all 50 states have adopted the revised U.C.C. Article 9).

24. U.C.C. § 9-503, 9-506(a).

25. U.C.C. § 9-521 (a).

26. U.C.C. §§ 9-203(b)(1) (for a security interest to attach, value must be given), 9-203(b)(2) (debtor must have rights in the collateral).

27. U.C.C. § 9-515(a) (generally, filings are effective for five years). *But see* U.C.C. § 9-515(b) (filings in manufactured home transactions and public finance transactions effective for thirty years).

28. U.C.C. § 9-515(d).

29. *See, e.g.*, 11 U.S.C. § 1129(b)(1) (2012) (absolute priority rule). If the collateral is not necessary to the reorganization, the collateral can be abandoned by the trustee, or the court can lift the automatic stay to allow a creditor to foreclose on the collateral. 11 U.S.C. §§ 362(d)(2), 544(a) (2012).

30. *See generally* Barry E. Adler, *A World Without Debt*, 72 WASH U. L.Q. 811, 826 (1994) (proposing carve out for tort claimants); Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 861-62 (1996) (examining rationale for priority of secured debt); Kenneth N. Klee, *Barbarians at the Trough: in Defense of the Warren Carve-Out Proposal*, 82 CORNELL L. REV. 1466, 1468-69 (1997) (describing attacks on proposals that secured lenders' claims should be subject to a carve out for the benefit of unsecured creditors as "hysterical efforts to entrench wealth in the hands of banks, insurance companies, and finance companies at the expense of tort creditors, tax creditors, environmental creditors, and perhaps, employees and trade creditors"); Charles Mooney, *The (Il)legitimacy of Bankruptcies for the Benefit of Secured Creditors*, 2015 U. ILL. L. REV. 735 (2015) (discussing societal benefits of liquidating bankruptcy cases for the benefit of secured creditors); Steven L. Schwarcz, *The Easy Case for the Priority of Secured Credit in Bankruptcy*, 47 DUKE L.J. 425 (1997) (granting security interests to secure

What did these rules mean in the GM financing? Basically, to perfect the security interest in equipment, JPMorgan had to file a one-page form with the secretary of state of Delaware, where General Motors was incorporated. The form could provide that the collateral was “all equipment and fixtures.”³¹ The form had to have the debtor’s name correct, which meant that it had to have the name of the debtor set forth in the debtor’s formation documents.³² Here, the secured party was described as “JPMorgan Chase Bank, as Administrative Agent.” The original filings gave little additional information: the address of JPMorgan was set forth as “P.O. Box 2558, Houston, TX 77252.”³³ Typically, this perfection would be “blessed” by counsel to the borrower in the form of a legal opinion to be delivered at closing of the loan.³⁴ Finally, the filing had to not be terminated. Here, however, the financing statement that perfected the Term Loan security interest in equipment was terminated, by accident.

B. Perfecting a Security Interest in Fixtures

Perfection of a security interest becomes a bit more complicated if the collateral is—or might be—a fixture. In that case, the U.C.C. requires dual filings for the secured creditor to have the optimum protection.³⁵

“Fixtures” are “goods that have become so related to particular real property that an interest in them arises under real property law.”³⁶ The plain language of the definition has led at least one scholar to conclude that a good cannot be a fixture unless a security interest in the good attached *before* it became a fixture.³⁷ This is because a “good” is defined in U.C.C. section 9-102(a)(41) to be “all things *moveable* when

“new money” loan benefits unsecured creditors).

31. U.C.C. §§ 9-108(b), 9-504. A lender could enhance its security interest by including any books, records, and general intangibles relating to the equipment as part of its security.

32. U.C.C. § 9-521.

33. *Motors Liquidation Co. Avoidance Action Trust v. JPMorgan Chase Bank, N.A.*, Adv. No. 09-00504 (Bankr. S.D.N.Y. July 31, 2009) [hereinafter *Term Loan Litigation*]; Affidavit of Debra Homic Hoge at Ex. D., *Term Loan Litigation*, Adv. No. 09-00504 (July 1, 2010), ECF No. 42 [hereinafter *Hoge Aff.*].

34. See generally Tri-Bar Opinion Committee, *Third-Party “Closing” Opinions*, 53 BUS. LAW 591 (1998).

35. For an excellent overview of the law of secured transactions as it relates to fixtures, see Marc L. Roark, *Groping Along Between Things Real and Things Personal: Defining Fixtures in Law and Policy in the U.C.C.*, 78 U. CIN. L. REV. 1437 (2010).

36. U.C.C. § 9-102(a)(41). Compare *Plant Fed. Credit Union v. Heflin (In re Heflin)*, 326 B.R. 696, 702 (Bankr. W.D. Ky. 2005) (blinds that can be easily removed are not fixtures) with *City of Buffalo v. Michael*, 209 N.E.2d 776, 777 (N.Y. 1965) (sign that was firmly attached to building was fixture).

37. Roark, *supra* note 35, at 1455 (“[F]ixtures are only fixtures if a security interest arises before they become fixtures.”).

a security interest attaches” (emphasis added).³⁸ Other language of Article 9, however, undermines that interpretation.³⁹

In any event, the threshold question is whether the good is a fixture under applicable state law.⁴⁰ To answer this question, the real property law of the jurisdiction in which the good is located controls.⁴¹ Although there is of course variety in the various jurisdictions concerning what constitutes a fixture, in many jurisdictions the definition can be quite narrow.⁴²

If something is in fact a fixture, a security interest in that good can be perfected by filing a financing statement with the office usually designated for the filing of financing statements for ordinary goods, such as equipment. That filing grants the holder of the security interest in the fixture priority over any other entity with a judicial lien or any entity that later perfects a security interest in the fixture by filing with the usual office for filing financing statements.⁴³ This includes priority

38. U.C.C. § 9-203 (non-possessory security interest in goods attaches when the debtor has rights in the collateral, has authenticated a written security agreement, and value has been given).

39. Although the language of the U.C.C. is clear that a fixture must be a good, and a good must be moveable, not all states clearly require that a chattel be moveable when the security interest attaches in order for the chattel to be an Article 9 fixture. *See, e.g., Kinzalow v. Bank & Trust (In re Value Inv. Props. LLC)*, 481 B.R. 403 (Bankr. E.D. Tenn. 2012) (“[T]he character of the property at the time the security interest attaches determines the proper method of perfection.”).

40. U.C.C. § 9-301(3)(A) provides that “while . . . goods . . . [are] located in a jurisdiction, the local law of that jurisdiction governs: (A) perfection of a security interest in the goods by filing a fixture filing.” Because the bankruptcy court is a federal court sitting with bankruptcy jurisdiction, as a logical matter, the court will have to determine what choice of law to apply. In the Second Circuit, courts follow the choice of law of New York for a case, such as *General Motors*, pending in the Southern District of New York. *See Bianco v. Entons (In re Gaston)*, 243 F.3d 601, 606 (2d Cir. 2001) (bankruptcy court should use choice of law of forum state). Other circuits mandate a federal choice of law in bankruptcy cases. *E.g., In re Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995) (bankruptcy court should use federal choice of law).

41. U.C.C. § 9-301(3)(A). As the court in *Strain v. Green*, 172 P.2d 216, 218 (Wash. 1946) (quoting *Philadelphia Mrtg. & Trust Co. v. Miller*, 56 P. 382 (Wash. 1899)) (internal quotation marks omitted) explained: “Every lawyer knows that cases can be found in this field [regarding fixtures] that will support any position that the facts of his particular case require him to take There is a wilderness of authority[,] . . . [fixture] cases are so conflicting that it would be profitless to undertake to review . . . them.”

42. *See, e.g., In re Value Inv. Props. LLC*, 481 B.R. at 408 (citing *Hickman v. Booth*, 173 S.W. 438, 438 (Tenn. 1915)) (to be a fixture under Tennessee law, a chattel must be “permanently annexed to the realty or a removal thereof must cause a serious injury to the freehold”); *Evans v. Green Tree Servicing, LLC (In re Evans)*, 370 B.R. 138 (Bankr. S.D. Ohio 2007) (citing *In re Jarvis*, 310 B.R. 330, 335–36 (Bankr. N.D. Ohio 2004)) (owner must intend chattel be fixed permanently to real estate); *Teaff v. Hewitt*, 1 Ohio St. 511 (1853); *In re Jackson*, 136 B.R. 797 (Bankr. N.D. Ill. 1992) (“fixtures” under U.C.C. is broader than under real estate law); *Am. Nat’l Bank & Trust Co. v. Matrix IV, Inc. (In re SM Acquisition Co.)*, 296 B.R. 452 (Bankr. N.D. Ill. 2005); *In re Cliff’s Ridge Skiing Corp.*, 123 B.R. 753 (W.D. Mich. 1991) (ski chairlift was fixture); *Ottaco, Inc. v. Gauze*, 226 Mich. App. 646 (1997) (fixture under Michigan law “(1) . . . is annexed to the realty; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty”).

43. U.C.C. § 9-317(a) (holder of perfected security interest primes judicial lien creditor; holder

over the trustee in bankruptcy—or the chapter 11 debtor in possession, the equivalent of a bankruptcy trustee for these purposes.⁴⁴

However, in order to have priority against an entity with a real estate mortgage on the property to which the fixture is affixed—or a bona fide purchaser for value of that real estate—a secured party has to file a “fixture filing”: a filing in the real property records where the fixture is located.⁴⁵ At that point, the fixture filer has priority over competing interests in the real property.⁴⁶

But what if an entity has no financing statement on file in the general U.C.C. record-filing office,⁴⁷ as was the situation in the GM Term Loan, but has made a proper fixture filing? In that case, Article 9 suggests that the fixture filings nevertheless will be good against the bankruptcy trustee or debtor in possession because Article 9 specifies that the place to file a financing statement to perfect a security interest in fixtures or goods that will become fixtures is either the U.C.C. record-filing office or the place in which real estate mortgages should be filed.⁴⁸

This interpretation is buttressed in another part of Article 9, which provides that:

[A] perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of real property if
 . . .

 (3) the conflicting interest is a lien on the real property obtained

of perfected security interest primes bankruptcy trustee); U.C.C. § 9-322(a) (between two perfected secured creditors, the first to file a financing statement or perfect its security interest has priority).

44. U.C.C. §§ 9-102, 9-317; 11 U.S.C. § 1107 (2012).

45. U.C.C. § 9-102(40).

46. U.C.C. § 9-334.

47. I use the term “U.C.C. record-filing office” to refer to the place most financing statements are filed, which, in the case of a Delaware corporation such as GM, is the office of the Secretary of State of Delaware. U.C.C. §§ 9-301(1), 9-307(e).

48. U.C.C. § 9-501(a).

[I]f the local law of this State governs perfection of a security interest or agricultural lien, the office in which to file a financing statement to perfect the security interest or agricultural lien is:

(1) the office designated for the filing or recording of a record of a mortgage on the related real property, if:

. . . .

(B) the financing statement is a filed as a fixture filing and the collateral is goods that are or are to become fixtures; or

(2) the office of [or any office duly authorized by] or in all other cases, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is filed as a fixture filing.

Id.

by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.⁴⁹

Although the language standing by itself is not crystal clear,⁵⁰ the official comments to the U.C.C. explain that the goal of this section is to “protect[] a perfected fixture security interest from avoidance by a trustee in bankruptcy under Bankruptcy Code section 544(a), regardless of the method of perfection.”⁵¹ Thus, the official comment argues that so long as the fixture is subject to a proper fixture filing, the lender’s security interest is good against a trustee in bankruptcy, and by extension against the avoiding powers of a debtor in possession or a creditor’s committee acting on behalf of the estate of a debtor in possession, even if the secured party did not have a proper non-fixture filing on file.

C. Fixtures and Equipment in the General Motors Case

Why does all this matter in the GM case? As mentioned, the Funds’ financing statement perfecting their security interest in equipment was accidentally terminated in the GM case, and that accidental termination was later held to have been effective. However, under the Term Loan, the Funds had a security interest not only in equipment, but also in fixtures.⁵² What is unclear from the record, however, was whether in fact any of the collateral actually was fixtures. The “fixture” component of the collateral may merely have been “belts and suspenders” to protect the equipment lenders from the possibility that some of their equipment would later become or be deemed to be a “fixture” by being attached to real estate. Although this issue has not yet been determined in the litigation that has been pending for over seven years in the GM case, the periodic statements GM provided its lenders up to the eve of its bankruptcy filing identified none of the collateral as having been fixtures, but rather categorized the collateral as “E&M” (apparently, equipment and machinery) and “special tools”: all goods that appear to

49. U.C.C. § 9-334(e)(3).

50. In other sections, Article 9 is clear that a perfected security interest primes the interest of a “judicial lien holder,” which is defined to include a bankruptcy trustee. *See* U.C.C. §§ 9-317(a), 9-102(a)(52)(C). However, the key defined term “judicial lien holder” is not used in U.C.C. § 9-334(e)(3), arguably creating ambiguity.

51. U.C.C. § 9-334 cmt. 9.

52. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (*In re Motors Liquidation Co.*), 755 F. 3d 78, 79 (2d Cir. 2014). Note there apparently are problems with at least some of the fixture filings securing the Term Loan. *See* Stipulation Regarding Surveyed Metes and Bounds, *Term Loan Litigation*, Adv. No. 09-00504 (Jan. 10, 2017), ECF. No. 827 (stipulation regarding property description used in filing).

fall within the definition of equipment under Article 9.⁵³

The collateral was located all over the country: Delaware, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, New York, Ohio, Texas, and Wisconsin.⁵⁴ Indeed, if some of the collateral was in fact fixtures, and if, in fact, those interests were prior to the security interests of any entities that had liens on the real estate to which the fixtures were affixed, then there is still some GM collateral securing the Fund's claims. That, however, is a thorny factual issue requiring an investigation into several issues, including the precise collateral and its use at the time the security interest attached,⁵⁵ the applicable state law that will determine how the term "fixture" is defined; and any prior mortgages or judicial liens on the property to which the fixture was affixed.⁵⁶ Once it is determined whether any collateral actually was a fixture over seven years ago and whether the fixture filing alone will grant the lenders secured status in bankruptcy, the court will have to determine the value of that collateral (not now, but perhaps over seven years ago at the beginning of the GM chapter 11 case, when no viable arm's length purchaser was willing to purchase its business assets) to see what part of the loan was secured.⁵⁷

D. The 2001 Revisions to Article 9

It bears emphasis that the perfection system currently in effect is greatly simplified from the rules that applied before the 2001 revisions to Article 9, which were adopted in all states.⁵⁸ Before 2001, many

53. Duker Aff., *supra* note 8. Under U.C.C. § 9-102(a)(33), "equipment" is defined as "goods other than inventory, farm products, or consumer goods." "'Goods' means 'all things that are moveable when the security interest attaches.'" U.C.C. § 9-102(a)(44). Note, however, that the machinery or equipment could be attached to the realty in such a way that it became a fixture. *See supra* notes 35–39 and accompanying text.

54. Duker Aff., *supra* note 8, at Ex. O, Schedule 1 Annex 1 to U.C.C. Financing Statement; Declaration of Eric Fisher in Support of Motion for Partial Summary Judgment, *Term Loan Litigation*, Adv. No. 09-00504 (July 1, 2010), ECF No. 27 [hereinafter Fisher Decl.].

55. This assumes that a good must be movable at the time the security interest attaches in order for it to be a fixture.

56. Under the U.C.C., the choice of law for determining perfection of a security interest in a fixture filing is the local law of the jurisdiction where the goods are located. U.C.C. §§ 9-301(3), 9-301(4). Thus, the court will have to look to the local law of each jurisdiction in which the collateral was located on June 1, 2009, to determine if in fact the good was a "fixture" under the U.C.C. and whether the fixture filing was proper.

57. *See* Affidavit of Frederick A. Henderson, Pursuant to Local Bankruptcy Rule 1007-2 ¶ 14, *GM Chapter 11 Case*, No. 09-50026 (June 1, 2009), ECF No. 21 [hereinafter Henderson Aff.] ("[T]he only entity that has the financial wherewithal and is qualified to purchase the assets—and the only entity that has stepped forward to make such a purchase—is the U. S. Treasury-sponsored purchaser."); *Id.* ¶ 73 (noting that the company could not "sell discrete assets that otherwise should have had substantial value under normal market conditions").

58. Livingston, *supra* note 23, at 113.

more financing-statement filings could be required and there were, in many cases, no bright lines regarding where those financing statements should be filed in order to be effective. Thus, before the 2001 revisions, when the property was tangible collateral, such as equipment, the financing statement had to be filed where the collateral was located, unless the collateral was mobile goods.⁵⁹ By contrast, when the property was intangible collateral, such as accounts or general intangibles, the financing statement had to be filed where the debtor was located.⁶⁰ For corporations, the debtor generally was “located” at its place of business if it had one place of business and at its chief executive office if it had more than one place of business.⁶¹ For large companies, like General Motors, it could be very difficult to keep track of where collateral was located. In some cases, it was even difficult to determine the location of the company’s chief executive office. The perfection of security interests through the filing of financing statements would be even more complicated in states that had adopted what was designated as the “Third Alternative” to filing rules, which required both central and local filing to perfect many security interests.⁶²

One scholar described the process as follows: “The Article 9 Filing System is a mess. Filings are spread among more than 4,300 offices, each of which imposes its own procedures and requirements.”⁶³

That all changed, however, when in 2001 all states adopted an overhauled version of Article 9. Under the revised Article 9, most security interests are perfected by filing only one financing statement in the state in which the debtor is located.⁶⁴ The location of a corporation for filing a financing statement is where the corporation is incorporated.⁶⁵ Suddenly, everything relating to perfecting a security interest became much simpler.

At the same time that Article 9 perfection was being simplified, the process of filing financing statements and searching for filed financing statements also became much easier. Filings once had taken up musty file drawers in large, sometimes remote buildings wherever a state capital or county registrar’s office happened to be located. Now, in most cases, these files can be easily—and cheaply—accessed electronically. For example, in Texas, searching for all financing

59. U.C.C. § 9-103(1) (superseded 2001) (herein I refer to the version of Article 9 that was superseded in 2001 as the “Former U.C.C.”).

60. Former U.C.C. § 9-103(3).

61. Former U.C.C. § 9-103(3)(d).

62. Former U.C.C. § 9-401(1).

63. Lynn M. LoPucki, *Why the Debtor’s State of Incorporation Should Be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 579 (1995).

64. U.C.C. §§ 9-301, 9-307, 9-311.

65. U.C.C. § 9-307(c).

statements filed against a particular debtor can be done electronically in a process that takes only a few minutes and costs only \$3.00.⁶⁶ It is hard to imagine a better, more user-friendly system. Unlike Texas, however, Delaware has not adopted a process that is as speedy and inexpensive.

Unlike states with low fees and immediate, easy access to the filing system, Delaware's system is more complicated. In Delaware, the fee to search a particular debtor's name is at least \$85 and a lawyer cannot undertake the search directly. Rather, the lawyer must hire a company to retrieve searches.⁶⁷ These Delaware procedures increase the cost, and more importantly for the issues to follow, increase the time to search the files: what is a 10 minute process in Texas that can be undertaken at any hour of the day, for example, takes a bit longer in Delaware, at many times the cost.⁶⁸

E. Why Is a Filing System Important?

In order to understand why a technical slip up such as the accidental termination in the GM case could lead to a \$1.5 billion loss, we need to consider why having accurate records in the filing system is important.

For centuries, courts have believed that it is a fraud on creditors to grant a secret lien to a favored creditor: the idea is that all creditors should be able to understand the assets that a debtor has available to pay its creditors.⁶⁹

The ancient case first famous for articulating the concept is *Twyne's Case*.⁷⁰ In *Twyne's Case*, an individual transferred his property to a third party, Twyne, in payment of outstanding debts, but the debtor continued to use the property himself. "C," an unpaid creditor, sought to recover money the debtor owed him, only to learn that assets the debtor possessed that appeared to be available for creditors were in fact

66. *SOSDirect: An Online Business Service from the Office of the Secretary of State*, TEXAS SECRETARY OF STATE, sos.state.tx.us/corp/sosda/index.shtml (last visited July 2, 2016).

67. *UCC Search*, STATE OF DELAWARE, DEPT. OF STATE, DIV. OF CORPORATIONS, <https://corp.delaware.gov/uccsearch.shtml> (last visited Feb. 26, 2016). The fees for a search are not on the Delaware web site. However, the web site requires that a searcher use an authorized search service. One search service informed me that the fee is \$50.00 for the state; \$40 for the search company; \$35.00 for the first page of a report, and \$2.00 for every page of the report thereafter. Email from nraiseservices.com to Sally M. Henry (Mar. 10, 2016) (on file with author). More recently, another search firm informed me that the fee was \$75.00 if the search came up empty, \$110.00 for the first page retrieved, and \$2.00 for each page thereafter. Email from Nicholas Bialota, Account Technician, Parasec, to Sally M. Henry (Jan. 5, 2017) (on file with author). Thus, a search for a large company's filings could be very expensive.

68. *UCC Search*, *supra* note 67; Email from nraiseservices.com to Sally M. Henry, *supra* note 67; Email from Nicholas Bialota to Sally M. Henry, *supra* note 67.

69. Jonathan C. Lipson, *Secrets and Liens: The End of Notice in Commercial Finance*, 21 EMORY BANKR. DEV. J. 421, 424 (2005).

70. *Twyne's Case* (1601) 76 Eng. Rep. 809; 3 Co. Rep. 80b.

held by his debtor for the benefit of a third party. The Star Chamber attacked the practice, claiming it to be a fraud, in part because it was a secret transfer.⁷¹

Courts in the United States followed suit, demonstrated most famously in the case of *Benedict v. Ratner*,⁷² in which the Supreme Court also held that a secret lien was a fraud on creditors.

Because secret liens were so suspect, for years the only appropriate security interest was the pledge, in which the secured creditor took possession of the collateral.⁷³ That rule relaxed eventually, and today, although security interests in tangible collateral may still be perfected by the secured creditor's taking possession of the collateral,⁷⁴ the law no longer requires that the secured party possess the collateral. Accordingly, security interests today generally are perfected through public filings.⁷⁵

Because of the common law's long-standing belief that security interests should be public knowledge, the 2001 Article 9 revision was criticized for increasing the secrecy of liens.⁷⁶ One major way in which the 2001 revisions did so was by providing that collateral could be described in a financing statement simply as "all personal property of the debtor" (provided the debtor agreed to that broad of a collateral description).⁷⁷ Previously, the U.C.C. had required much more specificity in the collateral description, and thus some were concerned that as a result of the revisions, a U.C.C. filing would be much less informative to third parties.⁷⁸ Another criticism is that the revision allows, for the first time, for a security interest to be perfected in deposit accounts (checking accounts, savings accounts, and the like) and that there need be no public notice of deposit-account security interests.⁷⁹

71. *Id.*

72. 268 U.S. 353, 364–65 (1925).

73. Lipson, *supra* note 69, at 429.

74. U.C.C. § 9-313(a) (security interest in tangible collateral may be perfected by possession, with limited exceptions).

75. U.C.C. § 9-310(a) ("Except as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens."). Besides filing, security interests in tangible collateral may be perfected by possession, which also gives notice to the world that the collateral is not available to other creditors. Security interests in a limited range of collateral are perfected automatically or by control of the collateral by the secured party. In addition to having the effect of making consensual security interests public, the filing system also prevents fraud with respect to the timing of a transaction creating a security interest. Steven Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2051, 2056–58 (1994).

76. Lipson, *supra* note 69, at 455.

77. U.C.C. § 9-504.

78. U.C.C. § 9-402(1) had required that a financing statement "contain[] a statement indicating the types, or describing the items, of collateral."

79. Lipson, *supra* note 69, at 429–30.

In this regard, note that, although a creditor or an entity doing business with a debtor can look at the financing statement to see if the debtor's property is subject to any sort of security interest, under the current scheme, it is now possible for the creditor to know only that the property has been subject to a security interest, securing some amount of debt, at some time in the previous five years (perhaps currently) in some or all of the debtor's personal property. The filing does not have to disclose the amount of the obligation or the specific collateral unless the debtor itself requires that the secured creditor describe the collateral specifically.⁸⁰ Moreover, the law specifically provides that the secured creditor need not respond to any requests for information from any entity other than the debtor.⁸¹

This scheme is not inevitable. In England, for example, which has a system very much like the United States filing system in many respects, creditors do have the right to specific information regarding the security interests held by other creditors.⁸²

III. IT'S NOT A LIGHT AT THE END OF THE TUNNEL, BUT RATHER AN ONCOMING CAR OUT OF CONTROL

By early 2008, the U.S. economy was stalled. In March, the Department of the Treasury had orchestrated an emergency acquisition of the investment bank Bear Stearns, and other banks were suffering from the freezing of the residential mortgage-backed securities market.⁸³ Chrysler and General Motors were in trouble, and it was becoming increasingly clear that something had to be done if those companies

80. U.C.C. § 9-521 (form of acceptable financing statement).

81. U.C.C. § 9-210 (describing rights of debtor to obtain information from a secured creditor); U.C.C. § 9-210 cmt. 3 ("A financing statement filed under Part 5 may disclose only that a secured party may have a security interest in specified types of collateral. In most cases the financing statement will contain no indication of the obligation (if any) secured, whether any security interest actually exists, or the particular property subject to a security interest . . . [T]he secured party should not be under a duty to disclose any details of the debtor's financial affairs to any casual inquirer or competitor who may inquire. For this reason, this section gives the right to request information to the debtor only.").

82. Scholars have described the contrast as follows:

In the English system, this creditor would have the right to review copies of every instrument creating a charge against the company. In the American system, this creditor would have the right to only the names of persons who might have security interests and general categories of property those interests might encumber.

Lynn M. LoPucki, Arvin I. Abraham & Bernd P. Delahaye, *Optimizing English and American Security Interests*, 88 NOTRE DAME L. REV. 1785, 1803 (2013).

83. THE FINANCIAL CRISIS INQUIRY REPORT, *supra* note 10, at ch. 15, 280–91; HENRY M. PAULSON, JR., ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM 90–121 (2010).

were going to be saved.⁸⁴

The situation only worsened. After Lehman Brothers filed for chapter 11 relief on September 15, 2008, the markets crashed: the Dow Jones Industrial Average plummeted, finally hitting bottom at less than half of its previous all-time high in March 2009.⁸⁵

A. General Motors Files Its Chapter 11 Case; No One Seems to Care if the Term Lenders' Security Interests Actually Are Perfected

At the same time, two of the United States' major automotive manufacturers, General Motors and Chrysler LLC, were running out of gas and needed emergency funding from the United States government. Saving those two automakers was believed to be critically important in avoiding economic collapse: the domestic automobile industry accounted, by some estimates, for 4% of the gross domestic product.⁸⁶ In the first quarter of 2009, General Motors had negative cash flow of \$9.4 billion. General Motor's then-CEO, Frederick Henderson, later contended that the failure of General Motors would lead to the loss of 200,000 jobs at General Motors, the collapse of 11,500 vendors of General Motors, and potential catastrophe for the vendors' 500,000 employees.⁸⁷

Eventually, the GM bankruptcy court approved the sale of the GM debtor companies to a consortium of purchasers that included the United States government.⁸⁸ The sales were to be part of prearranged chapter 11 cases negotiated with the GM unions that provided special protections for employees and retirees in exchange for important concessions.⁸⁹ These special protections were arguably at the expense of other unsecured creditors, who would eventually be paid from new GM securities and, possibly, other units of a General Unsecured Creditors' Trust.⁹⁰ Accordingly, although the pre-negotiated sale was not without some precedent, the magnitude of the transactions, the visibility of the transactions, and the fact that the United States

84. See generally THE FINANCIAL CRISIS INQUIRY REPORT, *supra* note 10, at ch. 11.

85. David K. Randall, *March 9, 2009: The Day Stocks Bottomed Out*, FORBES (March 8, 2010), <http://www.forbes.com/2010/03/06/march-bear-market-low-personal-march-2009.html>.

86. See Henderson Aff., *supra* note 57, ¶ 48.

87. *In re Motors Liquidation*, 529 B.R. 510, 531 (Bankr. S.D.N.Y. 2015).

88. *In re GMC*, 407 B.R. 463, 480–483 (Bankr. S.D.N.Y. 2009) (purchasers were the United States Department of the Treasury, Export Development, a new employees' beneficiary association, and, if certain contingencies were met, the pre-petition General Motors would own stock in the post-confirmation automobile manufacturer).

89. Henderson Aff., *supra* note 57, ¶¶ 16–18 (detailing pre-petition deal among the U.S. Treasury, Canada Export-Import and the United Auto Workers).

90. *In re Motors Liquidation*, 447 B.R. 198, 203 (Bankr. S.D.N.Y. 2011) (opinion on order confirming GM reorganization plan).

Department of Treasury was already under attack for bailing out large institutions when neighborhoods throughout much of the country were being blighted by foreclosures made it inevitable that the Treasury-driven auto chapter 11s would engender attention and attack. Indeed, when the GM sale was finally brought to hearing, roughly 835 entities objected to the General Motors sale.⁹¹

B. The First Recall: The Erroneous Termination

During the fall of 2008, when the economy had been spinning out of control, General Motors arranged for certain of its secured obligations to be repaid: obligations due under a facility referred to as the “Synthetic Lease Facility.”⁹² In connection with the repayment, General Motors hired a law firm (the GM Lease Counsel) that was tasked with documenting the unwinding of the Synthetic Lease Facility.⁹³ This work included causing the financing statements that had been filed with respect to that facility to be terminated.⁹⁴ The work terminating the financing statements was ultimately delegated to a paralegal who apparently did not have an overview of GM’s financings.⁹⁵

At the same time, JPMorgan, the agent for the Synthetic Lease Facility, hired its own counsel (JPMorgan Lease Counsel) to look out for its interests in the transaction.⁹⁶ An interesting delegation of duties occurred, however, in this mega-deal: the termination of the JPMorgan Synthetic Lease financing statements was not assigned to JPMorgan Lease Counsel. Instead, JPMorgan Lease Counsel served for the most part as a reviewer of the documentation that was being prepared by the most junior professionals at the law firm of GM’s Lease Counsel.⁹⁷

Although the documentation reflects that GM Lease Counsel’s junior lawyers and paralegals worked hard to effectively accomplish this task,⁹⁸ in fact they still made an error. Not only did the parties cause the financing statements relating to the Synthetic Lease Facility to be terminated, but they also caused the filings relating to another, unrelated

91. *In re Motors Liquidation*, 529 B.R. at 531.

92. Official Comm. of Motors Liquidation v. JPMorgan Chase Bank, N.A. (*In re Motors Liquidation*), 777 F.3d 100, 101 (2d Cir. 2015).

93. *Id.* at 101–02.

94. Official Comm. v. JPMorgan Chase Bank, N.A. (*In re Motors Liquidation Co.*), 486 B.R. 596 (Bankr. S.D.N.Y. 2013), *rev’d on other grounds*, 777 F.3d 100 (2d Cir. 2015).

95. Indeed, that’s what the Second Circuit concluded. *In re Motors Liquidation*, 777 F.3d at 101.

96. *In re Motors Liquidation Co.*, 486 B.R. at 610, *rev’d on other grounds*, 777 F.3d 100 (2d Cir. 2015).

97. *Id.* at 607–14.

98. Fisher Decl., *supra* note 54, at Exs. M–N.

financing to be terminated. This was the Delaware financing statement relating to the \$ 1.5 billion Term Loan that had perfected the Lenders' security interest in equipment.

Under the Term Loan, JPMorgan served as the administrative and collateral agent for the syndicate of lenders that had loaned \$1.5 billion to GM.⁹⁹ Based on the entities later named in the complaints filed to recover the amounts paid to the Funds, the syndicate members were for the most part collateralized loan obligations and other types of funds.¹⁰⁰ The lenders also included some other entities, such as local pension funds.¹⁰¹

JPMorgan would later insist that the firm it had hired on the synthetic lease deal was engaged only to represent it in connection with the Synthetic Lease Facility and not in any way in connection with the Term Loan.¹⁰² In any event, GM's Lease Counsel prepared a closing list that included the termination not only of the financing statements relating to the Synthetic Lease Transaction, but also the financing statement—filed in the same record in Delaware—relating to the Term Loan.¹⁰³ The closing list was circulated repeatedly.¹⁰⁴ Accordingly, after approval of all the lawyers on the deal, the financing statement relating to the Term Loan was terminated.¹⁰⁵

As explained above, a basic principle is that, if a security interest is not perfected, it is unenforceable in a bankruptcy case.¹⁰⁶ Accordingly,

99. *In re Motors Liquidation Co.*, 486 B.R. 596, *rev'd on other grounds*, 777 F.3d 100 (2d Cir. 2015).

100. Five hundred fifty entities are named as defendants in the amended complaint. They include entities such as "Advent Global Opportunity Master Fund," "Aegeon/Transamerica Series Trust MFS Highyield," "APG Fixed Income Credits Pool," and "APG Investments US Inc. A/C Stichting Pensionfunds ABP." The list of defendants in the amended complaint that are not household names goes on and on. They include over fifty entities that include the term "CLO" (Collateralized Loan Obligation) in their name. In addition, the defendants include over 130 entities with the name "Fund" in their name. Many more have a similar phrase in their name. Only a handful of banks are name as defendants. First Amended Adversary Complaint for (1) Avoidance of Unperfected Lien, (2) Avoidance and Recovery of Postpetition Transfers, (3) Avoidance and Recovery of Preferential Payments, and (4) Disallowance of Claims by Defendants, *Term Loan Litigation*, Adv. No. 09-00504 (May 20, 2015), ECF No. 91 [hereinafter Amended Complaint]; Answer of Defendant JPMorgan Chase Bank, N.A., *Term Loan Litigation*, Adv. No. 09-00504 (Oct. 7, 2009), ECF No. 12.

101. Amended Complaint, *supra* note 100.

102. Duker Aff., *supra* note 8, ¶ 12; Memorandum of Law in Support of Defendant JP Morgan Chase Bank, N.A. Motion for Summary Judgment at 35 n.15, *Term Loan Litigation*, Adv. No. 09-00504 (July 1, 2010), ECF No. 29.

103. *In re Motors Liquidation Co.*, 486 B.R. 596, *rev'd on other grounds*, 777 F.3d 100 (2d Cir. 2015).

104. *Id.* at 610–14.

105. *Id.* at 608–614.

106. 11 U.S.C. § 544 (2012) (trustee has rights of judicial lien creditor); U.C.C. § 9-317(a) (judicial lien creditor generally primes unperfected security interest); U.C.C. § 9-102(a) (defining lien creditor to include bankruptcy trustee).

with General Motors very publicly on the verge of bankruptcy, it would be normal to expect secured creditors to double check their filed financing statements and other secured loan documentation to be certain that all was in order.¹⁰⁷ If the filings were not in order, in many cases the problem could be fixed so long as the creditor did not wait until the last minute to correct filing errors.¹⁰⁸ And that is exactly what JP Morgan attempted to do: the banker at JP Morgan working on matters relating to the GM credit contacted a JPMorgan group located in Bangalore, India, to satisfy himself that all was in order with respect to the filing of the financing statement relating to the Term Loan.¹⁰⁹

Why reach out to Bangalore? Apparently JPMorgan had delegated oversight of U.C.C. perfection documentation to a group located in India, perhaps as a cost savings matter.¹¹⁰ In this case, however, there was another failure: the JPMorgan banker who was attempting to verify that the filings were in order received a nonresponsive answer from India that related to a different, already-concluded deal and did not follow up on the matter.¹¹¹ Thus, no one conducted a lien “audit,” designed to allow for any necessary corrections to the filed financing statements in time for the creditor to salvage the situation.

There were, moreover, other opportunities when the mistake may have been caught: in March 2009, the Term Loan was renegotiated to waive an event of default that would have occurred if GM’s accountants had expressed a going concern qualification regarding GM.¹¹² In connection with that waiver, GM gave the lenders more collateral and JPMorgan was paid a \$6 million fee.¹¹³ Even then, however, apparently no one working on the restructuring of that transaction checked to see if

107. This is possibly what happened in the case of Bucks Hospital. There, the Bank of New York had failed to refile its financing statement when the debtor changed its name, thereby limiting the effectiveness of its financing statement. Eventually the Bank of New York did file a corrected financing statement about 88 days before Bucks Hospital filed for chapter 11 relief. *See In re Lower Bucks Hosp.*, 471 B.R. 419 (E.D. Pa. 2012). Note that if debtor’s counsel had been aware of the belated refile it would have been incentivized to file the chapter 11 petition before the ninety-day preference period ran.

108. *See generally* 11 U.S.C. § 547 (2012 & Supp. 2016) (trustee can avoid a transfer of property of an insolvent debtor to a creditor on account of a pre-existing claim made within ninety days before a bankruptcy filing that causes the creditor to receive more than it would have received absent the transfer). A transfer may include the perfection of a security interest. In short, if a deficient filing is corrected more than ninety days before a debtor files for chapter 11 relief (one year in rare cases), the perfection problem can be solved and the secured creditor treated as secured even though there was a period in which the filings were deficient.

109. Fisher Decl., *supra* note 54, at Ex. Z (emails); Fisher Decl., *supra* note 54, at Ex. C 54–62 (Deposition of Richard W. Duker).

110. Fisher Decl., *supra* note 54.

111. Fisher Decl., *supra* note 54, at Ex. C, 60 (Deposition of Richard W. Duker.); Fisher Decl., *supra* note 54, at Ex. Z.

112. Duker Aff., *supra* note 8, ¶¶ 22–28 and Exs. M–N.

113. *Id.*

the security interests were perfected.¹¹⁴ In fact, the JPMorgan business person on the deal stressed during the litigation that “[a]t no time during the negotiations of the First Amendment did anyone from GM or anywhere else suggest that the Term Loan Lenders’ security interests were not fully perfected.”¹¹⁵

The March restructuring was not the first time that a team of lawyers had been working on GM financings after the critical financing statement was terminated, however. In December 2008, the Department of the Treasury had loaned GM \$4 billion and took a security interest in a great deal of GM collateral.¹¹⁶ Even then, however, no one discovered that GM’s equipment was no longer subject to a security interest enforceable in bankruptcy.

What happened when GM finally filed its chapter 11 case in June 2009, reflects that, in the fast-paced and sometimes chaotic days leading up to and immediately following the filing of the GM chapter 11 case, with one exception, apparently none of the innumerable parties in interest who had been working on a GM restructuring for over eight months checked to make sure that the \$1.5 billion Term Loan was properly secured.

C. The First Days and the First-Day Orders

When a debtor files for chapter 11 relief, it is typical for the debtor to seek so-called “first-day orders.”¹¹⁷ These orders are necessary to provide for critically important relief designed to preserve the business and stabilize operations. Although the Bankruptcy Code never uses the term “first-day order,”¹¹⁸ these orders are present in almost all, if not all, large chapter 11 cases.¹¹⁹ They include orders allowing for the payment

114. Transcript of Hearing re Motions for Summary Judgment at 20, *Term Loan Litigation*, Adv. No. 09-00504 (Dec. 6, 2010), ECF No. 63.

115. Duker Aff., *supra* note 8, ¶ 25.

116. Henderson Aff., *supra* note 57, ¶ 54 (noting that GM borrowed \$4 billion on December 31, 2008, and an additional \$9.4 billion in January and February 2009, “secured by a first priority lien on and security interest in substantially all the unencumbered assets of GM and the guarantors, as well as a junior lien on encumbered assets, subject to certain exceptions.”).

117. These “first-day orders” are so common that web sites for services that make available dockets of large chapter 11 cases have separate sections for interested parties to access “first-day motions” and “first-day orders.” See, e.g., LOGAN & COMPANY, INC., www.loganandco.com (last visited July 2, 2016); PRIME CLERK, www.primeclerk.com (last visited July 2, 2016).

118. Indeed, they have become so common that the Bankruptcy Rules have evolved to require that some of orders not be entered in a final form on the first day of a chapter 11 case, but rather require greater notice to interested parties. See, e.g., FED. R. BANKR. P. 4001(b)(2), 4001(c)(2) (requiring that orders providing for debtor-in-possession financing and the use of cash collateral not be finally approved before fourteen days after service of the motion).

119. On the first day of the GM case, as he was granting an order allowing for the payment of pre-petition employee claims, the judge remarked, “This motion is going to be granted for the reasons by

of employees (any pay due to those employees for work performed pre-petition is a pre-petition claim that normally could not be paid until the end of the case absent a court order); orders relating to goods in transit (to alleviate confusion about whether title to the goods passed pre-petition, in which case the debtors could not pay for the goods right away absent a court order and may not receive critically important deliveries), and, perhaps most importantly, emergency financing orders. This emergency financing order would include orders granting pre-petition lenders adequate protection for the collateral securing their outstanding loans to the debtor if the debtor will be using the creditors' collateral.¹²⁰

D. The Need for DIP Financing

If a company is going to operate in chapter 11, it needs cash. Of course, it could use free cash it has on hand, but by the time a debtor is in the desperate situation that justifies a chapter 11 filing, the little cash it has is usually encumbered directly or as proceeds of other collateral.¹²¹ On the filing of a chapter 11 case, a debtor may use encumbered cash (cash collateral) with the permission of its secured lenders.¹²² Without their permission, however, the debtor must prove that the lenders will be adequately protected,¹²³ and proving the lenders are adequately protected could lead to a protracted trial at the outset of the case rather than the “soft landing” that debtors prefer in the belief that it helps to preserve their businesses. Vendors do not want to ship goods when they learn a debtor is having a court battle with its secured creditor in order to get its hands on cash necessary to pay its chapter 11 bills.

Accordingly, it is typical for these issues to be addressed on day one of a case: the debtor seeks and is granted a debtor-in-possession¹²⁴

which motions of this character have been routinely granted (sic) every Chapter 11 case in my career.” Transcript re Hearing Held on June 1, 2009, *supra* note 5, at 55. In response to a motion to pay certain pre-petition taxes, the court noted, “I don’t think I’ve seen a motion anywhere where it hasn’t been granted.” *Id.* at 78.

120. See generally Notice of Commencement of Chapter 11 Cases and Agenda for First Day Hearings, *In re* Republic Airways Holdings, Inc., No. 16-10429 (Bankr. S.D.N.Y., Feb. 25, 2016), ECF No. 31; Notice of Hearing to Consider First Day Pleadings, *In re* Sports Authority Holdings, Inc., No. 16-10527 (Bankr. D. Del. Mar. 2, 2016), ECF No. 26.

121. U.C.C. §§ 9-103, 9-203(f), 9-315.

122. 11 U.S.C. § 363 (2012).

123. *Id.* The Bankruptcy Code does not define “adequate protection,” but the courts usually describe it as compensation for the risk of diminution in the value of the collateral during the case. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

124. The term “debtor in possession” refers to the debtor serving as a fiduciary for creditors of its chapter 11 estate; the debtor in possession has most of the rights and duties of a trustee. 11 U.S.C.

financing order, which provides for so-called “DIP” financing that makes cash available to a debtor,¹²⁵ and/or the debtor enters into a consensual “Cash Collateral Order” with its secured creditors, allowing it to use cash collateral.¹²⁶ At the same time, these or related orders may also include provisions for adequate protection of collateral other than cash: if the collateral value deteriorates during a chapter 11 case, the secured creditor would eat the loss unless the court has entered an order granting it adequate protection. These orders are typically entered on limited notice—after all, the need for cash is an emergency—at the outset of a case. Because notice is limited, these are interim orders that may not become final until after the passage of at least fourteen days from service of the motions.¹²⁷

E. Proof Required for DIP Financing

Although the evidence for these motions theoretically could be put on in the same way as in any federal trial,¹²⁸ given the many complicated issues before the court it is common for a “first-day affidavit”¹²⁹ to be filed with the pleadings. Counsel thus introduces his direct case through that affidavit, and any cross-examination of the affiant to take place in the traditional manner.¹³⁰ Of course, there are many varieties in how the evidence is presented, but in most large cases the first-day affidavit is critical for establishing the evidence that will support the emergency motions. In the GM case, Frederick A. Henderson, GM’s then-president and chief executive officer, signed the first-day affidavit that would serve as the evidence supporting most of the motions, including the DIP Financing motion and the Adequate Protection Motion.¹³¹ Later, William Repko, a financial advisor to the debtor, also submitted a declaration in support of the GM DIP financing.¹³²

§ 1107 (2012).

125. For a discussion of debtor-in-possession financing, see generally Kuney, *supra* note 14; David A. Skeel, Jr., *The Past, Present and Future of Debtor-in-Possession Financing*, 25 CARDOZO L. REV. 1905 (2004).

126. See Dean P. Wyman, *On our Watch: Cash Collateral; The Risks of Non-Consensual Use*, Am. Bankr. Inst. J. 12 (Sept. 1999).

127. FED. R. BANKR. P. 4001(b)(2), 4001(d)(2).

128. FED. R. BANKR. P. 9014(d), 9017 (2016) (Federal Rules of Evidence apply in bankruptcy cases).

129. Of course, the affidavit may also be a declaration sworn to under penalty of perjury. 28 U.S.C. § 1746 (2012).

130. See generally G. Michael Fenner, *The Forced Use of Inadmissible Hearsay Evidence in Bankruptcy Court*, 8 AM. BANKR. INST. L. REV. 453 (2003).

131. Henderson Aff., *supra* note 57.

132. Declaration of William C. Repko in Support of Debtors’ Proposed Debtor in Possession Financing, *GM Chapter 11 Case*, No. 09-50026 (June 1, 2009), ECF No. 68.

These DIP Financing and Adequate Protection orders are governed by Bankruptcy Code sections 361, 363, and 364 and Bankruptcy rule 4001. In addition, many jurisdictions, including the Bankruptcy Court for the Southern District of New York where the GM case was pending, have adopted local rules regarding DIP financing and cash collateral orders.¹³³

When a debtor files for protection under chapter 11, it lacks leverage in negotiating its debtor-in-possession financing with its secured creditors.¹³⁴ For that reason, financing orders have increasingly included provisions that some have felt were overreaching,¹³⁵ such as provisions limiting the time period during which the liens of the pre-petition creditor can be examined or litigation commenced relating to the liens;¹³⁶ provisions providing that the debt is immediately

133. See, e.g., BANKR. S.D.N.Y. R. 4001-2 (as amended December 1, 2009). Before the adoption of LBR 4001-2, the Bankruptcy Court for the Southern District of New York had a similar rule, LBR 4001-2, "Requests for Use of Cash Collateral or to Obtain Credit," repealed August 4, 2008, and before that a local order, General Order M-274.

134. One debtor's lawyer described the DIP Financing negotiations as follows:

Over the weekend, the lender's lawyer gave us this much loan documentation that was absolutely horrendous, the worst thing I had ever seen, and there were no negotiations. They effectively said, if we gave them back a red line, in four hours we will have twenty-five things that courts have prevented them from doing, and that this judge prohibited, and they said "Sign it or no money."

Edward Wolkowitz, Hon. Barry Russell, Jonathan Rosenthal & Richard Wagner, Symposium, *Bankruptcy in the New Millennium: Panel Two: Debtor-in-Possession Financing in Mega-Cases: Transcript of Proceedings*, 39 SW. L. REV. 643, 651 (2010) (statement of Richard Wynne). The late Harvey Miller, one of the most respected bankruptcy lawyers of all time, concurred, noting that "[n]egotiations over DIP agreements tend to be one-sided, with lenders structuring such agreements to enhance and influence control." Miller, *supra* note 13, at 390.

135. Kunej, *supra* note 14, at 30 ("[t]he lending industry and the insolvency community [have] found the holes and handles in chapter 11 and have used them to their advantage").

136. For example, the final DIP financing order in the 2015 Patriot Coal case provides not only that the creditors' committee has only forty-five days to commence a case challenging security interests (unless the condition is waived by the potential defedants or extended by the court for cause), but also that the court must determine the matter within 45 days after the action is commenced. Final Order (I) Authorizing the Debtors (A) to Obtain Post-Petition Financing, (B) Authorizing Use of Cash Collateral, (C) Granting Liens and Superpriority Claims, (D) Granting Adequate Protection, (E) Modifying the Automatic Stay And (G) Granting Related Relief ¶ 26, *In re Patriot Coal Corp.*, No. 15-32450 (Bankr. E.D. Va. June 4, 2015), ECF No. 230 [hereinafter Final DIP Financing Order]. The final cash collateral order in the Caesar's gaming bankruptcy case provides that the Creditors' Committee must commence any action challenging certain liens no later than May 6, 2015 (the cases were filed on January 15, 2015) and that other interested parties have no later than seventy-five days after the entry of the final cash collateral order (March 26, 2015) to contest liens. The committee has a budget of no more than \$150,000 to contest the liens and any challenge to the liens must have resulted in a final order no later than ninety days after the action was commenced. Final Order (I) Authorizing Use of Cash Collateral, (II) Granting Adequate Protection; (III) Modifying the Automatic Stay to Permit Implementation and (IV) Granting Relief, *In re Caesar's Entertainment Operating Co.*, No. 15-01145 (Bankr. N. D. Ill. Mar. 25, 2015), ECF No. 988.

accelerated if certain “goal posts” (such as the filing of a plan or the sale of assets) are not reached in a particular time period;¹³⁷ etc. These provisions, which typically have been approved early in the case, increasingly have been criticized by the bench and bar and led to the adoption of a revised Bankruptcy rule 4001. Rule 4001 provides, generally, that certain provisions in the orders must be conspicuous and that, while an interim order may be entered before fourteen days after service of the motion, a final order may not be entered until that period has lapsed.¹³⁸

Conspicuously absent from rule 4001, however, is *any* requirement that the debtor show that the security interests being protected are in fact perfected.¹³⁹ Nevertheless, a standard provision of financing orders has been that the debtor will make “adequate protection” payments—oftentimes the interest provided for the in pre-petition credit agreement—to the secured creditor before the security interest is determined to be enforceable.¹⁴⁰ Instead of findings that it is proper to pay the secured claim, the order oftentimes provides that purportedly secured creditors will disgorge any payments if it turns out they had no right to be paid.¹⁴¹ This limited proof is in stark contrast, for example, to the proof secured creditors must submit when they file a claim in a case to be paid in the ordinary fashion. In that case, the claim must be accompanied by “evidence that the security interest has been perfected.”¹⁴²

137. The GM DIP financing provided by the Treasury department contained a number of goal posts, including deadlines for the approval of the sale. DIP Financing Motion at 2(u) (setting forth case milestones); Interim Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004 (A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-priority Status, (C) Authorizing the Use of Cash Collateral and (D) Granting Adequate Protection to Certain Pre-petition Secured Parties, *GM Chapter 11 Case*, No. 09-50026 (June 2, 2009), ECF No. 292 [hereinafter Interim DIP Financing Order].

138. FED. R. BANKR. P. 4001(b).

139. Nor do the local rules and orders for the Southern District of New York or the District of Delaware provide that any party establish that a security interest is perfected as a condition for entry of a DIP financing order giving secured creditors extraordinary rights. Rather, the local rules of the Southern District of New York, for example, provide that an order providing for the immediate payment of pre-petition debt that is allegedly secured must provide that the payment be disgorged if it turns out the security interest had not been properly perfected. *See* BANKR. S.D.N.Y. R. 4001-1.

140. Marcia Goldstein et al., Debtor in Possession Financing and Second Lien/Subordination Issues (ALI-ABA, Apr. 2011), http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/CS029_chapter_01_thumb.pdf; Kuney, *supra* note 14, at 49; Skeel, Jr., *supra* note 126.

141. *E.g.*, BANKR. S.D.N.Y. R. 4001-2; BANKR. D. DEL. R. 4001-2.

142. FED. R. BANKR. P. 3001(d) setting forth the requirements for filing a proof of claim, provides: “Evidence of Perfection of Security Interest. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.”

Of course, in the early days of chapter 11 (which was effective in 1979), the typical financing orders may not have required proof the relevant security interests were perfected; before the revisions that took effect in 2001, the Article 9 perfection rules were extremely complicated. In a large case such as GM, financing statements covering substantially all of a debtor's property would have had to have been filed everywhere the debtor operated and had assets.¹⁴³ Figuring out whether those filings were appropriate was no easy task: there were three alternatives in the "uniform" code, not to mention non-uniform variations in some states.¹⁴⁴ And the "easy" financing statement filing—only one filing to perfect a security interest in accounts and general intangibles—was not so easy at all because the filing had to be made where the debtor had its chief executive office (wherever that was as a matter of law and fact).¹⁴⁵ In this regard, consider General Motors itself: its "headquarters" were in Detroit, but its finance and accounting operations were conducted out of New York City.¹⁴⁶ Because determining whether a purportedly perfected secured party was in fact perfected was such a challenging undertaking before the 2001 U.C.C. revisions, proof of perfection was not available at the beginning of a case unless the debtor or secured creditor had plenty of time before the chapter 11 case to marshal its evidence. Moreover, even if a party had gathered evidence of perfection, it could be a difficult undertaking for interested parties to quickly ensure themselves that the security interests in the collateral were in fact perfected.

Another reason paying secured creditors made sense in the early days of DIP financing before a lien investigation was completed was because of the perceived low risk of the transaction. At the time DIP financing disgorgement provisions first appeared, they may not have seemed very risky because the lenders were more often highly regulated depository institutions that were required by law to be well capitalized. The identity, whereabouts, amenability to service in the jurisdiction, and ability to repay the payments to be disgorged was often of little concern. The Department of the Treasury, the Federal Reserve Bank, and the Office of the Comptroller of the Currency were all seeing to that.

Although the Bankruptcy Code does not explicitly bless the practice, some courts—including the Southern District of New York and the District of Delaware, where many large chapter 11 cases are filed—have begun not only to require the debtor to make adequate protection payments, but also to allow the debtor in possession's new financing to

143. LoPucki, *supra* 63, at 579–80.

144. *Id.*

145. *Id.* at 590.

146. Henderson Aff., *supra* note 57, ¶ 21.

pay off its pre-petition loans.¹⁴⁷ These payments are oftentimes referred to as “roll-ups” because in many cases the financing being repaid is a revolving credit agreement and the mechanism by which the pre-petition debt is repaid is that the new collections on accounts receivable are applied first to outstanding pre-petition debt.¹⁴⁸ The justification for this practice is, among other things, ease of administration: because the pre-petition lenders have (presumably) a perfected security interest in pre-petition inventory and accounts, as well as in their proceeds,¹⁴⁹ litigants thought that these debts should just as well be paid off.

Even if the prepayment is not part of the DIP financing, however, a debtor may seek to prepay its secured creditor if it clearly will have cash to pay the creditor in full at the conclusion of the case and it seeks to avoid interest payments (or even default interest payments). Indeed, here, both the pre-petition revolving loan, for which Citibank was the agent, and the pre-petition Term Loan provided for 5% additional interest as a default rate, and lenders’ counsel told the judge that it was the Lenders’ agreement to waive this default interest that was the reason for the prepayment of both loans.¹⁵⁰

Despite the ubiquity of this prepayment practice in the jurisdictions that host many of the largest chapter 11 cases, there is little appellate analysis of the propriety of the practice,¹⁵¹ and it arguably is contrary to the case law in some circuits that criticize the pre-confirmation payment of pre-petition claims.¹⁵² The Bankruptcy Code itself does not provide for the prepayment of secured creditors. Rather, assuming that secured creditors are not allowed to foreclose on their collateral or their collateral is not abandoned,¹⁵³ the Bankruptcy Code and Rules¹⁵⁴

147. BANKR. S.D.N.Y. R. 4001-2; BANKR. D. DEL. R. 4001-2.

148. A former general order of the Bankruptcy Court of the Southern District of New York defined a roll-up as follows: “Roll-ups include the application of proceeds of post-petition financing to pay, in whole or in part, pre-petition credit.” General Order No. M-274 at 7, *In the Matter of the Adoption of Guidelines for Financing Requests* (Bankr. S.D.N.Y. Sept. 9, 2002).

149. U.C.C. § 9-203(f).

150. Transcript re Hearing Held on June 1, 2009, *supra* note 5, at 105–06.

151. For cases addressing “roll-ups,” see *In re Simon & Schuster, Inc. v. Advanced Mktg. Servs.*, 360 B.R. 421, 425 (Bankr. D. Del. 2007) (describing a roll-up in that case), *In re Appliance Store, Inc.*, 181 B.R. 237, 243 (Bankr. W.D. Pa. 1995) (referring to a roll-up as a “contract of adhesion”), and *In re FCX, Inc.*, 54 B.R. 833, 842 (Bankr. E.D.N.C. 1985) (roll-up allowed subject to proof of perfection and priority of security interest).

152. Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987) (forbidding pre-confirmation payment of unsecured claims of women who had been injured by defective intrauterine contraceptive device to pay for reconstructive surgery to allow for childbearing at a time when such surgery had a possibility of success; reasoning that Bankruptcy rule 3021 provides for distributions only after a reorganization plan is confirmed); *cf. In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir. 2004) (declining to determine whether 11 U.S.C. § 363(b) allows for the pre-confirmation payment of critical vendors).

153. The filing of a petition in bankruptcy creates an automatic stay that prohibits most creditors’

contemplate that secured creditors should be paid at the same time unsecured creditors are paid: at the end of the case.¹⁵⁵ Some jurisdictions specifically restrict the early payment of pre-petition claims.¹⁵⁶

Even though there is no direct statutory authority supporting the roll-up practice,¹⁵⁷ the practice has become commonplace. In fact, a roll-up has sometimes occurred in the case of a pre-petition term loan as well as in a case involving a pre-petition revolving loan,¹⁵⁸ although the “bookkeeping” rationale would not be applicable to a term loan to the same extent as to a revolver because in a term loan the bookkeeping could be less complicated.

There is, indeed, reason for a court to be careful with respect to cash collateral and DIP financing orders: if the entity extending credit did so in good faith, any order approving financing is subject to very limited review on appeal.¹⁵⁹

actions to recover on their claims. 11 U.S.C. § 362 (2012).

154. FED. R. BANKR. P. 3021 (providing for distributions to claimants after plan confirmation).

155. *See* 11 U.S.C. §§ 1123(a), 1129 (2012).

156. *See* Comments to Cash Collateral and DIP Financing, BANKR. N.D. TEX. R. app. H, ¶ 5A (revised Apr. 1, 2012) (“The court will not approve cash collateral orders (or post-petition financing orders that are in substance cash collateral orders) that have the effect of converting all the pre-petition liens and claims to post-petition liabilities under the guise of collecting pre-petition accounts and re-advancing them post-petition) that have the effect of converting pre-petition secured debt into post-petition administrative claims that must be paid in full in order to confirm a plan. That type of provision unfairly limits the ability and flexibility of the debtor and other parties in interest to formulate a plan. That type of provision, granted at the outset of a case, effectively compels the debtor to pay off the secured lender in full on the effective date and has the consequence of eviscerating § 1129(b).”).

157. Nevertheless, there is substantial authority supporting the payment of secured claims pre-confirmation in appropriate cases. *See In re Capmark Fin. Group Inc.*, 438 B.R. 471 (Bankr. D. Del. 2010); *Law Debenture Trust Co. v. Calpine Corp. (In re Calpine Corp.)*, 356 B.R. 585, 589 (S.D.N.Y. 2007); *HSBC Bank USA v. Calpine Corp.*, No. 07 Civ. 3088, 2010 U.S. Dist. LEXIS 96792, at *32–34 (S.D.N.Y. Sept. 14, 2010); *United States ex rel. Rural Electrification Admin. v. Wabash Valley Power Ass’n. (In re Wabash Valley Power Ass’n)*, 167 B.R. 885, 889 (S.D. Ind. 1994); *cf. In re FCX, Inc.*, 54 B.R. 833, 840 (Bankr. E.D.N.C. 1985) (cross-collateralization appropriate when lender is over-secured). *See generally In re Indus. Office Bldg. Corp.*, 171 F.2d 890, 893 (3rd Cir. 1949) (interim distributions to mortgage bonds appropriate when ultimate distributions to all creditors will not be decreased).

158. Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 707 n.209 (2009) (describing roll-ups as typically being associated with final DIP financing orders).

159. 11 U.S.C. § 364(e) (2012) (“The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.”).

F. The GM Cash Collateral Order and DIP Financing Order Are Built With Faulty Parts

On the first day of GM's chapter 11 case, the court entered both an Adequate Protection Order and a DIP Financing Order.¹⁶⁰ First, the estate sought and obtained a DIP Financing Order.¹⁶¹ This was no garden-variety order between a debtor and a bank; in this case the main lender was the United States Treasury.¹⁶² In addition, the bankruptcy court entered an adequate protection order with respect to the Term Loan. This adequate protection order provided, among other things, as a finding of fact, that the Term Loan liens were "secured claims" and provided for those "secured claims" to be repaid in full upon the draw down on the U.S. Treasury facility.¹⁶³ In addition, the Adequate Protection Order provided that the debtor could use the Term Lenders' collateral so long as replacement liens equal to the value of the collateral used were granted to the Term Loan Lenders and so long as the Funds received periodic payments equal to the interest payments that would be due under the pre-petition Term Loan agreement.¹⁶⁴ There is no hint in any of the papers filed that day, or the orders entered by the court, that anyone suspected any security interest of the Term Loan Lender's claims may not be perfected. This suggests that no one involved in negotiating and drafting the DIP financing or the adequate protection order had been able to examine the Term Loan financing statements to be certain they were effective. No one included evidence of perfection of the liens, attached that evidence to the First-Day Affidavit, or filed that evidence with the court. Instead, the Henderson Affidavit merely recited, "The Debtors believe the Term Loan Lenders are oversecured and anticipate full payment of all amounts owing under the Term Loan within 45 days."¹⁶⁵

160. Background facts were in the Henderson Aff., *supra* note 57.

161. Interim DIP Financing Order, *supra* note 137.

162. Economic Development Canada was also a lender. *Id.*

163. Interim Order Under 11 U.S.C. §§ 105, 361, 362, 363 and FED. R. BANKR. P. 2002, 4001 and 9014 (I) Granting Adequate Protection to Term Loan Secured Parties and (II) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) ¶ 3, *GM Chapter 11 Case*, No. 09-50026 (June 1, 2009), ECF No. 181 [hereinafter Interim Adequate Protection Order] ("The Debtors' Obligations are secured by liens granted to the Term Loan Agent on the property of the estates that constitutes Collateral under, and as defined in, the Term Loan Facility.").

164. *Id.* ¶ 5.

165. Motion of Debtors for Entry of Orders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 507(i) Authorizing Use of Cash Collateral (ii) Granting Adequate Protection to the Revolver Secured Parties, (iii) Granting Adequate Protection to the Term Loan Secured Parties, and (iv) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001, *GM Chapter 11 Case*, No. 09-50026 (June 1, 2009), ECF No. 60 [hereinafter Adequate Protection Motion]. Considering that the Adequate Protection Motion proposed to pay the Term Loan Lenders roughly \$1.5 billion, it is surprisingly brief in making its case. To secure GM's and Saturn's obligations under the Term Loan (the "Term Loan Obligations"),

Indeed, at this time the debtors were behaving, and had been behaving, as if they thought that the Term Lenders were over-secured: in March, they had renegotiated the Term Loan apparently based on that belief, and in the months leading up to the chapter 11 case they had continued to give JPMorgan collateral statements.¹⁶⁶

And it is at this point that a little clarification is in order. The first-day affidavit, which was signed not by a lawyer but rather by General Motor's then-President and CEO, Frederick A. Henderson, actually never made any attempt to establish that the Term Loan security interests were effective in bankruptcy.¹⁶⁷ Recall that having a security interest—usually made effective by an agreement by a debtor to grant a lender a right in the debtor's collateral to secure an obligation owed to the lender¹⁶⁸—is not the same as having a *perfected* security interest.¹⁶⁹ Only *perfected* security interests give creditors the special benefits of secured status in bankruptcy. Thus, the statements in the First-Day Declaration that the Term Lenders were “secured” in no way established that the Term Lenders had a security interest that was enforceable in bankruptcy, or that there was any legal basis to pay the Term Loan in full in a case in which other unsecured creditors were not being paid in full.¹⁷⁰ The right to full payment over time would have arisen (at the conclusion of the case) only if the Term Loan Lenders had a *perfected* secured claim.¹⁷¹ In other words, there was absolutely no evidence in any of the submissions or at the hearing showing that the Term Loan Lenders had a right to be paid.¹⁷² Not one bit.

It bears emphasis, however, that the local rules in the Southern

GM and Saturn entered into the Term Loan Collateral Agreement. Pursuant to the Term Loan Collateral Agreement, the Term Loan Agent was granted a security interest in and continuing senior liens on the Term Loan Collateral for the benefit of the Term Loan Agent and the Term Loan Lenders. As of May 23, 2009, the outstanding principal amount of the Term Loan was \$1,466,250,000. The borrowings under the Term Loan were used to fund general working capital requirements. The Debtors believe that, as of the Commencement Date, the value of the assets encumbered by the Term Loan Agent, for the benefit of the holders of Term Loan Obligations, exceed the aggregate amount of the Term Loan Obligations.

166. Duker Aff., *supra* note 8, ¶ 26, Exs. G, N, O (detailing collateral certificates of GM delivered to JPMorgan on December 2, 2008, March 23, 2009, and May 28, 2009).

167. Henderson Aff., *supra* note 57, ¶ 113 (describing Term Loan as being “secured”).

168. U.C.C. § 9-203(b).

169. Compare U.C.C. § 9-203(b) with U.C.C. § 9-311. See also U.C.C. § 9-317(a).

170. In general, unless classes of creditors agree to different treatment, in bankruptcy cases claims are paid in accordance with rules of absolute priority, with secured claimants being paid the present value of their collateral and unsecured claims of the same rank being paid *pari passu*. See generally 11 U.S.C. § 1129 (2012). Classes of claimants can vote to give up their rights to absolute priority so long as individual dissenting members are paid as much as they would be paid in a chapter 7 liquidation. 11 U.S.C. § 1129(a)(7) (2012).

171. 11 U.S.C. § 544(a) (2012) (trustee may avoid an unperfected security interest).

172. Transcript re Hearing Held on June 1, 2009, *supra* note 5, at 100–06.

District of New York where the GM case was pending (and where most other mega-chapter 11 cases are filed) not only requires no proof of perfection of the security interests but instead contemplates just the opposite: that the pre-petition debt may be repaid—at least in part—before the validity of the security interests has been established. The local rule specifically requires that an order providing for the repayment of pre-petition debt provide that the payments must be disgorged if the security interests are invalid.¹⁷³ This requirement has descended from a general order of the Southern District of New York that went back to 2002.¹⁷⁴ Accordingly, in one of the largest chapter 11 cases of all time in the middle of the greatest American financial catastrophe since the Great Depression, it is not surprising that, with so much else to be done, the usual model was followed. Compared with the other problems facing the court and many of the parties, this \$1.5 billion Term Loan may have seemed to be small potatoes.

G. The Term Loan Claims Were Scheduled to Be Paid Even Though There Was No Evidence the Security Interests Were Perfected

Notwithstanding the lack of relevant evidence, on the first day of the GM case, the court entered an interim order providing that, when the United States Department of Treasury and Economic Development Canada provided the DIP financing, the Term Loan Lenders would be repaid in full. The Order also provided that the Term Loan was secured, that the Lenders were entitled to adequate protection,¹⁷⁵ and that the reasonable fees and expenses incurred by the Lenders and their professionals would be paid going forward, with no necessity of further court approval.¹⁷⁶ As is required by the Bankruptcy Rules, the initial orders were “interim” orders that were made available to creditors and that were scheduled to be revisited if any objections to the orders were filed.¹⁷⁷

173. BANKR. S.D.N.Y. R. 4001-2.

174. See General Order No. M-274 ¶ A.2 at 11, In the Matter of the Adoption of Guidelines for Financing Requests (Bankr. S.D.N.Y. Sept. 9, 2002) (“An order approving a rollup must ordinarily reserve the right of the Court to unwind the paydown of the prepetition debt in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, and (where appropriate) priority of the prepetition lender’s claims or liens, or a determination that the prepetition debt was undersecured as of the petition date.”).

175. Interim Adequate Protection Order, *supra* note 163.

176. The authorization to pay fees for secured creditors is in 11 U.S.C. § 506(b) (2012) (“To the extent that an allowed secured claim is secured by property, the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or state statute under which such claim arose.”).

177. Interim DIP Financing Order, *supra* note 137.

The interim financing order and the interim adequate protection order were entered on June 2, 2009.¹⁷⁸ On June 3, 2009, a new set of lawyers entered the picture: counsel for the GM Creditors' Committee.¹⁷⁹ This firm, selected by a committee of unsecured creditors, typically is tasked with, among other things, assuring itself that the security interests of purported secured creditors are in fact perfected and thus enforceable in chapter 11 cases. As is virtually always the case, the GM creditors' committee was formed by the Office of the United States Trustee shortly after a chapter 11 case was commenced and promptly selected its counsel.¹⁸⁰

H. JPMorgan Bankruptcy Counsel Discovers the Financing Statement Had Been Terminated

Although apparently no one knew that the equipment's security interest financing statement had been terminated when the interim orders requiring payment of the Funds were entered, roughly two weeks into the GM case JPMorgan's bankruptcy counsel (JPMorgan Bankruptcy Counsel)—a different firm from that which had worked on the termination of the Synthetic Lease Financing—discovered the error. On June 16, 2009, the young associate who had worked on the GM Lease matter received an email from a paralegal with whom he had worked asking him to immediately contact Chase's Bankruptcy Counsel: "It is my understanding that [JPMorgan Bankruptcy Counsel] is in a roomful of lawyers right now and wants us to understand that this matter is urgent."¹⁸¹

Undoubtedly, JPMorgan Bankruptcy Counsel *did* perceive that the matter was urgent, having just discovered a \$1.5 billion error. At that point, things moved into high gear: the next day, on June 19, 2009,

178. Interim Order Pursuant to Bankruptcy Code Sections 105(a), 361, 362, 363, 364 and 507 and Bankruptcy Rules 2002, 4001 and 6004(A) Approving a DIP Credit Facility and Authorizing the Debtors to Obtain Post-Petition Financing Pursuant Thereto, (B) Granting Related Liens and Super-Priority Status, (C) Authorizing the Use of Cash Collateral, (D) Granting Adequate Protection to Certain Pre-Petition Secured Parties and (E) Scheduling a Final Hearing, *GM Chapter 11 Case*, No. 09-50026 (June 2, 2009), ECF No. 292; Interim Adequate Protection Order, *supra* note 163.

179. For a thoughtful empirical investigation of the important role played by creditors' committees in chapter 11 cases, see Michelle M. Harner & Jamie Marinck, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 *VAND. L. REV.* 747 (2011).

180. The competition to become counsel to the creditors' committee is another time in which lawyers could have discovered problems with the Term Loan security interest, because counsel typically make pitches to the newly appointed members of the creditors' committee and strive to prove to the committee their ability to protect unsecured creditors' interests. See *generally* 11 U.S.C. §§ 1102, 1103 (2012).

181. Declaration of John M. Callagy in Support of Motion for Summary Judgment of JPMorgan Chase Bank, N.A. at Ex. 20, *Term Loan Litigation*, Adv. No. 09-00504 (Dec. 6, 2010), ECF No. 41.

almost three weeks into the GM chapter 11 case and less than a week before the final hearing on the payment of the Term Loan, JPMorgan Bankruptcy Counsel emailed GM Bankruptcy Counsel (a different firm from GM Lease Counsel), newly appointed counsel to the Official Creditors' Committee, along with counsel to the Department of the Treasury's Automotive Task Force.¹⁸² The group was informed that the financing statement had been accidentally terminated, but not surprisingly, JPMorgan Bankruptcy Counsel maintained in this initial email that its security interests were still effective because the termination had been accidental.¹⁸³

I. The \$1.5 Billion Term Loan Is Paid Before the Termination Is Made Public

Even though GM's Bankruptcy Counsel, counsel for GM's creditors' committee and counsel for the Automotive Task Force of the Department of Treasury knew the key security interest filing had been terminated, on June 25, less than a month after the GM case was commenced, the court nevertheless ordered the Term Loan Lenders to be paid off in full. Before he signed the order, however, the judge was not informed that a serious problem had been discovered with respect to the security interests of the Term Loan lenders,¹⁸⁴ nor was there a hint in any pleadings that there was any issue concerning the perfection of the liens: although the Creditors' Committee filed a usual "reservation of rights" two days before the final hearing on DIP financing, this brief pleading had not a word suggesting there was any concern about the enforceability of any security interest.¹⁸⁵ Not a word was said in court about the key security filing having been terminated.

There was, however, an important change in the orders that were

182. Fisher Decl., *supra* note 54, at Ex. G (email message, dated June 19, 2009). See generally STEVEN RATTNER, OVERHAUL: AN INSIDER'S ACCOUNT OF THE OBAMA ADMINISTRATION'S EMERGENCY RESCUE OF THE AUTO INDUSTRY (2011).

183. Fisher Decl., *supra* note 54, at Ex. G ("Attached herewith is an affidavit . . . which sets forth the circumstances under which the termination statement was filed, and makes clear that such action was unauthorized We are hopeful that this clarifies the situation and removes any doubt that the termination statement was ineffective.").

184. Transcript re Hearing Held on June 25, 2009, *GM Chapter 11 Case*, No. 09-50026 (June 26, 2009), ECF No. 2595 (Statements of counsel to GM, seeking approval of prepayment of Term Loan).

185. Reservation of Rights of the Official Committee of Unsecured Creditors to Debtors' Motion for an Order Pursuant to 11 U.S.C. §§ 361, 362, 363 and 364 (I) Authorizing the Debtors to Obtain Postpetition Financing, Including on an Immediate, Interim Basis; (II) Granting Superpriority Claims and Liens; (III) Authorizing the Debtors to Use Cash Collateral; (IV) Granting Adequate Protection to Certain Prepetition Secured Parties; (V) Authorizing the Debtors to Prepay Certain Secured Obligations in Full Within 45 Days; and (VI) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001, *GM Chapter 11 Case*, No. 09-50026 (June 23, 2009), ECF No. 2319.

presented to the court on June 25, 2009, from those the court and interested parties had seen on June 1, 2009: unlike the first orders, the final orders did not provide that the Term Loan liens were valid and enforceable.¹⁸⁶ That change, however, was not highlighted and would not have been immediately obvious to anyone comparing the lengthy orders.

In any event, although the order reserved the Committee's right to contest the perfection of the security interests, as is typical, it specifically provided that JPMorgan's counsel could be paid all its reasonable expenses, including all expenses incurred in any objection to the security interests.¹⁸⁷ This was a puzzling initial concession—again with no meaningful notice to the creditor body—because, although the Bankruptcy Code allows for the payment of reasonable attorneys' fees to secured creditors, those fees are absolutely not payable unless the secured creditor is oversecured.¹⁸⁸ If a large piece of the collateral package securing the loan was invalid, then the Term Loan Lenders likely were not in fact oversecured, and JP Morgan would have had no right to have its fees paid by the estate going forward.¹⁸⁹

Why repay the Term Lenders? We do not know why Treasury continued to require this *after* it was discovered that there was a serious problem with the security interests, but we do know the reason bank counsel presented to the court before the infirmity in the liens was discovered: the loans provided for an additional 5% default interest rate.

186. Final DIP Financing Order, *supra* note 136, ¶ 19(c).

187. *Id.* (“In the event the Committee investigates any liens of any of the Prepetition Senior Facilities Secured Parties or any third party brings an action against a Prepetition Senior Facilities Secured Party that is entitled to indemnification by the Debtors under the applicable Prepetition Senior Facility, then, notwithstanding any other provision of this Final Order, (i) the Debtors shall pay (in accordance with Paragraph 6(d) of the Prepetition Revolving Credit Agreement Order and Paragraph 5(d) of the Prepetition Term Loan Facility Order), the reasonable fees, costs, and charges incurred by the agents for the Prepetition Senior Facilities . . . in responding to such investigation or in defending any challenge to such liens or to their ability to retain any Payment. . . .”).

188. 11 U.S.C. § 506(b) (2012) (“To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim . . . any reasonable interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement . . . under which such claim arose.”). Indeed, the Supreme Court has recently stressed that a bankruptcy court has *no* equitable discretion to allow for the payment of fees that are not explicitly provided for in the Bankruptcy Code. *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2164 (2015) (“Our basic point of reference when considering the award of attorney’s fees in the bedrock principle known as the American Rule. Each litigant pays his own attorneys’ fees, win or lose, unless a statute or contract provides otherwise.”); *cf. Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304 (2d Cir. 1953) (court may not allow payment of professional fees not specifically provided for in Bankruptcy Act); *see also* Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (*In re Capital*), 501 B.R. 549 (Bankr. S.D.N.Y. 2013) (undersecured creditor not entitled to interest or attorneys’ fees).

189. Its fees could be paid, however, as an unsecured claim, at no greater percentage than the claims of other unsecured creditors. *See generally Ogle v. Fidelity & Deposit Co. of Md.*, 586 F.3d 143 (2d Cir. 2009).

Indeed, avoiding a punitive default interest rate is a common justification for prepaying pre-petition secured claims. If another lender is going to lend the estate enough money to pay off the pre-petition loan for which default interest will have kicked in, the estate might save considerable funds—assuming the interest rate on the new financing is materially less than the default rate on the pre-petition financing—by paying off the pre-petition lender, because interest is allowed on an oversecured claim.¹⁹⁰ This rationale for prompt payment of secured lenders is used even though most courts hold that there is only a “rebuttable presumption” that oversecured creditors are entitled to be paid the default rate provided for in their pre-petition agreements during the period from when a case is filed until the effective date of a reorganization plan.¹⁹¹ Indeed, the rationale of avoiding default interest by repaying the secured lender is so compelling that in its recent, prestigious review of chapter 11 designed to identify the need for changes, the American Bankruptcy Institute concluded that it is appropriate to pay off pre-petition secured loans when a new lender is entering the picture, although not when the pre-petition lender is the DIP lender.¹⁹²

The rationale of avoiding paying default interest, however, does not apply in the case of a pre-petition lender that is undersecured.¹⁹³ In that case, not only is the lender not entitled to default interest, it is also not entitled to post-petition interest in any amount.¹⁹⁴ Given that clear-cut rule, it appears that the Lenders had absolutely no right to interest of any sort, and thus the traditional justification for prepaying the Lenders was nonexistent.

190. 11 U.S.C. § 506(b) (2012).

191. Interest incurred by secured creditors in the period between the filing of a case and the confirmation of a chapter 11 case is referred to as “pendency interest.” *In re 785 Partners, LLC*, 470 B.R. 126, 134 (Bankr. S.D.N.Y. 2012) (“Pendency interest is not based on contract and fixing the appropriate rate rests with the ‘limited discretion’ of the bankruptcy court”; adopting rate provided for in contract for payment of pendency interest); see also *Prudential Ins. Co. of Am. v. City of Boston (In re SW Boston Hotel Venture, LLC)*, 748 F.3d 393 (1st Cir. BAP 2014) (allowing default interest at contract rate but refusing to allow monthly compounding provided in credit agreement based upon equitable considerations); *Key Bank Nat’l Assn. v. Milham (In re Milham)*, 141 F.3d 420, 423 (2d Cir. 1998) (noting “limited discretion” of court to varying from contract rate when awarding pendency interest to oversecured creditor); *In re Mkt. Ctr. East Retail Prop., LLC.*, 433 B.R. 335 (Bankr. D.N.M. 2010) (pendency interest allowed at default rate).

192. *American Bankruptcy Institute Commission to Study the Reform of Chapter 11*, 23 AM. BANKR. INST. L. REV. 4, 79, 80–86 (2015).

193. The rationale also does not apply in a case in which the interest rate at which a debtor borrows money to repay the pre-petition debt is higher than the default interest rate. Along these lines, note that Marcia Goldstein, the chair of the prestigious Weil Gotshal restructuring department, and other Weil attorneys calculated that the effective post-petition borrowing interest rate—taking into account the fees paid for the loan and the limited duration of the loan—was 41% in one recent case and 33% in another case. Goldstein et al., *supra* note 140, at 4.

194. 11 U.S.C. § 506(b) (2012) (oversecured lender is entitled to interest).

One could argue, however, that, even though the Funds' financing statement had been terminated, it seemed likely that eventually the liens of the lenders would be vindicated. After all, no one seemed to have known that the filing was terminated, suggesting that no one relied upon the mistaken termination. One could argue that it is grossly unfair to penalize innocent parties for a minor technical slipup on which no one relied, especially when the penalty could be almost \$1.5 billion. That being said, the presence of a string of decisions from all over the country broadly construing the pre-revised Article 9 filing statement termination provisions¹⁹⁵ would have raised serious questions about whether the faulty termination should be ignored even though apparently no one had relied on the termination.

Of course, June 2009 was an extraordinary time: the Department of the Treasury had been doing its best to keep banks that were likely insolvent afloat to save the economy from even worse distress.¹⁹⁶ Because the Department of the Treasury was financing the case, it could dictate whether the Funds and JPMorgan's fees would be paid. But even though the Treasury knew about the problem of the terminated financing statement, the Treasury did nothing to stop the roughly \$1.5 billion from being paid or from committing the estate to pay JPMorgan's legal fees going forward. In fact, just the opposite occurred: the Treasury Loan agreement had, from the beginning, actually required that the Lenders be repaid, and that long-standing requirement was not modified after the parties knew the key financing statement had been terminated.¹⁹⁷

The record reveals nothing about the motivation of the Department of Treasury. The decision to pay creditors whose right to be paid was in dispute may have been a decision based on the conclusion that all energy should be focused on completing the sale, recapitalizing GM, and—hopefully, because the matter was in doubt—saving the economy. As large as the sum involved was, \$1.5 billion was a paltry amount compared to the amount at risk in the GM deal as a whole, and more importantly, for the economy as a whole. We do not know what

195. *Crestar v. Neal (In re Kitchen Equip. Co.)*, 960 F.2d 1242, 1246–47 (4th Cir. 1992) (erroneous notation on public filing was legally effective); *In re Pacific Trencher & Equip., Inc.*, 735 F.2d 362, 365 (1984) (affirming order refusing to reform amendment to financing statement when “termination” was erroneously checked); *In re Silvernail Mirror & Glass, Inc.*, 142 B.R. 987, 989 (Bankr. M.D. Fla. 1992) (“Even if the termination statement did not reflect the parties’ true intent” it was legally effective); *In re York Chemical Industries*, 30 B.R. 583, 586 (Bankr. D. S. C. 1983); *Ji Case Credit Corp. v. Foos*, 717 P.2d 1064, 1067 (Kan. Ct. App. 1986). *But see In re A.F. Evans, Co.*, No. 09-41727 EDT, 2009 Bankr. LEXIS 2473 (Bankr. N.D. Cal. July 14, 2009) (termination not effective when an unknown entity (someone other than the secured party) checked a “termination” box on a form).

196. *See, e.g.*, BEN S. BERNANKE, *THE FEDERAL RESERVE AND THE FINANCIAL CRISIS* 74–96 (2013); RICHARD A. POSNER, *THE CRISIS OF CAPITALIST DEMOCRACY* 80–92 (2010).

197. Interim DIP Financing Order, *supra* note 137.

Treasury was thinking (assuming this \$1.5 billion technicality was even brought to the attention of those higher up the chain of command), but we have been told that Treasury was extremely concerned that secured creditors—both in the United States and abroad—be protected in the bail outs: recently Ben Bernanke has explained how distressed soon-to-be Treasury Secretary Timothy Geithner was, in late 2008, because secured creditors were forced to take a haircut when JPMorgan Chase acquired Washington Mutual; Secretary Geithner, in his memoir of the financial crisis, confirmed Bernanke’s opinion.¹⁹⁸

In any event, the Final Financing Order did more than provide for the repayment of the Funds and the payment of the JPMorgan legal expenses and fees. The Final Financing Order also provided for a release of JPMorgan and the Funds with respect to issues relating to the Term Loan, but with a limitation on that release to allow the Creditors’ Committee to commence an action “with respect only to the perfection of first priority liens of the Prepetition Senior Facilities Secured Parties (it being agreed that if the Prepetition Senior Facilities Secured Parties, after Payment, assert or seek to enforce any right or interest in respect of any junior liens, the Committee shall have the right to contest such right to interest in such junior lien on any grounds, including (without limitation) validity, enforceability priority, perfection or value).”¹⁹⁹ Later, JPMorgan would argue that the release language left no room for any debate over whether the fixture collateral (if any) fully secured its loan.²⁰⁰ In the future, other defendants would also argue using additional theories that the DIP order waived causes of action and otherwise hogtied the Committee or undermined individual defendant’s rights.²⁰¹

198. BEN BERNANKE, *THE COURAGE TO ACT: A MEMOIR OF A CRISIS AND ITS AFTERMATH* 323 (2015) (describing Treasury Secretary Geithner’s disputes with head of the FDIC Sheila Bair regarding the treatment of Washington Mutual; Bair would not agree to use FDIC funds to pay Washington Mutual’s secured creditors (who were not legally entitled to be paid with FDIC funds) because she was concerned with preserving the FDIC’s assets; Geithner was adamant they should be paid with FDIC insurance funds so that secured creditors would not fail to be paid in full in the resolution of a failed insured depository institution and thus suffer a loss). In his memoir *STRESS TEST*, Timothy F. Geithner, Secretary of the Treasury at the time the Term Loan was repaid, describes how distraught he was that secured creditors of Washington Mutual were forced to take a haircut. TIMOTHY F. GEITHNER, *STRESS TEST: REFLECTIONS ON THE FINANCIAL CRISIS* 215–16 (2015) (“The U.S. government had sent a message that [secured] creditors of U.S. financial institutions were not safe, precisely the wrong message to send at a time of peril.”).

199. Final DIP Financing Order, *supra* note 136, ¶ 19(d).

200. Defendant JPMorgan Chase Bank N.A.’s Reply Memorandum of Law in Further Support of Motion for Summary Judgment at 24–27, *Term Loan Litigation*, Adv. No. 09-00504 (Aug. 26, 2010), ECF No. 56 (interpreting the *Final DIP Financing Order* to provide that Committee may not challenge the value of the non-equipment collateral security securing the Funds’ liens.).

201. *E.g.*, Answer and Cross-Claims of Ad Hoc Group of Answering Term Lenders at 98, *Term Loan Litigation*, Adv. No. 09-00504 (Dec. 18, 2015), ECF No. 334 (Twentieth Affirmative Defense).

No one objected to the order, but why would anyone object: the general creditor body had no notice JPMorgan's key financing statement had been terminated.

J. Who Was Paid?

As noted, the DIP Financing Order provided that the Funds would be paid but that, if the payment were later determined to have been improper, the Funds would repay the money to the estate.²⁰² But who were these entities that were obligated to return \$1.5 billion to the GM estate if the payment had been improper? Years later we are just beginning to learn who was paid.²⁰³

First, a little background: \$1.5 billion is a lot of money, and in practice a loan for this amount does not come from one entity. Rather, a loan such as this is made by a group of lenders who are represented with respect to the loan by an agent or agents. The agent is typically a large commercial bank, such as JPMorgan, and the syndicated lenders are a variety of entities: pension funds, investment funds, hedge funds, private equity, commercial banks, or other entities. When the loans are so-called "leveraged loans,"²⁰⁴ the lenders tend to be funds; a recent study concluded that the largest lenders in syndicates of leveraged loans are collateralized loan obligations (CLOs, a securitization vehicle), hedge funds, and mutual funds, which purportedly share 85% of the market.²⁰⁵ Although the syndicate members typically appear in court through their agent, they themselves are the entities that hold the claims against the estate; their representation by the agent only goes as far as the syndication agreement. The actual identity of the lenders can change: the secured creditors' claims can be bought and sold. Indeed, it is

202. Final DIP Financing Order, *supra* note 136, ¶ 19(d) ("Any Prepetition Senior Facilities Secured Party accepting Payment shall submit to the jurisdiction of the Bankruptcy Court, it being understood that the respective administrative and collateral agents for the Prepetition Senior Facilities shall have no responsibility or liability for amounts paid to any Prepetition Senior Facilities Secured Parties and such agents shall be exculpated for any and all such liabilities, excluding only such funds as are retained by each such agent solely in its respective role as a lender.").

203. Adversary Complaint For (1) Avoidance Of Unperfected Lien, (2) Avoidance And Recovery Of Postpetition Transfers, (3) Avoidance And Recovery Of Preferential Payments, And (4) Disallowance Of Claims By Defendants ¶ 8, *Term Loan Litigation*, Adv. No. 09-00504 (July 31, 2009), ECF No. 1 [hereinafter Complaint] ("In a diligent attempt to properly identify all possible parties to this Complaint, the Committee (i) asked counsel to [JPMorgan,] the administrative agent under the Term Loan Agreement, for a list of all lenders under the Term Loan Agreement or other entities who acquired an interest in the loan, which list has not been provided to date.").

204. A leveraged loan is a loan with a low rating. *In re Citigroup, Inc. Sec. Litig.*, 753 F. Supp. 2d 206, 216 (S.D.N.Y. 2010).

205. OLIVER WYMAN, RISK RETENTION FOR CLOS: A SQUARE PEG IN A ROUND HOLE? 6 (2013), https://www.federalreserve.gov/SECRS/2013/November/20131127/R-1411/R-1411_112713_111665_439982689060_1.pdf.

common for claims to change hands, particularly as the debtor's financial situation deteriorates and entities that are willing to bear more risk in exchange for a higher return buy claims at a discount in hopes of making a home run.

Incredibly, although they were paid almost \$1.5 billion of estate assets, the identity of the Funds and the amount of money each received have only recently been publicly disclosed. This is so even though these entities were paid with taxpayer money (TARP funds) and billions of GM TARP dollars have never been and will never be repaid to the United States Treasury.²⁰⁶ Recently, the Committee annexed an exhibit with the list of defendants to its amended complaint in the Term Loan litigation, setting forth their identities and the amount of money those defendants purportedly received. In accordance with an agreement with JP Morgan, however, that exhibit was filed under seal.²⁰⁷ Only recently—over six years after government funds were used to pay them—has the seal been removed from the exhibit, potentially providing information about who was paid.²⁰⁸

The mix of lenders we see in the GM case reflects changes in lending over the last few decades. As noted previously, in the early days of chapter 11 the lenders were oftentimes banks or insurance companies that are highly regulated. Increasingly, however, lenders today are often less closely regulated CLO trusts, other funds, private equity lenders, or hedge funds.²⁰⁹ As one expert described it, “In a little over ten years, the players in the loan markets have done almost a 180 degree shift. In 1995 banks represented over 70% of the investors in loans. Today [in 2007] that number stands at under 13%. Conversely in 1995, collateralized loan obligations (CLOs), hedge funds, and other such funds represented just over 16% of the lenders in loans. Today, that number stands at over 77%.”²¹⁰

The number and assets of these funds have grown amazingly over the past few decades: for example, while hedge funds had \$38.9 billion under management in 1990, by the summer of 2008, they had roughly

206. *Bank Bailouts Approach a Final Reckoning*, WALL ST. J. (Dec. 14, 2014), <http://www.wsj.com/articles/ally-financial-exits-tarp-as-treasury-sells-remaining-stake-1419000430> (summarizing Department of Treasury loss on GM bailout as roughly \$10.5 billion); see also *Financial Stability: Auto Industry*, U.S. DEPT. TREASURY, <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Pages/default.aspx> (last visited Mar. 6, 2016) (indicating Treasury had \$11.3 billion loss on GM bailout).

207. Complaint, *supra* note 203, ¶ 8; Amended Complaint, *supra* note 100.

208. Order Removing the Confidential Designation From Certain Documents and Unsealing Exhibits 3 and 4 to the Amended Complaint, *Term Loan Litigation*, Adv. No. 09-00504 (Dec. 3, 2015), ECF No. 300 [hereinafter Order Removing the Confidential Designation].

209. See generally FINANCIAL STABILITY BOARD, GLOBAL SHADOW BANKING MONITORING REPORT 2015 (2015) (noting increase from 2002 in the assets of non-bank financial intermediaries).

210. Miller, *supra* note 13, at 379.

\$2 trillion under management.²¹¹ Throughout the world, they are playing a larger role in secured lending: a recent survey by Professor Michele Harner indicates that hedge funds preferred investment in a chapter 11 case is as a secured lender.²¹²

Many of these investors are established overseas,²¹³ in venues that offer tax or other advantages to their operations or investors, although the actual day-to-day operations of the lenders may be run from offices in the United States.²¹⁴ These funds themselves may have raised all the money for their investments, or they may have gathered money to invest from other funds, also located abroad. Because these funds are oftentimes located off shore, collecting judgments from them or from the entities to which they transfer monies they receive may be a real challenge. Moreover, some of them may no longer exist or have no unencumbered assets.²¹⁵ Indeed, in a motion to dismiss filed in the Term Loan Litigation, certain defendants have insisted that “several of the Term Lenders have dissolved, been terminated, or otherwise materially changed their positions in the over six years since the complaint was filed.”²¹⁶

The developing facts in the Term Loan Litigation illustrate how little is known about who really received the taxpayer money. Like all parties to litigation, the defendants are required to file corporate ownership statements.²¹⁷ However, over six years into the litigation, counsel for

211. HAL S. SCOTT, *THE GLOBAL FINANCIAL CRISIS* 98–99 (2009).

212. For an empirical analysis of the role of distressed debt purchasers in chapter 11 cases, see Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors’ Objectives*, 16 AM. BANKR. INST. L. REV. 69 (2008). In her study, Professor Harner notes that 34.5% of the distressed debt investors she surveyed indicated that senior secured bank debt was their first choice for investments. *Id.* at 83. For other commentary on the role of distressed debt investors in chapter 11 cases, see generally Barry E. Adler, *Bankruptcy Primitives*, 12 AM. BANKR. INST. L. REV. 219, 239 (2004) and Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1211 (2006).

213. SCOTT, *supra* note 211, at 98.

214. See, e.g., *In re Zais Inv. Grade Ltd.* VII, 455 B.R. 839 (Bankr. D. N.J. 2011) (describing Cayman Island corporation—a collateralized debt obligation—operating through agents in the United States); *In re SPhinX, Ltd.*, 351 B.R. 103, 107 (Bankr. S.D.N.Y. 2006) (explaining that funds were established offshore to attract non-U.S. investors and U.S.-tax-exempt investors); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37 (Bankr. S.D.N.Y. 2008) (describing fund established in Cayman Islands).

215. Katherine Burton, *Hedge Funds See Worst Year for Closures Since 2009*, BLOOMBERG BUS. (Dec. 1, 2014), www.bloomberg.com/news/articles/2014-12-01/hedge-funds-see-worst-year-for-closures-since-2009; Alexandra Stevenson, *Hedge Funds Close Doors, Facing Low Returns and Investor Scrutiny*, N.Y. TIMES (May 17, 2015), www.nytimes.com/2015/05/18/business/dealbook/facing-low-returns-and-balky-investors-more-hedge-funds-close-doors.

216. Motion of Ad Hoc Group of Term Lenders (1) To Vacate Certain Prior Orders of the Court, and (2) To Dismiss the Adversary Proceeding, *Term Loan Litigation*, Adv. No. 09-00504 (Nov. 19, 2015), ECF No. 262.

217. FED. R. BANKR. P. 7007.1.

over 200 defendants sought an extension of the time to file such statements, explaining that “[f]or many clients . . . such information is not readily accessible. For example, investment funds often do not have direct access to the names of their investors because that information is controlled by a trustee or other intermediary, which itself may not always know if an entity owns 10% or more of the interests in the defendant.”²¹⁸

Despite this reality, there does not seem to be a thorough appreciation of the role that funds play in distressed lending. Although bankruptcy judges and practitioners in mega-cases are well aware that large secured loans are held by assorted non-bank lenders, in fact those parties oftentimes in shorthand refer to the loans as if they were made by the agent, rather than by a group of lenders.²¹⁹ As a practical matter, that means that when an order provides that sums paid to the lenders will be disgorged, many interested parties may be thinking that means the money will be repaid by JP Morgan Chase Bank, N.A., a member of the Federal Reserve system, required to maintain capital reserves in accordance with federal regulations, and not some unknown fund, organized who knows where, that may have transferred the funds received to who knows whom, organized wherever. In fact, however, oftentimes relative unknown entities are the actual lenders and the beneficiaries of early distributions. Here the Final DIP Financing Order specifically provided that JPMorgan would have no liability for the amounts paid to the Funds. Rather, the Final DIP Financing Order provided that the Funds alone would disgorge any inappropriate payments made to them.²²⁰

K. The Committee Faces Challenges in Bringing the Claims

Repaying lenders at the outset of a case, even though key players were aware of a serious problem regarding the lenders’ security interests, was a noteworthy example of one of the more unusual aspects of the GM case.

218. Letter to The Honorable Robert F. Gerber from Bruce Bennett, *Term Loan Litigation*, Adv. No. 09-00504 (Dec. 16, 2015), ECF No. 317.

219. For example, the bankruptcy rules require that the five largest secured lenders of the debtor be listed on a schedule to be filed on the first day of the case. In the General Motors case, the third largest secured lender was listed as “JPMorgan Chase Bank, N.A.,” which the affidavit asserted was owed almost \$1.5 billion. In fact, as explained above, JPMorgan was the agent for a group owed almost \$1.5 billion. When creditors read official sworn filings such as this, it would be natural for all but the most sophisticated creditors to be confused. Henderson Aff., *supra* note 57, at 72 sched.3.

220. Final DIP Financing Order, *supra* note 136, ¶ 19(d) (“the respective administrative and collateral agents shall have no responsibility or liability for amounts paid to any Prepetition Secured Facility”).

There was, however, one aspect of the post-petition financings that was typical: even though the Bankruptcy Code provides for a two-year period to bring actions challenging liens and improper transfers,²²¹ under the DIP financing order, the GM creditors would be given an extremely narrow window to file an avoidance complaint: the Committee had until no later than July 31 to file any complaint.²²² That was less than 60 days from the filing of the petition in a case in which hundreds of critical pleadings were being filed. Notwithstanding the two-year statutory limitations period, a short window for the investigation of liens is so common that rules formalizing the practice have been promulgated in both the Southern District of New York and the District of Delaware, two of the most popular venues for the filing of large chapter 11 cases.²²³ In the Southern District of New York, the local rule provides that the period “shall ordinarily be sixty (60) days from the date of entry of the final order authorizing the use of cash collateral or the obtaining of credit, or such longer period as the Court orders for cause shown prior to the expiration of such period.”²²⁴

The historic rationale for an order shortening that time to a few months or less was that the secured creditor did not want to throw good money after bad by financing a chapter 11 case²²⁵ in order to preserve its collateral’s value if its pre-petition security interests would later be voided. Of course, that rationale could not have applied in the General Motors case because the Term Lenders were lending no new money to the estate. In fact, the record discloses absolutely no rationale for the truncated time period, a period that was shorter than the time period required by the applicable local rule²²⁶ and almost two years less than the applicable statute of limitations.²²⁷ As we shall see, that shortened period later hurt the estate.

L. The Second Recall: The Litigation Commences

In light of the termination of the critical security interest filing, in July 2009, the Creditors’ Committee commenced litigation against the

221. 11 U.S.C. § 546(a) (2012).

222. Final DIP Financing Order, *supra* note 136, ¶ 19(d).

223. BANKR. S.D.N.Y. R. 4001-2; BANKR. D. DEL. R. 4001-2.

224. BANKR. S.D.N.Y. R. 4001-2(f).

225. An important rationale for lending money to a chapter 11 debtor (which may not successfully emerge from chapter 11), is that sometimes pre-petition lenders can use their post-petition loan to stabilize the business and, they hope, realize more on their collateral than they would if the debtor were desperate for cash.

226. The Bankruptcy Code provides generally for a two-year statute of limitations for actions to avoid an unperfected security interest or an improper post-petition transfer. 11 U.S.C. § 546(a) (2012).

227. *Id.*

holders of the Term Loan.²²⁸ The Committee initially named over 400 defendants as having been paid, including numerous collateralized debt obligations and a number of entities affiliated with giant financial organizations, such as Blackrock, Citibank, Pimco, and Fidelity.²²⁹ In addition, the committee alleged that, although it had attempted to discover the participants in the loan, the agent, JPMorgan, had refused its request for a list of the syndicate members, and thus the Committee alleged that there could be additional entities that were participating in the credit at the time of the loan and therefore had been repaid.²³⁰ Not surprisingly, given the extremely tight window in which the Committee was required to file its complaint, the complaint appears to have some errors in the name of the defendants, and may not have named all the entities that actually received the money:²³¹ the initial complaint named roughly 413 defendants; by contrast, the amended complaint named roughly 550 defendants.²³²

M. The Bankruptcy Court Decision

Both parties moved for summary judgment on the issue of whether the key security interest had been terminated. After discovery, the matter was decided by the bankruptcy court, which reasoned that the critical question was whether JPMorgan had authorized the termination.²³³ The key statute is U.C.C. section 9-509(d), which provides:

(d) Person entitled to file certain amendments. A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if:

(1) the secured party of record authorizes the filing. . . .

228. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JP Morgan Chase Bank, N. A. (*In re Motors Liquidation Co.*), 755 F.3d 78, 82 (2d Cir. 2014).

229. Complaint, *supra* note 203.

230. *Id.* ¶ 8.

231. For example, in a recent pleading one of the defendants, Alticor Inc. asserts, “Alticor has not been able to confirm receipt of the alleged transfers, but such transfers may have been received by Alticor or any of its related affiliates, subsidiaries, trusts or plans.” Limited Objection By Alticor, Inc. to Motion of Motors Liquidation Company Avoidance Action Trust for an Order Further Extending Time to Serve Summons and Amended Complaint at 2 n.1, *Term Loan Litigation*, Adv. No. 09-00504 (Aug. 4, 2015), ECF No. 125.

232. Amended Complaint, *supra* note 100.

233. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (*In re Motors Liquidation Co.*), 486 B.R. 596 (Bankr. S.D.N.Y. 2013) *rev'd on other grounds*, 777 F.3d 100 (2d Cir. 2015).

In the eyes of the bankruptcy court, the question was whether JPMorgan, had “authorized” the filing as the term was used in U.C.C. section 9-509(d).²³⁴ Because the term “authorized” is undefined in the U.C.C., the question was whether it was sufficient that the secured party approved the filing—as had undoubtedly happened here—or whether the secured party had to subjectively intend to terminate the security interests.²³⁵

Acknowledging that JPMorgan Lease Counsel had signed off on the documents proposing to terminate the Term Loan financing statement, the bankruptcy court nevertheless focused on the subjective understanding of JP Morgan Lease Counsel.²³⁶ The court held that, because JPMorgan Lease Counsel did not understand his approval of the documents to be approval of the termination of the Term Loan liens, the termination was not legally effective.²³⁷

Given the importance and novelty of the issues, the Bankruptcy Judge granted a direct appeal to the Second Circuit Court of Appeals.²³⁸

N. The Second Circuit Turns to Delaware

On appeal, the Second Circuit reasoned that there were two important questions.²³⁹ The first question was “[m]ust the secured creditor authorize the termination of the particular security interest that the U.C.C.-3 identifies for termination, or is it enough that the secured lender authorize the act of filing a U.C.C.-3 statement that has that effect?”²⁴⁰ The second key question was whether Chase had granted to GM’s counsel “the relevant authority—that is, alternatively, authority either to terminate the . . . Term Loan U.C.C.-1 or to file the U.C.C.-3 statement that identified that interest for termination?”²⁴¹ Because the first question was a significant matter of unsettled Delaware law, the Second Circuit certified the following question to the Supreme Court of Delaware:

Under U.C.C. Article 9, as adopted into Delaware law by Del. Code Ann. Tit. 6, art. 9, for a U.C.C.-3 termination statement to

234. *In re Motors Liquidation Co.*, 486 B.R. at 48 (“[T]he resolution of this controversy turn on whether GM was authorized, as part of the payoff of the Synthetic Lease, to terminate JPMorgan’s security interest in the unrelated Term Loan”).

235. *In re Motors Liquidation Co.*, 777 F.3d at 104.

236. *In re Motors Liquidation Co.*, 486 B.R. at 646.

237. *Id.*

238. *Id.* at 646–47.

239. *In re Motors Liquidation Co.*, 755 F.3d 78, 84 (2d Cir. 2014).

240. *Id.*

241. *Id.*

effectively extinguish the perfected nature of a U.C.C.-1 financing statement, is it enough that the secured lender review and knowingly approve for filing a U.C.C.-3 purporting to extinguish the perfected security interest, or must the secured lender intend to terminate the particular security interest that is listed on the U.C.C.-3?²⁴²

O. Delaware Lowers the Boom

It did not take long for the Supreme Court of Delaware to rule, and its opinion was clear: JPMorgan's Lease Counsel had authorized the filings that terminated the financing statement and it did not matter that JPMorgan's Lease Counsel did not understand the effect of the filings he had authorized. The Supreme Court of Delaware emphasized the importance of filings being available for public review and the importance of the filings being accurate. It explained:

JPMorgan's argument that a filing is only effective if the authorizing party understands the filing's substantive terms and intends their effect is contrary to 9-509, which only requires that "the secured party of record authorize[] the filing."

. . . .

Even if the statute were ambiguous, we would be reluctant to embrace JPMorgan's proposition [that a secured party understand what it is authorizing]. Before a secured party authorizes the filing of a termination statement, it ought to review the statement carefully and understand which security interests it is releasing and why If parties could be relieved from the legal consequences of their mistaken filings, they would have little incentive to ensure the accuracy of the information contained in their U.C.C. filings.²⁴³

P. The Long and Winding Road After the Second Circuit Decision

After Delaware ruled, the outcome before the Second Circuit Court of Appeals was predictable: it held that, given the approvals of the filings from JPMorgan's Lease counsel, GM's counsel had acted with authority

242. *Id.* at 86.

243. Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A., 103 A.3d 1010, 1016 (Del. 2014) (footnote omitted) (first alteration in decision).

and the financing statement was terminated.²⁴⁴ That, however, was not the end of the road: JPMorgan asked for a rehearing en banc, which was denied.²⁴⁵

The Second Circuit's rulings will not end the matter. The Second Circuit remanded the case; the committee is beginning to serve the defendants; the defendants are beginning to answer or move to dismiss the case; some of the 550 defendants are joining forces; other defendants have not appeared; and some defendants apparently no longer exist.²⁴⁶ The syndicate members have already received the money. Do they still have it, or if they are still in business, have they disbursed the funds to investors or otherwise become judgment proof?

Indeed, there are at least two other material issues that could stand in the way of recovering the money from the Funds. First, JPMorgan has argued that the Committee's options are severely limited by the terms of the DIP Financing Order.²⁴⁷ Counsel for JPMorgan explained its position during the oral argument on the motion for summary judgment held before the bankruptcy court as follows:

The fact of the matter is, Section 19(d) of the DIP order in this case preserves one issue to the creditors committee and that is the question of perfection. *The question of value is not preserved* and the *only* issue at least under the DIP order as we read it . . . that's preserved is the question of perfection. We believe that those twenty-six fixture filings should end the issue but that's obviously the issue—we need to deal with the issues that they've raised.²⁴⁸

In other words, JPMorgan's position is that, under the language of the order that was entered with no meaningful notice to the creditor body,

244. Official Comm. of Motors Liquidation v. JPMorgan Chase Bank, N.A. (*In re Motors Liquidation*), 777 F.3d 100, 105 (2d Cir. 2015).

245. *Id.* at 101.

246. Docket, *Term Loan Litigation*, Adv. No. 09-00504 (July 31, 2009).

247. *E.g.*, Transcript of Hearing re Motions for Summary Judgment, *supra* note 114, at 47–48 (“Section 19(d) of the DIP order in this case preserves one issue to the creditors committee and that is the question of perfection. And, in fact, that very same order, the very same section talks about a different scenario where the question of value is preserved but as it relates to this particular inquiry. . . the only its that's preserved is the question of perfection. We believe those 26 fixture filings should end the issue. . .”).

248. Transcript of Hearing re Motions for Summary Judgment, *supra* note 114, at 47 (“Section 19(d) of the DIP order in this case preserves one issue to the creditors committee and that is the question of perfection. And, in fact, that very same order, the very same section talks about a different scenario where the question of value is preserved but as it relates to this particular inquiry, . . .the only issue that's preserved is the question of perfection. We believe those twenty-six fixture filings should end the issue. . .”).

the court is precluded from examining the value of its security interests in fixtures (if, indeed, they have any value).

The second roadblock to recovery is the nature of the defendants: over 550 diverse entities that may or may not still exist, that may or may not be judgment proof, that may or may not be domiciled in the United States, that may or may not be subject to the personal jurisdiction of the bankruptcy court, and that may not even include all the entities that should have been sued.²⁴⁹

The Bankruptcy Code drafters understood the possibility that defendants could in fact transfer property wrongfully transferred to them to yet a third person. Accordingly, in order to enable the recovery of wrongfully transferred property from secondary transferees, Bankruptcy Code section 550 allows recovery from these transferees.

The use of that section may be limited here, however. Because many hedge funds and CLOs are located outside the United States²⁵⁰ and may take investments from foreign entities that in turn take other investments from other foreign entities, a litigant attempting to collect a judgment against them can encounter tremendous obstacles. In the *Madoff* case, for example, the SIPA trustee obtained judgments against a number of hedge funds that have received fraudulent transfers from Bernie Madoff's hedge fund, but was foiled when he tried to collect the judgment from transferees of foreign-based funds (the Feeder Funds) that had invested in the funds that dealt directly with the *Madoff* estate and against which he had obtained initial recoveries.²⁵¹ The Feeder Funds were in liquidation in foreign jurisdictions and had settled with the Madoff Trustee for small amounts, and thus the best opportunity for the estate to recover the money to which it was entitled was to go after the transferees using Code section 550(a).²⁵²

The district court refused, however, to let the *Madoff* trustee use the Bankruptcy Code to recover from the foreign transferees of the entities that had done business with Madoff's fund.²⁵³ Considering the possible application of section 550(a), the court emphasized that comity is

249. Although JPMorgan eventually turned over a list of the defendants to the Committee, the list had at least one error involving a defendant that was subsequently dismissed from the litigation because it never was properly served. *Motors Liquidation Co. Avoidance Acton Trust v. JPMorgan Chase Bank (In re Motors Liquidation Co.)*, No. 09-50026, Adv. No. 09-00504, 2016 Bankr. LEXIS 4182 (Bankr. S.D.N.Y. Dec. 07, 2016).

250. John M. Timperio, *New Developments in Collateralized Loan Obligation Transactions*, in *NEW DEVELOPMENTS IN SECURITIZATION 2012* at 1182 (Practicing Law Institute 2012) (describing offshore nature of CLO securitizations).

251. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014).

252. This would include a debtor in possession or a creditors' committee that had been granted standing.

253. *Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. at 233.

especially important in bankruptcy matters.²⁵⁴ The court concluded that the foreign entities that had done business with the foreign feeder funds had no reason to think they would be subjected to United States laws and that Code section 550(a) should not be applied extra-territorially.²⁵⁵ If other courts in the future follow this reasoning, an important tool to enable recoveries will be unavailable with respect to transfers to foreign entities, such as hedge funds and CLOs.

Granted, litigation usually settles. What is different about this litigation, however, is that, because JPMorgan's fees are being paid out of the estate, it has less incentive to settle than it otherwise would have. And even if JPMorgan wanted to settle, over 500 entities are parties; negotiations should prove to be extremely difficult.

IV. WHAT IS TO BE DONE?

A. The Flawed Official Response to the Term Loan Crash

As mentioned above, in the late 1990s, Article 9 of the U.C.C. was overhauled. The group that spearheaded this overhaul was a committee formed by the American Law Institute, the prestigious group that has spearheaded many legal reforms.²⁵⁶ In 2009, when the GM perfection issue became public, the group was considering minor tweaks to Article 9, mostly in the nature of "clean up."²⁵⁷

The controversy that had arisen from the erroneous termination in the GM case apparently did not miss the attention of this august group. Although no change was proposed to U.C.C. section 9-513 (the section addressing termination statements), the group did revise the official comments to U.C.C. section 9-518. This change buttressed the case of secured creditors that have mistakenly terminated a financing statement. The revision added to the official comment the following phrase: "Just as searchers bear the burden of determining whether an initial financing statement was authorized, searchers bear the burden of determining whether the filing of every subsequent record was authorized."²⁵⁸ This

254. *Id.* at 231–32.

255. *Id.* at 232.

256. U.C.C. § 9-101 cmt. 1.

257. Among the changes being considered was a change to enable the certainty in the name of the individual debtor's to be placed on financing statements. See U.C.C. § 9-503 (as amended 2010). For an analysis of the changes proposed, see generally David Frisch, *The Recent Amendments to UCC Article 9: Problems and Solutions*, 45 U. RICH. L. REV. 1009 (2011), Henry C. Sigman, *Improvements (?) to the UCC Article 9 Filing System*, 46 GONZ. L. REV. 457 (2010–11), and Edwin E. Smith, *A Summary of the 2010 Amendments to the Official Text of Article 9 of the Uniform Commercial Code*, 42 UCC L.J. 345 (2010).

258. U.C.C. § 9-518 cmt. 2 (amended 2010).

revised official comment has been adopted in 52 states and territories as of June 15, 2015.²⁵⁹

The ALI's desire to protect secured creditors from the harsh effects of an erroneous termination is understandable. After all, the circumstances of the General Motors case suggest that creditors may not monitor the financing statement filings of secured parties, and if that is true, it should have little practical effect if a filing had been accidentally terminated.²⁶⁰ The proposed revised comment also upheld the sanctity of the deal the debtor and its lenders had entered into and gave weight to bargained-for expectations. To the extent an accidental termination is not given effect, it would seem to encourage secured lending by enhancing predictability.

What the revised official comment also did, however, was undermine the long-standing principle of English common law that secret liens are fraudulent as to creditors, a basic principle of the law since the time of Elizabeth I.²⁶¹ In suggesting that “searchers bear the burden of determining whether every subsequent record was authorized” (such as whether termination was authorized), the official comment is in truth asking searchers to do the impossible. Because Article 9 very specifically provides that secured parties have absolutely no duty to respond to requests for information about financing statements other than those of the debtor, it is hard to imagine a creditor could ever determine whether a termination was authorized. Indeed, in this case, JPMorgan could not even determine for itself what financing statements it had on file. Moreover, it is impossible to imagine how any creditor would be able to determine whom to contact at JP Morgan to determine for itself whether the termination was authorized: after all, neither a financing statement nor a termination statement require any information about the secured creditor other than its name and address—the official form provides for neither an email address, a telephone number, nor a contact person at the secured party. Thus it is impossible to imagine that a creditor could determine whether a termination was authorized.

The 2001 amendments to Article 9 have already gone a long way to making liens secret, by allowing the description in a financing statement to provide that the collateral is “all personal property” of the debtor. That change has some justification: because it is over-inclusive, rather than under-inclusive, it does not lead parties that deal with a debtor to

259. 52 Jurisdictions Have enacted the 2010 Amendments to UCC Article 9, UNIFORM LAW COMMISSION (June 15, 2015), <http://www.uniformlaws.org/NewsDetail.aspx?title=52%20Jurisdictions%20Have%20Enacted%20the%202010%20Amendments%20to%20UCC%20Article%209>.

260. Hoge Aff., *supra* note 33.

261. Lipson, *supra* note 69, at 423–36.

believe there are free assets when none exist. But the new official comment to U.C.C. section 9-518 does exactly that, because given other Code provisions, there is as a practical matter absolutely no way for a creditor to know if a creditor meant to terminate a filing.

Moreover, having to determine if a termination statement was filed in error could impose a tremendous burden on searchers: in the mid-1990s one scholar reported that continuation statements, amendments, and termination statements accounted for about 44% of the U.C.C. filings in a sample he examined.²⁶²

And this is why the “fix” of the revision committee is flawed: it has the effect of further increasing the secrecy of liens, a matter that had already led to criticism of the 2001 Article 9 revisions.²⁶³ Accordingly, the admonition to entities to inquire whether a filing terminated in the public records actually was meant to have been terminated just simply does not make sense.

B. The Bankruptcy Rules Should Be Revised

This automobile pileup suggests, however, that changes should be made to the Bankruptcy Rules.

1. The Court Should Not Approve Extraordinary Payments to Secured Creditors or Truncated Periods to Commence Avoidance Actions Without Proof the Relevant Security Interest Is Perfected.

The repair is easy: the Bankruptcy Rules should be amended to provide that a purported secured creditor must prove it is in fact perfected before it is paid on its secured debt.

The Bankruptcy Rules specifically require that proofs of claim have annexed to them proof of perfection of any security interest claimed.²⁶⁴ There is, however, no such requirement that proof of perfection be presented for DIP Financing orders, orders providing for adequate protection payments for security interests, or orders otherwise allowing for the payment of claims outside of the proof of claim process,²⁶⁵ but there should be.

The propriety of requiring this proof is especially true now, following the 2001 revisions to Article 9. Now, most security interests are

262. LoPucki, *supra* note 63, at 597 n.71.

263. See Lipson, *supra* note 69, at 426 (“Article 9 . . . appears increasingly tolerant of secret liens.”); Lynn M. LoPucki, *The Unsecured Creditor’s Bargain*, 80 VAND. L. REV. 1887, 1891 (1994) (attacking “the deceptive nature of security”).

264. FED. R. BANKR. P. 3001.

265. FED. R. BANKR. P. 4001.

perfected by creditors filing one financing statement in one state. The ease of proving that a security interest is perfected is much greater than it was before Article 9 was revised in 2001. As noted, in many cases it takes less than ten minutes to get the information to prove perfection of a security interest.

One exception is those few cases in which a security interest in the collateral is not perfected by one filing in the debtor's location. But what collateral is that? It includes deposit accounts, perfection of which requires only a control agreement with the bank and for which the secured party should have the paperwork readily at hand to prove its security interest.²⁶⁶ Moreover, with respect to this collateral, the secured party—typically a bank—can temporarily freeze the account pending a determination of the parties' rights.²⁶⁷

Another exception arguably is the very type of collateral that continues to be at issue in the GM case: fixtures. But here again the solution is easy. If a secured creditor wants to prove that it is perfected, it need only produce in evidence one central filing in the state in which the debtor is located.²⁶⁸ It should be a rare case in which a bank has fixture filings filed throughout the United States and yet has not also made a central filing that includes fixtures to perfect its position in bankruptcy. Should there be such a rare case—as we have here, by accident—solving the problem only is a matter of time. Remember, fixtures are, by definition, affixed to the realty. The risk of fixtures disappearing overnight or being swiftly consumed should be minimal. Similarly, the other types of collateral that require dual filings (timber to be cut, as-extracted collateral)²⁶⁹ may be less likely to disappear immediately than other types of collateral. In any event, until a court finds that the security interests are perfected, the secured creditor can be protected by the requirement that the debtor provide the creditor adequate protection that does not involve payments to the syndicate members (but could require segregation of funds).

There is another pressing reason that courts should immediately institute new safeguards before allowing the pre-confirmation payment of a pre-petition claim: the nature of the lender has changed. While at one time many lenders were often closely regulated depository institutions, insurance companies, or American-based pension funds,²⁷⁰

266. U.C.C. § 9-312(b)(1).

267. *Citizens Bank v. Strumpf*, 516 U.S. 20, 21 (1995) (bank that asserts a right of set off in deposit account may freeze account pending determination of rights to funds in account).

268. U.C.C. §§ 9-301(1), 9-309(a1).

269. U.C.C. §§ 9-301(3)(B), 9-301(4). “As extracted collateral” is certain oil, gas, and other minerals and related accounts. U.C.C. § 9-102(a)(6).

270. G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3, 41–42 (Spring 2001).

now they oftentimes are foreign-based CLOs, hedge funds, or private equity,²⁷¹ which are not as tightly regulated or as well capitalized. These funds come and go, and it can be very difficult—if possible at all—to recover a judgment from these entities.

The rule amendment I propose does not have to break new ground. We merely need to include in Bankruptcy rule 4001 (the rule regulating debtor-in-possession financing and adequate protection orders) a provision similar to that in Bankruptcy rule 3001(d) regarding proofs of claim, which provides: “If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.” Therefore, Bankruptcy rule 4001 should be amended to include: “If a motion proposes to pay pre-petition debt on account of its being secured, whether such payment is to be made immediately or over time, the motion shall be accompanied by admissible evidence that the security interest is perfected.” A related rule would be, “If a motion proposes to shorten the time in which any party in interest can commence an action under any section of the Bankruptcy Code, including sections 544, 547, 548 and 554, and in connection with the motion any party alleges that any potential defendant claims to have a security interest in property of the estate, the motion shall be accompanied by evidence that the security interest of that potential defendant is perfected.” In chapter 11 cases, that evidence should be either (1) a control agreement (for deposit accounts) or (2) a security agreement and one file-stamped financing statement from one state.²⁷²

Given the speed with which a secured creditor now can produce this limited, easy proof of perfection, there is no justification for not requiring this proof; after all, every other creditor has to be able to prove its claim. Admittedly, this limited requirement of proof of perfection does not prove that the secured lender should be paid on its pre-petition claim: for example, another entity may have priority, or the collateral may not be equal in value to the secured creditor’s outstanding claim. Even if a secured claim is oversecured, moreover, proof of perfection does not definitively establish that a secured creditor has a right to be paid; a secured claim could be disallowed as having been a fraudulent

271. Matt Wirz & Liz Hoffman, *Investors Turn Sour on Risky Debt Deal*, WALL ST. J. (Nov. 9, 2015), <http://www.wsj.com/articles/DJFDBR0120151109ebb9h0o9q> (banks need to off-load high yield debt by year-end in order to comply with capital requirements of their regulators).

272. Granted, the proof may be slightly more complex for other collateral, such as that automatically perfected or perfected through possession, but that proof is required in a proof of claim, which is the usual way in which entities are paid. I also noted above that searching the Delaware Secretary of State for financing statements is somewhat slower than in some other states; if that timing should ever become problematic, Delaware presumably would modernize its systems.

transfer²⁷³ or a preferential transfer.²⁷⁴ There are other theories on which a secured claim could be disallowed or not paid, such as equitable subordination.²⁷⁵ Those facts, however, are not as easily established as is the presence of one authenticated security agreement and one proper financing statement on file in the correct location. However, nothing proposed herein requires a secured creditor to be paid merely with proof of perfection of its security interest, and nothing would stop creditors from seeking delay in appropriate cases if a purportedly secured claim might be disallowed.²⁷⁶ My second suggestion, set forth below, will help creditors make a more informed decision about whether they should oppose a particular payment in bankruptcy cases in light of the possibility that the secured claim could be avoidable even if it is perfected.

2. The Parties Must Know Key Facts Regarding Whom Is Being Paid

In the Term Loan litigation in the GM case, the Committee was forced to file its complaint less than forty days after the final debtor-in-possession financing order was entered instead of two years after the petition date, which is the period the Bankruptcy Code sets as the minimum limitations period to bring avoidance claims.²⁷⁷ Given the shortened time period, the Committee apparently had no way to determine whom had been paid: no names had been filed with the court, and the agent apparently refused to disclose the names of the syndicate members.²⁷⁸ So, although the Committee seems to have done the best that it could in these terrible circumstances, it appears to have made more than a few errors in determining whom to sue.²⁷⁹ Indeed, the litigation is just getting underway, and more problems could surface that might have been avoided had the Committee had a reasonable amount of time to bring its action.²⁸⁰ In any event, no other future plaintiff should

273. See, e.g., 11 U.S.C. §§ 544, 548 (2012) (providing for the avoidance of fraudulent transfers).

274. See, e.g., 11 U.S.C. § 547 (2012 & Supp. 2016) (providing for the avoidance of preferential transfers).

275. See 11 U.S.C. § 510(c) (2012) (providing for equitable subordination).

276. This is not to suggest that the proposals of the American Bankruptcy Institute relating to secured financing should not be adopted. The suggestions set forth herein, however, are much more modest suggestions that can be more easily implemented. See generally *American Bankruptcy Institute Commission*, *supra* note 192, at 79, 80–86 (proposals limiting “roll-ups” of pre-petition secured debt).

277. 11 U.S.C. § 546(a) (2012).

278. Complaint, *supra* note 203, ¶ 8.

279. Compare Complaint, *supra* note 203 (naming roughly 413 defendants) with Amended Complaint, *supra* note 100 (naming roughly 550 defendants).

280. Indeed, problems are already surfacing. For example, the court has dismissed the complaint as to an entity that was not served properly because of challenges the plaintiff faced in determining whom to serve and where to serve them. *Motors Liquidating Co. Avoidance Action Trust v. JPMorgan*

be put in such an unfair position. Accordingly, the Bankruptcy Rules should be amended to provide that lenders being paid are required to disclose the amount of money they are receiving, their legal names, and their agents for the service of process.

There is a second reason that the identities of the recipients of the extraordinary payments must be disclosed: interested parties need to be able to consider whether the estate can ultimately recover the money paid. If they know who is being paid, interested parties can consider the potentially limited life span and assets of the lenders. Moreover, parties can consider whether a judgment against the lenders—or their transferees—likely will ever be collectible.

V. CONCLUSION

Creditors of General Motors who were harmed by GM's negligence have not been paid in full. Laborers who worked their lives for GM have lost ground as a result of the GM restructuring. Unless they received special treatment under one of the extraordinary GM first-day orders, small suppliers to GM have been paid little on their claims, and their businesses may have been ruined. These creditors were all unsecured creditors, and for that reason, the hard luck of chapter 11's absolute priority rules is that they can end up with a fraction of their claims, or nothing.

Sophisticated financial investors, however, have been wrongfully paid in full, and even if they return all the money to which they were not entitled, they will have had the use of almost \$1.5 billion for years. Even if they have to return the entire amount of any overpayment they received, with interest—a resolution that is hard to imagine as a practical matter—the interest for which they will be liable is only the federal judgment rate, a paltry sum these days, particularly when compared to returns in the financial markets since they were paid.

In explaining why AIG could pay out \$165 million in “boom level bonuses” to its high executives after the company received billions of dollars of American-taxpayer bailout funds, former Secretary of the Treasury Timothy J. Geithner explained that those payments could not be stopped and, moreover, should not have been stopped by the Department of the Treasury²⁸¹ because “we’re a nation of laws.”²⁸²

Chase Bank (*In re Motors Liquidation Co.*), No. 09-50026, 2016 Bankr. LEXIS 4182 (Bankr. S.D.N.Y. Dec. 7, 2016) (dismissing complaint against GMAM Investment Funds Trust when trustee, proper entity for service, had liquidated in 2011 prior to service and new trustee had been appointed).

281. GEITHNER, *supra* note 198, at 315–18. The former Secretary of the Treasury also emphasized, “The rule of law was arguably our most important anchor, especially during the limbo period when fears of nationalization and federal interference were pervasive.” *Id.* at 316.

282. *Id.* at 318.

Even though Treasury was in the driver's seat of the GM case,²⁸³ the Department of Treasury did nothing to stop the illegal payment of JPMorgan's litigation defense fees. Ironically, at the time JPMorgan received this gift, it insisted it had absolutely no need for government money.²⁸⁴ Similarly, the Department of the Treasury required that the Funds be paid almost \$1.5 billion, even though their right to that money—and the ability to recover it should the payment be made—was doubtful.

This article has made much of one small error—with horrible consequences—made at the time of a grave financial crisis, when it was unclear whether our financial system would avoid a collapse that would lead to even greater misery than befell many people as a result of that financial crisis. No lives were lost because of this accident, but because of a minor technical glitch, lenders may be denied the benefits of the bargain they made, huge sums have been spent trying to come to a fair resolution of the issues, and reputations have suffered. We should not forget that many of the lawyers, businessmen, and politicians who were involved with this \$1.5 billion accident were at the same time working night and day to salvage the economy, bringing to bear creative lawyering of the highest caliber. But, just as we admire and marvel at the flight of the latest transcontinental jet, we appreciate that the pilots have strict protocols and check lists that they must go through before and during every flight to reduce the likelihood of a crash. After every accident, the experts dig through the wreckage, trying to determine how to avoid the next crash and specifically how to refine the systems so that future accidents can be avoided.²⁸⁵

So we've dug through this wreckage. In short, these \$1.5 billion recalls may be the least successful of the General Motors recalls. But perhaps the numbers involved will cause the courts and practitioners to focus on the problems arising from the absence of clear proof requirements for financing orders and could encourage a beneficial re-engineering of the system.

283. For an overview of the role the Automobile Task Force played in the General Motors chapter 11 case, see RATTNER, *supra* note 182. The extent to which the Department of the Treasury was calling the shots in the case may be best illustrated by an error Rattner, the so-called "Auto Czar," made in his recounting of the restructuring: he mistakenly refers to bankruptcy counsel for General Motors as "our counsel." *Id.* at 260.

284. *Id.* at 355 (describing how Jamie Dimon, CEO of JPMorgan, brought a fake \$25 billion check to a White House meeting to emphasize his desire to repay money Treasury had insisted JPMorgan take and for which he contended the bank had absolutely no need).

285. Apologies for mixing metaphors.