No. 16-764

IN THE

Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioner,

v.

CELESTINE ELLIOTT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT. 2

ARGUMENT. 3

I. The Second Circuit's decision creates a novel notice requirement that distorts established principles of due process. 4

II. The Second Circuit's decision will undermine the bankruptcy process and invite meritless class actions. 7

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

CASES

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 11

Blair v. Equifax Check Servs., Inc.,
181 F.3d 832 (7th Cir. 1999) 11

Cafeteria & Rest. Workers Union v. McElroy,
367 U.S. 886 (1961) 5

Chemetron Corp. v. Jones,
72 F.3d 341 (3d Cir. 1995) 6

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 11

In re Eveleth Mines, LLC,
312 B.R. 634 (Bankr. D. Minn. 2004) 2

In re Met-L-Wood Corp.,
861 F.2d 1012 (7th Cir. 1988) 2, 8

In re Placid Oil Co.,
753 F.3d 151 (5th Cir. 2014) 6

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 11

In re Takeout Taxi Holdings, Inc.,
307 B.R. 525 (Bankr. E.D. Va. 2004) 2

Page

Katchen v. Landy,
382 U.S. 323 (1966) 2

Matter of UNR Indus., Inc.,
20 F.3d 766 (7th Cir. 1994) 8

Morrissey v. Brewer,
408 U.S. 471 (1972) 5

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 5, 6

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 11

Toibb v. Radloff,
501 U.S. 157 (1991) 2

United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc.,
No. 2:16-cv-00064-RDP, 2016 WL 470815 (N.D. Ala. Feb. 8, 2016) 2

Wilkinson v. Austin,
545 U.S. 209 (2005) 5

STATUTES AND OTHER AUTHORITIES

11 U.S.C. § 363(f) 2

Page

11 U.S.C. § 363(m) 3

28 U.S.C. § 1711 9

Fed. R. Bankr. P. 2002, advisory committee's note to 1983 enactment 7

Fed. R. Bankr. P. 2002(c)(1) 6

Fed. R. Civ. P. 23, advisory committee's note to 1998 enactment 11

H.R. Rep. No. 95-595 (1977). 2, 7, 8

S. Rep. No. 108-123 (2003) 10, 12

2 Norton Bankr. L. & Prac. 3d § 44:25. 8

Adeola Adele, Dukes v. WalMart*: Implications for Employment Practices Liability Insurance* (2011). 11

Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2015). 11

Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* (2016). 11

Page

Deborah R. Hensler, *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000) 7

Emery G. Lee III, *et al.*, Fed. Judicial Ctr., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* (2008) 10

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Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* (2013) 10, 11

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. To protect its members' interests, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil-justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

The Chamber, ATRA, and their members have a strong interest in this case. Below, the Second Circuit distorted bankruptcy and constitutional law to enable the pursuit of certain claims against General Motors LLC ("GM LLC"). In fact, most of the claims that the Second Circuit revived are the very type of abusive, lawyer-driven class actions of dubious merit that cause enormous harm

1. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief, and the parties have provided written consent to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

to the business community, with little discernible value for the class members. If allowed to stand, the decision below will impose enormous and impractical burdens on companies who participate in bankruptcy sales and drive up the costs for debtors, creditors, and purchasers alike.

SUMMARY OF THE ARGUMENT

Congress created 363 sales to further the prime directive of the Bankruptcy Code: maximize the value of the bankruptcy estate, *Toibb v. Radloff*, 501 U.S. 157, 163 (1991), as quickly and smoothly as possible, *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966). A 363 sale allows a struggling company in bankruptcy to sell its assets to a good-faith purchaser "free and clear" of liability. 11 U.S.C. § 363(f). The free-and-clear protection helps the company obtain the best possible price for its assets, increasing the pool of money available to pay its creditors in the eventual restructuring or liquidation. *See In re Eveleth Mines, LLC*, 312 B.R. 634, 650 (Bankr. D. Minn. 2004); *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 528 (Bankr. E.D. Va. 2004). A 363 sale also allows the company's business to "continue in other hands than the bankrupt's, free of the stigma and uncertainty of bankruptcy." *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988). This transfer often saves the business and allows the purchaser to retain the seller's employees. But time is of the essence: "delay of two to four days could well be fatal to [the] business." H.R. Rep. No. 95-595, at 182 (1977). Congress thus provided for streamlined procedures that permit a "quick sale" of the debtor's assets and do not "bog the sale down." *United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc.*, No. 2:16-cv-00064-RDP, 2016 WL 470815, at *4 (N.D. Ala. Feb. 8, 2016).

The decision below undermines a crucial aspect of the 363 process. Although the Bankruptcy Rules require a seller to notify its creditors of the *363 sale*, the Second Circuit held that the Due Process Clause also requires a seller to notify creditors of the basis for any potential claims against the debtor. And although the Bankruptcy Code allows buyers to purchase assets "free and clear" of liability, the Second Circuit held that the buyer loses that protection if *the seller* provides inadequate notice. Together, these holdings undercut the very provisions that make 363 sales viable. By imposing a novel and unjustifiable notice requirement, the Second Circuit's decision will hinder debtors' ability to sell their assets quickly. And by threatening buyers with the loss of their "free and clear" protection, the decision deprives estates of a critical tool for maximizing creditor recovery.

The Chamber and ATRA agree with GM LLC that the Second Circuit's decision dramatically raises the costs and risks of 363 sales without any corresponding benefit and conflicts with decisions of other circuits. This case presents a rare and important opportunity to resolve that conflict, as most challenges to 363 sales become moot before any appeals can be resolved. *See* 11 U.S.C. § 363(m). The Chamber and ATRA write separately to emphasize the errors in the Second Circuit's analysis of due process and the enormous practical consequences of its decision—both of which weigh in favor of this Court's further review.

ARGUMENT

This Court should grant certiorari for at least two reasons. First, the Second Circuit imposed a novel notice requirement that squarely contradicts the Bankruptcy Rules and the decisions of the Third and Fifth Circuits. Second, the consequences of the Second Circuit's decision are intolerable. By saddling sellers with an onerous notice requirement and punishing buyers for any violations by the seller, the Second Circuit's decision will strip 363 sales of their many advantages. The decision will perpetuate the kind of abusive, lawyer-driven litigation that will offer little in the way of relief for the class members and will provide an enormous windfall for the plaintiffs' lawyers who bring them.

I. The Second Circuit's decision creates a novel notice requirement that distorts established principles of due process.

The claims at issue in this case do not seek to require GM LLC to repair any defective ignition switches, to perform other warranty service on vehicles purchased from General Motors Corporation ("Old GM") before the Sale Order, or to recover for any post-sale accidents causing injury, death, or property damage. GM LLC agreed to undertake all of *those* obligations in the Sale Order. Instead, this case involves more than 100 class actions alleging far more attenuated claims of injury—for example, the alleged diminution of value of Old GM vehicles (with or without the ignition-switch defect). Plaintiffs claim to represent classes that, based on these and other claims, are entitled to damages approaching $10 billion.

In permitting the Plaintiffs to pursue these dubious claims against GM LLC—notwithstanding the clear terms of the Sale Order entered seven years ago—the Second

Circuit strained to find both a due process violation and resulting prejudice from the fact that Old GM did not mail millions of individual notices of a widely publicized pending bankruptcy sale. The Second Circuit made little effort to consider the specific and unique circumstances of the parties' competing interests—as required by precedent.

The Second Circuit's failure to address the attenuated nature of Plaintiffs' claims affected its analysis. This Court has reiterated "so often … as not to require citation" that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This flexibility extends to the type of notice required. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). To determine whether the Due Process Clause requires a certain kind of notice, courts "must begin with a determination of the precise nature … of the private interest" at stake. *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Then, courts must consider "the risk of an erroneous deprivation" of the private interest under the current procedures, "the probable value" of additional procedures, and "the fiscal and administrative burdens" of those procedures. *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005) (citation omitted).

The Second Circuit eschewed this analysis entirely. It incorrectly found the publication notice insufficient even though: (1) none of the claimants at issue had notified Old GM of any loss or damage arising from alleged defects; (2) it would have cost millions of dollars to send direct mail notices to the tens of millions of people who *might* have a faulty ignition switch (even assuming Old GM knew that a safety defect existed before the sale); (3) almost every single one of the claimants had actual notice of Old GM's widely-publicized bankruptcy; and (4) the Sale Order did not eliminate any claim for payment by Old GM, but merely routed such claims to the trust established by the sale proceeds. Under these circumstances, and in light of the attenuated nature of the claimants' economic damages, the notice at the time of the sale was constitutionally sufficient.

Instead of carefully weighing the relevant interests—including the questionable value of the putative economic-loss claims—the Second Circuit reflexively imposed an unprecedented and unwarranted notice requirement. Now, a debtor in the Second Circuit must notify potential creditors of the basis for any potential claims against the debtor. Debtors have no such duty in the Third and Fifth Circuits (or any other circuit, for that matter) because those courts recognize that "such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." *Chemetron Corp. v. Jones*, 72 F.3d 341, 348 (3d Cir. 1995); *accord In re Placid Oil Co.*, 753 F.3d 151, 155-58 (5th Cir. 2014).

Based on the balance of the relevant interests, the Due Process Clause should not require anything more than notice of the 363 sale. This Court has held in a similar context that due process requires only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. That is exactly what the Bankruptcy Rules provide. The notice requirement of Rule 2002(c)(1) satisfies due process because it "affords creditors an opportunity to object to the sale and raise a dispute for the court's attention." Fed. R. Bankr. P. 2002, advisory committee's note to 1983 enactment; *accord* H.R. Rep. No. 95-595, at 181-82. By concluding otherwise, the Second Circuit implied that this Court did not fully appreciate the requirements of the Due Process Clause when it promulgated the Bankruptcy Rules. The Second Circuit is mistaken, and this Court should correct that error.

II. The Second Circuit's decision will undermine the bankruptcy process and invite meritless class actions.

The Second Circuit not only held that sellers must notify creditors of the basis for any potential claims against the debtor, but it also held that *buyers* will be the ones responsible for any defects in that notice. *See* Pet. App. 55. Together, these holdings will undermine 363 sales by making the process slower, costlier, and riskier. Just as troubling, these holdings will create a windfall for plaintiffs' lawyers, who will use them to file meritless class actions like those at issue here. This Court should intervene.

The Second Circuit's decision harms everyone involved in 363 sales. It is bad for debtors. Researching potential claims and notifying potential claimants is time-consuming and expensive. Here, for example, the Second Circuit held that Old GM was required to mail notices to 70 million car owners, identifying the grounds for potential claims against the company. These "[n]otice campaigns" can "cost millions of dollars." Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 450 (2000). The resulting expense and delay will frustrate the purpose of 363 sales: allowing debtors to offload their assets quickly so they can maximize the value of the bankruptcy estate. *See* H.R. Rep. No. 95-595, at 182 ("In order for a debtor to reorganize, it is important to continue to operate the business. Any cessation in operations … may mean a loss of customers that can never be recovered…. [D]elay of two to four days could well be fatal to his business."); *In re Met-L-Wood*, 861 F.2d at 1017 ("[Creditors' claims] would be more valuable if the assets were sold, and sold pronto.").

The Second Circuit's decision is bad for creditors too. Although *the seller* is the one with the duty to notify claimants before the 363 sale, the Second Circuit held that *the buyer* is liable for any notice problems. But the buyer can never be sure that the seller has identified all possible claims and has sent sufficient notice to all possible claimants: that information is uniquely within the seller's knowledge. Because of this uncertainty, the buyer will demand a discount to offset the risk of successor liability for the seller's past acts. Even worse, some buyers may be unwilling to participate in 363 sales at all. All of this leaves less money for the bankruptcy estate—undercutting one of the key purposes of 363 sales. *See Matter of UNR Indus., Inc.*, 20 F.3d 766, 770 (7th Cir. 1994) ("People pay less for assets that may be … affected by subsequent events.… [P]rotecting the interests of persons who acquire assets in reliance on a plan of reorganization … increases the price the estate can realize *ex ante*, and thus produces benefits for creditors in the aggregate."); 2 Norton Bankr. L. & Prac. 3d § 44:25 (explaining that the prospect of tort liability would "chill" the buyer's willingness to offer "a favorable price" for the debtor's assets).

Although the Second Circuit's decision imposes enormous burdens on debtors, creditors, and purchasers, it is a boon for plaintiffs' class-action lawyers. Most of the lawsuits spawned by the Second Circuit's decision will be the worst kinds of class actions, filed only to extract settlements in which lawyers are the primary beneficiaries. After all, plaintiffs who have legitimate claims before the 363 sale closes already know about them and can raise their concerns by filing suit or raising objections before the sale.[2] Here, for example, GM LLC agreed to repair any defective ignition switches, to perform warranty service on vehicles purchased from Old GM, and to assume liability for any post-sale accidents causing injury, death, or property damage. Pet. App. 67. GM LLC did not assume claims like the ones at issue here, which allege attenuated injuries like the purported diminution in value of Old GM vehicles that have defective ignition switches but never manifested any problems. *Id.* These dubious claims are constructed by lawyers attempting to manufacture a class action. Unsurprisingly, the plaintiffs' lawyers here are raising them in dozens of class actions seeking billions of dollars in damages. *Id.*

These class actions should not be encouraged; they benefit no one except the lawyers who bring them. As Congress has recognized, "[c]lass members often receive little or no benefit from class actions, and are sometimes harmed." 28 U.S.C. § 1711 note. In the infamous Bank of Boston case, for example, class members *lost* money

2. Some of the plaintiffs in this case, for example, allege personal injuries from accidents that occurred *before* the 363 sale. Pet. App. 69. But those plaintiffs obviously knew about their injuries before the 363 sale, and thus could have investigated and filed their claims beforehand.

because the $9 they recovered from the settlement was less than the $80 they were charged for the lawyers' $8.5 million in fees. *See* S. Rep. No. 108-123, at 15-16 (2003). The Senate Judiciary Committee has collected "numerous" other examples of class actions where "most—if not all—of the monetary benefits went to the class counsel, rather than to the class members those attorneys were supposed to be representing." *Id.* at 16-18. This data convinced the Committee that, when it comes to consumer class actions, "consumers are the big losers." *Id.* at 6.

The Chamber has observed this phenomenon empirically. A few years ago, the Chamber commissioned a study of the consumer and employee class actions that were litigated in federal court in 2009. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* (2013), goo.gl/mCzSy5 [hereinafter *Chamber Study*]. The results were striking. In nearly two-thirds of the class actions studied, "members of the putative class received *zero* relief." *Id.* at 6. Either the lead plaintiff voluntarily dismissed the suit (often after securing an individual settlement), or the court dismissed the suit as meritless. *Id.* at 5-6. Other studies put the number of zero-relief class actions even higher. *See, e.g.*, Emery G. Lee III et al., Fed. Judicial Ctr., *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11 (2008), goo.gl/NGF8VH (84 percent); Hilary Hehman, Judicial Council of Calif., *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, at D2 (2010), goo.gl/rGNnBa (71 percent).

These class actions not only fail to provide real benefits to the class members, but they also exact an enormous toll on American businesses. Class actions can take years to resolve, *see Chamber Study*, *supra* at 5, and the costs of defending a class action range from "$5 million to $100 million," Adeola Adele, Dukes v. WalMart*: Implications for Employment Practices Liability Insurance* (2011), goo.gl/zrS2Qf; *accord* Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), goo.gl/L5idv2 (finding that the median class action costs a company $5-13 million per year to litigate). In 2015 alone, companies spent $2.1 billion on class-action litigation. Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 4 (2016), goo.gl/iBVuxq.

Nearly all of this money goes toward defeating class certification. *See id.* Certification means that the "damages allegedly owed to tens of thousands of potential claimants" will be "aggregated and decided at once," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011), raising the specter of "potentially ruinous liability," Fed. R. Civ. P. 23, advisory committee's note to 1998 amendment. Because "[m]any corporate executives are unwilling to bet their company that they are in the right," *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999), they "will be under intense pressure to settle," *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). In fact, the pressure is so great that companies will settle "even unmeritorious claims." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978)).

The power of plaintiffs' class-action lawyers to extract settlements disconnected from the merits serves as a kind of "class-action tax" on American businesses. This tax does not benefit the class; it simply "drives up prices for all consumers." S. Rep. No. 108-123, at 18.

Given the high cost of class actions like those at issue here, this Court's review of the decision below is necessary. The Second Circuit's decision ignored the tenuous nature of the claims at issue, the onerous burden its notice requirement places on debtors, and the interests of consumers who will ultimately pay the price for the costs imposed by the wave of class actions sure to follow.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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