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Better Than a Discharge

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BETTER THAN A DISCHARGE

David G. Epstein†

Tevin Bowens††

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INTRODUCTION

*“It’s the Cadillac of . . .” Chilli Palmer.*¹ Traditionally, discharge has been regarded as the “Cadillac” of success in bankruptcy. Getting a discharge is as good as it can get.

When an individual debtor files for Chapter² 7 or Chapter 13 and receives a discharge then, in the language of the South, the attorney for that individual has “done good.” Or, in more academic verbiage, the lawyer has achieved Chapter 7 and Chapter 13’s “end goal.”³ Similarly, if a business entity files for Chapter 11 and its plan is confirmed which triggers a discharge, the attorney for the business has “done good.” As Professor LoPucki more eloquently put it, “provisions of Chapter 11 treat confirmation as a systems goal.”⁴

But now when a business entity files for Chapter 11 to sell its business under § 363 of the Bankruptcy Code,⁵ then increasingly the attorney for the buyer has done better than good. The order that the buyer gets from buying the assets of a debtor’s business in bankruptcy can be better than the discharge a debtor gets from having its Chapter plan confirmed.

This article will show the ways that, under various decisions of bankruptcy courts, district courts, and circuit courts, a § 363 sale order provides greater relief for a buyer of a business in bankruptcy than a

1. In *Get Shorty*, Chilli told Martin Weir that an Oldsmobile Odyssey that Chilli was driving was the “Cadillac of Minivans.” See *GET SHORTY* (Jersey Films 1995); we cite to the movie version of *Get Shorty* because that line does not appear in the Elmore Leonard’s book of the same title. Whoever added the line must have liked it because Chilli used the line again in the sequel, *Be Cool*, when he told Martin Weir that the Honda Insight Chilli was driving was “the Cadillac of Hybrids.” See *BE COOL* (Jersey Films 2005). This “qualitative” use of the term “Cadillac” is neither original to or limited to Chilli Palmer. *E.g.*, *North River Homes, Inc. v. Bosarge*, 594 So.2d 1153, 1155 (Miss. 1992) (“Cadillac of mobile homes”). And, of course, under the twenty-nine-year leadership of Sam Gerdano, the American Bankruptcy Institute has become the “Cadillac” of professional organizations. Sam has been to the ABI what Jim Boeheim has been to Syracuse basketball.

2. Most cases and secondary sources capitalize “Chapter 7,” “Chapter 9,” “Chapter 11,” “Chapter 12,” “Chapter 13,” and “Chapter 15.” *E.g.*, *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696, 700 (2020). We will capitalize “Chapters” unless quoting from a source that used lower case.

3. Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 226 (2018) (“the end goal of each [Chapter 7 and Chapter 13] is the discharge of debts”).

4. Lynn M. LoPucki, *Chapter 11: Changes in Chapter 11 Success Levels Since 1980*, 87 TEMPLE L. REV. 989, 993 (2015).

5. See 11 U.S.C. § 363(b) (2021).

discharge order can provide for any debtor who files for bankruptcy relief. And, we will examine the statutory and policy bases for these decisions.

I. OVERVIEW OF SALES OF BUSINESSES IN BANKRUPTCY

There have always been legal advantages to selling a business in bankruptcy. Under the various state corporate codes, a corporation's sale of all, or substantially all, of its assets requires not only action by the board of directors, but also shareholder approval.⁶ And, dissenting shareholders generally have a "right of appraisal."⁷ Neither is a part of the process of selling a business in bankruptcy.⁸

If the sale of a business is a forced sale resulting from a secured creditor's exercising its right under the security agreement and Article 9 of the Uniform Commercial Code, then the sale must meet the statutory requirements of reasonable notice and a sale that is commercially reasonable in all respects.⁹ There are additional statutory requirements if the secured creditor is the buyer at a "private sale" or if the secured creditor wants to retain the assets in satisfaction of its secured debt.¹⁰

Then there is "fraudulent transfer" law.¹¹ Sales of businesses that are in financial distress are frequently later challenged as being "constructive" fraudulent conveyances because the buyer paid less than

6. See JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW 634 (5th ed. 2020) ("Most states now provide for majority approval by the shares entitled to vote . . .").

7. *Id.* at 644 ("Every state has adopted 'appraisal statutes,' which give dissenting shareholders a right to demand payment of the fair value of their shares.").

8. D.J. BAKER ET AL., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012–2014 FINAL REPORT AND RECOMMENDATIONS, AM. BANKR. INST. 195 (2014) [hereinafter ABI REPORT] ("[C]ourts commonly allow a debtor in possession to sell all or substantially all of its assets under section 363(b) of the Bankruptcy Code without seeking or obtaining shareholder approval . . ."); see also Vincent S.J. Buccola, *Bankruptcy's Cathedral: Property Rules, Liability Rules, and Distress*, 114 NW. U.L. REV. 705, 739–41 (2019) (discussing "disabling equity vote" as one of the reasons to use § 363(b) sales); but cf., DAVID G. EPSTEIN, STEVE H. NICKLES & JAMES J. WHITE, BANKRUPTCY 5–6 (1992) (If Congress intended to free a reorganizing corporation from all of the rules of state law, it could have clearly stated that intent.).

9. See generally DAVID G. EPSTEIN ET AL., SELLING AND FINANCING THE SALE OF GOODS UNDER UCC ARTICLES 2 AND 9 816–22 (2019).

10. See *id.*; see also David M. Hillman & Aaron Wernick, *Private Foreclosure Sales: Successor Liability Risks for Buyers-Mere Continuation Theory*, 45 UCC L. J. 197, 209–10 (2013) (possibility of successor liability to a buyer at a UCC foreclosure sure "increases the attractiveness of a bankruptcy sale").

11. See CHARLES JORDAN TABB, LAW OF BANKRUPTCY 572 (4th ed. 2016).

“reasonably equivalent value.”¹² Conducting the sale after filing a bankruptcy petition and obtaining an order from the bankruptcy judge approving the sale eliminates any such challenges.¹³

A. Sales of Businesses Under the Bankruptcy Code

The Bankruptcy Code does not directly address sales of businesses. Nonetheless, there are three different alternatives for sale of a business under the Bankruptcy Code: (1) a Chapter 7 sale; (2) a Chapter 11 plan which provides “for the sale of all of the property of the estate” as permitted by § 1123(b)(4);¹⁴ and (3) a § 363(b)¹⁵ sale in a Chapter 11 case.¹⁶

Businesses rarely choose the first alternative.¹⁷ In all Chapter 7 cases, a trustee, whom the business owners have no say in selecting, immediately takes control of the debtor’s assets and conducts the sale of assets.¹⁸ The Chapter 7 trustee can operate the debtor’s business post-petition and sell the business as a going concern.¹⁹ If the debtor that owned the business is a corporation, limited liability company, or some form of partnership, then there will be no discharge in the Chapter 7 case.²⁰

12. See *id.* at 587; e.g., *Kaler v. Red River Commodities, Inc. (In re Sun Valley Products, Inc.)*, 326 B.R. 147, 149 (Bankr. N.D. 2005) (trustee alleging that pre-bankruptcy sale of business was voidable fraudulent transfer).

13. See *Chapter 11 – Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited Mar. 20, 2021).

14. See 11 U.S.C. § 1123(b)(4) (2021).

15. See 11 U.S.C. § 363(b) (2021).

16. See ABI REPORT, *supra* note 8, at 58.

17. Chapter 7 sales are such a “rare” alternative that Michael H. Reed, a Pepper Hamilton bankruptcy partner, who, unlike your authors, actually does this stuff, concluded: “There are essentially two ways that a bankruptcy trustee or debtor-in-possession can sell assets, i.e., a sale pursuant to § 363 of the Code or a sale pursuant to a confirmed Chapter 11 plan of reorganization.” Michael H. Reed, *Successor Liability and Bankruptcy Sales Revisited—A New Paradigm*, 61 BUS. LAW. 179, 180 (2005). Karen Cordry, bankruptcy and special issues counsel to the National Association of Attorneys General, has argued that many of the Chapter 11 cases that result in sales of substantially all of the debtor’s assets should be Chapter 7 sales: “Selling off assets and paying creditors is what Chapter 7 trustees do and there may well be no need for the ponderous (and expensive) machinery of a Chapter 11 case.” Karen Cordry, *Section 363 Sales: Cherry Picking the Code: Successor Liability and Lessons from Wile E. Coyote*, 28 J. BANKR. L. & PRAC. (2019).

18. See 11 U.S.C. §§ 701–04 (2021).

19. See 11 U.S.C. § 721 (2021).

20. See 11 U.S.C. § 727(a) (2021); see TABB, *supra* note 11, at 957 (“Since the business entity is being liquidated, and will not continue to exist after bankruptcy, a discharge is unnecessary. Only people need a ‘fresh start’ in life; they do continue to exist after a bankruptcy liquidation.”).

The second alternative—a Chapter 11 plan—is not a popular choice either. Selling a business pursuant to a Chapter 11 plan is time-consuming and expensive.²¹ The selling business must prepare a “plan” that meets the requirements of § 1123,²² draft a disclosure statement that meets the requirements of § 1125 as determined at a hearing,²³ obtain the “acceptance” of the requisite majorities of claims as provided in § 1126,²⁴ and satisfy the bankruptcy judge at a “confirmation” hearing.²⁵

Section 363 has also been an option for sales of businesses in bankruptcy since the Bankruptcy Code became effective.²⁶ Professor Sarah Sharer Curley, who served as a bankruptcy judge for more than twenty-eight years before joining the Arizona State Law School faculty, recently observed, “[a] sale of all or part of the assets of a bankruptcy estate has become the new form of reorganization.”²⁷

*B. Sales of Businesses Under the Bankruptcy Act of 1898*²⁸

The Bankruptcy Act of 1898 as originally enacted only provided for sales of businesses by creditor-elected trustees in what has come to be described as “ordinary bankruptcy”²⁹ or “straight bankruptcy.”³⁰ Straight bankruptcy was similar to present-day Chapter 7.³¹

The Bankruptcy Act’s 1938 amendments, commonly referred to as the Chandler Act,³² created two additional forms of bankruptcy for

21. See Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L. J. 862, 889 (2014).

22. See 11 U.S.C. § 1123 (2021).

23. See 11 U.S.C. § 1125 (2021).

24. 11 U.S.C. § 1126 (2021).

25. 11 U.S.C. § 1129 (2021).

26. A survey of large public company Chapter 11 cases that confirmed a plan between January 1, 2000, and December 31, 2010, reported that six times as many cases used traditional reorganizations than § 363 sales. James C. Behrens, *Don’t Fear the § 363 Sale, Fear the Delay that Follows It: Asset Sales and Confirmation Delays in Large Chapter 11s*, 33 AM. BANKR. INST. J. 42, 43 (2014).

27. Sarah Sharer Curley, *Sellers and Buyers Beware: New Developments in the Sale of Assets*, 38 AM. BANKR. INST. J. 26, 26 (2019).

28. The most accessible discussion of sales of businesses under the Bankruptcy Act of 1898 is *In re Lionel Corp.*, 722 F.2d 1063, 1066–67 (2d Cir. 1983).

29. *In re Preble Corp.*, 15 F. Supp. 775, 775 (D. Me. 1936) (“ordinary bankruptcy . . . liquidating assets . . .”).

30. DAVID G. EPSTEIN, *DEBTOR-CREDITOR RELATIONS: TEACHING MATERIALS* 372 (1st ed. 1973).

31. See *In re Box*, No. 06-12268-NPO, 2013 Bankr. LEXIS 4262, at *8 (Bankr. N.D. Miss. Oct. 10, 2013) (“In a typical chapter 7 case, also known as a ‘straight bankruptcy,’ . . .”).

32. See Bankruptcy Act of 1938 (Chandler Act), Pub. L. 75-696, 52 Stat. 840 (1938) (repealed 1978); see also *In re Jacobs*, 31 F. Supp. 620, 620 (N.D.N.Y. 1940) (“ . . . enactment of the Chandler Act amending the Bankruptcy Law . . .”).

operating businesses:³³ Chapter X Corporate Reorganizations and Chapter XI Arrangements.³⁴

In Chapter X, the owners of the business lost control of their business.³⁵ Unlike present day Chapter XI “Reorganizations,” Chapter X “Corporate Reorganizations” required a creditor-elected trustee in every case,³⁶ provided that the trustee could “sell any property,”³⁷ and the trustee filed a plan of reorganization.³⁸ That plan could provide for “the sale . . . of all or any part of its property.”³⁹

In a Chapter XI Arrangement, it was possible for a business owner to remain in control of the business⁴⁰ and “sell any property”⁴¹ but Chapter XI did not expressly provide for the possibility of a plan of reorganization in which there was a sale of the business. Indeed, Chapter XI did not even provide for the possibility of a plan of reorganization. Instead, Chapter XI contemplated an “arrangement,” not a plan of reorganization, and the Chandler Act section setting out the possible contents of the arrangement makes no mention of sale of property.⁴²

That was important to the Second Circuit in *In re Pure Penn Petroleum, Co.*,⁴³ where the Chapter XI debtor proposed an arrangement which contemplated the sale of all of its assets and payment of its various debts from the proceeds of the sale.⁴⁴ The bankruptcy court authorized the

33. The Chandler Act also created Chapter XII Real Property Arrangements by Persons Other Than Corporations and Chapter XIII Wage Earner Plans. See Bruce Grohsgal, *How Absolute Is the Absolute Priority Rule in Bankruptcy? The Case for Structured Dismissals*, 8 WM. & MARY BUS. L. REV. 439, 472–73 (2017).

34. See *id.*

35. See ABI REPORT, *supra* note 8, at 22.

36. See *id.*

37. § 116(3), 52 Stat. at 885.

38. See § 216(10), 52 Stat. at 896–97.

39. *Id.*

40. See ABI REPORT, *supra* note 8, at 2.

41. § 313(2), 52 Stat. at 907.

42. See § 461, 52 Stat. at 921–22.

43. 188 F.2d 851, 854 (2d Cir. 1951) (holding Chapter XI did not require the sale of all property); see John C. Anderson & Peter G. Wright, *Liquidating Plans of Reorganization*, 56 AM. BANKR. L.J. 29, 40–44 (1982).

44. At least it was important to the majority of the panel. Judge Swan’s dissenting opinion summarizes the majority opinion as follows: “Authority for a sale under a Chapter X plan is found in section 216(10), 11 U.S.C. 616(10). Because no similar section appears in Chapter XI, my brothers think that authority is lacking to order a sale of the debtor’s assets pursuant to a plan of arrangement.” *In re Pure Penn Petroleum Co.*, 188 F.2d at 856 (Swan, J., dissenting).

sale.⁴⁵ A divided Second Circuit panel reversed.⁴⁶ Judge Jerome Frank,⁴⁷ writing for the majority, explained:

Section 216(10), applicable to a Chapter X proceeding, provides that a plan may authorize the sale of all of the assets ‘at not less than a fair upset price’ and the distribution of the proceeds among the creditors. . . . But Chapter XI, . . . contains no provision such as Sec. 216(10); and Section 101, part of Chapter X, . . . 11 U.S.C.A. § 501 *et seq.*, states: ‘The provisions of this chapter shall apply exclusively to proceedings under this chapter.’ . . .

There are good reasons why Congress provided that a sale of all assets may be part of a Chapter X plan but did not so provide with respect to a Chapter XI arrangement: In Chapter X, . . . ; under Sec. 169, the trustee prepares and presents the plan. . . .⁴⁸

The *Pure Penn* majority opinion also addressed the possibility of the sale of a business outside the plan in a Chapter X or Chapter XI case:

Under Chapter XI, a sale of all the debtor’s assets may be authorized, pursuant to Sec. 313(2), 11 U.S.C.A. 713(2), only ‘upon cause shown’. This section is worded the same as Sec. 116(3), 11 U.S.C.A. § 516(3), relative to such a sale in a Chapter X proceeding. It has been held that to prove ‘cause’ for a sale under Sec. 116(3) it is necessary to show that the assets are, in effect, ‘perishable’; such a sale must ‘be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken.’ . . . We think Sec. 313(2) must be similarly interpreted.⁴⁹

45. *See id.* at 856.

46. *See id.*

47. *See generally* Edmond Cahn, *Judge Jerome Frank’s Fact Skepticism and Our Future*, 66 YALE L. J. 824, 824–31 (1957) (describing Judge Frank’s legal philosophy).

48. *In re Pure Penn Petroleum Co.*, 188 F.2d at 854; *see generally* Note, *Bankruptcy—In General—Sale of Entire Assets Not Permitted in Chapter XI Arrangement*, 65 HARV. L. REV. 686 (1952) (Congress intended to exclude power of sale from Chapter XI arrangements).

49. *In re Pure Penn Petroleum Co.*, 188 F.2d at 854 (quoting *In re Solar Mfg. Corp.*, 176 F.2d 493, 494 (3d Cir. 1949)) (citing *In re V. Loewer’s Gambrinus Brewery Co.*, 141 F.2d 747, 748 (2d Cir. 1944)). An excerpt from the *39th Annual Report of the Securities and Exchange Commission*, which is reproduced in Walter J. Blum & Stanley Kaplan’s *Corporate Readjustments and Reorganizations*, states in part, “The Commission is satisfied that any proposed sale of all or a critical portion of a debtor’s assets under the summary procedure of Section 116(3) involves a conflict with the policy of Chapter X. . . . Resort to Section 116(3) as a substitute for Section 216(10) effectively disenfranchises the creditors and shareholders [who are the beneficial owners of the property being dealt with].” WALTER J. BLUM & STANLEY KAPLAN, *CORPORATE READJUSTMENTS AND REORGANIZATIONS* 271 (1976) (citing 39TH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION 120–21 (1973)). The SEC played a significant advisory role in Chapter X cases. *See* Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920, 937 (1964) (“The court may submit to the Commission any plan which it regards as worthy of consideration for its examination and report and must do so in those cases where the

C. 1970 Commission

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States (“Commission”) to study and recommend changes to the bankruptcy laws.⁵⁰ In 1973, the Commission submitted a Report and a completely new bankruptcy statute to Congress that combined Chapters X and XI (and XII) into a single chapter and included § 7-205.⁵¹ Section 7-205 provided that “a sale or lease of all or substantially all of the property of the estate may be authorized by a court if in the best interest of the estate.”⁵² Section 7-205 in the Commission Bill became § 363—without the explicit authorization for the sale of “all or substantially all.”⁵³

We cannot say with certainty why that language—“all or substantially all”—was omitted. What we can say with certainty is that since 1983,⁵⁴ courts of appeals have consistently upheld § 363(b) sales of “all or substantially all” of the assets of a business without requiring an emergency.⁵⁵ And, like J.D. Salinger in *Field of Dreams*, we can say with certainty that “if you build it, they will come.”⁵⁶ Courts have built a § 363(b)

scheduled indebtedness exceeds \$3,000,000. Although the Commission’s report is purely advisory, the Commission is in a position to play a crucial and aggressive role in the reorganization process.”).

50. Congress appointed the Commission on the Bankruptcy Laws of the United States to study and recommend revisions of the bankruptcy laws. See Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

51. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R.Doc. No. 93-137, pt. II, at 222 (1973) [hereinafter 1973 COMMISSION REPORT], reprinted in COLLIER ON BANKRUPTCY, App. Vol. B, App. Pt. 4-795 (Richard Levin & Henry Sommers eds., 16th ed. 2018).

52. *Id.* at 239. In the accompanying note, the Commission commented that “[t]here is a split of authority in the case law presently, with some courts allowing this type of sale, but others requiring some showing of emergency. This section makes it clear that a showing of emergency is not necessary.” *Id.*

53. See *In re Pure Penn Petroleum Co.*, 188 F.2d at 854. Recall that the comparable provisions in Chapters X and XI did not include the phrase “all or substantially all” but the dicta in *Pure Penn* restated those provisions as authorizing “sale of all of the [debtor’s] assets.” *Id.*

54. See *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (requiring an articulated business justification, not an emergency.). The first reported bankruptcy court opinion to consider the question of whether § 363 could be used to sell a business had held that that it was *clear* § 363 could not be so used. *In re White Motors Credit Co.*, 14 B.R. 584, 590 (Bankr. N.D. Ohio 1981) (“As a matter of legislative intent, to endow section 363 with the purpose of or a potential for total reorganization would nullify, at debtor’s option, the major protections and standards of chapter 11 of the code . . . It is *clear*, and the Court holds accordingly, that in a chapter 11 reorganization under the Bankruptcy Code, Section 363(b) does not authorize the sale of all or substantially all assets of the estate.” (emphasis added)). In so ruling the court relied on quotes from the 1973 COMMISSION REPORT, *supra* note 51, at 239.

55. See, e.g., *Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 113 (2d Cir. 2009) (quoting *In re Lionel Corp.*, 722 F.2d at 1069).

56. Throughout the book *Shoeless Joe* and the movie, *Field of Dreams*, Ray Kinsella keeps hearing the voice of an unseen radio announcer telling him that “[i]f you build it, he will come.” W.P. KINSELLA, *SHOELESS JOE*, 6 (1982). At the end of the book, Ray hears J.D.

that buyers have come to⁵⁷—a § 363(b) that not only permits sales “all or substantially all” of a business’s assets but also provides protections for a § 363 buyer that are greater than the protection for discharged debtors.⁵⁸ Starting with protecting the buyer from successor liability.

II. SECTION 363 SALES & SUCCESSOR LIABILITY: “INTERESTS”

A. *Non-Bankruptcy Law of Successor Liability*

It is a well settled rule of corporate law that a “corporation that purchases the assets of another corporation is generally not liable for the seller’s liabilities.”⁵⁹ That’s basic.⁶⁰ That’s a rule based on what state corporate codes say and don’t say.⁶¹

This basic statutory rule of no liability on the seller’s debts for the successor buyer is subject to limited judge-created exceptions which are commonly lumped together under the label “successor liability.”⁶² In *New York v. National Services Industries, Inc.*, Judge (now Justice) Sotomayor provides this summary of the four traditional grounds for successor liability:

[A] buyer of a corporation’s assets will be liable as its successor if: “(1) it expressly or impliedly assumed the predecessor’s tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation,

Salinger (in the movie it is the James Earl Jones’s character, Terence Mann) telling him all the reasons why “they” (people other than Shoeless Joe Jackson and Ray’s father) will come to Ray’s Iowa farm to watch baseball. *See id.* at 251–53. In this paper, we tell the reasons that “they” have come to § 363 to buy businesses.

57. *See* Buccola, *supra* note 8, at 733 n.119 (“Exactly what fraction of cases result in a going-concern sale is hard to say both because there is variance year-to-year and because arbitrary definitional issues (e.g., size of firms of interest, meaning of ‘going-concern,’ etc.) cloud the subject. Nevertheless, for what they are worth, empirical studies of large-debtor bankruptcy resolutions have quoted a range of between one-fifth and two-thirds of all cases.”).

58. 11 U.S.C. § 363(b) (2021).

59. *New York v. Nat’l Serv. Indus., Inc.*, 460 F.3d 201, 209 (2d Cir. 2006) (first citing *United States v. Gen. Battery Corp.* 423 F.3d 294, 305 (3d Cir. 2005); and then citing *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 198 (N.Y. 1983)).

60. *See, e.g.*, DAVID G. EPSTEIN, *A SHORT AND HAPPY GUIDE TO BUSINESS ORGANIZATIONS* 205 (2d ed. 2020).

61. *See* DAVID G. EPSTEIN, RICHARD D. FREER, MICHAEL J. ROBERTS & GEORGE B. SHEPHERD, *BUSINESS STRUCTURES* 549–50 (5th ed. 2019) (state corporate codes provide that in a merger creditors of the disappearing corporation become creditors of the surviving corporation but in a sale of assets creditors of the selling corporation do not become creditors of the buying corporation).

62. *See* Marie T. Reilly, *Making Sense of Successor Liability*, 31 *HOFSTRA L. REV.* 745, 746 (2003).

or (4) the transaction is entered into fraudulently to escape such obligations.”⁶³

In 1977, in *Ray v. Alad Ladder Corp.*, the California Supreme Court created a fifth ground for successor liability.⁶⁴ There, Ray was injured in a fall from a year-old defective ladder on which he had been working.⁶⁵ Before Ray’s accident, the corporation that manufactured the ladder, Alad Corporation, had sold all of its assets, including its name and goodwill.⁶⁶ After the sale, the purchaser corporation continued to manufacture the same line of ladders, under the same name.⁶⁷ And, after the sale, the seller corporation distributed the proceeds from the sale of its assets to its creditors and dissolved.⁶⁸ Ray’s accident occurred a couple of months after the seller corporation’s dissolution.⁶⁹ Since the seller corporation no longer existed, Ray sued the purchaser corporation on the theory of strict liability in tort even though the purchaser corporation had not manufactured the defective ladder.⁷⁰

The trial court granted the purchaser corporation summary judgment, determining that none of the four traditional grounds for successor liability could be proved.⁷¹ The California Supreme Court agreed with that determination but nonetheless reversed the trial court’s summary judgment in favor of the purchaser corporation.⁷²

The California Supreme Court concluded that a departure from the traditional approaches to successor liability was called for by the policies underlying strict tort liability for injuries caused by defective products.⁷³ It developed the following new approach to successor liability, which has since come to be known as the “product line” approach⁷⁴ to successor corporation liability for injuries caused by defective products:

We . . . conclude that a party which acquires a manufacturing business and *continues the output of its line of products* under the circumstances here presented assumes strict tort liability for defects in units of the

63. 460 F.3d at 209 (quoting *Schumacher*, 451 N.E.2d at 198) (citing *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 651 (7th Cir. 1998)).

64. *See* 560 P.2d 3, 11 (Cal. 1977).

65. *See id.* at 5.

66. *See id.* at 5–6.

67. *See id.* at 5.

68. *See id.* at 6.

69. *See Ray*, 560 P.2d at 5.

70. *See id.* at 4.

71. *See id.* at 5.

72. *See id.*

73. *See id.* at 11.

74. *See* Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 72 TENN. L. REV. 753, 759 (2005).

same product line previously manufactured and distributed by the entity from which the business was acquired.⁷⁵

We have emphasized the requirement “continues the output of its line of products” because that is what courts require and emphasize in finding successor liability.⁷⁶ The following statement from Judge Stuart Bernstein’s opinion in *In re Grumman Olson Industries, Inc.*, explaining the state law of successor liability is illustrative:

Furthermore, the Fredericos are not basing their claims on the transfer of the Lot 2 Assets or the consummation of the sale transaction. If Morgan had immediately resold the Lot 2 Assets to a third party, the Fredericos would not be suing Morgan in state court. Instead, the Fredericos are basing their claims on what Morgan did *after* the sale. According to their state court Amended Complaint, Morgan is liable as a successor under New Jersey law because it “continued the product line since the purchase.”⁷⁷

In the more than forty years since the California Supreme Court decision in *Ray*, only New Jersey and a handful of other states have added the product line approach to their law of successor liability.⁷⁸ Nonetheless, the product line approach has significantly increased the threat of successor liability to the buyer of the assets of a business that manufactures goods.⁷⁹ If those goods are sold in or have been sold to residents of Alabama, California, Connecticut, Indiana, Mississippi, New Jersey, Pennsylvania, and Washington, the buyers of such a business would benefit from a bankruptcy court order that protects them from successor liability.⁸⁰

B. Successor Liability & the Bankruptcy Code

The term “successor liability” does not appear in the Bankruptcy Code. We have not been able to find any mention of successor liability in the legislative history.⁸¹ Nonetheless, cases and commentators addressing

75. *Ray*, 560 P.2d at 11 (emphasis added).

76. *Id.*

77. 445 B.R. 243, 250 (Bankr. S.D.N.Y. 2011).

78. See Daniel R. Campbell, *Product Line Exception Just Doesn't Fly*, 84 DEF. COUNS. J. 1, 10 (2017) (Fifty state survey).

79. See *id.* at 9.

80. See *id.* at 10.

81. See Cordry, *supra* note 17 (“neither the Code, nor the Congressional Reports, contain any discussion of successor liability”); see also Michael H. Reed, *Successor Liability and Bankruptcy Sales*, 51 BUS. LAW. 653, 654 n.9 (1996) (“There is nothing in the Code or its legislative history suggesting Congress intended to override the successor liability exposure of non-debtors through either bankruptcy plans or bankruptcy sales.”).

bankruptcy sales free from successor liability focus on three sections of the Bankruptcy Code:⁸² § 105, § 363(f), and § 1141.⁸³

1. Section 105

Section 105(a) provides in pertinent part, “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”⁸⁴

In re White Motor Credit Corp. relied on § 105 and a Supreme Court case under the Bankruptcy Act of 1898 in eliminating any possible successor liability for a buyer of a business under § 363.⁸⁵ The Supreme Court case, *Van Huffel v. Harkelrode*, involved a straight bankruptcy case in which the Court upheld a bankruptcy referee’s order that a piece of real property was sold free and clear of a county tax lien even though the Bankruptcy Act of 1898 “contains no provision which in terms confers upon bankruptcy courts the power to sell property free from incumbrances [sic].”⁸⁶

White Motor was a Chapter 11 case in which all of the assets of the debtor truck manufacturer were sold under § 363 on August 20, 1981, and less than two weeks later there was an accident allegedly caused by a truck negligently manufactured by the debtor.⁸⁷ The injured person sued the buyer of the assets asserting successor liability.⁸⁸ The bankruptcy court ruled that the “August 20, 1981, order approving the sale by its terms, precludes imposition of successor liability.”⁸⁹

In so ruling, the bankruptcy court looked to the Supreme Court decision in *Van Huffel* and to § 105:

Absence of specific statutory authority to sell free and clear poses no impediment. This authority is implicit in the court’s general equitable powers and in its duty to distribute debtor’s assets and determine controversies thereto. Authority to conduct such sales is within the court’s equitable powers when necessary to carry out the provisions of Title 11.

82. We have no information about what, if anything, bankruptcy referees and United States district court judges applying the Bankruptcy Act of 1898 said about successor liability. Bankruptcy court opinions were not generally available until the first issue of West’s Bankruptcy Reporter in January 1980.

83. 11 U.S.C. §§ 105, 363(f), 1141 (2021).

84. § 105(a) (emphasis added).

85. *White Motor Credit Corp. v. Volvo White Truck Corp.* (*In re White Motor Credit Corp.*), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

86. 284 U.S. 225, 227 (1931).

87. See *In re White Motor Credit Corp.*, 75 B.R. at 946.

88. *Id.*

89. *Id.* at 951.

The sale in question was in fact conducted under the equitable provisions of Section 105.⁹⁰

There are three reasons⁹¹ that a bankruptcy court's sale of a business free from successor liability cannot be supported by *Van Huffel* or § 105 more generally.

First, although *Van Huffel* used the phrase “free from incumbrances,” the question before the Court was whether the bankruptcy court could order that a sale be free from liens.⁹² In answering that specific question about sales free from liens, the Court found “implicit authority” because “like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure.”⁹³ Sales of businesses free from successor liability is not a power that has “long been exercised by federal courts sitting in equity.”⁹⁴

Second, a year after the bankruptcy court's decision in *White Motor*, the Supreme Court in *Norwest Bank Worthington v. Ahlers* said, “Whatever equitable powers remain in the bankruptcy courts . . . can only be exercised within the confines of the Bankruptcy Code.”⁹⁵ The Court reiterated this limited role of equity in bankruptcy more recently in *Law v. Siegel*.⁹⁶

Third, the use of § 105 to extend the Bankruptcy Code to unprovided-for cases such as sales free and clear of successor liability raises problems of statutory language and constitutional concepts.⁹⁷

The problem with the statutory language is obvious. Section 105 is limited to court orders that “carry out the provisions of this title.”⁹⁸ The choice of the word “provisions” is telling. “Congress could have used the

90. *Id.* at 948.

91. We are mindful of the impact of the “Rule of Threes.” See *What Is a Tricolon?* WHOLE-BRAIN PRESENTING, speaklikeapro.co.uk/What-is-tricolon.htm (last visited June 17, 2020) (“A Tricolon (sometimes called the ‘Rule of Threes’) is really more of a general principle than a rhetorical technique, but it is very effective. For some reason, the human brain seems to absorb and remember information more effectively when it is presented in threes. . . . [For example,] ‘[v]eni, vidi, vici’ . . . Julius Caesar [or] . . . ‘The few, the proud, the Marines’—advertising slogan, United States Marine Corps.”).

92. *Van Huffel v. Harkelrode*, 284 U.S. 225, 228 (1931).

93. *Id.* at 227 (first citing *First Nat'l Bank v. Shedd*, 121 U.S. 74, 87 (1887); and then citing *Mellen v. Moline Malleable Iron Works*, 131 U.S. 352, 367 (1889)).

94. *Id.*; but cf., *In re Trans World Airlines*, 322 F.3d 283, 284–85, 289 (3d Cir. 2003) [hereinafter *TWA*] (reliance on *Van Huffel* for the bankruptcy court's equitable power to authorize sales free and clear of successor liability).

95. 485 U.S. 197, 206 (1988).

96. See 571 U.S. 415, 425 (2014).

97. See Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAPMAN L. REV. 7, 10 (2000).

98. *Id.* at 18.

word ‘policies’ or the word ‘purposes’ in section 105. It did not.”⁹⁹ “Provisions” is much more limiting than “policies” or “purposes.” “Provisions” requires a connection to a specific word or phrase in a specific section of the Bankruptcy Code.

The problem with the basic constitutional concept of separation of powers is also obvious. Neither Congress nor bankruptcy courts can use § 105 to widen the constitutional limits of judicial power.¹⁰⁰ When a bankruptcy court uses § 105 to rule that bankruptcy courts can sell businesses free from successor liability that bankruptcy court is “making law to the extent of violating the constitutional separation of powers” between the legislative and judicial branches.¹⁰¹

In the more than thirty years since the *White Motor* opinion, bankruptcy courts’ orders for the sale of a business free and clear of successor liability continue to reference § 105.¹⁰² However, court opinions explaining the statutory basis for such orders focus on provisions other than § 105.¹⁰³

2. Section 1141

We need to consider § 1141 out of numerical order. It is necessary first to understand what § 1141 says to fully understand what § 363(f) says and does not say. Section 1141 provides in pertinent part:

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor. (d) . . . (3) The confirmation of a plan does not discharge a debtor if— (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under Chapter 7 of this title.¹⁰⁴

The *White Motor* opinion also discusses § 1141:

99. *Id.*

100. *See id.*

101. *Id.*

102. *E.g.*, TWA, 322 F.3d 283, 287 (3d Cir. 2003) (The Bankruptcy Court’s order provided that: “Pursuant to sections 105(a) and 363 of the bankruptcy code, all Persons are enjoined from taking any action against Purchaser or Purchaser’s Affiliates including, without limitation, TWA Airlines LLC, to recover any claim which such Person had solely against Sellers of Sellers’ Affiliates.”).

103. *See id.* at 288 (focusing on 11 U.S.C. § 363(f) (2021)).

104. 11 U.S.C. § 1141(c), (d)(3) (2021).

[A bankruptcy court's] equitable power to sell free and clear must be interpreted consistent with its power to discharge claims under a plan of reorganization Section 1141(d) "discharges the debtor from any debt that arose before the date of such confirmation." A sale conducted through the court's equitable powers can provide the debtor the same degree of relief effected by a sale in a plan of reorganization¹⁰⁵

White Motor is not looking to § 1141 as a statutory basis for a court's entering a § 363 sale order eliminating successor liability. Rather, the court is looking to § 1141 to support its conclusion that a § 363 sale can "provide . . . the same degree of relief" as a "sale in a plan of reorganization."¹⁰⁶

We have three problems with *White Motor*'s look at § 1141. First, it is, at best, unclear from the language of § 1141 whether the § 1141 discharge that results from the confirmation of a Chapter 11 plan eliminates successor liability.¹⁰⁷ Section 1141 does not directly address successor liability; instead it simply says "[e]xcept as provided in subsections (d)(2) and (d)(3) . . . the property dealt with by the plan is free and clear of all claims and interests of creditors."¹⁰⁸

"Creditors" is defined as an "entity that has a claim against the debtor."¹⁰⁹ That definition raises two questions. Is the plaintiff in a successor liability lawsuit based on the product continuation exception a "creditor"—is that plaintiff asserting a claim against the seller who was the "debtor" in the bankruptcy case or asserting a claim against the buyer who has continued the product line?¹¹⁰ And, there is the still unsettled question of whether a person who was injured post-confirmation by a product manufactured pre-confirmation has a "claim" as that term is used in the Bankruptcy Code. There is a large body of case law as to what due

105. See *In re White Motor Credit Corp.*, 75 B.R. 944, 948–49 (Bankr. N.D. Ohio 1987).

106. *Id.* at 949.

107. *But cf.*, George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 242 (2002) ("Although § 1141(c) has been largely ignored, it provides firm statutory support in the plan context for clearing title and blocking successor liability.").

108. § 1141(c) (emphasis added).

109. 11 U.S.C. § 101(10)(A) (2021).

110. See Kuney, *supra* note 107, at 261 ("Successor liability arises out of the actions of the purchaser, not the property itself. For example, the successor liability doctrine of express or implied assumption of liability is rooted in the actions of the purchaser (agreeing or appearing to agree to assume liability). Similarly, when a de facto merger is found, or mere continuation of an enterprise justifies imposing successor liability, it is the purchaser's postsale conduct (in continuing the business in substantially the same form and manner) that gives rise to liability. The same is true for successor liability founded upon fraudulent transfer and continued manufacture of a product line. All these successor liability doctrines are grounded upon acts or implications from acts of the purchaser, not the property.").

process requires in terms of such future claims.¹¹¹ Your senior author contributed at least his name to that body of law.¹¹² The Second Circuit provided a more recent, albeit less “creative” consideration of future claims in *In re Motors Liquidation Company*.¹¹³

Then, there is the introductory phrase: “[e]xcept as provided in subsection[] . . . (d)(3).”¹¹⁴ Subsection (d)(3) expressly precludes a discharge for a corporate debtor who is selling all of its property in its Chapter 11 plan.¹¹⁵

We understand that § 1141(c) speaks to the effect of confirmation of a plan on the property of the debtor and § 1141(d)(3) deals with the effect of confirmation on the debtor. But, a section 1141(c) “in rem discharge of the property” should not be broader than the section 1141(d)(3) discharge of the debtor. Moreover, since Congress in the Bankruptcy Code § 1141 expressly states that debtors that sell all of their business assets do not get relief from their debts, courts should not imply that a third party purchaser gets relief from successor liability.¹¹⁶

The Fifth Circuit’s decision in *N.L.R.B. v. Laborers’ International Union of North America, AFL-CIO* is instructive.¹¹⁷ There, the court found that a labor union that went through Chapter 7 was not discharged from its unfair labor practice liability and that that a successor union representing the identical members constituted an alter ego—also undertaking the liabilities.¹¹⁸

Secondly, § 524 raises a question about whether a discharge can protect anyone other than the debtor, whether a discharge can protect a buyer from successor liability. A discharge does not make a debt disappear.¹¹⁹ Rather, a discharge simply protects the debtor from “personal liability”

111. See Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM BANKR. L.J. 339, 339 (2004).

112. See generally Epstein v. Official Comm. of Unsecured Creditors (*In re Piper Aircraft Corp.*), 162 B.R. 619 (Bankr. S.D. Fla.), *aff’d*, 168 B.R. 434 (S.D. Fla. 1994), *aff’d and modified*, 58 F.3d 1573 (11th Cir. 1995) (case in which author Epstein served as Legal Representative for “[f]uture [c]laimants”).

113. See Elliott v. GM LLC (*In re Motors Liquidation Co.*), 829 F.3d 135, 154 *et seq.* (2d Cir. 2016); see also Jacob C. Cohn & C.R. “Chip” Bowles, *Caveat Emptor for § 363 Sales? Known Creditors, Successor Liability and Notice Issues from the GM Chapter 11 Case*, 35 AM. BANKR. INST. J. 16, 16 (2016).

114. 11 U.S.C. § 1141(c).

115. Kuney, *supra* note 107, at 242 n.29.

116. § 1141(d)(3).

117. 882 F.2d 949, 953–54 (5th Cir. 1989).

118. See *id.* at 952–54; see also Craig H. Averch, *Denial of Discharge Litigation*, 16 REV. LITIG. 65, 77–78 (1997); EPSTEIN ET AL., *supra* note 9, at 316.

119. See DAVID G. EPSTEIN, *BANKRUPTCY AND RELATED LAW IN A NUTSHELL* 255 (9th ed. 2017).

on the debt.¹²⁰ It also only protects the debtor.¹²¹ Section 524(e) provides in pertinent part: “discharge of a debt of the debtor does not affect the liability of any other entity.”¹²²

Because of § 524(e), courts are divided as to whether a Chapter 11 plan can provide releases of third parties.¹²³ Judge Cummings raised this § 524(e) question in dictum in *Chicago Truck Drivers, Helpers, and Warehouse Workers (Independent) Pension Fund v. Tasemkin, Inc.*¹²⁴ Does § 524(e) also preclude a bankruptcy court from ordering protection from liability for a third party such as a purchaser of the debtor’s business? He answered, “[W] need not decide whether § 524(e) of the Code, which states that discharge in bankruptcy releases only the debtor, would compel us to find that the cleansing power of a bankruptcy does not extend to the successor.”¹²⁵

Third, we should consider whether a § 363 sale should provide “the same degree of relief” as a confirmed plan. Section 363 sales and plan confirmation as co-equals is at best a “dubious premise.”¹²⁶ The goal of the drafters of Chapter 11 was to create a system of checks and balances

120. *Id.*

121. *Id.*; see Trevor W. Swett III, “Free and Clear” Bankruptcy Sale Orders and State Law of Successor Liability Claims: The Overlooked Question of Preemption, 25 AM. BANKR. L. INST. L. REV. 275, 303 (2017) (describing § 524(e) as “a manifestation of the limits of bankruptcy law: its fundamental purpose is to adjust the relations between debtors and their creditors, not those between nondebtors” and comparing successor liability to a guarantee).

122. 11 U.S.C. § 524(e) (2021).

123. See, e.g., *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020); see Richard L. Epling, *Third Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?* 75 BUS. LAW. 1747, 1748 (2020) (suggesting a statutory solution to resolve the split in the circuits); see generally Patrick M. Birney, *Section 363 Sale Orders: May Sales Be Made Free and Clear of Successor Liability Claims?* 22 J. BANKR. L. & PRAC. 5 (2013) (“releasing asset purchasers from successor liability claims is tantamount to unauthorized third-party releases”).

124. See 59 F.3d 48, 50 n.2 (7th Cir. 1995) (citing *Zerand-Bernal Group, Inc., v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994)).

125. *Id.* (citing *Zerand-Bernal Group, Inc.*, 23 F.3d at 163). Eamonn O’Hagan suggests an answer that the attorney for the buyer might argue: “[S]ection 524(e) presumes an independent basis for a third-party’s liability and . . . unlike a guarantor or co-debtor, a successor has no liability independent of the debtor’s liability.” Eamonn O’Hagan, *Can Existing Tort Claimants’ Successor Liability Claims Get Completely 363(f)’d in Chapter 11?*, 23 J. BANKR. L. & PRAC. 327, 331 n.23 (2014). We like that argument. We also like the argument that there is nothing in the language of § 524(e) or its legislative history to support the “independent basis” presumption and the argument that successor liability requires more than simply the debtor’s liability. *Id.*

126. We have “borrowed” the phrase dubious premise from Swett, *supra* note 121, at 302 (“dubious premise that the legislative intent underlying the two statutes (§§ 1141 and 363) must be the same”).

between the owners of a business and its creditors¹²⁷ that would produce a confirmed plan.¹²⁸ Chapter 11 is a process that not only results in retaining going concern value, but also an allocation of the difference between going concern value and liquidation value that was acceptable to both debt and equity.¹²⁹

In *Florida Department of Revenue v. Picadilly Cafeterias, Inc.*, the Supreme Court considered and rejected the proposition that § 363 sales provide “the same degree of relief” as a confirmed plan.¹³⁰ There, the Court, in looking only to the statutory language and disregarding varied policy arguments held that § 1146(a)’s¹³¹ stamp tax exemption applied only to sales resulting from a confirmed plan.¹³²

3. Section 363(f)

Section 363(f) provides:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if— . . . (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property.¹³³

Let’s start with what § 363(f) does say: “free and clear of any interest in such property.”¹³⁴ The phrase “interest in such property” is the pivotal phrase, not simply the word interest.

A law review article on § 363(f) has a section with the title “Section 363(f) and the Meaning of ‘Any Interest’”¹³⁵ which includes the

127. See, e.g., *In re Chavarria*, 117 B.R. 582, 584 (Bankr. D. Idaho 1990) (“Bankruptcy Code . . . is an attempt to balance the interests of debtors and their creditors”).

128. Cf. Kunej, *supra* note 107, at 235, (describing Chapter 11 as “a process originally focused on confirmation of a plan of reorganization”); see also Birney, *supra* note 123, at (“The drafters of the Bankruptcy Code surely envisioned that a typical Chapter 11 case would culminate in the confirmation of a Chapter 11 plan of reorganization.”).

129. See generally Chaim J. Fortgang & Thomas Moers Mayer, *Valuation in Bankruptcy*, 32 U.C.L.A. L. REV. 1061 (1985) (describing the role of going concern value and liquidation value in asset valuation in bankruptcy proceedings).

130. See 554 U.S. 33, 45 (2008).

131. See 11 U.S.C. § 1146(a) (2021). The critical phrase in § 1146(a) was “under” a confirmed plan. *Picadilly* contended that the term, “under,” means “in accordance with.” See *Picadilly*, 554 U.S. at 40. In contrast, the Florida Department of Revenue contended that “under” means “with the authorization of.” See *id.* at 39 (citing *Ardestani v. INS*, 502 U.S. 129, 135 (1991)); see Lorenzo Marinuzzi & Jordan A. Wishnew, *Picadilly Cafeterias: Congress Should Revisit Supreme Court’s Bright-Line Test*, 27 AM. BANKR. INST. J. 1, 1 (2008).

132. See *Picadilly*, 554 U.S. at 52–53.

133. 11 U.S.C. § 363(f)(3).

134. § 363(f).

135. Steven J. Boyajian, *The Transfer of Unemployment Insurance Experience Rates*, AM. BANKR. INST. J. 24, 24 (2013). In fairness to Mr. Boyajian, who was named a “Legal Rising

observation that because the word interest “is employed differently throughout the Code, it is not susceptible to a single definition.”¹³⁶ The observation is of course correct. Obviously, § 502(b) which disallows a claim for “unmatured interest” is using the word “interest” different from § 327 which disqualifies professionals holding an “interest adverse to the estate.”¹³⁷

While the observation is obviously accurate, it is irrelevant. “Interest” is not the operative term. The operative phrase is “interest in such property.” As Judge Leif Clark explained in *In re Fairchild Aircraft Corp.*, “[t]hese three additional words [‘in such property’] define the real breadth of *any interests*.”¹³⁸

The Bankruptcy Code does define a number of phrases.¹³⁹ Just not the phrase “interest in such property.”

Even though the Bankruptcy Code does not define the phrase “interest in such property,” the phrase is susceptible of definition from the Bankruptcy Code. The phrase “interest in property” is not employed differently throughout the code. For example, we know from case law under § 362(d)(1)¹⁴⁰ on adequate protection of an “interest in property,”¹⁴¹ case law under § 541¹⁴² on “interests of the debtor in property”¹⁴³ as property of the estate, and from § 363(f)(3), that (1) a lien is an “interest in such property” and (2) “interest in such property” is not limited to liens.¹⁴⁴

Now consider what § 363(f) does not say. Section 363 does not say free from “claims.”¹⁴⁵ Section 1141(c), unlike § 363(f), not only provides for a sale free from interests in the property “dealt with by the plan”; § 1141 provides for sale free and clear of “*claims* and interests” in such

Star” in 2016, Collier also discusses the “definition of interests,” rather than the definition of “interests in such property.” Nicole Dotzenrod, *Boyajian Named Legal Rising Star*, PROVIDENCE BUS. NEWS (Nov. 25, 2016, 5:05 AM), <https://pbn.com/Boyajian-named-legal-Rising-Star,118768/>; *e.g.*, COLLIER, *supra* note 51, at § 363.06.

136. Boyajian, *supra* note 135, at 24.

137. 11 U.S.C. § 502(b)(2) (2021); 11 U.S.C. § 327(a) (2021).

138. *Fairchild Aircraft Corp. v. Fairchild Aircraft Inc. (In re Fairchild Aircraft)*, 184 B.R. 910, 917 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

139. *See, e.g.*, § 101(30) (“individual with regular income”).

140. 11 U.S.C. § 362 (2021).

141. *See* DAVID G. EPSTEIN & STEVE H. NICKLES, *PRINCIPLES OF BANKRUPTCY LAW* 7–8 (2d ed. 2017).

142. 11 U.S.C. § 541(a)(1) (2021).

143. *See* EPSTEIN & NICKLES, *supra* note 141, at 10–12.

144. § 363(f).

144. § 363.

145. *See id.*

property.¹⁴⁶ Section 1141(c), unlike 363(f) does not say that the property sold is to be free not only from “interests in such property,” such as “liens,” but also from “claims.”¹⁴⁷

We also know from § 1141(c) that interest in the debtor’s property and “claim” are not coextensive. The word “claim” in § 1141(c) would be surplusage if “interest” in the property dealt with by the plan included all “claims.”¹⁴⁸

And § 1141(c) is not the only Bankruptcy Code provision that uses the term “claim” together with the term “interest” in property.¹⁴⁹ After providing an exhaustive if not complete list of Bankruptcy Code and Rule sections that use the terms,¹⁵⁰ Karen Cordry, bankruptcy counsel for the National Association of Attorneys General, concludes:

What can be gleaned from this list is that, while it may not be easy to precisely define an “interest,” it is at least clear that the Code drafters uniformly treated them as something different from claims. *Nowhere* in these provisions is a claim treated as a subset of the term “interest [in property].”¹⁵¹

C. Successor Liability & Circuit Court Case Law

Most bankruptcy courts have not issued an opinion as to whether § 363(f) authorizes sales free and clear of successor liability. Indeed, there are so few cases that it is not meaningful to talk about a majority view. However, because of the liberal venue rules for bankruptcy cases,¹⁵² it is meaningful to talk about the circuit court decisions that have authorized sales free and clear of successor liability. And, there are important cases from the Second, Third and Fourth Circuits that treat successor liability as a subset of “interest in such property” for purposes of § 363.¹⁵³

146. Section 1141 does not use the exact phrase “interest in such property,” it instead uses the phrase “property dealt with by the plan.” § 1141(c) (emphasis added). Anyone who paid attention in their grammar school classes covering pronouns should understand that, as Dolly Parton would say, § 363’s “such property” is “likened to” § 1141’s “property dealt with by the plan.” See *DOLLY PARTON, THE BARGAIN STORE* (RCA Victor 1975).

147. See §§ 363, 1141.

148. § 1141.

149. See, e.g., 11 U.S.C. § 106(c) (2021) (“claim or interest”); 11 U.S.C. § 1124 (2021) (“impairment of claims or interests”).

150. See *CORDRY*, *supra* note 17.

151. *Id.*

152. See 28 U.S.C. § 1408 (2021).

153. See, e.g., *Cooper v. B & L, Inc.* (*In re Bulldog Trucking, Inc.*), 66 F.3d 1390, 1395 (4th Cir. 1995); *Cinicola v. Scharffenberger*, 248 F.3d 110, 123 (3d Cir. 2001); *Licensing by Paolo v. Sinatra* (*In re Gucci*), 126 F.3d 380, 383 (2d Cir. 1997).

1. *In re Leckie*

United Mine Workers of America 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie) is one of the leading such cases.¹⁵⁴ There the Fourth Circuit heard appeals from two companion cases in which the debtors were coal companies that had outstanding liabilities under the federal Coal Industry Retiree Health Benefit Act of 1992 (the “Coal Act”).¹⁵⁵

The Coal Act provided for health and death benefits for coal industry retirees financed by premiums paid by “operators.”¹⁵⁶ The debtors were “operators.”¹⁵⁷ The Coal Act also imposed liability on any “successor in interest.”¹⁵⁸

Each of the debtors moved to sell all of its assets under § 363(f) free and clear of all “interest[s],” including successor liability claims arising under the Coal Act.¹⁵⁹ In each case, the lower courts found that (1) the purchasers would not be “successors in interest” under the Coal Act, and (2) § 363(f) authorized the sale free and clear of any successor liability under the Coal Act.¹⁶⁰

The Fourth Circuit affirmed on the basis that successor liability was an interest in such property for purposes of § 363(f).¹⁶¹ In so ruling the court expressly addressed the district court’s holding that “[a] creditor has an ‘interest in the property’ of a debtor when he has a right to seek a future money payment from the debtor.”¹⁶² That was labelled “an unduly broad interpretation of the statute.”¹⁶³

After summarily rejecting the proposition that a mere unsecured claim is not enough to be an interest, the Fourth Circuit also summarily rejected the proposition that an “interest in such property” is limited to in

154. See *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie)*, 99 F.3d 573, 576 (4th Cir. 1996). For a more complete discussion of *Leckie* and the cases leading up to *Leckie*, see David R. Kuney, *Successor Liability in Sales of a Debtor’s Assets: The Problem of the “Mere Continuation” Exception*, 6 J. BANKR. L. & PRAC. 269, 281 (1997).

155. *Leckie*’s Coal Act liabilities exceeded \$7,000,000. See *In re Leckie*, 99 F.3d at 575, 577 (citing 26 U.S.C. §§ 9701–22 (2021)). The amount of Coal Act liability of the other debtor coal company, Lady H Coal, was unliquidated. See *id.* at 580.

156. See *In re Leckie*, 99 F.3d at 577; § 9704(b)(1).

157. See *In re Leckie*, 99 F.3d at 575.

158. See *id.* at 577 (quoting § 9701(c)(2)(A)).

159. See *id.*

160. See *id.* at 578–79.

161. See *id.* at 582.

162. See *In re Leckie*, 99 F.3d at 581 (quoting *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 201 B.R. 163, 171 (S.D. W. Va. 1996)).

163. See *id.* (citing *Leckie*, 201 B.R. at 171).

rem interests.¹⁶⁴ The opinion did not expressly consider the phrase interest in property in other sections of the Bankruptcy Code such as 362¹⁶⁵ and 541.¹⁶⁶

Although the Fourth Circuit was specific about what a § 363(f) interest in property is not (i.e., not all claims, not only in rem interests) it was less specific about what a § 363(f) interest in property is.¹⁶⁷ The court concluded its discussion of § 363(f) with the following fact-specific holding:

[W]e hold that the Fund's and Plan's rights to collect premium payments from Appellees constitute interests in the assets that Appellees now wish to sell, or have sold already. Those rights are grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes: if Appellees had never elected to put their assets to use in the coal-mining industry, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek premium payments from them. Because there is therefore a relationship between (1) the Fund's and Plan's rights to demand premium payments from Appellees and (2) the use to which Appellees put their assets, we find that the Fund and Plan have interests in those assets within the meaning of section 363(f).¹⁶⁸

2. *In re* Trans World Airlines, Inc.

Seven years later the Third Circuit looked to *Leckie* in deciding whether bankruptcy courts in Delaware and other Third Circuit states could order the buyer at a § 363 sale to take free from successor liability.¹⁶⁹ In *In re Trans World Airlines, Inc.* (“TWA”), the Third Circuit held that a § 363(f) sale order may protect the purchaser of a business against successor liability.¹⁷⁰ The third and last time TWA filed for Chapter 11 it was to sell its assets to American Airlines under § 363(f).¹⁷¹ Among

164. See *id.* at 582 (first citing § 363(f); then citing *P.K.R. Convalescent Ctrs. v. Virginia* (*In re* P.K.R. Convalescent Ctrs.), 189 B.R. 90, 92 (Bankr. E.D. Va. 1995); then citing *In re Fairchild Aircraft*, 184 B.R. 910, 917–18 (Bankr. W.D. Tex. 1995); cf. Reed, *supra* note 17, at 192–94 (arguing that all claims including successor liability claims are in rem “interests in property,” albeit “inchoate interests,” because of their potential to obtain liens).

165. See 11 U.S.C. § 362(d)(1) (2021) (“adequate protection of an interest in property”); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“‘interest in property’ certainly summons up such concepts as ‘fee ownership,’ ‘life estate,’ ‘co-ownership,’ and ‘security interest. . .’”).

166. See § 541(a)(1) (“interests of the debtor in property”).

167. See *In re Leckie*, 99 F.3d at 582.

168. See *id.* at 582; see also § 363(f).

169. See *TWA*, 322 F.3d 283, 284–85, 289 (3d Cir. 2003) (citing *In re Leckie*, 99 F.3d at 582); see also § 363(f).

170. See *TWA*, 322 F.3d at 285.

171. See *id.* at 286 n.2.

TWA's many problems were two groups of employment discrimination claims.¹⁷² The first group of discrimination claims had resulted in a class action which was settled pre-petition, with the class members receiving travel vouchers usable indefinitely by class members and their families.¹⁷³ The second group of employment discrimination claims were still being investigated by the Equal Employment Opportunity Commission at the time of TWA's bankruptcy filing.¹⁷⁴

American Airlines of course wanted the court's sale order to include a provision that pursuant to § 363(f), the assets would be delivered to American free and clear of all interests in such property, including "all asserted or unasserted, known or unknown, employment-related claims, payroll taxes, employee contracts, employee seniority accrued while employed with any of the Sellers and successorship liability accrued up to the date of closing of such sale."¹⁷⁵ The bankruptcy court issued such an order.¹⁷⁶ The bankruptcy court's order also provided "[p]ursuant to sections 105(a) and 363 of the Bankruptcy Code, all Persons are enjoined from taking any action against Purchaser . . . to recover any claim which such Person had solely against Sellers. . . ."¹⁷⁷

The district court and Third Circuit affirmed the bankruptcy court's order.¹⁷⁸ In so ruling, the Third Circuit relied on the Fourth Circuit's decision in *Leckie*: "

In arriving at this conclusion, we explored the significance of the Fourth Circuit's decision in *In re Leckie* Here the Airlines correctly assert that the Travel Voucher and EEOC claims at issue had the same relationship to TWA's assets in the § 363(f) sale as the employee benefits did to the debtors' assets in *Leckie*. In each case it was the assets of the debtor which gave rise to the claims. Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Furthermore, TWA's investment in commercial aviation is inextricably linked to its employment of the Knox-Schillinger [class action] claimants as flight attendants, and its ability to distribute travel vouchers as part of the settlement agreement. While the interests of the EEOC and the Knox-Schillinger class in the assets of TWA's bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, the reasoning of *Leckie* . . . suggests that they are interests in property within the

172. *See id.* at 285.

173. *See id.*

174. *See id.* at 286.

175. *TWA*, 322 F.3d at 286–87 (citing 11 U.S.C. § 363(f) (2021)).

176. *See id.* at 287.

177. *Id.* (citing §§ 105(a), 363(f)).

178. *See id.* at 287, 293.

meaning of section 363(f) in the sense that they arise from the property being sold.¹⁷⁹

That is not exactly the “reasoning of *Leckie*.” In *Leckie*, the holding that successor liability was an “interest in such property” was “grounded” in the purchaser’s post-bankruptcy use of the property, not from “the property being sold” itself.¹⁸⁰

The Third Circuit then finds further support for its ruling that successor liability is an “interest in such property” for purposes of § 363 in the language of § 363(f)(3)—“if such interest is a lien.”¹⁸¹ We agree with Collier and the other sources cited in the Third Circuit’s *TWA* opinion that § 363(f)(3) means that a “lien” is a type of “interest in such property” and that there must be types of interests in property other than a lien.¹⁸² Every first year property student (and a lot of people who have never been to law school) know that there are many forms of “interests in such property” other than liens. No one is arguing that the phrase “interests in such property” in § 363(f)¹⁸³ is limited to liens.

179. See *id.* at 289–90 (first citing § 363(f); then citing *In re Leckie*, 99 F.3d 573, 582 (4th Cir. 1996); and then citing *Folger Adam Sec., Inc. v. DeMatteis/MacGregor, J.V.*, 209 F.3d 252, 259 (3d Cir. 2000)). Even though the Third Circuit’s *TWA* opinion is based on the Fourth Circuit’s *Leckie* opinion, two experienced practitioners from Drinker Biddle & Reath LLP describe the *TWA* opinion as “seminal.” See Heath D. Rosenblat & Joseph N. Argentina, Jr., *Would Free-and-Clear Jurisprudence Hold Up Before the Supreme Court? A Question With the Potential of Having an Unpopular Answer*, 36 AM. BANKR. INST. L. J. 34, 58–59 (2017). Perhaps because *TWA* was a Third Circuit decision and thus available to all debtors incorporated in Delaware or with a subsidiary incorporated in Delaware. See *Third Circuit Courts*, U.S. COURT OF APPEALS FOR THE THIRD CIR., <https://www.ca3.uscourts.gov/third-circuit-courts> (last visited Mar. 20, 2021) (Third Circuit includes Delaware Bankruptcy Court). Whatever the reason, cases and commentaries, including this paper, focus more on *TWA* more than *Leckie*.

180. 99 F.3d at 582.

181. See *TWA*, 322 F.3d at 290 (quoting § 363(f)).

182. See *id.* (first citing § 363(f)(3); then citing COLLIER, *supra* note 51, at § 363.06 [1]).

183. See *TWA*, 322 F.3d at 290 (citing § 363). The term “interests” also appears in U.C.C. section 9-617 which deals with the rights of a buyer of assets at UCC foreclosure sale. U.C.C. § 9-617 (AM. LAW INST. & UNIF. LAW COMM’N 2019). Section 9-617(b) provides in pertinent part “a transferee that acts in good faith takes free of the rights and *interests* described in subsection (a)” *Id.* § 9-617(b) (emphasis added). Some commentators have argued that case law holding that “interest” as used in section 9-617 does not include successor liability claims supports the conclusion that “interests in such property” as used in § 363(f) does not include successor liability claims. See, e.g., Rachel P. Corcoran, *Why Successor Liability Claims Are Not “Interests in Property” Under Section 363(f)*, 18 AM. BANKR. INST. L. REV. 698, 717–19 (2010) (an uncommonly thorough LLM thesis). There are three problems with this argument. First, and most obvious, the same word often has different meanings in different statutes. Second, and almost as obvious, there are important factual differences—e.g., who the seller is, what role the court has—between a section 9-617 sale and a § 363(f) sale. Third, the operative language in section 9-617(b) is “interests described in subsection [9-617](a)” which describes “security interests.” U.C.C. § 9-617(a)(2)–(3). In U.C.C. section 9-617, unlike Bankruptcy Code § 363(f), “interest” is indeed limited to liens.

Courts and commentators, however, have argued that the phrase “interests in such property” in § 363(f) is limited to *in rem* interests.¹⁸⁴ We respectfully disagree with the Third Circuit’s conclusion, that “to equate interests in property with only *in rem* interests . . . would be inconsistent with section 363(f)(3).”¹⁸⁵

As we noted earlier, Judge Leif Clark noted in *In re Fairchild Aircraft Corp.*, the pivotal language is the phrase “interests in such property”, not the word “interests”:

Section 363(f) does not authorize sales free and clear of *any interest*, but rather of *any interest in such property*. These three additional words define the real breadth of *any interests*. The sorts of interests impacted by a sale “free and clear” are *in rem* interests which have attached to the property . . . [W]hile successor liability may give a party an alternative entity from whom to recover, the doctrine does not convert the claim to an *in rem* action running against the property being sold.¹⁸⁶

In *TWA*, the Third Circuit described its result as the “more expansive reading of ‘interests in [such] property’” and stated that there was a “trend” toward this expansive reading.¹⁸⁷ In support of this “trend,” *TWA* cites only one case, a bankruptcy court decision from Virginia,¹⁸⁸ in the circuit that decided that *Leckie*. Then, in *In re Chrysler LLC*, discussed below, the Second Circuit followed the “trend,” relying on and quoting from the statement in the *TWA* opinion about the “trend.”¹⁸⁹

184. See, e.g., *In re Fairchild Aircraft*, 184 B.R. 910, 918 (Bankr. W.D. Tex. 1995).

185. *TWA*, 322 F.3d at 290 (citing § 363). For a less “respectful” disagreement with the Third Circuit, see Karen Cordry, *Textualism, Originalism and the Code: Arguments for a Heretical View of § 363*, 39 AM. BANKR. INST. J. 20, 28 n.12 (2020) (“ . . . a *non sequitur* in *In re TWA*, where the court, after correctly noting that liens in § 363(f)(3) were not the *only* form of *in rem* “interest,” then jumped to the conclusion that an *in personam* claim was also an interest—a result that plainly does not follow from the mere fact that there are a variety of *in rem* interests.”); see also Reed, *supra* note 17, at 198 (“the reasoning underlying these decisions [*Leckie* and *TWA*] is at best insufficiently articulated and at worst flawed”).

186. 184 B.R. at 917–18, 920 (citing § 363).

187. 322 F.3d at 289 (citing COLLIER, *supra* note 51, at § 363.06 [1]).

188. See *id.* at 290 (citing P.K.R. Convalescent Ctrs. v. Virginia (*In re P.K.R. Convalescent Ctrs.*), 189 B.R. 90, 94 (Bankr. E.D. Va. 1995)).

189. See *In re Chrysler LLC*, 576 F.3d 108, 124 (2d Cir. 2009) (quoting *TWA*, 322 F.3d at 289) (citing Kuney, *supra* note 107, at 267).

D. Second Circuit Car Company Cases (Chrysler & Motors Liquidation [General Motors])

I. Chrysler

In *In re Chrysler LLC*, the Second Circuit considered objections to the bankruptcy court's approval of a § 363(f) sale order.¹⁹⁰ The sale order, entered a little more than a month after the petition, authorized the sale of all the assets of the debtor ["Old Chrysler"] to a newly formed car company ["New Chrysler"].¹⁹¹ The order provided, inter alia, for the termination of any right to pursue claims against the § 363_asset purchaser "on any theory of successor or transferee liability, . . . whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated."¹⁹²

In affirming the sale order, the Second Circuit relied on the Third Circuit's *Leckie* decision and the Fourth Circuit's *TWA* decision:

We agree with *TWA* and *Leckie* that the term "any interest in property" encompasses those claims that "arise from the property being sold." By analogy to *Leckie* (in which the relevant business was coal mining), "[appellants'] rights are grounded, at least in part, in the fact that [Old Chrysler's] very assets have been employed for [automobile production] purposes: if Appellees had never elected to put their assets to use in the [automobile] industry, and had taken up business in an altogether different area, [appellants] would have no right to seek [damages]".¹⁹³

Again, in *Chrysler*, like *Leckie* and *TWA*, the circuit court is focusing on the purchaser's post-petition use of the purchased assets, not the purchased assets themselves.¹⁹⁴

In *Chrysler*, unlike *Leckie*¹⁹⁵ and *TWA*, the court expressly addressed the argument that since § 1141(c)(3) provided for sales free and

190. *See id.* at 112–13.

191. *See id.* at 111–12 (citing § 363).

192. *Id.* at 127.

193. *Id.* at 126 (quoting 99 F.3d 573, 582 (4th Cir. 1996)) (citing 322 F.3d at 290) (alterations in original).

194. *In re Chrysler LLC*, 576 F.3d at 126 (quoting 99 F.3d at 582) (citing 322 F.3d at 290) (alterations in original).

195. *See* 99 F.3d at 576 (citing § 363); *see also* Reply Brief for Appellants at 12, *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996) (Nos. 96-1708, 96-1739, 96-1849, 96-1850), 1996 WL 33417845 (citing § 524). In fairness to our Fourth Circuit, the Appellants' briefs in *Leckie* do not even mention § 1141. *See id.*; *see also* Brief for Appellants, *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996) (Nos. 96-1708, 96-1739, 96-1849, 96-1850), 1996 WL 34563145. And in fairness to the many law firms representing the many Appellants, the Appellants reply brief makes a strong argument based on § 524(e) that the *Leckie* opinion does not expressly address: "Finally, in a further attempt to eliminate the

clear of all “claims and interests” and § 363(f) only provided for sales free and clear of “interests” that a § 363 sale order could not extinguish successor liability torts claims.¹⁹⁶ The Second Circuit used less than a paragraph addressing this argument, making essentially three points: (1) it did not put “such weight” on the differences in the wording of § 363(f) and § 1141(c), (2) the two statutes apply in different situations, and (3) because of the “expanded role” of § 363 sales in bankruptcy cases, “it makes sense to harmonize the application of § 1141(c) and § 363(f) to the extent permitted by the statutory language.”¹⁹⁷ The opinion did not further focus on the “statutory language” or otherwise explain why a sale free and clear of successor liability claims was “permitted by the statutory language.”¹⁹⁸

Successor liability is more like a “claim” which is defined as a “right to payment, whether . . . contingent . . . [or] unmatured,” rather than interest in property.¹⁹⁹ Reading successor liability claims into the phrase “interests in such property” in § 363(f) when the word “claims” and interest in property both appear in § 1141(c) does not “harmonize” the statutory language of the two statutory provisions.²⁰⁰ Reading successor claims into the word “interests” in § 363(f) when the word “claims” and “interests in property” both appear in § 1141 is either treating the word “claims” in § 1141 as surplusage or adding words to § 363.²⁰¹ In sum, §

Purchasers’ potential future joint and several liability under the Coal Act, the Debtors argue that Section 524(e) of the Bankruptcy Code prohibits only a formal discharge of a nondebtor’s “preexisting” joint and several liability, and contend that a nondebtor may obtain a *de facto* discharge of that liability without running afoul of Section 524(e). This argument, however, would permit a nondebtor to obtain through the back door what it cannot obtain through the front door—a discharge of its potential joint and several Coal Act tax liability. Such an incongruous result should not be condoned.” Reply Brief for Appellants at 12, *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 99 F.3d 573 (Nos. 96-1708, 96-1739, 96-1849, 96-1850).

196. See *In re Chrysler LLC*, 576 F.3d at 125 (first citing § 1141(c); and then citing § 363).

197. *Id.* (first citing § 363; then citing § 1141; and then citing *In re Golf, LLC*, 322 B.R. 874, 877 (Bankr. D. Neb. 2004)).

198. See *id.* The *Chrysler* opinion does go on to suggest that courts have already harmonized §§ 363 and 1141 “in other contexts.” *Id.* at 126. The two cases cited in support of that proposition—*JCB, Inc. v. Union Planters Bank, N.A.*, 539 F.3d 862, 870 (8th Cir. 2008) and *Elixir Indus., Inc. v. City Bank & Trust Co. (In re Ahern Enters.)*, 507 F.3d 817, 820–22 (5th Cir. 2007)—simply hold that § 1141 sales can extinguish liens, without even mentioning § 363(f).

199. § 101.

200. *In re Chrysler LLC*, 576 F.3d at 125; see O’Hagan, *supra* note 125 (reading successor liability claims into the word “interests” also creates adequate protection problems. Under § 363(e), the holders of § 363 “interests” are entitled to adequate protection).

201. See §§ 363, 1141; see also Swett, *supra* note 121, at 302 n.166 (“*In re Stinson*, 285 B.R. 239 (Bankr. W.D. Va. 2002), provides as instructive analogy. A former Chapter 11 debtor complained that he had been denied a job by a private employer in violation of § 525(b) of the Code. That provision forbids private employers to discriminate against an individual

1141(c)'s use of both "claims" and interest in property means "interests in such property" in § 363 does not include "claims."

The creditor group which had appealed the bankruptcy court's order in the *Chrysler* case to the Second Circuit then appealed the Second Circuit's decision to the Supreme Court, seeking a stay of the sale.²⁰² While Justice Ginsburg granted a temporary stay, the Court, in a per curiam opinion, denied the Indiana Funds' request for a permanent stay and vacated the temporary stay.²⁰³ The Court's per curiam opinion explicitly stated that it offered no opinion on the merits of the creditors' appeal.²⁰⁴

A day later the sale closed.²⁰⁵ More than six months later, the Supreme Court issued a short, cryptic decision vacating both the Second Circuit's and the bankruptcy court's opinions on Chrysler's § 363 sale.²⁰⁶ Again, the Supreme Court voiced no opinion on the Second Circuit's interpretation of § 363(f).²⁰⁷ The decision read: "Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit with instructions to dismiss the appeal as moot."²⁰⁸ The Second Circuit then vacated its *Chrysler* opinion.²⁰⁹

2. General Motors

About the same time that all of the assets of Old Chrysler had been sold to New Chrysler in a § 363 sale, all of the assets of Old GM had been sold to New GM in a § 363 sale.²¹⁰ Again, the asset sale was approved by a sale order containing broad injunctive language purporting to bar

"with respect to employment" based solely on his or her prior bankruptcy. By contrast, § 525(a) deals with *public* employers and makes it unlawful for them not only to engage in such discrimination "with respect to employment," but also "to deny employment" to an individual because of his or her history as a bankrupt. The contrast between these provisions led the bankruptcy court to conclude that reading denials of employment into section 525(b) would make superfluous the express provision of that ground of liability in section 525(a), and it therefore dismissed the plaintiff's complaint.").

202. See *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009).

203. See *id.*

204. See *id.*

205. See Fred N. David, *Interpreting the Supreme Court's Treatment of the Chrysler Bankruptcy and Its Impact on Future Business Reorganizations*, 27 EMORY BANKR. DEV. J. 25, 27 (2010).

206. *Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009), remanded to *sub nom.*, *Ind. State Police Pension Tr. v. Chrysler LLC*, 592 F.3d 370 (2d Cir. 2010); see David, *supra* note 208, at 27–28 (suggesting reasons that the Supreme Court vacated the Second Circuit's decision and possible reasons for the six-month delay).

207. *Id.*

208. *Chrysler LLC*, 558 U.S. at 1087.

209. *Chrysler LLC*, 592 F.3d at 372.

210. *In re Gen. Motors Corp.*, 407 B.R. 463, 520 (Bankr. S.D.N.Y. 2009) *aff'd sub nom.*, *In re Motors Liquidation Corp.*, 428 B.R. 43, 46 (S.D.N.Y. 2010) (granting sale).

“rights or claims based on any successor or transferee liability” against New GM, other than certain obligations that New GM expressly agreed to assume.²¹¹

New GM ordered a recall for millions of vehicles in 2014, five years after the bankruptcy sale.²¹² Following the recall announcement, class action lawsuits were filed against New GM, alleging liability for the tortious conduct of both Old and New GM.²¹³ New GM immediately sought to enjoin all of the tort claims through enforcement of the sale order by the bankruptcy court.²¹⁴ The bankruptcy court held that all claims arising from Old GM’s conduct fell within the scope of the sale order precluding successor liability.²¹⁵ The court certified its order for direct appeal to the Second Circuit, which took on the appeal.²¹⁶

Even though the Second Circuit had vacated its *Chrysler* opinion, the purchaser of all of the assets of General Motors asserted in its argument to the Second Circuit that “*In re Chrysler, LLC*, resolved that successor liability claims are interests.”²¹⁷ And, even though the Second Circuit stated that the *Chrysler* opinion “is no longer controlling precedent,”²¹⁸ the portion of the *Motors Liquidation* opinion on § 363 sales and successor liability reads as if the reasoning and result of *Chrysler* was still controlling precedent in the Second Circuit.²¹⁹

After briefly recounting what some other courts and Collier²²⁰ have said about § 363 sales and successor liability, *Motors Liquidation*

211. *In re Motors Liquidation Corp.*, 529 B.R. 510, 534–35 (Bankr. S.D.N.Y. 2015).

212. *See id.* at 521.

213. *See id.*

214. *Id.* Trevor Swett III points out that the claims in *Motors Liquidation* unlike the claims in *Leckie* and *TWA* are based on state law and so there are questions as to whether § 363(f) can preempt state law that the bankruptcy court and the Second Circuit did not consider. *See Swett, supra* note 121, at 282 *et seq.*

215. *In re Motors Liquidation Corp.*, 529 B.R. at 598.

216. *See In re Motors Liquidation Corp.*, 829 F.3d 135, 144 (2d Cir. 2016), *rev’g in part, aff’g in part, and vacating as moot*, 529 B.R. 510, 598 (Bankr. S.D.N.Y. 2015), *cert. denied*, *GM LLC v. Elliott*, 137 S. Ct. 1813 (2017).

217. *Id.* at 154.

218. *Id.* at 155 (citing *In re Chrysler LLC*, 576 F.3d 108, 124 (2d Cir. 2009)).

219. Most of the *Motors Liquidation* opinion deals with the constitutional issues raised by enforcing the sale order against claimants who did not receive actual notice of the proposed sale of all of the assets. *Cf., In re Motors Liquidation Co.*, 529 B.R. at 523 (“the real issues before the Court involve questions of procedural due process”); *see generally* Cohn & Bowles, *supra* note 113 (discussing the court’s holding that “known creditors are entitled to actual notice of proceedings”).

220. We question the court’s citation of *Collier on Bankruptcy* § 363.06[7] for its conclusion that “successor liability claims can be “interests.”” *In re Motors Liquidation Co.*, 829 F.3d at 155. *Collier on Bankruptcy* § 363.06[7] provides “successor liability is a nonbankruptcy state law issue, and bankruptcy should not change the result that would otherwise obtain under nonbankruptcy law.” COLLIER, *supra* note 51, at § 363.06[7]. Collier is a multi-

concluded, “[w]e agree that successor liability claims can be ‘interests’ when they flow from a debtor’s ownership of transferred assets.”²²¹ Then the *Motors Liquidation* opinion quotes from the “no longer controlling precedent” *Chrysler* opinion: “[I]t makes sense to ‘harmonize’ Chapter 11 reorganizations and § 363 sales ‘to the extent permitted by the statutory language.’”²²² Like the “no longer controlling” *Chrysler* opinion, the *Motors Liquidation* opinion does not explain how the “statutory language” harmonizes § 363(f)’s “free and clear of any interest in such property” with § 1141(c)’s “free and clear of all claims and interests of creditors.”²²³

In *In re Catalina Sea Ranch, LLC*, the most recent bankruptcy court decision holding that a § 363 sale free and clear of “all interests in Debtor’s property means a sale free and clear of successor liability,” the California bankruptcy court does not even reference the *Motors Liquidation* opinion.²²⁴ While the *Catalina* decision is based in part on precedent—“[n]umerous courts have held that ‘any interest’ includes any successor liability”—the cases cited to support that statement are *Leckie*, *TWA*, and California bankruptcy court decisions.²²⁵ Not even a citation to *Motors Liquidation*.

The *Catalina Sea Ranch* opinion is problematic not so much for what it does not say about *Motors Liquidation*,²²⁶ but rather for what it does say about (1) “the plain meaning” of “interest” in § 363 and (2) the court’s “understanding” of “successor liability” as reflected in the following statement:

So a creditor who asserts successor liability in the context of a bankruptcy sale is asserting that the estate’s property cannot be transferred without the claim—i.e., that the claim legally shares in, or has a stake in, whatever profits, proceeds, or other value will be derived in future from the property being transferred. That fits within the common

volume loose-leaf treatise that is revised periodically. The page we quoted from is dated 2017. Perhaps, Collier took a different position in the prior version of that page.

221. *In re Motors Liquidation Co.*, 829 F.3d 135, 155 (2d Cir. 2016).

222. *Id.* (quoting *In re Chrysler*, 576 F.3d at 125) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

223. *See id.* at 159.

224. *In re Catalina Sea Ranch, LLC*, No. 2:19-bk-24467-NB, 2020 Bankr. LEXIS 1083, at *40 (Bankr. C.D. Cal. Apr. 13, 2020).

225. *Id.* at 35 (first citing *In re Leckie*, 99 F.3d 573, 576, 581–82 (4th Cir. 1996); then citing *TWA*, 322 F.3d 283, 289 (3d Cir. 2003); then citing *Myers v. United States*, 297 B.R. 774, 784 (S.D. Cal. 2003); and then citing *In re Wilkes Bashford Co.*, 09-33497 TEC, 2009 Bankr. LEXIS 5063, at *9 (Bankr. N.D. Cal. Nov. 25, 2009)).

226. *Cf.*, Swett, *supra* note 121, at 124 (describing the *General Motors* case as the “‘high watermark’ of ‘free and clear’ sale orders crafted under section 363(f) of the Bankruptcy Code”).

understanding of an “interest,” as reflected in Webster’s dictionary definition. Therefore, under the plain meaning of § 363(f), a bankruptcy sale can be free and clear of successor liability.²²⁷

First, Webster’s many plain meanings of the word “interest” are irrelevant. Again, the operative phrase is “interest in such property,” not “interest.”

Second, “*profits, proceeds, or other value derived in future from the property being transferred*” is irrelevant to successor liability.²²⁸ When S Corp. sells all of its assets to B Inc. and subsequently to C a creditor of S Corp. who obtains a successor liability judgment, then C’s collection of that judgment is not dependent on whether there have been profits, proceeds, or other value derived in the future from the property being transferred. C’s recourse is not limited to the property B Inc. received from S Corp. or the value of that property.²²⁹ C can look to all of the property of B Inc. that is available for the satisfaction of judgments.²³⁰ The Bankruptcy Court for Central District of California’s understanding of successor liability as stated in *Catalina Sea Ranch* is a misunderstanding.²³¹

We are neither the first nor the fiercest law review critics of the results and reasoning in the circuit court opinions protecting buyers of

227. *In re Catalina Sea Ranch, LLC*, 2020 Bankr. LEXIS 1083, at *33 (emphasis added) (citations omitted) (first citing *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019); and then citing *TWA*, 322 F.3d at 289); *but see Reed, supra* note 17, at 213 (“[I]t is unclear how the *TWA* and *Leckie Smokeless* models of ‘interest in property’ can be reconciled with the plain meaning of the term ‘interest [in such property]’ as it is utilized elsewhere in the Code where the term connotes a property interest recognized under state law.”).

228. *In re Catalina Sea Ranch, LLC*, 2020 Bankr. LEXIS 1083, at *33 (emphasis added).

229. *See Raytech Corp. v. Official Comm. of Unsecured Creditors of Raytech Corp.* (*In re Raytech Corp.*), 217 B.R. 679, 692–93 (Bankr. D. Conn. 1998).

230. *Id.*

231. *See In re Catalina Sea Ranch, LLC*, 2020 Bankr. LEXIS 1083, at *33 (“Therefore, under the plain meaning of § 363(f), a bankruptcy sale can be free and clear of successor liability.”). If you have relatives or friends who aspire to clerk for the bankruptcy court in the Central District of California and are considering where to go to law school, you should probably advise them to choose a law school other than the University of Richmond Law School. Maybe Syracuse?

businesses in § 363 sales from successor liability.²³² Not surprisingly,²³³ as *Catalina Sea Ranch* illustrates, bankruptcy courts are, nonetheless relying on these decisions to protect § 363(b) buyers from successor liability.

II. SECTION 363 SALES & EXPERIENCE RATING

Bankruptcy courts are also relying on the circuit court opinions in *Leckie* and *TWA* to protect buyers of businesses at § 363 sales from the “experience rating” of the debtor/seller.

Generally, state employment benefit statutes set the amount that a business has to pay the state for unemployment and workers’ compensation coverage for its employees based on that business’s “experience rating,” i.e., statistical information about how many former employees of that business received unemployment or workers’ compensation benefits in recent years.²³⁴ There are least three reasons for this reliance on “experience rating”: (1) unemployment and workers compensation are to some extent within the control of the employer; (2) lower experience ratings will be an incentive to employment stabilization and safer work places; and (3) higher experience ratings have the further effect of allocating the burden of paying for unemployment and workers compensation benefits to those businesses whose employees have received the payments.²³⁵

Thus, if Oldco Widget Corp., a company that has manufactured widgets for years, is in financial distress in 2021 and has laid off a

232. See George W. Kuney, *Bankruptcy and Recovery of Tort Damages*, 71 TENN. L. REV. 81, 106 (2003). While we are not certain that Professor Kuney was the “first” or the “fiercest” critic of *Leckie* and *TWA*, we are pretty sure he has been the most persistent. See generally George W. Kuney, *ABI Commission Testimony*, 15 TRANSACTIONS: TENN. J. OF BUS. L. 333, 333 (2014); George W. Kuney, *Vacating Chrysler*, 19 J. BANKR. L. & PRACT. (2010); George W. Kuney, *A Taxonomy and Evaluation of Successor Liability (Revisited)*, 18 TRANSACTIONS: TENN. J. OF BUS. L. 242, 242 (2017); George W. Kuney, *Let’s Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1266 (2004); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 21 (2004); George W. Kuney, *Further Misinterpretation of Bankruptcy Code Section 363(f): Elevating In Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Developments*, 76 AM. BANKR. L.J. 289, 290 (2002); Kuney, *supra* note 107, at 235.

233. See Judge Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 AM. BANKR. L.J. 547, 547 (2006) (“I find—too often—that . . . articles argue for positions helpful neither in practice nor as an avenue of analysis.”); see also Joëlle Anne Moreno, *99 Problems and The Bitchin’ Is One: A Pragmatist’s Guide to Student-Edited Law Reviews*, 33 TOURO L. REV. 407, 421 (2017) (“Consideration of practice-oriented work that informs teaching and includes sound legal analysis should be encouraged.”).

234. See Almon R. Arnold, *Experience Rating*, 55 YALE L.J. 218, 218 (1945).

235. See Emerson P. Schmidt, *Experience Rating and Unemployment Compensation*, 55 YALE L.J. 212, 242 (1945).

significant number of employees or has neglected workplace safety and had a significant number of employees with injuries, then Oldco Widget Corp. will have a higher experience rating in 2022. And, as a result of its higher experience rating, Oldco Widget Corp. will pay higher taxes in 2022.²³⁶

If Newco Widget Company is organized in 2022 and starts its own widget business by buying “new” assets and hiring new employees, Newco will have to pay unemployment and workers’ compensation taxes in 2022 even though it did not exist in 2021 and so has no actual “experience rating.” But, Newco taxes will be based on a much lower rate than Oldco’s. New businesses are assigned a relatively low “new entity” rate that remains effective until an experience rating can be established.²³⁷

If, instead of starting its own widget business in 2022, Newco Widget Company buys all of the assets of Oldco Widget Corporation in 2022, then under the laws of most states, the experience rating of Oldco Widget Corporation will transfer to Newco Widget Company.²³⁸ Newco Widget Company will have to pay higher unemployment and workers’ compensation taxes if it buys Oldco’s assets than it if starts its own business with new assets and new employees, so there must have been advantages to the owners of Newco to buying the assets of an existing business with experienced employees instead of starting its own business, buying new assets and finding and training new employees.

Are there employment tax advantages to Oldco in filing for bankruptcy if it wants to continue in business? If it wants to sell its assets?

If Oldco Widget Corporation, a business facing higher unemployment and workers’ compensation taxes in 2022 because of its experience rating in recent years, wants to continue in business, then filing for bankruptcy will not affect its 2022 unemployment and workers’ compensation taxes.²³⁹ While the filing of a bankruptcy petition results in a debtor in possession which is treated as a new legal entity for some purposes,²⁴⁰ a

236. *See id.* at 242, 246. An employer’s payment to the state for the unemployment and workers’ compensation benefits for its employees is variously called “contributions” or “taxes.”

237. *See, e.g.,* Berry Contracting, L.P. v. Tex. Workforce Comm’n, No. 03-03-00510-CV, 2004 Tex. App. LEXIS 4530, at *2 (Tex. App. May 20, 2004) (citing TEX. LAB. CODE ANN. § 204.006 (West 2020)).

238. *See* Boyajian, *supra* note 135, at 24; *see* Note, *Transfer of Experience Rating for Unemployment Compensation Contributions to Successor Employing Units*, 60 HARV. L. REV. 276, 279 (1946).

239. Schmidt, *supra* note 235, at 251.

240. *Cf.,* N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) (“For our purposes, it is sensible to view the debtor-in-possession as the same ‘entity’ which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.”).

debtor in possession is not a new taxable entity.²⁴¹ And, while the confirmation of a restructuring plan results in a § 1141 discharge, that discharge does not preclude state taxing authorities from applying OldCo Widget Corporation's pre-petition experience rating in determining OldCo Widget Corporation's post-petition tax rate.²⁴²

As *In re A.C. Williams Co.*, one of the first reported cases to consider such a set of facts, cogently explains:

[T]he higher rate levied has no relation to the filing of bankruptcy by the debtors, or pre-petition debts, dischargeable or not. The higher rate is related to the debtors' pre-petition experience of safety, or lack of it, in the workplace. The rate determined by the Bureau would be the same whether the employers were "debtors" under Title 11 of the Code, or not The debtor may avail itself of the bankruptcy laws to achieve a "fresh start", but . . . not . . . a "head start" when a non-debtor employer would pay a higher rate based upon the same experience.²⁴³

Thus, the answer to the question of whether there are lower employment tax benefits to a bankruptcy filing by a business that wants to restructure its debts and continue as an operating business is clear—no.²⁴⁴ The answer to the related question of whether there are lower employment tax benefits from a bankruptcy filing that wants to sell all of its assets while once clear has become less clear. Because of *Leckie* and *TWA*.²⁴⁵

A. *In re Wolverine Radio Co., Inc.*

Before the Leckie Smokeless Coal bankruptcy and the Trans World Airlines bankruptcy, there was the Wolverine Radio Company, Inc. ("Wolverine Radio") bankruptcy.²⁴⁶ Wolverine Radio owned and

241. See, e.g., *In re A.C. Williams Co.*, 51 B.R. 496, 500–01 (Bankr. N.D. Ohio 1985) (citing 11 U.S.C. § 525 (2021)).

242. Patricia L. Barsalou, *State Unemployment Contributions: Setting Tax Rates After Bankruptcy*, 14 AM. BANKR. INST. J 10, 10 (1996) ("A bankruptcy filing does not entitle a debtor to a 'new entity' unemployment tax rate, shield a debtor from the operation of the applicable state law, or prohibit state unemployment agencies from considering pre-petition experience ratings when calculating a debtor's post-bankruptcy unemployment tax rate.").

243. 51 B.R. at 500–01 (citing § 525).

244. See *id.* ("No court has stretched the intent of section 525 so far and this court will not be the first to do so. The debtor may avail itself of the bankruptcy laws to achieve a "fresh start", but it may not shield itself from state authority and use section 525 to achieve a "head start" when a non-debtor employer would pay a higher rate based upon the same experience.").

245. See 99 F.3d 573, 587 (4th Cir. 1996); see also 322 F.3d 283, 293 (3d Cir. 2003).

246. See *Mich. Empl. Sec. Comm'n v. Wolverine Radio Co.* (*In re Wolverine Radio Co.*), 930 F.2d 1132, 1135 (6th Cir. 1991), *cert. denied*, 503 U.S. 978, 978 (1992).

operated a radio station in Midland, Michigan.²⁴⁷ In April 1984, Wolverine Radio filed a Chapter 11 petition.²⁴⁸ More than a year later, the bankruptcy court confirmed Wolverine Radio's Chapter 11 plan.²⁴⁹ The plan was a liquidating plan providing for a "'free and clear' sale of Wolverine[] [Radio's] assets."²⁵⁰

Because of Wolverine Radio's recent history of laying off employees, if Wolverine Radio had continued operating the radio station instead of filing for bankruptcy, its contribution rate for state unemployment benefits for 1986 would be ten percent.²⁵¹ And, if Wolverine Radio had filed a Chapter 11 petition, confirmed a restructuring plan, and continued operating the radio station, its 1986 contribution rate would be the same ten percent.²⁵² Finally, if Wolverine Radio had sold all of its assets outside of bankruptcy, the purchaser's contribution rate in 1986 would be the same ten percent.²⁵³

A "new employer's" contribution rate would be only 2.7 percent.²⁵⁴ Understandably, the purchaser of Wolverine Radio's assets under Wolverine Radio's liquidating Chapter 11 plan wanted "new employer" status.²⁵⁵

And so, in response to a motion nominally filed by Wolverine Radio, the bankruptcy court entered an order prohibiting the state from "assigning Debtor's experience rating to purchasers" so that purchaser would only have to pay the 2.7 percent "new employer rate."²⁵⁶ When the district court reversed, Wolverine Radio appealed to the Sixth Circuit.²⁵⁷

In affirming the district court's transfer of Wolverine Radio's ten percent experience-based tax rate to the purchaser, the Sixth Circuit reasoned:

- (1) If Wolverine Radio had not only filed for Chapter 11 but confirmed a restructuring plan, then Wolverine Radio would be taxed at the 10 percent rate;²⁵⁸

247. *See id.*

248. *Id.*

249. *See id.*

250. *See id.*

251. *In re Wolverine Radio Co.*, 930 F.2d at 1136.

252. *See id.* at 1148.

253. *Id.*

254. *Id.* at 1136.

255. *See id.* at 1136–37.

256. *In re Wolverine Radio Co.*, 930 F.2d at 1137.

257. *Id.* at 1134.

258. *See id.* at 1148–49.

- (2) Bankruptcy law should not provide greater protection to non-debtor purchasers of debtors' assets than to debtors.²⁵⁹
- (3) If Wolverine Radio had sold its assets outside of bankruptcy, then the purchaser of its assets would be taxed at the 10 percent rate;²⁶⁰
- (4) Bankruptcy law should not provide an "employer" who purchases assets in bankruptcy "with a more preferable tax rate than employers who purchase the assets of a predecessor not in bankruptcy."²⁶¹

The court's reasoning was based in substantial part on the conclusion that "[f]actors, not related to the bankruptcy proceeding itself, such as the past employment experience of Wolverine, are not pre-petition debts and can be considered in determining JOSI's [the purchaser's] future unemployment tax contributions."²⁶²

Recall that in *Wolverine Radio*, the sale of all of the assets was a part of the Chapter 11 plan.²⁶³ Although the Sixth Circuit's *Wolverine Radio* opinion briefly discusses § 363, there was not a § 363 sale in the *Wolverine Radio* case.²⁶⁴ That perhaps explains why four years later the Fourth Circuit opinion in *Leckie*, a § 363 sale case, relegates the *Wolverine Radio* decision to inclusion in a string citation²⁶⁵ and brief mention in a footnote near the end of the opinion.²⁶⁶

B. *In re PBBPC, Inc.*

A little more than twenty years after the Sixth Circuit decision in *Wolverine Radio*, the Bankruptcy Appeals Panel for the First Circuit decided *PBBPC*, a case that it described as factually similar to *Wolverine*

259. *Id.* at 1149.

260. *See id.*

261. *In re Wolverine Radio Co.*, 930 F.2d at 1149.

262. *Id.* at 1147 (first citing *In re Primrose Bedspread Corp.*, 67 B.R. 659, 661 (Bankr. D.N.J. 1986); and then citing *Beaverton Plastics, Inc. v. Mich. Emp't Sec. Comm'n*, No. 87-CV-40177-FL, 1988 U.S. Dist. LEXIS 18206 *5-6 (E.D. Mich. Feb. 11, 1988)).

263. *Id.* at 1135.

264. *See id.* at 1145-46. After discussing the effect of confirmation of plan under § 1141, *In re Wolverine Radio* adds, by way of dictum, "Similarly, while 11 U.S.C. § 363(f) provides that property may be sold 'free and clear of any interest in such property,' we do not perceive the experience history of Wolverine as an 'interest' that attaches to property ownership so as to cloud its title." *Id.* at 1147 (emphasis added). In the preceding paragraph, the court had offered the same perception about "interest" as that term is used in § 1141(c). *See In re Wolverine Radio Co.*, 930 F.2d at 1147.

265. *See In re Leckie*, 99 F.3d 573, 586 (4th Cir. 1996) (citing *In re Wolverine Radio Co.*, 930 F.3d at 1147-48).

266. *Id.* at 586 n.17 (citing *In re Wolverine Radio Co.*, 930 F.3d at 1134-35).

Radio.²⁶⁷ The similar facts are (1) the debtor sold substantially all of its operating assets;²⁶⁸ (2) the debtor had laid off employees (all but one) and so if the debtor had continued business operations, its experience rating would have resulted in 12.27 percent unemployment contribution rate;²⁶⁹ (3) under state law, a “successor employer” (i.e., the buyer of the assets of an operating business who then continues business operations) pays unemployment taxes at the same rate as its seller would have paid and the state treated the buyer of PBBPC’s assets as a “successor employer”;²⁷⁰ and (4) the employment taxes of a “new employer” would be much lower—2.89 percent.²⁷¹

In *PBBPC*, like *Wolverine Radio*, the bankruptcy court entered an order barring the state from assigning the debtor’s experience rating to the buyer.²⁷² While in *Wolverine Radio* the district court and the Sixth Circuit reversed that bankruptcy court order, the Bankruptcy Appeals Panel for the First Circuit (“BAP”) in *Massachusetts Department of Unemployment Assistance v. OPK Biotech, LLC (In re PBBPC, Inc.)*, affirmed the bankruptcy court order, expressly rejecting *Wolverine Radio* and relying instead on *Leckie, TWA*, and *Chrysler*.²⁷³

The BAP’s consideration of *Wolverine Radio* is limited to the last paragraph of the opinion.²⁷⁴ In that paragraph the BAP labeled *Wolverine Radio* as “unpersuasive” but did not expressly reference any statement in *Wolverine Radio* or challenge *Wolverine Radio*’s four step reasoning process outlined above.²⁷⁵ Instead the BAP described the experience rating as “sums that the Debtor would have paid had it remained in business [post-petition]” and concluded that the experience rating is an “interest in the property sold” “[s]ince the motivation and underlying rationale . . . is to recover money from the purchaser of the Debtor’s assets.”²⁷⁶

The BAP correctly describes experience rating as a concept that affects the debtor only if the debtor “remained in business.”²⁷⁷ If the debtor

267. See 467 B.R. 1, 9 (Bankr. D. Mass. 2012) (citing *In re Wolverine Radio Co.*, 930 F.3d at 1145–49).

268. See *id.* at 4.

269. See *id.*

270. *Id.* at 8 (citing MASS. GEN. LAWS ch. 151A, § 14(n) (2021)).

271. See *id.* at 4, 10.

272. Compare 467 B.R. at 10, with 930 F.2d 1132, 1146 (6th Cir. 1991).

273. See *In re Wolverine Radio Co.*, 930 F.2d at 1134, 1135; see also 484 B.R. 860, 861, 870 (B.A.P. 1st Cir. 2013) (first citing 99 F.3d 573, 586 (4th Cir. 1996); then citing 322 F.3d at 289; and then citing 576 F.3d at 126).

274. See *In re PBBPC*, 484 B.R. at 870.

275. See *id.*

276. *Id.*

277. *Id.*

had retained the assets but terminated business operations, the 2010 experience rating would be meaningless. Similarly, if the purchaser of all of PBBPC's assets at the 2009 § 363 sale had been Larry "the Liquidator" Garfield²⁷⁸ who then resold the assets to various assets, then Larry the Liquidator would not be a successor employer paying ten percent unemployment taxes in 2010 because Larry would not even be an employer in 2010.²⁷⁹

Accordingly, the motivation and underlying rationale of an experience rating is to recover the appropriate amount of money from a person because that person is an employer who remained in business post-bankruptcy and thus has employees eligible for unemployment benefits.²⁸⁰ The motivation and underlying rationale of an experience rating is not to recover money from a person because that person is a buyer of assets at a § 363 sale.²⁸¹ The BAP's conclusion about the motivation and underlying rationale of an experience rating is inconsistent with the BAP's description of the effect of an experience rating.²⁸²

Bankruptcy courts in other states have relied on *PBBPC* (and *Leckie* and *TWA*) to relieve purchasers of assets at § 363 sales from the debtor's unemployment²⁸³ and workers' compensation experience ratings.²⁸⁴ After reviewing *PBBPC* and its progeny, Jeremy Fischer and Kaitlyn M. Husar, experienced bankruptcy lawyers in Maine, recommend that instead of selling a business outside of bankruptcy which "cannot unlock the full value of the assets, . . . practitioners should strongly consider

278. *In re PBBPC*, 484 B.R. at 861, 861–62; *OTHER PEOPLE'S MONEY* (Warner Bros. 1991).

279. *In re PBBPC*, 484 B.R. at 862–63; cf. Larry E. Ribstein, *Wall Street and Vine: Hollywood's View of Business*, at 1, 15, 17 (Mar. 9, 2009), <https://poseidon01.ssrn.com/delivery.php?ID=898031068069022000081101088015123113024008049068035042027072082093009087104110113102101009029001009024018093075030124093126018098004058073081091070066080123094014003087091124108019007105091120088103112000081118023104079026025079117075090029022026&EXT=pdf>. "As for the employees, 'Who cares? They didn't care about you. . .'" *Id.* at 15.

280. *In re PBBPC*, 484 B.R. at 870.

281. *Id.* at 870 (citing *In re PBBPC*, 467 B.R. at 9).

282. *See id.* We find an identical inconsistency in an almost identical statement made earlier in the *BAP* opinion: "Indeed, the record reflects that the transfer of an employer's contribution rate to a successor asset purchaser is really an attempt to recover the money that the predecessor employer would have paid if it had continued in business. . . . The transfer of those assets alone, not the continuation of the Debtor's business, is sufficient to trigger the imposition of successor liability on a purchaser" *Id.* at 869.

283. *E.g.*, *In re USA United Fleet, Inc.*, 496 B.R. 79, 85–86 (Bankr. E.D.N.Y. 2013) (first citing § 363(f); then citing *TWA*, 322 F.3d 283, 290 (3d Cir. 2003); then citing *In re Leckie*, 99 F.3d 573, 582 (4th Cir. 1996); and then citing *In re PBBPC*, 484 B.R. 860 at 870).

284. *E.g.*, *In re ARSN Liquidating Corp.*, No. 14-11527-BAH, 2017 Bankr. LEXIS 185, at *12, *15 (Bankr. D. N.H. 2017) (first citing *TWA*, 322 F.3d at 290; and then citing *In re Leckie*, 99 F.3d at 582).

bankruptcy sales, which might enable the assets to be sold free and clear of the workers' compensation and unemployment ratings, as well as other non-traditional interests [in such property]."²⁸⁵

The most recently reported decision relying on *PBBPC* involved a nontraditional interest in such property.²⁸⁶ In *In re Verity Health System of California, Inc.*, the court looked to *PBBPC* to conclude that the California Attorney General's conditions on the sale of a non-profit hospital were interests in such property and so the debtor could use § 363 to sell its hospital free and clear of those interests in such property.²⁸⁷

In California, the Attorney General must consent to the sale of a nonprofit health facility and can condition assent on the purchaser's continuing the existing charity care obligations and maintenance of the same types and levels of health care services.²⁸⁸ *Verity Health* compared these conditions to the experience rating in *PBBPC* because they were "based upon the Hospitals' prior operating history"²⁸⁹ and concluded that the conditions were "'interest[s] in property' within the meaning of § 363(f) [because the conditions] . . . are monetary obligations arising from the ownership of property."²⁹⁰

If the hospitals in the *Verity Health* case had filed for Chapter 7 relief, instead of Chapter 11, and the Chapter 7 trustee had closed the hospitals, the estate would have had no monetary obligations for failure to provide future charity care and future level of services "arising from the ownership of property."²⁹¹ The conditions relating to future charity care and future levels of hospital care are obligations that cost money to meet, arising from the purchaser's post-bankruptcy operation of the property,

285. Jeremy R. Fischer & Kaitlyn M. Husar, *Freer and Clearer Sales: Using § 363(f) to Strip Non-Traditional Interests from Distressed Assets*, 39 AM. BANKR. INST. J. 16, 16, (2017).

286. See *In re Verity Health Sys. of Cal., Inc.*, No. 2:18-bk-20151-ER, 2019 Bankr. LEXIS 3321, at *16–17 (Bankr. C.D. Cal. 2019), *vacated*, 2019 Bankr. LEXIS 3514 (Bankr. C.D. Cal.). Perhaps the most nontraditional interest in such property in a reported § 363(f) case is the bylaws of the National Hockey League. See *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 581 (Bankr. Ariz. 2009). In *In re Dewey Ranch Hockey, LLC*, the court, without discussion, treated the National Hockey League bylaws as interests in such property for the purposes of 363(f) but refused to authorize the § 363 sale of the franchise free and clear of the bylaws because it could not provide adequate protection of the interest. See *id.* at 591, 592, 593 (citing COLLIER, *supra* note 51, at § 363.05[2]).

287. 2019 Bankr. LEXIS 3321, at *35; § 363(f).

288. CAL. CORP. CODE § 5914(a)(1) (2020); 11 CAL. CODE REGS. tit. 11, § 999.5(a)(1) (2020); see Mary H. Rose, *Intensive Care, Reining in the California AG in the Sale of a Non-profit Hospital*, 38 AM. BANKR. INST. L. J. 16, 16 (2017).

289. *In re Verity Health*, 2019 Bankr. LEXIS 3321, at *17.

290. *Id.* (citing § 363(f)).

291. *Id.* at *17.

not from merely the debtor's or the purchaser's ownership of property.²⁹² The conditions were not "interests in such property" as that phrase is used in § 363(f).²⁹³

IV. SECTION 363 SALES & LESSEES (& LICENSEES?)

Trivia champions remember Silvio as the owner of an apartment building at 129 W. 81st Street with the troublesome tenants—Jerry, Kramer, and Newman.²⁹⁴ Silvio could not use bankruptcy to get rid of Jerry, Kramer and Newman and then find new tenants after his bankruptcy case was concluded. Avoidance of unfavorable leases is not covered by the description of "Effect of Discharge" in § 524.²⁹⁵

While § 365(a) provides for rejection of unexpired leases by debtors, § 365(h) significantly limits the effect of rejection of lease by a debtor landlord on its tenants.²⁹⁶ Under § 365(h) Jerry, Kramer and Newman may remain in possession of their apartments at the same rental rate after Silvio's rejection of their leases under § 365.²⁹⁷

In sum, even after bankruptcy, rejection of leases, and a discharge, it is well settled that a building owner who files for bankruptcy and keeps its building is stuck with its tenants who have below market leases.²⁹⁸

If, however, Silvio wants to sell his apartment building, then, at least in the Seventh and Ninth Circuits, Silvio can file a bankruptcy petition, move to sell the apartment building in a § 363 sale, and obtain a court order that the buyer takes the building free and clear of Jerry's, Kramer's, and Newman's unfavorable leases.²⁹⁹ In sum, once again, there are some circuit court cases that support the proposition that a § 363 sale can provide greater bankruptcy relief to a third party assets buyer than a discharge provides to the debtor.

292. See *id.* at *19 n.9 (citing *In re Verity Health System of California, Inc.*, 598 B.R. 283, 293 (Bankr. C.D. Cal. 2018)).

293. See § 363(f).

294. See *Silvio*, WIKISEIN, <https://seinfeld.fandom.com/wiki/Silvio> (last visited Oct. 23, 2020). You are at the very least a champion at Trivia if you remember that Silvio was Seinfeld's landlord. Jon Polito as Silvio was only in one episode of *Seinfeld*, albeit one of the more memorable episodes. *Id.*

295. See 11 U.S.C. § 524 (2021).

296. See 11 U.S.C. § 365(a),(h) (2021).

297. *Id.* § 365.

298. See, e.g., *In Re Ames Dep't Stores, Inc.*, 348 B.R. 91, 98 (Bankr. S.D.N.Y. 2006).

299. § 363; see *infra* Part IV.B. (discussing relevant circuit court cases).

A. Statutory Language on the Effect of § 363 Sale of Building with Tenants on the Tenant's Right to Continue & Canons of Statutory Construction

1. Section 363

If only § 363 controlled the effect of a § 363 sale of a building with tenants on the rights of the tenants, the result would be clear. The leasehold rights of tenants are “interest[s] in such property” and § 363(f) empowers the bankruptcy court to sell property such as Silvio’s apartment building “free and clear of [such] interest[s] in . . . property.”³⁰⁰

Moreover, § 363(d) provides that “[t]he trustee may use, sell, or lease property under subsection (b) or (c) of this section . . . only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.”³⁰¹ It is important to note what § 363(d) does not provide. While Congress expressly provided that a § 363 sale cannot be “inconsistent with any relief” provided to secured parties under § 362, it does not provide that a § 363 sale of a building with lessees cannot be inconsistent with any relief provided to the lessees under § 365(h).³⁰²

2. Section 365

If only § 365 controlled the effect of a § 363 sale of a building with tenants on the rights of the tenants, then a different result would be clear. A debtor landlord such as Silvio could reject the leases under § 365(a), but then under § 365(h), tenants such as Jerry, Kramer, and Newman could retain their rights under their leases “including . . . payment of rent[,] . . . use, [and] possession.”³⁰³

3. Canons of Statutory Construction

There is a well-accepted canon of statutory construction that when two statutory provisions conflict, the specific governs the general.³⁰⁴ Most courts that have considered fact patterns similar to our Seinfeld hypothetical have concluded that § 363(f) and § 365(h) conflict: “each provision seems to provide an exclusive right that when invoked would override the interest of the other.”³⁰⁵ And, all of the reported cases that have

300. § 363(f).

301. § 363(d)(2).

302. *See id.*

303. § 365(a), (h)(1)(A)(ii).

304. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

305. *E.g., In re Churchill Props. III Ltd. P’ship*, 197 B.R. 283, 286 (Bankr. N.D. Ill. 1996).

found such a conflict, have concluded that § 365(h) should control because:

Section 365(h) is clear and specific in providing for certain rights and remedies available to the lessee after rejection of its lease. Since Congress decided that lessees have the option to remain in possession, it would make little sense to permit a general provision, such as Section 363(f), to override its purpose. The Code is not intended to be read in a vacuum. Here, if the Court were to adopt the Bank's application of Section 363(f), the application of Section 365(h)(1)(A)(ii) as it relates to non-debtor lessees would be nugatory.³⁰⁶

Accordingly, under the "majority rule,"³⁰⁷ Jerry, Kramer, and Newman can stay in their apartments even after a § 363 free and clear sale by Silvio.

There is another well accepted canon of statutory construction that two statutory provisions are to be construed so as to avoid a conflict if at all possible.³⁰⁸ The Seventh Circuit and the Ninth Circuit have relied on that canon of statutory construction to reach the different result described below.

B. Circuit Court Cases

1. *Precision Industries, Inc. v. Qualitech Steel SBQ LLC*

In 1999, Qualitech Steel Corporation filed a Chapter 11 petition.³⁰⁹ Three months later, Qualitech's assets were sold in a § 363 sale to a group of its secured creditors.³¹⁰ The assets sold included a steel mill with a warehouse leased to Precision Industries, Inc. ("PI").³¹¹

306. *Id.* at 288; *contra* Ralph Brubaker, *Sale of a Debtor's Real Property Free and Clear of a Tenant's Lease: Code §§363(f) and 365(h): "Applicable Nonbankruptcy Law and the Tenant's Putative Adequate Protection Rights,"* 38 BANKR. L. LETTER (2018) ("[I]n comparing the two provisions, it is hard to say which is the more specific and which is the more general.").

307. We have used the adjective "majority" because that is the adjective courts and commentators currently use. *E.g.*, *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC)*, 862 F.2d 1148, 1154 (9th Cir. 2017) ("The 'Majority Approach'"); Nancy A. Peterman, Ryan A. Wagner & Kai Zhu, *The Interplay of Sections 363(F) and Section 365(H): Can These Provisions of the Bankruptcy Code Be Reconciled?*, 28 J. BANKR. LAW & PRAC (2019) ("majority" view) The term "majority rule" is, however, somewhat misleading. While most reported bankruptcy court decisions take this position, most bankruptcy courts have not published decisions on this issue. And, as discussed below, two of the three circuit courts that have considered this issue have followed the "minority rule."

308. *See* J.E.M. *Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001).

309. *Precision Indus. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 540 (7th Cir. 2003).

310. *See id.*

311. *Id.*

The mortgage preceded the lease.³¹² That is a potentially important fact. Because of the prior mortgage, PI's leasehold interest would have been wiped out by either a foreclosure of the mortgage or a Chapter 7 distribution.³¹³ Generally, in large transactions, new tenants obtain a subordination agreement from an existing mortgage.³¹⁴

The order provided that the assets were to be sold "free and clear of all liens, . . . encumbrances, and interests."³¹⁵ PI did not object to the sale and did not request adequate protection of its interest in property.³¹⁶

After unsuccessful negotiations with the buyer, PI filed a complaint in district court alleging inter alia wrongful eviction.³¹⁷ The district court referred the case to the bankruptcy court which ruled that under § 363(f) PI no longer had any possessory rights.³¹⁸

On appeal, the district court reversed the bankruptcy court, holding that § 365(h), which dealt specifically with the rights of a lessee, superseded the more general provisions of § 363(f).³¹⁹ In so holding, the district court added "[t]here is *no statutory basis* for allowing the debtor-lessee to terminate the lessee's possession by selling the property out from under the lessee, and thus limiting a lessee's post-rejection rights solely to cases where the debtor-lessee remains in possession of its property."³²⁰

The buyer of Qualitech's assets appealed to the Seventh Circuit which reversed.³²¹ The Seventh Circuit looked to the verbs in §§ 363 and 365 in finding a "statutory basis for allowing the debtor-lessee to terminate the lessee's possession by selling the property."³²² The verb "sell"

312. *See id.*

313. *See* Robert M. Zinman, *Precision in Statutory Drafting: The Qualitech Quagmire and the Sad History of 365(h) of the Bankruptcy Code*, 38 J. MARSHALL L. REV. 97, 120–21 (2004).

314. *See id.* at 122.

315. *Qualitech*, 327 F.3d at 541.

316. *Id.* at 548. Professor Zinman, an expert on leasehold financing, suggests that because foreclosure of a mortgage would have wiped out the lease, PI had no "interest" for adequate protection. *See* Zinman, *supra* note 313, at 121.

317. *Qualitech*, 327 F.3d at 541.

318. *See id.*

319. *Id.* at 542 (quoting *Precision Indus. v. Qualitech Steel SBQ, LLC*, No. IP 00-247-C H/G, 2001 U.S. Dist. LEXIS 8328, at *36 (S.D. Ind. 2001)).

320. *Id.* (quoting *Precision Indus.*, 2001 U.S. Dist. LEXIS 8328, at *46) (emphasis added).

321. *Id.* at 540.

322. *Qualitech*, 327 F.3d at 542 (quoting *Precision Indus.*, 2001 U.S. Dist. LEXIS 8328, at *36).

appears in § 363 but not in § 365.³²³ The verb “reject” appears in § 365 but not in § 363.³²⁴ The court then concluded that

[w]here estate property under lease is to be *sold*, section 363 permits the sale to occur free and clear of a lessee’s possessory interest—provided that the lessee (upon request) is granted adequate protection for its interest. Where the property is not sold, and the debtor remains in possession thereof but chooses to *reject* the lease, section 365(h) comes into play and the lessee retains the right to possess the property. So understood, both provisions may be given full effect without coming into conflict with one another and without disregarding the rights of lessees.³²⁵

Since *Qualitech*, only one circuit has ruled on whether a buyer at a § 363 sale takes free from unexpired leases.³²⁶ The Ninth Circuit in *Spanish Peaks Holdings*, discussed below, followed *Qualitech*.³²⁷

2. *In re* Spanish Peaks Holdings II LLC

Spanish Peaks Holdings (“SPH”) was a Chapter 7 case involving a § 363 sale of SPH’s resort property to CH SP Acquisitions (“CH”), a secured creditor with a mortgage on the resort property.³²⁸ After CH’s mortgage but before SPH’s Chapter 7, SPH had entered into two leases of parts of the property to affiliates; both leases were significantly below market.³²⁹

The bankruptcy court’s sale order included “free and clear” language but provided that the sale was subject to a later determination of the rights of the lessees under the two unexpired leases.³³⁰ The Chapter 7 trustee then moved to reject the two leases.³³¹ In a different motion, CH sought a determination that the sale was free and clear of the two leases.³³² After noting that the validity of the leases were subject to bona fide dispute and that neither lessee had requested adequate protection of their leasehold interests, the bankruptcy court ruled that the sale was free and clear of the leases.³³³ The district court and the Ninth Circuit

323. *See id.* at 547–48; *see also* §§ 363, 365.

324. *Id.*

325. *Id.* at 548 (emphasis added).

326. *See* Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions (*In re* Spanish Peaks Holdings II, LLC), 872 F.3d 892, 894 (9th Cir. 2017).

327. *See id.* at 899.

328. *See id.* at 895.

329. *See id.* at 894–95.

330. *Id.* at 896.

331. *See In re Spanish Peaks*, 872 F.3d at 896.

332. *Id.*

333. *See id.*

affirmed, relying on *Qualitech* and summarizing, “In sum, section 363 governs the sale of estate property, while section 365 governs the formal rejection of a lease. Where there is a sale, but no rejection (or a rejection, but no sale), there is no conflict.”³³⁴

3. Intellectual Property Licenses

Section 365(n) of the Bankruptcy Code protects licensees of intellectual property from the effect of their licensor’s bankruptcy.³³⁵ Section 365(n) is modeled after § 365(h).³³⁶ Just as § 365(h) provides that a lessee can remain in possession of the leasehold after a debtor/lessor’s rejection of the lease, § 365(n) provides that a licensee can continue to use licensed intellectual property after a debtor/licensor’s rejection of an intellectual property licensee.³³⁷

After *Qualitech*, Michael St. Patrick Baxter, a partner at Covington & Burling and leading bankruptcy practitioner, warned that courts that follow *Qualitech* would allow § 363(f) sales to extinguish the rights of intellectual property licensees, notwithstanding § 365(n).³³⁸ There is dictum in a bankruptcy court decision out of the Seventh Circuit that supports Baxter’s analysis.³³⁹

V. POLICY ARGUMENTS

The relevant policy question is not whether there is a strong policy basis for holding the buyer/operator of a business liable for injuries suffered as a result of a defective product manufactured by its seller. Nor

334. *Id.* at 899 (first citing 11 U.S.C. § 363 (2021); and then citing § 365). In *In re Spanish Peaks*, like *Qualitech*, the result is justified by canons of statutory construction. See *supra* Part IV.A.3. (discussing canons of statutory interpretation). Professor Anthony J. Casey recently suggested a policy justification for the same result. See Anthony J. Casey, *Chapter 11’s Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1765 (2020) (“While it is likely that a debtor might use a bankruptcy filing to terminate a lease, it is much less likely that it would sell its business to do so. Thus . . . the rule that best constrains hold up on both sides is one that allows sales free and clear of leases . . .”).

335. § 365(n).

336. § 365(h).

337. § 365(h)(1)(a), (n)(1).

338. See Michael St. Patrick Baxter, *Section 363 Sales Free and Clear of Interests: Why the Seventh Circuit Erred in Precision Industries v. Qualitech Steel*, 59 BUS. LAW. 475, 477 (2004).

339. See *Compak Cos., LLC v. Johnson*, 415 B.R. 334, 342 (N.D. Ill. 2009) (citing *Precision Indus. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 546 n.3, 548 (7th Cir. 2003)) (“As we interpret *Qualitech*, § 365(n) would not prevent the trustee or debtor-in-possession from extinguishing a license in a sale of intellectual property free and clear of interests *provided that one of § 363(f)’s conditions was satisfied.*”); *but cf. In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 777 (Bankr. D. N.J. 2014) (applying the “majority rule” so that the more specific § 365(n) controls over the more general section 363(f)).

whether there is a strong policy basis for applying the seller's experience ratings to the buyer of its business. State courts and legislatures have already answered such questions. The relevant policy question is whether there is a strong bankruptcy policy for a different answer if the buyer bought the business in a § 363 sale.³⁴⁰

In decisions that have been reported as of July 2020, the most common policy justification for holding that § 363 permits sales free and clear of successor liability or experience ratings, or unexpired leases, is that it makes it easier to sell the assets at a higher price.³⁴¹ The following statement from the Third Circuit's *TWA* opinion is representative:

[T]he sale of TWA's assets to American at a time when TWA was in financial distress was likely facilitated by American obtaining title to the assets free and clear of these civil rights claims. Absent entry of the Bankruptcy Court's order providing for a sale of TWA's assets free and clear of the successor liability claims at issue, American may have offered a discounted bid.³⁴²

The above language from the *TWA* opinion was persuasive to the Commission to Study the Reform of Chapter 11 ("Chapter 11 Commission").³⁴³ Under Sam Gerdano's leadership, the American Bankruptcy Institute organized the Chapter 11 Commission comprised of leading bankruptcy practitioners to suggest changes in Chapter 11.³⁴⁴

340. Some would say that the relevant policy question is who should make bankruptcy policy. The United States Supreme Court's answer to that question is that it is not the job of the courts to make bankruptcy policy. *Cf. Florida Dep't of Revenue v. Picadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008). That's the job of Congress. *See id.* The job of the courts is to ascertain the policy choices Congress made reflected in the provisions of the Bankruptcy Code. *See id.* ("to the extent the 'practical realities' of Chapter 11 reorganizations are increasingly rendering postconfirmation transfers a thing of the past, it is incumbent upon the Legislature, and not the Judiciary, to determine whether § 1146(a) is in need of revision."); *see also Rosenblat & Argentina, Jr.*, *supra* note 179, at 34 ("regardless of how prevalent, urgent or noble the objectives might be").

341. *See, e.g., In re Catalina Sea Ranch, LLC*, No. 2:19-bk-24467-NB, 2020 Bankr. LEXIS 1083, at *39 (Bankr. C.D. Cal. Apr. 13, 2020) ("Exposure of purchasers to potential successor liability is a sure-fire way to minimize the value of the bankruptcy estate. That is directly contrary to Congressional intent, and sound policy, of maximizing the value of assets."). Some decisions also assert that allowing any form of successor liability would be inconsistent with the bankruptcy priority policies. *E.g., TWA*, 322 F.3d 283, 292 (3d Cir. 2003) ("To allow the claimants to assert successor liability claims against [buyer] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme."). Buyers at § 363 sales often assume certain liabilities. If these buyers' voluntary payments to the debtors' creditors are not "inconsistent with bankruptcy priority policies," then payments required by successor liability laws should not be violative of bankruptcy priority policies.

342. 322 F.3d at 292–93.

343. *See* ABI REPORT, *supra* note 8, at 143, nn.529–30, 144–45.

344. *See id.* at 2.

After three years of work, the Chapter 11 Commission published a report which made recommendations for sales of businesses under § 363, including:

In general, the trustee *should* be able to sell a debtor's assets free and clear of all interests in a debtor's assets, including liens and encumbrances, to the extent permitted by the U.S. Constitution and the guidelines set forth in these principles. In addition, the trustee *should* be able to sell a debtor's assets free and clear of all *claims* related to a debtor's assets in the context of a sale of all or substantially all of a debtor's assets under section 363x (or a transaction involving less than substantially all of the debtor's assets if the court determines that the trustee has otherwise complied with the requirements of section 363x). . . . In the context of a section 363x sale, a trustee should be able to sell assets free and clear of any successor liability claims (including tort claims) other than those specifically excluded from free and clear sales by these principles.³⁴⁵

The two policy reasons that the Chapter 11 Commission gave for its "Recommended Principles" read very much like the policy reasons stated in the *TWA* opinion: (1) this expansive approach attracts buyers ("more competition for the debtors' assets") and (2) this expansive approach attracts more money ("enhanced the value of the assets sold").³⁴⁶

Even though the Chapter 11 Commission was charged with studying what Chapter 11 *should* provide and not what Chapter 11 now provides, attorneys for asset buyers can and should use these policy arguments from the Chapter 11 Commission Report and *TWA* in seeking "a more expansive reading of interests in [such] property."³⁴⁷ And also use the "trend toward a more expansive reading" language from *TWA*—the Chapter 11 Commission seemed to think that "trend" was important, mentioning it twice.³⁴⁸

Attorneys for future claimants, states' attorneys general, and attorneys for lessees opposing should consider framing their policy arguments

345. *Id.* at 141, 142 (emphasis added).

346. *Id.* at 144. Professor Anthony J. Casey has recently proposed what he calls the "New Bargaining Theory of Bankruptcy" which reflects such a policy: "An efficient bankruptcy law should create more value than it destroys, accounting for consequences in and out of bankruptcy. That requires a balancing of effects across all states of the world, but it does not require any *special* protection for nonbankruptcy entitlements. In short, bankruptcy law should not be put into effect unless it creates net value." Casey, *supra* note 334, at 1714.

347. See ABI REPORT, *supra* note 8, at 143 n.529 (quoting *TWA*, 322 F.3d at 289).

348. *Id.* at 143 n.529, n.530 (quoting *TWA*, 322 F.3d at 289) (citing *TWA*, 322 F.3d at 290). Maybe even better, the "majority trend" language from *In re Vista Mktg. Grp. Ltd.*, 2014 Bankr. LEXIS 1441, at *18 (N.D. Ill. 2014) (quoting *TWA*, 322 F.3d 283, 289 (3d Cir. 2003)) ("[T]he *majority* trend construes it expansively to encompass 'other obligations that may flow from ownership of the property.')" (emphasis added).

around the highly descriptive language used by Professor Vincent S. J. Buccola in a recent article on § 363 sales.³⁴⁹ Professor Buccola uses the phrase “tainted assets” to describe assets such as the Montana resort in the *Spanish Peaks* case and the California hospital in the *Verity Health System* case.³⁵⁰ He then describes the effect of § 363(f) in cases such as *TWA*, *Verity Health System* and *Spanish Peaks* as “[b]ankruptcy washes tainted assets.”³⁵¹

It is at best questionable whether Congress intended that bankruptcy be used to wash tainted assets. In *Toibb v. Radloff*, the United States Supreme Court acknowledged a “congressional purpose of deriving as much value as possible from the debtor’s estate,”³⁵² but that is different from washing tainted assets. The debtor’s estate is the debtor’s interest in property.³⁵³ As Justice Kagan wrote for the majority in *Mission Product Holdings, Inc. v. Tempnology, LLC*, “[t]he estate cannot possess anything more than the debtor did itself outside bankruptcy.”³⁵⁴

If, outside bankruptcy, the debtor’s property is tainted, then the debtor’s estate is tainted assets and the congressional purpose for bankruptcy is to “deriv[e] as much value as possible” from those tainted assets.³⁵⁵ There is no Congressional bankruptcy policy of increasing the value by washing the tainted assets. Yet washing tainted assets is what happened in cases such as *TWA*, *Verity Health System*, and *Spanish Peaks*.³⁵⁶

And cases like *TWA*, *Verity Health System*, and *Spanish Peaks* wash assets only for third-party buyers—not for the debtors who filed for bankruptcy relief.³⁵⁷ If Trans World Airlines or Verity Health System or Spanish Peaks Holdings had retained its assets, confirmed its Chapter 11 plan, and received a discharge, it would exit bankruptcy with “tainted assets.”³⁵⁸ The expansive approach thus provides greater relief for third party buyers than a discharge can provide for the debtor.

349. See Buccola, *supra* note 8, at 735.

350. *Id.* at 735–36; see *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions (In re Spanish Peaks Holdings II, LLC)*, 872 F.3d 892, 894, 895 (9th Cir. 2017); see also *In re Verity Health Sys. of Cal., Inc.*, No. 2:18-bk-20151-ER, 2019 Bankr. LEXIS 3321, at *2–3 (Bankr. C.D. Cal. 2019).

351. Buccola, *supra* note 8, at 737.

352. 501 U.S. 157, 164 (1991).

353. 11 U.S.C. § 541(a) (2021).

354. 139 S. Ct 1652, 1663 (2019) (first citing *Board of Trade of Chicago v. Johnson*, 264 U.S. 1, 15 (1924); and then citing § 541(a)).

355. *Toibb*, 501 U.S. at 164.

356. See *supra* pp. 489–90 (discussing the language Professor Buccola uses to describe assets in cases such as these).

357. See *id.*

358. Buccola, *supra* note 8, at 736.

CONCLUSION

Congress did not intend for bankruptcy to provide for greater protection to third party buyers at a § 363 sale than to debtors who satisfy the requirements of Chapter 11, confirm a plan, and receive a discharge. As Chilli Palmer would say, the argument that protection for a third party asset buyer in a § 363 sale should not be better than a discharge is the “Cadillac of policy arguments.”³⁵⁹

359. See GET SHORTY, *supra* note 1.