

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

By Robert M. Fishman and Matthew A. Swanson

I. INTRODUCTION

Sales of property under the Bankruptcy Code¹ are ordinary and, most often, unspectacular events in commercial bankruptcy cases. Whether they are consummated shortly after a case is filed or through a plan of reorganization, the vast majority of bankruptcy sales proceed without controversy or fanfare. Under the Bankruptcy Code, a sale of bankruptcy estate property may occur free and clear of any “interest” in the property being sold. That being said, there is presently no clear answer among the courts, professionals, or academics as to exactly what is an “interest” and exactly of which such “interests” the debtor’s assets may be sold free and clear. It is this absence of clarity that has spurred the authors’ interest in this topic and, as a result, this article.

The first portion of this article explores the backdrop against which the issue of free and clear sales commonly presents itself—the statutory bases for selling assets under the Bankruptcy Code, the underlying notions of what the buyer is acquiring and what the seller is transferring, the particular language that allows such sales to occur free and clear of interests, the limits or lack thereof on the concept of “free and clear,” and the cases interpreting this statutory language. Next, the article identifies and considers both the narrow and expansive interpretations of section 363(f) that have played out in the jurisprudence. After identifying the prevailing views, the article examines the trend amongst courts to embrace the expansive view of “interests” in bankruptcy sales and the authors’ concurrence with that approach. Lastly, the article discusses the specific language that one might include in a sale order in an effort to take full advantage of section 363(f) under the prevailing expansive view.

II. THE PLAYING FIELD

Since the Bankruptcy Code became effective in 1979, roughly 20,000 to 80,000 business bankruptcy cases have been filed on an annual basis.² One of the mechanisms most often used by debtors in response to financial distress is the sale of some or all of their property (and even entire businesses) to third parties during the course of the

Robert M. Fishman is member of the Chicago, Illinois law firm of Shaw Gussis Fishman Glantz Wolfson & Towbin LLC, co-chair of its Bankruptcy and Insolvency Group, former President of the American Bankruptcy Institute, a Fellow of the American College of Bankruptcy, and a 1979 graduate of the George Washington University Law School. Matthew A. Swanson is a member of the Bankruptcy and Creditors’ Rights Group at the Chicago, Illinois law firm of Barack Ferrazzano Kirschbaum & Nagelberg LLP and a 2000 graduate of the University of Southern California Law School.

bankruptcy case. The motivation for these sales may be to monetize excess or underperforming assets, to retrench a multifaceted operation into a core business, or to simply pay creditors and reduce debt. Indeed, sales of estate property are a (if not the) primary source of value for a debtor's bankruptcy estate and thus a creditor's recovery. In contemplation of the need for a process to govern the sale of property in bankruptcy cases, Congress included several provisions in the Bankruptcy Code that provide, as the case may be, for the sale of property by debtors or trustees.³

A. The Statutes

The Bankruptcy Code addresses the sale of property of the bankruptcy estate⁴ by a debtor (under various scenarios) in several different sections. The sale of property of the debtor in the ordinary course of business is authorized by section 363(c)(1). That type of sale—typically the sale of inventory by an operating business entity—is not the subject of this article. The Bankruptcy Code also addresses the sale of estate property pursuant to a plan of reorganization. Specifically, section 1123(a)(5)(D) authorizes the debtor, pursuant to a plan, to sell property of the estate “subject to or free of any lien,” and section 1141(c) provides that, upon confirmation, such property shall be “free and clear of all claims and interests.” This type of sale, too, is not the direct subject of this article. The focus of this article is the sale, outside the ordinary course of business and not pursuant to a plan of reorganization, of substantially all of a business debtor's assets or of a business unit or division pursuant to section 363(b)(1). This section authorizes the debtor “after notice and a hearing [to] use, sell or lease, other than in the ordinary course of business, property of the estate” and is invoked in connection with the majority of sales brought before a bankruptcy court.⁵

B. Liabilities of the Seller and the Buyer's Assumption Thereof

An integral part of most section 363 sales (and most sales of property outside of bankruptcy as well) is the notion that the purchaser is buying the property from the seller free from the seller's liabilities. Section 363(f) of the Bankruptcy Code is the enabling provision of section 363 that furthers this fundamental bankruptcy concept. This subsection reflects Congress's intent to effectuate the business reality that buyers, whether in the bankruptcy world or simply the normal commercial marketplace, want to know what price they are paying to the seller and what they are getting for their payment. Usually the latter part of this thought arises in the context of just what assets are being acquired, but in the evolving world of section 363 sales, a buyer also needs to understand what liabilities it might be involuntarily inheriting.

Where a particular purchaser, for identified business reasons, contractually agrees to assume certain of the seller's liabilities as part of a sale transaction, such assumption will certainly impact the purchase price (the cash payment component) that the purchaser is willing to pay. That being said, as long as it is the purchaser who is making the decision on exactly which specific liabilities to assume, the value of the package of assets sought to be acquired by the purchaser can be evaluated with reasonable certainty. The problem highlighted by this article comes into play when that decision (i) is not voluntarily made by the purchaser but by a judge, and (ii) is made not prior

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

to the time the sale is negotiated and approved but often months, if not years, after the transaction has closed.

C. The Free and Clear Provisions of Section 363(f)

Section 363(f) governs the circumstances under which a debtor may sell property “free and clear of any interest in such property.”⁶ Section 363(f) sets forth five circumstances under which free and clear sales are appropriate: (1) if applicable non-bankruptcy law permits it; (2) if the entity with an interest in the property consents; (3) if the interest is a lien and the sale price of the property is greater than the amount secured by the lien; (4) if the interest is in bona fide dispute; or (5) if the other entity could be compelled to accept a money satisfaction of the interest in a legal or equitable proceeding.⁷ There are numerous potential issues with respect to whether a particular sale is authorized under one or more of the subsections of section 363(f), but those controversies are the subject of a different commentary. For purposes of this analysis, we shall presume that the sale in question is authorized by one or more of the subsections of 363(f), and we will instead focus on the meaning of the words “free and clear of any interest.”

D. “Interest”—What Does it Mean in Section 363(f)?

One can scour the Bankruptcy Code and never find a definition of the word “interest.” Numerous Bankruptcy Code provisions⁸ utilized the word “interest,” but, unlike some 75 other terms defined in section 101 of the Bankruptcy Code, Congress chose not to provide a definition of the word “interest.”⁹ What about looking beyond the Bankruptcy Code’s definitions for an answer? For example, section 1141(c) speaks to the sale of property under a plan “free and clear of all claims and interests.”¹⁰ Unless Congress was being redundant, logic suggests that an “interest” can and should be distinguished somehow from a “claim.” Section 363 itself may shed some light on the topic—referring in subsection (f)(3) to a lien as being a type of interest. So an interest is something different than a claim and something more than a lien. It is of no surprise that there is no clear consensus among the courts or professionals when it comes to the scope of the word “interest” in the context of the debtor’s ability to sell property free and clear at a section 363 sale.¹¹

E. Examples of “Interests” Identified in the Case Law

The issue of what constitutes an interest under section 363(f) may present itself in a number of ways. For example, a creditor may object to a debtor’s motion requesting authority to sell property in which the claimant asserts that it has an interest. More commonly, however, the issue seems to surface well after a sale transaction has closed by way of collateral attack—either (1) offensively by a creditor seeking a declaration that the purchaser’s acquisition of the debtor’s business did not cleanse the purchased property (and thus the purchaser) of liability on account of claims against the debtor, or (2) defensively by the purchaser seeking a declaration that its acquisition of the debtor’s business assets was free and clear of the liability asserted by the allegedly aggrieved party.

While we understand that there is no clear definition as to what an “interest” is, courts examining this issue have scrutinized the following liabilities in the context of the free and clear provisions of section 363(f): (1) leasehold interests; (2) discrimination claims; (3) personal injury claims; (4) civil rights claims; (5) products liability claims; (6) tort claims; and (7) tax claims.¹² As evidenced by this expansive list, the answer to the question posed by this article transcends the size of a debtor’s case, the debtor’s industry and physical location, and whether the debtor is reorganizing or liquidating. Moreover, the issue of whether property can be sold free and clear of a particular interest deserves attention regardless of the constituency represented—debtors, purchasers, and creditors will all be better served if they understand the lay of the land surrounding section 363(f).

F. Successor Liability

The most prevalent context in which the “interest” debate arises (and the area that has garnered the bulk of the attention in the case law) is that of successor liability. Generally, when one business sells its assets to another business, the seller’s liabilities are not passed on to the successor absent an express agreement providing otherwise.¹³ Not surprisingly, there are common-law exceptions to this general rule at both the state and federal levels. For example, under Illinois state law there are four exceptions to the general rule of successor “non-liability”: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller’s obligations.¹⁴ Successor liability under federal common law is even broader. In order to protect federal rights and effect federal policies, the theory of successor liability allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition of the property, and (2) there is “substantial continuity in the operation of the business before and after the sale”¹⁵

A review of the case law reveals two types of claims for which successor liability is commonly imposed on a purchaser of property from a bankruptcy estate. First, there are claims based on federal statutes providing protection to employees, including claims under the NLRA, ERISA, and Title VII.¹⁶ Second, there are product liability claims under the “product line exception,” which bases liability on the continued marketing by the successor of the predecessor’s product.¹⁷ It is important to emphasize that successor liability is based on the actions of the purchaser and not merely the property itself—it is a continuity issue, not a specific asset issue. Both of these types of claims are common in large commercial bankruptcy cases, and it is these areas that have galvanized the great debate over the free and clear provisions of section 363(f).

G. Legislative History

Two basic schools of thought have developed on the breadth of the word “interest” in section 363(f), commonly referred to as the narrow view and the expansive view. Before examining the judicial gloss on these two approaches, let us start where the

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

courts start—with the legislative history. The Congressional reports mirror the Bankruptcy Code in finding that “Section [363](f) permits sales of property free and clear of any interest in the property of an entity other than the estate.” In pertinent part, the legislative history goes on to provide:

At a sale free and clear of other interests, any holder of any interest in the property being sold will be permitted to bid. If that holder is the high bidder, he will be permitted to offset the value of his interest against the purchase price of the property. Thus, in the most common situation, a holder of a lien on property being sold may bid at the sale, and if successful, may offset the amount owed to him that is secured by the lien on the property (but may not offset other amounts owed to him) against the purchase price, and be liable to the trustee for the balance of the sale price, if any.¹⁸

Unfortunately, a review of the legislative history reflects little guidance or clarity in terms of the intended scope of “interests” under section 363(f). If anything, the legislative history only serves to cast further doubt on exactly what the House and Senate intended when they adopted this provision of the Bankruptcy Code. What is clear from the legislative history, however, is that Congress considered a lien to be a common example of an interest that might be asserted in property being sold free and clear. The use of that particular example does not really shed any new light on the unanswered question, as the single noncontroversial part of this debate is the agreement by almost everyone that property can be sold free and clear of an interest when the interest is a lien. While this construction is consistent with section 363(f)(3) (authorizing a sale free and clear if “such interest is a lien”), Congress largely left the courts with no foundation or guidance on the broader application issue.

III. TWO VIEWS AND THE AUTHORS’ VIEW

Two views of the word “interest” under section 363(f) have developed in the case law. While earlier cases (circa 1982-1987) seemed more enamored of a narrow interpretation of the word, more recent cases seem to conclude that an “interest” is a broader concept that requires a broad interpretation. While each side has its following amongst professionals and academics, the authors have adopted the later approach and espouse the virtues of an expansive view of interests. To that end, it is important to note that the authors’ views expressed herein should not be considered unbiased or in any way impartial. At the same time, however, the authors have consciously endeavored to avoid a discussion of section 363 sales in a world where the “ends justify the means” and have instead sought to focus their efforts on a critical interpretation of the Bankruptcy Code, its policies, and Congressional intent. Of course, our view of how section 363(f) should be construed is colored, in large part, by our experience representing commercial debtors throughout the Chapter 11 process, and we are aware that academics and members of the plaintiffs’ bar may not be so ready to accept our point of view.

A. The Narrow View of “Interest in Such Property”

A minority of courts have interpreted the phrase “interest in such property” under section 363(f) to mean only in rem interests such as liens, mortgages, and money judgments. The rationale here is that unsecured claims, including successor liability claims, are merely in personam claims against the debtor—claims that are not tied to any of the debtor’s specific property. Until these in personam claims are turned in to in rem “interests” (by obtaining a judgment and recording a lien against specific property, for example), such claims should not be characterized as interests and are therefore not “interests” as to which property can be sold free and clear under section 363(f).

Two cases frequently cited for the narrow view of section 363(f) include *In re New England Fish Co.*¹⁹ (discussing civil rights claims) and *In re White Motor Credit Corp.*²⁰ (discussing tort claims). Both of these cases dealt with successor liability of a purchaser under a pre-plan sale of the debtor’s business assets. In *New England Fish*, the issue was brought before the court when the claimants objected to the debtor’s proposed sale of its fish processing business free and clear of their civil rights claims. In *White Motor*, the purchaser of the debtor’s truck assets sought declaratory relief after the consummation of the sale transaction regarding the extent of its liability for the claimant’s tort claims.

In both of these cases, the courts observed that while section 363(f) allows the trustee to sell property “free and clear of any interest in such property,” the claimants were general unsecured creditors with no specific interest in the debtors’ property. Specifically, the court in *White Motor* held that “[g]eneral unsecured claimants including tort claimants, have no specific interest in a debtor’s property... Therefore, section 363 is inapplicable for sales free and clear of such claims.”²¹ Similarly, the court in *New England Fish* found that “the Domingo claimants are general unsecured creditors... They also do not have an interest in the specific property of the estate being sold to Ocean Beauty which is contemplated by 11 U.S.C. § 363(f).”²² There is an irony in the aforementioned cases espousing the narrow view of interests. In both of these cases, the courts found an alternative justification for authorizing the sale free and clear, even though they both rejected the statutory construction that the types of claims found in those two cases were within the meaning of the word “interest” as it appears in section 363(f).

In *New England Fish*, the court relied, in part, on the Supreme Court’s rationale in *Nathanson v. National Labor Relations Board*²³ that if one claimant of the debtor’s estate is to be preferred over other such claimants, “the purpose should be clear from the statute.” The court went on to find that the prospect of allowing the sale to proceed subject to successor liability claims “would chill or render impossible any sale” and authorized the sale free and clear. As best as we are able to determine, the *New England Fish* court never actually articulated a statutory basis for authorizing the sale free and clear of the employment claims. Rather, the court merely discussed the pros and cons of the outcome and decided that authorizing the sale free and clear of those claims was the appropriate outcome.

In finding an alternate basis (not pursuant to section 363(f)) to sanction the sale free and clear, the *White Motor* court relied on the grant of authority under section

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

1141(c) that authorizes property dealt with by a plan to be disposed of “free and clear of all claims and interests,” finding that a sale conducted through the court’s equitable powers can provide the debtor with the same degree of relief effectuated by a sale in a plan of reorganization.²⁴ While it is doubtful that in today’s legal climate, a court’s order authorizing a sale free and clear of interests as enunciated in the *White Motor* case could withstand appellate scrutiny, the case is representative of the narrow view advocated in the courts.²⁵

B. The Expansive View of “Interest in Such Property”

Other courts have adopted a more expansive view of interests in property that “encompasses other obligations that may flow from ownership of the property,” including “claims” as defined in section 101(5) of the Bankruptcy Code.²⁶ The authors agree with the approach of these courts and advocate that while, outside of bankruptcy, a purchaser might be “tagged” with successor liability for products liability claims and environmental, labor, and employment law violations, a purchaser acquiring assets under section 363(f) should do so “free and clear of any interest in such property” and should be insulated from successor liability.

An expansive view of interests is appropriate for at least four reasons: (1) courts have adopted a very broad and liberal interpretation of “interests in property” so as to include “claims” (as defined in section 101(5)); (2) allowing successor liability to survive in the face of bankruptcy sales would improperly rearrange the priority scheme established by Congress; (3) the Bankruptcy Code preempts state law successor liability claims; and (4) public policy behind the Bankruptcy Code requires courts to shield a purchaser of the assets of a failing business from liability incurred by its predecessor, the debtor.

C. Courts Have Adopted a Very Broad and Liberal Interpretation of “Interests in Property”

1. In Rem Interests Are Merely One Type of “Interests in Property”

While some have advocated that the “interest” referred to in section 363(f) should be interpreted to mean only in rem interests such as liens, paragraph (3) thereof makes clear that a lien is just one type of “interest in property.” In fact, that a lien is mentioned as one example of an “interest” makes it hard to imagine that Congress meant the words “lien” and “interest” to be synonymous in section 363(f). So the term “interest” must mean something more than merely a lien;²⁷ but how much more? On the one hand, some courts have found that a “claim”—broadly defined under the Bankruptcy Code as a right to payment or a right to an equitable remedy—is a subset of an “interest”.²⁸ These courts maintain that a party has an interest in property of the estate by virtue of its claim against the debtor, and upon sale of that property under section 363(f), the claim is directed solely to the sale proceeds and may not be subsequently asserted against a purchaser of that property. On the other hand, opponents of the expansive view argue that section 363 only refers to interests, and when viewed outside of bankruptcy, claims have no relationship to a debtor’s property.²⁹

2. Section 1141 is Instructive in Interpreting Section 363(f)

Under an expansive interpretation of section 363(f), courts have used their equitable power to affect claims, including successor liability claims, by invoking section 1141 of the Bankruptcy Code—the section dealing with plan confirmation.³⁰ Section 1141 provides that the confirmation of a plan discharges claims against the debtor (except as otherwise provided in the plan or the order of confirmation). Specifically, it states that, with limited exceptions, 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 debtors.”³¹

Courts latching on to section 1141 in support of selling a debtor’s assets free and clear of claims have argued that a sale conducted through the court’s equitable powers, in conjunction with section 105(a), can provide a debtor with the same degree of relief effected by a sale in a plan of reorganization. As a result, these courts reason that the order approving the section 363 sale can affect any claim that could be dealt with under a plan.³² While such an approach has been criticized on the basis that sales under section 363(f) require very little in the way of notice, disclosure, and an opportunity to object (unlike sales under a confirmed plan), as a practical matter, current practice seems to disregard these criticisms.³³

3. Future Claims and Interests

While many courts have found that a claim or interest can only be addressed in a sale (or through confirmation) to the extent that it arose prior thereto, at least one court has interpreted the term “interest” so as to include future claims and interests as well.³⁴ While this decision may be against the manifest weight of authority on section 363 sales, it is an example of how far the courts will go to insulate purchasers from liability. In *Paris Industries*, the District Court of Maine affirmed a bankruptcy court’s order enjoining a products liability suit brought in the state court against the purchaser of a debtor’s assets under the theory of successor liability.³⁵ Prior to the debtor’s bankruptcy filing, Mrs. Pabst purchased a wooden toboggan that was manufactured by the debtor. Several months after the section 363 sale of the assets of the debtor’s business, Mrs. Pabst was injured while riding the toboggan, and she eventually filed a products liability and negligence complaint against the successor and purchaser of the debtor’s property.³⁶

The Maine district court disagreed with the plaintiff and the notion “that a bankruptcy court cannot approve the sale of estate assets free and clear of all claims that might arise in the future, but only free of claims then existing.”³⁷ It held that:

To conclude that a bankruptcy court cannot approve the sale of assets free and clear of such future claims against a purchaser from the debtor significantly impairs the bankruptcy court’s ability to administer bankruptcy estates. Every sale must then be discounted by the risk the purchaser sees of future claims. The result will be decreasing assets for those who already have claims and essentially a preference for later-filed claims that can be brought against the purchaser.³⁸

D. Allowing Claims to Follow Assets Sold Under 363(f) Would Frustrate the Bankruptcy Code’s Distribution Scheme

A key component of the expansive view of “interests” under section 363(f) is the notion that allowing claims to follow assets would frustrate the Bankruptcy Code’s distribution scheme. In other words, excluding the claims of unsecured creditors from the definition of “interests” under section 363(f) would sanction an unsecured creditor later asserting its bankruptcy claim against a good-faith purchaser. Such an interpretation would improperly give priority and preference to that creditor.³⁹ The rule that asset sales in bankruptcy occur free and clear of any interest is founded upon the principle that good faith purchasers receive clean title to the property and that any claims against the property attach to the proceeds; a more restrictive interpretation would infringe upon the priority scheme provided by the Bankruptcy Code.

Section 507 of the Bankruptcy Code defines the various classes of creditors entitled to priority treatment before general unsecured creditors receive a distribution of estate assets.⁴⁰ If a creditor were allowed to pursue a claim against an entity that has purchased assets free and clear under section 363(f), then that creditor would be given a “second bite at the apple” and potentially receive a priority over those claims paid in accordance with the Bankruptcy Code. That would be so even though the claims in question were afforded the same priority under the Bankruptcy Code and the claimants received the same treatment in the debtor’s bankruptcy case. Such a construct would clearly frustrate the distribution scheme established by Congress.

In fact, the U.S. Supreme Court has held that if one claimant of the debtor’s estate is to be preferred over others, “the purpose should be clear from the statute.”⁴¹ Allowing certain creditors—in this case creditors with successor liability claims—to seek a recovery from a section 363(f) purchaser while other creditors accorded an equal or higher priority by the Bankruptcy Code are limited to obtaining their recovery solely from the limited assets of the bankruptcy estate would “subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors.”⁴² In other words, allowing creditors to pursue claims against a party who has purchased assets free and clear of interests under section 363(f) would frustrate the orderly scheme of the Bankruptcy Code by allowing some unsecured creditors to leapfrog over others.⁴³

When a creditor has already pursued its claim in the bankruptcy case, has been treated therein consistent with the claims and priorities of all creditors as provided by the Bankruptcy Code, and has still come up short, permitting that creditor to pursue its claim against the purchaser/successor would unacceptably favor that creditor over other creditors. In addition to the Third Circuit’s ruling in *TWA* cited above, other courts have followed this rationale. For example, in *Forde v. Kee-Lox Mfg. Co., Inc.*,⁴⁴ the District Court for the Western District of New York dismissed a Title VII suit by an employee of a debtor against the purchaser of the debtor’s property on a successor liability theory. The court rejected the claimant’s assertion that the court could not reduce his demand for reinstatement to a fixed amount of money that could be satisfied out of the proceeds of the sale of the assets of the debtor’s bankruptcy estate (an argument about whether section 363(f)(5) constituted a basis for a sale free and clear of the interest in question).⁴⁵ The court explained that a major difficulty with

the plaintiff's position was that it "would allow claimants such as [plaintiff] to assert their claims against purchasers of the bankrupt's assets, while relegating lienholders to the proceeds of the sale. This elevates claims that have not been secured or reduced to judgment to a position superior to those that have."⁴⁶ Accordingly, it must be that, under section 363(f), property can be sold free and clear of claims.

E. Sanctioning Successor Liability in Section 363(f) Sales Would Frustrate the Important "Fresh Start" Purpose of Bankruptcy

Another reason the free and clear provisions of section 363(f) incorporate claims and trump traditional notions of successor liability (at least with respect to "substantial continuity" and other state-law successor liability claims) is because federal law preempts state law in this area. Generally speaking, federal preemption of state law must either be explicit or compelled due to an unavoidable conflict between the two.⁴⁷ With respect to the later situation, in order for a state law to be preempted, the Supremacy Clause of the U.S. Constitution requires a determination that the state law frustrates the full objective of the federal legislation.⁴⁸ To determine whether a state law is constitutionally in conflict with the federal law, the purpose of each law must be construed.⁴⁹

For example, in the products liability context, the purpose underlying state law successor liability is to protect defenseless victims from a manufacturer's defects and to spread the cost of compensation throughout society.⁵⁰ Successor liability is imposed in part as a burden attaching to the manufacturer's goodwill enjoyed by the successor. While outside of bankruptcy a firm's true worth may generally reflect this potential liability, in a section 363 sale there is often little value ascribed to a debtor's intangible goodwill. A primary purpose of the Bankruptcy Code is to grant debtor's "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."⁵¹ Reorganization under the Bankruptcy Code is a vehicle to finalize resolution of claims and interests. By imposing successor liability on purchasers of assets when the underlying liability is discharged, the federal purpose of final resolution and discharge of debt is compromised. Accordingly, there is yet another reason that section 363(f) sales may be free and clear of claims.

F. An Inability to Sell Property Free and Clear of Claims Would Irreparably Damage a Debtor's Ability to Maximize Value for Its Estate

Another fundamental purpose of bankruptcy law is the maximization of value of the debtor's estate. Authorizing the sale of property under section 363(f) free and clear of claims is entirely consistent with that purpose. In fact, the availability of the "free and clear" relief under section 363 is probably the principal benefit sought by potential buyers in bankruptcy asset sale scenarios. "The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less consideration in exchange for their assets (and, accordingly, creditors to receive less) to compensate for this potential liability."⁵²

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

As recently highlighted by the Third Circuit in its influential *TWA* opinion, the sale of TWA’s assets to American Airlines at a time when TWA was in financial distress was facilitated by American obtaining title to the assets free and clear of the civil rights claims maintained by TWA’s employees. Absent entry of the bankruptcy court’s order providing for a sale free and clear of the successor liability claims at issue, American likely would have offered a substantially discounted bid on account of those future claims, thereby eroding value for the debtor’s estate and creditors generally.⁵³ These cases make clear that there is a need to shield purchasers of the property of failing businesses from liability incurred by the predecessors.⁵⁴

One of the primary goals of Chapter 11 is to maximize the value of a debtor’s assets. To achieve this goal, the court is often asked to approve sales of the debtor’s property to third parties. A key factor in a third party’s purchase of assets is the “worth” of those assets. It would be exceedingly difficult, if not impossible, for a purchaser to assess worth if a court order that authorized them to take the assets free and clear of any and all “interests” at the same time enabled unsecured creditors with “claims” to “lie in the weeds” and wait until the court approved the sale before they sued the purchaser on account of their claims against the debtor/seller.⁵⁵ Such a scenario is inimical to the bankruptcy process and militates in favor of an interpretation of “interests in property” under section 363(f) that includes claims.

IV. IS THERE LANGUAGE TO BE PUT IN AN ORDER SUFFICIENT TO EFFECTIVELY SELL ASSETS FREE AND CLEAR OF ALL CLAIMS?

In order to effectuate a sale free and clear of all claims, the cases cited herein suggest that the language in the sale order should be expansive. For example in *Mickowski v. Visi-Trak Worldwide, LLC*, where the order only provided that the debtor’s “assets will be sold ‘as is’ and ‘where is’ free and clear of liens” and did not reference free and clear of any claims other than liens, the court concluded that the sale order did not limit the claimant’s successor liability claims.⁵⁶ However, in *Forde v. Kee-Lox Mfg.*, the court order authorizing the sale of assets provided that the sale was “free and clear of liens, including tax liens, if any, claims, encumbrances, demands and rights of creditors, or any other person.”⁵⁷ In *In re New England Fish*, the court entered an order approving the sale of the debtor’s property free and clear of a judgment obtained by employees of the debtor on account of employment discrimination.⁵⁸ In addition, the court in *In re Paris Industries Corporation* approved a purchase agreement that provided for a sale “free and clear” of “all claims for product liability (to the extent that such claims are in existence or arise out of products manufactured and sold prior to the closing date.”⁵⁹ In each of those cases, the court found the language in the respective orders sufficient to allow the debtor to sell its assets free and clear of applicable claims.

The drafting lesson for purchasers of property from debtor’s bankruptcy estates to be learned from these cases is simple: If one wants a subsequent court, including an appellate court, to be in the best position to conclude that the purchaser has obtained title to the debtor’s property free and clear of any of the “interest” or “claims” asserted or capable of being asserted against the debtor, broad, inclusive language should be

put into the order approving the sale. An example of such broad language might include the foregoing findings and conclusions:

The transfer of the assets (“Assets”) to the buyer (“Buyer”) shall vest the Buyer with all right, title, and interest of the Debtor to the Assets free and clear of any and all liens, claims, interests, and encumbrances of any type whatsoever (whether known or unknown, secured or unsecured or in the nature of setoff or recoupment, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or non-material, disputed or undisputed, whether arising prior to or subsequent to the commencement of the chapter 11 cases, and whether imposed by agreement, understanding, law, equity, or otherwise, including claims otherwise arising under doctrines of successor liability), including but not limited to those (i) that purport to give to any party a right or option to effect any forfeiture, modification, right of first refusal, or termination of the Debtor’s or the Buyer’s interest in the Assets, or any similar rights, and (ii) relating to taxes arising under or out of, in connection with, or in any way relating to the operation of the Assets, including the transfer of the Assets to the Buyer (all such liens, claims, interests, and encumbrances listed herein, the “Claims and Interests”).

Except as expressly permitted or otherwise specifically provided for herein, pursuant to 11 U.S.C. §§ 363(b) and 363(f), the Debtor’s right, title, and interest in the Assets shall be transferred to the Buyer free and clear of all Claims and Interests, with all such Claims and Interests to attach to the cash proceeds of the sale in the order of their priority, with the same validity, force, and effect which they had as against the Assets immediately before such transfer, subject to any claims and defenses the Debtor may possess with respect thereto.

This order (a) shall be effective as a determination that, upon the closing of the sale, all Claims and Interests of any kind or nature whatsoever existing to or in the Assets prior to the closing of the sale have been unconditionally released, discharged, and terminated (other than any obligations surviving by agreement), and that the conveyances described herein have been effected and (b) shall be binding upon and shall govern the acts of all entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Assets.

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

All persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade creditors, and other stakeholders, holding Claims and Interests of any kind or nature whatsoever against or in the Debtor or the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Assets hereby are forever barred, estopped, and permanently enjoined from asserting against the Buyer, its successors or assigns, their property, or the Assets, such persons’ or entities’ Claims and Interests.

V. CONCLUSION

The impact of the meaning of section 363(f) on bankruptcy cases is substantial. While courts have struggled with the narrow questions of what does the word “interest” mean in section 363(f) and whether “claims” are included within that meaning, they have almost unwaveringly adhered to the notion that effective sales free and clear of claims is an integral part of the bankruptcy practice. It would be simple enough for Congress to clear up the issue once and for all by amending the Bankruptcy Code, but there is no reason to believe any such clarity is in the offing. What we are left with is an outcome driven interpretation of the statute and a fairly universal view that sales free and clear of claims is the “right” outcome.

Research References:

Bankr. Serv., L Ed §§ 20:232, 20:248 to 20:20:257; Norton Bankr. L. & Prac. 3d § 44:22; Norton Bankr. L. & Prac. 3d 11 U.S.C. § 363

West’s Key Number Digest, Bankruptcy ☞ 3073

NOTES

1. 11 U.S.C.A. §§ 101 et seq. is hereinafter referred to as the “Bankruptcy Code,” and all references in this article to sections are to sections of the Bankruptcy Code unless otherwise noted.

2. See Bankruptcy Statistics published by the Public Access to Court Electronic Records (PACER) system at <http://www.uscourts.gov/bnkrpctstats/statistics.htm>.

3. Pursuant to section 1107, a debtor in possession is essentially granted the status of a trustee. With respect to the sale of assets, therefore, whenever the Bankruptcy Code authorizes a trustee to sell property, in the absence of an order by the court to the contrary, that authorization is equally applicable to a debtor in possession. In this article, we shall refer to the seller of property as the “Debtor,” intending to include debtor in possession and trustee in that reference.

4. Property of a bankruptcy estate is defined in section 541. See 11 U.S.C.A. § 541.

5. Sales of estate property outside of the ordinary course of business pursuant to section 363(b)(1) are typically referred to in the bankruptcy vernacular as “section 363 sales” and will be referred to as such throughout this article.

6. 11 U.S.C.A. § 363(f).

7. 11 U.S.C.A. § 363(f).

8. In Chapters 1, 3, 5, 7, and 11 of the Bankruptcy Code, the word “interest” or “interests” appears multiple times in 85 different sections.

9. Section 101 contains numerous defined terms. See 11 U.S.C.A. § 101.

10. 11 U.S.C.A. § 1141(c).

11. *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 545, 41 Bankr. Ct. Dec. (CRR) 65, 49 Collier Bankr. Cas. 2d (MB) 1765, Bankr. L. Rep. (CCH) P 78836 (7th Cir. 2003) (The Bankruptcy Code does not define “any interest,” and, in the course of applying section 363(f) to a wide variety of rights and obligations related to estate property, courts have been unable to formulate a precise definition. *Folger Adam Security, Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252,258, 35 Bankr. Ct. Dec. (CRR) 254 (3d Cir. 2000) However, the Code itself does not suggest that “interest” should be understood in a special or narrow sense; on the contrary, the use of the term “any” counsels in favor of a broad interpretation).

12. *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285, 40 Bankr. Ct. Dec. (CRR) 140, Bankr. L. Rep. (CCH) P 78757 (7th Cir. 2002) (discussing leasehold interests); *In re Trans World Airlines, Inc.*, 322 F.3d 283, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362, 22 A.L.R. Fed. 2d 809, 290 (3d Cir. 2003) (discussing discrimination claims against the debtor as well as rights to a travel voucher program established in settlement of a sex discrimination action); *Myers v. U.S.*, 297 B.R. 774 (S.D. Cal. 2003) (discussing unsecured personal injury claims arising out of the debtor’s performance of a contract that was transferred to an asset purchaser); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582, 36 Collier Bankr. Cas. 2d (MB) 1693, 20 Employee Benefits Cas. (BNA) 2103, 78 A.F.T.R.2d 96-7021 (4th Cir. 1996) (discussing claims of a retiree benefit fund for future pension and health benefit plan payments under the Coal Act, which makes a “successor in interest” liable for such benefits); *In re Lady H Coal Co., Inc.*, 199 B.R. 595, 608 (S.D. W. Va. 1996), *aff’d*, 99 F.3d 573, 36 Collier Bankr. Cas. 2d (MB) 1693, 20 Employee Benefits Cas. (BNA) 2103, 78 A.F.T.R.2d 96-7021 (4th Cir. 1996) (discussing claims of a union benefit fund for payment of employee benefit premiums); *In re New England Fish Co.*, 19 B.R. 323, 329, 8 Bankr. Ct. Dec. (CRR) 1382, 6 Collier Bankr. Cas. 2d (MB) 549, 34 Fair Empl. Prac. Cas. (BNA) 496, Bankr. L. Rep. (CCH) P 68836, 29 Empl. Prac. Dec. (CCH) P 32728 (Bankr. W.D. Wash. 1982) (discussing Title VII employment discrimination and civil rights claims of a debtor’s employees).

13. See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424, 24 *Env’tl. L. Rep.* 20217 (7th Cir. 1993) (“[t]he general rule in Illinois as elsewhere is that the purchaser of assets does not acquire the seller’s liabilities unless he agrees to do so”).

14. *Steel Co. v. Morgan Marshall Industries, Inc.*, 278 Ill. App. 3d 241, 248, 214 Ill. Dec. 1029, 662 N.E.2d 595, 29 U.C.C. Rep. Serv. 2d 649 (1st Dist. 1996) (collecting cases).

15. *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49, 27 Bankr. Ct. Dec. (CRR) 591, 33 Collier Bankr. Cas. 2d (MB) 1456, 19 Employee Benefits Cas. (BNA) 1463, Bankr. L. Rep. (CCH) P 76547 (7th Cir. 1995) (citing *E.E.O.C. v. G-K-G, Inc.*, 39 F.3d 740, 748, 66 Fair Empl. Prac. Cas. (BNA) 344 (7th Cir. 1994)).

16. See *Steinbach v. Hubbard*, 51 F.3d 843, 845, 2 Wage & Hour Cas. 2d (BNA) 1089, 129 Lab. Cas. (CCH) P 33216 (9th Cir. 1995) (commenting that “federal courts have developed a federal common law successorship doctrine that now extends to almost every employment law statute”).

17. See *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 93-94, Prod. Liab. Rep. (CCH) P 12256 (3d Cir. 1989) (describing successor liability in product liability cases).

18. H.R. REP. 95-595, 1978 U.S.C.C.A.N. 5963, 6302, S. REP. 95-989, 1978 U.S.C.C.A.N. 5787, 5842.

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

19. In re New England Fish Co., 19 B.R. 323, 329, 8 Bankr. Ct. Dec. (CRR) 1382, 6 Collier Bankr. Cas. 2d (MB) 549, 34 Fair Empl. Prac. Cas. (BNA) 496, Bankr. L. Rep. (CCH) P 68836, 29 Empl. Prac. Dec. (CCH) P 32728 (Bankr. W.D. Wash. 1982).

20. In re White Motor Credit Corp., 75 B.R. 944, 948, 16 Bankr. Ct. Dec. (CRR) 217, 17 Collier Bankr. Cas. 2d (MB) 293 (Bankr. N.D. Ohio 1987).

21. White Motor, 75 B.R. at 948.

22. New England Fish, 19 B.R. at 329.

23. Nathanson v. N. L. R. B., 344 U.S. 25, 29, 73 S. Ct. 80, 97 L. Ed. 23, 31 L.R.R.M. (BNA) 2036, 22 Lab. Cas. (CCH) P 67234 (1952).

24. While this was not a sale under 1141(c), its free and clear provisions seem to have provided the *White Motor* court with comfort that it was reaching the right result. While the courts in *New England Fish* and *White Motor* are often cited for the narrow view of “interests” in 363(f), a number of cases have hewed to their construction of the statute without resorting to equitable considerations and finding the sales to be free and clear of successor liability. For example, the Ohio district court refused to allow a sale free and clear of successor liability claims where the sale order sale order only said that “assets will be sold ‘as is’ and ‘where is’ free and clear of liens” and did not include any free and clear language referring to any claims other than liens. *Mickowski v. Visi-Trak Worldwide, LLC*, 321 F. Supp. 2d 878 (N.D. Ohio 2003). On another occasion, the Sixth Circuit found that a state agency’s assignment of an “experience rating” of the debtor to the debtor’s statutory successor did not violate the free and clear provisions of 363(f)—the experience rating is not an “interest,” and there was no conflict with federal law. In re *Wolverine Radio Co.*, 930 F.2d 1132, 21 Bankr. Ct. Dec. (CRR) 932, 24 Collier Bankr. Cas. 2d (MB) 1702, Bankr. L. Rep. (CCH) P 73898, Unempl. Ins. Rep. (CCH) P 21952 (6th Cir. 1991).

25. The *White Motor* court expressed that:

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. *Van Huffel v. Harkelrode*, 284 US 225, 52 S.Ct. 115, 76 L.Ed 256 (1931). Authority to conduct such sales is within the court’s equitable powers when necessary to carry out the provisions of Title 11. 11 U.S.C.A. § 105(a). The sale in question was in fact conducted under the equitable provisions of Section 105.

White Motor, 75 B.R. at 948.

26. See, e.g. In re *Trans World Airlines, Inc.*, 322 F.3d 283, 289, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362, 22 A.L.R. Fed. 2d 809 (3d Cir. 2003) (“the trend seems to be toward a more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of the property’”) (citing 3 Collier on Bankruptcy ¶ 363.06[1]); In re *WBQ Partnership*, 189 B.R. 97, 105, 27 Bankr. Ct. Dec. (CRR) 1200, 34 Collier Bankr. Cas. 2d (MB) 674 (Bankr. E.D. Va. 1995) (the term “interest” extends beyond liens and included the state’s right to recapture asset depreciation).

27. See *Trans World Airlines*, 322 F.3d at 290 (“to equate interests in property with only in rem interests such as liens would be inconsistent with section 363(f)(3)”; In re *P.K.R. Convalescent Centers, Inc.*, 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (“[a]s the plain meaning of the statute demonstrates, § 363 covers more situations than just sales involving liens”).

28. See *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93, 17 Bankr. Ct. Dec. (CRR) 293, 18 Collier Bankr. Cas. 2d (MB) 316, Bankr. L. Rep. (CCH) P 72180 (2d Cir. 1988) (principle of preserving estate for creditors and funneling claims to one proceeding in bankruptcy court justified channeling of interest in settlement fund); *P.K.R. Convalescent Ctrs.*, 189 B.R. at 94 (creditors’ contingent claim against estate property was an interest subject to being sold free and clear).

29. See George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. 235, 262 (Spring 2002).

30. See *White Motor*, 75 B.R. at 948-949 (citations omitted).

31. 11 U.S.C.A. § 1141(c).

32. *White Motor*, 75 B.R. at 948 (a case that rejected the notion that section 363(f) itself could authorize a sale free and clear of the claims in question but concluded that the combination of sections 105(a) and 1141(c) supported the sale free and clear, even though the sale was not proposed as part of a plan and was actually approved by the court on a sale motion with the determination that the “sale was appropriate outside of the context of a plan of reorganization.” *White Motor*, 75 B.R. at 947).

33. See Kuney, 76 Am. Bankr. L.J. at 262.

34. *Epstein v. Official Committee of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577, 27 Bankr. Ct. Dec. (CRR) 694, 33 Collier Bankr. Cas. 2d (MB) 1751, Bankr. L. Rep. (CCH) P 76574 (11th Cir. 1995) (potential products liability claimants that were not exposed to a specific identifiable defective product or pre-confirmation relationship with the debtor lacked a claim that could be dealt with in the bankruptcy process); *Matter of Mooney Aircraft, Inc.*, 730 F.2d 367, 375, Bankr. L. Rep. (CCH) P 69858 (5th Cir. 1984) (bankruptcy court cannot approve the sale of estate assets free and clear of all claims that might arise in the future but only free of claims then existing); *In re Fairchild Aircraft Corp.*, 184 B.R. 910, 931 (Bankr. W.D. Tex. 1995), decision vacated, 220 B.R. 909, 32 Bankr. Ct. Dec. (CRR) 742 (Bankr. W.D. Tex. 1998) (claimant must have a prepetition relationship with the debtor such that it was possible for the court to practically deal with the claimant in bankruptcy).

35. See *In re Paris Industries Corp.*, 132 B.R. 504, Bankr. L. Rep. (CCH) P 74283 (D. Me. 1991).

36. *Paris Industries*, 132 B.R. at 506.

37. *Paris Industries*, 132 B.R. at 510, n.14.

38. *Paris Industries*, 132 B.R. at 510, n.14.

39. *In re Lady H Coal Co., Inc.*, 199 B.R. 595, 605, n.6 (S.D. W. Va. 1996), *aff'd*, 99 F.3d 573, 36 Collier Bankr. Cas. 2d (MB) 1693, 20 Employee Benefits Cas. (BNA) 2103, 78 A.F.T.R.2d 96-7021 (4th Cir. 1996).

40. 11 U.S.C.A. § 507.

41. *Nathanson v. N. L. R. B.*, 344 U.S. at 29.

42. *In re New England Fish Co.*, 19 B.R. 323, 329, 8 Bankr. Ct. Dec. (CRR) 1382, 6 Collier Bankr. Cas. 2d (MB) 549, 34 Fair Empl. Prac. Cas. (BNA) 496, Bankr. L. Rep. (CCH) P 68836, 29 Empl. Prac. Dec. (CCH) P 32728 (Bankr. W.D. Wash. 1982). The court further observed:

To hold as contended for by the claimants would effectively implement a value judgment, or interpretation, that it was the intent of Congress for certain creditor or claimant constituencies to be accorded a higher priority than any set forth in the Code; indeed, that the particular wage claimants in the claimant classes are to be accorded a higher priority than wage claimants generally who are provided for by 11 U.S.C.A. § 507(a)(3). Such a result would be contrary to *Nathanson v. NLRB*, *supra*.

New England Fish., 19 B.R. at 328.

43. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 292, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362, 22 A.L.R. Fed. 2d 809 (3d Cir. 2003) (“[t]o allow the claimants to assert successor liability claims against American [Airlines] while limiting other creditors’ recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code’s priority scheme”).

WHAT IS YOUR “INTEREST” IN SECTION 363(F)?

44. Forde v. Kee-Lox Mfg. Co., Inc., 437 F. Supp. 631, 16 Fair Empl. Prac. Cas. (BNA) 262 (W.D. N.Y. 1977), judgment aff'd, 584 F.2d 4, 17 Fair Empl. Prac. Cas. (BNA) 1603, 17 Empl. Prac. Dec. (CCH) P 8611 (2d Cir. 1978).
45. Forde v. Kee-Lox Mfg., 437 F. Supp. at 633.
46. Forde v. Kee-Lox Mfg., 437 F. Supp. at 633-34.
47. Penn Terra Ltd. v. Department of Environmental Resources, Com. of Pa., 733 F.2d 267, 272, 11 Bankr. Ct. Dec. (CRR) 1202, 10 Collier Bankr. Cas. 2d (MB) 949, 20 Env't. Rep. Cas. (BNA) 2185, Bankr. L. Rep. (CCH) P 69827, 14 Env'tl. L. Rep. 20475 (3d Cir. 1984).
48. See White Motor, 75 B.R. at 950.
49. Perez v. Campbell, 402 U.S. 637, 650, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971).
50. See White Motor, 75 B.R. at 950.
51. Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195 (1934).
52. White Motor, 75 B.R. at 951.
53. Trans World Airlines, Inc., 322 F.3d at 292-93.
54. Musikiwamba v. ESSI, Inc., 760 F.2d 740, 751, 37 Fair Empl. Prac. Cas. (BNA) 821, 36 Empl. Prac. Dec. (CCH) P 35149 (7th Cir. 1985) (rejected by, Walker v. Faith Technologies, Inc., 344 F. Supp. 2d 1261 (D. Kan. 2004)) (companies may have trouble selling their assets for a decent price because “successors will be unwilling to assume a business involved in substantial time-consuming and expensive litigation when the assets themselves lack substantial value”).
55. Myers v. U.S., 297 B.R. 774, 784 (S.D. Cal. 2003).
56. Mickowski v. Visi-Trak Worldwide, LLC, 321 F. Supp. 2d 878, 880 (N.D. Ohio 2003).
57. Forde v. Kee-Lox Mfg., 437 F. Supp. at 632.
58. New England Fish., 19 B.R. at 329.
59. Paris Industries, 132 B.R. at 506.