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Section 363 Sale Orders: May Sales Be Made Free and Clear of Successor Liability Claims?

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I. Introduction

Chapter 11 debtors continue to elect the section 363 sale process, in many instances involuntarily, to sell substantially all of their assets and wind-down their business affairs, rather than attempting to restructure and emerge through a traditional plan of reorganization. [1] According to some commentators, "section 363 sales provide a mechanism to preserve going concern value and maximize creditor recoveries in a way that often cannot be accomplished through the traditional chapter 11 process or outside of bankruptcy." [2]

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. Today, however, that is rarely the case. [3] Section 363 sales are now followed by liquidating plans [4] or structured dismissals. [5] "There is little evidence that this trend will reverse itself soon." [6]

Furthermore, in almost all cases, bankruptcy court orders approving a section 363 sale (purportedly pursuant to section 363(f) of the Bankruptcy Code) include boilerplate language that the asset sale is free and clear of any claims against the purchaser, including claims that could be asserted under state law successor liability theory ("successor liability claims"), or that the purchaser is obtaining the assets based upon assurances that it would be protected from successor liability claims, [7] or both. Some believe that a sale order conveying estate assets free and clear of successor liability claims increase the value of the debtor's estate by attracting purchasers who have seemingly paid more for the assets because of a perceived insulation from successor liability claims. [8]

The true extent of the purchaser's insulation from successor liability claims, however, can only be measured after analyzing the relief afforded under section 363(b) and (f) of the Bankruptcy Code, the primary statutory predicates for a "free and clear" sale order. This article argues that section 363(b) and (f) simply cannot provide insulation from successor liability claims, notwithstanding the ever-expanding body of federal case law broadly endorsing pre-confirmation sales of a debtor's assets free of such claims. Instead, claims against a section 363 under a successor liability theory should be evaluated under state successor liability law. Part I of this article briefly discusses the various provisions of section 363. Part II of this article provides a primer on relevant state successor liability law. Part III introduces the various reasons supporting the body of federal case law that authorizes the sale of a debtor's business free and clear of successor liability claims pursuant to section 363(b) and (f). Part IV challenges the conclusions reached in these decisions and provides support for the proposition that the merits of successor liability claims against a section 363 purchaser should be analyzed under state successor liability law, notwithstanding the existence of broadly worded section 363 sale orders that purport to insulate asset purchasers from successor liability.

II. Section 363 Sales

Section 363 of the Bankruptcy Code allows for the use, sale, or lease of property that belongs to the bankruptcy estate. [9] Subsection (b) allows a trustee [10] of a bankruptcy estate to sell estate property within the normal course of a debtor's

business without prior notice or hearing by a bankruptcy court, while subsection (c) allows the trustee to sell estate property out00000side the normal course of a debtor's business with prior notice to and a hearing before the bankruptcy court. [11] In turn, subsection (f) of section 363 makes plain that the property may be sold unencumbered by interests held by others under certain listed conditions. [12]

Subsection (e) of section 363 provides that "on request of an entity that has an *interest in property* ... proposed to be ... sold ... by the trustee, the court, with or without a hearing, shall prohibit or condition such ... sale ... as is necessary to provide adequate protection of such interest." [13]

Thus, section 363 provides means to sell estate assets without the need to confirm a Chapter 11 plan. [14] In a section 363 sale, "assets are typically burnished (or 'cleansed') because they are sold free and clear of [interests in property]." [15] A free and clear order maximizes estate value, presumably, because it "allows the buyer to acquire [the assets] without fear that an estate creditor can enforce its claim against those assets." [16]

III. Successor Liability Theories

Section 363(f) sale orders routinely contain provisions providing that the section 363 purchaser is acquiring the assets free and clear of claims, including claims that could be asserted under state successor liability law. This section provides a brief primer on state successor liability law.

As an initial premise, it is generally accepted that a purchaser of corporate assets does not assume any debts or liabilities of the corporation it has purchased. [17] State law determines those circumstances where an exception applies to this general rule and an asset purchaser is deemed to have assumed the debts or liabilities of the seller. [18] Under state common law, there are four exceptions to the general prohibition against successor liability: (1) where the purchaser expressly or impliedly agrees to assume such debts or other liabilities; (2) where the transaction amounts to a consolidation or merger of the seller and purchaser; (3) where the purchasing corporation is merely a continuation of the selling corporation; or (4) where the transaction is entered into fraudulently in order to escape liability for such debts. [19]

In addition to these four exceptions to the general rule that an asset purchaser does not assume the liabilities of an asset seller, some states have also adopted the rule of product line successor liability. Under this theory, "a purchaser of substantially all assets of a firm assumes, with some limitations, the obligation for product liability claims arising from the selling firm's presale activities. Liability is transferred irrespective of any clauses to the contrary in the asset purchase agreement." [20] The policy underlying the product line exception is based upon a "premise that a person who is injured by a defective product should be able to bring a product liability action against a company which purchases the assets of an unrelated company and then continues manufacturing and distributing essentially the same product using the predecessor's assets, equipment, intellectual property and goodwill." [21]

IV. Successor Liability Claims as "Interests" in Property

Property that is sold pursuant to a section 363 sale order is sold "free and clear of any interest in such property." [22] "Interest in property" is not defined within the Bankruptcy Code and for the most part, courts have been unable to construct a precise definition of the term. [23] "But 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 definition." [24] And while the term "any interest in property" should not be viewed without boundaries, [25] Congress has historically utilized the

term "interest" in legislation in order avoid "rigid and technical definitions drawn from other areas of the law..." [26] *In re Leckie Smokeless Coal Co.* [27] provides good instruction on this issue. In *Leckie*, the debtors sought declaratory relief that they could sell their assets free and clear of funding obligations arising under the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act"). [28] The benefit plans argued that the bankruptcy court could not extinguish successor liabilities arising under the Coal Act. [29] In determining that the debtors could sell their assets free and clear of funding obligations, the *Leckie* court first embraced an expansive view of the phrase "any interest in property":

> [W]hile the plain meaning of the phrase "interest in such property" suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of [section] 363(f) to in rem interests, strictly defined, and we decline to adopt such a restricted reading of the statute here. [30]

In turn, the *Leckie* court concluded that because the section 363 assets were to be used in coal mining operations, the benefit plans' entitlement to payment for the debtors' Coal Act obligations created an "interest in property" within the meaning of section 363(f): [31]

[I]f 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 [§] 363(f). [32]

"Thus, *Leckie* seems to suggest that the term 'any interest' is intended to refer to obligations that are connected to, or arise from, the property being sold." [33]

In an oft-cited decision on the interpretation of "interest in property," the Third Circuit in *In re Trans World Airlines* [34] similarly construed the term broadly. The *TWA* court concluded that the rights of employees to travel-related benefits received in settlement of a sex discrimination lawsuit constituted "interests in property." [35] This decision was based upon the belief that "any interest" should include interests "that could potentially travel with the property being sold." [36] Thus, the TWA Court concluded that "[t]he 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." [37]

Cases that have squarely addressed whether successor liability claims are deemed "interests in property" under section 363(f) have, in most instances, held in the affirmative. [38] That is, successor liability claims are a type of "interest" in property from which the property may be sold free and clear. [39] This approach diverged from early Bankruptcy Code cases that concluded that section 363 could not be used to sell assets free and clear of tort claims, including successor liability tort claims, because tort claimants did not have specific interests in debtor property. [40] Nevertheless, in later cases, courts [41] have linked their power under section 363(f) of the Bankruptcy Code (which does not use the term "claims") to authorize sales of assets "free and clear" of successor liability claims to their power under section 1141(c) of the Bankruptcy Code, which provides that after confirmation of a plan of reorganization, 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." [42]

The Second Circuit's decision in *In re Chrysler* provides a good example of this reasoning. [43] In *Chrysler*, the Second Circuit was called upon to review objections to the bankruptcy court's approval of a section 363 sale order. The sale order authorized the sale of the debtor's assets, while terminating the right to pursue claims against the section 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." [44] Objectors to the sale argued that successor liability claims could not be extinguished because they were not "interests" in the debtor's property. Because Congress intentionally included the word "claims" in section 1141(c), and excluded the term from § 363(f), the objectors argued, "it was willing to extinguish tort claims in the reorganization context, but unwilling to do so in the § 363 sale context." [45] According to the *Chrysler* objectors, the rationale for the different language was born from a belief that plan confirmation afforded successor liability claimants procedural rights that were not provided in a section 363(b) sale. [46]

Although conceding that the language and structure of sections 1141(c) and 363(f) were quite different, [47] the Second Circuit believed the ever-expanding role of section 363 in bankruptcy proceedings required it to "harmonize the application of § 1141(c) and § 363(f)" [48] so as to incorporate successor liability claims into the definition of "interests in property", notwithstanding that the term "claim" was not contained in section 363(f). [49] Thus, if assets could be cleansed of successor liability claims pursuant to a confirmed plan of reorganization, as permitted under section 1141(c), they should likewise be cleansed in a 363 sale order.

In turn, a primary rationale underlying this expansive interpretation of section 363 is premised on preserving the Bankruptcy Code's priority-of-distribution scheme: by allowing successor liability claimants to recover from section 363 purchasers--instead of limiting the right of a successor liability claimant to obtain a distribution on its claim from the debtor's estate--a low-priority, unsecured claimant "might upend the priorities of competing creditors." [50] As noted in *Chrysler*: [51]

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 [the purchasers 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 [from the asset purchasers].

To allow the claimants to assert successor liability claims against [the purchasers] while limiting the other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme. [52]

Thus, this expansive interpretation of section 363(f), arguably, preserves the "priority scheme of the Bankruptcy Code and the principle of equity of distribution by preventing a plaintiff from asserting *in personam* successor liability against the [purchaser] while leaving other creditors to satisfy their claims from the proceeds of the asset sale." [53]

An additional rationale supporting this generous interpretation of section 363 is that by enabling the s0ale of debtor assets to be free and clear of successor liability claims, the debtor encourages more bidding on the assets, and, presumably, obtains a higher sale price for them, "thereby maximizing the value of the estate and maximizing potential recovery to creditors." [54]

The preceding rationale was one of the bases for the Seventh Circuit in *Teed vs. Thomas & Betts Power Solutions, L.L.C.* [55] to conclude in dicta that the framework for imposing successor liability on an asset purchaser should be different if the asset seller was insolvent. [56] In *Teed,* Judge Posner noted that:

> If [the debtor's assets were] sold as a going concern, a buyer subject to successor liability would not pay as much as it would if it didn't bear that liability. As a result the bank's secured claim would in effect become junior to the workers' unsecured claim by the amount by which that claim depressed the price that the successor would pay for [the seller's assets]. That is a good reason not to apply successor liability after an insolvent debtor's default, whether its assets were sold in bankruptcy or outside (by a receiver, for example, as in this case): to apply the doctrine in such a case might upend the priorities of competing creditors. [57]

Notably, Judge Posner's position in *Teed* is also based upon preserving bankruptcy priorities [58] and implies that section 363 should preempt state successor liability laws. As discussed in Section V, C in this article, however, section 363 of the Bankruptcy Code does not preempt state successor liability laws because of the lack of a "clear and manifest purpose" of congress authorizing such preemption. [59]

V. Why Asset Purchasers Should Not Be Insulated From Successor Liability Claims

A. Successor Liability Claims are Not Interests in Property

The inclusion of language in a section 363 sale order that estate assets are "free and clear" of successor liability claims is routine. Yet, successor liability claimants are general unsecured creditors, who have no specific interest in the property that is being sold. [60] It is important to note here that there is no nexus between a successor liability claimant and specific debtor property outside of bankruptcy, unless the successor liability claimant was to miraculously transform his in personam claim to an in rem claim against the debtor. [61] Traditionally a transformation from an in personam claim to an in rem claim can arise from a consensual security agreement related to specifically identified property, or the filing of an attachment or lien following the successful prosecution of a civil action claim. [62] Once this transformation occurs, it is widely accepted that the in rem claim is the type of interest that should be cleansed in a section 363 sale given the broad definition of "any interest in property" adopted by the courts. [63] Such an interest is specifically quantified by the judgment and readily protected under section 363(e). Obviously, a judgment based upon a successor liability claim is not one that can be assessed against debtor property in the first instance, however, and can only be levied against a successor's property based upon a judgment against the successor. A judgment against a successor does not constitute an interest in the debtor's property, and thus is not cleansed by section 363(f) on a free and clear sale in the debtor's bankruptcy case.

The type of "interest in property" that is contemplated by the language of section 363(f) is one that "clouds title." [64] Interests that cloud title are "interests that raise questions that may *affect* the claim of title and pose problems in the future." [65] Suits to remove a "cloud on title" originated in the equity court of England:

> They were in the nature of bills quia timet, [66] which allowed the plaintiff to institute suits when an action would not lie in a court of law. For instance, a plaintiff whose title to land was continually being subjected to litigation in the law courts could bring a suit to quiet title in a court of equity in order to obtain an adjudication on title and relief against further suits. Similarly, one who feared that an outstanding deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title. [67]

Common examples of actions that "cloud title" include the filing of a UCC financing statement affecting personal property, or the filing of a lis pendens or lien affecting real property. A successor liability claim is an in personam claim,

and an in personam claim, in and of itself, does not "cloud title." In turn, allowing claims that do not cloud title to be considered "interests in property" allow an unduly and improperly broad interpretation of section 363(f). [68]

Accordingly, the case law cited above [69] that posits that an "interest" exists in debtor property so long as there is a nexus between a right to demand payment from successor and the successor's use of debtor property is simply too tenuous to insulate the asset purchaser from successor claims.

B. Releasing Asset Purchasers from Successor Liability Claims Is Tantamount to Unauthorized Third-Party Releases

Indeed, if a section 363 asset purchaser is truly insulated from successor liability claims as a result of a section 363 sale order, the in personam relief granted by the order is tantamount to a nondebtor release of the asset purchaser from the successor liability claim. [70]

Nondebtor releases, however, are permitted under the Bankruptcy Code only in very limited circumstances. For example, section 524(g) provides for a channeling injunction for asbestos-related claims for personal injury, wrongful death, or property damage. [71] Some courts have also looked to the provisions of sections 105(a) and 1123(b)(6) to allow for nondebtor releases in the context of plan confirmation. [72] In those circumscribed instances, courts have employed multi-part tests to determine if a nondebtor release is appropriate [73] and, so long as the test has been satisfied, authorized nondebtor releases. [74] By no means, however, are nondebtor releases universally permitted in the context of plan confirmation. [75]

Indeed, The Ninth and Tenth Circuits have held that nondebtor releases are prohibited by the Code, except in the asbestos context. [76] The Ninth Circuit in *In re Lowenschuss*, [77] for example, concluded that a third-party release was contrary to the express language of section 524(e). "Section 524 does not ... provide for the release of third parties from liability ... This court has repeatedly held, without exception, that section 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." [78]

In turn, Circuit Courts that have authorized third-party releases have done so sparingly. The Second Circuit's decision in *In re Metromedia Fiber Network, Inc.* [79] is instructive on this point. In *Metromedia*, the court voiced great hesitancy in approving nondebtor releases. [80] Nondebtor releases are "a device that lends itself to abuse" insofar as they operate "as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." [81] "No case has tolerated non-debtor releases absent the finding of circumstances that may be characterized as unique," and such releases have been appropriate only in the rarest of cases. [82] The *Metromedia* court outlined the following factors that were to be satisfied before such a release would be granted:

> A nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan, including findings that the estate received substantial consideration ...; the enjoined claims were channeled to a settlement fund rather than extinguished ...; the enjoined claims would indirectly impact the debtor's reorganization by way of indemnity or contribution .... and the plan otherwise provided for the full payment of the enjoined claims .... [or] the affected creditors consent[ed]. [83]

The Sixth Circuit in *In re Dow Corning Corp.*, [84] likewise, circumscribed the ability of bankruptcy courts to issue a third-party release, requiring the following factors to be satisfied before such a release could be given:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions. [85]

If third-party releases are permitted (if at all) only in limited circumstances and only in the context of a confirmed plan of reorganization, the Bankruptcy Code, and in particular section 363, simply cannot authorize the insulation of an asset purchaser from successor liability claims.

C. Section 363 Sale Orders Do Not Preempt State Successor Liability Law

There is no doubt that "courts have long recognized the exclusive authority of Congress and the federal courts to pass and enforce the bankruptcy laws." [86] A fundamental element of our federalist system as preserved by the Tenth Amendment, however, is that the states do retain certain traditional sovereign powers that permit the regulation of matters relating to the Bankruptcy Code. In turn, courts should assess claims of preemption with the "starting presumption that Congress does not intend to supplant state law." [87] Lacking a patently well-defined statement from Congress, courts should not presume that the Bankruptcy Code intended to tramp on state rights. [88] Indeed, the presumption against preemption is particularly strong in the bankruptcy context. [89] The United States Supreme Court has noted that, absent a "clear and manifest" purpose to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace... state law." [90] Similarly, it has also noted that "[i]f Congress wishes to grant ... an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed.'" [91]

Section 363 does not contain an express Congressional mandate empowering bankruptcy courts to sell debtor assets free and clear of in personam claims, including successor liability claims. Instead, it is the courts that have interpreted section 363 broadly to permit the extinguishment of all claims said to arise from the property being sold, including successor liability claims. [92] Absent express language in section 363 allowing assets to be sold free and clear of in personam claims, neither section 363, nor a sale order entered thereunder, can preempt state successor liability law.

D. Successor Liability Claims are Born from the Conduct of the Asset Purchaser, and Not the Asset.

State law successor liability is generally imposed due to the conduct and acts of the purchaser, and not from the assets being sold under a section 363 sale order. [93] As one commentator noted:

> 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 a mere continuation enterprise justifies imposing successor liability, it is the purchaser's postsale conduct (in continuing the business of substantially the same 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 of these successor liability doctrines are grounded upon acts or implications from acts of the purchaser, not the property. [94]

Because successor liability arises from the conduct of the asset purchaser, and not from the asset being sold, it follows that a section 363 sale order--which is intended to cleanse debtor assets as they are transferred to the asset purchaser--should not insulate the buyer from claims based on its own conduct or acts.

E. Decisional Law Interpreting Successor Liability in the Context of a UCC Article 9 Sale Further Supports the Conclusion that Asset Purchasers Should Not Be Insulated from Successor Liability

Judge Posner in *Teed* concluded in dicta that the imposition of successor liability on an asset purchaser should be analyzed differently in the context of an insolvent debtor. [95] In his view, imposing successor liability on those who purchased assets from insolvent buyers would deflate asset values and upend the priorities of competing creditors. [96] Under a long line of well-reasoned cases, discussed below, however, an entity that purchases assets at an Article 9 foreclosure sale--which foreclosure sale generally arises in the context of a debtor's insolvency--is simply not insulated from successor liability claims. In turn, reliance on this decisional law provides a new approach to interpreting the meaning of section 363(f) "interests."

In relevant part, section 9-617(a) of the Uniform Commercial Code provides that, "[a] secured party's disposition of collateral after default: (1) transfers to a transferee for value all of the debtor's rights in the collateral; (2) discharges the security interest under which the disposition is made; and (3) discharges any subordinate security interest or other subordinate lien." In turn, 9-617(b) provides that "[a] transferee that acts in good faith takes free of the rights and interests described in subsection (a)." [97]

Interpreting this provision, the U.S. District Court for the District of New Jersey in *Glynwed, Inc. v. Plastimatic, Inc.*, [98] concluded that a corporation that acquired assets via an Article 9 foreclosure sale remained legally responsible for a successor liability claim against the debtor.

> Nothing in the UCC supports [the successor's] argument that the [UCC foreclosure sale process] provides a safe harbor against successor liability claims. [The creditor] is not looking to enforce a lien on the assets that [the successor] purchased at the foreclosure sale, but is asserting a claim of successor liability. Contrary to [the successor's] assertions, this is a distinction with a difference. [99]

Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., [100] a case from the First Circuit, is instructive on this point. In *Ed Peters* a sales agent brought an action to recover sale commissions from the corporation that acquired a manufacturer's operating assets, asserting claims for successor liability, among others. The successor corporation acquired the assets at a foreclosure sale, which followed the debtor's default of its secured loan. After recounting the general rule that a corporation normally may acquire another corporation's assets without becoming liable for the divesting corporation's debts, the First Circuit concluded that two state law successor liability theories were implicated in the lawsuit. [101] In turn, the *Ed Peters* court analyzed the impact the foreclosure sale had on insulating the successor corporation from the plaintiff's claims [102] and concluded that an "intervening foreclosure sale affords an acquiring corporation no automatic exemption from successor liability." [103]

Likewise, in *EEOC v. SWP, Inc.*, [104] the U.S. District Court for the Northern District of Indiana stated that "[t]he mere fact that the transfer of assets involved foreclosure on a security interest will not insulate a successor corporation

from liability where [state law successor liability would otherwise impose liability]." [105] "While *SWP* involved a claim of successor liability in an employment discrimination context rather than a commercial law context, it accurately reflects the general rule that an intervening disposition of collateral under the UCC does not preclude successor liability." [106]

The rationale for these decisions is based upon the fact that an Article 9 foreclosure sale relates to in rem interests in the debtor's assets, [107] while the indebtedness underlying the in personam interest pertains to a person or legal entity. "Thus, although foreclosure by a senior lienor often wipes out junior-lien interests in the same collateral..., it does not discharge the debtor's underlying obligation to junior lien creditors. [T]herefore, [the Article 9 foreclosure sale process] focuses exclusively on the effect a foreclosure sale has upon subordinate liens, rather than any extinguishment of the underlying indebtedness, whereas the successor liability doctrine focuses exclusively on debt extinguishment, be the debt secured or unsecured." [108] In short, a secured creditor and its debtor do not possess the power to effect a discharge of underlying third-party debts pursuant to an Article 9 foreclosure sale. [109]

VI. Conclusion

The inclusion in a section 363 sale order of boilerplate findings that the sale is purportedly free and clear of successor liability claims should not insulate the asset purchaser from successor liability claims. Rather, the liability of a section 363 asset purchaser for successor liability claims should be determined by state successor liability law, and free of bankruptcy court involvement.

Footnotes

1 See Deutsh & Distefano, The Mechanics of a Section 363 Sale, 30-Feb. Am. Bankr. Inst. J. 48 (2008). This article will focus on those instances where a sale of a debtor's assets is outside a plan of reorganization.

2 Fishman & Gouveia, What's Driving Section 363 Sales After Chrysler and General Motors, 19 Norton Journal of Bankruptcy Law and Practice 352, 364 (2010).

3 Brege, An Efficiency Model Section 363(b) Sales, 92 Virginia L. Rev. 1639, 1641 (2006) ("While it is doubtful that the drafters anticipated the use of Section 363(b) sales as an alternative method of selling off large portions of businesses [pursuant to a confirmed plan], in recent years this method of partial liquidation has swelled to the point that...[c]orporate reorganizations have all but disappeared.")

4 Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 37, n. 2, 128 S. Ct. 2326, 171 L. Ed. 2d 203, 50 Bankr. Ct. Dec. (CRR) 34, 59 Collier Bankr. Cas. 2d (MB) 1316, Bankr. L. Rep. (CCH) P 81257 (2008); see also Deutsh & Distefano, 30-Feb. Am. Bankr. Inst. J. 48 (noting that in "recent years, it has become more commonplace for debtors to hold § 363 sales with the purpose of selling substantially all of their assets.").

5 See, e.g. Eitel, Tinker & Lambert, Structured Dismissals, Or Cases Dismissed Outside of Code's Structure?, 30-Am. Bankr. Inst. J. 20, 20 (March 2011).

6 Deutsh & Distefano, 30-Feb. Am. Bankr. Inst. J. 48 ; see also In re Chrysler LLC, 576 F.3d 108, 125, 51 Bankr. Ct. Dec. (CRR) 254, 62 Collier Bankr. Cas. 2d (MB) 183, 47 Employee Benefits Cas. (BNA) 1513 (2d Cir. 2009) (noting the expanded role section 363 sales have in the bankruptcy process); In re Golf, L.L.C., 322 B.R. 874, 877, 52 Collier Bankr. Cas. 2d (MB) 1095 (Bankr. D. Neb. 2004) ("[A]s a practical matter, current practice seems to have expanded section 363(f)'s use from its original intent.").

7 See Goldberg, New Decisions Protecting Purchasers of Assets Under § 363 of the Bankruptcy Code, 22-May Am. Bankr. Inst. J. 30 (2003).

8 See Corcoran, Why Successor Liability Claims are Not "Interests in Property" Under Section 363(f), 18 Am. Bankr. Inst. L. Rev. 697, 728 (Winter 2010); see also Douglas v. Stamco, 363 Fed. Appx. 100 (2d Cir. 2010) ("[T]o the extent that the 'free and clear' nature of the sale...was a crucial inducement in the sale's successful transaction, it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would turn counter to...[maximizing] the value of the assets and thereby maximiz[ing] potential recovery to creditors.");Teed v. Thomas & Betts Power Solutions, L.L.C., 711 F.3d 763, 20 Wage & Hour Cas. 2d (BNA) 726, 163 Lab. Cas. (CCH) P 36107 (7th Cir. 2013) (noting that assets owned by an insolvent debtor should be sold "free and clear" of claims and interests to maximize asset value and to attract buyers).

9 11 U.S.C.A. § 363.

10 The debtor in possession in a Chapter 11 case assumes the powers and obligations of the trustee under section 363(f). See 11 U.S.C.A. § 1107(a).

11 11 U.S.C.A. § 363(b) and (c).

12 Pursuant to § 363(f), "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--(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (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; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." 11 U.S.C.A. § 363(f).

13 11 U.S.C.A. § 363(e) (emphasis added).

14 Kuney, Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L. J. 235, 239 (2002).

15 In re Motors Liquidation Co., 430 B.R. 65, 79 (S.D. N.Y. 2010); see also In re Mirant Corp., 389 B.R. 481, 492, 50 Bankr. Ct. Dec. (CRR) 19 (Bankr. N.D. Tex. 2008) ("The bankruptcy court's authority under section 363 is limited to cleansing what a debtor owns.")

16 In re Grumman Olson Industries, Inc., 445 B.R. 243, 249, 54 Bankr. Ct. Dec. (CRR) 102 (Bankr. S.D. N.Y. 2011), judgment aff'd, 467 B.R. 694, Bankr. L. Rep. (CCH) P 82194 (S.D. N.Y. 2012).

17 Mikels & Walker, Will New Successor Liability Cases Send Companies Back to Chapter 11 for Asset Sales, 29-Feb Am. Bankr. Inst. J., 34 (February 2010); Corcoran, 18 Am. Bankr. Inst. L. Rev. at 713; Rosenberg & Block-Lieb, Sales Under Section 363, 13 Bankr. L. & Prac. 1, 2 (2004).

18 See Mikels & Walker, 29-Feb Am. Bankr. Inst. J., 34; Corcoran, 18 Am. Bankr. Inst. L. Rev. at 713-14.

19 Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145, 146, Prod. Liab. Rep. (CCH) P 11617 (6th Cir. 1987); Antiphon, Inc. v. LEP Transport, Inc., 183 Mich. App. 377, 454 N.W.2d 222, 224 (1990).

20 Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 112 Ohio St. 3d 482, 491, 2006-Ohio-6551, 861 N.E.2d 121 (2006).

21 Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 315, 622 S.E.2d 213, Prod. Liab. Rep. (CCH) P 17315 (2005).

22 11 U.S.C.A. § 363(f).

23 See Rosenberg & Block-Lieb, 13 Bankr. L. & Prac. at 13; 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); see also Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716, 730-32 (N.D. Ind. 1996) ("[C]ourts have not yet settled upon a precise definition of the phrase 'interest in such property.'")

24 Qualitec, 327 F.3d at 545.

25 In re Leckie Smokeless Coal Co., 99 F.3d 573, 581-582, 36 Collier Bankr. Cas. 2d (MB) 1693, 20 Employee Benefits Cas. (BNA) 2103 (4th Cir. 1996) (rejecting a district court's "unduly broad interpretation of [section 363(f) which concluded] that one has an interest in a debtor's property simply when one has a right to demand money from the debtor. We have previously observed,

for example, that 'courts have recognized that general, unsecured claims do not constitute interests within the meaning of § 363(f).'")

26 Qualitec, 327 F.3d at 545.

27 Leckie, 99 F.3d at 582.

28 26 U.S.C.A. §§ 9701-9722.

29 Leckie, 99 F.3d at 577.

30 Leckie, 99 F.3d at 582.

31 Leckie, 99 F.3d at 582.

32 Leckie, 99 F.3d at 582.

33 In re PBBPC, Inc., 484 B.R. 860, 868, 57 Bankr. Ct. Dec. (CRR) 126, 68 Collier Bankr. Cas. 2d (MB) 1691, Bankr. L. Rep. (CCH) P 82407 (B.A.P. 1st Cir. 2013).

34 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 (3d Cir. 2003).

35 Trans World Airlines, 322 F.3d at 288.

36 Trans World Airlines, 322 F.3d at 288.

37 Trans World Airlines, 322 F.3d at 289.

38 See Corcoran, 18 Am. Bankr. Inst. L. Rev. at 728; see also In re Grumman Olson Industries, Inc., 467 B.R. 694, 703, Bankr. L. Rep. (CCH) P 82194 (S.D. N.Y. 2012).

39 Kuney, 76 Am. Bankr. L. J. at 257.

40 See 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) (concluding that tort claimants have no specific interest in a debtor's assets); In re New England Fish Co., 19 B.R. 323, 326, 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) (same).

41 See, e.g., Chrysler, 576 F.3d at 126 (2d Cir. 2009) ("The court's power under Section 363 to authorize sales of assets 'free and clear' of claims is related to the provision in the Code that the confirmation of a plan of reorganization renders the 'property dealt with by the plan... free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.')

42 11 U.S.C.A. § 1141(c) (emphasis added).

43 Chrysler, 576 F.3d 108.

44 Chrysler, 576 F.3d 127.

45 Chrysler, 576 F.3d 125.

46 Chrysler, 576 F.3d 125.

47 For example, the court noted that section 1141(c) applies to all reorganization plans, while section 363(f), applies only to classes of property that satisfy one of the criteria in section 363(f)(5). Chrysler, 576 F.3d 125. The court also conceded that section 363 sales does not afford the expansive procedural safeguards contained in the plan confirmation process. Chrysler, 576 F.3d 125.

48 Chrysler, 576 F.3d 125.

49 Chrysler, 576 F.3d 125.

50 See Teed, 711 F.3d 763; Trans World Airlines, 322 F.3d at 292; New England Fish, 19 B.R. at 329 ("To allow exceptions to be created by extrapolation from one case to another would eventually subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors.").

51 Chrysler, 576 F.3d 108.

52 Chrysler, 576 F.3d at 125-126.

53 Grumman Olson, 445 B.R. at 249. See also, 18 Am. Bankr. Inst. L. Rev. at 717 ("[A] successor liability claimant simply possesses an *in personam* claim against the purchaser of assets whose conduct satisfies the requirements of one of the exceptions to the general rules of non-liability.")

54 Grumman Olson, 467 B.R. at 703 (S.D.N.Y. 2012) (citing Chrysler, 576 F.3d at 126).

55 Teed v. Thomas & Betts Power Solutions, L.L.C., 711 F.3d 763, 20 Wage & Hour Cas. 2d (BNA) 726, 163 Lab. Cas. (CCH) P 36107 (7th Cir. 2013).

56 Teed, 711 F.3d at 768.

57 Teed, 711 F.3d at 768.

58 Teed, 711 F.3d at 768.

59 See section C below.

60 See White Motor Credit, 75 B.R. at 948; see also Leckie, 99 F.3d at 581-582 (noting that courts have recognized that general, unsecured claims do not constitute interests within the meaning of § 363(f)); Wilkerson v. C.O. Porter Machinery Co., 237 N.J. Super. 282, 567 A.2d 598, 604 (Law Div. 1989) ("The order issued under [section 363] can only protect the purchaser of estate property against 'any interest in such property.' Plaintiff does not claim an interest in the purchased property, and the order does not affect plaintiff's claim against [the successor corporation]."

61 Kuney, 76 Am. Bankr. L. J. at 261-62; see also Leckie, 99 F.3d at 581 ("Coal Act obligations are not in the nature of an encumbrance on property of the debtor, nor are they enforceable through an *in rem* action, nor do they arise from ownership of property. Those obligations, therefore, cannot be subject to a free and clear sale under Section 363(f).") (citing appellant's brief).

62 Kuney, 76 Am. Bankr. L. J. at 261-62.

63 Qualitec, Qualitec, 327 F.3d at 545-546. For purposes of clarity, this hypothetical could only apply if the successor, itself, was a debtor in a bankruptcy case and the trustee sought to sell its assets under section 363(b) and (f).

64 See In re Wolverine Radio Co., 930 F.2d 1132, 1147, 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).

65 Robinson v. U.S., 586 F.3d 683, 687 (9th Cir. 2009) (emphasis in original).

66 "A bill quia timet was the equitable bill used to guard against possible or prospective injuries. Quia timet is the right to be protected against anticipated future injury that cannot be prevented by the present action." Robinson, 586 F.3d at 687 (internal quotations and citations omitted).

67 Robinson, 586 F.3d at 687.

68 Leckie, 99 F.3d at 581-582.

69 Leckie, 99 F.3d at 582.; Trans World Airlines, 322 F.3d at 288.

70 See, e.g., Grumman Olson Indus., Inc., 445 B.R. 243.

71 See 11 U.S.C.A. § 524(g)(2)(B)(i)(I).

72 See Silverstein, Overlooking Tort Claimants' Best Interests: Non-Debtor Releases in Asbestos Bankruptcies, 78 UMKC L. Rev. 1, 17 (Fall 2009).

73 See Silverstein, 78 UMKC L. Rev. at 19.

74 See Silverstein, 78 UMKC L. Rev. at 19-20. (The multi-part test includes findings: "(1) that there is an identity of interest between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate; (2) that the third party must contribute substantial assets to the reorganization; (3) that the release must be essential to reorganization; (4) that substantial majority of the creditors agree to the release, specifically, the impacted class, or classes has overwhelmingly voted to accept the proposed plan treatment; (5) that the plan provides for payment of all, or substantially all, of the claims of the class or classes affected by the non-debtor release; and (6) that all dissenting creditors whose claims are extinguished by the release must be paid in full under the plan.") (internal citations and quotations omitted).

75 See Silverstein, 78 UMKC L. Rev. at 18-19 ("most 'anti-release' courts have concluded that non-debtor releases violate § 524(e), which provides that the 'discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt... or contend that sections 105(a) and 1123(b)(6) simply do not grant sufficient equitable power to permit the release of claims against non-debtors.")

76 See In re Lowenschuss, 67 F.3d 1394, 1401-02, 34 Collier Bankr. Cas. 2d (MB) 544, Bankr. L. Rep. (CCH) P 76673, 33 Fed. R. Serv. 3d 249 (9th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592, 600-02, 21 Bankr. Ct. Dec. (CRR) 320, 24 Collier Bankr. Cas. 2d (MB) 1012, Bankr. L. Rep. (CCH) P 73754 (10th Cir. 1990), opinion modified, 932 F.2d 898 (10th Cir. 1991).

77 Lowenschuss, 67 F.3d at 1401.

78 Lowenschuss, 67 F.3d at 1401.

79 In re Metromedia Fiber Network, Inc., 416 F.3d 136, 44 Bankr. Ct. Dec. (CRR) 276, 54 Collier Bankr. Cas. 2d (MB) 1033, Bankr. L. Rep. (CCH) P 80397 (2d Cir. 2005).

80 Metromedia Fiber, 416 F.3d at 141.

81 Metromedia Fiber, 416 F.3d at 141.

82 Metromedia Fiber, 416 F.3d at 141-42.

83 Metromedia Fiber, 416 F.3d at 142-43 (internal citations and quotation marks omitted).

84 In re Dow Corning Corp., 280 F.3d 648, 39 Bankr. Ct. Dec. (CRR) 9, 47 Collier Bankr. Cas. 2d (MB) 1158, Bankr. L. Rep. (CCH) P 78582, 2002 FED App. 0043P (6th Cir. 2002).

85 Dow Corning Corp., 280 F.3d at 661; see also Matter of Specialty Equipment Companies, Inc., 3 F.3d 1043, 1044-49, 29 Collier Bankr. Cas. 2d (MB) 1215, Bankr. L. Rep. (CCH) P 75398 (7th Cir. 1993) (holding that section 524(e) permits third parties only where release is consensual and noncoercive and would constrain only those creditors who expressly voted in favor of the plan); In re A.H. Robins Co., Inc., 880 F.2d 694, 701-02, 19 Bankr. Ct. Dec. (CRR) 997, Bankr. L. Rep. (CCH) P 72955 (4th Cir. 1989) (permitting a third-party release in certain limited circumstances).

86 Grumman Olson, 467 B.R. at 701.

87 New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995).

88 See, e.g., BFP v. Resolution Trust Corp., 511 U.S. 531, 544-45, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) P 75885 (1994).

89 Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487, 493, 31 Bankr. Ct. Dec. (CRR) 422, 38 Collier Bankr. Cas. 2d (MB) 805 (3d Cir. 1997).

90 BFP, 511 U.S. at 544-45.

91 Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) P 70923, 16 Envtl. L. Rep. 20278 (1986) (citation omitted).

92 Grumman Olson, 467 B.R. at 703.

93 Kuney, 76 Am. Bankr. L. J. at 261.

94 Kuney, 76 Am. Bankr. L. J. at 261.

95 Teed, 711 F.3d at 768.

96 Teed, 711 F.3d at 768-69.

97 U.C.C. § 9-671.

98 Glynwed, Inc. v. Plastimatic, Inc., 869 F. Supp. 265, 25 U.C.C. Rep. Serv. 2d 341 (D.N.J. 1994).

99 Glynwed, 869 F. Supp. at 274.

100 Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 124 F.3d 252, 47 Fed. R. Evid. Serv. 997, 33 U.C.C. Rep. Serv. 2d 664 (1st Cir. 1997).

101 Ed Peters, 124 F.3d at 266.

102 Ed Peters, 124 F.3d at 266.

103 Ed Peters, 124 F.3d at 267 (citing Glynwed, 869 F.Supp. at 273-75); Asher v. KCS Intern., Inc., 659 So. 2d 598, 600, Prod. Liab. Rep. (CCH) P 14200 (Ala. 1995); G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc., 125 N.C. App. 424, 481 S.E.2d 674, 679-80, 31 U.C.C. Rep. Serv. 2d 1223 (1997); Upholsterers' Intern. Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1325, 1327, 13 Employee Benefits Cas. (BNA) 1138, 117 Lab. Cas. (CCH) P 10452, 115 A.L.R. Fed. 893 (7th Cir. 1990).

104 E.E.O.C. v. SWP, Inc., 153 F. Supp. 2d 911, 924, 86 Fair Empl. Prac. Cas. (BNA) 717 (N.D. Ind. 2001).

105 E.E.O.C., 153 F. Supp. at 924.

106 Glentel, Inc. v. Wireless Ventures, LLC, 362 F. Supp. 2d 992, 999, 56 U.C.C. Rep. Serv. 2d 685 (N.D. Ind. 2005).

107 Ed Peters, 124 F.3d at 267 (internal quotations and citations omitted).

108 Ed Peters, 124 F.3d at 267 (internal quotations and citations omitted).

109 Ed Peters, 124 F.3d at 267.

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