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INEQUALITY AMONG CREDITORS: THE UNCONSTITUTIONAL USE OF SUCCESSOR LIABILITY TO CREATE A NEW CLASS OF PRIORITY CLAIMANTS

Honorable William T. Bodoh [*FN:* B.S. Ohio University; J.D. The Ohio State University College of Law; United States Bankruptcy Judge, Northern District of Ohio.]

Michelle M. Morgan [*FN:* B.A. Boston College; J.D. The Ohio State University College of Law; Associate, Jones, Day, Reavis & Pogue, Cleveland, Ohio; Former Law Clerk to Judge William T. Bodoh 1995−96.]

Introduction

The Framers of the United States Constitution placed the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" [*FN:* U.S. Const. art. I, § 8, cl. 4 (the "Bankruptcy Clause "). Commentators generally recognize Charles Pinckney of South Carolina as the author of the Bankruptcy Clause. See Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States , 3 Am. Bankr. Inst. L. Rev. 5, 13 (1995) (indicating Charles Pinckney drafted Bankruptcy Clause); Judith Koffler, The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity , 58 N.Y.U. L. Rev. 22, 35−36 (1983) (same); see also 5 Elliot 's Debates on the Federal Constitution 488 (1845) (detailing Mr. Pinckney 's original proposal regarding Bankruptcy Clause on August 29, 1787).] in the legislative hands of Congress. [*FN:* See, *e.g.* , Continental Ill. Nat'l Bank & Trust Co. v. Chicago Rock Island & Pac. Ry. Co. (*In re* Chicago, Rock Is. & Pac. Ry. Co.), 72 F.2d 443, 450 (7th Cir. 1934) (stating that pursuant to Constitution, Congress is authorized to enact bankruptcy legislation "as it may deem wise and appropriate."), aff'd , 294 U.S. 648 (1935).] Delegating this authority to Congress was perceived as complementing the Commerce Clause and protecting nonresident creditors from discriminatory state insolvency laws. [*FN:* See Tabb, supra note 1, at 13 (stating origins of Bankruptcy Clause). Professor Tabb 's article presents a complete analysis of the history and development of bankruptcy law in the United States. In its discussion of the Bankruptcy Clause, the article notes the cursory review given the Bankruptcy Clause at the Constitutional Convention of 1787 and explains the underlying purpose of the Bankruptcy Clause in the following words of James Madison: The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question. Id . (quoting The Federalist No. 42 (James Madison)).] An exercise of power by Congress under the Bankruptcy Clause preempts state laws regarding the same. [*FN:* See Perez v. Campbell, 402 U.S. 637, 651−52 (1971) (finding Arizona Motor Vehicle Safety Responsibility Act unconstitutional as conflicting with mandate of Bankruptcy Act of 1898 and thus violating Supremacy Clause of Constitution); Kalb v. Feuerstein, 308 U.S. 433, 439 (1940) (stating that Congress was granted exclusive power to regulate bankruptcy and therefore, may limit state and federal courts exercise of jurisdiction over individuals and property of individuals invoking bankruptcy law); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 196 (1819) (finding that once Congress exercises its power under Bankruptcy Clause, state law on same issue is preempted).] As former Chief Justice Marshall explained:

If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states. [*FN:* Sturges , 17 U.S. at 196.]

Subsequent to the ratification of the Constitution, the Bankruptcy Clause remained relatively dormant until 1898, when Congress enacted the first comprehensive federal bankruptcy law. [*FN:* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, amended by Chandler Act, ch. 575, 52 Stat. 840 (1938), repealed by Bankruptcy Reform Act of 1978, reprinted in 1978 U.S.C.C.A.N. 5787. See United States v. Kras, 409 U.S. 434, 447 (1973) (describing virtual absence of federal bankruptcy law prior to 1898); Tabb, supra note 1,

at 13 (same); Melodie Freeman−Burney, Jurisdiction Under the Bankruptcy Amendments of 1984: Summing Up the Factors , 22 Tulsa L.J. 167, 169−71 (1986) (summarizing development of bankruptcy laws in United States, with emphasis on jurisdictional components of laws); see also Charles Warren, Bankruptcy in the United States History (1935) (exploring historical development of bankruptcy laws in United States). Congress first exercised its authority under the Bankruptcy Clause in 1800; however, this legislation was limited to "certain acts of bankruptcy by merchants, traders, bankers, and factors " and only remained in effect for three years. Bankruptcy Act of 1800, ch. 19, 2 S tat . 19, repealed by Act of Dec. 19, 1803, ch. 6, 2 S tat . 248; 1 Collier on Bankruptcy ¶ 1.02, at 1−2 (Lawrence P. King ed., 15th ed. 1996) (discussing limitations and provisions of Act noting failure to provide for voluntary bankruptcy); see also Tabb, supra note 1, at 14−15 (summarizing act and its downfall); Freeman−Burney, supra , at 169−70 (same). The next bankruptcy legislation enacted by Congress was the Bankruptcy Act of 1841. Act of Aug. 19, 1841, ch. 9, 5 S tat . 440, repealed by Act of Mar. 3, 1843, ch. 82, 5 S tat . 614. The 1841 Act included provisions for both voluntary and involuntary bankruptcy, but it did not extend bankruptcy protection to corporate debtors. See Tabb, supra note 1, at 16−17 (noting that act allowed for voluntary bankruptcy for individuals but not for corporate debtors); Freeman−Burney, supra , at 170 (indicating Act added jurisdictional provision). The Bankruptcy Act of 1867 furthered the progress made by the 1841 Act and included corporate debtors within its provisions. Bankruptcy Act of 1867, ch. 176, 14 S tat . 517, repealed by Act of June 7, 1878, ch. 160, 20 S tat. 99; see Tabb, supra note 1, at 18−23 (discussing particulars of Bankruptcy Act of 1841). The 1867 Act, as its predecessors was short − lived; however, its successor proved to be Congress ' first permanent bankruptcy legislation. See id. at 23−26 (discussing particulars of Bankruptcy Act of 1898).] The Bankruptcy Act of 1898 permeated the field of bankruptcy legislation, [*FN:* Bankruptcy Act of 1898, ch. 541, 30 S tat . 544 (repealed by Bankruptcy Reform Act of 1978). The 1898 Act remained in effect for approximately eighty years, although it was amended substantially on several occasions, most notably by the Chandler Act in 1938. Chandler Act, ch. 575, 52 S tat . 840 (1938) repealed by Bankruptcy Reform Act of 1978, reprinted in 1978 U.S.C.C.A.N. 5787. Not only did the 1898 Act introduce the concept of permanent bankruptcy legislation into American jurisprudence, it also fostered the policy of liberal treatment for debtors which is an underpinning to the Bankruptcy Code. See Tabb, supra note 1, at 6−13, 23−25 (explaining that under English common law and prior American bankruptcy legislation, debtors often received harsh punishment; however, 1898 Act implemented broad debtor discharge and other debtor−friendly mechanisms which are well accepted principles under Bankruptcy Code). The 1898 Act also sought to encourage efficient administration of a debtor 's estate in order to maximize distributions to creditors. See id . at 25 (positing that much of Act was directed towards principles of equality and efficiency). No longer was Congress content with piecemeal bankruptcy legislation. In enacting the 1898 Act, Congress utilized its full range of authority pursuant to the Bankruptcy Clause. For a thorough discussion of the 1898 Act and the amendments thereto, see Collier, supra note 6, ¶ 1.02, at 1−3 through 1−9.] evidencing the intent of Congress to exercise itsexclusive jurisdiction over the subject of bankruptcy. [*FN:* Although opposition to instituting permanent legislation was prevalent in Congress in 1898, two national financial disasters prior to 1898 convinced Congress that state insolvency laws were incapable of resolving the financial problems of a growing market in the United States. See Tabb, supra note 1, at 23 (examining panics of 1884 and 1893); Warren , supra note 6, at 128−41 (same). Accordingly, the 1898 Act was drafted to meet the needs of a burdened national economy and to be more than a short−term fix as were its predecessors. See Tabb, supra note 1, at 23−26 (discussing drafting of 1898 Act).] This intent was carried forward into the Bankruptcy Reform Act of 1978. [*FN:* Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat . 2549, reprinted in 1978 U.S.C.C.A.N. 5787 (codified as amended in various provisions of Titles 11 and 28 of United States Code). The 1978 Act has been amended frequently since its enactment, with the most substantial amendment packages being passed in 1984, 1986, and 1994. See The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98 − 353, 98 S tat . 333, reprinted in 1984 U.S.C.C.A.N. 576 (codified as amended in various provisions of Titles 11 and 28 of United States Code); The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99 − 554, 100 S tat . 3088, reprinted in 1986 U.S.C.C.A.N. 5227 (codified as amended in various provisions of Titles 11 and 28 of United States Code); The Bankruptcy Reform Act of 1994, Pub. L. No. 103 − 394, 108 S tat . 4106, reprinted in 1994 U.S.C.C.A.N. 3340. The headway forged by the 1898 Act was continued and improved by the Bankruptcy Reform Act of 1978. In fact, as explained by one notable commentary in the bankruptcy field: As part of the sweeping changes brought about by enactment of the 1978 reform legislation, restructuring of the judicial system to administer the Code was found absolutely necessary in order to achieve the laudable aims of that statute and to correct and overcome the shortcomings which were uniformly found to have pervaded the earlier system under the 1898 Bankruptcy Act. Collier, supra note 6, ¶ 1.03, at 1−9.] As a result, the federal bankruptcy scheme governs all aspects of a post−petition debtor−creditorelationship, [*FN:* A specific example of the expansive nature of the 1978 Act is that: Possession of a res that is the subject of a particular litigation was no longer to be a relevant factor, and all matters arising under the 1978 legislation and all proceedings involving the administration of any case under the 1978 Code were confided though not exclusively to the courts to be exercised by the bankruptcy judges when resolution by judicial determination was called for. Collier, supra note 6, ¶ 1.03, at 1−11.] preempting application of state insolvency laws, [*FN:* See supra notes 4−5 and infra Part III (discussing federal preemption of state successor liability). For an excellent discussion of the preemption of state laws relating to the subject of bankruptcy by the federal bankruptcy law, see J. Maxwell Tucker, The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand that Relief Be Afforded Unknown and Unknowable Claimants , 12 Bankr. Dev. J. 1, 28−40 (1995).] save those few explicit exceptions recognized in the Bankruptcy Code. [*FN:* 11 U.S.C. §§ 101−1330 (1994). Examples of explicit exceptions to the supremacy of the Bankruptcy Code include § 522(b)(2) which allows a state to opt−out of the federal scheme of personal exemptions that may be claimed by a debtor in his or her bankruptcy case and the trustee 's strong−arm provision under § 544(b) which permits a trustee to avoid a transfer of a debtor 's interest in property or other obligations that is voidable under applicable state or federal law. 11 U.S.C. §§ 522(b)(2), 544(b).]

In enacting this federal bankruptcy scheme, Congress attempted to balance two competing interests [*FN:* See Seth J. Gerson, Note, Separate Classification of Student Loans in chapter 13 , 73 Wash. U. L.Q. 269, 273−74 (1995) (explaining often conflicting nature of two primary goals of Bankruptcy Code; namely debtor 's fresh start and equitable distribution to creditors) (citing Thomas H. Jackson, The Fresh−Start Policy in Bankruptcy Law , 98 Harv. L. Rev. 1393, 1395−99 (1985)). As stated in Gerson 's note, "Congress ' attempt to balance these two opposing interests is manifested in the discharge and automatic stay provisions of the Bankruptcy Code: the provisions affording discharges to individual debtors reflect the 'fresh start ' policy, while the several exceptions to discharge reflect a desire to protect certain creditors ' interests. " Gerson, supra at 273 (citations omitted); see also 11 U.S.C. §§ 362 (automatic stay), 523(a), 727, 1141, 1328 (discharge sections).] often present in a debtor−creditor relationship, providing a fresh start for the debtor [*FN:* See Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (outlining purpose of Bankruptcy Act is to give honest debtor fresh start) (citing Williams v. U.S. Fidelity & Guar. Co., 236 U.S. 549, 554−55 (1915)); Michelle M. Arnopol, Including Retirement Benefits in a Debtor 's Bankruptcy Estate: A Proposal for Harmonizing ERISA and the Bankruptcy Code , 56 Mo. L. Rev. 491, 501−02 (1991) (referring to S. Rep. No. 95−989 at 7 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5793 to support fresh start policy of Bankruptcy Code); Gerson, supra note 13, at 272−73 (discussing origins of fresh start policy). The concept of a fresh start for the honest but unfortunate debtor originated in the discharge provisions of the Bankruptcy Act of 1898. See discussion supra note 6 (citing history of Act). Although the "fresh start " policy is most often associated with the discharge provision of 11 U.S.C. § 727 and individual debtors, a reorganizing corporation may need and, in fact, may receive a discharge pursuant to 11 U.S.C. § 1141. See 11 U.S.C. §1141 (providing that discharge has effect of confirmation); Thomas H. Jackson, Avoiding Powers in Bankruptcy , 36 Stan. L. Rev. 725, 727 n.8 (1984) (reasoning that corporations in reorganization may need a discharge but not because of any "fresh start" policy). Accord Richard A. Posner, The Rights of Creditors of Affiliated Corporations , 43 U. C hi. L. Rev. 499, 503 (1976) (suggesting that corporations do not need fresh start as they are granted same by limited−liability aspects of state corporation laws). In this respect, a corporation through the bankruptcy process acquires fresh start in the business community, having its prepetition obligations dealt with through its plan of reorganization. However, several commentators suggest that the practical effect of § 1141 is not to provide a corporate debtor with a fresh start, but rather to allow the debtor to choose between dissolution and continuing business operations. Jackson, supra , at 727 n.8 (citing Thomas H. Jackson, Bankruptcy, Non−Bankruptcy Entitlements, and Creditors ' Bargain , 91 Yale L.J. 857, 892−95 (1982)).] and ensuring equitable distribution to creditors. [*FN:* See Arnopol, supra note 14, at 501−02 (referring to H.R. Rep. No. 95−595, at 177−78 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6138 to support policy underlying Bankruptcy Code to distribute equitably debtor 's property to his or her creditors); Gerson, supra note 13, at 271−72 (citing history of equitable distribution policy). Efficient and equitable distribution of a debtor 's estate is a feature of American bankruptcy law that was recognized under the Bankruptcy Act of 1898 as well. See Report of the Comm 'n on the Bankruptcy Laws of the United States , H.R. Doc. No. 93−137, at 1−75 (1973) (recognizing equitable distribution to creditors as fundamental policy). The "equitable distribution " principle interjected throughout the Bankruptcy Code is an extremely important feature of federal bankruptcy law, as nonbankruptcy law usually permits the first creditor to grab a debtors ' property, creating an all or nothing situation for creditors. See J. Bradley Johnston, The Bankruptcy Bargain , 65 Am. Bankr. L.J. 213, 235−37 (1991) (explaining "grab law " nature of nonbankruptcy debt collection). "This mandatory 'race ' structure of nonbankruptcy law rewards the diligent creditor (the competitor) with full payment and the slower creditor (the cooperator) with the risk of receiving less than full payment or no payment at all. " *Id.* at 236. For a discussion of how the equitable distribution principle is distorted by the successor liability doctrine, see infra notes 126 − 27 and accompanying text.] Part II of this article will demonstrate that the increasing use of the successor liability doctrine by both state and federal courts to hold a purchaser of a debtor's assets liable forprepetition claims against the debtor, jeopardizes this delicate balance [*FN:* To illustrate this point consider the following scenario in light of the equitable distribution principle underlying the Bankruptcy Code. If a creditor holds a claim against a debtor which may be collected from the debtor 's pool of assets and he or she files a proof of claim in the debtor 's bankruptcy case, then that creditor receives a percentage of the debtor 's assets to satisfy his or her claim; the same percentage as that received by other similarly situated creditors. This is the essence of the priority system for claims established by the Bankruptcy Code. However, if a creditor whose claim is subject to treatment in the bankruptcy case may also pursue a purchaser of the debtor 's assets for distribution on his or her claim, that particular creditor, if successful, is receiving more than other similarly situated creditors. Such a result undercuts the equitable distribution principle of the Bankruptcy Code and returns debt collection to a nonbankruptcy, grab−law mentality. For further discussion of this negative aspect of successor liability as applied to the Bankruptcy Code, see infra notes 20−21, 126−28 and accompanying text.] and erodes the basic premise underlying federal bankruptcy law. [*FN:* If state and federal courts are permitted to develop and apply successor liability theories in the bankruptcy context, any uniformity existing in the approach to bankruptcy sales under the federal bankruptcy law disappears, and the liability incurred by a purchaser of a debtor 's assets will largely depend upon the jurisdiction in which the successor liability action is brought. Moreover, it seems illogical to grant certain creditors the opportunity to collaterally attack the finality of a court−approved bankruptcy sale through a state or federal successor liability action.] Congress has made a policy decision to permit debtors to sell their assets free and clear of prepetition interests [*FN:* Throughout the Article, the term "prepetition interest " or "prepetition claim " is intended to reflect the broad definition of "claim " set forth in 11 U.S.C. § 101(5). See 11 U.S.C. §101(5) (1994) (defining "claim"); Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir.), cert. dismissed sub nom. Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988) (incorporating broad reading of definition of "claim" in reaching decision); see also infra notes 96−97 and accompanying text (discussing varying interpretations of term "claim"). Thus, the authors posit that a bankruptcy sale is free and clear of any claim or obligation that arose prepetition because of a debtor 's conduct. However, the authors do not mean to suggest that this protection extends to a claim or an obligation that arose because of a purchaser 's conduct or dealings with the purchased assets. For example, if a product manufactured and sold prepetition by a debtor causes an injury (even if the injury occurs postpetition), this is a liability of the debtor and the purchaser should not be held liable. (The injured party in this situation would have a claim against the fund or resource established during the bankruptcy case to handle future claims. If no such fund or resource exists, the injured party may have a claim against

another entity in the distribution chain. However, such a lack of resources does not justify allowing the injured party to pursue the bankruptcy purchaser.) On the other hand, if the purchaser uses a debtor 's design to manufacture a product or sells a product manufactured by the debtor, and this product then causes an injury, the purchaser itself can be held liable because it had a hand in the offensive conduct. In the bankruptcy sale, the purchaser could not bargain to relieve itself of liability for harm which it creates and thus, the rights of the purchaser are not adversely affected by allowing the injured party in the latter scenario to pursue an action against the purchaser. For further discussion of these issues, see infra notes 141−42, 193 and accompanying text.] that had attached thereto. [*FN:* See 11 U.S.C. §§363(f), 1123(b), 1141(c) (permitting sale of assets free and clear of prepetition interest). This Article focuses primarily on the impact of the successor liability doctrine as applied to bankruptcy sales in the context of chapter 11 business reorganizations and chapter 7 business liquidations.] Allowing certain creditors to pursue their prepetition claims under the guise of a successor liability claim enables these creditors to grab more than their fair share, [*FN:* See supra note 16 and accompanying text.] which results in seriously diluting the desired goal of uniformity in bankruptcy laws. [*FN:* See generally Koffler, supra note 1 (explaining various interpretations of uniformity requirement of Bankruptcy Clause). Under the express provisions of the Bankruptcy Code, a person or entity purchasing a debtor 's assets through a § 363(f) sale or a plan of confirmation is entitled to obtain the assets free and clear of any prepetition claims against the debtor. See 11 U.S.C. §363(f). Allowing various state and federal jurisdictions to alter this result through the application of the successor liability doctrine dispels any uniformity in the treatment accorded persons and entities purchasing assets through the federal bankruptcy process. See infra notes 126−27 and accompanying text (discussing how equitable distribution principle is distorted by successor liability doctrine). Although the term "uniformity " as set forth in the Bankruptcy Clause has been interpreted as requiring geographical uniformity, even this narrow definition of uniformity is hindered by application of successor liability.]

Not only does the application of successor liability to bankruptcy sales thwart the policy goals underlying the Bankruptcy Code, it has severe constitutional implications as well. As set forth in the Bankruptcy Clause, Congress is vested with the authority to enact uniform bankruptcy laws. [*FN:* U.S. Const. art. I, §8, cl. 4. See supra notes 1−3 and accompanying text (explaining founders' intent).] Any state law in derogation thereof is preempted by federal bankruptcy law and the Supremacy Clause. [*FN:* See supra notes 4−5 and accompanying text (citing origins of preemption doctrine); infra Part III (discussing federal preemption of state successor liability).] Accordingly, Part III of this Article argues that application of a state's successor liability statute or common law in the context of a bankruptcy sale is preempted by federal bankruptcy law. The Bankruptcy Code provides two instances by which a purchaser may obtain a debtor's assets without acquiring liability for prepetition claims against the debtor. [*FN:* A prospective purchaser may obtain assets from a debtor 's estate either pursuant to 11 U.S.C. § 363 or pursuant to the debtor 's plan of reorganization. See 11 U.S.C. §363(b)(1), (c)(1), (f) (authorizing use, sale or lease of debtor's property); *Id.* §§1123(b), 1141(c) (authorizing debtor to sell property free and clear of all interests according to plan of reorganization under chapter 11). The phrase "bankruptcy sale " used throughout this Article is intended to refer to either a § 363 sale or a sale pursuant to a plan of reorganization.] A contrary result produced by operation of state successor liability law is preempted by applicable provisions of the Constitution and the Bankruptcy Code. [*FN:* See supra notes 4−5 and accompanying text (citing origins of preemption doctrine); discussion infra part III (discussing federal preemption of state successor liability).]

Part IV of the Article addresses the separation of powers issue that arises when federal courts make a policy decision to hold a bankruptcy purchaser liable under a successor liability theory. Courts of the United States do not possess the power to enact legislation and are prohibited from achieving the same through policy decisions not mandated by the statute that they are interpreting. [*FN:* See, *e.g.* , City of Milwaukee v. Illinois, 451 U.S. 304, 317 n.9 (1981) (declining to imply private right of action in federal statute explaining that federal courts are not general common law courts and thus should avoid implementing policy decisions through creation of federal common law).] The growing practice in the federal courts to apply successor liability theories to bankruptcy sales is impermissible judicial activism that crosses the line between interpreting statutory language and legislating statutory change. [*FN:* See infra Part IV.]

Although Parts III and IV separately address the constitutional defects apparent in state and federal successor liability law in the bankruptcy context, Part V focuses on a collective constitutional infirmity. When a purchaser obtains a debtor's assets through a bankruptcy sale, value is injected into the debtor's estate and, in return, value is received by the purchaser. [*FN:* See infra notes 195−99 and accompanying text (stating that claimants can only look to debtor's "pool of value," consisting only of sale proceeds of debtor's assets, to satisfy claims).] Holding the purchaser, via the purchased assets, liable for prepetition claims against the debtor essentially burdens the purchased property in favor of a creditor's private interests. Such a servitude constitutes an unconstitutional taking under the Fifth Amendment of the Constitution. [*FN:* See infra Part V and accompanying text (discussing situations where successor liability amounts to unconstitutional taking under Fifth Amendment).] Accordingly, Part V explores the elements of successor liability in the bankruptcy context which offend the Takings Clause of the Fifth Amendment. The Article concludes in Part VI by suggesting that the determination of a bankruptcy purchaser's liability for a debtor's obligations is governed exclusively by the Bankruptcy Code.

II. The Inherent Conflict Between the Bankruptcy Code

and the Successor Liability Doctrine

The Bankruptcy Code sets forth two methods by which a debtor may achieve a partial or a complete liquidation of its assets: (1) a sale in or out of the ordinary course of business pursuant to section 363; [*FN:* 11 U.S.C. §363 (1994).] and (2) a sale pursuant to a plan of reorganization, under section 1123. [*FN: Id.* §1123.] Each method of sale offers certain advantages to the parties involved in the transaction and selecting the appropriate method is best achieved by weighing the advantages and disadvantages of the particular method of sale with the parties' business objectives.

Regardless of the method selected, a sale of a debtor's assets pursuant to the Bankruptcy Code establishes the respective rights of each party to the transaction. [*FN:* See MacArthur Co. v. Johns−Manville Corp. (*In re* Johns−Manville Corp.), 837 F.2d 89, 93−94 (2d Cir. 1988) (explaining that power of Bankruptcy Court to transfer assets free and clear of all interests is well−established) (citing Van Huffel v. Harkelrode, 284 U.S. 225, 227−28 (1931) for proposition that Bankruptcy Court has "the inherent equitable power to sell a debtor 's property and transfer third−party interests to sale proceeds "), *cert. denied* , 488 U.S. 868 (1988)).] Under well−accepted principles of federal preemption, these rights may not be subsequently altered by the application of a state's successor liability law. [*FN:* See discussion infra Part III (discussing federal preemption of state successor liability).] Any variation of this result contravenes the Bankruptcy Clause and the Supremacy Clause of the United States Constitution.

A. A Sale Pursuant to Section 363

Section 363 permits a debtor or a trustee of the debtor's estate to sell the debtor's assets in or out of the ordinary course of business. [*FN:* 11 U.S.C. § 363(c). Whether a particular sale is in the ordinary course of business pursuant to § 363(c) or out of the ordinary course pursuant to 363(b) is somewhat of a gray area in bankruptcy jurisprudence. Generally, courts use two different tests to determine the ordinariness of any given sale. The first test is the creditor 's expectation test (also referred to as the vertical dimension) which analyzes whether the transaction imposes economic risks on creditor other than those risks anticipated when credit was extended. See Committee of Asbestos−Related Litigants and/or Creditors v. Johns−Manville Corp. (*In re* Johns−Manville Corp.), 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986). The second test is the industry−wide test (also referred to as the horizontal dimension) which focuses on the type of sale proposed by the debtor and the frequency of such sales by businesses of a similar nature. See Johnston v. First Street Cos. (*In re* Waterfront Cos.), 56 B.R. 31, 34−35 (Bankr. D. Minn. 1985). For the most part, the type of sales at risk under the successor liability doctrine are those sales concerning real estate transactions or a liquidation of all or substantially all of the debtor 's assets. Such sales are generally construed by the courts to be out of the ordinary course of business. See *In re* American Dev. Corp., 95 B.R. 735, 737 (Bankr. C.D. Cal. 1989) (finding that transfer of all of corporate debtor 's assets to its subsidiaries was not in ordinary course of business);*In re* Fountain Bay Mining Co., 46 B.R. 122, 124 (Bankr. W.D. Va. 1985) (holding that transfer of leases which constituted primary asset of debtor 's estate was not in ordinary course of business);*In re* United Puerto Rican Food Corp., 41 B.R. 565 (Bankr. E.D.N.Y. 1984) (finding that liquidation of debtor 's inventory was not in ordinary course of business). Accordingly, this section of the Article focuses primarily on sales pursuant to § 363(b). However, the discussion of sales free and clear of prepetition interests under § 363(f) and the application of the successor liability doctrine thereto is relevant in the § 363(c) context as well.] To accomplish a sale out of the ordinary course of business, [*FN:* See Fed. R. Bankr. P. 6004(f) (governing conduct of §363 sale not in ordinary course of business).] the debtor or the trustee must provide all interested parties [*FN:* Bankruptcy Rule 6004(a) in conjunction with Bankruptcy Rule 2002 states that notice of the proposed § 363 sale must be given to the following parties: the debtor, the trustee, all creditors and indenture trustees under Bankruptcy Rule 2002(a); see Fed. R. Bankr. P. 6004(a) (notice of proposed use, sale, or lease or property); see id. 2002 (notices to creditors, equity security holders, United States and United States Trustee), 2002(a) (twenty day notice to parties in interest); committees elected pursuant to § 705 or appointed pursuant to § 1102 under Bankruptcy Rule 2002(i); see id. 2002(i) (notices to committees); and the United States trustee under Bankruptcy Rule 2002(k); see id. 2002(k) (notices to United States trustee). Further, if applicable, notice of the proposed § 363 sale must be given in accordance with 11 U.S.C. § 363(b)(2).] with notice and an opportunity to be heard. [*FN:* 11 U.S.C. §363 (b)(1).] "Notice and hearing" is defined in section 102 of the Bankruptcy Code as "such notice and such opportunity for hearing as is appropriate in the particular circumstances." [*FN:* Id . § 102(1). See Fed. R. Bankr. P. 6004(a), 2002(a)(2) (noting § 363 sale is contested matter). Bankruptcy Rule 2002(a) mandates that the debtor, the trustee, all creditors, and any indenture trustee receive not less than twenty days notice of the proposed sale. See id. 2002(a). This notice period may be lengthened or shortened by the court for cause shown under Bankruptcy Rule 9006(b), (c). See id. 9006(b) (time enlargement); id. 9006(c) (time reduction). It should also be noted that in certain instances the court has the authority to order the requested relief, *i.e.*, the bankruptcy sale, without hearing. See 11 U.S.C. § 102(1)(B)(i) (permitting court to grant requested relief without a hearing when proper notice has been given and party in interest has not made timely request); id . § 102(1)(B)(ii) (permitting court to grant requested relief without hearing when proper notice has been given and "there is insufficient time for a hearing to be commenced before such act must be done ").] Partiesemploying section 363 should pay special attention to the notice requirement, as parties not receiving notice or receiving inadequate notice of the proposed sale may challenge the

validity of the sale at some later time. [*FN:* See Western Auto Supply Co. v. Savage Arms Inc. (*In re* Savage Indus. Inc.), 43 F.3d 714, 723 (1st Cir. 1994) (holding that debtor 's creditors who received insufficient notice of terms of § 363 sale were entitled to pursue purchaser of debtor 's assets under successor liability theory).] Moreover, such a flaw may be fatal to the parties' desire to achieve a sale free and clear of all prepetition interests under section 363(f). [*FN:* 11 U.S.C. §363(f); see Savage Indus. , 43 F.3d at 722−23 (holding lack of notice as factor in imposing successor liability); see also discussion infra notes 90−92 and accompanying text (discussing how continuity of enterprise theory has led to increase of successor liability).]

In addition to providing interested parties with notice and an opportunity to be heard, a debtor in possession seeking to sell all or substantially all of its assets pursuant to section 363(b) must articulate some business justification to support the proposed sale. [*FN:* See infra notes 42−45 and accompanying text (discussing business justification standard).] The United States Court of Appeals for the 2nd Circuit forged the development of the business justification standard with its decision in *Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.)* [*FN:* 722 F.2d 1063 (2d Cir. 1983). The business justification standard imports a more lenient standard of review into § 363 when the proposed sale is for all or substantially all of the debtor 's assets. See id. at 1070− 71 (adopting ruling that judge find merely "good business reason" to grant application). Prior to Lionel , concern was expressed by various courts that allowing a sale of all or substantially all of the debtor 's assets pursuant to § 363 circumvented the creditor−protections provided for in the plan confirmation process. See *In re* Solar Mfg. Corp., 176 F.2d 493, 495 (3d Cir. 1949) (holding insufficient emergency to warrant sale);*In re* White Motor Credit Corp., 14 B.R. 584, 590−91 (Bankr. N.D. Ohio 1981) (allowing emergency exception because Congress has left exception "in text"). Accordingly, pre− Lionel decisions employed an "emergency rule " standard which only permitted a sale of all or substantially all of a debtor 's assets in very limited circumstances. See Solar Mfg. , 176 F.2d at 495 (concluding that real estate value deterioration not emergency); White Motor Credit , 14 B.R. at 590−91 (holding emergency exception appropriate even though emergency was created by debtor).] and several of the circuit courts have followed its lead. [*FN:* See, *e.g.* , Stephens Indus. Inc. v. McClung, 789 F.2d 386, 389−90 (6th Cir. 1986) (adopting Lionel's reasoning, concluding court can authorize sale of all assets when sound business purpose dictates); Institutional Creditors of Continental Air Lines Inc. v. Continental Air Lines Inc. (*In re* Continental Air Lines Inc.), 780 F.2d 1223, 1225−26 (5th Cir. 1986) (holding that for debtor−in−possession or trustee to satisfy its fiduciary duty to debtor, creditor, and equity holders, there must be some articulated business justification).] The business justification standard is defined by a multi−factor checklist and is intended to assist courts in balancing a debtor in possession's desire to sell its assets outside of a plan of reorganization with a creditor's desire to either retain the assets or convert the chapter 11 case to one under chapter 7 of the Bankruptcy Code. [*FN:* Lionel , 722 F.2d at 1071 (listing business justification factors). Among the factors considered by the courts in examining a business justification articulated by a debtor in possession are: 1. The proportionate value of the asset to the estate as a whole; 2. The amount of elapsed time since the filing of the petition; 3. The likelihood that a plan of reorganization will be proposed and confirmed in the near future; 4. The effect of the proposed disposition on future plans of reorganization; 5. The proceeds to be obtained from the proposed disposition vis−a−vis any appraisals of the property; 6. Which of the alternatives of use, sale, or lease the proposal envisions; and 7. Whether the asset is increasing or decreasing in value. See id. ; see also William T. Bodoh et al., The Parameters of the Non−Plan Liquidating chapter Eleven: Refining the Lionel Standard , 9 Bankr. Dev. J. 1, 8−14 (1992) (discussing each business justification standard).] However, the utility of the businessjustification standard is called into doubt by the increasing application of the successor liability doctrine to section 363 sales. [*FN:* The purpose underlying the business justification standard is to provide courts with a flexible method of evaluating the benefits of a proposed § 363 sale to the estate and the detriment, if any, to creditors. See Lionel , 722 F.2d at 1071 (stating that bankruptcy judge should consider all "salient factors"). If a creditor is permitted to use a § 363 sale as a vehicle to hold third−parties liable for the debtor 's prepetition obligations, there is no need to balance the creditor 's interest in the assets being sold with the benefits to the debtor. Such a consideration is a nonfactor as the successor liability doctrine essentially allows a creditor 's interest to continue in the asset subsequent to the § 363 sale.]

Because section 363 contemplates the disposition of assets in which a party other than the debtor may have an interest, the court may order the debtor to provide such a party with adequate protection pursuant to section 363(e). [*FN:* 11 U.S.C. §363(e) (1994) (providing for adequate protection for secured party in event of use, sale or lease of secured property). Requests for adequate protection in the § 363 context are often satisfied by assurances of sale consummation and feasibility. See, *e.g.* ,Mutual Life Ins. Co. of N.Y. v. Red Oak Farms Inc. (*In re* Red Oak Farms Inc.), 36 B.R. 856, 859 (Bankr. W.D. Mo. 1984) (rejecting debtor in possessions' attempt to sell assets of estate because of weak feasibility assurances). Further, if the sale is pursuant to subsection 363(f), the creditor 's interest in the asset attaches to the proceeds of sale and thus, adequate protection issues rarely prove to be insurmountable.] An adequate protection issue raised under section 363(e) has the potential of delaying or hindering a successful section 363 sale. [*FN:* See Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co., 294 U.S. 648, 666− 67 (1935) (addressing issue of adequate protection given to parties with secured interests in notes prior to sale); Martin v. United States (*In re* Martin), 761 F.2d 472, 478 (8th Cir. 1985) (remanding case to District Court with instructions to remand to Bankruptcy Court for determination of issue concerning adequate protection); United States v. Collins (*In re* Northeast Chick Servs. Inc.), 43 B.R. 326, 331−32 (Bankr. D. Mass. 1984) (holding creditor may ask for adequate protection at any time up to and including court's order allowing use of secured property) (citing 2 Collier , supra note 6, ¶ 363.06); see also 2 Collier , supra note 6, ¶ 363.06, at 363−32 to 363−05 (discussing procedure for secured creditor to seek adequate protection under §363(e)).] Another potential barrier to sales proposed pursuant to section 363 lies in section

363(d) which prevents the sale of assets if a creditor has previously obtained relief from the automatic stay with respect to those assets. [*FN:* See 11 U.S.C. §363(d) (providing that trustee may use, sell or lease property so long as it does not hinder relief granted from automatic stay).] Similar to the business justification standard, the protection afforded creditors under subsections (d) and (e) of section 363 is intended to strike an appropriate balance between the rights of particular creditors with interests in the assets and the rights of the debtor and general creditors of the estate. [*FN:* See, *e.g.* , Burlington N. R.R. Co. v. Dant & Russell Inc. (*In re* Dant & Russell Inc.), 67 B.R. 360, 363 (D. Or. 1986) (stating that purpose of §363 "is to allow businesses to continue their daily operations without incurring the burden of . . . notifying creditors for minor transactions while protecting secured creditors and others from the dissipation of the estate's assets.") (citing H.R. Rep. No. 95−595, at 181−82 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6141−43).] As the discussion in Part II.C ofthe Article illustrates, upsetting this balance crafted by Congress with the application of the successor liability doctrine impermissibly accords certain creditors priority over others.

One advantage that a section 363 sale has over a sale pursuant to a plan of reorganization is efficiency, in terms of both time and money. A motion to sell assets under section 363 may be brought at any time after the filing of the petition, and the court may approve the sale within twenty days or less. [*FN:* See Fed. R. Bankr. P. 6004(a), 2002(a), and 9006(b), (c).] This rather simple procedure must be contrasted with the time and expense associated with compiling and circulating a disclosure statement and plan of reorganization, distributing and collecting ballots, and holding hearings on both the adequacy of the disclosure statement and the confirmation of the plan of reorganization. [*FN:* See 11 U.S.C. §§ 1125 (postpetition disclosure and solicitation), 1126 (acceptance of plan), 1128 (confirmation hearing); Fed. R. Bankr. P. 9006, 9007, 2002 (notice rules). All parties in interest must receive at least twenty−five days notice of a hearing scheduled to consider the adequacy of a disclosure statement. See id. 9017(a), 2002(c). Although a court retains discretion to extend or shorten this notice period for cause shown, a sale pursuant to a plan of reorganization does not proceed subsequent to the hearing on the disclosure statement. *Id.* 9006(b), (c). Rather, a separate confirmation hearing is held after the disclosure statement is circulated with the plan of reorganization for voting purposes. 11 U.S.C. § 1128. This simplified two−step version of the confirmation process does not account for any objections, negotiations, or amendments with respect to the plan of reorganization. See id. § 1127 (modification of plan); Fed. R. Bankr. P. 3019 (modification of accepted plan before confirmation). The plan confirmation process may be condensed in two particular circumstances: (1) a small business election pursuant to 11 U.S.C. § 1121(e); and (2) a pre−packaged bankruptcy plan pursuant to 11 U.S.C. § 1126. For a detailed discussion of the small business election, see Angela K. Layden, Inconsistencies in the Small Business Amendments , 15 Am. Bankr. Inst. J. 26 (1996) (discussing in detail small business elections); Neal Batson, Small Business Bankruptcies in chapter 11 After the 1994 Amendments , 736 PLI/ Comm 135 (Apr.−May 1996) (same). For a discussion of prepackaged bankruptcies, see Marc. S. Kirschner et al., Prepackaged Bankruptcy Plans: The Deleveraging Tool of the '90s in the Wake of OID and Tax Consequences , 21 Seton Hall L. Rev. 643 (1991) (discussing prepackaged bankruptcies); Steven R. Gross & George E.B. Maguire, Prepackaged chapter 11 Plans , 682 PLI/ Comm 433 (Jan. 1994) (same); see also Republic Health Corp. v. Coral Gables Ltd. (*In re* Republic Acquisition Co.), 134 B.R. 194, 196 n.1 (Bankr. N.D. Tex. 1991) (explaining basic concept underlying prepackaged bankruptcy plan).]

Another aspect of the section 363 sale that enhances its efficiency is subsection 363(f) which enables a debtor to achieve substantially the same result as if the assets were sold pursuant to a plan of reorganization. [*FN:* 11 U.S.C. §363(f) (1994).] Under subsection 363(f), an asset may be sold "free and clear of any interest in such property of an entity other than the estate" [*FN:* Fed. R. Bankr. P. 6004(c) (providing mechanics for moving under §363(f) to compel sale of assets).] if any of the following criteria are met: (1) the sale would be permitted by applicable nonbankruptcy law, [*FN:* 11 U.S.C. § 363(f)(1).] (2) such entity consents, [*FN:* See id. § 363(f)(2).] (3) the interest is a lien and the purchase price exceeds the aggregate value of all liens, [*FN:* See id. § 363(f)(3).] (4) the interestis in bona fide dispute, [*FN:* See id. § 363(f)(4).] (5) or the entity could be compelled to accept money satisfaction of such interest. [*FN:* See id. § 363(f)(5).]

The term "interest" is not defined in the Bankruptcy Code [*FN:* See Ninth Ave. Remedial Group v. Allis−Chalmers Corp., 195 B.R. 716, 730−31 (N.D. Ind. 1996) (analyzing interpretations of term "interest").] and hence, one disadvantage to pursuing a section 363 sale is that some courts have interpreted the term "interest" to include only in rem interests, such as liens. [*FN:* See Zerand−Bernal Group Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) (stating in dicta that scope of § 363 was limited to liens against assets); Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 917−18 (Bankr. W.D. Tex. 1993) (invoking equitable powers of Bankruptcy Court to find sale free and clear of claims that could have been brought in debtor 's bankruptcy case although holding scope of §363(f) was limited to in rem interests).] However, other courts have disregarded such a narrow interpretation, pointing out that in rem liens are defined by the Bankruptcy Code [*FN:* See 11 U.S.C. §101(37) (defining "lien " as "charge against or interest in property to secure payment of a debt or performance of an obligation. ").] and that Congress could have limited subsection 363(f) to sales free and clear of "liens" if it had so intended. [*FN:* See WBQ Partnership v. Virginia Dep't of Med. Assistance Servs. (*In re* WBQ Partnership), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995) (reasoning that Congress, if intended to restrict scope of §363(f), would have used "lien" instead of "interest"); P.K.R. Convalescent Ctrs. Inc. v. Virginia Dep't of Med. Assistance Servs. (*In re* P.K.R.

Convalescent Ctrs. Inc.), 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (stating plain meaning of §363 demonstrates covering more situations than sales involving liens); Volvo White Truck Corp. v. Chambersburg Beverage Inc. (*In re* White Motor Credit Corp.), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (providing liens example of interest); American Living Sys. v. Bonapfel (*In re* All Am. of Ashburn Inc.), 56 B.R. 186, 189−91 (Bankr. N.D. Ga.) (holding that sale of assets free and clear of all claims precluded application of successor doctrine against purchaser of same assets), aff 'd , 805 F.2d 1515 (11th Cir. 1986); Rubinstein v. Alaska Pac. Consortium (*In re* New England Fish Co.), 19 B.R. 323, 326−28 (Bankr. W.D. Wash. 1982) (holding that assets of debtor's estate transferred pursuant to purchase agreement could be transferred free and clear of Title VII employment discrimination and civil rights claims if debtor's employees); see also Miller v. Kemira Inc. (*In re* Lemco Gypsum Inc.), 910 F.2d 784, 788 (11th Cir. 1990) (stating that upon sale of property by Trustee, with court approval, buyer acquires property free and clear of claims) (citing*In re* Chicago, Rock Island & Pac. Ry. Co., 794 F.2d 1182, 1187 (7th Cir. 1986)). In Ninth Avenue Remedial Group v. Allis−Chalmers Corp. , 195 B.R. 716 (N.D. Ill. 1996), the court acknowledged both sides of the debate with respect to the coverage of § 363(f); however, the court declined to accept either statutory interpretation. See id. at 729−33. Rather, the court determined that, irrespective of the meaning of the term "interest, " it had the authority under its equitable powers to sell a debtor 's assets free and clear of all claims that could be asserted in the debtor 's bankruptcy case. See id. at 729−33; see also Van Huffel v. Harkelrode, 284 U.S. 225, 227−28 (1931) (finding that court has inherent equitable power to sell debtor 's assets and to transfer any third−party claims to proceeds of sale); White Motor Credit , 75 B.R. at 948−49 (stating that court 's "equitable power to sell free and clear must be interpreted consistent with its power to discharge claims under plan of reorganization ").] Thus, the broad definition of a "claim" in section 101 [*F*N: 11 U.S.C. §101(5) (defining "claim " as right to payment or right to equitable remedy for breach of performance). Courts interpreting §101(5) have consistently held that Congress intended the term "claim " to have the broadest possible application in order to provide full relief to the honest, but unfortunate, debtor. See, *e.g.* , Johnson v. Home State Bank, 501 U.S. 78, 85−86 (1991) (explaining that Congress intended to adopt an even broader definition of "claim" for 1978 Bankruptcy Act than was found in Acts prior to 1978) (citing H.R. Rep. No. 95−595, at 309 (1977), reprinted in 1978 U.S.C.C.A.N. at 6266; S. Rep. No. 95−989, at 21−22 (1978), reprinted in 1978 U.S.C.C.A.N. at 5807−08); Pennsylvania Dep 't of Pub. Welfare v. Davenport, 495 U.S. 552, 558−59 (1990) (noting that "to the extent the phrase 'right to payment ' is modified in the statute, the modifying language ('whether or not such right is . . . ') reflects Congress ' broad rather than restrictive view of the class of obligations that qualify as a 'claim ' giving rise to a 'debt ' ") (citing H.R. Rep. No. 95−595, at 309 (1977), reprinted in 1978 U.S.C.C.A.N. at 6266); see also Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (supporting proposition that Congress desired broad definition of claim). The United States Supreme Court has reinforced the broad scope of the term "claim " as defined in § 101(5) on several occasions, noting that the legislative history of the Bankruptcy Code "contemplates that all legal obligations of the debtor . . . will be able to be dealt with in a bankruptcy case. " Davenport , 495 U.S. at 558 (quoting H.R. Rep. No. 95−595, at 309 (1977), reprinted in 1978 U.S.C.C.A.N. at 6266); see also Johnson , 501 U.S. at 2154 (reviewing legislative history and determining that Congress intended to adopt "broadest possible " definition of term "claim "); Kovacs , 469 U.S. at 274 (holding that state court judgment requiring debtor to remove hazardous waste from dump site was claim within meaning of 11 U.S.C. § 101(5)).] coupled with the underlying dualpolicy of the Bankruptcy Code, to grant the debtor a fresh start and to provide an equitable distribution to creditors, [*FN:* See supra notes 14−15 and accompanying text (discussing dual policy goals in bankruptcy code).] suggests that the term "interest" [*FN:* Considering that the one link, as tenuous as it may be, between a bankruptcy purchaser and a successor liability claimant is the assets purchased from the debtor 's estate, a successor liability claim is most certainly an interest in the assets which may be extinguished through either a § 363 sale or a sale pursuant to a plan of reorganization.] is best interpreted to include all prepetition claims and liens subject to being satisfied from property of the debtor's estate. [*FN:* See 11 U.S.C. §363(f) (providing that " if such interest is a lien , " then the purchase price must exceed aggregate value of all such liens in order to sell property free and clear of liens) (emphasis added); Fed. R. Bankr. P. 6004(c). The phrase "if such interest is a lien " suggests that the term "interest " as used in § 363(f), although it may encompass a lien, includes more than merely in rem liens. See 11 U.S.C. §363(f). Likewise, the language of Bankruptcy Rule 6004(c) refers to motions to sell property "free and clear of liens or other interests. " Fed. R. Bankr. P. 6004(c) (emphasis added). The authors recognize that Congress explicitly authorized a debtor in possession or a trustee to sell assets of the estate pursuant to a plan of reorganization free and clear of all "claims and interests. "11 U.S.C. §§ 1123(a)(5), (b)(4), 1141(c). Section 1141, which provides that property dealt with by the plan is free and clear of all "claims and interests " addresses in general terms the effect of a confirmed plan on the assets of and the claims against a debtor 's estate. *Id.* §1141. As such, it makes good sense to specifically reference the term "claims " in § 1141(c) because a plan of reorganization is intended to resolve all prepetition obligations of a debtor and represent a new contract between the debtor and each respective creditor. On the other hand, a § 363 sale is focused on the liquidation of property of the estate and not per se resolution of all claims asserted against a debtor. However, when a debtor satisfies the business justification standard and is authorized by a court to sell all or substantially all of its assets pursuant to § 363, the purchaser should receive protection from all prepetition claims asserted against the debtor which will be satisfied in whole or in part through the bankruptcy process. See id. §363. Thus, the term interest is best interpreted to include all prepetition obligations of a debtor because these obligations will be dealt with in the bankruptcy case and should not be revived thereafter against a third − party who purchased a debtor 's asset for value through a bankruptcy sale.]

B. A Sale Pursuant to a Plan of Reorganization

Unlike section 363(f), which limits the circumstances in which a debtor or a trustee may sell assets free and clear of prepetition interests, section 1123(a)(5)(D)provides that:

Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall−

(5) provide adequate means for the plan's implementation, such as−

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate . . . . [*FN:* 11 U.S.C. § 1123(a)(5)(D) (1994) (emphasis added).]

Thus, a sale barred from proceeding by applicable nonbankruptcy law under section 363(f)(1) may be accomplished pursuant to a plan of reorganization.

Additional benefits to selling a debtor's assets pursuant to a plan of reorganization are found in sections 1141 and 1145 of the Bankruptcy Code. However, as with the section 363 sale, there are positive and negative aspects to a sale pursuant to a plan of reorganization. Any benefits that may be received by the use of section 363 must be weighed against the time and expense of the confirmation process. [*FN:* See supra Part II.A and accompanying text (discussing requirements of §363 sale) see also 11 U.S.C. §1128(a) (providing broad notice requirement and court held hearing on confirmation); id . §1128(b) (giving "a party in interest" standing to challenge plan); id . §1129 (legislating extensive procedural requirements before court may approve plan).]

Section 1141 addresses the effect of a confirmed plan of reorganization and it states that "after confirmation of a plan, the property dealt with by the plan is free and clear of all *claims and interests* of creditors, equity security holders, and of general partners in the debtor." [*FN:* 11 U.S.C. § 1141(c) (emphasis added).] The language of section 1141(c) clearly establishes that the parameters of a sale pursuant to the plan are that it is "free and clear of all claims and interests. . . ." [*FN:* See id.; supra note 62 and accompanying text. The term "claim" is defined quite expansively in 11 U.S.C. § 101(5) and encompasses any prepetition obligation of a debtor, whether contingent, non−contingent, liquidated or unliquidated. See id. § 101(5). Thus, although the term "interest" is not defined in the Bankruptcy Code, the reference to both claims and interests evidences the wide latitude granted sales pursuant to a plan of reorganization.] As such, a purchaser obtains a more concrete indication of the "interests" extinguished from the property upon consummation of the sale than it would in the section 363 context. [*FN:* See 11 U.S.C. §1141(c); supra notes 59−66 and accompanying text (discussing interpretation of "interest").]

Moreover, if securities are to change hands as a result of the asset sale, section 1145 provides a substantial benefit to pursuing the sale through a plan of reorganization. [*FN:* See 11 U.S.C. § 1145.] Section 1145(a) provides that, except for those entities qualifyingas an "underwriter," [*FN:* See id. §1145(b)(1) defines "underwriter " as: except with respect to ordinary trading transactions of an entity that is not an issuer, an entity is an underwriter under section 2(11) of the Securities Act of 1933, if such entity − (A) purchases a claim against, interest in, or claim for an administrative expense in the case concerning, the debtor, if such purchase is with a view to distribution of any security received or to be received in exchange for such a claim or interest; (B) offers to sell securities offered or sold under the plan for the holders of such securities; (C) offers to buy securities offered or sold under the plan from the holders of such securities, if such offer to buy is − (i) with a view to distribution of such securities; and (ii) under an agreement made in connection with the plan, with the consummation of the plan, or with the offer or sale of securities under the plan; or (D) is an issuer, as used in such section 2(11), with respect to such securities. *Id.*] an entity need not comply with section 5 of the Securities Act of 1933 or any state or local law requiring registration for the offer or sale of a security if:

(1) the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan−

(A) in exchange for a claim against, an interest in, or a claim for an administrative expense in the case concerning, the debtor or such affiliate; or

(B) principally in such exchange and partly for cash or property . . . . [*FN: Id.* §1145(a).]

Thus, the safe harbor provision of section 1145 enables a sale to be consummated in whole or in part with securities. [*FN:* See id. §1145(a)(3)(B)(i) (requiring issuer to disclose sale and comply with §§13, 15(2) of Securities Exchange Act of 1934).]These securities can then be distributed directly to creditors under the terms of the plan of reorganization without the necessity of complying with the registration and disclosure requirements of state and federal securities laws. [*FN:* See id.; Richard M. Cieri et al., "Safe Harbor in Uncharted Waters " −Securities Law Exemptions Under Section 1125(e) of the Bankruptcy Code , 51 Bus. Law. 379, 388−92 (1996) (giving overview of §1125(e) and its relationship to the overall chapter 11 disclosure scheme); George W.

Kuney, Going Public Via chapter 11: 11 U.S.C. Sections 1125(e) and 1145 , 23 Cal. Bankr. J. 3, 6−13 (1996) (discussing legal intricacies involved in issuing stock through chapter 11 reorganization); Richard J. Morgan, Application of the Securities Laws in chapter 11 Reorganizations Under the Bankruptcy Reform Act of 1978 , 1983 U. Ill. L. Rev. 861, 902−04 (discussing resales of portfolio securities by debtor).] Such an efficient means of purchasing assets with consideration other than cash is not available in the section 363 context. [*FN:* See 11 U.S.C. § 1125(e) (permitting person to offer, issue, sell or purchase security under plan and not be held liable for violation of other applicable law governing securities). Thus, unless the § 363 sale is accomplished in conjunction with a plan of reorganization, the securities exemption of § 1125(e) is not applicable.]

C. The Successor Liability Doctrine

Historically, a purchaser of all or substantially all of an entity's assets could not be held liable for obligations of the seller. [*FN:* See Tucker, supra note 11, at 8−9 (citing Commercial Nat 'l Bank v. Newton, 349 N.E.2d 138 (Ill. App. Ct. 1976) as illustrating traditional notion of no successor liability).] The common law doctrine of successor liability originated as a set of exceptions to the traditional rule of no liability [*FN:* See, *e.g.* , Wallace v. Dorsey Trailers Southeast Inc., 849 F.2d 341, 343 (8th Cir. 1988) (explaining four exceptions to traditional notion of no successor liability); C. Mac Chambers Co. v. Iowa Tae Kwon Do Academy Inc., 412 N.W.2d 593, 597 (Iowa 1987) (same). For an excellent discussion of the development of the traditional and the modern exceptions to the rule of no successor liability, see Daniel H. Squire et al., Corporate Successor Liability Under CERCLA: Who 's Next? , 43 SMU L. Rev. 887, 888−92 (1990) ("The policy rationales underlying the traditional rule and its exceptions include: the protection of minority shareholders and creditors, the proper assessment of taxes, and the promotion of alienability of corporate assets. ").] and, quite literally, was the exception rather than the rule. The four original exceptions to the rule of no successor liability include:

(1) transactions where the purchaser expressly or impliedly agrees to assume such debts and liabilities; [*FN:* See Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903−04 (Ark. 1995) (discussing expressed or implied assumption of liability exception in products liability context); see also Nissen Corp. v. Miller, 594 A.2d 564 (Md. Ct. App. 1991) (finding that contract provision denying liability precluded successor liability).]

(2) transactions that amount to a consolidation or merger of the corporations; [*FN:* See Leannais v. Cincinnati Inc., 565 F.2d 437, 438−39 (7th Cir. 1977) (finding that transaction which possesses characteristics of merger warrants application of successor liability doctrine).]

(3) transactions where the purchaser is merely a continuation of the selling entity; [*FN:* See Bud Antle Inc. v. Eastern Foods Inc., 758 F.2d 1451, 1458 (11th Cir. 1985) (explaining mere continuation exception to nonliability of successor corporations); Cyr v. B. Offen & Co., 501 F.2d 1145, 1152 (1st Cir. 1974) (same).] or

(4) transactions that are entered into fraudulently in order to escape liability for such debts and liabilities. [*FN:* See Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1426 (7th Cir. 1993) (stating that "the fraud exception to the nonliability of successors is merely an application of the law of fraudulent conveyances ") (citing 15 Fletcher Cyclopedia of the Law of Private Corporations §§ 7125, 7129 (rev. ed. vol. 1990).]

The successor liability doctrine has not remained stagnant since its inception. [*FN:* See Squire et al., supra note 79, at 890 (noting modern judicially made exceptions to four traditional rules of successor liability).] Rather, the doctrine is continuing to evolve under the common law and its coverage is expanding with these changes. [*FN:* See, *e.g.* , Turner v. Bituminous Cas. Co., 244 N.W.2d 873, (Mich. 1976) (holding that law of products liability was determinative of whether successor liability would attach to successor corporation).] A driving force behind this evolution is thedevelopment of the product−line theory of successor liability. [*F*N: See Ray v. Alad Corp., 560 P.2d 3, 8−9 (Cal. 1977) (developing elements of product−line theory of successor liability); see also Grand Labs. Inc. v. Midcon Labs of Iowa, 32 F.3d 1277, 1283−84 (8th Cir. 1994) (distinguishing product−line theory from traditional mere continuation exception); Conway v. White Trucks, 885 F.2d 90, 93 (3d Cir. 1989) (explaining application of product−line test); Martin v. Abbott Lab. Inc., 689 P.2d 368, 384 (Wash. 1984) (same); Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa. Super. 1981) (same); Ramirez v. Amsted Indus. Inc., 431 A.2d 811 (N.J. 1981) (same). Courts have described the policy implications of the product − line theory in the following terms: A three−part policy underlies the "product−line " liability doctrine: (1) such all−asset acquisitions virtually eliminate the tort plaintiff 's remedies against the seller, which usually dissolves after the sale; (2) the buyer becomes the most efficient conduit for effecting the cost−spreading policy at the root of strict tort liability; and (3) fairness demands that the buyer−−−the party enjoying the economic benefits of its predecessor 's good will−−−bear the initial financial burden of its predecessor 's contingent product liability. Western Auto Supply Co. v. Savage Arms Inc. (*In re* Savage Indus. Inc.), 43 F.3d 714, 718 n.4 (1st Cir. 1994) (citing Ray , 560 P.2d at 8−9).] This theory is essentially a spin−off of the mere continuation exception set forth above, and seeks to import the strict liability notions underlying products liability law into asset purchases. [*FN:* See Florom v. Elliott Mfg., 867 F.2d 570, 578 (10th Cir. 1989) (stating that product−line exception to nonliability of successor corporations is only applicable in products liability cases); Tucker,

supra note 11, at 15 (noting that some courts have rejected product line theory as inappropriate application of strict liability) (quoting Restatement (Second) of Torts § 402A (1965) for proposition that entity must have sold product to consumer in order to incur strict liability for any resulting injuries).] The product−line theory holds a purchaser liable if that purchaser continues to manufacture the same product line as the seller, under the same name and with no outward indication of a change of ownership. [*FN:* Dawejko , 434 A.2d at 109.] A notable difference between the product−line theory and its predecessor exceptions is that under the product−line theory a purchaser need not purchase all or substantially all an entity's assets to subject itself to liability exposure. Merely purchasing a single product line of the seller creates the potential for transferring liability to the purchaser. [*FN:* See Tucker, supra note 11, at 14−15 (citing Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir. 1986)).]

Similarly, the continuity of enterprise theory [*FN:* See, *e.g.* , Grand Labs., 32 F.3d at 1283−84 (distinguishing continuity of enterprise theory from the traditional mere continuation exception); Florom , 867 F.2d at 578 (explaining continuity of enterprise theory of successor liability); Turner , 244 N.W.2d at 881−82 (same).] has contributed to the increasing application of the successor liability doctrine, [*FN:* See Turner , 244 N.W.2d at 883 (noting that if business entity continues, successor can be held liable).] and it too stems from the original mere continuation exception. Under the continuity of enterprise theory, a purchaser is liable for all obligations of the seller if: (1) the purchaser retains the seller's general operations, (2) the seller dissolves, (3) the purchaser assumes the normal business obligations of the seller, and (4) the purchaser holds itself out as a continuation of the seller. [*FN:* See id. at 883−84.] In light of the expanding nature of the successor liability doctrine, a purchaser is no longer assured of receiving what it bargained for in the purchase agreement.

This uncertainty regarding a purchaser's liability exposure under an asset purchase agreement persists in the bankruptcy [*FN:* See Mooney Aircraft Inc. v. Foster (*In re* Mooney Aircraft Inc.), 730 F.2d 367, 375 (5th Cir. 1984) (holding that claims arising more than five years after sale of assets and over one year after bankruptcy estate was closed is dismissed for lack of jurisdiction despite lack of prior notice to claimants); Renkiewicz v. Allied Prod. Corp., 492 N.W.2d 820, 823 (Mich. Ct. App. 1992) (holding claim that arose one month after plan confirmation was non−dischargeable) appeal denied , 505 N.W.2d 579 (Mich.), *cert. denied* , 510 U.S. 1011 (1993). For an excellent discussion of the specific types of claims at risk under the successor liability doctrine as applied in the bankruptcy context, see Michael H. Reed, Successor Liability and Bankruptcy Sales , 51 Bus. Law. 653, 656−64 (1996).] as well as the nonbankruptcy context. [*FN:* See Turner, 244 N.W.2d at 883−84 (assigning liability in non−bankruptcy context).] Although some courts have determined that a bankruptcy sale approved by the court in compliance with the Bankruptcy Code precludes successor liability, [*FN:* See Paris Mfg. Corp. v. Ace Hardware Corp. (*In re* Paris Indus. Corp.), 132 B.R. 504 (D. Me. 1991) (denying successor liability); Forde v. Kee−Lox Mfg. Co., 437 F. Supp. 631 (W.D.N.Y. 1977) (same), aff 'd , 584 F.2d 4 (2d Cir. 1978);*In re* Lady H. Coal Co., 193 B.R. 233 (Bankr. S.D. W. Va. 1996) (same); WBQ Partnership v. Commonwealth of Va. Dep't of Med. Assistance Servs. (*In re* WBQ Partnership), 189 B.R. 97 (Bankr. E.D. Va. 1995) (same); P.K.R. Convalescent Ctrs. Inc. v. Commonwealth of Va. Dep't of Med. Assistance Serv. (*In re* P.K.R. Convalescent Ctrs. Inc.), 189 B.R. 90 (Bankr. E.D. Va. 1995) (same); Volvo White Truck Corp. v. Chambersburg Beverage Inc. (*In re* White Motor Credit Corp.), 75 B.R. 944 (Bankr. N.D. Ohio 1987) (same); American Living Sys. v. Bonapfel (*In re* All Am. of Ashburn Inc.), 56 B.R. 186 (Bankr. N.D. Ga.) (same), aff 'd , 805 F.2d 1515 (11th Cir. 1986); Rubinstein v. Alaska Pacific Consortium (*In re* New England Fish Co.), 19 B.R. 323 (Bankr. W.D. Wash. 1982) (same).] other courts have used semantics to reach the opposite conclusion. [*FN:* See Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin Inc., 59 F.3d 48 (7th Cir. 1995) (allowing successor liability despite predecessors bankruptcy); Western Auto Supply Co. v. Savage Arms Inc. (*In re* Savage Indus. Inc.), 43 F.3d 714, 714 (1st Cir. 1994) (same); Zerand−Bernal Group Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994) (same); Farmers Union Oil Co. v. Allied Prods. Corp., 162 B.R. 834 (D.N.D. 1993) (same); Michigan Employment Sec. Comm 'n v. Wolverine Radio Co. Inc. (*In re* Wolverine Radio Co.), 930 F.2d 1132 (6th Cir. 1991) (same), *cert. denied* , 503 U.S. 978 (1992); see also infra notes 99−106 and accompanying text (explaining rationale used in holding successors liable). Several courts have taken a middle ground on the issue of successor liability in the bankruptcy context holding that if a claim is one that could have been brought in the debtor 's bankruptcy case, the claimant is precluded from asserting a successor liability claim. See, *e.g.* , Ninth Ave. Remedial Group v. Allis−Chalmers Corp., 195 B.R. 716 (N.D. Ind. 1996) (finding that sale free and clear pursuant to Bankruptcy Code does not relieve purchaser of successor liability for future claims arising after bankruptcy proceedings have concluded); Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910 (Bankr. W.D. Tex. 1993) (same).] Most often, this extended liability results from varying interpretations of the term "claim"; [*FN:* Under § 101(5), the term "claim " is defined broadly. 11 U.S.C. §101(5) (1994). Although all courts acknowledge the broad definition of a claim in § 101(5), a divergence among the courts exists as to when a claim arises under this definition. As a result, three distinct tests have emerged to assist in this determination. First, the state law test stands for the proposition that a claim does not come into existence under § 101(5) until it is legally cognizable under applicable state law. See Avellino & Bienes v. M. Frenville Co. Inc. (*In re* M. Frenville Co. Inc.), 744 F.2d 332, 337 (3d Cir. 1984) (holding that absent overriding federal law, question must be decided according to applicable state law) (citations omitted), *cert. denied* , 469 U.S. 1160 (1985). The approach taken by the 3rd Circuit in Frenville has been widely criticized and the majority of courts have declined to adopt the state law test because it is viewed as contradicting the broad definition of claim intended by Congress. See Acevedo v. Van Dorn Plastic Mach. Co., 68 B.R. 495, 497 (Bankr. E.D.N.Y. 1986) (noting restrictive nature of state law test);*In re* Black, 70 B.R. 645, 647 (Bankr. D. Utah 1986) (same). Second, the conduct test analyzes the particular facts of each case to determine if "the acts constituting the tort or breach of warranty have occurred prior to the

filing of the petition. " Grady v. A.H. Robins Co. Inc., 839 F.2d 198, 203 (4th Cir.), cert. dismissed sub nom. Joynes v. A.H. Robins Co. Inc., 487 U.S. 1260 (1988). If the offending conduct takes place prior to the petition date, the creditor holds a claim against the debtor within the parameters of § 101(5). See Grady , 839 F.2d at 199−200. The final test is the prepetition relationship test. This test recognizes a claim for purposes of § 101(5) if there is any form of prepetition contact between the creditor and the debtor. See*In re* Piper Aircraft Corp., 162 B.R. 619, 627 (Bankr. S.D. Fla.) (holding that prepetition relationship connecting conduct to claimant is threshold requirement), aff 'd ,168 B.R. 434 (S.D. Fla. 1994), aff 'd sub nom. Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995). The prepetition relationship test is slightly more restrictive than the conduct test as it requires an acquaintance of sorts between the creditor and the debtor prior to the petition date. For a detailed discussion of the three tests employed by the courts to determine if a claim exists for purposes of § 101(5), see Michelle M. Morgan, The Denial of Future Tort Claims in*In re* Piper Aircraft: Will the Court 's Quick−Fix Solution Keep the Debtor Flying High or Bring It Crashing Down? , 27 Loy. Univ. Chi. L.J. 27, 29−37 (1995). Requiring that a prepetition relationship exist in order for the claim to be addressed in a debtor 's bankruptcy case was recently approved by the 11th Circuit in Epstein , 58 F.3d 1573. In affirming the lower courts ' decisions, the 11th Circuit slightly modified the prepetition relationship test, which it labeled the "Piper test. " See id. at 1577. Under the Piper test: [A]n individual has a §101(5) claim against a debtor manufacturer if (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor 's product; and (ii) the basis for liability is the debtor 's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. *Id.* ; see also Reed, supra note 93, at 661−62 (explaining 11th Circuit 's holding in Epstein).] *i.e.*,whether the claim being asserted against the purchaser is a claim that could have been asserted in the debtor's bankruptcy case. [*FN:* In holding that a creditor 's claim did not exist prepetition, courts permit that creditor to pursue a successor liability action against a bankruptcy sale purchaser by reasoning that the creditor is not bound by the bankruptcy court order. See Savage Indus. Inc., 43 F.3d at 723 (holding that new successor liability poses "no threat" to operations of bankruptcy code); Zerand−Bernal Group , 23 F.3d at 164 (holding that because bankruptcy plan confirmation became irrevocable years ago, suit was not related to bankruptcy proceeding); see also supra notes 84−92 and accompanying text (noting general increase of successor liability). Although such a creditor 's claim against the debtor, the party allegedly causing the harm suffered, is not extinguished by the bankruptcy case, the creditor does not hold a viable claim against a bankruptcy purchaser who obtained assets from the estate through an arms length transaction, in good faith, and for valid consideration. See discussion infra notes 125−28 and accompanying text. This result is mandated by the "free and clear" language of the Bankruptcy Code. See 11 U.S.C. §363(f); supra notes 52−58 and accompanying text (discussing term "free and clear"). Another approach used by the courts to escape the "free and clear " language of the Bankruptcy Code is to hold that a particular claimant 's action against the bankruptcy purchaser is not an interest in the assets and thus, not subject to the terms of sale. See Wolverine Radio , 930 F.2d 1132, 1145−46 (holding that debtor 's experience rating could be assigned to asset purchaser because experience rating was not an "interest " in the assets), *cert. denied* , 503 U.S. 978 (1992); Farmers Union Oil , 162 B.R. 834, 839 (holding that sale free and clear did not relieve purchaser of obligation under North Dakota statute to repurchase percentage of withdrawing dealer 's inventory). However as is discussed supra notes 63−66 and accompanying text, the definition of a successor liability claim, *i.e.* , that an entity may be held liable solely because of the assets purchased, evidences that such a claim is an interest in the assets.]

For example, in *Zerand−Bernal Group Inc. v. Cox*, [*FN:* 23 F.3d at 159 (7th Cir. 1994).] the United States Court of Appeals for the 7th Circuit determined that the bankruptcy court lacked jurisdiction to enjoin a successor liability suit against the purchaser of the debtor's assets where the plaintiff was injured subsequent to the asset purchase by a debtor−manufactured machine. [*FN:* Zerand−Bernal , 23 F.3d at 162−63. In Zerand−Bernal , the bankruptcy court approved the sale of the debtor 's assets "free and clear of any liens, claims or encumbrances of any sort or nature. " Id . at 161. Subsequent to the confirmation of the debtor 's plan and the execution of the sales agreement, Ronald Cox injured his hand in a machine manufactured and sold to his employer by the debtor. *Id.* Mr. Cox filed a products liability suit against the debtor and the asset purchaser, among others, approximately four and a half years after the bankruptcy proceedings. *Id.* The asset purchaser had no involvement in the manufacturing or the sale of the machine which caused Mr. Cox 's injury. *Id.*] The 7th Circuit distinguished the plaintiff from unknown claimants, such as asbestosis victims, whose claims are dealt with in a debtor's bankruptcy case. [*FN:* Zerand−Bernal , 23 F.3d at 163.] Because the plaintiff's opportunity to pursue its legal remedy had been foreclosed by the debtor's liquidation, the 7th Circuit concluded that the plaintiff could pursue a successor liability action against the purchaser of the debtor's assets. [*FN:* See id. In explaining this distinction, the 7th Circuit noted: Had the Coxes [the injured party] been parties to the bankruptcy proceeding, they would have had no possible basis for suit against Zerand. But that is not because the bankruptcy court could and would enjoin such a suit; it is because the successorship doctrine on which they rely is inapplicable if the plaintiff had a chance to obtain a legal remedy against the predecessor, even so limited a remedy as that afforded by the filing of a claim in bankruptcy. Id . (citing Conway v. White Trucks, 885 F.2d 90, 96 (3d Cir. 1989)).]

Likewise, in *Western Auto Supply Co. v. Savage Arms Inc. (In re Savage Industries Inc.)*, [*FN:* 43 F.3d 714 (1st Cir. 1994).] the United States Court of Appeals for the 1st Circuit determined that parties who held unfiled claims in the debtor's bankruptcy case and who did not receive sufficient notice of the terms of the bankruptcy sale could pursue the entity which purchased the debtor's assets pursuant to section 363. [*FN:* See Savage Indus., 43 F.3d at 721. In Savage Indus. the court stated that because claimants did not receive adequate notice of the chapter 11 plan, or of the privately negotiated terms of the asset transfer agreement, claimants were not precluded from pursuing successor liability claims against arms from proceeding with claims against debtor Savage Industries. The debtor was in the business of manufacturing firearms and, through its bankruptcy case, sold substantially all of

its assets to Savage Arms. See id. at 717. Prior to the consummation of the sale, Kevin Taylor was injured by a debtor−manufactured firearm and approximately one−year after the asset purchase was complete, Mr. Taylor brought a products liability suit against the debtor. See id. Western Auto Supply Company, the retailer which had sold Mr. Taylor the firearm, was later added as a defendant and it filed a third−party complaint against Savage Arms for indemnification and/or apportionment under a successor liability theory. See id . The asset purchase agreement negotiated between the debtor and Savage Arms provided that certain products liability claims were to be assumed by Savage Arms, but it the agreement explicitly exempted liability and or obligation any product liability claims relating to firearms the debtor manufactured prior to the consummation of the transfer. See id.] The 1st Circuit emphasized the integral role that notice and court approval play in thebankruptcy process and determined that where these elements are insufficient, successor liability may attach. [*FN:* Savage Indus. , 43 F.3d at 722−23.] To support its decision, the 1st Circuit relied on *Zerand−Bernal Group*, where Judge Posner suggested that "[section] 363(f) cannot be employed to extinguish successor product−line liability claims." [*FN: Id.* at 721 (stating that §102 is founded on fundamental notions of due process, and that without appropriate notice claim could not be extinguished).]

Recent decisions such as *Zerand−Bernal Group* and *Savage Industries* disregard the import of the Bankruptcy Code provisions which permit a court to "cleanse" a debtor's assets through a bankruptcy sale. The Bankruptcy Code and the scrutiny exercised by courts reviewing proposed bankruptcy sales provide an adequate means of protecting parties from improprieties such as fraudulent transfers and collusive bidding. [*FN:* See 11 U.S.C. §363(b) (1994) (providing that sale of estate property other than in ordinary course of business requires notice to all parties in interest and hearing); see also supra note 34 (discussing requirement that sales of debtors assets be in ordinary course of business). The sale may be by private sale or by public auction. Fed. R. Bankr. P. 6004(f)(1). The debtor or trustee must articulate on the record at the hearing a business justification for the sale of all or substantially all of the debtor 's assets. See supra notes 41−45 and accompanying text (discussing different business justification standards). In addition, the court must make an affirmative finding that the purchaser is engaging in the transaction "in good faith. "*In re* Abbotts Dairies Inc., 788 F.2d 143, 149 − 50 (3d Cir. 1986). The rights of lienholders are protected in such circumstances by the provision in § 363(d) which prevents the sale of assets if a creditor has previously obtained relief from the automatic stay with respect to those assets. 11 U.S.C. §363(d); see supra note 46 (quoting §363(d) which limits sale of debtor's property to extent that it is inconsistent with other relief granted under Code). Further, holders of liens on or claims in the debtor's property may be provided adequate protection transferring the lien or claim to the proceeds of sale. See 11 U.S.C. §363(e); see also supra note 46 (discussing §363(e) and adequate protection issues). The evaluation process utilized by a bankruptcy court in approving a sale under either §363 or a plan of reorganization ensures that the proposed sale is an arms length transaction, for market value, and in the best interests of the debtor 's estate and its creditors. Such a review forecloses sales which are improvident because of collusion or fraudulent activities. Thus, the Bankruptcy Code itself provides a protective mechanism similar to that which courts seek to create through the application of the successor liability doctrine (*i.e.*, the exceptions to the traditional rule of no successor liability). In this respect, Congress has set forth the conditions that a purchaser must satisfy in order to achieve a sale free and clear of all claims (thus, a sale in accord with the traditional rule of no successor liability) and this legislative mandate should not be upset by contrary judicial decisions.] Judicial activism that strips a purchaser of the protections afforded by the Bankruptcy Code and a court−approved sale is not only prohibited by the preemption doctrine but is in violation of basic constitutional guarantees. [*FN:* The equitable principles enunciated by both the First and the 7th Circuits to support their decisions, *i.e.*, ensuring notice and an opportunity to seek relief against an entity, are valid concerns in the successor liability bankruptcy sale evaluation; however, such policy decisions are Congress 's to make. See supra notes 107−108 (discussing rationale used by First and 7th Circuits in applying 11 U.S.C. §363). The current policy choice evident in the federal bankruptcy scheme is that a third−party purchaser of a debtor 's assets pursuant to a bankruptcy sale obtains the assets free and clear of any interests or claims that may be viable against the debtor or its property. See 11 U.S.C. §363(f) (detailing when trustee may sell debtor's assets free and clear). This policy choice is premised upon the sale being for valid consideration and an arms−length transaction which ensures that the purchaser is not liable for the claims being extinguished. See id. § 363(b)(1) (requiring trustee to give notice of sale whenever sale is not in the ordinary course of business); id §363(c) (requiring that trustee has consent of interested parties or court approval to sell debtor's assets in the ordinary course of business). If a policy choice favoring the claimants in any given situation is to prevail, Congress is the appropriate body to institute the change.]

III. The Preemption of State Successor Liability

It is a well−accepted principle that "within constitutional limits Congress may pre−empt state authority." [*FN:* Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm 'n, 461 U.S. 190, 203 (1983).] In defining the parameters of federal preemption, the United States Supreme Court has articulated three instances in which federal preemption will be found: (1) express preemption; [*FN: Id.* at 203 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).] (2) implied preemption where "a `scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;'" [*FN: Id.* at 204 (citing Fidelity Fed. Sav. & Loan Ass 'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (citations omitted)).] and (3) implied preemption where state law "actually conflicts with federal law." [*FN: Id.* (citing Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142−43 (1963) and Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). In Louisiana Public Serv. Comm'n v. F.C.C. , 476 U.S. 355 (1986) the Supreme Court offered the following explanation of circumstances to which the doctrine of federal preemption applies: Preemption occurs when Congress, in enacting a federal statute, expresses

a clear intent to pre− empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* at 368−69 (citations omitted).] Disturbing the finality of a bankruptcy sale with the imposition of state successor liability law is invalid under each category of implied preemption [*FN:* The preemption argument is framed under the implied preemption categories because express preemption is not necessarily applicable to state successor liability laws as applied in the bankruptcy context. Although an argument may exist under the express preemption category −that the Bankruptcy Clause expressly preempts any state bankruptcy laws −such an argument is actually more potent under the Supremacy Clause. See cases cited supra note 4 (demonstrating laws which, when conflicting with Bankruptcy laws, are unconstitutional under Supremacy Clause of Constitution). The Bankruptcy Clause is not an express intent of Congress to preempt state bankruptcy laws; rather, the Bankruptcy Clause defines a portion of the power granted to Congress by the United States Constitution. See supra notes 1−3 and accompanying text (discussing Article I, section 8, clause 4 of Constitution and power granted to Congress by it). The Bankruptcy Clause itself stands for the proposition that once Congress chooses to act under the authority granted to it by the Bankruptcy Clause, this federal bankruptcy law is the supreme law of the land and states have no jurisdiction to enact laws governing the same. See supra notes 4−5 and accompanying text (discussing Supreme Court 's view of preemption in bankruptcy context); see also Stephen A. Gardbaum, The Nature of Preemption , 79 Cornell L. Rev. 767, 770−77 (1994) (explaining distinctions which make Supremacy Clause and preemption doctrine two separate legal theories). Accordingly, the Bankruptcy Clause, in conjunction with the Supremacy Clause, prevents states from establishing a bankruptcy scheme independent from the federal scheme and, in this respect, any state law in derogation of the Bankruptcy Code is invalid under the Supremacy Clause.] recognized bythe Supreme Court. [*FN:* See supra notes 111−13 (recognizing three categories of implied preemption).]

Any state law, whether common law or statute, that limits the scope of emancipation granted a debtor's assets upon sale by the Bankruptcy Code is preempted as conflicting with and frustrating the purposes of the federal bankruptcy scheme. [*FN:* See Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1107−08 (1996) (holding that state statute prohibiting certain banks from selling insurance was preempted by federal statute granting banks the right to sell insurance, as the two statutes presented an "irreconcilable conflict "). See also CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993) (holding Federal Railroad Safety Act pre−empted negligence claim in as far as it alleged behavior regulated by Act); Rice v. Norman Williams Co., 458 U.S. 654 (1982) (requiring an "irreconciliable conflict" not merely hypothetical or potential conflict for state statute to be pre−empted).] It is impossible for a purchaser to enjoy the protections of the Bankruptcy Code which authorizes the sale of a debtor's assets "free and clear" of the debtor's prepetition obligations and to comply with the mandates of state successor liability law. [*FN:* In Barnett Bank , the Supreme Court was faced with a dilemma analogous to the conflict between the Bankruptcy Code and state successor liability law. Barnett Bank , 116 S. Ct. at 106−07. The issue before the Court in Barnett Bank was the conflict between a federal law which permits national banks in small towns to sell insurance and various state laws which prohibit the same. See id. After discussing the components of the federal preemption doctrine, the Court noted: [t]he two statutes do not impose directly conflicting duties on national banks−−−as they would, for example, if the federal law said, "you must sell insurance, " while the state law said, "you may. " Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State 's prohibition of those activities would seem to "stan[d] as an obstacle to the accomplishment " of one of the Federal Statute 's purposes . . . . *Id.* at 1108.] Moreover, the Bankruptcy Code is a comprehensive piece of legislation that occupies the entire field of bankruptcy law. [*FN:* See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining federal statute may contain express language or purport to regulate entire field subject to regulation so that there may be reasonable inference that states are precluded form supplementing federal act); Walker v. Cadle Co. (*In re* Walker), 51 F.3d 562, 568 (5th Cir. 1995) (discussing comprehensive jurisdiction granted to Bankruptcy Courts to ensure all matters relating to bankruptcy may be dealt with efficiently and expeditiously).] Aside from the explicit exceptions recognized in the Bankruptcy Code, [*FN:* See supra note 12 and accompanying text (discussing exceptions to supremacy of Bankruptcy Code).] state law attempting to regulate the affairs of a debtor or its creditors is impermissible under "federal preemption" theory. [*FN:* See supra notes 109−18 and accompanying text (discussing federal pre−emption); infra notes 178−81 and accompanying text (indicating support for proposition that Congress intended Bankruptcy Code to be comprehensive).]

The federal preemption doctrine focuses on congressional intent to determine if a particular federal statute displaces state law regarding the same. [*FN:* See Barnett Bank , 116 S. Ct. at 1107 (noting determination of pre−emption is based on congressional intent); Hawaiian Airlines Inc. v. Norris, 114 S. Ct. 2239, 2243 (1994) (stating pre−emption is found when Congress clearly indicates its intention that statute pre−empt state action).] In those instances where a federal statute fails to expressly address the preemption issue, [*FN:* See BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1765−66 (1994) (discussing Bankruptcy Code's ability to override state law or practice where intent to give that ability is unambiguous).] "courts must consider whether the federal statute's `structure and purpose,' ornonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent." [*FN:* Barnett Bank , 116 S. Ct. at 1108 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).] Under such an analysis, it is clear that Congress, by enacting the Bankruptcy Code, sought to establish a comprehensive system to assist debtors with the management of their financial affairs [*FN:* See supra note 14 and accompanying text (discussing fresh start and reorganization as purposes of Bankruptcy Code).] and to resolve all claims against a debtor in an organized and efficient manner. [*FN:* See

supra note 15 and accompanying text (discussing efficient and equitable distribution of debtor's assets under Bankruptcy Code).] The authority to sell a debtor's assets free and clear of claims against the debtor provides a source of funding that a debtor often desperately needs to accomplish this dual policy goal underlying the Bankruptcy Code. [*FN:* See, *e.g.* ,*In re* Au Natural Restaurant Inc., 63 B.R. 575, 579−80 (Bankr. S.D.N.Y. 1986) (discussing standards of review applicable when approval of sale pursuant to § 363 is sought in order to generate funds to be distributed through a debtor 's plan of reorganization) (citations omitted);*In re* Burke Mountain Recreation Inc., 56 B.R. 72, 73−74 (Bankr. D. Vt. 1985) (finding that proposed § 363 sale was necessary in order raise working capital for business).] There can be little doubt that the phrase "free and clear" [*FN:* 11 U.S.C. §363(f) (1994). As regards the specific application of successor liability to a bankruptcy purchaser, courts should be guided by the dual policy of providing a debtor with a fresh start and ensuring an equitable distribution to creditors, as well as the statutory language. See id. §363(f); Patterson v. Shumate, 504 U.S. 753, 759 (1992) (holding courts "must enforce statute according to its terms"); 11 U.S.C. §§363(f), 1123 (establishing courts may approve sale of debtor's assets free and clear of claims and interests). See also Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (noting bankruptcy courts may only exercise equity within confines of Bankruptcy Code).] was incorporated into the Bankruptcy Code to maximize profits flowing into the estate for the benefit of its creditors, by providing a purchaser with marketable title. [*FN:* See*In re* Lady H. Coal Co., 193 B.R. 233, 247 (Bankr. S.D. W. Va. 1996) (stating that "free and clear" rule is founded on principals mandating that good faith purchasers receive clean title and that claims against property attach to proceeds of sale).] A bankruptcy purchaser cannot receive the benefit of its bargain if its title to that property is later rendered unmarketable by the imposition of successor liability. [*FN:* See supra note 98 and accompanying text. Although this frustration of purpose may not evidence a direct conflict, it does show that a purchaser cannot take full advantage of the rights granted to it by the Bankruptcy Code if state successor liability law is applicable. See Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103, 1108 (1996).]

From a practical perspective, allowing a claimant to pursue a successor liability action against the purchaser of a debtor's assets allows that particular claimant to receive more than other creditors holding similar claims against the debtor. [*FN:* See Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 918−19 (Bankr. W.D. Tex. 1995). Several courts have acknowledged that allowing a successor liability claim to proceed disturbs the priority scheme established by Congress in the Bankruptcy Code. See id. However, these courts fail to point to any provision of the Bankruptcy Code which restricts the free and clear language of 11 U.S.C. §§ 363, 1123 and 1141 and provides that the law of successor liability may trump these provisions. See, *e.g.* , Fairchild Aircraft , 184 B.R. at 918−19 (recognizing adverse affect that successor liability claim may have on bankruptcy priority scheme, but then stating that such disruption of priority scheme is for Congress and not courts to fix); see also Small Business Admin. v. Preferred Door Co. (*In re* Preferred Door Co.), 990 F.2d 547, 550−51 (10th Cir. 1993) (finding that courts may exercise equity but such exercise is limited to confines of Bankruptcy Code and equitable powers do not extend to altering priority schemes) (citations omitted)] Inessence, this favorable treatment transforms a general unsecured claim into a priority claim. [*FN:* See 11 U.S.C. §507(a) (1994) (listing priority of claims).] In fact, such claimants may actually obtain a super−priority status in those instances where the claimant receives one−hundred cents on the dollar through the successor liability action while the first tier of priority claimants in the debtor's bankruptcy case merely receive a pro rata distribution. [*FN:* See id. (establishing priority in which unsecured claimants of debtor receive distributions). Unsecured claims not qualifying for priority treatment under § 507 receive distribution after all priority unsecured claims are satisfied. See 11 U.S.C. §507; id. §726(a)(2) (providing for payment of secured and unsecured claims under chapter 7); id. §1129(b)(2)(B) (providing for payment of secured and unsecured claims under chapter 11); id. §1322(a)(2) (providing for payment of secured and unsecured claims under chapter 13). If there are insufficient funds available to satisfy an entire class of priority claimants, the claimants receive a pro rata distribution and lower priority claimants receive nothing. See 11 U.S.C. §507. It should also be noted that distributions to priority unsecured claimants and general unsecured claimants usually are not made until a debtor 's secured claimants are accounted for.] This disparity in treatment created by state successor liability law not only conflicts with and frustrates the federal priority scheme established in section 507, it changes the priority scheme to favor one type of general unsecured claimant.

In *Perez v. Campbell*, [*FN:* 402 U.S. 637 (1971). Note that the legislative history to 11 U.S.C. § 525(a) indicates that this subsection was enacted to codify the Supreme Court 's holding in Perez . See, *e.g.* , Saunders v. Reeher (*In re* Saunders), 105 B.R. 781, 787 (Bankr. E.D. Pa. 1989) (explaining interplay between Court 's ruling in Perez and Congress ' enactment of § 525(a)).] the United States Supreme Court was confronted with a preemption problem in the bankruptcy context similar to the successor liability doctrine. The state statute at issue in *Perez* was the Arizona Motor Vehicle Safety Responsibility Act. [*FN:* Ariz. Rev. State. Ann . §28−1163(B) (West 1956).] The Act contained a provision nullifying the effect of a bankruptcy discharge with respect to an automobile accident tort judgment to the extent that the payment of such judgment could be collected by suspending a debtor's driving privileges. [*FN:* See id . ("a discharge in bankruptcy following the rendering of any such judgement shall not relieve the judgement debtor from any of the requirements" of the Motor Vehicle Act).] Although the Arizona Supreme Court articulated the underlying purpose of the Act as "the protection of the public using the highways from financially irresponsible persons," the United States Supreme Court determined that the doctrine of federal preemption may not be avoided merely because "the state legislature in passing its law had some purpose in mind other than one

of frustration." [*FN:* Perez , 402 U.S. at 651−52.] Rather, the Supreme Court held that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." [*FN:* Id . at 652.]

In striking down the financial responsibility requirement of the Arizona Motor Vehicle Safety Responsibility Act, the Supreme Court found that the statuteconflicted "with a federal statute that gives discharged debtors a new start `unhampered by the pressure and discouragement of preexisting debt.'" [*FN:* Id . at 649 (citations omitted).] Likewise, a state's successor liability law that frustrates the finality of a bankruptcy sale and changes the priority scheme among prepetition creditors of the debtor is void under the preemption doctrine. [*FN:* See United States v. Reorganized CF&I; Fabricators, 116 S. Ct. 2106, 2115 (1996) ("[t]he principle is simply that categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under § 510(c). ") (citing United States v. Noland, 116 S. Ct. 1524 (1996)); see also Dennis F. Dunne, Stock Repurchase Agreements in Bankruptcy: A Tale of State Law Rights Discarded , 12 Bankr. Dev. J. 355, 380−81 (1996) (finding that primary element of bankruptcy law is state legislatures do not possess power to alter priority and distribution schemes set forth in Bankruptcy Code) (citing 4 Collier, supra note 6, ¶ 726.01 (15th ed. 1995)); Helen H. Han, Testing the Limits of Judicial Discretion in chapter 11: The Doctrine of Necessity and Third Party Releases , 1994 Ann. Surv. Am. L. 551, 557−58 (Oct. 1995) (noting that most courts which reject Doctrine of Necessity and "favor a limited view of the bankruptcy court 's equitable powers, which maintains that a bankruptcy court has no power to alter the section 507 priority scheme and 'may not authorize the pre−plan payment of selected prepetition claims, no matter what its particular view of the equities of a particular case may be. ' ") (quoting Charles J. Tabb, Emergency Preferential Orders in Bankruptcy Reorganizations , 65 Am. Bankr. L.J. 75, 92 (1991).] The fact that a successor liability action may not be brought until after the bankruptcy case is closed does not alter this analysis as the essence of a successor liability action is to collaterally attack the terms of a court−authorized sale. [*FN:* But see Chicago Truck Drivers v. Tasemkin Inc., 59 F.3d 48, 51 (7th Cir. 1995) (discarding argument that successor liability action should be enjoined to preserve orderly administration of debtor 's estate even after bankruptcy case is closed).] Endorsing such back−door tactics reverts the collection efforts of a debtor's creditors to "grab−law" principles applicable prior to a debtor invoking federal bankruptcy jurisdiction [*FN:* See discussion supra note 15 and accompanying text (discussing policy of equitable distribution).] and dilutes the effectiveness and attractiveness of the federal bankruptcy alternative. [*FN:* See discussion supra note 129 and accompanying text (recognizing inequity in allowing successor liability claims).]

Even in situations where the claimant pursuing the successor liability action was not a party to the debtor's bankruptcy case, the applicable provisions of the Bankruptcy Code relieve the sold assets of any liability for these claims. [*FN:* The authors do not mean to suggest that a purchaser should be absolved of liability that arises because of the purchaser 's conduct and/or use of the purchased assets. Rather, a bankruptcy sale is intended to free the assets of any claims for which the debtor is responsible. See supra note 18 and accompanying text. This perspective accords with notions of product liability law that holds strict liability should only attach to parties having some hand in the harm inflicted. See, *e.g.* , Reyes v. Wyeth Labs., 498 F.2d 1264, 1272 (5th Cir.), (explaining elements that a consumer, as products liability plaintiff must establish to prove strict liability on a defendant), *cert. denied* , 419 U.S. 1096 (1974); see also Alan J. Belsky, Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma? , 22 U. Balt. L. Rev. 185, 249−50 (1993) ("Under strict products liability, a seller of a defective product is liable if the plaintiff can show that the product was unreasonably dangerous and the defect was present when the product left the seller 's control. ") (emphasis added); Lynda J. Oswald, Strict Liability of Individuals Under CERCLA: A Normative Analysis , 20 B.C. Envtl. Aff. L. Rev. 579, 593 (1993) ("One of the most basic rationales for strict liability is that of fairness: where both parties are blameless, the party who created the risk of harm should bear the burden of loss . ") (emphasis added); Ellen Wertheimer, Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back , 60 U. Cin. L. Rev. 1183, 1189 n.16 (1992) (explaining that products liability is premised upon fault; a seller/manufacturer will be held responsible for products that it has produced and which are proven to be defective).] This isnot to suggest that a particular claimant's lack of notice or opportunity to participate in the debtor's bankruptcy case has no impact on the analysis, it does, but only as the analysis relates to the debtor. [*FN:* The authors recognize that precluding a claimant 's action against a debtor or any other entity that may have had a hand in the offensive conduct (*i.e.* , manufacturers, distributors, retailers, individuals, etc.) if the claimant did not receive notice of the bankruptcy case raises due process concerns. See Sequa Corp. v. Christopher (*In re* Christopher), 28 F.3d 512, 516 (5th Cir. 1994) (noting that due process generally requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)); see also Ninth Ave. Remedial Group v. Allis−Chalmers Corp., 195 B.R. 716, 734−35 (N.D. Ill. 1996) (explaining that, in bankruptcy context, "[c]onstructive notice, provided through publication . . . , is sufficient for unknown potential creditors "). Thus, in this scenario, the claimant 's rights against the responsible parties survive. However, the claimant 's alleged rights against the bankruptcy purchaser exist only because of the bankruptcy case. Such a connection is tenuous at best. Allowing a claimant to challenge the rights of the purchaser created by the Bankruptcy Code and the bankruptcy court 's order presents serious constitutional problems, including due process concerns on the part of the bankruptcy purchaser. See Paris Mfg. Corp. v. Ace Hardware Corp. (*In re* Paris Indus. Corp.), 132 B.R. 504, 509 (D. Me. 1991) (explaining that due process rights of products liability plaintiffs were not impaired and that plaintiffs were not prejudiced by lack of notice because, in absence of bankruptcy sale, plaintiffs would hold no claims against purchaser); Conway v. White Trucks, 885 F.2d 90, 96 (3d Cir. 1989) (noting that lack of notice "primarily provides a justification for permitting [a creditor] to file late proof of claim with the bankruptcy court or to avoid the discharge . . . rather than a justification for imposing successor liability on [the bankruptcy purchaser] "); see also

discussion infra note 160 and accompanying text.] It is well−established that a claim is not discharged in a bankruptcy case if the claimant did not receive notice of the case or, perhaps, did not yet hold a claim against the debtor. [*FN:* See 11 U.S.C. §502(b)(9) (1994); Pettibone Corp. v. Payne (*In re* Pettibone Corp.), 151 B.R. 166, 170 (Bankr. N.D. Ill. 1993) (citing*In re* Longardner & Assocs., 855 F.2d 455, 465 (7th Cir. 1988) (holding confirmation order will not discharge debtor and enjoin claim unless sufficient notice of bankruptcy is given to claimant and bar date is set)).] However, such a claim does not survive as against a purchaser of the debtor's assets.

The United States Bankruptcy Court for the Eastern District of Virginia recently relied upon the "free and clear" language set forth in section 363(f) to reach a similar conclusion with respect to the preemption doctrine. [*FN:* See WBQ Partnerships v. Commonwealth of Va. Dep't of Med. Assistance Servs. (In re WBQ Partnership), 189 B.R. 97, 99 (Bankr. E.D. Va. 1995).] In *WBQ Partnership v. Commonwealth of Virginia Department of Medical Assistance Services (In re WBQ Partnership),* [*FN:* 189 B.R. 97 (Bankr. E.D. Va. 1995).] the debtor sought to preclude the Department of Medical Assistance Services ("DMAS") from asserting a right to collect depreciation overpayments from the purchaser of the debtor's assets pursuant to section 32.1−329 of the Virginia Code. [*FN:* See id. at 101.] The bankruptcy court sustained the debtor's motion, finding the Virginia statute preempted by the federal bankruptcy law. [*FN:* See id. at 110.] The bankruptcycourt specifically held that the Virginia statute, which authorized DMAS to recapture depreciation using "any means available by law," frustrated the federal bankruptcy scheme, [*FN:* See id. at 108.] in particular, section 363(f), which permits assets of the estate to be sold "free and clear of any interest in such property." [*FN:* 11 U.S.C. §363(f); WBQ Partnership , 189 B.R. at 108−09. But see Michigan Employment Sec. Comm 'n v. Wolverine Radio Co. Inc. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1146 (6th Cir. 1991) (upholding assignment of successor liability because such transfer does not conflict with plan of reorganization or Bankruptcy Code), cert. dismissed , 503 U.S. 978 (1992).]

In addition to analyzing the statutory language, the bankruptcy court in *WBQ Partnership* supported its decision with the "broader `purposes and objectives'" underlying the Bankruptcy Code. [*FN:* WBQ Partnership , 189 B.R. at 108−09.] The court noted:

[I]t stands to reason that the purpose behind the "free−and−clear" language is to maximize the value of the asset, and thus enhance the payout made to creditors. Without the "free−and−clear" language, prospective buyers would be unwilling to pay a fair price for the property subject to sale; instead, the price would have to be discounted, perhaps quite substantially, to account for the liabilities that the buyer would face simply as a result of acquiring the asset. A discounted price would reduce the return to the estate to the detriment of the creditors involved in the case. The "free−and−clear" language avoids this kind of prejudice by providing the buyer with what is essentially a fully marketable title. [*FN: Id.* at 108 (citations omitted).]

Based upon the objectives promoted by the "free and clear" language of section 363(f), the bankruptcy court concluded that the statute conflicted with the Bankruptcy Code because it prevented realization of Congressional purposes and objectives and, therefore, the statute was preempted. [*FN:* See id. at 110−12; The WBQ Partnership opinion is an excellent exploration of the distinctions inherent in the application of a state successor liability statute in and out of the bankruptcy context. The Bankruptcy Court explained that a statute such as § 32.1−329 of the Virginia Code "is sensible outside bankruptcy because it allows DMAS to provide depreciation reimbursements based on the nominal, historical price paid for the asset. Inside bankruptcy, however, DMAS must contend with the interests of other creditors who would be prejudiced by the effect of the Virginia statute. " WBQ Partnership , 189 B.R. at 108 (citations omitted).]

At least two courts have rejected as "illusory" the purpose−and−objective theory accepted by the court in *WBQ Partnerships.* [*FN:* See Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin Inc., 59 F.3d 48, 50 (7th Cir. 1995) (criticizing these policy arguments as granting bankruptcy purchasers undue protection that they could not obtain outside of bankruptcy); Western Auto Supply Co. v. Savage Arms Inc. (*In re* Savage Indus. Inc.), 43 F.3d 714, 720 (1st Cir. 1994) (finding such policy concerns to be "unwarranted " and "more illusory than real ").] These courts grant little, if any, merit to concerns voiced by the parties regarding the big bankruptcy picture−i.e., thedetrimental effect of the successor liability doctrine on the utility of bankruptcy sales and the equitable distribution among creditors. [*FN:* Chicago Truck Drivers , 59 F.3d at 50; Savage Indus. , 43 F.3d at 722.] In light of the "free and clear" language and the priority scheme set forth in the Bankruptcy Code, these concerns are warranted and deserve due consideration by courts interpreting Bankruptcy Code provisions. Although an equitable evaluation of the respective positions of a plaintiff and a purchaser may weigh in favor of a successor liability action [*FN:* See supra note 93 and accompanying text (discussing equitable principles).] and may be admirable from a public policy perspective, such policy decisions must be implemented by the legislative branch. Until Congress

chooses to act, state successor liability law, which frustrates the terms of a court−approved bankruptcy sale, is preempted by the Bankruptcy Code and the Supremacy Clause of the Constitution.

IV. Impermissible Judicial Activism Under

the Separation of Powers Doctrine

The Constitution separates the power of government among the executive branch, the legislative branch, and the judicial branch. [*FN:* U.S. Const . art. I, §1 ("All legislative Powers herein granted shall be vested in a Congress . . ."); U.S. Const . art. II, §1 ("The executive Power shall be vested in a President . . ."); U.S. Const . art. III, §1 ("The judicial Power of the United States, shall be vested on one supreme Court. . . ").] The parameters of each branch's authority are set forth in Articles I, II, and III, respectively, of the Constitution. [*FN:* See U.S. Const. art. I, § 1 (legislative power); U.S. Const . art. II, § 1 (executive power); U.S. Const . art. III, § 1 (judicial power). The Constitution does not define the role of each branch of government; rather, "the Constitution 's central mechanism of separations of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. " Lujan v. Defenders of Wildlife, 504 U.S. 555, 559−60 (1992).] This authority encompasses an internal system of checks and balances to ensure that one branch does not encroach on the territory of another. [*FN:* See Harold J. Krent, Separating the Strands in Separation of Powers Controversies , 74 Va. L. Rev. 1253, 1261 (1988) (stating "The goal of the constitutional scheme was therefore to 'contriv[e] the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. ' ") (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).] From this tri−partite system of government the separation of powers doctrine has emerged. [*FN:* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590−91 (1949) (discussing separation of powers doctrine as being fundamental to system, coming from "behind the words of the constitutional provisions" and not from Article III) (citing Principality of Monaco v. Miss., 292 U.S. 313, 323 (1934)).] This doctrine seeks to enforce acts of each branch that are properly executed and to invalidate those that exceed the branch's constitutional grant of authority. [*FN:* This general description of the separation of powers doctrine is derived from the two main approaches to interpreting the separations of power doctrine set forth in the Constitution. The first approach is termed a formalistic approach and it stresses keeping the functions of each branch as distinct as possible. See Krent, supra note 159, at 1254. The second approach is a functional approach that focuses on "whether the exercise of the contested function by one branch impermissibly intrudes into the core function or domain of the other branch. " Id . at 1255 n.8.]

The main "check" on the judicial branch is the restriction embedded in Article III which confines the judiciary's authority to deciding "cases" and "controversies." [*FN:* U.S. Const. art. III, § 2.] In this manner, the judicial branch may only review acts of the other two branches when a question regarding the interpretation of the same arises in a case or controversy before it. [*FN:* See Morrison v. Olson, 487 U.S. 654, 677 (1988) (recognizing judicial power as being limited to cases and controversies); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 72 (1961) (describing "ripeness" as role of judiciary which precludes interference by courts with legislative and executive functions which have not yet proceeded so far to affect individuals interests adversely); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 90 (1947) (finding adherence to separation of powers doctrine ensures that courts decide ripe issues between litigants).] The execution of this task, however, does not empower the judicial branch to change the acts of the legislative or executive branch. [*FN:* See, *e.g.* , United States Nat 'l Bank v. Independent Ins. Agents, 508 U.S. 439, 446 (1993) (" 'The exercise of judicial power under Art[icle] III of the Constitution depends on the existence of a case or controversy, ' and 'a federal court [lacks] the power to render advisory opinions. ' ") (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)); Flast v. Cohen, 392 U.S. 83, 96 (1968) ("When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. ").] Rather, the judicial branch is limited to invalidating improvidently enacted legislation or executive orders on constitutional or other appropriate grounds. [*FN:* See Flast , 392 U.S. at 97 (limiting judicial power to role consistent with doctrine of powers); Mushrat v. United States, 219 U.S. 346, 358 (1911) (noting that declaration that Act of Congress is unconstitutional requires case to be proper for judicial determination) (citing Marbury v Madison, 1 Cranch 137 (1803)).] The business of instituting public policy is reserved to the legislative branch which is elected by the populace. [*FN:* See City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (stating "Federal courts, unlike state courts, are not general common−law courts and do not possess a general power to develop and apply their own rules of decision. ") (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)). See Donald L. Doernberg, Juridicial Chameleons in the "New Erie " Canal , 1990 Utah L. Rev. 759 (relying on Erie to support separation of powers doctrine).] For this reason, the judicial branch should be cautious when legislating public policy through its judicial opinions. [*FN:* Milwaukee , 451 U.S. at 312.]

Questions regarding the propriety of judicial opinions under the separation of powers doctrine arise most often in "implied right of action" cases that seek to embellish federal legislation with a federal common law. [*FN:* See Doernberg, supra note 166, at 765 (noting doctrine of separation of powers is generally discussed in only judicial implication of private causes of action

under federal law or constitutional challenges).] Although the Supreme Court has endorsed the creation of federal common law where a conflict or gap exists in an act of Congress, [*FN:* See Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (explaining federal common law preempts state law in areas involving "uniquely federal interests") (quoting Texas Indus. Inc. v. Radcliff Materials Inc., 451 U.S. 630, 640 (1981)).] some of the Court's recent opinions emphasize thatsuch judicial activism is the exception rather than the rule. [*FN:* See Milwaukee , 451 U.S. at 317 (holding Congress, not courts, has duty to set applicable standards of federal law); United States v. Oswego Barge Corp. (*In re* Oswego Barge Corp.), 664 F.2d 327, 335 (2nd Cir. 1981) ("separation of powers concerns create a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislation on the subject") (emphasis in original).] The charge to reevaluate judicial activism in this manner has been led by Justice Powell's dissenting opinion in *Cannon v. University of Chicago.* [*FN:* 441 U.S. 677, 730 (1979) (Powell, J. dissenting).] As Justice Powell explained:

While "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . ," it is equally−and emphatically−the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. . . .

. . . .

"Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." [*FN: Id.* at 744−45 (Powell, J., dissenting) (quoting Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194−95 (1978)).]

Since *Cannon*, several Justices have adopted Justice Powell's view of the separation of powers doctrine [*FN:* Carlson v. Green, 446 U.S. 14, 31 (1980) (Rehnquist, J., dissenting) (developing Justice Powell's dissent in Cannon without directly quoting to Justice Powell); See City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (adopting and developing Justice Rehnquist's dissenting opinion in Carlson); Dorenberg, supra note 166, at 768 (supporting separation of powers).] which gained majority support in *City of Milwaukee v. Illinois.* [*FN:* 451 U.S. 304 (1981).] In *Milwaukee*, the state of Illinois sought to bring an action under the federal common law against Milwaukee, Wisconsin for abatement of a nuisance caused by interstate water pollution. [*FN:* Milwaukee , 451 U.S. at 308−10.] The United States Supreme Court held that no federal common law remedy was available, as Congress had evidenced its intent to occupy this field of law by enacting the Federal Water Pollution Control Act Amendments of 1972. [*FN:* See id. at 317 (explaining Congress, not courts formulates appropriate federal standards through establishment of comprehensive regulatory program supervised by administrative agencies with expertise in specialized areas).] As the Court explained: "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from

democratic pressures, but by the people through their elected representatives in Congress." [*FN:* See id . at 312−13.]

A similar analysis is appropriate in the bankruptcy context, as Congress has enacted a comprehensive scheme of legislation to govern the rights of debtors and creditors. [*FN:* The Bankruptcy Reform Act of 1978 was enacted "to establish a uniform law on the subject of bankruptcies, " "to modernize the bankruptcy law by codifying a new title 11 that [would] embody the substantive law of bankruptcy and to make extensive amendments to title 28, Judiciary and Judicial Procedure, that will encompass the structure of the revised bankruptcy courts. " S. Rep. No. 95−989, at 1 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5787; see H.R. Rep. No. 95−595, at 3 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5965.] The Bankruptcy Code not only occupies the field of law in this area, [*FN*: See Walker v. Cadle Co. (*In re* Walker), 51 F.3d 562, 567 (5th Cir. 1995) (explaining comprehensive nature of Bankruptcy Code); Koffman v. Osteoimplant Tech. Inc., 182 B.R. 115, 126 (D. Md. 1995) (providing for uniform remedies); Wiebildt Stores Inc. v. Schottenstein, 111 B.R. 162, 168 (N.D. Ill. 1990) (explaining that Congress created "comprehensive legislative program" when enacting Bankruptcy Code).] but it specifically addresses the rights of each party involved in a bankruptcy sale. [*FN:* See 11 U.S.C. §§ 363, 507, 1123, 1141 (1994) (use, sale, or lease of property; priorities; contents of plan; effect of confirmation).] Although these parties may possess different rights outside of the bankruptcy context, Congress has chosen to alter various rights of a debtor and its creditors when these parties are operating under the Bankruptcy Code. [*FN:* See infra notes 182−83 and accompanying text (involving statutory rights of creditors).]

As such, a debtor is authorized to sell its assets free and clear of all claims and interests therein and its creditors are confined to recovering their claims from the proceeds of such sale. [*FN:* See 11 U.S.C. §363(f) (providing for sale of property free and clear of liens and claims).] Any decision that allows a creditor to pursue a bankruptcy

purchaser under the federal common law, via a successor liability action, is inappropriate under the *Milwaukee* analysis of the separation of powers doctrine. [*FN:* City of Milwaukee , 451 U.S. at 304, 315 (1981) ("Our `commitment to the separation of powers is too fundamental ' to continue to rely on federal common law 'by judicially decreeing what accords with common sense and the public weal ' when Congress has addressed the problem.) (quoting Tennessee Valley Auth. v. Mill, 437 U.S. 153, 195 (1978)).]

V. Successor Liability as an Unconstitutional Taking

Part II reviews in depth the process that Congress has provided in Title 11 of the United States Code for the sale of property of a debtor's estate, either pursuant to a plan of reorganization or in a manner other than in the ordinary course of business. The applicable provisions of the Bankruptcy Code authorize bankruptcy courts to approve such sales free and clear of liens or claims, transferring liens or claims to the proceeds of sale. [*FN:* See 11 U.S.C. §363(f).] In theoretical terms, it is presumed that the property to be sold is a pool of value to which claimants can look to satisfy their claims. [*FN:* See*In re* Allegheny Int'l Inc., 118 B.R. 282, 300 (Bankr. W.D. Pa. 1990) (stating purpose of creditor confirmation in reorganization is increasing "pool of value" for all creditors).] However, the amount available to satisfy those claims can never be morethan the sum total of the proceeds from the sale of the debtor's property. [*FN:* See Forde v. Kee−Lox Mfg. Co., 437 F. Supp. 631, 633 (W.D.N.Y. 1977) (finding that "once the property is sold . . . the creditor is allowed to look only to the sale proceeds, and not to the purchaser, for satisfaction of its claim."), aff'd , 584 F.2d 4 (2d Cir. 1978).] Thus, where the debtor's property is sold in a bankruptcy setting, the property in the hands of the debtor from which claimants can satisfy their claims is no longer a thing or things but the value the purchaser pays to the debtor or trustee in the sale. [*FN:* See id.] A concomitant of such a sale is that the purchase price is fair [*FN:* See*In re* Theroux, 169 B.R. 498, 499 (Bankr. D.R.I. 1994) (stating inadequate price was reason for denying approval of sale).] and the purchase is

accomplished in good faith. [*FN:* See 11 U.S.C. §363(m) (1994);*In re* Abbotts Dairies Inc., 788 F.2d 143, 147 (3d. Cir. 1986) (noting that "[u]nfortunately, neither the Bankruptcy Code nor the Bankruptcy Rules attempt to define `good faith'. Courts applying §363(m) . . . have, therefore, turned to traditional equitable principles, holding that the phrase encompasses one who purchases in `good faith' and for `value'.") (citing Tompkins v. Frey (*In re* Bel Air Assoc. Ltd.), 706 F.2d 301, 305 (10th Cir. 1983);*In re* Rock Indus. Mach. Corp., 572 F.2d 1195, 1197 (7th Cir. 1978)).] When a sale meeting the applicable criteria occurs, the sale will not be overturned based upon abuse of discretion. [*FN:* See Official Comm. of Unsecured Creditors v. LTV Corp. (*In re* Chateaugay Corp.), 973 F.2d 141, 144− 45 (2d Cir. 1992).]

From the core objective of the Takings Clause, [*FN:* See U.S. Const. amend. V (providing "[n]or shall private property be taken for public use without just compensation"); Alan E. Brownstein, Constitutional Wish Granting and the Property Rights Genie , 13 Const. Comment. 7 (1996) (developing Takings Clause jurisprudence and comparing Supreme Court's treatment of property rights with that of other rights protected by Constitution); William M. Treanor, The Original Understanding the Takings Clause and the Political Process , 95 Colum. L. Rev. 782 (1995) (focusing on historical development of Takings Clause).] the protection of property against direct government "property grabs," [*FN:* See Treanor, supra note 191, at 834−35 (discussing that there was little debate over meaning of Takings Clause as there are no records of discussion, either in Congress or at state level and noting that Madison, author of Clause, understood it to mean compensation was mandated when government physically took property); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982) (noting most Supreme Court's decisions emphasize physical invasion cases as being special and do not repudiate the rule that any permanent physical occupation is taking, or that such would even be exempt from the Takings Clause).] additional concepts have emerged. For example, "one of the principal purposes of the takings clause is `to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" [*FN:* Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960).] Another concept is that government may not use its taking authority to resolve the claim of one private citizen against another. [*FN:* See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (requiring public purpose) (citing Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937); Cincinnati v. Vester, 281 U.S. 439, 447 (1930); Madisonville Creation Co. v. St. Bernard Mining Co., 196 U.S. 239, 251−52 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159 (1896)).]

Underlying Congress' exercise of the authority granted by the Bankruptcy Clause [*FN:* See U.S. Const. art. I, §8, cl. 4 (granting congressional power "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States.").] is the principle that, in a liquidation or reorganization, the asset value of the liquidated or reorganized person or entity is spread equally among creditors of the various classes. [*FN:* See 11 U.S.C. §507 (1994) (setting forth priorities of various classes of claimants); see, *e.g.* , Rubinstein v. Alaska Pac. Consortium (*In re* New England Fish Co.), 19 B.R. 323, 327 (Bankr. W.D. Wash. 1982) (finding theme of Bankruptcy Act is equal distribution among creditors) (quoting Nathanson v. Nat'l Labor Relations Bd., 344 U.S. 25, 29 (1952)).] Where there has been a sale of all or substantially all of the assets of a debtor, the pool of value available for claimants has been changed from tangible property (and perhaps patent, copyright, contractual, or other intangible

property rights) to money or money's worth. [*FN:* See supra notes 45−50, 52−60, 184−86 and accompanying text (discussing purpose, scope, and remedy of §363); infra notes 200−02 and accompanying text (noting that it is well − recognized principle that parties having claim to or interest in the property sold pursuant to § 363(f) or 1123(a)(5) may satisfy their respective claims or interests from proceeds of sale).] The purchaser, having paid full value, has a reasonable expectation that the things for which it has exchanged money or money's worth may be used in business without the attainder of the imposition of liability for the debtor's pre−sale actions. [*FN:* See supra notes 21, 126−27, (discussing that expectation is justified even as to claims that are obligations of the debtor but, for one reason or another, have not been asserted in the debtor 's bankruptcy case). The lack of notice that underpins Western Auto Supply Co. v. Savage Arms Inc. (In re Savage Indus. Inc.), 43 F.3d 714, 720 (1st Cir. 1994) ignores a fundamental question −what is the remedy of a claimant who does not have notice of the pending bankruptcy action or whose claim does not arise until after the time fixed for filing claims. See supra notes 103 − 06 and accompanying text (regarding Savage Arms). Provision is made for allowing or disallowing late−arising claims "as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition. " 11 U.S.C. § 501(d); see also id. § 502(e)(2), (f) − (i); Fed. R. Bankr. P. 3004 (providing for filing of claim outside §341 deadline). Congress could surely provide similarly for late − arising tort claims. Where there is a lack of notice and a failure to timely file a claim, a debtor or a trustee may nonetheless file a claim which will be given effect. See 11 U.S.C. § 501(b), (c). Moreover, a claimant will ordinarily be given an opportunity to file a proof of claim upon the amendment of a debtor 's bankruptcy schedules. See Fed. R. Bankr. P. 1009(a), 3002(c)(1). The remedy for a lack of notice of a proposed sale is initially, an opportunity to be heard. If the sale was fair and reasonable and for value, meeting the standards for a bankruptcy sale, see supra note 107 the claimant having late notice would not have been able to avoid the sale ab initio . Absent a showing that the sale originally failed to meet appropriate standards, the allowance of a successor liability action (as in Savage Industries) to remedy the lack of notice is a clear example of an inappropriate taking. See infra notes 212−18 and accompanying text. It further fits the classic example of no harm−no foul. See supra note 125 and accompanying text (regarding creditor protections under §363). Where the claimant without notice can show evidence that would have prevented the original sale, the best possible remedy would be to reopen the bankruptcy case. See 11 U.S.C. § 350(b) (providing for reopening of debtor 's bankruptcy case "to administer assets, to accord relief to the debtor, or for other cause "). If other creditors of the same class received no dividend in the debtor 's bankruptcy case, the inquiry is at an end. However, if a dividend was distributed, the liability of the purchaser should be capped at the amount of the pro − rata dividend that the creditor without notice would have received. The ultimate inequity of successor liability is shown in the situation where the purchaser is potentially liable for more than the value of the assets purchased from the debtor 's estate, such as where the purchaser obtains a debtor 's product line to complement its existing assets. To impose a burden on these non − purchased assets is a most egregious example of a taking to satisfy a non−government claim. See discussion supra notes 191−94 and accompanying text (regarding taking clause relationship to Bankruptcy).] Indeed, it is quite likely that if thepurchaser had known of the attachment of post−purchase obligations for pre−purchase arising claims, a further adjustment in the pool of value paid for the things purchased would have been made. [*FN:* See supra note 128 and accompanying text.]

The imposition of successor liability on the property for claims that have their genesis in pre−sale activity of the debtor creates an inappropriate servitude on the property. [*FN:* See David G. Carlson, Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created By Running Covenants, Products Liability, and Toxic Waste Cleanup , 50 Law & Contemp. Probs. 119, 123−31, 145−49 (1987) (discussing in detail servitude imposed upon property by application of successor liability in bankruptcy context); see also , Tucker, supra note 11, at 34 n.177 (noting that "Black 's Law Dictionary defines 'servitude ' as a burden resting upon one estate for the benefit of another " and thus, classifying successor liability in bankruptcy context as servitude) (citing Black 's Law Dictionary 1370 (6th ed. 1991)).] It is a well−recognized and fundamental rule that a person with judgment or other lien rights in property may resort to that property for satisfaction of the claim. [*FN:* See Armstrong v. United States, 364 U.S. 40, 44 (1960) (discussing right to resort to specific property for satisfaction of claim).] The Supreme Court has unequivocally held that "such a right is compensable by virtue of the Fifth Amendment." [*FN:* See id. (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)).] Likewise, a bona fide purchaser (a "BFP") for value who purchases property from a bankruptcy estate without knowledge of unasserted or future claims possesses guaranteed Fifth Amendment rights. [*FN:* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation."); see supra note 166 and accompanying text.]

The post−purchase attachment of successor liability is in essence the government or its agency, through the courts of the United States, requiring the purchaser for value, to bear burdens which should be borne by the bankruptcy estate. Where the claim was not known to exist at the time the bankruptcy estate was liquidated and distribution made, the burden of those subsequently discovered claims ought to in fairness and justice, be borne by the public as a whole in such fashion as may be determined by the legislative body. [*FN:* For an excellent discussion of the improper transfer of wealth facilitated by the imposition of a successor liability servitude, see Carlson, supra note 200, at 120 ("If the owner of the servient property is bankrupt, these servitudes create unusual economic consequences for general creditors. Without foreclosure, servitudes can result in transfers of wealth from present to future creditors. ").] The authors posit that the imposition of that burden on a BFP for value by a court of the United States constitutes a taking barred by the Fifth Amendment.

The Supreme Court's decisions under the Takings Clause of the Fifth Amendment evidences two distinct lines of reasoning. The first, and the more traditional, application of the takings doctrine pertains to the physical taking ofproperty for government use. [*FN:* One of the Supreme Court 's earliest decisions holding that the physical occupation of property constitutes a permanent taking is Pumpley v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1872) (stating that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution "). For a review of Supreme Court precedent regarding the physical invasion of private property as an unconstitutional taking, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428−30 (1982) (holding that even slight, temporary physical invasion of private property may constitute taking).] Pursuant to this line of decisions, the government's ability to condemn private property for public purposes is limited to those instances where just compensation is paid. [*FN:* See Kirby Forest Indus. Inc. v. United States, 467 U.S. 1, 3−4 (1984) (positing private property may not be taken for public use without just compensation); see also United States v. 564.54 Acres of Land, 441 U.S. 506, 507−08 (1979) (determining proper measure of compensation when government condemns property owned by private nonprofit organization and operated for public purpose).] The second line of decisions revolves around the "regulatory takings" doctrine. [*FN:* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. "). For an excellent discussion of the regulatory takings doctrine, see Mark J. Thurber, Note, Successor Liability of Financial Institutions Under CERCLA−−−A Takings and Policy Analysis , 1988 Colum. Bus. L. Rev. 243, 259−69 (positing that imposition of successor liability on lending institutions under CERCLA constitutes an unconstitutional taking pursuant to regulatory takings doctrine).] This doctrine finds an unconstitutional taking where the challenged government action may not constitute a physical taking of property, but has the effect of denying a property owner the economically viable use of its property. [*FN:* One of the earliest examples of the Supreme Court 's application of the regulatory takings doctrine is Village of Euclid v. Ambler Realty Co. , 272 U.S. 365 (1926). In Euclid , it was argued that the imposition of zoning regulations on real property constituted a taking. See id. at 371 (argument for appellee). That view was rejected by the court even in the face of a contention that some 75% of the pre − zoning regulation value of the property had been lost by restricting the use of the property under the zoning regulations. See id . at 384−85; see also Nectow v. City of Cambridge, 277 U.S. 183, 185 (1928) (applying reasoning announced by Court in Euclid to find that challenged zoning regulation was unconstitutional taking).] In recent decisions, the Supreme Court has indicated that a regulatory taking may exist even if the government action does not deprive the property of all or substantially all of its economic value. [*FN:* See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) (noting that argument that requires deprivation of all economic viability "errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation "; rather court emphasized that " '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment−backed expectations ' are keenly relevant to takings analysis generally ") (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)); see also Kaiser Aetna v. United States, 444 U.S. 164, 178−80 (1979) (holding that United States government's attempt to create public right of access to pond amounted to taking).]

As the regulatory takings doctrine has developed, the Supreme Court has emphasized that the regulatory takings analysis is performed on an ad hoc basis, relying upon the factual circumstances of each particular case. [*FN:* See, *e.g.* , Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986) ("In all of [the Supreme Court 's Takings Clause] cases we have eschewed the development of any set formula for identifying a "taking " forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. ").] However, to assistwith this factual evaluation, the Supreme Court has identified three criteria to be balanced in a court's analysis. This balancing test evaluates: (1) the character of the government action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with reasonable investment−backed expectations. [*FN:* See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Thurber, supra note 207, at 259−69 (discussing components of regulatory takings doctrine, including considerations regarding expenditures required of private party because of government regulation).]

Applying this test to the potential successor liability of a bankruptcy purchaser results in an unconstitutional taking. In looking at the first factor, regardless of whether the successor liability doctrine stems from a state's statute or the common law, a court's implementation of successor liability as against a bankruptcy purchaser is directly at odds with a congressional mandate authorizing a debtor to sell its assets free and clear of pre−sale obligations. [*FN:* See 11 U.S.C. §§ 363, 1123, 1141 (1994). In reviewing the nature of the challenged government action, the Supreme Court has assessed the enunciated public purpose behind the action and whether the means implemented by the government has been calculated to achieve a legitimate end. See Nollan v. California Coastal Comm 'n, 483 U.S. 825, 837 (1987) (holding that government agency's imposition of public easement did not serve legitimate state interest). The fact that Congress has addressed the liability which attaches to bankruptcy sales in the Bankruptcy Code and has not chosen to implement a policy of successor liability should be respected by the courts. Thus, contrary public policy decisions made by the courts should be viewed as an inappropriate means to reach an ill−stated end.] Thus, the nature of the government action tips in favor of finding an unconstitutional taking. As for the second factor, it is quite conceivable that a successor liability action could have a substantial and an adverse economic impact on the bankruptcy purchaser. [*FN:* An underpinning to regulatory taking analysis is that the property is deprived of its economically viable use. Thus, a property owner must establish financial loss

to assert a successful regulatory taking argument. See Agins v. Tiburon, 447 U.S. 255, 260 (1980). In fact, the Supreme Court has recognized that where property is deprived of all of its economic value, a categorical taking has occurred and no other factors need be considered by a reviewing court. See Lucas , 505 U.S. at 1019 (stating that owner who has lost economically beneficial uses of property has suffered taking).] Indeed, the theory behind facilitating sales "free and clear" of a debtor's obligations through the bankruptcy process is that it is better to have a debtor's property continue in commerce than to have it dismembered to scrap value. [*FN:* chapter 11 of Title 11 of the United States Code is premised upon the belief that an on−going business is preferential to a liquidation of a business for scrap value. See, *e.g.* , Luper v. Columbia Gas of Ohio Inc. (*In re* Carled Inc.), 91 F.3d 811, 815 (6th Cir. 1996) (explaining benefit of 11 U.S.C. § 547 and noting that "Congress intended to discourage creditors 'from racing to the courthouse to dismember the debtor during his slide into bankruptcy ' and to further 'the prime bankruptcy policy of equality of distribution among creditors ' ") (quoting H.R. Rep. No. 95−595, at 177−78 (1977)); Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (*In re* Chugach Forest Prods. Inc.), 23 F.3d 241, 245 (9th Cir. 1994) ("Congress intended §362(a)(3) 'to prevent dismemberment of the estate ' and to enable an 'orderly ' distribution of the debtor 's assets. ") (quoting H.R. Rep. No. 95−595, at 341 (1977)). This premise relates back to the enactment of Chapters X and XII of the Bankruptcy Act of 1898. See, *e.g.* , Charlestown Savs. Bank v. Martin (*In re* Colonial Realty Inv. Co.), 516 F.2d 154, 158 (1st Cir. 1975) ("The purpose of Chapters X and XII is to restore, not to dismantle, the economically distressed debtor. ").] Burdening a debtor's assetswith successor liability essentially creates a covenant that runs with the property and permanently impairs the value and economic viability of the property.

The third and final factor considered in the regulatory takings analysis is most apparent in the successor liability−bankruptcy sale scenario. Under the Bankruptcy Code, a purchaser pays valuable consideration to obtain property free and clear of a debtor's pre−sale obligations. [*FN:* See 11 U.S.C. §§ 363, 1123, 1141.] This legislative act of Congress creates a reasonable expectation in the bankruptcy purchaser that it will not be held accountable for wrongs which it did not commit. [*FN:* See generally 11 U.S.C. §§101−1330 (Bankruptcy Code).] Imposing successor liability upon this purchaser for liabilities of the debtor destroys the purchaser's reasonable investment backed expectations. [*FN:* The Supreme Court has noted that "[a] 'reasonable investment−backed expectation' must be more than `unilateral expectation or an abstract need,'" Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005−06 (1984) (quoting Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980)), and considering the expectations created by §§363, 1123, 1141, this threshold requirement is satisfied. The majority of the Supreme Court cases which have addressed the investment−backed expectations of a property owner are inapposite to successor liability in the bankruptcy context as these cases involve legislative acts of Congress which serve as a warning that the property may be subject to regulation. See *e.g.* , Concrete Pipe and Prods. of Cal. Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 646 (1993) (finding no reasonable expectation because of comprehensive regulatory scheme enacted by Congress regarding pension rights); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 235 (1986) (same). However, in Ruckelshaus , the Supreme Court held that a trade secret was a property right entitled to the confidential treatment guaranteed by FIFRA. Ruckelshaus , 467 U.S. at 1013 (noting that this property right was only protected during time period in which this portion of statute was effective, *i.e.*, prior to applicable revisions). The Court stated: If EPA, consistent with the authority granted it by the 1978 FIFRA amendments, were now to disclose trade−secret data or consider those data in evaluating the application of a subsequent applicant in a manner not authorized by the version of reasonable investment−backed expectation with respect to its control over the use and dissemination of the data submitted. *Id.* , at 1011; see also Thurber, supra note 207, at 262−65 (discussing reasonable investment−backed requirement in detail).] This review under the regulatory−takings balancing test demonstrates the constitutional infirmities inherent in holding a bankruptcy purchaser liable as a successor of the debtor. As such, it is reasonable to conclude that a BFP for value in a bankruptcy sale whose property is subsequently burdened with successor liability to satisfy a pre−sale claim (for less than the total value paid at the bankruptcy sale) may be the victim of a regulatory taking. [*FN:* For a brief explanation of how the bankruptcy process protects the parties involved in a bankruptcy sale and of why this protection precludes the imposition of successor liability, see supra notes 95−96 and accompanying text (noting some courts have found successor liability claims precluded in bankruptcy context whereas other courts have allowed successor liability claims in bankruptcy proceedings).]

It may be argued that the Bankruptcy Code's failure to provide a remedy for unknown future claimants, either in the liquidation or reorganization of debtors, somehow impairs a contractual obligation entered into when an individual purchases a product and gains rights to future compensation for any harm arising from the use of the product purchased. However, if such a remedy is to be provided, it is solelywithin the province of the legislative body. Indeed, the Supreme Court has recognized that in the exercise of its authority under the Bankruptcy Clause, Congress may properly authorize the impairment of contractual obligations. [*FN:* Hanover Nat 'l Bank v. Moyses, 186 U.S. 181, 188 (1902).] In the current Bankruptcy Code, Congress has made provision for impairing contractual rights in (1) providing for the rejection of executory contracts or unexpired leases, [*FN:* See 11 U.S.C. §365.]

(2) in the provision for recovering preferential payments, [*FN:* See id. §547.] (3) in the avoidance of liens [*FN:* See id. §545.] or (4) the turnover of property by a custodian. [*FN:* See id. §543.]

One final point on the Fifth Amendment infirmities inherent in the application of successor liability to a bankruptcy sale is that such a taking cannot be remedied with just compensation. The imposition of successor liability by a court of the United States on property purchased by a BFP for value in a bankruptcy setting is essentially the taking of the purchaser's property for the benefit of private claimants where Congress has not enunciated a public purpose. The Supreme Court has stated: "`[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" [*FN:* Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 80 (1937).] It is beyond doubt that Congress in announcing public policy could impose a form of successor liability on purchases of property. [*FN:* See Maximilian R. Peterson, Note, Now You See It, Now You Don 't: Was It a Patentable Machine or an Unpatentable "Algorithm" On Principle and Expediency in Current Patent Law Doctrines Relating to Computer − Implemented Inventions , 64 Geo. Wash. L. Rev. 90, 126 (1995) (citing John M. Kernochan, The Legislative Process 5 (1981) for proposition that Congress is branch of the government to which "the citizenry looks for the major declarations and shifts of public policy"); see also U.S. Const. art. I, § 8, cl. 18 (Necessary and Proper Clause) (granting Congress authority to enact legislation necessary to bring "into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").] However, the distinction to be drawn between what Congress could do and what it has done is the reasonable expectations of a bankruptcy purchaser.

If Congress would announce a public policy that imposes a form of successor liability on acquisitions of bankruptcy estate property, the acquiring entity would know from the outset what burdens are imposed on the property. As a result, if the purchaser then elects to acquire the property, it has information *ab initio* and an opportunity to adjust the purchase price accordingly. Such a liability assessment that taxes assets of a bankruptcy estate is a public policy decision that the constitutional separation of powers doctrine mandates be implemented by Congress rather than the courts. [*FN:* See supra Part IV (discussing impermissible judicial activism under Separation of Powers doctrine).] Under the current state of affairs, the imposition of successor liability by

the courts of the United States on property purchased in a bankruptcy setting is an unconstitutional taking of the property rights granted a bankruptcy purchaser by Congress through its enactment of Title 11 of the United States Code. [*FN:* See supra notes 191−94 and accompanying text.]

Conclusion

State and federal decisions holding a bankruptcy purchaser liable as a successor of the debtor are directly at odds with Congressional intent to allow a debtor to sell its assets free and clear of all claims and interests therein. This conflict poses a constitutional dilemma that must be resolved in favor of the specific provisions of the Bankruptcy Code. Absent evidence of collusion or strong public policy concerns enunciated by Congress, a bankruptcy purchaser should not be held liable for a debtor's obligations. Any further extension of successor liability in the bankruptcy context is a policy decision best implemented by Congress pursuant to its exclusive jurisdiction over the subject of bankruptcy.