WHY SUCCESSOR LIABILITY CLAIMS ARE NOT "INTERESTS IN PROPERTY" UNDER SECTION 363(F)

LL.M. THESIS

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INTRODUCTION

Section 363 of the Bankruptcy Code ("the Code") is the controlling statutory provision when a debtor seeks to sell property of the estate.[1] Despite its frequent use, section 363's various subsections have been subject to much debate. One such debate involves subsection (f), which permits the sale of property of the estate outside the ordinary course of business "free and clear of *any interest in such property*."[2] As the Code itself is silent as to what constitutes an "interest in property," both practitioners and courts across the country have struggled to determine what constitutes an "interest in such property" for purposes of subsection (f)'s free and clear treatment.[3] This is an important issue in the realm of successor liability where a determination of whether a successor liability claim constitutes an "interest in property" will dictate whether a successor liability claimant may assert his or her claim against a purchaser where the underlying sale was authorized to be free and clear of "interests in property."

The majority of courts faced with the issue of whether successor liability claims constitute "interests in property" within the meaning of section 363(f) have interpreted "interest in property" expansively to include those claims.[4] This interpretation, however, overlooks both applicable Supreme Court precedent and the implications of such an expansive interpretation. The vast majority of courts addressing the issue do not address the precedent set by the Supreme Court in *Butner v. United States*[5] and *Barnhill v. Johnson*.[6] Both of these decisions hold that

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[1] *See* Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 257 (5th Cir. 2010) (citing 11 U.S.C. § 363(b)(1) (2006)) (explaining section 363 governs sale, lease, or use of property of estate); *see also* Weingarten Nostat, Inc. v. Serv. Merch. Co., 396 F.3d 737, 742 (6th Cir. 2005) (emphasizing sale of property of estate is governed by section 363); L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (*In re* Rickel Home Ctrs., Inc.), 209 F.3d 291, 297 (3d Cir. 2000) (discussing section 363 permits "trustee, after notice of a hearing, to use, sell, or lease property of the estate outside the ordinary course of business").

[2] 11 U.S.C. § 363(f) (emphasis added).

[3] *See* United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 581 (4th Cir. 1996) (noting courts have not settled upon definition of "interest in such property"); *see also In re* Taylor, 198 B.R. 142, 161–62 (Bankr. D.S.C. 1996) (discussing courts differ in their definition of "interest"); Sheila Rock, *An Appeal To Equity: Why Bankruptcy Courts Should Resort To Equitable Powers For Latitude In Their Interpretation Of "Interests" Under Section 363(f) Of The Bankruptcy Code*, Note, 47 WM. & MARY L. REV. 347, 348 (2005) (stating there has been much debate on what qualifies as "interest" under section 363(f)).

[4] *See, e.g.*, Douglas v. Stamco, 363 F. App'x 100, 101 (2d Cir. 2010) (barring successor liability claimant from holding purchaser of debtor corporation's assets responsible for debtor corporation's torts through operation of section 363(f)'s "free and clear" language); Ind. State Police Pension Trust v. Chrysler LLC (*In re* Chrysler LLC), 576 F.3d 108, 126 (2d Cir. 2009) (finding "interest in property" language includes claims "arising" from sold property), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010); United States v. Knox-Schillinger (*In re* Trans World Airlines, Inc.), 322 F.3d 283, 289 (3d Cir. 2003) (adopting expansive reading of "interests in property" to include obligations flowing from property ownership); *In re Leckie Smokeless Coal Co.*, 99 F.3d at 585 (allowing trustee to sell property free and clear of successor liability claims).

[5] 440 U.S. 48 (1979). Although decided under the Bankruptcy Act of 1898, *Butner* "is still good law under the Bankruptcy Code of 1978." Wolters Vill., Ltd. v. Vill. Props., Ltd. (*In re* Vill. Props., Ltd.), 723 F.2d 441, 443 (5th Cir. 1984).

state law guides the analysis of whether a particular claim or right constitutes "property" or an "interest in property" in the bankruptcy context, unless some identifiable federal interest requires otherwise.[7] Indeed, the *Barnhill* decision specifically states that, "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."[8] By ignoring these precedents, and the very nature of successor liability claims, courts adopting the expansive view of "interest in property" under section 363(f) present an inherently flawed conclusion as neither state law nor federal common law doctrines of successor liability grant successor liability claimants "interests in property" by virtue of their claims.

Courts adopting the expansive view of "interests in property" also overlook an important implication of such interpretation—if a successor liability claim constitutes an "interest in property" under section 363(f), the holder of such claim is entitled to adequate protection under section 363(e).[9] Application of section 363(e) would potentially provide successor liability claimants enhanced treatment, as compared to similarly situated unsecured creditors of the debtor. There is no Congressional history to support the view that such claims should be treated different by bankruptcy law than how other general unsecured claims are treated. To hold otherwise would run counter to the priority rules of the Bankruptcy Code and the bankruptcy goal of equality of the treatment to similarly situated creditors.

By properly applying relevant Supreme Court precedent and recognizing the implications of an expansive interpretation, it becomes clear that successor liability claims do not constitute "interests in property" for purposes of section 363(f) free and clear treatment. Part I of this paper sets forth the statutory framework in which the issue of whether a successor liability claim constitutes an "interest in property" under section 363(f) arises. Part II first addresses whether state or federal law applies to determine whether a particular claim constitutes an "interest in property." Finding that state law applies, Part II then examines state law "interests in property" generally, and the state law doctrine of successor liability with the aim of determining whether state law creates an "interest in property" with respect to state law successor liability claims. Part III shifts attention to whether federal law creates an "interest in property" with respect to either state or federal successor liability claims. This section addresses federal law "interests in property" generally, other instances of "interest in property" found in the Bankruptcy Code, and the federal

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[6] 503 U.S. 393 (1992).

[7] *See Barnhill*, 503 U.S. at 398 (looking to state law to define "interest in property" when controlling federal law does not exist); *Butner*, 440 U.S. at 55 (defining property interests according to state law unless federal law requires otherwise).

[8] *Barnhill*, 503 U.S. at 398 (citing McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945)).

[9] *See* 11 U.S.C. § 363(e) (2006) (requiring courts, upon request of entity with interest in property, to prohibit or condition sale or use of property being sold by trustee in order to adequately protect interests in such property); *see also* Clear Channel Outdoor, Inc. v. Knupfer (*In re* PW, LLC), 391 B.R. 25, 45 n.24 (9th Cir. B.A.P. 2008) (emphasizing "[a] sale under § 363(f) is subject to § 363(e)"); *In re* Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995) (finding secured creditor can get adequate protection under section 363(e), and common method for doing so is to attach liens to proceeds of sale under section 363(f)).

common law doctrine of successor liability. Part IV directly addresses the issue at hand – whether successor liability claims are "interests in property" for purposes of section 363(f) free and clear treatment. This final section examines the arguments presented on behalf of the expansive interpretation of "interest in property" and explains why such arguments, although well-reasoned, are inherently flawed due to their failure to apply relevant Supreme Court precedent and their failure to recognize the implications of such a broad interpretation.

I. SETTING THE FEDERAL STATUTORY FRAMEWORK

Section 363 of the Code, a chapter 3 provision, is applicable to all bankruptcy cases, except those under chapter 15.[10] Through the various provisions found in section 363, a debtor is permitted to use, sell and lease property of the estate, subject to certain limitations.[11] In particular, section 363(b) permits "[t]he trustee, after notice and a hearing, [to] use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ."[12] Operating in conjunction with this provision, subsection (f) enables the bankruptcy court to authorize "[t]he trustee [to] sell property under subsection (b) . . . of this section free and clear of any *interest in such property* of an entity other than the estate, only if" one of five conditions is met.[13] The primary purpose of section 363(f) sales is to enable the enhancement of the debtor's estate for the benefit of all creditors.[14] If protected from successor

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[10] *See* 11 U.S.C. § 103(a) (mandating "chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title"); *see also In re* Dawson, 411 B.R. 1, 22–23 (Bankr. D.D.C. 2008) (applying section 363 in chapter 13 case and explaining section 363 applies to "chapter 7, 11, 12, and 13"); *In re* Lee, 35 B.R. 452, 456 (N.D. Ga. 1983) (noting "[t]he provisions of Chapters 1, 3, 5, prime facie, are applicable to the operative Chapter 7, 11, and 13; they apply except where inconsistent with a specific provision of Chapter 7, 11, or 13.").

[11] *See* 11 U.S.C. § 363 (entitled "Use, Sale or Lease of Property"); *see e.g.* N.H. Bus. Dev. Corp. v. Cross Baking Co., Inc. (*In re* Cross Baking Co.), 818 F.2d 1027, 1031 (1st Cir. 1987) (citing section 363(c)(2) (providing section 363(c)(2) requires notice and hearing or consent of entities with interest in cash collateral, before such cash collateral may be sold, leased, or used)).

[12] 11 U.S.C. § 363(b)(1). Through operation of section 1107(a), a debtor in possession is granted the powers of a trustee, and thus has the same right to use, sell and lease property of the estate under section 363. *See id.* § 1107(a) (granting debtor in possession all rights and powers of trustee except right to compensation under section 330); *see also In re* Chuck's Constr. Co., 424 B.R. 202, 204–5 (Bankr. D.S.C. 2010) (recognizing debtor in possession has power to sell property of estate and "enjoys the rights, powers and duties of a trustee"); *In re* Bella Vista Assocs., LLC, No. 07-18134, 2007 WL 4555891, at *3–4 (Bankr. D.N.J. Dec. 18, 2007) (noting section 1107 gives debtor in possession right to sell estate property under section 363).

[13] 11 U.S.C. § 363(f) (emphasis added). The five conditions listed in subsection (f) have been subject to great debate among courts and commentators. *See In re* Gen. Motors Corp., 407 B.R. 463, 500–01 (Bankr. S.D.N.Y. 2009) (acknowledging "cases on a nationwide basis are split" regarding 363(f) requirements); *In re* Silver, 338 B.R. 277, 282 (Bankr. E.D. Va. 2004) (discussing alternative interpretations of payment requirement of section 363(f)(5)). For the purposes of this thesis, that debate will be left for another day.

[14] *See In re* Chung King, Inc., 753 F.2d 547, 549 (7th Cir. 1985) ("The governing principle at a [363 sale] confirmation proceeding is the securing of the highest price for the bankruptcy estate."); Myers v. United States, 297 B.R. 774, 784 (S.D. Cal. 2003) ("In Chapter 11 proceedings, the court is trying to obtain and preserve as many assets as it can to protect secured and unsecured creditors. To do so, it needs to approve

liability, a section 363(f) purchaser will be willing to pay more than without such insulation, thus further benefitting the estate.[15]

The ability to sell assets of the estate free and clear was not novel to the Bankruptcy Code, but rather sections 363(b) and (f) are the codification of a long-standing rule. In 1931, the Supreme Court in *Van Huffell v. Harkelrode*,[16] held that a bankruptcy court has the "power to sell property of the bankrupt free from encumbrances."[17] In that case, the Court noted that while such power was expressly granted in the Bankruptcy Act of 1867, the Bankruptcy Act of 1898, then in effect, contained no such provision.[18] Instead, the *Van Huffell* Court relied upon the "general equity powers of the court and the duty imposed by § 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto."[19] With these premises in mind, the Court went on to conclude that state tax liens were not exempt from "this general power to sell free from encumbrances."[20]

As the *Van Huffell* Court observed, the general power to sell free and clear was expressly granted in the Bankruptcy Act of 1867.[21] In 1874, the Supreme Court held, with respect to the Bankruptcy Act of 1867 and sales of estate property, "[b]eyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance . . . ."[22] This power was similarly recognized under the Bankruptcy Act of 1841, as interpreted by the Supreme Court in *Houston v. City Bank of New Orleans*.[23] In that case, the Court upheld a sale of estate property "free and discharged from the mortgage [at issue], and from all other encumbrances mentioned in the proceedings."[24] Overall, it is plain that the general power of a debtor to sell assets of the estate free and clear of encumbrances is well-established.

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sales of assets to third parties."); *In re* Wilde Horse Enters., Inc., 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) ("In any sale of estate assets, the ultimate purpose is to obtain the highest price for the property sold.").

[15] *See infra* Part IV.B.1 (discussing goal of value maximization and whether goal preempts imposition of successor liability against section 363(f) purchasers).

[16] 284 U.S. 225 (1931).

[17] *Id.* at 227.

[18] *Id.* (stating power of bankruptcy courts to sell property of bankrupt free from encumbrances "was granted by implication").

[19] *Id.* at 228 (internal citation omitted); *see* Bankruptcy Act of 1898, ch. 541, § 2, 30 Stat. 544, 546 (1898) (repealed 1978) (enumerating nineteen specific powers and duties of bankruptcy court and cautioning "[n]othing in this section [] shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated").

[20] *Van Huffell*, 284 U.S. at 228.

[21] *Id.* at 227 (citing Bankruptcy Act of 1867, ch. 176, § 20, 14 Stat. 517 (1867) (repealed 1878)) (providing courts with power to order sale of real or personal property of bankrupt "in such manner as the court shall direct").

[22] Ray v. Norseworthy, 90 U.S. 128, 135 (1874); *see In re* Kirtland, 14 F. Cas. 688, 688 (C.C.S.D.N.Y. 1873) (citing Bankruptcy Act of 1867, ch. 176, § 20, 14 Stat. 517, 526 (1867) (repealed 1978)) ("There is no doubt of the power of the court to order a sale of lands free of the incumbrances thereon; and the proceeds will stand as a substitute for the lands themselves, for the benefit of those holding liens, to the extent of their interest therein, and, as to the surplus, for the benefit of the general creditors.").

[23] 47 U.S. 486 (1848).

[24] *Id.* at 506.

As such, when it came time to draft the Bankruptcy Code, the power to sell assets of the bankruptcy estate free and clear was codified in sections 363(b) and (f) of the Code which expanded its "free and clear" reach beyond encumbrances to "interests in property."[25] Unfortunately, the legislative history accompanying the Bankruptcy Act of 1978 sheds little light on these specific subsections. Rather, the Senate Report merely restates the language of subsections (b) and (f).[26] The Senate Report did, however, shed some light on another important subsection of section 363 – subsection (e). Subsection (e) states that:

> at any time, on request of an entity that has an *interest in property* used, sold, or leased, or proposed to be used, sold or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.[27]

The Senate Report indicates that, "[m]ost often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."[28] Thus, subsection (e) provides a level of protection to those holding "interests in property" subject to the free and clear provision of subsection (f).[29]

Because section 363(e) grants adequate protection only to those holding "interests in property," the very concept of adequate protection and what it is meant to protect sheds light on what an "interest in property" under section 363(f) may be. The phrase "adequate protection" is found in a number of Code sections and is not limited to section 363 and sales free and clear.[30] In addressing the general concept

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[25] *See* 11 U.S.C. § 363(b)(1), (f) (2006); *see also In re* WDH Howell, LLC, 298 B.R. 527, 530 (D.N.J. 2003) (articulating section 363(b) sale can be done "free and clear" of any "interests in property" under section 363(f)).

[26] S. REP. NO. 95-989, at 56 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5842 (restating language of section 363(f) verbatim).

[27] 11 U.S.C. § 363(e) (emphasis added).

[28] S. REP. NO. 95-989, at 56; *see* Precision Indus., Inc v. Qualitech Steel SBQ, LLC (*In re* Qualitech Steel Corp. & Qualitech Steel Holding Corp.), 327 F.3d 537, 547–48 (7th Cir. 2003) (stating adequate protection for lessee will ordinarily come from proceeds of sale of property formerly leased); Stephen R. Haydon & Nancy J. March, *Sale of Estate Property Free and Clear of Real Property Leasehold Interests Pursuant to § 363(F): An Unwritten Limitation?*, 19 AM. BANKR. INST. J. 20, 42 (2000) (explaining "[a]ccording to the legislative history of § 363, in the context of a sale under § 363(f), adequate protection most often will mean that the interest of the lessee (or other third party) will attach to the proceeds from the sale").

[29] *See* Harmon v. United States, 101 F.3d 574, 581 (8th Cir. 1996) (explaining "a lien may be removed from collateral and replaced by adequate protection, if the trustee obtains permission to sell property free and clear of liens"); *In re* Adamson, 312 B.R. 16, 20–21 (Bankr. D. Mass. 2004) (ruling creditor was not entitled to adequate protection because creditor did not have requisite interest in debtor's property or lien on debtor's property necessary to attach sale proceeds); La Jolla Mortg. Fund v. Rancho El Cajon Assocs., 18 B.R. 283, 286 (Bankr. S.D. Cal. 1982) (reasoning creditor receives adequate compensation for section 363 sale in order to ensure creditor receives value of what was bargained for).

[30] *See* 11 U.S.C. §§ 361, 362, 364 (listing other sections in Code discussing "adequate protection"); *see also* Chase Manhattan Bank USA NA v. Stembridge (*In re* Stembridge), 394 F.3d 383, 387 (5th Cir. 2004) (stating if automatic stay under section 362 decreases value of creditor's secured interest, debtor must make

of adequate protection, the Senate Report accompanying the 1978 Act notes that the concept "is derived from the fifth amendment protection of *property interests* as enunciated by the Supreme Court."[31] The report cites both *Wright v. Union Central Life Insurance Co.*[32] and *Louisville Joint Stock Land Bank v. Radford*[33] for this proposition. In *Louisville*, the Supreme Court observed that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."[34] In that case, the Court held the Frazier-Lemke Act impermissibly took "substantive rights in specific property" held by secured creditors without just compensation, and thus, the Act was unconstitutional.[35] Meanwhile, in *Wright*, the Supreme Court observed that a creditor has a constitutional claim to no more than "the extent of the value of the property" securing the claim.[36] Construed together, *Wright* and *Louisville* stand for the proposition that a secured creditor is entitled to have his or her property rights in the collateral securing his or her claim protected by the Fifth Amendment, but only to the extent of the value of that collateral. Thus, Congress's reliance on *Louisville* and *Wright* indicates its intent that adequate protection serves to protect a *secured* creditor's interest in a particular asset to the extent of the value of that asset. There is no indication that Congress intended for section 363(e) to protect unsecured claims. As the *Louisville* Court explained, "the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none."[37]

Although nothing in the Code expressly limits adequate protection to secured interests,[38] the very concept is tied to the idea of "property interests" and protection of those interests.[39] This narrow view of what types of interests are entitled to

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periodic payments as adequate protection to ensure secured creditor's interest); *In re* 495 Cent. Park Ave. Corp., 136 B.R. 626, 632 (Bankr. S.D.N.Y. 1992) (explaining "[i]f the debtor is unable to obtain credit without giving a senior or equal lien as security, the debtor may obtain credit secured by a senior or equal lien in accordance with § 364(d) only if the holders of senior or equal liens on the property are adequately protected").

[31] S. REP. NO. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835 (emphasis added).

[32] *Id.* (citing Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940)).

[33] *Id.* (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)).

[34] *Louisville*, 295 U.S. at 589.

[35] *Id.* at 590, 602 (holding Fifth Amendment requires just compensation to be given before private property is taken).

[36] *Wright*, 311 U.S. at 278.

[37] *Louisville*, 295 U.S. at 588.

[38] *See In re* Garland, 6 B.R. 456, 462 (B.A.P. 1st Cir. 1980) (finding "[t]here is no express statutory requirement that holders of unsecured claims be provided 'adequate protection'"). *But see* New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (*In re* Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 90 (2d Cir. 2003) (holding "adequate protection provision of 11 U.S.C. § 361 protects only secured creditors"); *In re* Utah Aircraft Alliance, 342 B.R. 327, 337 (B.A.P. 10th Cir. 2006) (emphasizing courts have held adequate protection is limited to secured interests).

[39] *See* S. REP. NO. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835 (noting "concept of adequate protection is derived from the fifth amendment protection of property interests"); *see also In re* South Village, Inc., 25 B.R. 987, 996 n.15 (Bankr. D. Utah 1982) (acknowledging adequate protection concept is derived from Fifth Amendment property protections); 3 COLLIER ON BANKRUPTCY, ¶ 361.02 at 361-4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (explaining adequate protection is necessary to protect entity's property interest).

adequate protection has resulted in many courts treating adequate protection as a protection for secured creditors only.[40] Indeed, in discussing section 361[41] and the concept of adequate protection, the Senate Report accompanying the 1978 Act observed, "[t]his section and the concept of adequate protection are based as much on policy grounds as on constitutional grounds. *Secured* creditors should not be deprived of the benefit of their bargain."[42] As to unsecured creditors, Congress prescribed various protections, including the priority scheme found in section 507.[43] Consequently, in determining whether a party is entitled to adequate protection under section 363(e), courts have generally relied on the premise that adequate protection is "a means of preserving the *secured* creditor's position at the time of bankruptcy."[44]

This narrow interpretation of what interests are entitled to adequate protection finds further support in the Bankruptcy Amendments of 1994.[45] Prior to those

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[40] *See In re Dairy Mart*, 351 F.3d at 90 (noting "[t]he adequate protection provision of 11 U.S.C. § 361 protects only secured creditors") (citations omitted); Ford Motor Credit Co. v. JKJ Chevrolet, Inc. (*In re* JKJ Chevrolet, Inc.), No. 96-1986, 1997 WL 407827, *2 (4th Cir. July 21, 1997) ("The concept of adequate protection is an amorphous one, but, in essence, it means that the value of a creditor's interest in the property *securing* the debt owed to him may not be diminished."(emphasis added)); Bluebird Partners, L.P. v. First Fid. Bank, 85 F.3d 970, 972 (2d Cir. 1996) (explaining "[g]enerally, the right to adequate protection allows a *secured* creditor or its representative to propose a method of protecting its interest against the diminution in value of the security during a bankruptcy proceeding" (emphasis added)); Travelers Ins. Co. v. Am. AgCredit Corp. (*In re* Blehm Land & Cattle Co.), 859 F.2d 137, 139 (10th Cir. 1988) (emphasizing "[w]hen a creditor affected by the proposed action [under section 362, 363 or 364] objects, the court must then determine whether the interest of a *secured* creditor is adequately protected" (emphasis added)); Martin v. United States (*In re* Martin), 761 F.2d 472, 476–77 (8th Cir. 1985) ("[I]n applying the adequate protection standard . . . the bankruptcy court must necessarily (1) establish the value of the *secured* creditor's interest, (2) identify the risks to the *secured* creditor's value resulting from the debtor's request for use of cash collateral, and (3) determine whether the debtor's adequate protection proposal protects value as nearly as possible against risks to that value consistent with the concept of indubitable equivalence." (emphasis added)); Chrysler Credit Corp. v. Ruggiere (*In re* George Ruggiere Chrysler-Plymouth, Inc.), 727 F.2d 1017, 1019 (11th Cir. 1984) ("The principal restraint on use of cash proceeds is found in § 363(e), which specifies that the court shall condition the use of *secured* property 'as is necessary to provide adequate protection of such interest.'" (emphasis added)); *cf.* United States v. Whiting Pools, Inc., 462 U.S. 198, 209 (1983) (discussing protections afforded to tax collectors in Code and contrasting sections 507(a)(6) and 523(a)(1)'s protection of unsecured tax claims with section 363(e)'s protection of tax liens).

[41] 11 U.S.C. § 361 (2006) (outlining methods of providing adequate protection).

[42] S. REP. NO. 95-989, at 53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5839 (emphasis added); *see* La Jolla Mortg. Fund v. Rancho El Cajon Assocs., 18 B.R. 283, 286 (Bankr. S.D. Cal. 1982) ("Congress advanced the concept of adequate protection because, though the creditor might not receive his bargain in kind, the purpose of the provision is to insure that the creditor with a secured claim receive in value essentially what he bargained for."); *In re* Alyucan Interstate Corp., 12 B.R. 803, 807 (Bankr. D. Utah 1981) (noting adequate protection is meant to "insure that the secured creditor receives in value essentially what he bargained for" (citations omitted)).

[43] *See infra* notes 54–62 and accompanying text (discussing section 507).

[44] *In re* Computer Mgmt., Inc., 40 B.R. 201, 204 (Bankr. N.D. Ga. 1984) (emphasis added); *see* Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re* Braniff Airways, Inc.), 700 F.2d 935, 940 n.2 (5th Cir. 1983) (describing section 363(e) as "'adequate protection' to *secured* creditors" (emphasis added)); *In re* San Jacinto Glass Indus., Inc., 93 B.R. 934, 944 (Bankr. S.D. Tex. 1988) (denying adequate protection under section 363(e) because creditor was unsecured).

[45] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.).

amendments, section 363(e) was interpreted by some courts to bar a claim for adequate protection by a personal property lessor pending the debtor's decision to assume or reject the personal property lease under section 365.[46] In order to clarify that a "lessor's interest is subject to 'adequate protection[,]'"[47] Congress added the following language to subsection (e): "This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362)."[48] Thus, in order to expand the protections of section 363(e) beyond secured creditors, Congress expressly added personal property lessors, but no other group of unsecured creditors. While this is not dispositive as to whether an unsecured creditor may ever be entitled to adequate protection under section 363(e), it does lend support for the conclusion that adequate protection is granted only in limited circumstances.

A number of other Code provisions are relevant to the meaning of "interests in property" under section 363(f). One such provision is section 1141(c),[49] a provision whose language runs parallel to that of section 363(f).[50] Section 1141(c) states, in part, "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."[51] The broad language of section 1141(c), "claims *and* interests," would appear to cover unsecured claims, including successor liability claims, so long as the claim is dealt with in the confirmed plan and the claimant had an opportunity to participate in the plan process.[52] In contrast to the broad language of section 1141(c), stands the language of section 363(f) which refers only to "interests in property" and not claims.[53]

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[46] *See In re* Sweetwater, 40 B.R. 733, 742–43 (Bankr. D. Utah 1984) ("Section 363(e) was intended to protect the collateral of secured creditors while the debtor in possession or trustee operated the business. A construction of Section 363(e) that equates the lessor's interest with 'an interest in property' entitled to adequate protection, would be 'plainly at variance with the policy of the legislation as a whole.'" (internal citation omitted) (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)), *aff'd*, 57 B.R. 743 (D. Utah 1985); *see also In re* Wheeling-Pittsburgh Steel Corp., 54 B.R. 385, 390–91 (Bankr. W.D. Pa. 1985) (finding lessors were not entitled to adequate protection before rejection or assumption of unexpired lease). *But see In re* Dabney, 45 B.R. 312, 313–14 (Bankr. E.D. Pa. 1985) (requiring debtor to provide adequate protection to lessor).

[47] H. REP. NO. 103-835, at 56 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3359.

[48] 11 U.S.C. § 363(e) (2006); *see In re* Palace Quality Servs. Indus., Inc., 283 B.R. 868, 882 n.13 (Bankr. E.D. Mich. 2002) (observing amendment to section 363(e) was in response to *In re Sweetwater*); *see also In re* Megan-Racine Assocs., Inc., 192 B.R. 321, 326 (Bankr. N.D.N.Y. 1995) (explaining 1994 amendments to Code clarified analysis of section 363(e) after *In re Sweetwater*).

[49] 11 U.S.C. § 1141(c).

[50] *See infra* Part IV.A.1 (discussing similar language of sections 363(f) and 1141(c)).

[51] 11 U.S.C. § 1141(c) (emphasis added).

[52] *See* Universal Suppliers, Inc. v. Reg'l Bldg. Sys., Inc. (*In re* Reg'l Bldg. Sys., Inc.), 254 F.3d 528, 530–31 (4th Cir. 2001) (outlining elements needed "to invoke § 1141(c)'s 'free and clear of all claims' language"), *aff'g* 251 B.R. 274, 279 (Bankr. D. Md. 2000) (interpreting section 1141(c) broadly).

[53] *See infra* Part IV.A.1 (comparing language of sections 1141(c) and 363(f) in further detail); *see also* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 257–58 (2002) [hereinafter Kuney I] (asserting impropriety of expanding

Another important Code section is section 507,[54] which outlines the priority levels of unsecured claims.[55] According to the Supreme Court, "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property."[56] Much like the ability to sell assets of the estate free and clear, the policy of equality of distribution is a long-standing principle of the bankruptcy process.[57] Section 507 upsets the policy of equal distribution by "specif[ying] the kinds of claims that are entitled to priority in distribution, and the order of their priority[,]"[58] *i.e.*, those unsecured creditors entitled to priority under section 507 will be paid prior to otherwise similarly situated unsecured creditors not entitled to priority under section 507.[59] Section 507 thus grants special protection to those unsecured claims that qualify for priority treatment. Given the fundamental nature of equality of distribution in bankruptcy, section 507 priorities are narrowly construed[60] and the claimant bears the burden of proving that section 507 entitles

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"interest in property" language of section 363(f) to include unsecured claims in light of section 1141(c)'s broader language.).

[54] *See infra* Part IV.C. (discussing section 507).

[55] 11 U.S.C. § 507 (a); *see* Specker Motor Sales Co. v. Eisen, 393 F.3d 659, 662 (6th Cir. 2004) (explaining section 507(a) creates "a hierarchy of creditors, describing the order in which they may lay claim to the assets of the bankrupt estate"); *see also* Deborah Gille, *Bankruptcy Law—Tenth Circuit Bankruptcy Appellate Panel Holds Worker's Compensation Premiums Are Not Entitled To Fringe Benefits Priority Status—In re Southern Star Foods, Inc.*, 28 N.M. L. REV. 487, 487 n.3 (1998) (noting "[s]ection 507(a) delineates [ten] levels of priority for expenses and unsecured claims, each of which is subject to hierarchical payment among the priorities. Creditors of equal priority are treated equally, and all creditors, starting with the highest priority, are paid before any creditor in the next lower priority.").

[56] Begier v. IRS, 496 U.S. 53, 58 (1990) (citations omitted).

[57] *See* Nathanson v. NLRB, 344 U.S. 25, 29 (1952) ("The theme of the Bankruptcy Act is 'equality of distribution;' and if one claimant is to be preferred over others, the purpose should be clear from the statute." (internal citation omitted)); Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941) ("[T]he theme of the Bankruptcy Act is equality of distribution."); Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930) ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration.").

[58] S. REP. NO. 95-989, at 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854.

[59] *See* Drabkin v. District of Columbia, 824 F.2d 1102, 1104 (D.C. Cir. 1987) ("Under the 1978 Bankruptcy Code, liquidated assets comprising the debtor's estate are distributed among unsecured creditors according to the priority scheme established in 11 U.S.C. § 507. Creditors assigned a higher priority recover their claims in full before a lower-priority creditor recovers anything." (footnote omitted)); *see also* Boeing N. Am., Inc. v. Ybarra (*In re* Ybarra), 424 F.3d 1018, 1025 (9th Cir. 2005) ("Section 507 of the Code sets forth the order of priority accorded to various classes of unsecured creditors . . . ."); *In re* Lazar, 207 B.R. 668, 673 (Bankr. C.D. Cal. 1997) (noting section 507 categorizes priority claims as high level categories to be paid before lower categories).

[60] *See In re* Bos. Reg'l Med. Ctr., 256 B.R. 212, 219 (Bankr. D. Mass. 2000) ("[C]ourts construe the priority provisions of the Bankruptcy Code narrowly." (citation omitted)); *In re* Patient Educ. Media, Inc., 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998) ("Because the priority elevates the payment of the administrative claim to the detriment of the unsecured creditors, *see* 11 U.S.C. § 507(a)(1), the language of section 503(b)(1)(A) must be narrowly construed to promote the bankruptcy goal of equality of distribution."); *see also* Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 547 U.S. 651, 667 (2006) (stressing priorities should be narrowly construed because "[e]very claim granted priority status reduces the funds available to general unsecured creditors and may diminish the recovery of other claimants qualifying for equal or lessor priorities").

them to priority.[61] Successor liability claims do not fall within any one of the section 507 priorities, and therefore, are general unsecured claims entitled to a pro rata share of whatever remains after secured and priority claims are paid.[62]

Throughout the remainder of this thesis, other Code sections will be relevant to the discussion. For now, the focus shifts to the issue at hand – whether successor liability claims constitute "interests in property" for purposes of section 363(f) free and clear treatment, and whether the issue is resolved by federal law, state law, or both.

II. DOES STATE LAW CREATE AN "INTEREST IN PROPERTY"?

A. Does State or Federal Law Apply?

In *Helvering v. Stuart*,[63] the Supreme Court observed that, in interpreting a federal statute, "[t]he intention of Congress controls what law, federal or state, is to be applied."[64] In the bankruptcy context, the Supreme Court has further observed that, "Congress did not intend for the Bankruptcy Code to pre-empt all state laws."[65] Thus, in *Butner v. United States*,[66] the Supreme Court set forth a rule, well established by pre-Code practice,[67] that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an

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[61] *See* Woburn Assocs. v. Kahn (*In re* Hemingway Transp.), 954 F.2d 1, 5 (1st Cir. 1992) ("The burden of proving entitlement to priority payment as an administrative expense . . . rests with the party requesting it." (citing Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268 (1941) (citation omitted))); *cf. In re* Bentley, 266 B.R. 229, 240 (B.A.P. 1st Cir. 2001) (discussing equality of distribution and asserting, "absent an express grant of priority (as under § 507(a)) or cause for subordination under § 510(c), unsecured creditors should share equally in any dividend" (footnote omitted)); *In re* Quality Stores, Inc., 289 B.R. 324, 336 n.20 (Bankr. W.D. Mich. 2003) ("Unless the Bankruptcy Code grants a priority to a creditor, *see, e.g.*, 11 U.S.C. § 507(a), the equality of distribution principle mandates that all unsecured creditors shall be treated alike.").

[62] *See infra* Part IV.C (discussing section 507 priority scheme and successor liability claims in further detail).

[63] 317 U.S. 154 (1942).

[64] *Id.* at 161 (citing Lyeth v. Hoey, 305 U.S. 188, 194 (1938); Burnet v. Harmel, 287 U.S. 103, 110 (1932)).

[65] Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 505 (1986) (citing 28 U.S.C. § 959(b) (2006)).

[66] 440 U.S. 48 (1979).

[67] *See* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946) ("What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law." (footnote omitted) (citations omitted)); *see also* Sec. Mortg. Co. v. Powers, 278 U.S. 149, 153–54 (1928) (holding validity of lien for attorneys' fees and construction of underlying contract granting those fees were questions of local law in bankruptcy context); Bryant v. Swofford Bros. Dry Goods Co., 214 U.S. 279, 290–91 (1909) ("[I]n bankruptcy the construction and validity of such a contract must be determined by the local laws of the State." (citations omitted)); Thompson v. Fairbanks, 196 U.S. 516, 522 (1905) ("Whether and to what extent a mortgage of this kind is valid, is a local question, and the decisions of the state court will be followed by this court in such case." (citation omitted)).

interested party is involved in a bankruptcy proceeding."[68] The *Butner* Court explained that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[69] Later, in *Barnhill v. Johnson*,[70] the Supreme Court further held that, in the bankruptcy context, "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."[71] In light of this precedent, whether a particular claim or right constitutes an "interest in property" under section 363(f) will require application of state, rather than federal, law.[72]

Nevertheless, in *United States v. Craft*,[73] the Supreme Court cautioned that, "[i]n looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them."[74] Although that observation was made in the context of a federal tax dispute, it is equally applicable in the bankruptcy context. Accordingly, whether a successor liability claim constitutes an "interest in property" under section 363(f) will require an understanding of state law "interests in property" generally, the state law doctrine of successor liability, and what substantive rights in property, if any, that doctrine grants successor liability claimants.

B. State Law "Interests in Property" Generally

The phrase "interest in property" is not the subject of any general definition within the state law context. Although Black's Law Dictionary does not include an "interest in property" entry, definitions of related terms shed some light of what an "interest in property" may be. The entry for "interest" includes numerous sub-definitions, but is generally defined as, *inter alia*, "[a] legal share in *something*; all

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[68] *Butner*, 440 U.S. at 55; *see* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."); Sauer v. City of New York, 206 U.S. 536, 547–48 (1907) (holding questions relating to property interests for purposes of constitutional taking "must be for the final determination of the state court").

[69] 440 U.S. at 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

[70] 503 U.S. 393 (1992).

[71] *Id.* at 398 (citing *Butner*, 440 U.S. at 54; McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945)).

[72] *See* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." (citations omitted)); *see also* Jones v. Atchison (*In re* Atchison), 925 F.2d 209, 210–11 (7th Cir. 1991) (analyzing whether transaction qualified for avoidance and observing "[a]bsent a federal provision to the contrary, a debtor's interest in property is determined by applicable state law" (citing *Butner*, 440 U.S. at 55; *In re* Pac. R.R. Co., 772 F.2d 299, 302 (7th Cir. 1985)); Mickelson v. Detlefsen (*In re* Detlefsen), 610 F.2d 512, 515 (8th Cir. 1979) (applying state law to define property interests in bankruptcy proceedings).

[73] 535 U.S. 274 (2002).

[74] *Id.* at 279.

or part of a legal or equitable claim to or right in *property*."[75] This definition is akin to the definition of "*in rem*," which is defined as "[i]nvolving or determining the status of a *thing*, and therefore the rights of persons generally with respect to that *thing*."[76] In both definitions, focus is placed on some *thing* and a party's rights or interests with respect to that *thing*. The definition of "*in personam*" stands in contrast, being defined as "[i]nvolving or determining the personal rights and obligations of the parties."[77] In the context of legal action, an "*in personam*" claim is "brought against a person rather than property."[78] As the Court of Appeal of California stated, "[a]n in rem action seeks to adjudicate *interests in property* or in a status; an In personam suit [seeks] to establish personal liability."[79] Thus, under state law, an "interest in property" is something more than simply a claim against another person or entity; an "interest in property" represents rights to a particular piece of property, whether real or personal, tangible or intangible.[80]

In the context of section 363(f) free and clear sales, what state law created rights and privileges constitute "interests in property" remains somewhat unclear. While it is widely acknowledged that an "interest in property" under section 363(f) extends beyond liens[81] and includes leases,[82] "courts have been unable to formulate a precise

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[75] BLACK'S LAW DICTIONARY 885 (9th ed. 2009) (emphasis added).

[76] *Id.* at 864 (emphasis added).

[77] *Id.* at 862.

[78] *Id.*

[79] Cent. Bank v. Super. Ct. of Sacramento Cnty., 106 Cal. Rptr. 912, 914 (Ct. App. 1973) (emphasis added) (citations omitted); *see* Pennoyer v. Neff, 95 U.S. 714, 734 (1878) ("[I]n a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."); *see also* Liley v. Dist. Court for Denver, 709 P.2d 1379, 1382 (Colo. 1985) (en banc) (discussing *in rem* proceeding and asserting "the term is employed to encompass any action brought against a person in which the essential purpose of the suit is to determine title to or affect interests in property"); Ellsworth Builders Supply, Inc. v. Sinclair Builders, Inc., No. Civ.A. RE-01-12, 2003 WL 22244706, at *1, *4 (Me. Super. Ct. Sept. 9, 2003) ("An action on a lien is *in rem*; it does not seek relief against individuals but rather is a mechanism to perfect an interest in property."); President & Dirs. of Manhattan Co. v. Morgan, 150 N.E. 594, 597 (N.Y. 1926) (distinguishing negotiable instruments representing "interests in property . . . which . . . give rise to rights in rem" from those "creating rights in personam"); Carlson v. Bos, 740 P.2d 1269, 1272 n.7–8 (Utah 1987) ("In personam jurisdiction refers to a court's authority to determine the rights and obligations between the parties. . . . In rem jurisdiction refers to a court's authority to determine a party's interests in property." (citations omitted)).

[80] *See* Russello v. United States, 464 U.S. 16, 22 (1983) ("Every property interest . . . may be described as an interest in something."); *see also In re* Quality Health Care, 215 B.R. 543, 561 (Bankr. N.D. Ind. 1997) (noting Code does not define "property" and "makes no distinction between tangible real or personal property and intangible personal property"); Susannah L. Baker, Note & Comment, *It's All Fun and Games Until Somebody Declares Bankruptcy: A Debtor's Right to Season Ticket Holder Status*, 14 BANKR. DEV. J. 159, 184–85 (1997) (emphasizing "property" is interpreted broadly and includes tangible and intangible property, as well as title to property and causes of action).

[81] *See In re* P.K.R. Convalescent Ctrs, Inc., 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (interpreting section 363 to cover more than liens); *see also In re* Taylor, 198 B.R. 142, 161 (Bankr. D.S.C. 1996) (presuming if Congress did not intend for section 363 to apply to just liens); *In re* Manning, 37 B.R. 755, 759 (Bankr. D. Colo. 1984) (describing section 363 is broad and covers more than just liens).

[82] *See* Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (*In re* Qualitech Steel Corp.), 327 F.3d 537, 545 (7th Cir. 2003) ("[T]he term 'any interest' as used in section 363(f) is sufficiently broad to include [a

definition" of what constitutes such an interest.[83] Some courts appear to unwittingly follow the calls of *Butner* and *Barnhill* and look to the state law source of the particular right or privilege for guidance, such as common law[84] or statutory law.[85] Other courts have a less statutory-based focus.[86] The Sixth Circuit Court of Appeals, for instance, described an "interest in property" "as an 'interest' that attaches to property ownership so as to cloud its title."[87] In this instance, the reference to "title" necessarily implies a relation to a specific asset whose title may be clouded. A clear understanding of the state law doctrine of successor liability is necessary to illuminate whether a successor liability claim constitutes an "interest in property" for purposes of section 363(f) free and clear treatment.

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claimant]'s possessory interest as a lessee."); *In re* Hill, 307 B.R. 821, 826 (Bankr. W.D. Pa. 2004) (stating "any interest" under section 363(f) is broad and includes leasehold interest); C.H.E.G., Inc. v. Millennium Bank, 121 Cal. Rptr. 2d 443, 447 (Ct. App. 2002) ("Uniformly, courts reaching this issue have determined that a lease is an interest under section 363." (citations omitted)).

[83] *In re Qualitech Steel Corp.*, 327 F.3d at 545 (citing Folger Adam Sec., Inc. v. Dematteis/MacGregor, J.V., 209 F.3d 252, 258 (3d Cir. 2000)); *see* Matthew T. Gunlock, Note, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in Their Interpretation of "Interests" Under Section 363(f) of the Bankruptcy Code*, 47 WM. & MARY L. REV. 347, 348–49 (2005) (noting there is debate over what is considered "interest" under section 363(f) and case law is not clear as to whether a broad or narrow definition of "interest" is correct). *See generally* George W. Kuney, *Further Misrepresentation of Bankruptcy Code Section 363(f): Elevating In Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Developments*, 76 AM. BANKR. L.J. 289, 294 (2002) [hereinafter Kuney II] (explaining some courts interpret interest to be "broader than mere ownership interests and lien rights" and other "courts are perhaps unduly restrictive in their interpretation of the term" (footnotes omitted)).

[84] *See In re* Lawrence United Corp., 221 B.R. 661, 669, 671 (Bankr. N.D.N.Y. 1998) (looking to state common law, without reference to *Butner* or *Barnhill*, and holding "alleged right of recoupment" does not qualify as "interest in property"); *see also Folger Adam Sec.*, 209 F.3d at 261 (finding right to recoupment is not "interest in property" by referencing common law). In *Folger Adam Security*, the Third Circuit Court of Appeals relied on the reasoning of *In re Lawrence United Corp.*, but not on *Butner* or *Barnhill*, and looked to common law to hold that the right to recoupment did not constitute an "interest in property" under section 363(f). 209 F.3d at 261. In his concurrence, Justice Stapleton came to the same conclusion by relying on *Butner* and applying Pennsylvania state law. *Id.* at 267 (Stapleton, J., concurring) (citing *Butner*, 440 U.S. at 54; 13 PA. CONS. STAT. § 9102(a)(2) (2003)); *see also In re* Project Orange Ass'n., LLC, 432 B.R. 89, 101–02 (Bankr. S.D.N.Y. 2010) (acknowledging *Butner* as authority to look at state law to define property interests).

[85] *See In re* WBQ P'ship, 189 B.R. 97, 105 (Bankr. E.D. Va. 1995) (relying on state statutory authority to find such "right of recapture runs with the property," and thus, was "interest in property" under section 363(f) (citation omitted)); *In re P.K.R. Convalescent Cntrs.*, 189 B.R. at 94 (examining same Virginia law and similarly holding right to recapture qualifies as an "interest in property" under section 363(f)); *see also In re* Jurgielewicz Duck Farm, No. 8-10-70231-478, 2010 WL 2025503, at *4 (Bankr. E.D.N.Y. May 20, 2010) (relying on New York Real Property Law to define property interests).

[86] *See Folger Adam Sec.*, 209 F.3d at 258 (discussing scope of "interest in property" language of section 363(f) and noting "the trend seems to be towards a broader interpretation which includes other obligations that may flow from ownership of the property" (citations omitted)); *see also* United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 582 (4th Cir. 1996) (stating Congress did not intend narrow interpretation of section 363(f) and did not want to limit scope to *in rem* interests); Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp., 195 B.R. 716, 730–31 (N.D. Ind. 1996) (noting many courts interpret section 363(f) broadly to cover more than just *in rem* interests).

[87] Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1136, 1146–47 (6th Cir. 1991) (footnote omitted) (holding debtor-seller's state unemployment benefits experience rating, requiring a higher contribution to state unemployment security fund, did not constitute "interest in property" under section 363(f)).

C. State Law Doctrine of Successor Liability

1. Origins and Policy

The state law doctrine of successor liability is rooted in corporate law and generally seeks to placate the often draconian consequences of corporate transactions structured to avoid liabilities. "Successor liability is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests."[88] Thus, where there is an exception to the general rule of non-liability, "a creditor or plaintiff with a claim against the seller may assert that claim against and collect payment from the purchaser."[89] According to a leading commentator, Professor George Kuney, the doctrine was "designed to eliminate the harsh results that could attend strict application of corporate law" and consequently, has its origins in "the rise of corporate law in the last half of the 19th century and early part of the 20th century."[90]

One of the earliest formulations of the state law doctrine of successor liability was presented by the Circuit Court for the Eastern District of Missouri in *Hibernia Insurance Co. v. St. Louis and New Orleans Transportation Co.*,[91] decided in 1882. In that case, the court stated:

> The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and place itself practically beyond the reach of creditors, and this without assuming its liabilities.[92]

According to the court, equity would not permit such a result.[93] Thus, the court held that "the sale by the [seller] Company of all its property to another corporation, composed mostly, if not wholly, of the same persons, was fraudulent and void as to all creditors of the former company not assenting thereto."[94] In 1889, the Supreme

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[88] George Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 11 (2007) [hereinafter Kuney III]; *see* Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 182 n.5 (1973) ("[T]he general rule of corporate liability is that, when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities . . . ."); MPI Acquisition, LLC v. Northcutt, 14 So. 3d 126, 128 (Ala. 2009) ("As a general rule, the transferee/purchasing corporation is not liable for the debts and liabilities of the transferor/seller corporation." (citing Matrix-Churchill v. Springsteen, 461 So. 2d 782, 788 (Ala. 1984))).

[89] Kuney III, *supra* note 88, at 11.

[90] *Id.* at 11–12.

[91] 13 F. 516 (C.C.E.D. Mo. 1882).

[92] *Id.* at 519.

[93] *Id.* (explaining "equity cannot permit the owners of one corporation to organize another, and transfer from the former to the latter all the corporate property, without paying all the corporate debts").

[94] *Id.* at 518.

Court of New York similarly barred a purchaser from denying liability on a claim where the purchaser, "composed of the same individuals as the [seller] firm," purchased the assets of the seller in a "bold attempt to defraud the claimant out of her rights."[95]

In addition to recognizing this fraud-based exception to the general rule of non-liability, early courts recognized two additional exceptions – express assumption and the concept of the purchaser corporation as a "mere continuation" of the seller.[96] In *Reed Brothers Co. v. First National Bank of Weeping Water*,[97] the Supreme Court of Nebraska was faced with a situation in which the members of an already existing partnership formed a corporation with a strikingly similar name, using "[t]he $20,000 worth of merchandise owned by the partnership" as "the fund or property basis of the corporation."[98] In that case, the court found the purchaser-corporation was liable for seller-partnership liabilities as the corporation was essentially an incorporation of the partnership, or rather, a mere continuation of it.[99] The Circuit Court of the Eastern District of Louisiana arrived at a similar conclusion where "everything which could be relied upon belonging to the [seller] to pay and satisfy its outstanding liabilities – went into and constituted the capital and assets of the [purchaser]."[100] Despite finding that "everything was intended and carried out in the best of faith," the Eastern District of Louisiana held that the purchaser "must pay the debts of the old company."[101] Thus, by the turn of the twentieth century, the emerging doctrine of successor liability was gaining traction in a growing number of courts.[102]

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[95] Williams v. Colby, 6 N.Y.S. 459, 464 (N.Y. Gen. Term. 1889).

[96] *See e.g.*, *In re* W.J. Marshall Co., 3 F.2d 192, 194 (S.D. Ga. 1924) (recognizing mere continuation exception as common law rule); Austin v. Tecumseh Nat'l Bank, 68 N.W. 628, 629–30 (Neb. 1896) (discussing three situations in which successor is liable for its predecessor's debts: (1) express assumption; (2) transfer amounts "to a fraud upon the creditors of the old corporation"; and, (3) "the circumstances attending the creation of the new corporation and its succession to the business, franchise, and property of the old are such as to raise the presumption or warrant the finding that it is a mere continuation of the former"); Poisson v. Williams, 15 F.2d 582, 583 (E.D.N.C. 1926) (applying theory of mere continuation to hold newly formed company liable for debt of predecessor).

[97] 64 N.W. 701 (Neb. 1895).

[98] *Id.* at 703.

[99] *Id.* at 704 (citations omitted) (holding corporation liable for partnership's debt when partnership engaged in business during failing circumstances, transferred assets of partnership to corporation, and partnership's business was continued by corporation).

[100] Brum v. Merchs. Mut. Ins. Co., 16 F. 140, 143 (C.C.E.D. La. 1883).

[101] *Id.* (showing, even upon exercise of good faith, when new charter is granted and organization under charter succeeds to property of former company, it is liable for former company's debts).

[102] *See* Douglas Printing Co. v. Over, 95 N.W. 656, 659 (Neb. 1903) (citing Hibernia Ins. Co. v. St. Louis & New Orleans Trans. Co., 13 F. 516, 519 (C.C. Mo. 1882); Austin v. Tecumseh Nat'l Bank, 68 N.W. 628, 629–30 (Neb. 1896); Reed Bros. Co. v. First Nat'l Bank of Weeping Water, 64 N.W. 701 (Neb. 1895) ("We think the circumstances attending the creation of the new company, and its succession to the business and property of the old one, are of such a character as to warrant the finding that this new concern is a mere continuance of the old one."); *see also Brum*, 16 F. at 142 (showing new corporation taking over all property and assets of old corporation is liable to pay debts of old corporation); Campbell v. Farmers & Merchs. Bank, 68 N.W. 344, 345 (Neb. 1896) ("[W]here the stockholders of a corporation organize a new one, and

2. Current Application of the State Law Doctrine of Successor Liability

As of July 2010, every state or territory that has addressed successor liability has recognized it in some form or another, including the District of Columbia, Puerto Rico and the U.S. Virgin Islands.[103] The only state that has not yet addressed the doctrine is Wyoming.[104] The vast majority of courts addressing the state law doctrine of successor liability recognize four traditional exceptions to the general rule of non-liability, similar to those recognized by early courts –

> (1) there is an express agreement to assume the obligations of the transferor, (2) the transaction amounts to a *de facto* merger or consolidation of the two companies, (3) the transaction is a fraudulent attempt to escape liability, or (4) the transferee corporation is a mere continuation of the transferor.[105]

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appropriate all the assets of the old corporation, and continue its business, such acts afford conclusive evidence that the new corporation, by its conduct, assumed the liabilities of the old one.").

[103] *See* Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 361 (9th Cir. 1997) ("[C]reat[ing] federal common law rules of successor liability by drawing on the traditional rules of successor liability in operation in most states." (citation omitted)); *see also* Action Mfg. Co. v. Simon Wrecking Co., 387 F. Supp. 2d 439, 444 (E.D. Pa. 2005) (emphasizing need for national uniformity of successor liability in all states). *See generally* Kuney III, *supra* note 88, at 62 (showing varying states' approaches to successor liability are reason federal courts adopted uniform federal common law).

[104] *See* Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995) (showing most, but not all, states have adopted successorship doctrine which provides exception from general no liability rule); *see also In re* Welding Fume Prods. Liab. Litig., No. 1:03-CV-17000, 2010 WL 2403355, at *7 (N.D. Ohio June 11, 2010) (stating while some states have not adopted successor liability, its purpose is to ensure claimants have recourse against entities when entity sells its assets or changes its corporate form); Kuney III, *supra* note 88, at 147 (indicating as of June 2009, "Wyoming courts do not appear to have addressed successor liability in a published opinion"). In addition to Wyoming, American Samoa, Guam, and the Northern Mariana Islands have also not yet addressed the doctrine. *See id.* at 148. This was confirmed by my own research.

[105] MPI Acquisition, LLC v. Northcutt, 14 So. 3d 126, 128 (Ala. 2009) (quoting Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 785 (Ala. 1979)); *see* Savage Arms, Inc. v. W. Auto Supply Co., 18 P.3d 49, 54 (Alaska 2001) (citations omitted); Winsor v. Glasswerks PHX, L.L.C., 63 P.3d 1040, 1044 (Ariz. Ct. App. 2003) (citation omitted); Ford Motor Co. v. Nuckolls, 894 S.W.2d 897, 903 (Ark. 1995) (citation omitted); Centerpoint Energy, Inc. v. Super. Ct. of San Diego County, 69 Cal. Rptr. 3d 202, 218 (Ct. App. 2007) (citation omitted); Alcan Aluminum Corp., Metal Goods Div. v. Elec. Metal Prods., Inc., 837 P.2d 282, 283 (Colo. Ct. App. 1992) (citation omitted); Chamlink Corp. v. Merritt Extruder Corp., 899 A.2d 90, 93 (Conn. App. Ct. 2006) (citations omitted); Bingham v. Goldberg. Marchesano. Kohlman. Inc., 637 A.2d 81, 89–90 (D.C. Ct. App. 1994) (citations omitted); Bernard v. Kee Mfg. Co., 409 So. 2d 1047, 1049 (Fla. 1982) (citations omitted); Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734, 749 (Haw. 2007) (citation omitted); Vernon v. Schuster, 688 N.E.2d 1172, 1175–76 (Ill. 1997) (citations omitted); Sorenson v. Allied Prods. Corp., 706 N.E.2d 1097, 1099 (Ind. Ct. App. 1999) (citation omitted); Comstock v. Great Lakes Distrib. Co., 496 P.2d 1308, 1311 (Kan. 1972) (citations omitted); Parker v. Henry A. Petter Supply Co., 165 S.W.3d 474, 479 (Ky. Ct. App. 2005) (citation omitted); Bourque v. Lehmann Lathe, Inc., 476 So. 2d 1125, 1127 (La. Ct. App. 1985) (citing omitted); Nissen Corp. v. Miller, 594 A.2d 564, 565–66 (Md. 1991) (citations omitted); Guzman v. MRM/Elgin, 567 N.E.2d 929, 931 (Mass. 1991) (citations omitted); Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 509–10 (Mich. 1999) (citations omitted); Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989) (citation omitted); Paradise Corp.

In addition to these four exceptions, there is growing recognition of two additional exceptions – "continuity of enterprise"[106] and "product line."[107] Unfortunately, "[e]ach of these species of successor liability has, within it, different sub-species with different standards and variations in the jurisdictions that recognize them."[108] Thus, in order to determine whether a particular sale of assets will subject the purchaser to successor liability, it is necessary to look to the particular state in which the sale took place and to that state's particular treatment of the successor

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v. Amerihost Dev., Inc., 848 So. 2d 177, 179 (Miss. 2003) (citations omitted); Chem. Design, Inc. v. Am. Standard, Inc. 847 S.W.2d 488, 491 (Mo. Ct. App. 1993) (citations omitted); Jones v. Johnson Mach. & Press Co. of Elkhart Ind., 320 N.W.2d 481, 483 (Neb. 1982) (citations omitted); Lamb v. Leroy Corp., 454 P.2d 24, 27 (Nev. 1969) (citation omitted); Bielagus v. EMRE of N.H. Corp., 826 A.2d 559, 564 (N.H. 2003) (citations omitted); Lefever v. K.P. Hovnanian Enters., Inc., 734 A.2d 290, 292 (N.J. 1999) (citations omitted); Sw. Distrib. Co. v. Olympia Brewing Co., 565 P.2d 1019, 1022 (N.M. 1977); Schumacher v. Richards Shear Co., 451 N.E.2d 195, 198 (N.Y. 1983) (citations omitted); G.P. Publ'ns, Inc. v. Quebecor Printing, 481 S.E.2d 674, 679 (N.C. Ct. App. 1997) (citations omitted); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118, 121 (N.D. 1984) (citations omitted); Flaugher v. Cone Auto. Mach. Co., 507 N.E.2d 331, 334 (Ohio 1987) (citations omitted); Pulis v. U.S. Elec. Tool Co., 561 P.2d 68, 69 (Okla. 1977) (citations omitted); Tyree Oil, Inc. v. Bureau of Labor & Indus., 7 P.3d 571, 573–74 (Or. Ct. App. 2000) (citations omitted); Cont'l Ins. Co. v. Schneider, Inc., 873 A.2d 1286, 1291 (Pa. 2005) (footnote omitted); Oquendo v. Petrie Retail Inc., 167 P.R. Dec. 509, 525 (P.R. 2006); Simmons v. Mark Lift Indus., Inc., 622 S.E.2d 213, 215 (S.C. 2005) (citation omitted); Parker v. W. Dakota Insurors, Inc., 605 N.W.2d 181, 184–85 (S.D. 2000) (citation omitted); Gas Plus of Anderson Cnty., Inc. v. Arowood, No. 03A01-9311-CH-00406, 1994 WL 465797, at *3 (citations omitted) (Tenn. Ct. App. Aug. 30, 1994); Tabor v. Metal Ware Corp., 168 P.3d 814, 816 (Utah 2007) (citations omitted); Gladstone v. Stuart Cinemas, Inc., 878 A.2d 214, 220 (Vt. 2005) (citation omitted); Harris v. T.I., Inc., 413 S.E.2d 605, 609 (Va. 1992); Hall v. Armstrong Cork, Inc., 692 P.2d 787, 789–90 (Wash. 1984) (citations omitted); Davis v. Celotex Corp., 420 S.E.2d 557, 562 (W. Va. 1992) (citations omitted); Fish v. Amsted Indus., Inc., 376 N.W.2d 820, 823 (Wis. 1985) (citation omitted).

[106] *See* Turner v. Bituminous Cas. Ins., 244 N.W.2d 873, 882 (Mich. 1976) (establishing continuity of enterprise exception); *see also Andrews*, 369 So. 2d at 785 (applying exception because of "basic continuity of the enterprise between the original Smith Co. and Hobam: the same products were manufactured by the same people in the same place . . . . Hobam holds itself out to its customers as an old established company and solicits their business as if it were the old family firm"); *Savage Arms*, 18 P.3d at 55–56 (indicating "[t]he key factors under the 'continuity of enterprise' exception . . . are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity." (footnote omitted)).

[107] *See* Ray v. Alad Corp., 560 P.2d 3, 11 (Cal. 1977) (establishing product line exception); *see also Savage Arms*, 18 P.3d at 55 at n.25 (explaining "[u]nder the 'product line' exception, a successor will be liable if it acquires substantially all of the predecessor's assets and undertakes essentially the same manufacturing operation of the same or similar products" (citations omitted)); *Lefever*, 734 A.2d at 292 (explaining purchase of "substantial part of the manufacturer's assets and continuing to market goods in the same product line" exposes corporation to strict liability in tort for defects in such products); *Cont'l Ins. Co.*, 873 A.2d at 1291 n.8 (adopting product-line exception, "which permits successor liability to be imposed for injuries caused by defective products manufactured by a predecessor if the successor continues to manufacture the product." (citations omitted)); *Hall*, 692 P.2d at 790 (finding product line rule is rooted in tort law and corporate law).

[108] Kuney III, *supra* note 88, at 12; *see* United States v. Gen. Battery Corp., 423 F.3d 294, 301 (3d Cir. 2005) (indicating "although the general doctrine of successor liability is 'largely uniform' under state law . . . this uniformity is less apparent when the general standards are applied in specific cases" (internal citations omitted)); Ruiz v. Blentech Corp., 89 F.3d 320, 322 (7th Cir. 1996) (determining "Illinois and California have different rules for determining when one corporation is responsible, as a successor, for the tort liabilities of its predecessors").

liability doctrine.[109] No matter how the doctrine is applied, where an exception is found to apply to the general rule of non-liability, the result is the same – the creditor or claimant of the seller is permitted to seek relief from the purchaser. The question then becomes, what type of claim does the successor liability claimant possess?

At first blush, it would appear as though the claim against the purchaser is wholly derivative of the seller's liability. Surely, a successor liability claim does not "have an existence independent of the underlying liability of the entity that sold the assets."[110] And, in a number of jurisdictions, a successor liability claimant's inability to recover from the predecessor is a required element of the successor liability claim.[111] However, each exception to the general rule of non-liability is not solely derivative of the seller's liability, as each requires some action on the part of the purchaser in order for successor liability to attach.[112] Where the assumption exception applies, the purchaser must have expressly assumed the liabilities.[113]

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[109] For an extremely detailed and thoughtful analysis of the state law doctrine of successor liability and the various ways in which each state applies it, please refer to Professor George Kuney's article. *See* Kuney III, *supra* note 88.

[110] *In re* Fairchild Aircraft Corp., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998); *see* Herbolsheimer v. SMS Holding Co., 608 N.W.2d 487, 496 (Mich. Ct. App. 2000) ("Simply being a successor in liability does not make a company liable – there must be an allegedly viable legal claim against the predecessor in order for the case to survive a motion for summary disposition."); Russell v. SunAmerica Secs., Inc., Civ. No. E90-0084, 1991 WL 352563, at *2 (S.D. Miss. Mar. 6, 1991) ("Reason dictates that in an action such as this, where liability is sought to be imposed against a successor corporation for the torts of its predecessor, the successor's liability, if any, derives exclusively from and is coterminous with the liability to which the predecessor could have been subjected.").

[111] *See* Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, 59 F.3d 48, 51 (7th Cir. 1995) ("[T]his Circuit and others have held that a creditor's ability to recover against the predecessor is a factor of significant weight in deciding whether to allow successor liability." (citing Musikiwamba v. ESSI, Inc., 760 F.2d 740, 750 (7th Cir. 1985) ("[I]t would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief . . . ."))); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) (enumerating factors relevant to imposition of successor liability in labor context, including "the ability of the predecessor to provide relief"); Ray v. Alad Corp., 560 P.2d 3, 8–9 (Cal. 1977) (citing "virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business" as one of "[j]ustification[s] for imposing strict liability upon a *Successor*" (emphasis added)); Bennett v. MC # 619, Inc., 586 N.W.2d 512, 517 (Iowa 1998) (listing "predecessor is presently unable to provide relief" as element necessary "[t]o prove successor liability in the context of a civil rights case"); Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 820 (N.J. 1981) (quoting *Ray*, 560 P.2d at 9) (imposing liability on successor corporation if it has ability to assume risk of original manufacturer).

[112] *See* Kuney III, *supra* note 88, at 55 ("Successor liability arises out of the liability of the predecessor . . . but at the same time requires certain *actions* on the part of the purchaser, *not* merely the purchaser's acquisition of the property itself-thus it is not 'solely derivative.'" (emphasis added)); *see also* Alec P. Ostrow, *Free and Clear of Successor Liability or Whose Liability is it Anyway?*, 2003 NORTON ANN. SURV. BANKR. L. 125 (discussing "grounds for the imposition of successor liability" and observing "no matter how formulated, [they] deal with the conduct of the purchaser, not the conduct of the debtor").

[113] *See* Kuney III, *supra* note 88, at 55 (reasoning successor liability does not apply unless purchaser assumes liability in agreement); *see also* Kessinger v. Grefco, Inc., 875 F.2d 153, 155 (7th Cir. 1989) (recognizing purchaser organization is not liable for liabilities of seller corporation unless purchaser

Where a "de facto merger is found, or when mere continuation of enterprise justifies imposing successor liability, it is the purchaser's post-sale conduct (in continuing the business in substantially the same form and manner) that [is the necessary final element that] gives rise to liability."[114] Thus, the transfer of property alone will not impose state law successor liability on the purchaser of that property – "successor liability is based on the actions of the purchaser and not merely the property itself."[115] The claim against the purchaser is not a claim against any specific asset transferred to the purchaser. Certainly, if a claimant were successful in his or her successor liability action against a purchaser, "the liability [would] not [be] capped at the value of the assets as they [would be] in the case of an *in rem* interest."[116] Therefore, a state law successor liability claim is essentially *in personam* in nature.[117]

Because of the *in personam* nature of state law successor liability claims, they are not "interests" in the property sold.[118] The case law supports this conclusion. In a search of the language of more than four hundred cases addressing the doctrine of successor liability, the phrase "interest in property" appeared less than ten times,

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corporation assumes such liabilities); Kuney I, *supra* note 53, at 261 (explaining successor liability is justified if purchaser expressly or impliedly agreed to assume liability).

[114] Kuney I, *supra* note 53, at 261 (internal citations omitted); *see* Greystone Cmty. Reinv. Ass'n v. Berean Capital, Inc., 638 F.2d 278, 290 (D. Conn. 2009) (determining successor corporation is continuation of predecessor corporation if "successor maintains the same business" with same management, products, and conditions); *see also* Societe Anonyme Dauphitex v. Schoenfelder Corp., No. 07 Civ. 489, 2007 WL 3253592, at *3–5 (S.D.N.Y. Nov. 2, 2007) (considering various factors to determine if de facto merger has occurred, such as continuity of management, assets, and ownership and whether successor assumed liabilities necessary to continue business of predecessor corporation).

[115] Robert M. Fishman & Matthew A. Swanson, *What Is Your "Interest" in Section 363(f)?*, 2008 NORTON ANN. SURV. BANKR. L. 315, 318. Although the transferred property itself does not give rise to the successor liability claim, it is not suggested that the transfer of property is not an essential aspect of any successor liability claim – without such transfer there would be no successor against whom to bring a claim. The purchase of assets alone, however, will not give rise to successor liability. *See* Cyr v. B. Offen & Co., 501 F.2d 1145, 1152 (1st Cir. 1974) (emphasizing transferee of assets is not automatically liable for predecessor's liabilities and debt); Kuney III, *supra* note 88, at 11 (explaining when corporate assets are sold, "assets are transferred free and clear of all but valid liens and security interests"); *see also* 3 COLLIER ON BANKRUPTCY, ¶ 363.06[7], at 363-56 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (articulating purchaser of assets does not assume seller's liabilities unless purchaser agrees). Rather, the purchaser's post-sale actions must satisfy the requirements of the relevant exception to the general rule of non-liability for successor liability to attach. *See* 3 COLLIER ON BANKRUPTCY, ¶ 363.06[7], at 363-56 (explaining successor liability will not attach unless a minimum of one of four exceptions is met); *see also* Cooper v. Lakewood Eng'g & Mfg. Co., 45 F.3d 243, 245 (8th Cir. 1995) (listing four relevant exceptions under Minnesota law); Conway v. White Trucks, 885 F.2d 90, 93 (3d Cir. 1989) (articulating four exceptions under Pennsylvania law).

[116] Kuney III, *supra* note 88, at 56; *see* Ostrow, *supra* note 112, at 131 ("[T]he liability imposed is not limited to the purchase price or the value of the assets acquired.").

[117] *See* Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp., 195 B.R. 716, 730 (N.D. Ind. 1996) ("Successor liability . . . does not turn a claim into an *in rem* interest simply because it allows recovery from an asset purchaser." (citation omitted)); *In re* Fairchild Aircraft Corp., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995) ("[W]hile successor liability may give a party an alternative entity from whom to recover, the doctrine does not convert the claim to an *in rem* action running against the property being sold." (footnote omitted)), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

[118] *See supra* notes 77–80 and accompanying text.

none in reference to the successor liability claim itself.[119] The term "interest" appeared frequently in the cases surveyed, but once again, the interest or interests discussed were not in reference to the successor liability claim. Instead, courts were referring to interest rate,[120] policy interests,[121] ownership interests,[122] security interests,[123] and other varied usages of the term "interest." If a successor liability claim against the purchaser of assets did generate some kind of "interest" in those transferred assets, it would seem likely that at least one court would link the successor liability claim directly to the property sold. And yet, in none of the cases surveyed was any such connection made between the successor liability claim and the property sold. Rather, a successor liability claimant simply possesses an *in personam* claim against the purchaser of assets whose conduct satisfies the requirements of one of the exceptions to the general rule of non-liability. And, as previously discussed, an *in personam* claim under state law is not related to, nor does it create, an "interest in property."[124]

3. State Law Successor Liability Claims in the Context of UCC Foreclosure Sales

The conclusion that successor liability claimants do not possess an "interest" in the property transferred is further supported by the general rule that "a UCC foreclosure sale affords an acquiring corporation no automatic exemption from

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[119] The majority of cases searched were gleaned from the most recent appendix to Professor Kuney's Taxonomy article. *See* Kuney III, *supra* note 88, at app. at 9–10. Cases using the phrase "interest in property" used that term in the following ways: reference to an ownership interest, Orthotec, LLC v. REO Spineline, LLC, 438 F. Supp. 2d 1122, 1133 (C.D. Cal. 2006); quotation of section 548(a)(1)(A), *In re* Metro Sewer Servs. Inc., 374 B.R. 316, 324 (Bankr. M.D. Fla. 2007); quotation of section 363(f), Diguilio v. Goss Int'l Corp., 906 N.E.2d 1268, 1275 (Ill. App. Ct. 2009); Lefever v. K.P. Hovnanian Enters., 734 A.2d 290, 292–93, 296 (N.J. 1999); and, quotation of section 544(b), *In re* Easyriders, Inc., No. SV 01-16836, 2006 Bankr. LEXIS 2445, at *13 (Bankr. C.D. Cal. May 18, 2006).

[120] *See, e.g.*, Miller v. R.J. Reynolds Tobacco Co., 502 F. Supp. 2d 1265, 1268 (S.D. Fla. 2007) (discussing jurisdictional standard in federal courts); Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734, 738 n.3 (Haw. 2007) (explaining possible liability included interest); Gray v. Mundelein Coll., 695 N.E.2d 1379, 1383 (Ill. App. Ct. 1998) (awarding prejudgment interest).

[121] *See, e.g.*, Action Mfg. Co. v. Simon Wrecking Co., 387 F. Supp. 2d 439, 448 (E.D. Pa. 2005) (depicting interests of national uniformity); Guerrero v. Allison Engine Co., 725 N.E.2d 479, 482 (Ind. Ct. App. 2000) (describing interest in product safety); Telxon Corp. v. Smart Media of De. Inc., Nos. 22098, 22099, 2005 WL 2292800, at *35 (Ohio Ct. App. Sept. 1, 2005) (discussing social policy).

[122] *See, e.g.*, Dir. of Bureau of Labor Standards v. Diamond Brands, Inc., 588 A.2d 734, 736 n.6 (Me. 1991) (discussing employer ownership interests); Timmerman v. Am. Trencher, Inc., 368 N.W.2d 502, 507 (Neb. 1985) (analyzing common ownership interests in context of corporate entity); Parker v. W. Dakota Insurors, Inc., 605 N.W.2d 181, 186 (S.D. 2000) (stating plaintiff lacked ownership interest in insurance business).

[123] *See, e.g.*, Storage & Office Sys., LLC v. United States, 490 F. Supp. 2d 955, 959 (S.D. Ind. 2007) (discussing section 6323(a) of Internal Revenue Code); CMCB Enters., Inc. v. Ferguson, 114 P.3d 90, 92 (Colo. App. 2005) (noting security interest in furniture, fixtures, and equipment under Uniform Commercial Code); Bingham v. Goldberg. Marchesano. Kohlman. Inc., 637 A.2d 81, 93 (D.C. 1994) (highlighting evidence of security interest in computer equipment).

[124] *See supra* notes 77–80 and accompanying text (analyzing interests in property).

successor liability."[125] Under Uniform Commercial Code section 9-617, formerly section 9-504, "[a] transferee that acts in good faith takes free of the *rights and interests* described in subsection (a) . . . ."[126] Subsection (a), meanwhile, refers to "the debtor's rights in the collateral," "the security interest under which the disposition is made," and "any subordinate security interest or other subordinate lien."[127] In interpreting these provisions, courts have shed light on how successor liability claims are viewed generally.

In *Glynwed, Inc. v. Plastimatic, Inc.*,[128] the District Court for the District of New Jersey emphasized that the successor liability plaintiff "[wa]s not asserting an interest in the collateral purchased at the 9-504 sale, but [wa]s attempting to hold [the defendant purchasers] liable as a successor corporation under the law of successor liability."[129] Other courts have emphasized this "distinction with a difference",[130] *i.e.*, "there is a distinction between permitting an unsecured creditor to assert a lien against assets that have been sold pursuant to a section 9-504 foreclosure sale and permitting an unsecured creditor to assert a claim of successor liability against the purchaser of that collateral."[131] Because successor liability claimants have no "interest" in the property transferred at foreclosure, section 9-617 does not preclude later imposition of successor liability.[132] Thus, permitting imposition of successor liability against UCC foreclosure purchasers underscores

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[125] Milliken & Co. v. Duro Textiles, LLC, No. BRCV2002-1364, 2005 WL 1791562, at *9 (Mass. Super. Ct. 2005 June 10, 2005) (citations omitted); *see* Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 267 (1st Cir. 1997) ("[E]xisting case law overwhelmingly confirms that an intervening foreclosure sale affords an acquiring corporation no automatic exemption from successor liability." (citations omitted)); Stoumbos v. Kilimnik, 988 F.2d 949, 962 (9th Cir. 1993) ("The mere fact that the transfer of assets involved foreclosure on a security interest will not insulate a successor corporation from liability where other facts point to continuation."); Asher v. KCS Int'l, Inc., 659 So. 2d 598, 600 (Ala. 1995) (concluding "purchase of . . . assets through a foreclosure sale does not affect the imposition of successor liability"); G.P. Publ'ns, Inc. v. Quebecor Printing, 481 S.E.2d 674, 679–80 (N.C. Ct. App. 1997) ("[A] successor liability claim is not absolutely barred where a secured creditor purchases the debtor's assets via Article 9 . . . ." (emphasis omitted)).

[126] U.C.C. § 9-617(b) (2002) (emphasis added).

[127] *Id.* § 9-617(a)(1)–(3).

[128] 869 F. Supp. 265 (D.N.J. 1994).

[129] *Id.* at 273 (distinguishing Liqui * Lawn Corp. v. Andersons, 509 N.E.2d 1236, 1238–39 (Ohio 1987)).

[130] *Id.* at 274.

[131] Cont'l Ins. Co. v. Schneider, Inc., 873 A.2d 1286, 1292 (Pa. 2005) (citing *Glynwed*, 869 F. Supp. at 274); *see* Glentel, Inc. v. Wireless Ventures, LLC, 362 F. Supp. 2d 992, 1000 (N.D. Ind. 2005) (noting claimant "is not attempting to enforce a lien on the assets that [purchaser] purchased from [foreclosed seller;] rather, it is pursuing a claim of successor liability to collect a debt"); Milliken & Co. v. Duro Textiles, LLC, No. BRCV2002-1364, 2005 WL 1791562, at *9 (Mass. Super. Ct. 2005 June 10, 2005) (observing plaintiff successor liability claimant "[wa]s not asserting an interest in the collateral purchased at the § 9-617 sale, but [wa]s attempting to hold [the purchaser] liable as a successor corporation under the law of successor liability").

[132] *See Glynwed*, 869 F. Supp. at 272–75 (holding purchaser corporation liable for seller corporation's commercial debt even when assets were sold in foreclosure sale); *see also* Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, 123 F.3d 201, 207–08 (4th Cir. 1997) (holding purchaser corporation liable for judgment against old corporation, even though assets were purchased at public foreclosure sale); *Glentel*, 363 F. Supp. 2d at 1000 (allowing claimant to collect debt from purchaser corporation, even though purchaser corporation bought assets during foreclosure sale).

the conclusion that state law successor liability claimants do not have an "interest" in the property transferred.[133]

The state law doctrine of successor liability simply permits a claimant to assert an *in personam* claim against the purchaser of transferred property where that purchaser's actions fall within one of the exceptions to the general rule of non-liability.[134] In light of *Butner* and *Barnhill*, because state law does not grant successor liability claimants an "interest in property" with respect to their claims, successor liability claims do not constitute "interests in property" under section 363(f), that is, unless federal law provides to the contrary.[135]

III. DOES FEDERAL LAW CREATE AN "INTEREST IN PROPERTY"?

In order to determine whether any "controlling federal law"[136] or "federal interest requires a different result"[137] from that found through application of state law, this paper examines "interests in property" under federal law generally, both in and out of the bankruptcy context. Although the scant case law in this area favors an expansive interpretation of "interest in property" under section 363(f) to include successor liability claims, the analysis that follows reveals this to be erroneous as federal law does not create such an "interest in property," nor does it compel a different result from that achieved by application of state law.

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[133] The courts reaching the conclusion that UCC foreclosure sales do not cut off successor liability did not address the possibility that this conclusion may reduce the price a willing purchaser will pay at a UCC foreclosure sale. *See infra* Part IV.B.1 (rejecting argument stating imposition of successor liability against section 363(f) purchaser would impermissibly reduce purchase price). Nor were these courts given pause by the fact that this rule would arguably disturb the priority scheme of UCC Article 9 by permitting an unsecured claimant to seek recovery from the UCC foreclosure purchaser when a secured creditor would be barred from doing so. *See* U.C.C. § 9-322 (2002) (outlining general priority rules); *see also* Wilson v. M & W Gear, 442 N.E.2d 670, 676 (Ill. App. Ct. 1982) ("As a general rule, the holder of a perfected security interest has an interest in the secured property, and the proceeds from the sale thereof, which is superior to the interests of unsecured creditors of the debtor and subsequent purchasers of the secured property."). *See generally infra* Part IV.C (rejecting argument permitting imposition of successor liability against section 363(f) purchaser would reorder Bankruptcy Code priorities).

[134] Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973) (explaining "when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability"); *see* Florum v. Elliott Mfg. Co., 629 F. Supp. 1145, 1148 (D. Colo. 1986) (emphasizing "product line exception" to non-liability followed by some courts in strict liability cases); *see also* Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968) (recognizing exceptions under state law to general non-liability due to successorship).

[135] *See* Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (defining "interest in property" with reference to state law unless there is "controlling federal law"); Butner v. United States, 440 U.S. 48, 54–55 (1978) (explaining "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. . . . [u]nless some federal interest requires a different result"); *see* also *In re* Eveleth Mines, LLC., 312 B.R. 634, 650 (Bankr. D. Minn. 2004) (looking to state law to define "nature of rights and interest in property" when "no controlling federal law would govern" (citations omitted)).

[136] *Barnhill*, 503 U.S. at 398.

[137] *Butner*, 440 U.S. at 55.

A. Federal Law "Interests in Property" Generally

Much like in the state law context, there appears to be no set definition of "interest in property" under federal law. As was previously observed, "[t]he intention of Congress controls what law, federal or state, is to be applied."[138] As such, the first step in assessing whether the particular right or interest constitutes an "interest in property" is to determine whether state or federal law controls.[139] Applying this rule in the federal tax law context, the Supreme Court in *Drye v. United States*[140] set forth the following test: "We look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."[141] Accordingly, for federal tax purposes, determination of a "future interest" has been held to be a matter of federal law[142] while determination of the "possibility of the revesting of property or the distribution of income" has been deemed a state matter.[143] Unfortunately, these distinctions shed little light on what exactly constitutes an "interest in property" under federal law.

Federal cases directly addressing what constitutes an "interest in property" provide some limited insight. A lien, for instance, has been described as an "interest in property" based on its "practical effects," *i.e.*, "[a] lien on real property

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[138] Helvering v. Stuart, 317 U.S. 154, 161 (1942) (citing Lyeth v. Hoey, 305 U.S. 188, 194 (1938); Burnet v. Harmel, 287 U.S. 103, 110 (1932)); *see Butner*, 440 U.S. at 55 (articulating "[p]roperty interests are created and defined by state law. . . . [u]nless some federal interest requires a different result"); Midlantic Nat'l Bank v. N.J. Dep't of Envtl Prot., 474 U.S. 494, 505 (finding "Congress did not intend for the Bankruptcy Code to pre-empt all state laws"). *See generally supra* Part II.A (discussing how to interpret federal statute).

[139] *See Barnhill*, 503 U.S. at 398 (stating "interest in property" is defined by state law unless a controlling federal law exists); *see also* Mottaz v. Oswald (*In re* Frierdich), 294 F.3d 864, 867 (7th Cir. 2002) (requiring analysis to determine if definition of "interest in property" is controlled by federal law or state law); Jones v. Atchison (*In re* Atchison), 925 F.2d 209, 210 (7th Cir. 1991) (rationalizing "[a]bsent a federal provision to the contrary, a debtor's interest in property is determined by applicable state law").

[140] 528 U.S. 49 (1999).

[141] *Id.* at 58 (citing Moran v. Comm'r, 309 U.S. 78, 80 (1940) ("State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.")).

[142] *See* United States v. Pelzer, 312 U.S. 399, 402–03 (1941) (holding determination of "future interest" is based on federal law); *see also* Charles v. Hassett, 43 F. Supp. 432, 433–34 (1942) (looking to federal tax law to determine if gift is future interest in property); Braddock v. United States, No. GCA-532, 1973 WL 665, at *1 (N.D. Fla. Nov. 5, 1973) (explaining determination of whether something is future interest in property is determined by federal law, not state law).

[143] *Helvering*, 317 U.S. at 161 (positing Congress' designation of applying federal definition to determine future interest in federal tax scheme should necessarily imply "possibility of the revesting of property or the distribution of income" to be determined by state law); *see* Blair v. Comm'r, 300 U.S. 5, 9, 10 (1937) (ruling validity of assignment and disposition of property are subject to state law); *see also* Sun First Nat'l Bank of Orlando v. United States, 607 F.2d 1347, 1358 (Cl. Ct. 1979) (emphasizing "[w]hen Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the 'necessary implication,' we think, is that the possibility is to be determined by the state law. Grantees under deeds, wills and trusts, alike, take according to the rule of the state law" (citations omitted)).

runs with the land and is enforceable against subsequent purchasers."[144] A tenancy in common also grants "an interest in property in accordance with the percentage of [the tenant in common's] contribution to the purchase price."[145] Like a lien, a tenancy in common represents an interest in specific property.[146] With respect to *economic* "interests in property," the Fifth Circuit Court of Appeals has observed,

> A taxpayer does not have an economic interest in property merely because his right to payments is linked to profits, dividends, farm produce, or the like. The question in all cases is what is owned by whom, or more exactly, what is the source of the right pursuant to which payments are received.[147]

In that case, the Fifth Circuit distinguished between receipt of payment based on what was sold and receipt of payment based on what was retained.[148] In either case, sale or retention of a specific asset was a necessary component of the "economic interest in property."[149] In describing an "*insurable* interest in property," the District Court for the District of Kansas noted that it may be "entirely disconnected from any title, lien, or possession" as the proper focus is whether the holder of such interest "will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by happening of the event insured against."[150] In this particular context, it goes without saying that the "insurable interest in property" is directly connected to a specific asset the insurance is meant to protect. Overall, federal cases addressing what constitutes an "interest in property" tend to take for granted that a specific piece of property exists and is subject to that interest.

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[144] Permanent Mission of India to the UN v. City of New York, 551 U.S. 193, 198 (2007) (citing RESTATEMENT (FIRST) OF PROP. § 540 (1944)); *see* Streams Club, Ltd., v. Thompson, 536 N.E.2d 459, 461 (Ill. App. Ct. 1989) (stating obligation to pay ran with land and "was binding on subsequent purchasers of condominium units"); *see also* Kuney II, *supra* note 83, at 319 (noting lien is *in rem* interest and runs with land).

[145] *In re* Novak, 354 B.R. 611, 617 (Bankr. E.D.N.Y. 2006); *see* Colo. Korean Ass'n. v. Korean Senior Ass'n., 151 P.3d 626, 627 (Col. App. 2006) (stating interests of tenants in common "would mirror their respective contributions"); *In re* Estate of Garland, 928 P.2d 928, 932 (Mont. 1996) (positing respective shares of tenants in common depend on each tenant's "individual contributions to the acquisition and maintenance of the property").

[146] *See In re* Banner, 394 B.R. 292, 298 (Bankr. D. Conn. 2008) (emphasizing "[t]enancy in common represented the [d]ebtor's entire interest in the [p]roperty"); *see also* BLACK'S LAW DICTIONARY 1604 (9th ed. 2009) (defining tenancy in common as "[a] tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property").

[147] Bryant v. Comm'r, 399 F.2d 800, 806 (5th Cir. 1968).

[148] *Id.* (positing receipt of payment based on what was sold is purchaser's taxable income, and receipt based on what was retained is ultimately recipient's ordinary income).

[149] *Id.* (explaining "economic interest in property" exists in payments, and payments are received either by sale or retention).

[150] Tri-State Ins. Co. of Minn. v. H.D.W. Enters., Inc., 180 F. Supp. 2d 1203, 1222 (D. Kan. 2001) (citation omitted).

1. Instances of "Interest in Property" Under the Bankruptcy Code

The phrase "interest in property" is found throughout the Code.[151] The meaning of "interest in property" under these various sections of the Code illuminates what Congress may have intended "interest in property" to mean under section 363(f). Overall, bankruptcy courts tend to interpret "interest in property" by reference to state law.[152]

Section 101(37) of the Code defines a "lien" as a "charge against or *interest in property* to secure payment of a debt or performance of an obligation."[153] In interpreting this provision, the Bankruptcy Court for the District of Massachusetts made the following observation, "[t]he definition of lien is a matter of federal law, but the issue of whether a particular mortgage is a 'charge against or *interest in property* to secure payment of a debt' . . . is one of state law."[154] In coming to this conclusion, the court relied on *Butner* and its call to define property interests according to state law.[155] The Eighth Circuit Court of Appeals, relying on both *Butner* and *Barnhill*, "turn[ed] to state law for guidance" when interpreting section 101(37) "[b]ecause the Bankruptcy Code does not indicate whether a lien arising from a dissolution decree is a mere charge against property or, instead, an interest in property . . . ."[156] Reliance on state law to determine whether a particular lien constitutes an "interest in property" under section 101(37) appears to be the general rule.[157]

Section 101(54) of the Code defines "transfer" as, *inter alia*, "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or

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[151] The phrase "interest in property" appears no less than forty times throughout the Code. *See, e.g.*, 11 U.S.C. §§ 101(37), 101(54), 110(e)(2)(B)(iv), 361(1), 361(2), 361(3), 362(b)(3), 362(d)(1), 363(e), 363(f), 363(h)(2), 363(*l*), 363(p)(2), 506(a)(1), 522(b)(3)(B), 522(d)(5), 522(f)(2)(A), 522(q)(1), 522(q)(2), 541(a)(3), 541(a)(4), 541(a)(5), 541(a)(7), 541(c)(1), 541(c)(1)(B), 541(d), 546(b)(1)(A), 546(b)(1)(B), 546(b)(2), 547(c)(3), 547(d), 548(d)(1), 1123(a)(5)(D), 1129(a)(7)(B), 1129(b)(2)(A)(i)(II), 1205(b)(1), 1205(b)(2), 1205(b)(4), 1206, 1222(b)(8) (2006).

[152] Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (finding "property" and "interests in property" to be governed by state law); Butner v. United States, 440 U.S. 48, 55 (1979) (holding property interests in bankruptcy proceedings are controlled by state law, unless federal law specifically dictates to the contrary); *In re* Eveleth Mines, LLC., 312 B.R. 634, 650 (Bankr. D. Minn. 2004) (noting rights in property governed by state law when no controlling federal law exists).

[153] 11 U.S.C. § 101(37) (emphasis added).

[154] *In re* Smith, 315 B.R. 636, 640 (Bankr. D. Mass. 2004) (citing Butner, 440 U.S. at 55) (emphasis added).

[155] *Id.* (citing *Butner*, 440 U.S. at 55).

[156] Keller v. Johnson (*In re* Johnson), 375 F.3d 668, 670 (8th Cir. 2004) (citing *Barnhill*, 503 U.S. at 397–98; *Butner*, 440 U.S. at 55).

[157] *See In re* Sullivan, 387 B.R. 353, 358 (B.A.P. 1st Cir. 2008) (rationalizing whether mortgage is interest in property under section 101(37) is matter of state law); *see also In re* Yerrington, 144 B.R. 96, 99 (B.A.P. 9th Cir. 1992) (observing "extent of [debtor]'s interest in the Property when [his wife]'s lien attached is a question of state law" (citation omitted)); *In re* Fink, 417 B.R. 786, 790 (Bankr. E.D. Wis. 2009) ("Because the Code does not provide any guidance as to whether a lien arising from a mortgage granted pursuant to a dissolution decree is a mere charge against property or, instead, an interest in property that would constitute an 'aggregate interest,' we again turn to state law for guidance."(citations omitted)).

parting with—(i) property; or (ii) an *interest in property*."[158] In the House Report accompanying the 1978 Act, it was explained that "[u]nder this definition, any transfer of an *interest in property* is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because possession, custody and control are *interests in property*."[159] Thus, Congress intended "interest in property" under section 101(54) to include possession, custody and control of a specific asset. In *Barnhill*, the Supreme Court had the opportunity to address section 101(54) in the context of a section 547 avoidance action.[160] The Court observed that,

> 'What constitutes a transfer and when it is complete' is a matter of federal law. . . . But that definition in turn includes references to parting with 'property' and 'interest[s] in property.' In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law.[161]

Based on this precedent, a determination of what constitutes an "interest in property" for purposes of section 101(54) must necessarily rely on state rather than federal law.[162]

Sections 544, 545, 546, 547, 548 and 549 of the Code, generally referred to as the "trustee's avoidance powers," also make reference to "interests in property."[163] As was the case with sections 101(37) and 101(54), in determining whether a particular claim or right constitutes an "interest in property" for the particular avoidance power, courts look to state law. Thus, with respect to section 544, a provision permitting the trustee to "avoid any unperfected liens on bankruptcy estate property,"[164] "[s]tate law controls whether a creditor's security interest is unperfected and, therefore, avoidable under § 544(a)."[165] Under section 546(b)(1),

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[158] 11 U.S.C. § 101(54)(d) (emphasis added).

[159] H.R. REP. No. 95-595, at 314 (1977), *reprinted in* U.S.C.C.A.N. 1978, 6271 (emphasis added).

[160] 503 U.S. at 397 (addressing whether transfer occurred under sections 101(54) and 547(e)).

[161] *Id.* at 397–98 (citations omitted).

[162] *See In re* Meadows, 396 B.R. 485, 492 (B.A.P. 6th Cir. 2008) ("[I]t is normally necessary to look to state law to determine the existence or scope of a debtor's interest in property." (citing *Barnhill*, 503 U.S. at 397–98; Butner v. United States, 440 U.S. 48, 55 (1979)); *see also* McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945) (indicating when there is no "controlling federal statute" exists, an right or interest in property is defined by state law); *In re* Maurer, 140 B.R. 744, 745 (D. Minn. 1992) (explaining "[a]lthough what constitutes a transfer and when it occurs is generally a matter of federal law, in the absence of any controlling federal law, property and interests in property are defined by state law" (internal citations omitted)).

[163] 11 U.S.C. §§ 544–549.

[164] *In re* Davis, No. 07-42789, 2009 WL 1033194, at *5 (Bankr. E.D. Tex. Mar. 24, 2009) (citing Morris v. CIT Grp./Equip. Fin., Inc. (*In re* Charles), 323 F.3d 841, 842 (10th Cir. 2003); *see* 11 U.S.C. § 544(a) (discussing trustee's avoidance power); *see also In re* E.M. Williams & Sons, Inc., No. 08-30054-KRH, 2009 WL 2211727 (Bankr. E.D. Va. 2009) (explaining trustee can avoid unperfected liens under strong-arm powers of section 544).

[165] *In re Davis*, 2009 WL 1033194, at *5 (citing *In re Charles*, 323 F.3d at 842–43); *see In re* Houston, 409 B.R. 799, 807 (Bankr. D.S.C. 2009) ("The essential inquiry is whether, notwithstanding the transfer, a

the trustee's avoidance powers under sections 544, 545, and 549 are subject to "any generally applicable law that – (A) permits perfection of an *interest in property* to be effective against an entity that acquires rights in such property before the date of perfection."[166] This provision has been commonly interpreted to "permit[] a creditor to perfect its interest if state law provides for retroactive perfection that supersedes the rights of an intervening bona fide purchaser."[167]

Section 547, permitting the trustee to avoid preferential transfers,[168] is expressly excluded from section 546(b)'s limitations, leading the Supreme Court to conclude that "Congress quite specifically intended a trustee's power to avoid prepetition preferences to prevail over any state rules permitting relation back."[169] However, because section 547(b) refers to and requires a "*transfer* of an interest of the debtor in property[,]"[170] section 101(54)'s definition of transfer applies to determine whether a transfer occurred.[171] And, as the *Barnhill* Court held, whether a transfer has occurred is a matter of federal law, but section 101(54)'s reference to "interest in property" requires application of state law.[172] As such, section 547(b) relies on state law to determine whether an "interest in property" was preferentially transferred for purposes of avoidance.

Section 548, permitting the trustee to avoid fraudulent transfers, is similarly excluded from section 546's limitations and also requires a "*transfer* [] of an interest

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subsequent lien creditor or purchaser claiming through the debtor would, *under local law*, acquire rights to the property superior to the interest of the prior transferee." (emphasis added)); *In re* Lauver, 372 B.R. 751, 758 (Bankr. W.D. Pa. 2007) (describing trustee's section 544(a) "strong-arm power" and noting that "[t]he scope of this power . . . is governed by the substantive law of the state in which the property is located as of the filing of the bankruptcy petition"); *In re* Fuell, No. 06-40550, 2007 WL 4404643, at *2, (Bankr. D. Idaho Dec. 13, 2007) (discussing section 544(a) and stating "[w]hether a creditor has properly perfected its security interest is governed by state law" (citation omitted)).

[166] 11 U.S.C. § 546(b)(1)(A) (emphasis added). The House Report refers to "generally applicable law" as "applicable nonbankruptcy law" and states that it "relates to those provisions of applicable law that apply both in bankruptcy cases and outside bankruptcy cases." H.R. REP. NO. 95-595, at 371 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6327.

[167] *In re* Grede Foundries, Inc., No. 09-14337, 2009 WL 4927491, at * 3 (Bankr. W.D. Wis. Dec. 21, 2009) (citing 11 U.S.C. § 546 (b)(1)(A)); *see* Lincoln Sav. Bank v. Suffolk Cnty. Treasurer (*In re* Parr Meadows Racing Ass'n), 880 F.2d 1540, 1546 (2d Cir. 1989) ("[I]f a creditor possesses a prepetition interest in property, and state law establishes a time period for perfection of a lien based upon that interest, the 'lien does not lose its preferred standing by reason of the fact that it [is] not perfected until after the commencement of bankruptcy' so long as it is perfected within the time period established by state law." (quoting Poly Indus., Inc. v. Mozley, 362 F.2d 453, 457 (9th Cir. 1966), *cert. denied*, 493 U.S. 1058 (1990), *superseded by statute*, 11 U.S.C. § 362(b)(18) (1995), *as recognized in In re* Fisher, 184 B.R. 41, 45 n.4 (Bankr. M.D. Tenn. 1995)); *see also* Miner Corp. v. Hunters Run Ltd. P'ship (*In re* Hunters Run Ltd. P'ship), 875 F.2d 1425, 1428 (9th Cir. 1989) (discussing section 546(b) and Washington state law to determine whether lien was properly perfected).

[168] 11 U.S.C. § 547 (2006).

[169] Fid. Fin. Servs., Inc. v. Fink, 522 U.S. 211, 217 (1998).

[170] 11 U.S.C. § 547(b) (emphasis added).

[171] *See* Barnhill v. Johnson, 503 U.S. 393, 397 (1992) (using section 101(54) to determine whether transfer that trustee sought to avoid could have occurred before specific date); *see also supra* notes 158–62 and accompanying text.

[172] *Barnhill*, 503 U.S. at 397–98 (stating what qualifies as transfer is let to federal law, whereas interests in property arise from state law).

of the debtor in property."[173] As such, section 548 has similarly been interpreted to rely on state law to determine the debtor's "interest in property" with respect the contested transfer.[174] In the context of trustee avoidance powers, state law plays the important role of delimiting the extent of creditor's claims and the debtor's "interests in property."[175]

Within the bankruptcy context, when faced with a Code provision referring to an "interest in property," courts tend to interpret "interest in property" by reference to state law.[176] Indeed, *Butner* and *Barnhill* would seem to require this result, and no court has pointed to any federal law or interest requiring a different result. In light of the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning[,]"[177] the usage of "interest in property" in section 363(f) must also rely on state law. Thus, in order to determine whether a section 363(f) sale is free and clear of successor liability claims, a court should turn to state law to determine whether state law creates an "interest in property" with respect to successor liability claims. As the discussion in Part II indicated, no such "interest in property" exists under state law with respect to successor liability claims. Next, this paper examines the federal common law doctrine of successor liability to determine if this doctrine in any way changes the result.

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[173] 11 U.S.C. § 548 (a)(1); *see In re* Benskin, 161 B.R. 644, 646, 649–50 (Bankr. W.D. Tenn. 1993) (allowing trustee avoidance where debtors admitted transfers were fraudulent).

[174] *See* Frierdich v. Mottaz (*In re* Frierdich), 294 F.3d 864, 867 (7th Cir. 2002) (analyzing section 548(d)(1) in light of section 101(54) and stating "[a]lthough this definition of transfer is obviously federal, its references to 'property' and 'interest in property' require an analysis of whether a property interest was created under state law" (citing *Barnhill*, 503 U.S. at 398)); *see also* Jones v. Atchison (*In re* Atchison), 925 F.2d 209, 210 (7th Cir. 1991) (discussing section 548(a)'s reliance on section 101(54) and observing "[a]bsent a federal provision to the contrary, a debtor's interest in property is determined by applicable state law" (citing Butner v. United States, 440 U.S. 48, 55 (1979))); *In re* Roca, 404 B.R. 531, 540 (Bankr. D. Ariz. 2009) ("Section 548 of the Bankruptcy Code does not provide a definition of 'property' or an interest in property. Consequently, the Court must look to applicable state law to determine the definition." (citing *In re* Loken, 175 B.R. 56, 60 (B.A.P. 9th Cir. 1994))).

[175] *See* Gaughan v. Edward Dittlof Revocable Trust (*In re* Costas), 555 F.3d 790, 792–94 (9th Cir. 2009) (applying Arizona law and determining debtor did not have property interest in trust inheritance after her disclaimer of such property); *see also* Simpson v. Penner (*In re* Simpson), 36 F.3d 450, 453 (5th Cir. 1994) (explaining under Texas law, debtor's renunciation of is not transfer under section 548 because debtor never possesses such property); *In re* Sanford, 369 B.R. 609, 612–13 (B.A.P. 10th Cir. 2007) (discussing role of state law to determine if disclaimer of testamentary devise was to be transfer under section 548).

[176] *See Barnhill*, 503 U.S. at 398 (mandating "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law" (citing *Butner*, 440 U.S. at 54)); *see also In re* Costas, 555 F.3d at 793 (turning to Arizona law to determine definition of property because Congress intended for this to be decided by state law); Weinman v. Simons (*In re* Slack-Horner Foundries Co.), 971 F.2d 577, 580 (10th Cir. 1992) (defining "property and interests in property" with reference to state law).

[177] *See* Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934) (quoting Atl. Cleaners & Dyers, Inc. v. Unites States, 286 U.S. 427, 433 (1932)); *see also* Envtl. Defense v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (requiring same words in different parts of statute to be given same meaning unless it is reasonable Congress intended different meanings); United States v. Cinergy Corp., 458 F.3d 705, 710–11 (7th Cir. 2006) (explaining same words appearing in different parts of statute have identical meanings).

B. Federal Law Doctrine of Successor Liability

Despite the Supreme Court's declaration in *Erie Railroad Co. v. Tompkins*[178] that "[t]here is no federal general common law[,]"[179] the federal common law doctrine of successor liability has emerged and been applied in a number of cases. While the propriety of developing federal common law in the area of successor liability has been questioned in light of *Erie* and other Supreme Court precedent,[180] this paper examines only whether federal successor liability claimants have an "interest in property." Much like a state law successor liability claimant, a federal successor liability claimant does not have an "interest in property," but simply an *in personam* claim against the purchaser of assets.

In *John Wiley and Sons, Inc. v. Livingston*,[181] the Supreme Court addressed the successor liability doctrine for the first time.[182] In that case, the Court was faced with the issue of whether a successor corporation was subject to an arbitration provision contained in a collective bargaining agreement signed by its predecessor.[183] The Court first observed that "[f]ederal law, fashioned 'from the policy of our national labor laws,' controls."[184] With that in mind, the Court ruled

> that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.[185]

The Court described how this holding promoted the federal interest in arbitration and supported the "objectives of national labor policy" which "require that the rightful prerogative of owners independently to rearrange their businesses and even

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[178] 304 U.S. 64 (1938).

[179] *Id.* at 78.

[180] *See* Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981) (articulating federal courts have limited jurisdiction and thus, federal lawmaking is best left to Congress). *See generally* Wendy B. Davis, *De Facto Merger, Federal Common Law, and* Erie*: Constitutional Issues in Successor Liability*, 2008 COLUM. BUS. L. REV. 529, 541–58 (2008) (discussing *Erie* doctrine and impropriety of development of federal common law); Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny & Meyers*, 16 VA. ENVTL. L.J. 505, 507–08 (arguing federal courts over step limited jurisdiction when they create federal common law in areas of law best left to state control).

[181] 376 U.S. 543 (1964).

[182] *Id.* at 544 ("The major question[] presented [is] (1) whether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer . . . ."); *see* Musikiwamba v. ESSI, Inc., 760 F.2d 740, 745 (7th Cir. 1985) ("The Supreme Court first considered the doctrine of successor liability in John Wiley & Sons, Inc. v. Livingston . . . .").

[183] *John Wiley & Sons*, 376 U.S. at 546–47 (explaining issue was whether arbitration provisions of collective bargaining agreement survived merger).

[184] *Id.* at 548 (quoting Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 456 (1957)).

[185] *Id.*

eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."[186] In coming to these conclusions, the Court relied on federal policy objectives rather than on the transfer of assets, balancing the interests of the purchaser and seller of the assets against the interests of potentially adversely affected employees.[187] There was no indication that the employee successor liability claimants possessed any interest in the transferred assets.[188]

In *Golden State Bottling Co. v. NLRB*,[189] the Supreme Court held "that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d)[,]"[190] that is, with respect to injunctions and restraining orders resulting from unfair labor practices.[191] The Court reasoned, "[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees . . . and protection for the victimized employee – all important policies subserved by the National Labor Relations Act, are achieved at a relatively minimal cost to the bona fide successor."[192] Much like the Court's reasoning in *John Wiley*, the imposition of successor liability in *Golden State* was not due to the transfer of property alone, but rather, federal policy concerns and the successor's knowledge at the time of purchase.

The *Golden State* Court also observed that, in comparison to the state law doctrine of successor liability and the traditional exceptions, "[t]he perimeters of the labor-law doctrine of successorship . . . have not been so narrowly confined."[193] Indeed, the federal common law doctrine of successor liability is generally acknowledged to present a lower threshold for imposition of successor liability than the state law doctrine.[194] The Seventh Circuit Court of Appeals laid out the two elements of a federal successor liability claim:

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[186] *Id.* at 549.

[187] *Id.* (noting removal of previously established duty to arbitrate due to change in corporate structure or ownership would derogate from federal policy of using arbitration to settle labor disputes).

[188] *Id.* at 549–50 (rationalizing "[t]he preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded. We find none.").

[189] 414 U.S. 168 (1973).

[190] *Id.* at 180 (citations omitted).

[191] *See* FED. R. CIV. P. 65(d)(2) (stating original parties and those acting in concert or participation with original parties are bound by restraining orders and injunctions); *see also Golden State*, 414 U.S. at 179 (explaining Rule 65(d) is based on common law principle stating injunction binds defendant and those in privity with defendant (citing Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945))); United States v. Hall, 472 F.2d 261, 267 (5th Cir. 1972) (holding injunction not only binds defendant parties, but also those in privity with defendant).

[192] *Golden State*, 414 U.S. at 185 (internal citations omitted) (citing 29 U.S.C. §§ 141, 157 (2006)).

[193] *Id.* at 182–83 n.5 (citing Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968); 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7122–23 (perm. ed., rev. vol. 1961) (stating "general rule of corporate liability" and exceptions thereto)).

[194] *See* Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995) (describing state law successor liability and observing "[s]uccessor

> [I]n order to protect federal rights or effectuate federal policies, [the federal common law doctrine of successor liability] allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was "substantial continuity in the operation of the business before and after the sale."[195]

Neither of these elements refer to the successor liability claimant or the property transferred because, much like the state law doctrine of successor liability, the liability of the successor under federal common law is dependent upon actions of that successor, *i.e.*, knowledge and continuing operations.[196]

Although the federal common law doctrine of successor liability presents a lower threshold for imposition of liability when compared to the state law doctrine of successor liability, it appears to achieve the same result. A federal successor liability claimant has an *in personam* claim against the purchaser of assets where that purchaser had knowledge of the claim at the time of purchase, the purchaser continues operations of the seller, and policy considerations warrant imposition of successor liability.[197] While it is federal law that determines whether a federal successor liability claim may be imposed, the resulting *in personam* claim creates no "interest" in the property transferred.[198] Thus, neither state nor federal law doctrines of successor liability create an "interest in property" with respect to successor liability claims.

IV. ARE SUCCESSOR LIABILITY CLAIMS "INTERESTS IN PROPERTY" UNDER SECTION 363(F)?

The scant number of courts that have addressed the issue of whether successor liability claims constitute "interests in property" under section 363(f) have, for the most part, held that such claims are "interests in property" under section 363(f), thus barring the post-sale assertion of successor liability against section 363(f)

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liability under federal common law is broader still"); *see also* EEOC v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994) (noting federal law favors broader view of successor liability than limited approach taken by general common law); Fishman, *supra*, note 115, at 318 ("Successor liability under federal common law is even broader.").

[195] *Chi. Truck Drivers*, 59 F.3d at 49 (citation omitted).

[196] *See Golden State*, 414 U.S. at 180 (holding bona fide purchaser in privity with predecessor if purchaser has knowledge of unremedied wrongs); *see also supra* notes 112–15 and accompanying text (discussing state law successor liability claims).

[197] *See Golden State*, 414 U.S. at 188–89 (computing wrongfully discharged employee's successor claim in light of "what he would have earned" without reference to property transferred to successor); *see also Chi. Truck Drivers*, 59 F.3d at 49 (explaining purchaser liable as successor when successor had notice of claim prior to acquisition and successor substantially continued target's business after acquisition); *G-K-G, Inc.*, 39 F.3d at 748 (commenting successor liability imposed when successor had notice of adverse claim and substantially continued operation of business subsequent to acquisition).

[198] *See supra* notes 75–79 and accompanying text (distinguishing *in rem* which relates to interests in specific things and *in personam* which does not).

purchasers.[199] This majority position relies in large part on three components: (a) an expansive view of the "interest in property" language of section 363(f); (b) federal bankruptcy preemption of successor liability; and, (c) the theory that allowing imposition of successor liability claims against section 363(f) purchasers would upset Code priorities.[200] It is clear, however, that despite these well-reasoned arguments in favor of including successor liability claims within the ambit of section 363(f)'s "interest in property" language, both Supreme Court precedent and the implications of such a broad interpretation require otherwise.

A. Expansive vs. Narrow Interpretations of "Interest in Property"

The issue of whether a successor liability claim constitutes an "interest in property" for purposes of section 363(f) free and clear treatment has been directly addressed by three Circuit Courts of Appeals – the Second Circuit in *In re Chrysler LLC*[201] and *Douglas v. Stamco*,[202] the Third Circuit in *In re Trans World Airlines, Inc.*,[203] and the Fourth Circuit in *In re Leckie Smokeless Coal Co.*[204] Each of these courts joined the majority of lower courts in adopting an expansive view of "interests in property," holding that a successor liability claim constitutes an "interest in property" under section 363(f).[205] Meanwhile, the First and Seventh

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[199] *See In re* Trans World Airlines, Inc., 322 F.3d 283, 286 (3d Cir. 2003) (holding sale order extinguishes successor liability of purchaser under section 363); *see also* Douglas v. Stamco, 363 F. App'x 100, 103 (2d Cir. 2010) (holding under New York Law, successor liability extinguished through section363 in certain situations); *In re* Motors Liquidation Co., 428 B.R. 43, 58 (Bankr. S.D.N.Y. 2010) (noting section 363(f) authorizes sale of assets "free and clear" of successor liability).

[200] *See In re Trans World Airlines, Inc.*, 322 F.3d at 286 (noting current trend for "more expansive reading of 'interests in property'"); *see also In re* Chrysler LLC, 576 F.3d 108, 126 (2d Cir. 2009) (finding imposition of successor liability on purchaser to violate Code priorities), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010); MPI Acquisition, LLC v. Northcutt, 14 So. 3d 126, 130 (Ala. 2009) (holding Bankruptcy Code preempts state law successor liability).

[201] 576 F.3d at 108.

[202] 363 F. App'x 100 (2d Cir. 2010).

[203] 322 F.3d at 285.

[204] 99 F.3d 573 (4th Cir. 1996).

[205] *See Douglas*, 363 F. App'x at 102–03; *Chrysler*, 576 F.3d at 126; *Trans World Airlines, Inc.*, 322 F.3d at 289; *In re Leckie Smokeless Coal*, 99 F.3d at 585. *Compare* Forde v. Kee-Lox, Mfg. Co., 437 F. Supp. 631, 634 (W.D.N.Y. 1977) ("[T]he Bankruptcy Act clearly entitles purchasers at liquidations sales to take title to the property free of all claims."), *In re* General Motors Corp., 407 B.R. 463, 501 (Bankr. S.D.N.Y. 2009) (addressing section 363 and ruling "that property can be sold free and clear of successor liability claims"), *In re* Berkeley Premium Nutraceuticals, Inc., No. 08-15012, 2008 Bankr. LEXIS 3578, at *14 (Bankr. S.D. Ohio Dec. 26, 2008) (authorizing sale free and clear of successor liability), *In re* Lady H. Coal Co., 199 B.R. 595, 605 n.6 (Bankr. W.D. Va. 1996) ("It is conceptually difficult to understand how an unsecured creditor can assert that they are to be excluded from the definition of 'interests' as utilized in the Bankruptcy Code in § 363(f)."), Myers v. United States, 297 B.R. 774, 781–82 (Bankr. C.D. Cal. 2003) (finding successor liability claim was not "interest in property" for purposes of section 363(f)), Paris Mfg. Corp. v. Ace Hardware Corp. (*In re* Paris Indus. Corp.), 132 B.R. 504, 510 n.14 (Bankr. D. Me. 1991) ("To conclude that a bankruptcy court cannot approve the sale of assets free and clear of such future claims against a purchaser from the debtor significantly impairs the bankruptcy court's ability to administer bankruptcy estates."), *In re* All Am. of Ashburn, Inc., 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (adopting expansive view and finding 363 sale to be free and clear of successor liability claims), *with* Mickowski v.

Circuits, although not addressing the issue directly, have suggested that a successor liability claim is not an "interest in property" under section 363(f).[206] This thesis addresses the majority position first.

In *Leckie Smokeless*, the Fourth Circuit Court of Appeals laid the groundwork for both the Second and Third Circuits' later decisions, when it declined to "limit the scope of section 363(f) to *in rem* interests."[207] The claims at issue in *Leckie Smokeless* involved financial obligations owed to "the Plan" and "the Fund" arising out of the Coal Industry Retiree Health Benefit Act of 1992.[208] In the consolidated cases, the various debtors subject to such obligations sought permission to sell their assets pursuant to section 363(f) free and clear of any federal successor liability with respect to the Coal Act.[209] The Fourth Circuit reasoned that the rights of the Plan and the Fund to collect Coal Act premiums constituted "interests in property" under section 363(f) because such rights were

> grounded, at least in part, in the fact that those very assets [sold were] employed for coal-mining purposes: if [the purchasers] had never elected to put their assets to use in the coal-mining industry, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek premium payments from them. Because there is therefore a relationship between (1) the Fund's and Plan's rights to demand premium payments from [the purchasers] and (2) the use to which [the purchasers] put their

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Visi-Trak Worldwide, LLC, 321 F. Supp. 2d 878, 883 (N.D. Ohio 2003) ("[A] sale of assets under § 363(f) is free and clear of secured claims only. It does not extend to unsecured creditors."), R.C.M. Exec. Gallery Corp. v. Rols Capitol Co., 901 F. Supp. 630, 637 (S.D.N.Y. 1995) ("[T]here is no federal preemption of state law successor liability merely because the sale of assets occurred in a bankruptcy proceeding."), Schwinn Cycling & Fitness v. Benois (*In re* Schwinn Bicycle Co.), 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997) ("[Section 363(f)] and its invocation in the sale order in no way protects the buyer from current or future product liability; it only protects the purchased assets from lien claims against those assets.").

[206] Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 50 (7th Cir. 1995) (addressing successor liability and observing "there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities"); Zerand-Bernal Grp. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) (suggesting section 363(f) cannot be employed to extinguish successor liability claims); W. Auto Supply Co. v. Savage Arms, Inc. (*In re* Savage Arms Indus., Inc.), 43 F.3d 714, 721 (1st Cir. 1994) (assuming that if successor liability constitutes an "interest" extinguished by a section 363 sale, it nevertheless cannot be extinguished without "appropriate notice").

[207] 99 F.3d at 582. In coming to this conclusion, the Fourth Circuit expressly recognized its previous observation in *Yadkin Valley Bank & Trust Co. v. McGee (In re Hutchinson)* that "courts have recognized that general, unsecured claims do not constitute 'interests' within the meaning of § 363(f)." *Id.* at 581–82 (quoting Yadkin Valley Bank & Trust Co. v. McGee *(In re* Hutchinson), 5 F.3d 750, 756 n.4 (4th Cir. 1993)). Despite coming to the opposite conclusion, the *Leckie* court did not overrule *Yadkin*. *Id.* at 587.

[208] *Id.* at 576–77 (describing nature of retiree benefit obligations at issue in *In re Leckie Smokeless Coal*).

[209] *Id.* at 577–79 (noting previous cases whereby debtors sought to sell assets without obligations under Coal Act, pursuant to section 363).

> assets, we find that the Fund and Plan have interests in those assets within the meaning of section 363(f).[210]

In reaching this conclusion, the Fourth Circuit relied on the fact that the purchaser of the assets continued to use those assets in the same fashion as the seller.[211] This fact, however, merely satisfies one of the two elements of a federal successor liability claim, knowledge of the claim at the time of the sale being the second.[212] Even where both elements are satisfied, a successor liability claimant is not granted an "interest in property" with respect to the property sold, but rather has an *in personam* claim against the purchaser of that property.[213]

In *Trans World Airlines*,[214] the Third Circuit Court of Appeals adopted the reasoning of *Leckie Smokeless* with respect to continuing use of the purchased property and concluded that successor liability claims constitute "interests in property" under section 363(f) because "they arise from the property being sold."[215] In support of this conclusion, the Third Circuit asserted that "to equate interests in property with only *in rem* interests such as liens would be inconsistent with section 363(f)(3), which contemplates that a lien is but one type of interest."[216] Section 363(f)(3), one of the five conditions under which a section 363(f) sale may take

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[210] *Id.* at 582. Interestingly, the Fourth Circuit came to the conclusion that the rights of the Plan and the Fund to collect against the purchaser constitute "interests in property" without addressing "the question of whether third parties become the debtors' successors in interest within the meaning of the Coal Act upon purchasing [the debtor's] property." *Id.* at 582 n.11. Rather than first determining whether the purchaser could be held liable under federal successor liability law, which would have ended the inquiry altogether if the court found that the purchaser was not a successor in interest, the Fourth Circuit skipped ahead the issue of whether potentially non-existent successor liability claims constitute "interests in property" under section 363(f). *See id.*

[211] *See id.* at 583 (holding purchaser engaged in substantially same business and therefore plan premium was "interest" in purchased assets).

[212] *See* Chi. Truck Drivers Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995) (noting two elements of federal successor liability claim are whether "(1)successor had notice of claim before acquisition and (2)[if] there was substantial continuity in operation of business existed before and after sale"); EEOC v. G-K-G, Inc., 39 F.3d 740, 747–48 (7th Cir. 1994) (discussing how to satisfy federal successor liability claim); Maccora, Peoples & Lam v. Malone, Civ. No. 95-20366 SW, 1996 WL 350808, at *2 (N.D. Cal. Jun. 20, 1996) (stating for successor liability claim to exist "the successor must have notice of the claim before the acquisition . . . .[and] there must be substantial continuity in the operation of the business before and after the sale").

[213] *See supra* Part III.B; *see also* Ninth Ave. Remedial Grp. v. Allis-Chambers Corp., 195 B.R. 716, 730 (Bankr. N.D. Ind. 1996) ("Successor liability . . . . does not turn a claim into an *in rem* interest simply because it allows recovery from an asset purchaser."); *In re* Fairchild Aircraft Corp., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995) ("[W]hile successor liability may give a party an alternative entity from whom to recover, the doctrine does not convert the claim to an *in rem* action running against the property being sold."), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

[214] 322 F.3d 283 (3d Cir. 2003).

[215] *Id.* at 290 (citing *In re Leckie Smokeless Coal*, 99 F.3d 573, (4th Cir. 1996)) (noting successor liability claim was "interest in property" under section 363(f) because transferred assets of debtor gave rise to claim).

[216] *Id.* (discussing how equating interests in property solely with *in rem* interests would conflict with section 363(f)(3)).

place, refers to a situation where the "interest in property" is a lien.[217] As such, the phrase "interest in property," as used in section 363(f), includes, but is not limited to, liens.[218] This fact, without more, does not imply that general unsecured claims, such as successor liability claims, are also included within the phrase "interest in property." Thus, without further explanation as to why general unsecured successor liability claims constitute "interests in property" under section 363(f), the Third Circuit has presented an unpersuasive argument.

In *Chrysler*,[219] the Second Circuit Court of Appeals relied on both *Leckie Smokeless* and *Trans World Airlines* to conclude that "the term 'interest in property' encompasses those claims that 'arise from the property being sold[,]'" and thus the proposed section 363 sale was ordered free and clear of successor liability claims.[220] This decision was subsequently vacated by the Supreme Court,[221] thus rendering its precedential power moot.[222] However, exactly one week after vacating the *Chrysler* decision, the Second Circuit decided *Douglas v. Stamco*,[223] which served to reassert the Second Circuit's position that successor liability claims constitute "interests in property" under section 363(f).[224] The *Douglas* decision relied entirely on policy

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[217] 11 U.S.C. § 363(f)(3) (2006) ("The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if . . . . (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property . . . ."); *see* Matsuda Capital, Inc. v. Netfax Dev., LLC (*In re* Netfax, Inc.), 335 B.R. 85, 88 (Bankr. D. Md. 2005) (noting that in order for lien to qualify as "interest in property" under "11 U.S.C. § 363(f)(3) . . . . the aggregate value of all liens on the property must be less than the sale price of the property"); *see also* Franz Scherer v. Fed. Nat'l Mortgage Ass'n (*In re* Terrace Chalet Apartments, Ltd.), 159 B.R. 821, 825 (Bankr. N.D. Ill. 1993) (noting "sale which extinguishes a lien may proceed under Section 363(f)(3) if the proceeds from the sale of the asset exceed 'the aggregate value of all liens' on the property").

[218] *See In re Trans World Airlines, Inc.*, 322 F.3d at 290 (discussing how liens, in addition to other interests, qualify as "interests in property" under section 363(f)); 3 COLLIER ON BANKRUPTCY, ¶ 363.06 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009), *available at* LEXIS, 3-363 Collier on Bankruptcy P 363.03. ("Certainly a lien is a type of 'interest' of which the property may be sold free and clear. This becomes apparent in reviewing section 363(f)(3), which provides for particular treatment when 'such interest is a lien.' Obviously there must be situations in which the interest is something other than a lien; otherwise, section 363(f)(3) would not need to deal explicitly with the case in which the interest is a lien."); *see also* WBQ P'ship v. Commonwealth of Va. Dep't of Med. Assistance Servs. (*In re* WBQ P'ship), 189 B.R. 97, 105 (Bankr. E.D. Va.1995) ("Since 'lien' is a defined term under the Bankruptcy Code, it stands to reason that Congress would have used the term 'lien' instead of 'interest,' had it intended to restrict the scope of § 363(f) to liens. Furthermore, § 363(f)(3) applies to situations in which 'such interest is a lien,' which suggests that liens constitute a subcategory of 'any interest.' Other courts have indicated that the term 'interest' is broad, covering more than mere liens.").

[219] 576 F.3d 108 (2d Cir. 2009), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010).

[220] *Id.* at 126 (citing *In re Trans World Airlines, Inc.*, 322 F.3d at 290; *In re Leckie Smokeless Coal*, 99 F.2d at 582) (agreeing with proposition successor liability claims are "interest in property" because such rights are grounded in property being sold, thus sale was free and clear of those claims)).

[221] *See* Ind. State Police Pension Trust v. Chrysler LLC (*In re* Chrysler LLC), 592 F.3d 370, 372 (2d Cir. 2010) (noting Supreme Court vacated earlier judgment and dismissed appeal as moot).

[222] *See* Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (indicating "a decision that has been vacated has no precedential authority whatsoever"). Although vacated, the Second Circuit's decision in *Chrysler* remains helpful for understanding the arguments set forth in favor of the expansive interpretation of "interests in property" to include successor liability claims.

[223] 363 F. App'x 100 (2d Cir. 2010).

[224] *Id.* at 102.

reasons, rather than an analysis of the "interests in property" language found in section 363(f),[225] and will be subject to further analysis in subsequent sections of this thesis.[226]

Overall, each of the three circuit courts directly addressing the issue of whether successor liability claims constitute "interests in property" under section 363(f) have concluded that they do, relying primarily on the idea that such claims "arise" from the property being sold. And yet, the prior discussion of state and federal successor liability indicates that it is not the transferred property that gives rise to the successor liability claim, but rather it is the purchaser's actions subsequent to the purchase of that property that imposes liability.[227] As such, it is from the purchaser's post-sale actions that successor liability arises, not from purchased property itself. That a sale must take place in order for liability to attach to a successor is not in question. Nor is it questioned that a successor liability claim does not "have an existence independent of the underlying liability of the entity that sold the assets."[228] But, this does not alter the character of a successor liability claim as simply an *in personam* claim against the purchaser of assets that has met the criteria for imposition of successor liability, such as through express assumption of liability or by acting as a mere continuation of the seller.[229] By failing to recognize the very nature of successor liability claims as derivative of the seller's liability but also requiring action on the part of the purchaser, the decisions of the Second, Third and Fourth Circuit Courts of Appeals are unconvincing.

Indeed, in *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Tasemkin*,[230] the Seventh Circuit Court of Appeals asserted that "a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a *per se* preclusive effect on the creditor's chances."[231] This case, however, did not involve a section 363(f) sale.[232] Rather, after the debtor had filed for chapter 11 relief, a new entity "was incorporated for the purpose of obtaining the assets of [the

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[225] *Id.* (mentioning Code priorities and goal of asset maximization as underlying policy reasons to support decision).

[226] *See infra* Parts IV.B.1, IV.C.

[227] *See supra* Parts II.C.2, III.B.

[228] *In re* Fairchild Aircraft Corp., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995) *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998); *see* Herbolsheimer v. SMS Holding Co., 608 N.W.2d 487, 496 (Mich. Ct. App. 2000) ("Simply being a successor in liability does not make a company liable—there must be an allegedly viable legal claim against the predecessor in order for the case to survive a motion for summary disposition."); Russell v. SunAmerica Secs., Inc., 1991 WL 352563, at *2 (S.D. Miss. Mar. 6, 1991) ("Reason dictates that in an action such as this, where liability is sought to be imposed against a successor corporation for the torts of its predecessor, the successor's liability, if any, derives exclusively from and is coterminous with the liability to which the predecessor could have been subjected.").

[229] *See supra* notes 110–13 and accompanying text.

[230] 59 F.3d 48 (7th Cir. 1995).

[231] *Id.* at 51.

[232] *Id.* at 50 n.2 (noting case did not involve trustee sale because 363 not implicated).

debtor]" by acquiring the security interest of the debtor's secured lender.[233] Upon conversion of the case to chapter 7, the automatic stay was lifted in order to permit the new entity to foreclose on its collateral.[234] Having received no distribution on their ERISA claims in the bankruptcy proceeding, the successor liability claimants sought relief from the newly formed entity.[235] Although not involving a section 363(f) sale, the conclusion reached by the Seventh Circuit is apt – "there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities."[236] With that in mind, the Seventh Circuit permitted the federal successor liability claimants to proceed with their complaint against the new entity.[237]

Only lower courts have directly addressed the issue of whether successor liability claims constitute "interests in property" under section 363(f) and concluded that they do not.[238] A case frequently cited for this proposition is *In re White Motor Credit Corp.*,[239] decided by the Bankruptcy Court for the Northern District of Ohio. In that case, the court observed that "[g]eneral unsecured claimants including tort claimants, have no specific interest in a debtor's property. Therefore, section 363 is inapplicable for sales free and clear of such claims."[240] Despite this holding, the *White Motor* court went on to state that the "[a]bsence of specific statutory authority to sell free and clear poses no impediment. This authority is implicit in the court's general equitable powers and in its duty to distribute debtor's assets and determine controversies thereto."[241] Thus, according to the *White Motor* court, section 105(a), permitting "[t]he court . . . [to] issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title[,]"[242] permits a sale free and clear of successor liability claims where the language of section 363(f) does not.[243] Taking a similar approach, the Bankruptcy Court for the Western District of Washington also found general unsecured successor liability claimants to not possess "an interest in the specific property of the estate being sold" pursuant to

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[233] Chi. Truck Divers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 172 B.R. 877, 878 (N.D. Ill. 1994), *rev'd*, 59 F.3d 48 (7th Cir. 1995).

[234] *Id.*

[235] *Chi. Truck Drivers*, 59 F.3d at 49.

[236] *Id.* at 50.

[237] *Id.* at 51.

[238] *See* Mickowski v. Visi-Trak Worldwide, LLC, 321 F. Supp. 2d 878, 883 (N.D. Ohio 2003) ("[A] sale of assets under § 363(f) is free and clear of secured claims only. It does not extend to unsecured creditors."); R.C.M. Exec. Gallery Corp. v. Rols Capitol Co., 901 F. Supp. 630, 637 (S.D.N.Y. 1995) ("[T]here is no federal preemption of state law successor liability merely because the sale of assets occurred in a bankruptcy proceeding."); Schwinn Cycling & Fitness v. Benois (*In re* Schwinn Bicycle Co.), 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997) ("[Section 363(f)] and its invocation in the sale order in no way protects the buyer from current or future product liability; it only protects the purchased assets from lien claims against those assets.").

[239] 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987).

[240] *Id.* (finding successor liability claims do not constitute interests in property).

[241] *Id.* (citing Van Huffel v. Harkelrode, 284 U.S. 225 (1931)).

[242] 11 U.S.C. § 105(a) (2006) (depicting powers of court).

[243] *In re White Motor Credit Corp.*, 75 B.R. at 948 (explaining jurisdictional basis for proceeding).

section 363(f),[244] but such sale could be free and clear of general unsecured claims for policy reasons.[245]

Whether reached directly or indirectly, the conclusion that successor liability claims constitute "interests in property" under section 363(f) is the general consensus among most courts. And yet, in light of Supreme Court precedent with respect to statutory interpretation,[246] due process rights,[247] and the treatment of property interests in bankruptcy proceedings,[248] it is evident that this expansive reading of "interest in property" is fundamentally flawed.

1. Section 1141(c)

In *Russello v. United States*,[249] the Supreme Court stated, "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[250] Section 1141(c)[251] states, in part, "after confirmation of a plan, the property dealt with by the plan is free and clear of all *claims and interests*."[252] Section 363(f), meanwhile, permits sales of bankruptcy estate property "free and clear of any *interest* in such property" sold.[253] In light of *Russello* and the broader language used in section 1141(c), section 363(f)

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[244] *In re* New England Fish Co., 19 B.R. 323, 326 (Bankr. W.D. Wash. 1982) (analyzing applicability of Bankruptcy Code to property of estate).

[245] *Id.* at 328–29 (citing Nathanson v. NLRB, 344 U.S. 25 (1952)) (proclaiming goals of bankruptcy outweigh employee interests in rejecting labor agreement).

[246] Russello v. United States, 464 U.S. 16, 23 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))); United States v. Turkette, 452 U.S. 576, 580–81 (1981) (reasoning intentional exclusion of term, if unambiguous, should be "conclusive"); United States v. Wooten, 688 F.2d 941, 950 (4th Cir. 1982) (explaining Congress explicitly chose to include or exclude specific statutory provisions based on language of statute and surrounding provisions).

[247] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (requiring notice to be reasonably calculated to apprise parties of pending action for due process to be met); Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc., (*In re* Center Wholesale, Inc.)759 F.2d 1440, 1448 (9th Cir. 1985) (setting aside judgment in bankruptcy case because of failure by one party to satisfy due process requirements of timeliness and specificity); *In re* Loloee, 241 B.R. 655, 662 (B.A.P. 9th Cir. 1999) (concluding notice to creditor with potentially senior lien was insufficient because it failed to explain priority would be established at sale of encumbered property)).

[248] Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (finding "property" and "interests in property" to be governed by state law); Butner v. United States, 440 U.S. 48, 55 (1979) (holding property interests in bankruptcy proceedings are controlled by state law, unless federal law specifically dictates to the contrary); *In re* Eveleth Mines, LLC., 312 B.R. 634, 650 (Bankr. D. Minn. 2004) (noting rights in property governed by state law when no controlling federal law exists).

[249] 464 U.S. at 16.

[250] *Id.* at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

[251] *See supra* notes 49–53 and accompanying text (discussing section 1141(c)).

[252] 11 U.S.C. § 1141(c) (2006) (emphasis added).

[253] *Id.* § 363(f) (emphasis added).

should be interpreted narrowly to not include claims.[254] The fact that section 363(f) provides fewer procedural safeguards when compared to section 1141(c)[255] further suggests that the disparate language found in sections 1141(c) and 363(f) was intentional as those safeguards are arguably in place to protect the larger class of parties covered by the free and clear language found in section 1141(c).

Despite the discrepancy in language and the *Russello* precedent, neither the Third nor the Fourth Circuit Courts of Appeals addressed section 1141(c) in coming to the conclusion that section 363(f)'s "interest in property" language extends to successor liability claims.[256] In *Chrysler*,[257] however, the Second Circuit expressly rejected the argument that section 1141(c)'s broader language implies that section 363(f) does not include claims.[258] First, the court distinguished the two sections, observing that section 1141(c) "applies to all reorganization plans" while section 363(f) "applies only to classes of property that satisfy one of five criteria."[259] While it is true that subsections (1) through (5) of section 363(f) limit the applicability of section 363(f) to particular situations,[260] it does not follow that the language found in section 363(f) should be interpreted liberally in light of its limited applicability. And, the Second Circuit pointed to no authority dictating that result.[261]

After distinguishing sections 1141(c) and 363(f), the Second Circuit went on to assert that, "[g]iven the expanded role of § 363 in bankruptcy proceedings, it makes sense to harmonize the application of § 1141(c) and § 363(f) to the extent permitted by the statutory language."[262] For support of this conclusion, the Second Circuit pointed to the fact that despite not explicitly referring to liens, section 1141(c) has

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[254] *See In re* Chrysler LLC, 576 F.3d 108, 125 (2d Cir. 2009) ("Appellants argue that Congress must have intentionally included the word 'claims' in § 1141(c), and omitted the word from § 363(f), because it was willing to extinguish tort claims in the reorganization context, but unwilling to do so in the § 363 sale context."(internal footnote omitted), *vacated on other grounds*, 592 F.3d 370, 372 (2d Cir. 2010). *But see In re* Golf, LLC, 322 B.R. 874, 877 (Bankr. D. Neb. 2004) (observing 363(f)'s use has expanded from original intent). *See generally* Kuney I, *supra* note 53, at 236 (noting bankruptcy courts have not followed plain meaning of section 363(f)).

[255] *See* 11 U.S.C. § 363(f) (requiring little notice, disclosure, and opportunity for objectors and alternate bidders to be heard); *In re Golf, LLC*, 322 B.R. at 877 ("[Section] 363(b) and (f) control asset sales prior to plan approval and require less notice and opportunity for hearing than § 1123(a)(5)(D) and § 1141(c), which govern sales made pursuant to a plan."); Kuney I, *supra* note 53, at 236. (comparing section 1141(c) which requires "extensive disclosure" and multiple hearings with section 363(f) "which requires little in the way of notice, disclosure, and an opportunity for objectors and alternate bidders to actually be heard").

[256] *In re* Trans World Airlines, 322 F.3d 283, 285 (3d Cir. 2003) (holding because section 363(f) permits sale of property "free and clear" of an "interest in such property[,]" sale is "free and clear" of successor liability); UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 576 (4th Cir.1996) (ruling Bankruptcy Court could extinguish successor liability by issuing free and clear order pursuant to section 363(f)).

[257] 576 F.3d 108 (2d Cir. 2009), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010).

[258] *Id.* at 125 (comparing language of section 1141(c) and section 363(f), and explaining court did not "place such weight on the absence of the word 'claims' in § 363(f)").

[259] *Id.* (citing 11 U.S.C. §§ 363(f), 1141(c)) (explaining differences in language and structure of two sections).

[260] 11 U.S.C. § 363(f)(1)–(5) (setting forth five situations in which a free and clear sale may take place).

[261] *See generally In re Chrysler*, 576 F.3d at 125 (citing only Code sections).

[262] *Id.*

been held to extinguish liens through a confirmed plan.[263] And yet, in neither of the two cases cited for the proposition that sections 363(f) and 1141(c) ought to be "harmonized," did either court refer to section 363(f) in their respective holdings that section 1141(c) extinguishes liens.[264] As such, it is not entirely clear what the Second Circuit meant by "harmonize the application of § 1141(c) and § 363(f)."[265] Given the apparent flaws in the Second Circuit's reasoning in this regard, and the lack of any other reason for not following the precedent set by the Supreme Court in *Russello*, section 363(f) ought to be interpreted narrowly to not include claims in light of section 1141(c)'s broader language.[266]

2. The Matter of Notice

In *Mullane v. Central Hanover Bank & Trust Co.*,[267] the Supreme Court addressed the due process requirements of the Fourteenth Amendment and observed that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *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."[268] This requirement of notice is equally applicable in a bankruptcy proceeding as it would be in any other.[269] Indeed, section 363(b) only permits sales of bankruptcy estate property outside the ordinary course, such as through section 363(f), "after *notice* and a hearing."[270] In a number of the cases discussed, the successor liability claim, or

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[263] *See id.* at 126 (citing JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862, 870 (8th Cir. 2008)) (explaining precedents holding "confirmation of a reorganization can act to extinguish liens"); Elixir Indus. Inc. v. City Bank & Trust (*In re* Ahern Enters. Inc.), 507 F.3d 817, 820 (5th Cir. 2007) (noting other circuits have held section 1141(c) extinguished liens not preserved in confirmed chapter 11 plan).

[264] *See In re Chrysler*, 576 F.3d at 125–26; *JCB, Inc.*, 539 F.3d at 870 (making no reference to section 363(f) with respect to its assertion that "a lien not preserved by the plan may be extinguished"); *In re Ahern*, 507 F.3d at 820 (holding that "under section 1141(c), the confirmation of a Chapter 11 plan voids liens on property dealt with by the plan unless they are specifically preserved," but making no mention of section 363(f)).

[265] *See In re Chrysler*, 576 F.3d at 125 (limiting application of section 363(f) to specific classes of property).

[266] *Cf.* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 41 (2008) (holding stamp tax exemption applies "only to postconfirmation [sic] transfers" and not pre-confirmation transfers pursuant to section 363(f)). *But cf.* Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (applying different meanings to "allowed secured" language found in sections 506(a) and 506(d)).

[267] 339 U.S. 306 (1950).

[268] *Id.* at 314 (emphasis added) (citations omitted) (stating due process requires reasonably calculated notice).

[269] *See* Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (*In re* Center Wholesale, Inc.), 759 F.2d 1440, 1448 (9th Cir. 1985) (discussing due process and requirement of notice with respect to section 364 cash collateral order); *In re* Loloee, 241 B.R. 655, 661 (B.A.P. 9th Cir. 1999) (noting when "notice is inadequate, then the order is void" in context of lien priority dispute); *In re* Ex-Cel Concrete Co. Inc., 178 B.R. 198, 203 (Bankr. Ariz. 1995) (stating bankruptcy rules crafted to provide assurance of timely notice).

[270] 11 U.S.C. §§ 363(b), (f) (2006) (emphasis added); *see* W. Auto Supply Co. v. Savage Arms, Inc. (*In re* Savage Indus., Inc.), 43 F.3d 714, 723 (1st Cir. 1994) (court could not enjoin successor liability claims when

claims, at issue had already arisen at the time of the section 363(f) sale, thus there was no problem identifying successor liability claimants and giving those claimants notice of the section 363(f) sale.[271] But, the very concept of successor liability, particularly in the context of products liability, implies that claims may arise *after* the transfer of assets is complete. In light of *Mullane*, can a section 363(f) sale nonetheless be deemed free and clear of future successor liability claims?

In *Chrysler*, the Second Circuit Court of Appeals deferred answering this question to another day despite confirming the bankruptcy court's sale order that "extinguished the right to pursue claims 'on any theory of successor or transferee liability . . . whether known or unknown as of the Closing, now existing *or hereafter arising*, asserted or unasserted, fixed or contingent, liquidated or unliquidated.'"[272] The Second Circuit "affirm[ed] this aspect of the bankruptcy court's decision insofar as it constituted a valid exercise of authority under the Bankruptcy Code."[273] The court did, however, "decline to delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as [they] are presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law."[274] Thus, the Second Circuit acknowledged that extinguishing future claims may not have been an appropriate aspect of the section 363(f) sale order, but permitted the sale order to stand nonetheless.[275]

In *In re Paris Industries Corp.*,[276] the Bankruptcy Court for the District Court of Maine seemingly became the only court to expressly permit a section 363(f) sale to be free and clear of future successor liability claims.[277] In that case, the successor liability claimants purchased a wooden toboggan manufactured by the debtor prior

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inadequate notice was given); *see also In re* Watford, 159 B.R. 597, 599 (Bankr. M.D. Ga. 1993) (discussing notice and hearing requirement for sale or lease of property by trustee outside ordinary course of business).

[271] *See In re* Trans World Airlines, 322 F.3d 283, 285–86 (3d Cir. 2003) (discussing discrimination settlement prior to sale); *see also* UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 576–77 (4th Cir.1996) (discussing liability arising from Coal Act in sale of coal mine operations).

[272] *In re* Chrysler LLC, 576 F.3d 108, 127 (2d Cir. 2009), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010) (emphasis added) (quoting Sale Order at 40 –41).

[273] *Id.*

[274] *Id.*

[275] *Id.* Although the *Chrysler* opinion was vacated by the Supreme Court, the underlying sale order was not disturbed. Ind. State Police Pension Trust v. Chrysler LLC (*In re* Chrysler LLC), 592 F.3d 370, 372 (2d Cir. 2010).

[276] 132 B.R. 504 (Bankr. D. Me. 1991).

[277] *Id.* at 505–06. In *In re White Motor Credit Corp.*, the Bankruptcy Court for the Northern District of Ohio approached this conclusion when it permitted claims that arose prior to confirmation, but after the section 363(f) sale, to be extinguished by that sale, despite acknowledging that the successor liability plaintiffs "had no known claims against [the debtor] on the date of sale." 75 B.R. 944, 949 (Bankr. N.D. Ohio 1987). The court explained that due process was nevertheless satisfied because "notice in publications of national circulation was reasonably calculated to inform [those claimants] of the pendency of the sale." *Id.* at 949–50. Thus, according to the *White Motor* court, due process may be satisfied even where those adversely affected by a proceeding had no "opportunity to present their objections" because their claims did not exist at the time of the proceeding. *Id.* at 949 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

to the debtor's bankruptcy.[278] Subsequent to a "bankruptcy court-approved sale" of the debtor's manufacturing division to its successor, one of the claimants was injured while riding the toboggan.[279] As such, the claimants had no notice of the section 363(f) sale that ultimately extinguished their successor liability claim.[280] In addressing this lack of notice, the court stated that, "[t]o conclude that a bankruptcy court cannot approve the sale of assets free and clear of such future claims against a purchaser from the debtor significantly impairs the bankruptcy court's ability to administer bankruptcy estates."[281] Thus, despite clear Supreme Court precedent to the contrary, the *Paris Manufacturing* court not find the lack of notice to be a problem and the successor liability claim was deemed extinguished by the section 363(f) sale occurring prior to the accrual of that claim.[282]

In general, however, most courts appear reluctant to permit a section 363(f) sale to extinguish future successor liability claims because of the lack of notice to holders of such claims. In *Western Auto Supply Co. v. Savage Arms, Inc.* (*In re Savage Industries, Inc.*),[283] the First Circuit Court of Appeals held that, assuming a successor liability claim does constitute an "interest in property" under section 363(f), "there can be no question that [this] claim could not be extinguished absent a showing that [the claimant] was afforded appropriate notice in the particular circumstances."[284] This sentiment was echoed by the Fifth Circuit Court of Appeals in *Lemelle v. Universal Manufacturing Corp.*,[285] a case involving assertion of a successor liability claim that arose two years after the predecessor corporation's chapter 11 plan had been confirmed.[286] In declining to bar imposition of such claim against the debtor's successor, the Fifth Circuit stated "that, at a minimum, there must be evidence that would permit the debtor to identify, during the course of the bankruptcy proceedings, potential victims and thereby permit notice to these potential victims of the pendency of the proceedings."[287] Thus, assuming a successor liability claim is an "interest in property" for purposes of section 363(f) free and clear treatment, the holder of such claim must receive notice prior to its claim being extinguished by a section 363(f) sale.[288]

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[278] *Paris Mfg. Corp.*, 132 B.R. at 506.

[279] *Id.*

[280] *Id.* at 509 (stating order approving sale was entered without notice to plaintiffs).

[281] *Id.* at 510 n.14.

[282] *See id.* at 509–10 (holding plaintiffs were not prejudiced by lack of notice, even though Supreme Court has held parties should receive clear and unambiguous notice, since they would have had no claims against purchaser if sale did not occur).

[283] 43 F.3d 714 (1st Cir. 1994).

[284] *Id.* at 721.

[285] 18 F.3d 1268 (5th Cir. 1994).

[286] *Id.* at 1270–71 (describing plaintiff's action against successor corporation of mobile home manufacturer as emerging from chapter 11 proceedings).

[287] *Id.* (citing *In re* Chateaugay Corp., 944 F.2d 997, 1003(2d Cir. 1991); *In re* Piper Aircraft Corp., 162 B.R. 619, 628 (Bankr. S.D. Fla. 1994)).

[288] *See* Ninth Ave. Remedial Grp. v. Allis-Chambers Corp., 195 B.R. 716, 732 (Bankr. N.D. Ind. 1996) ("[A] sale free and clear does not include future claims that did not arise until after the bankruptcy proceedings concluded."); *cf. In re* Cone Mills Corp., 313 F. App'x 538, 541 (3d Cir. 2009) (barring

Whether or not future successor liability claims constitute "interests in property" under section 363(f), such claims are entitled to the protections afforded future claims generally. As a general rule, only those holding claims that arose prior to the debtor's bankruptcy filing will be subject to the debtor's discharge.[289] As the Eleventh Circuit Court of Appeals has observed, "[u]nder the Bankruptcy Code, only parties that hold pre-confirmation claims have a legal right to participate in a Chapter 11 bankruptcy case and share in payments pursuant to a Chapter 11 plan."[290] The Third Circuit Court of Appeals has similarly held that, "[u]nder fundamental notions of procedural due process, a claimant who has no appropriate notice of a bankruptcy reorganization cannot have his claim extinguished in a settlement pursuant thereto."[291] Consequently, where there exists a strong likelihood of future claims against a debtor arising post-bankruptcy, courts often appoint a representative to act on behalf of potential future claimants in the bankruptcy proceeding.[292] In the context of future asbestos liability, section 524(g) expressly permits the creation of a liquidating trust to pay future asbestos claimants.[293] Therefore, in order to satisfy the requirements of due process, some provision must be made in the bankruptcy proceedings for future successor liability claimants, possibly in the form of a personal representative or liquidating trust.[294]

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assertion of successor liability claim against section 363(f) purchaser where claimant "received all the notice that was due"). *See generally In re* Chance Indus., Inc., 367 B.R. 689, 709–10 (Bankr. D. Kan. 2006) (concluding although successor liability would be decided by state court, debtor and asset purchaser could not extinguish claim for future claimants in bankruptcy without satisfying due process).

[289] 11 U.S.C. § 101(10) (2006) (defining "creditor" as, *inter alia*, an "entity that has a claim against the debtor that arose *at the time of or before* the order for relief concerning the debtor" (emphasis added)); *Id.* § 1141(d) (discharging "debtor from any debt that arose before date of such confirmation"). *See generally In re* Senczyzyn, 426 B.R. 250, 256–57 (Bankr. E.D. Mich. 2010) (citing *In re* Dixon, 295 B.R. 226, 230 (Bankr. E.D. Mich. 2003)) (explaining income taxes although not yet due, were claim because courts look to relationship between debtor and creditor to determine if claim by creditor is considered at time of filing).

[290] Epstein v. Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp., 58 F.3d 1573, 1576 (11th Cir. 1995) (citing 11 U.S.C. §§ 101(10), 501, 502).

[291] Jones v. Chemetron Corp., 212 F.3d 199, 209–10 (3d Cir. 2000) (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–19 (1950); Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. Pa. 1995); W. Auto Supply Co. v. Savage Arms (*In re* Savage Indus.), 43 F.3d 714, 721 (1st Cir. Mass. 1994)).

[292] *Id.* at 209 ("[D]ue process considerations are often addressed by the appointment of a representative to receive notice for and represent the interests of a group of unknown creditors." (citing Hatch v. Riggs Nat'l Bank, 361 F.2d 559, 566 (D.C. Cir. 1966)); *Estate of Piper Aircraft Corp.*, 58 F.3d at 1575 (discussing appointment of a legal representative for future claimants)). *See generally In re* UNR Indus., Inc., 46 B.R. 671, 675–78 (Bankr. N.D. Ill. 1985) (ordering selection of legal representatives for protection of future claimants).

[293] 11 U.S.C. § 524(g)(2)(B)(i) (allowing for trusts to pay future claimants); *see In re* W. Asbestos Co. 313 B.R. 832, 852 (Bankr. N.D. Cal. 2003) (agreeing with plan proponents' assertion of section's purpose to provide future payments to claimants); *see also In re* G-I Holdings, Inc, 323 B.R. 583, 598 (Bankr. D.N.J. 2005) (noting Congressional intent of section 524(g) to create trust for payment of post-bankruptcy asbestos-related personal injury claims).

[294] *See In re* Fairchild Aircraft Corp., 184 B.R. 910, 932–33 (Bankr. W.D. Tex. 1995) (noting failure to provide protections for future claimants and concluding such failure precludes treating such future claims as claims subject to debtor's discharge), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998). Because some jurisdictions count as an element of successor liability claims the inability of the claimant to recover from the predecessor, provision of these protections may weigh against the successor liability claimant's right to hold the successor liable. *See supra* note 114 and accompanying text. This limitation on

Overall, due process requires that future successor liability claimants be afforded with at least some level of protection.[295] Even assuming a successor liability claim does constitute an "interest in property" under section 363(f), if that claim does not exist at the time of a section 363(f) sale, it cannot be extinguished by that sale. And, where there exists a high likelihood of future successor liability claims arising, then those future claimants are entitled to some form of protection and representation during the bankruptcy proceedings.

3. What About *Butner* and *Barnhill*?

In *Butner v. United States*[296] the Supreme Court held that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[297] And, in *Barnhill v. Johnson*,[298] the Court further held that, in the bankruptcy context, "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."[299] This precedent directly addresses the issue at hand – whether a successor liability claim constitutes an "interest in property" for the purposes of section 363(f) free and clear treatment. That issue, according to this precedent, must be decided by relevant state law unless some federal interest or law

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recovery may also come into play with respect to claims arising prior to the debtor's bankruptcy proceeding. Where a claim arises prior to a debtor's bankruptcy filing and the claimant is provided due notice of that filing, that claim will be subject to the debtor's discharge pursuant to section 1141(d). 11 U.S.C. § 1141(d). Meanwhile, section 524(e) clarifies that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Id.* § 524(e). *See* Zerand-Bernal Grp. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) ("[D]ischarge operates as an injunction, but only against suing the debtor; the statute is explicit on this point, ..." (citing 11 U.S.C. § 524(e)). As such, where a debtor sells substantially all of its assets to a third party pursuant to section 363(f) during the pendency of the bankruptcy proceeding, any successor liability claim arising therefrom will not be subject to the debtor's discharge. But, if the holder of such a successor liability claim was provided for in the predecessor's bankruptcy proceeding, and that particular jurisdiction counts inability to recover from the predecessor as a required element of a successor liability claim, that claim may be limited or barred entirely. *See supra* note 114 and accompanying text.

[295] *See In re G-I Holdings, Inc.*, 328 B.R. at 696 (stating statutory prerequisites set forth in section 542(g) are tailored to "protect the due process rights of future claimants." (quoting *In re* Combustion Eng'g, Inc., 391 F.3d 190, 234 (3d Cir. 2004))); Jeffrey Davis, *Cramming Down Future Claims in Bankruptcy: Fairness, Bankruptcy Policy, Due Process, and the Lessons of the Piper Reorganization*, 70 AM. BANKR. L.J. 329, 344–45 (1996) (discussing due process concerns in confirmation process to address future claims and successor liability); *see also* Kuney I, *supra* note 53 at 286 (proposing additions to current process are necessary to satisfy due process requirements).

[296] 440 U.S. 48 (1979); *see supra* Part II.A.

[297] *Butner*, 440 U.S. at 55; *see* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) ("Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." (citing *Butner*, 440 U.S. at 55; Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161–62 (1946))).

[298] 503 U.S. 393 (1992).

[299] *Id.* at 398.

requires otherwise.[300] And yet, none of the Circuit Courts of Appeals adopting the expansive interpretation of section 363(f)'s "interest in property" language addressed this precedent in their respective discussions of the "interest in property" issue, or at all, for that matter.

The Bankruptcy Court for the Southern District of New York, in *In re General Motors Corp.*,[301] appears to be one of only a few courts directly addressing whether successor liability claims constitute "interests in property" under section 363(f) to discuss this precedent.[302] In footnote ninety-nine of that lengthy opinion, the court summarily dismissed the claimants' reliance on *Butner*.[303] The *General Motors* court first asserted that "the *Butner* court laid out principles by which we determine what is property of the estate; it did not address the different issue of whether a state may impose liability on a transferee of estate property by reason of something the debtor did before the transfer."[304] While the first portion of that argument is undoubtedly correct, the second portion, although correct, misconstrues the issue. The issue *General Motors* addressed was whether a successor liability claim constituted an "interest in property" under section 363(f);[305] the issue was *not* whether a state may impose liability on the basis of that successor liability claim. Whether successor liability may be imposed on the purchaser of assets is determined by each state's particular usage of the common law doctrine of successor liability.[306] Or, in the case of a federal successor liability claim, whether successor liability may be imposed is determined by the federal common law doctrine of successor liability.[307] Only once a successor liability claim is established under the relevant successor liability doctrine and "imposed" against a section 363(f) purchaser do we address the issue of whether that claim constitutes an "interest in property" under section 363(f), that is, whether that claim survived the section 363(f) sale. To answer this question, *Butner* guides us to state law to

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[300] Note, if it is a federal successor liability claim at issue, the federal common law doctrine of successor liability would decide whether the claim constitutes an "interest in property" under section 363(f). *See* Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp., 195 B.R. 716, 723 (Bankr. N.D. Ind. 1996) (using federal common law doctrine of successor liability in determining claims arising after bankruptcy proceeding are not included in "free and clear" language of section 363(f)); *see also* EEOC v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994) (explaining reason for "special federal common law doctrine of successor liability" in particular case). *But see* Mickowski v. Visi-Trak Worldwide, LLC., 415 F.3d 501, 510 (6th Cir. 2005) (holding district court properly held Ohio state law applies relevant standard of successor liability).

[301] *See In re* Gen. Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

[302] *See id.* at 505 (stating "363(f) may be appropriately invoked to sell free and clear of successor liability claims"); *In re* Eleveth Mines LLC, 312 B.R. 634, 650 (Bankr. D. Minn. 2004) (citing *Barnhill*, 503 U.S. at 398; *Butner*, 440 U.S. at 54).

[303] *In re Gen. Motors*, 407 B.R. at 503 n.99 (asserting *Butner* Court's holding "neither supports nor defeats either party's position" and therefore not pertinent to making a decision in this case).

[304] *Id.* (stressing *Butner* Court did not address state imposed liability on estate property for debtor actions before transfer).

[305] *Id.* at 503 ("Neither the Code nor interpretive aids tells us how broadly or narrowly – in the particular context of section 363(f) – 'interest in property' should be deemed to be defined.").

[306] *See supra* Part II.C.2.

[307] *See supra* Part III.B.

determine whether the successor liability claim constitutes an "interest in property" for purposes of being cut off by section 363(f).[308]

The *General Motors* court further reasoned that *Butner* itself "noted that provisions of the Code can and do sometimes trump state law[,]" noting that section 363(f) "is exactly such a provision."[309] Unfortunately, the court did not explain *why* section 363(f) is "exactly such a provision" requiring a different result, nor did the *General Motors* court point to any "congressional command" or "identifiable federal interest"[310] barring application of state law to determine whether a particular claim constitutes an "interest in property" under section 363(f). *Butner* simply requires that a court defer to state law to determine whether a particular claim or interest constitutes an "interest in property."[311] If the claim or interest is found to be an "interest in property" under state law, section 363(f) will trump that state-created "interest in property" by permitting sale of estate property free and clear of that interest.[312] The fact that section 363(f) extinguishes state-created "interests in property" does not render *Butner* inapplicable to section 363(f)'s "interest in property" language. State law simply illuminates what claims and interests are subject to sales free and clear under section 363(f).

Although not addressed by the courts themselves, one could argue that a strong federal interest was at play in each of the Circuit Court of Appeals decisions adopting the expansive interpretation of section 363(f)'s "interest in property" language. That is, both the Fourth and Third Circuits were faced with national labor issues and potentially failing national industries, coal[313] and airline,[314] and the Second Circuit, in *Chrysler*, was faced with the imminent collapse of one of the nation's largest automobile manufacturers, one that had been infused with federal monies to prevent such a collapse.[315] These case-specific federal considerations, however, go more toward the existence of the successor liability claim itself. As the Supreme Court in *Golden State* made evident, federal policy concerns are key components of federal successor liability claims.[316] Thus, in the situations faced by

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[308] Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law.").

[309] *In re Gen. Motors.*, 407 B.R. at 503 n.99.

[310] *Id.* (citing *Butner*, 440 U.S. at 55) (determining federal law should apply without explanation); *see Butner*, 440 U.S. at 55.

[311] *Butner*, 440 U.S. at 55 (holding property interests are created and defined by state law).

[312] 11 U.S.C. § 363(f) (2006) (permitting sale of estate property free and clear of any interest in that property); *see In re Gen. Motors*, 407 B.R. at 503 n.99 (discussing situations where provisions of Bankruptcy Code trump state law). *See generally Butner*, 440 U.S. at 55 (holding state law defines property interests).

[313] *See generally* UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573 (4th Cir. 1996) (discussing successor liability issue in context of troubled coal industry).

[314] *See generally In re* Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) (determining whether successor liability claims constituted "interests in property" in shadow of national airline crisis).

[315] *See In re* Chrysler LLC, 576 F.3d 108, 111–12 (2d Cir. 2009) (examining dire consequences if section 363(f) sale were not approved to newly created government assisted entity), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010).

[316] *See* Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 184–85 (1973) (discussing important federal labor policy behind deciding against liability); *see also supra* note 208 and accompanying text.

the Third and Fourth Circuit Courts of Appeals, it could have been argued that the successor liability claims themselves ought to give way to the federal interests at stake.[317] If this argument were successful, the successor liability claims may have become a non-issue; that is, because the successor liability claims themselves would have been outweighed by the federal interest, there would be no need to address whether the section 363(f) sale would cut off liability with respect to those claims. If, on the other hand, that case-specific federal interest is used as a basis for not following the rule of *Butner* requiring deference to state law, precedent is set for future cases that may not implicate that same federal interest, or any federal interest for that matter.

Meanwhile, deference to state law in determining whether a successor liability claim constitutes an "interest in property" under section 363(f) will serve the three purposes set forth by the *Butner* court: (1) reducing uncertainty, (2) discouraging forum shopping, and (3) preventing "a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[318] If courts uniformly defer to state law in addressing the general issue of what constitutes an "interest in property" under section 363(f), it will reduce the uncertainty currently found among courts addressing that issue.[319] With respect to forum shopping, uniform deference to state law will likely reduce the incentive to push a company facing liability into bankruptcy court, rather than state court, for the purpose of selling substantially all of the company's assets and cutting off that liability. This, in turn, serves the third purpose of preventing "a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[320] As the Seventh Circuit Court of Appeals explained, "there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities."[321]

If *Butner* is not applied, and the relevant doctrine of successor liability is never analyzed to determine whether it grants successor liability claimants an "interest in property" with respect to their claims, corporations facing imminent liability will have incentive to enter bankruptcy and sell their assets pursuant to section 363(f),

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[317] Unlike the successor liability claims at issue in *Leckie* and *TWA*, the successor liability claims at issue in *Chrysler* were based on state law successor liability, thus any federal interests would not necessarily come into the analysis. *See In re Chrysler*, 576 F.3d at 126 ("It is the transfer of Old Chrysler's tangible and intellectual property to New Chrysler that could lead to successor liability (where applicable under state law) in the absence of the Sale Order's liability provisions. Because appellants' claims arose from Old Chrysler's property, 363(f) permitted the bankruptcy court to authorize the Sale free and clear of appellants' interest in the property.").

[318] Butner v. United States, 440 U.S. 48, 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

[319] *See supra* notes 83–86 and accompanying text (describing various methods of interpreting "interest in property" language of section 363(f)).

[320] *Butner*, 440 U.S. at 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)).

[321] Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 50 (7th Cir. 1995).

rather than sell those assets outside of bankruptcy.[322] If there is a strong federal interest served by not permitting assertion of a particular federal successor liability claim, that interest will be equally applicable inside and outside the bankruptcy process where it will factor into whether or not a federal successor liability claim may be imposed at all.[323] But, a strong federal interest in one case should not alter how the "interest in property" language of section 363(f) is treated generally.[324] Doing so would defeat the purposes served by uniform deference to state law, that is, reducing uncertainty, discouraging forum shopping, and preventing "a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[325]

Thus, when faced with the issue of whether a particular claim or interest constitutes an "interest in property" under section 363(f), *Butner* commands that state law governs.[326] The precedent set by *Barnhill* further supports this conclusion by making clear that when a Code provision refers to an "interest in property," that interest must be defined according to state law.[327] As the Bankruptcy Court for the District of Minnesota explained, "[a]ny treatment of this issue has to recognize a bedrock principle: in bankruptcy cases, the rule of decision for the nature of rights and interests in property is furnished by state law where no controlling federal law would govern."[328] If the precedent set by *Butner* and *Barnhill* is properly applied, it

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[322] *See In re* Gulf Coast Oil Corp., 404 B.R. 407, 420 (Bankr. S.D. Tex. 2009) (stating asset sales under section 363 "have become the preferred method of monetizing the assets of a debtor company" (quoting Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales*, 24 AM. BANKR. INST. J. 22, 22 (June 2005))); *In re* Pan Am. Hosp. Corp., 364 B.R. 832, 838 (Bankr. S.D. Fla. 2007) ("Congress enacted § 363 to provide incentives for purchasers to come into the bankruptcy court and buy troubled businesses for more value than that which might be affixed to the business outside of a Bankruptcy Court."). *See generally In re* Liberate Techs., 314 B.R. 206, 217 (Bankr. N.D. Cal. 2004) (finding if company can sell business as going concern outside of bankruptcy and pay creditors in full then it should not use bankruptcy and 363(f) sale as way to get more money). The absence of an insolvency requirement in bankruptcy makes this possibility all the more troubling. *See* NMSBPCSLDHB, L.P v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 121 (3d Cir. 2004) ("To be sure, a debtor need not be insolvent before filing for bankruptcy protection."); *In re* SGL Carbon Corp., 200 F.3d 154, 163 (3d Cir. 1999) (stating it is "well established that a debtor need not be insolvent before filing for bankruptcy protection" as drafters of Bankruptcy Code understood need for relief before debtor is faced with "hopeless situation"); *In re* Johns-Manville Corp., 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984) (finding Code drafters intended debtors with "real debt and real creditors" to file reorganization before situation was "beyond repair").

[323] *See supra* note 214 and accompanying text.

[324] Nor should the "generic interest in expanding the debtor's property" or the fact that section 363(f) is a "*federal* rule" change the analysis. Gaughan v. Edward Dittlof Revocable Trust (*In re* Costas), 555 F.3d 790, 798 (9th Cir. 2009); *see* Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329 (1993) (stating absence of federal language indicates state law property rights should govern); *see also* Laughlin v. Nouveau Body and Tan, L.L.C. (*In re* Laughlin), 602 F.3d 417, 426 n.9 (5th Cir. 2010) (declining to hold "generic 'federal interests'" prohibit "deference to state property law" in bankruptcy).

[325] *Butner*, 440 U.S. at 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)); *see In re Costas*, 555 F.3d at 798 (rejecting existence of federal interests as interfering with *Butner's* "three goals"); Kent's Run P'ship, Ltd. v. Glosser, 323 B.R. 408, 423 (Bankr. W.D. Pa. 2005) (noting Supreme Court's emphasis on "uniformity and policies served by such an approach").

[326] *Butner*, 440 U.S. at 54–55 (holding determination of property rights is established by state law).

[327] Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (defining property by state law absent controlling federal interest).

[328] *In re* Eveleth Mines, LLC, 312 B.R. 634, 650 (Bankr. D. Minn. 2004) (citing *Barnhill*, 503 U.S. at 398; *Butner*, 440 U.S. at 54); *see* Keller v. Johnson (*In re* Johnson), 375 F.3d 668, 670 (8th Cir. 2004) (reasoning

is clear that successor liability claims do not constitute "interests in property" under section 363(f) as neither state nor federal law doctrines of successor liability create such an interest with respect to successor liability claims.[329]

B. Does the Bankruptcy Code Preempt Successor Liability?

One of the most commonly asserted bases for barring assertion of state law successor liability claims against section 363(f) purchasers is that federal bankruptcy law and policies preempt imposition of state law successor liability.[330] According to Article VI, clause 2, of the United States Constitution, the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[331] Interpreting the Supremacy Clause, the Supreme Court stated,

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption 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.[332]

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state law controls to determine "whether lien arising from dissolution decree is mere charge against property or interest in property"); Michael H. Reed, *Successor Liability and Bankruptcy Sales Revisited – A New Paradigm*, 61 BUS. LAW. 179, 212 (2005) ("Treating successor liability claims as 'interests in property' under these models *alters the character* of the claims compared to their status under state law without explanation. Thus, treating successor liability claims as 'interests in property' as proposed in Leckie Smokeless, TWA and their progeny arguably runs afoul of Butner.").

[329] *See supra* Parts IV.B.2, III.B.

[330] *See* Myers v. United States, 297 B.R. 774, 783–84 (Bankr. C.D. Cal. 2003) (finding "Bankruptcy Code preempts California state law in this case regarding successor liability"); MPI Acquisition, LLC v. Northcutt, 14 So. 3d 126, 130 (Ala. 2009) (holding Bankruptcy Code preempts state law successor liability); Fishman, *supra* note 115, at III.E ("Another reason the free and clear provisions of section 363(f) incorporate claims and trump traditional notions of successor liability . . . is because federal law preempts state law in this area."). *But see* R.C.M. Exec. Gallery Corp. v. Rols Capitol Co., 901 F. Supp. 630, 637 (S.D.N.Y. 1995) ("[T]here is no federal preemption of state law successor liability merely because the sale of assets occurred in a bankruptcy proceeding.").

[331] U.S. CONST. art. VI, cl. 2 (creating preemption of state law by federal law in Constitution).

[332] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368–69 (1986) (internal citations omitted) (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Fl. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Free v. Bland, 369 U.S. 663 (1962); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941)).

Thus, a state law may be preempted by federal law a number of different ways, both expressly and implicitly.[333]

With respect to federal bankruptcy law, however, the Supreme Court has made it clear that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws."[334] In *Stellwagen v. Clum*,[335] the Supreme Court made the following observations with respect to bankruptcy and preemption:

> The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.[336]

According to this precedent, federal bankruptcy law will preempt state law only where there is an *actual* conflict with federal law.[337] Although *Stellwagen* was decided under the Bankruptcy Act of 1898, this sentiment remains in force today.[338] Indeed, the Third Circuit Court of Appeals has observed in the context of federal bankruptcy preemption, "[c]onsideration of whether a state provision violates the supremacy clause starts with the basic assumption that Congress did not intend to displace state law."[339] As such, "[p]re-emption must either be explicit, or compelled due to an unavoidable conflict between the state law and the federal law."[340] The

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[333] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (noting intent of Congress to preempt state law occurs in both express or implied manner); FMC Corp. v. Holliday, 498 U.S. 52, 64–65 (1990) (holding ERISA expressly preempted application of state law to self funded health care plans); Fid. Fed. Sav'n & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982) (stating state law may be impliedly preempted where state law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject").

[334] Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 505 (1986) (citing 28 U.S.C. § 959(b)).

[335] 245 U.S. 605 (1918).

[336] *Id.* at 613 (citing Sturges v. Crowninshield, 17 U.S. 122 (1819); Ogden v. Saunders, 25 U.S. 213 (1827)).

[337] *See* Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270, 273 (8th Cir. 1983) (holding state laws suspended when conflicting with federal laws); *In re* Pruitt, 401 B.R. 546, 552–53 (Bankr. D. Conn. 2009) (explaining state law preempted where Congress intended federal regulation); *see also* In *re* Tate, 253 B.R. 653, 670 (Bankr. W.D.N.C. 2000) (explaining preemption when state law conflicts with federal law).

[338] *See* P.K.R. Convalescent Ctrs., Inc. v. Virginia (*In re* P.K.R. Convalescent Ctrs., Inc.), 189 B.R. 90, 93 (Bankr. E.D. Va. 1995) ("Congress did not place preemptive language in the Bankruptcy Code, nor did Congress intend that the Bankruptcy Code be so pervasive that it occupy the field of debtor/creditor relations.").

[339] Penn Terra Ltd. v. Dep't of Envt'l Res., 733 F.2d 267, 272–73 (3d Cir. 1984) (citing Maryland v. Louisiana, 451 U.S. 725 (1981)).

[340] *Id.* at 272; *see* Kent's Run P'ship v. Glosser, 323 B.R. 408, 426 (Bankr. W.D. Pa. 2005) (explaining pre-emption must be explicit); *In re* Jarjisian, 314 B.R. 318, 326 (Bankr. E.D. Pa. 2004) (stating pre-emption must be explicit or compelled by conflict of laws).

Ninth Circuit Court of Appeals has further held that "[s]imply making a reorganization more difficult for a particular debtor . . . does not rise to the level of 'standing as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"[341] Thus, preemption requires something more than mere difficulty in achieving a particular bankruptcy goal or policy.

The Bankruptcy Court for the Eastern District of Virginia had the opportunity to apply these propositions in *P.K.R. Convalescent Centers, Inc. v. Virginia* (*In re P.K.R. Convalescent Centers, Inc.*).[342] In that case, the court was faced with the issue of whether a Virginia law permitting the state taxing authority to recapture depreciation was preempted by the free and clear language of section 363(f).[343] In reaching the conclusion that section 363(f) did preempt the Virginia law, the bankruptcy court first examined the Virginia law to determine whether the state taxing authority had an "interest in property" under section 363(f).[344] In finding that the taxing authority had such an "interest in property," the court relied on the fact that its claim against the debtor was "tied to a sale of the property [where the] debtor realizes a gain from the proposed sale."[345] Where the debtor fails to reimburse the taxing authority, it may collect from the section 363(f) purchaser, resulting "in direct conflict with the free and clear provision of 11 U.S.C. § 363(f)."[346] As such, the Virginia law was preempted by section 363(f).[347]

The *P.K.R. Convalescent* court used a two-step approach, first determining whether the particular claim constituted an "interest in property" under state law, and then asking whether section 363(f) would preempt imposition of that "interest in property" against the section 363(f) purchaser.[348] The distinction drawn between these two aspects of the analysis is crucial. If relevant state law creates an "interest in property" with respect to a particular claim or interest, then section 363(f) directly preempts imposition of that claim against a section 363(f) purchaser. If, on the other hand, state law does not create an "interest in property" with respect to a claim or interest, then the language of section 363(f) will not apply to that claim or interest, thus presenting no conflict between section 363(f) and that state law. Rather than relying on this more obvious form of preemption, courts arguing that section 363(f) preempts imposition of successor liability rely on the federal bankruptcy policies of value maximization and the fresh start.

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[341] Baker & Drake, Inc. v. Public Serv. Comm'n (*In re* Baker & Drake, Inc.), 35 F.3d 1348, 1354 (9th Cir. 1994) (quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).

[342] 189 B.R. at 93.

[343] *See id.*

[344] *See id.* at 94 (citation omitted).

[345] *Id.*

[346] *Id.*

[347] *See id.*

[348] *See id.* ("Any claim . . . against [the purchaser] is derived from its interest in the property . . . [a]nd[ ] the authority to collect against [purchaser] pursuant to . . . [State] Code is [preempted by] the free and clear provision of 11 U.S.C. § 363(f).").

1. Value Maximization

One of the driving goals of the bankruptcy process is to maximize the value of the debtor's estate in order to maximize the return to creditors.[349] And, section 363(f) sales of estate property free and clear of "any interest in such property" help achieve this goal by adding value to the estate.[350] Thus, in arguing that section 363(f) preempts imposition of successor liability, the Second Circuit Court of Appeals asserted in *Douglas v. Stamco*,[351] that,

> to the extent that the "free and clear" nature of the sale . . . was a crucial inducement in the sale's successful transaction, it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code, which is to maximize the value of the assets and thereby maximize potential recovery to the creditors.[352]

This sentiment has been echoed by a number of lower courts.[353]

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[349] *See* Bank of Am. Nat'l Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 453 (1999) (citing Toibb v. Radloff, 501 U.S. 157, 163 (1991)) (observing recognized policy of chapter 11 to be "maximizing property available to satisfy creditors"); Fields Station LLC v. Capitol Food Corp. (*In re* Capitol Food Corp.), 490 F.3d 21, 25 (1st Cir. 2007) ("Two primary purposes of chapter 11 relief are the preservation of businesses as going concerns, and the maximization of the assets recoverable to satisfy unsecured claims."); Fishman *supra* note 115, at II.F ("One of the primary goals of Chapter 11 is to maximize the value of the debtor's assets.").

[350] *See In re* Chung King, Inc., 753 F.2d 547, 549 (7th Cir. 1985) ("The governing principle at a [363 sale] confirmation proceeding is the securing of the highest price for the bankruptcy estate."); *In re* Wilde Horse Enters., Inc., 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991) ("In any sale of estate assets, the ultimate purpose is to obtain the highest price for the property sold."); *see also In re* Alpha Indus., Inc., 84 B.R. 703, 705 (Bankr. D. Mont. 1988) (citing *In re* Chung King, Inc., 753 F.2d 547 (7th Cir. 1985)) (defining underlying principle of [363 sale] confirmation proceeding as receiving highest price for bankruptcy estate).

[351] 363 F. App'x 100, 101 (2d Cir. 2010).

[352] *Id.* at 102–03 (citing Toibb v. Radloff, 501 U.S. 157, 163 (1991)); *see In re* Chrysler, 576 F.3d 108, 126 (2d Cir. 2009) ("The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the Sale."), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010).

[353] *See* Forde v. Kee-Lox Mfg. Co., 437 F. Supp. 631, 633–34 (W.D.N.Y. 1977) ("If the trustee in a liquidation sale is not able to transfer title to the bankrupt's assets free of all claims, including civil rights claims, prospective purchasers may be unwilling to pay a fair price for the property, leaving less to distribute to the creditors."); Myers v. United States, 297 B.R. 774, 784 (Bankr. C.D. Cal. 2003) ("In Chapter 11 proceedings, the court is trying to obtain and preserve as many assets as it can to protect secured and unsecured creditors. To do so, it needs to approve sales of assets to third parties. A key factor to a third party in purchasing assets is the 'worth' of the asset. Third parties cannot assess 'worth' if the Bankruptcy Court orders that they take the assets free and clear of any and all claims whatsoever, but nonetheless, unsecured creditors can 'lie in the weeds' and wait until the bankruptcy court approves a sale before it sues the purchasers."); *In re* Lady H Coal Co., 199 B.R. 595, 607 (Bankr. W.D. Va. 1996) ("The rights of buyers at a bankruptcy sale free and clear of liens and other interests are given this protection to insure that the best offers are made and as many claims as possible are paid from the sale proceeds."); Paris Mfg. Corp. v. Ace Hardware Corp. (*In re* Paris Indus. Corp.), 132 B.R. 504, 510 n.14 (Bankr. D. Me. 1991) ("To conclude that a bankruptcy court cannot approve the sale of assets free and clear of such future claims against a purchaser from the debtor significantly impairs the bankruptcy court's ability to administer bankruptcy estates. Every sale must then be discounted by the risk the purchaser sees of future claims."); *In re* White Motor Corp., 75

Although it is evident that the price a willing buyer would pay at a section 363(f) sale would likely go down were that buyer subject to successor liability on account of its purchase, it does not follow that this presents an "actual conflict" with federal bankruptcy law. As the Seventh Circuit Court of Appeals has noted, "purchasers can demand a lower price to account for pending liabilities of which they are aware,"[354] and this will still result in value added to the estate through that purchase price, albeit less than what would be paid otherwise. With respect to unknown claims, more thorough due diligence on the part of the purchaser may be required.[355] But, as the First Circuit Court of Appeals observed with respect to the value maximization argument, "this largely illusory concern is entirely of the parties' own making."[356] Overall, a possible reduction in purchase price does not "stand[] as an obstacle to the accomplishment of the full purposes and objectives of Congress,"[357] *i.e.*, value maximization.

2. The Debtor's Fresh Start

Another primary goal of the bankruptcy process is to grant the debtor a fresh start.[358] In the context of preemption, the argument is made that imposition of state law successor liability against the purchaser of a debtor's assets will deny the debtor

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B.R. 944, 951 (Bankr. N.D. Ohio 1987) ("The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability."); *In re* All Am. of Ashburn, Inc., 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (asserting "negative impact that potential successor liability claims would have on the trustee's ability to sell assets of the estate at a fair price" as basis for not allowing imposition of successor liability claim).

[354] Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 50–51 (7th Cir. 1995).

[355] *See* Salkin v. Hage (*In re* Maxko Petroleum, LLC), 425 B.R. 852, 872 (Bankr. S.D. Fla. 2010) (refusing to relieve 363(f) purchasers from undesirable purchase when they failed to engage in due diligence); Food Mgmt. Grp., LLC v. Matrix Realty Grp., Inc. (*In re* Food Mgmt. Grp., LLC) 372 B.R. 171, 207 (Bankr. S.D.N.Y. 2007) (refusing to protect chapter 11 purchaser because it proceeded without exercising due diligence); Kuney III, *supra* note 88, at 56–57 ("[A]ttempting to ferret out all claims that may exist in the due diligence process, and providing a contractual mechanism for their payment (a hold back or adjustment of the purchase price, an escrow, or insurance) seems a small price to pay to afford otherwise injured but uncompensated parties a means of recovery.").

[356] W. Auto Supply Co. v. Savage Arms, Inc. (*In re* Savage Indus., Inc.), 43 F.3d 714, 722 (1st Cir. 1994) (contending successor liability actions would not "chill" asset bidding in bankruptcy proceedings), *Cf.* Gaughan v. Edward Dittlof Revocable Trust (*In re* Costas), 555 F.3d 790, 798 (9th Cir. 2008) (referring to "interest in bankruptcy estate augmentation" as "generic").

[357] Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (noting federal law will preempt state law if state law poses an obstacle to Congressional objectives).

[358] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915))); Burlingham v. Crouse, 228 U.S. 459, 473 (1913) ("It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched."); S. REP. NO. 95–989, at 98 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5884 (describing discharge as "the heart of the fresh start provisions of the bankruptcy law").

their fresh start.[359] As the *White Motor* court reasoned, "[t]he liability which state law imposes through successor liability is that of the manufacturer. The federal purpose of final resolution and discharge of corporate debt is clearly compromised by imposing successor liability on purchasers of assets when the underlying liability has been discharged under a plan of reorganization."[360]

The key problem with this argument lies in a basic misunderstanding of successor liability. As the discussion of the state law doctrine of successor liability indicated, a state law successor liability claim is not wholly derivative of the seller's liability. Rather, some action on the part of the purchaser is necessary to impose successor liability.[361] Consequently, the claim against the purchaser is a separate and distinct claim from any claim that could be asserted against the seller.[362] And, in the bankruptcy context, this distinction is powerful as a "discharge operates as an injunction, but only against suing the debtor; the statute is explicit on this point."[363] Thus, where a debtor has sold its assets through a section 363(f) sale and subsequently received a discharge, future imposition of a successor liability claim against the purchaser of the debtor's assets will in no way affect the debtor's discharge or fresh start.[364] As such, there is no conflict between state law successor liability and the Bankruptcy Code in this instance, and therefore no preemption.[365]

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[359] *See* Hon. William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability To Create a New Class of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325, 328–29 (1996) (arguing successor liability "jeopardizes" balance between providing debtors a fresh start and creditors with equitable distribution intended by Congress); Fishman, *supra* note 115, at III.E ("By imposing successor liability on purchasers of assets when the underlying liability is discharged, the federal purpose of final resolution and discharge of debt is compromised."). *But see* Michael L. Tuchin & Martin R. Barash, *Protecting the Rights of Claimants that are Excluded from the Bankruptcy Process: The Survival of Successor Liability and Alternative Means of Recovery*, 8 J. BANKR. L. & PRAC. 273, 273–74 (1999) (suggesting claim that successor liability prevents debtors from obtaining fresh start is overstated).

[360] *In re* White Motor Credit Corp., 75 B.R. 944, 950 (Bankr. N.D. Ohio 1987).

[361] *See supra* notes 115–19 and accompanying text.

[362] *See* Zerand-Bernal Grp. v. Cox, 23 F.3d 159, 162 (7th Cir. 1994) (discussing successor liability claim and stating it is "a claim neither by nor against the debtor. For while it names the debtor as a defendant, the debtor . . . no longer exists, all its assets having been transferred to [the successor] pursuant to the plan of reorganization."); Mid-Atl. Truck Ctr. v. Pak-Mor Ltd. (*In re* Pak-Mor Mfg. Co.), No. SA-06-CA-658-RF, 2007 WL 2327615, at *4 (W.D. Tex. Aug. 10, 2007) (finding liability of successor to be unrelated to debtor's reorganization plan); *In re* Holiday RV Superstores, Inc., 362 B.R. 126, 128–29 (Bankr. D. Del. 2007) (concluding successor liability claim naming successors, but not debtors to be separate from bankruptcy proceeding).

[363] *Zerand-Bernal Grp.*, 23 F.3d at 163 (citing 11 U.S.C. § 524(e) (2006)) ("[D]ischarge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.").

[364] *See id.* at 163 (discussing liability of debtor for assets after sale); *see also* Chi. Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 51 (7th Cir. 1995) (explaining debtor cannot be liable for subsequent actions because it "cease[s] to be"). *But see In re* A.H. Robins, Inc., 880 F.2d 694, 702 (4th Cir. 1989) (indicating exception where there are guarantors of debt).

[365] *See* Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963))); *see also* Penn Terra Ltd. v. Dep't of Env't Res., 733 F.2d 267, 272 (3d Cir. 1984) (explaining preemption should be applied only where conflict between state and federal law exists); *In re* White Motor Credit Corp., 75 B.R.

C. Would Permitting Assertion of a Successor Liability Claim Upset Code Priorities?

According to well-established Supreme Court precedent, "[t]he theme of the Bankruptcy Act is 'equality of distribution' and if one claimant is to be preferred over others, the purpose should be clear from the statute."[366] Section 507 of the Code sets forth which unsecured claimants are to be preferred over others.[367] Of the ten groups of claimants entitled to priority treatment under section 507, unsecured successor liability claimants do not make the cut.[368] As such, they are general unsecured creditors in a bankruptcy proceeding, entitled to a pro rata share once distribution has been made to all priority claimants.[369] Thus, a number of courts have argued that "[a]llowing the [successor liability] plaintiff to proceed with his . . . claim directly against [the section 363(f) purchaser] would be inconsistent with the Bankruptcy Code's priority scheme because plaintiff's claim is otherwise a low-priority, unsecured claim."[370]

944, 950 (Bankr. N.D. Ohio 1987) (noting conflict between state law and federal must be explicit for pre-emption).

[366] Nathanson v. NLRB, 344 U.S. 25, 29 (1952) (internal citation omitted).

[367] 11 U.S.C. § 507(a) (listing priorities); *see supra* notes 53–60 and accompanying footnotes.

[368] *See In re* Trans World Airlines, Inc., 322 F.3d 283, 292 (3d Cir. 2003) (noting successor liability claims are general unsecured creditors and therefore should not be permitted to assert claims inconsistent with "Bankruptcy Code's priority scheme"); Bes Enters., Inc. v. Natanzon, Civil Case No. RDB 06-870, 2006 WL 3498419, at *4 (D. Md. Dec. 4, 2006) (expressing concern unsecured creditors might bypass priority through successor liability); *see also* Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp., 195 B.R. 716, 731 (Bankr. N.D. Ind. 1996) (discussing argument "successorship doctrine frustrates the orderly scheme of the bankruptcy laws by allowing some unsecured creditors to recover without regard to the priority order of the bankruptcy proceedings").

[369] *See* 11 U.S.C. § 507(a) (enumerating priority among unsecured creditors for pro rata distribution); *In re* Anjopa Paper & Bd. Mfg. Co., 269 F. Supp. 241, 258 (D.C.N.Y. 1967) (stating priority creditor entitled to full satisfaction before pro rata distribution to unsecured creditors). *See generally In re* Childress, 182 B.R. 545, 556 (Bankr. W.D. Mo. 1995) (holding excess of enumerated share in statute dealt within "same manner as other general unsecured creditors by pro rata sharing in the distribution of the estate").

[370] Douglas v. Stamco, 363 F. App'x 100, 102(2d Cir. 2010) (citing section 507(a)); *see In re* Chrysler LLC, 576 F.3d 108, 126 (2d Cir. 2009) (finding imposition of successor liability on purchaser to violate Code priorities), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010); *In re Trans World Airlines, Inc.*, 322 F.3d at 291 ("Even were we to conclude that the claims at issue are not interests in property, the priority scheme of the Bankruptcy Code supports the transfer of TWA's assets free and clear of the claims."); *In re* Lady H Coal, Co., Inc., 199 B.R. 595, 605 n.6 (Bankr. S.D. W. Va. 1996) ("It is conceptually difficult to understand how an unsecured creditor can assert that they are to be excluded from the definition of 'interests' as utilized in the Bankruptcy Code in § 363(f). Such exclusion would result in an unsecured creditor later asserting the same claim against a good faith purchaser, which would disrupt and give priority and preference to an unsecured creditor."); *In re White Motor Credit Corp.*, 75 B.R. at 951 (noting negative impact on sale price if successor liability could later be imposed and asserting "[t]his negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code"); *In re* All Am. of Ashburn, Inc., 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) ("There is no suggestion of Congressional intent to apply the successor doctrine to elevate product liability claims above their status under the Bankruptcy Code."); *In re* New England Fish Co., 19 B.R. 323, 328 (Bankr. W.D. Wash. 1982) (rejecting successor liability claim on ground it would accord higher priority to certain creditors than provided for in Code).

In two separate cases not directly addressing the issue of whether successor liability claims constitute "interests in property" under section 363(f), the Seventh Circuit suggested that this argument with respect to Code priorities is incorrect. In *Zerand-Bernal Group v. Cox*,[371] the Seventh Circuit faced a situation in which a state law successor liability claimant had brought suit in federal court against a section 363(f) purchaser on account of an injury occurring after the section 363(f) sale and as a result of the debtor's alleged manufacturing defect.[372] The purchaser brought an adversary proceeding in the bankruptcy court seeking to enjoin the state law action.[373] In affirming the district court's dismissal of the purchaser's action for want of jurisdiction, the Seventh Circuit noted that "the [state law action] cannot possibly affect the amount of property available for distribution to [the debtor]'s creditors; all of [the debtor]'s property has already been distributed to them."[374] This comment, in dicta, suggests that because the state law successor liability action was brought subsequent to confirmation and consummation of the debtor's plan of reorganization, it could not possibly impact Code priorities.

In *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Tasemkin*,[375] the Seventh Circuit directly addressed and rejected the argument that permitting imposition of successor liability claims following bankruptcy would upset Code priorities.[376] In that case, the debtor had gone "belly-up, but not before allegedly running up over $ 300,000 in delinquent pension fund payments and ERISA withdrawal liability from plaintiffs."[377] After unsuccessfully seeking recovery in the debtor's bankruptcy proceeding, the plaintiffs brought action against the newly formed entity that had acquired the debtor's assets by first purchasing the security interest in those assets held by the debtor's secured lender, and then successfully having the automatic stay lifted in order to foreclose on those assets.[378] In rejecting the argument that "the successorship doctrine frustrates the orderly scheme of the Bankruptcy Code by allowing some unsecured creditors to leapfrog over others[,]"[379] the Seventh Circuit made the following observation:

> [O]nce a bankruptcy proceeding is completed and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their force. In the instant case, whatever happens to [the purchaser] in the [plaintiff]'s pursuit of

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[371] 23 F.3d 159 (7th Cir. 1994).

[372] *Id.* at 161 (recounting how debtor in possession sold assets free and clear of any liens or claims, and four years later tort claim brought against debtor and purchaser).

[373] *Id.*

[374] *Id.* at 162, 164.

[375] 59 F.3d 48 (7th Cir. 1995).

[376] *Id.* at 51 (describing how successor liability claims will have no effect on bankruptcy proceedings).

[377] *Id.* at 49.

[378] *Id.*; *see* Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 172 B.R. 877, 878 (N.D. Ill. 1994), *rev'd*, 59 F.3d 48 (7th Cir. 1995).

[379] *Chi. Truck Drivers*, 59 F.3d at 51 (citing *In re* New England Fish Co., 19 B.R. 323, 328 (Bankr. W.D. Wash. 1982)).

> this claim will have no effect on the bankruptcy proceeding–that is over and done with and the debtor [] has ceased to be.[380]

This distinction between entities, purchaser and seller, is a crucial aspect of the analysis seemingly overlooked by those courts arguing imposition of successor liability claims against section 363(f) purchasers upsets Code priorities. The distinction draws attention to the fact that a successor liability claim is a claim against the purchaser, separate and distinct from any claim against the seller, as it requires action of the part of the purchaser in order for liability to be imposed.[381]

One could argue that if section 363(f) purchasers are not free from successor liability arising from the purchase of bankruptcy estate assets, those purchasers will pay less for those assets, essentially shifting that value from the bankruptcy estate and to successor liability claimants.[382] This potential value shift, however, appears to be a necessary consequence of the language of section 363(f). Because section 363(f)'s free and clear language applies only to "interests in property,"[383] Congress impliedly acknowledged that some claims and interests will not be subject to that language, *i.e.*, those claims and interests that do not constitute "interests in property."[384] The existence of such claims and interests may result in a reduction in the price a willing section 363(f) will pay for estate assets, arguably resulting in a value shift from the bankruptcy estate and to the holders of those non-"interest in property" claims and interests. Section 507 priorities will not apply to that shifted value because those priorities apply only to claims and interests against the debtor in bankruptcy,[385] a separate and distinct entity from the section 363(f) purchaser.[386] Because Congress did not draft section 363(f) to apply to any claim or interest against the debtor, and made no indication that section 507 priorities apply outside

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[380] *Id.* (citing *In re New England Fish Co.*, 19 B.R. at 328).

[381] *See supra* notes 115–18 and accompanying text.

[382] *See In re* White Motor Corp., 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987*)* (noting negative impact on sale price if successor liability could later be imposed and asserting "[t]his negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code"); *see also* WBQ Ptnr. v. Va. Dep't of Med. Assistance Servs. (*In re* WBQ P'ship), 189 B.R. 97, 108 (Bankr. E.D. Va. 1995) (noting discounted price potential purchasers would pay as result of successor liability); Forde v. Kee-Lox Mfg. Co., Inc., 437 F. Supp. 631, 633–34 (W.D.N.Y. 1977) (discussing sale of assets encumbered by successor liability and that "prospective purchasers may be unwilling to pay a fair price for the property").

[383] 11 U.S.C. § 363(f) (2006) ("The trustee may sell property under subsection (b) or (c) of this section free and clear of any *interest in such property* of an entity other than the estate." (emphasis added)).

[384] *See In re White Motor Credit Corp.*, 75 B.R. at 948 (holding unsecured successor liability claims do not constitute "interests in property" under section 363(f)); *see also In re New England Fish Co.*, 19 B.R. at 326, 329 (prohibiting general unsecured claims from being included in section 363(f)'s "interest in property" language).

[385] *See* 11 U.S.C. § 507(a) (listing "expenses and claims" that have priority). *See generally In re* Trans World Airlines, Inc., 322 F.3d 283, 291 (3d Cir. 2003) ("[Section 507(a)] defines various classes of creditors entitled to satisfaction before general unsecured creditors may access the pool of available assets."); *In re New England Fish*, 19 B.R. at 326 (explaining trustee whenever possible should liquidate estate and distribute assets according to statutory priority scheme in section 507, but if one claimant is preferred over others it must be clear from statute).

[386] *See supra* notes 114–17 and accompanying text.

bankruptcy, this potential value shift is a necessary consequence of the language of section 363(f). As such, permitting imposition of successor liability against section 363(f) purchasers will not upset the Code priority scheme because that scheme simply does not apply to claims against non-debtor asset purchasers.

1. Section 363(e) and the Requirement of Adequate Protection

In addition to failing to recognize the important distinction between purchasers and sellers at section 363(f) sales, courts adopting the expansive view of "interest in property" to include successor liability claims also fail to acknowledge the implications such view has with respect to section 363(e). That is, if successor liability claims are "interests in property" under section 363(f), then successor liability claimants are entitled to request adequate protection under section 363(e).[387] When requested, provision of adequate protection is mandatory.[388] Thus, section 363(e) would potentially grant general unsecured successor liability claimants enhanced treatment compared to similarly situated non-priority creditors,[389] essentially turning on its head the argument that permitting imposition of successor liability claims against section 363(f) purchasers would upset Code priorities. As Collier on Bankruptcy, one of the few to recognize this inherent flaw, remarked,

> If the [successor liability] claims or defenses . . . were indeed "interests" to which section 363(f) applied, then the court should provide adequate protection, such as by providing for the interests to attach to proceeds of the sale. Thus, while the authority to sell free and clear of such interests may enhance the sales price, the net

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[387] 11 U.S.C. § 363(e) ("[A]t any time, on request of an entity that has an *interest in property* used, sold, or leased, or proposed to be used, sold or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." (emphasis added)); *see supra* notes 18–21and accompanying text; *see also* Michael H. Reed, *Insulating Asset Purchasers from Debt Through Bankruptcy Sales*, 15 J. BANKR. L. & PRAC., 743, 752 (2006) ("[I]f successor liability claims are 'interests in property' under § 363(f), then the holders of such claims should be entitled to demand adequate protection under § 363(e) of the Code.").

[388] *See In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 592 (Bankr. D. Ariz. 2009) ("The requirement of adequate protection in Section 363(e) is mandatory. If adequate protection cannot be provided, such sale must be prohibited."); *In re* Metromedia Fiber Network, Inc., 290 B.R. 487, 491 (Bankr. S.D.N.Y. 2003) (recognizing adequate protection as mandatory not discretionary when requested by secured entity); *In re* Heatron, Inc., 6 B.R. 493, 494 (Bankr. Mo. 1980) (noting adequate protection mandatory when requested by entities with property interests but its form and sufficiency is developed by trustee).

[389] *See* 11 U.S.C. § 363(e) (noting entity with interest in property may request adequate protection if such property is to be sold, used, or leased). How one would adequately protect an unsecured successor liability claim is an issue for another article. Suffice it to say, section 363(e) does grant those holding "interests in property" the right to seek adequate protection, a right not generally granted to unsecured creditors. *See supra* notes 38–44 and accompanying text.

> effect of the authority on the general unsecured claims in the case might not necessarily be positive.[390]

As this observation implies, if successor liability claims are entitled to adequate protection, it will arguably place those claims in an enhanced position with respect to other general unsecured claims. There is no indication in the Code or elsewhere that Congress intended successor liability claims to receive this special treatment.

Despite the mandatory requirement of adequate protection for those holding "interests in property" subject to section 363(f) free and clear treatment, only one court was found to have addressed section 363(e) with respect to the successor liability issue.[391] In *Fairchild Aircraft Corp. v. Campbell (In re Fairchild Aircraft Corp.)*,[392] the Bankruptcy Court for the Western District of Texas made the following observation:

> [I]f unsecured creditors had an "interest in property" sufficiently cognizable that a special provision is required to achieve a sale "free and clear," then those selfsame creditors should also be entitled to adequate protection of those interests during the pendency of the case.[393]

Although this decision was later vacated "based on equitable considerations[,]"[394] the conclusion it reaches is critical to understanding why deeming a successor liability claim to be an "interest in property" under section 363(f) is inherently flawed – it "renders the distinctions drawn in the Code [with respect to secured and unsecured claims] a nullity."[395] Although section 363(e) is not expressly limited to secured creditors, adequate protection is generally granted in only limited

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[390] 3 COLLIER ON BANKRUPTCY, ¶ 363.06, at 3-363 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

[391] Reed, *supra* note 387, at VI.C ("The courts generally have failed to address this issue."); *see* 11 U.S.C. § 363(e) ("[A]t any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."); 3 COLLIER ON BANKRUPTCY, ¶ 363.06, at 3-363 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) ("None of the *Leckie*, *TWA* or *Folger Adam* courts addressed the consequences of authorizing a sale free and clear, apparently assuming that the authorization to sell free and clear of the interests in those cases effectively abrogated the interests or relegated them to general unsecured status. However, section 363(e) requires a court, on request of a party in interest, to condition a sale so as to provide adequate protection to an interest in property that is sold under section 363.").

[392] 184 B.R. 910 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

[393] *Id.* at 918 (citing 11 U.S.C. § 362(e)). It is assumed that citation of section 36*2*(e) was meant to be citation of section 36*3*(e) as section 362(e) is unrelated.

[394] *In re Fairchild Aircraft*, 220 B.R. at 918 (vacating court's prior decision based on equitable considerations how case may be detrimental to efficient administration of bankruptcy cases).

[395] *In re Fairchild Aircraft*, 184 B.R. at 918 (deeming successor liability claim as "interest in property" blurs distinction between secured and unsecured creditors' interests in estate).

circumstances and is often viewed as a special protection for secured creditors only.[396]

Overall, the argument that permitting imposition of a successor liability claim against a section 363(f) purchaser would upset Code priorities is fundamentally flawed. It fails to acknowledge the nature of the claim against the successor as a separate and distinct claim from that which could have, and may have, been asserted in the debtor's bankruptcy proceeding. And, more significantly, the argument fails to realize that qualifying successor liability claims as "interests in property" under section 363(f) would potentially grant such claims enhanced treatment through operation of section 363(e), plainly upsetting Code priorities.

CONCLUSION

The issue of whether successor liability claims constitute "interests in property" for purposes of section 363(f) free and clear treatment is a complicated one. It involves issues of both state and federal law and has far-reaching consequences for debtors in bankruptcy, purchasers at section 363(f) bankruptcy sales, and successor liability claimants. Unfortunately, in addressing this issue, many courts seem to overlook fundamental aspects of the analysis. By ignoring *Butner* and *Barnhill* and the call to define "interests in property" according to state law, many courts have misunderstood the very nature of successor liability claims. Supreme Court precedent with respect to statutory interpretation and the requirements of due process have also been seemingly disregarded as courts attempt to fit successor liability claims within the ambit of section 363(f)'s free and clear treatment. Another significant oversight lies in the failure to recognize and apply section 363(e). When section 363(e) is given its due deference, it becomes evident that holding successor liability claims to be "interests in property" under section 363(f) creates an impermissible result – it potentially grants holders of such claims enhanced treatment as compared to similarly situated general unsecured creditors. By not acknowledging this result, and relevant Supreme Court precedent, the argument that successor liability claims constitute "interests in property" under section 363(f) is doomed to fail. Indeed, as this thesis has shown, a full and complete analysis of the issue plainly reveals that successor liability claims are not "interests in property" for purposes of section 363(f) free and clear treatment.

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[396] *See supra* notes 31–37 and accompanying text. "[O]ther parties, such as lessors and co-owners, are also entitled to demand adequate protection of their interests in the debtor's property." 3 COLLIER ON BANKRUPTCY, ¶ 362.07, at 3-362 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009). Each of these parties, however, holds a specific interest in a specific asset, unlike an unsecured successor liability claimant who merely possesses an *in personam* claim against the successor. *See supra* notes 114–15 and accompanying text.