SUCCESSOR LIABILITY IN THE BANKRUPTCY CONTEXT: THE PROBLEM OR THE SOLUTION?

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INTRODUCTION

On June 1, 2009, after suffering the devastating effects of the 2008 financial crisis, General Motors (Old GM), with over $82 billion in assets, filed for Chapter 11 bankruptcy[1] in the Southern District of New York.[2] As one of the nation's leading automobile manufacturers, Old GM was desperate for federal aid in order to successfully reorganize its debts and survive as a company.[3] In response, the Obama Administration provided a $30.1 billion debtor-in-possession loan to Old GM in order to facilitate a speedy bankruptcy and prevent liquidation of Old GM's assets.[4] The Obama Administration, among other entities, endorsed the sale of Old GM's assets and some subsidiaries to NGMCO Inc. (New GM) pursuant to § 363 of the United States Bankruptcy Code.[5] Under § 363(f),[6] all assets sold in a sale—pursuant to § 363, commonly referred to as a "363 sale"—are "free and clear of any interest in such property of an entity other than the estate."[7]

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1 Peter Edmonston, *G.M.'s Big Bankruptcy, by the Numbers*, N.Y. TIMES: DEALBOOK (June 1, 2009, 11:58 AM), https://dealbook.nytimes.com/2009/06/01/gms-big-bankruptcy-by-the-numbers/?mcubz=1. Notably, GM features the single greatest lien avoidance in history at $1.5 billion. GM's counsel, Mayer Brown, erroneously authorized the termination of the UCC-1 financing statement. Jeffrey A. Wurst, *Unintended Consequence—JPMorgan's Costly Mistake*, ABF J. (Mar. 2015), http://www.abfjournal.com/articles/unintended-consequence-jpmorgans-costly-mistake.

2 *GM Files for Chapter 11 Bankruptcy*, KELLEY BLUE BOOK (June 1, 2009, 10:13 AM) [hereinafter *GM Files for Chapter 11 Bankruptcy*], http://www.kbb.com/car-news/2010-chicago-auto-show/gm-files-for-chapter-11-bankruptcy/2000004210.

3 David Gow, *We'll Go Bust Without Bail-out or Merger, Says General Motors*, GUARDIAN (Nov. 7, 2008, 7:01 PM), https://www.theguardian.com/business/2008/nov/08/general-motors-us-economy; *see also* Bill Vlasic & Nick Bunkley, *Obama Is Upbeat for G.M.'s Future*, N.Y. TIMES (June 1, 2009), http://www.nytimes.com/2009/06/02/business/02auto.html?_r=0; *GM Files for Chapter 11 Bankruptcy*, *supra* note 2.

4 Vlasic & Bunkley, *supra* note 3; *see also GM Files for Chapter 11 Bankruptcy*, *supra* note 2.

5 11 U.S.C. § 363(f) (2012); Vlasic & Bunkley, *supra* note 3.

6 11 U.S.C. § 363(f) provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
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> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Id.

7 11 U.S.C. § 363(f). The Bankruptcy Code does not explicitly define the term "interest."

In other words, New GM did not assume liability for many of the product liability claims against Old GM.[8]

Several years after the bankruptcy sale closed, creditors with claims arising from ignition switch defects in certain models of vehicles manufactured by Old GM brought an adversary proceeding against New GM, asserting economic losses under a theory of successor liability.[9] Successor liability is a state law doctrine that allows for creditors to seek recovery from the purchaser of assets even when the purchaser did not expressly assume such liabilities upon purchase.[10] New GM, in response, moved to enforce § 363's "free and clear" language in order to enjoin the claims.[11] Four groups of creditors then appealed the bankruptcy court's ruling that the sale order between Old GM and New GM (Sale Agreement) covered these creditors' tort claims.[12] Recently in *In re Motors Liquidation Company*[13] (*Motors Liquidation*), the Second Circuit reversed the bankruptcy court's decision, holding New GM liable for the ignition switch claims asserted against Old GM, among other claims.[14] Where courts have taken an expansive interpretation of the "interest in such property" language of

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The Code's silence on this definition leaves § 363's interpretation to the courts. *See id.*

8 *See In re* Gen. Motors Corp., 407 B.R. 463, 483 (Bankr. S.D.N.Y. 2009). "New GM assumed fifteen categories of liabilities." *In re* Motors Liquidation Co., 829 F.3d 135, 147 (2d Cir. 2016) ("New GM agreed to assume liability for accidents *after* the closing date for the [363 sale] and to make repairs pursuant to express warranties issued in connection with the sale of GM cars . . . . With these exceptions, New GM would be 'free and clear' of any and all liabilities of Old GM.").

9 *See In re Motors Liquidation Co.*, 829 F.3d at 143, 150; *see also* Mona L. Burton et al., *Buyer Beware: Sale "Free and Clear" Is Not Free and Clear of Claims Whose Holders Were Not Provided Notice of Sale Hearing*, NAT'L L. REV. (Aug. 16, 2016), http://www.natlawreview.com/article/buyer-beware-sale-free-and-clear-not-free-and-clear-claims-whose-holders-were-not.

10 *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 (AM. LAW INST. 1998). The Restatement (Third) of Torts on Products Liability provides:

> A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:
>
> > (a) is accompanied by an agreement for the successor to assume such liability; or
> >
> > (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
> >
> > (c) constitutes a consolidation or merger with the predecessor; or
> >
> > (d) results in the successor becoming a continuation of the predecessor.

Id.; *Successor Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/s/successor (last visited Oct. 23, 2017).

11 *In re Motors Liquidation Co.*, 829 F.3d at 143, 150–51.

12 *See id.* at 151. Plaintiffs also challenged the bankruptcy court's rulings that: (1) it had jurisdiction; (2) enforcement of the sale order would not violate procedural due process; and (3) relief for any late-filed claims would be barred as equitably moot. *Id.*

13 829 F.3d 135 (2d Cir. 2016).

14 *See id.* at 166, 170.

§ 363[15] to encompass successor liability claims, *Motors Liquidation*'s narrow reading of § 363's scope raises concern amongst legal scholars, bankruptcy lawyers, and especially companies looking to buy or sell assets through a 363 sale.

This Note supports the holding in the Second Circuit's *Motors Liquidation* decision and urges that courts universally follow this interpretation of § 363. Part I of this Note provides background on GM's government bailout, Chapter 11 bankruptcy, and its ignition switch defects. An overview of Chapter 11 bankruptcy protection and process and § 363 of the United States Bankruptcy Code then follows.[16] Next, this Note provides background on the successor liability doctrine, examining the countervailing forces of the successor liability doctrine and the goals of the bankruptcy process. A discussion of the circuit split among courts in interpreting § 363 to include successor liability claims follows. Part II further discusses the theories upon which courts have (and have not) held purchasing companies liable under the successor liability doctrine.[17] Part III of this Note acknowledges that the Second Circuit in *Motors Liquidation* employed the appropriate analysis to exclude successor liability claims from § 363 protections and held the successor in interest liable.[18] However, this Note proposes that ultimately, a long-term solution to this issue requires an amendment to the Bankruptcy Code.

I. BACKGROUND

A. *GM's Bailout and Bankruptcy*

The General Motors Corporation plays a significant role in both the United States and global automobile industries. In the years leading up to the financial crisis of 2008, however, the company was quickly approaching financial distress.[19] In 2007, Old GM lost $38.7 billion, the largest annual loss in automobile industry history at the time.[20] Then, in February 2008, Old GM posted a $39 billion quarterly loss, the biggest

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15 *See In re* Trans World Airlines, Inc., 322 F.3d 283, 289–90 (3d Cir. 2003); United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 581–82 (4th Cir. 1996). *But see* Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1145–47 (6th Cir. 1991).

16 *See infra* Part I.

17 *See infra* Part II.

18 *See infra* Part III.

19 *GM's Beginnings*, NBCNEWS.COM: AUTOS, http://www.nbcnews.com/id/30990482/ns/business-autos/#.Wc543miPJPZ (last visited Oct. 23, 2017).

20 *Id.*

ever for an automobile manufacturer.[21] In November of that same year, Old GM reported that it would most likely run out of cash in 2009, and sought federal assistance.[22] On December 19, 2008, the Bush Administration announced plans to bail out Detroit's automobile industry, most notably Old GM and Chrysler Group.[23] On December 19, 2008, the U.S. Treasury Department announced that it would extend $13.4 billion to Old GM, on the condition that Old GM submit a business plan for long-term viability to the President no later than February 17, 2009.[24] This loan made the U.S. federal government the largest stakeholder in Old GM at the time.[25] On March 30, 2009, President Obama announced that he would give the company sixty days to make substantial changes to its business plan, or face bankruptcy.[26] In April 2009, "[t]he Obama Administration provided a $2 billion working capital loan to [Old] GM."[27]

Ultimately, Old GM's plan of viability did not meet President Obama's standards, and on June 1, 2009, Old GM voluntarily filed for Chapter 11 bankruptcy in the Southern District of New York.[28] Before Old GM filed for bankruptcy protection, it already had entered into a proposed sale agreement under § 363(b) with New GM.[29] On July 5, 2009, the bankruptcy court approved the 363 sale to New GM.[30] New GM received substantially all of Old GM's assets, while Old GM retained its liabilities pursuant to § 363(f); this allowed New GM to operate in its ordinary course of business.[31] While New GM quickly emerged from bankruptcy to operate the GM business, Old GM remained in bankruptcy and underwent a traditional, lengthy liquidation process that addressed how its remaining liabilities would be

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21 *Id.*

22 Sharon Silke Carty, *GM Warns It Could Run out of Cash in 2009*, USA TODAY (Nov. 16, 2008, 7:54 PM), http://usatoday30.usatoday.com/money/companies/earnings/2008-11-07-general-motors_N.htm.

23 *See* David E. Sanger et al., *Bush Aids Detroit, but Hard Choices Wait for Obama*, N.Y. TIMES (Dec. 19, 2008), http://www.nytimes.com/2008/12/20/business/20auto.html?mcubz=1; Chris Woodyard, *GM Bailout Played out Over Five Years*, USA TODAY (Dec. 9, 2013, 7:18 PM), http://www.usatoday.com/story/money/cars/2013/12/09/gm-bailout-timeline/3929953.

24 *In re* Motors Liquidation Co., 829 F.3d 135, 144 (2d Cir. 2016).

25 *See In re* General Motors Corp., 407 B.R. 463, 479 (Bankr. S.D.N.Y. 2009).

26 *See* Sheryl Gay Stolberg & Bill Vlasic, *President Gives a Short Lifeline to Carmakers*, N.Y. TIMES: BUS. (Mar. 30, 2009), http://www.nytimes.com/2009/03/31/business/31auto.html?pagewanted=all&_r=0.

27 Woodyard, *supra* note 23.

28 *In re General Motors Corp.*, 407 B.R. at 479.

29 *See id.* at 479–81.

30 *In re* Motors Liquidation Co., 829 F.3d 135, 146 (2d Cir. 2016).

31 *See* 11 U.S.C. § 363(f) (2012). "Old GM assumed all future liability claims from incidents that occurred prior to the bankruptcy filing date, and successor liability claims against New GM were barred." Brad Warner, Comment, *Reconciling Bankruptcy Law and Corporate Law Principles: Imposing Successor Liability on GM and Similar 'Sleight-of-Hand' 363 Sales*, 32 EMORY BANKR. DEV. J. 537, 539 (2016).

paid.[32] On July 10, 2009, New GM emerged, and the company exited bankruptcy in under sixty days.[33]

B. *GM's Ignition Switch Defects*

In 1997, Old GM sold three out of ten cars on the road in North America.[34] In the fall of 2002, Old GM began manufacturing vehicles with faulty ignition switches.[35] To date, General Motors has recalled more than 2.5 million vehicles due to defective ignition switches.[36] These faulty ignition switches are now linked to 124 deaths and 275 injuries.[37] Old GM engineers admitted to knowing about these faulty ignition switches years before Old GM filed for bankruptcy.[38] Not only did some of Old GM's employees know of the faulty ignition switches, but the company was also accused of concealing such defects.[39] New GM, however, did not begin recalling vehicles for ignition switch defects until February 2014, an entire five years after Old GM filed for Chapter 11 bankruptcy.[40]

After New GM's initial recall of vehicles, the company was hit with a number of class action lawsuits, with plaintiffs alleging "that the ignition switch defect caused personal injuries and economic losses, both before and after the 363 sale closed."[41] Specifically, there were four categories of ignition switch claims asserted against New GM: "(1) pre-closing accident claims, (2) economic loss claims arising from the ignition switch defect or other defects, (3) independent claims relating only to New GM's conduct, and (4) [u]sed [c]ar [p]urchasers' claims."[42]

In response, New GM invoked the liability shield to hold New GM "free and clear" of all of these successor liability claims against the defective vehicles manufactured by Old GM.[43] The United States

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32 *See In re Motors Liquidation Co.*, 829 F.3d at 146–47 (citing 11 U.S.C. § 1129(a)(11) (2012)).

33 *Id.* at 147.

34 U.S. SEC. & EXCH. COMM'N, FILE NO. 1-143, ANNUAL REPORT: GENERAL MOTORS CORPORATION 60 (1998).

35 *See In re Motors Liquidation Co.*, 829 F.3d at 149.

36 *See* Jessica Dye, *GM Not Protected From Ignition Switch Claims: U.S. Appeals Court*, REUTERS (July 13, 2016, 10:44 AM), http://www.reuters.com/article/us-gm-ruling/gm-not-protected-from-ignition-switch-claims-u-s-appeals-court-idUSKCN0ZT1RR; Nora Naughton, *GM Ignition Switch Defects Tied to 124 Deaths, 275 Injuries, Feinberg Review Finds*, AUTOMOTIVE NEWS (Aug. 24, 2015, 12:15 PM), http://www.autonews.com/article/20150824/OEM/150829957/gm-ignition-switch-defects-tied-to-124-deaths-275-injuries-feinberg.

37 *See* sources cited *supra* note 36.

38 *See In re Motors Liquidation Co.*, 829 F.3d at 150.

39 *See id.* at 150–51.

40 *See id.* at 143.

41 *Id.* at 150.

42 *Id.* at 156.

43 *See id.* at 146.

Bankruptcy Court of the Southern District of New York, relying on the Second Circuit's reasoning in *In re Chrysler L.L.C.*,[44] agreed that tort claims such as these are "interests in property" such that they are extinguished by a free and clear sale under § 363(f)(5),[45] and were therefore extinguished by the Sale Agreement.[46] In other words, the bankruptcy court barred such claims from being asserted against New GM.[47] Moreover, the bankruptcy court held that New GM could not be sued for ignition switch claims that otherwise could have been brought against Old GM, unless those claims arose from New GM's own wrongful conduct.[48]

Recently in *Motors Liquidation*, the Second Circuit reversed the bankruptcy court's decision and interpreted "interest," under § 363(f), as *not* encompassing successor liability for claims stemming from Old GM's 363 sale.[49] This recent Second Circuit decision raises a lot of questions and concerns for both Chapter 11 debtors and prospective buyers with respect to successor liability claims. Many circuits throughout the nation have disagreed on the interpretation of the "interest in such property" language of § 363; the majority of courts hold that successor liability claims fall within the scope of this statute.[50] In *Motors Liquidation*, however, the Second Circuit was silent on

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44 Ind. State Police Pension Tr. v. Chrysler L.L.C. (*In re* Chrysler L.L.C.), 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010).

45 11 U.S.C. § 363(f)(5) (2012) provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if . . . such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Id.

46 *In re* General Motors Corp., 407 B.R. 463, 505 (Bankr. S.D.N.Y. 2009).

> [T]he Court has, at the least, a judgment by the Second Circuit that 363(f) may appropriately be invoked to sell free and clear of successor liability claims. The claims sought to be preserved here are identical to those in *Chrysler*. And *Chrysler* is not distinguishable in any legally cognizable respect. On this issue, it is not just that the Court feels that it *should* follow *Chrysler*. It *must* follow *Chrysler*.

Id.

47 *See id.*

48 *See id.* at 500–01.

49 *See In re* Motors Liquidation Co., 829 F.3d 135, 155–56 (2d Cir. 2016).

50 *In re* Trans World Airlines, Inc., 322 F.3d 283, 286–87 (3d Cir. 2003) (affirming Chapter 11 debtor-airline's sale of assets to successor, free and clear of airline employees' discrimination claims against debtor); United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 586 (4th Cir. 1996) (affirming Chapter 11 debtor-coal operator's sale of assets to successor, free and clear of debtors' Coal Act obligations); Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1145–46 (6th Cir. 1991) (affirming that the Michigan Employment Security Commission could assign the Chapter 11 debtor-radio broadcast company's experience rating to assignee under § 363); *see also* Rachel P. Corcoran, *Why Successor Liability Claims Are Not "Interests in Property" Under Section 363(f)*, 18 AM. BANKR. INST. L. REV. 697, 719 (2010).

whether it agreed or disagreed with the bankruptcy court's decision to permit the Sale Agreement, *specifically* pursuant to § 363(f)(5).[51]

C. *Chapter 11 Bankruptcy*

In the United States, companies in financial distress are often faced with the question of whether to file for bankruptcy protection.[52] Chapter 11 of the United States Bankruptcy Code serves to keep businesses alive and pay creditors over time with the remaining assets of the debtor's estate.[53] Filing for Chapter 11 bankruptcy allows the debtor company to reorganize its debts while continuing to operate its business in the ordinary course as the "debtor in possession" (DIP).[54] When the debtor voluntarily files a Chapter 11 bankruptcy petition with the court, an automatic stay is placed against all creditors, freezing any further debt collection and allowing the DIP to operate in its ordinary course of business.[55]

Within the first 120 days of bankruptcy, the DIP has the exclusive right to propose a plan of reorganization.[56] A Chapter 11 plan of reorganization sets forth how the DIP plans to restructure its financial affairs, pay creditors, and fulfill its future obligations.[57] Upon the DIP's proposal of its reorganization plan, only one class of creditors need accept the plan.[58] As for those classes of creditors who reject the plan, they can be "crammed down," pursuant to § 1129(b).[59] Alternatively, a

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51 *See In re Motors Liquidation Co.*, 829 F.3d 135.

52 When a debtor files for Chapter 11 bankruptcy, she is afforded with protective safeguards such as the automatic stay. *See* 11 U.S.C. § 362(a) (2012).

> The automatic stay provides a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. . . . [A] stay of creditor actions against the . . . debtor automatically goes into effect when the bankruptcy petition is filed.

Chapter 11-Bankruptcy Basics, U.S. COURTS [hereinafter *Bankruptcy Basics*], http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics (last visited Feb. 14, 2017) (citing § 362(a)).

53 *See* § 362; *Bankruptcy Basics*, *supra* note 52.

54 § 1107.

55 *See* § 362. "The [automatic] stay provides a breathing spell for the debtor, during which negotiations can take place to try to resolve the difficulties in the debtor's financial situation." *Bankruptcy Basics*, *supra* note 52.

56 *See* § 1121; *see also Bankruptcy Basics*, *supra* note 52.

57 *See* § 1123.

58 *See* § 1129(a)(10).

59 Section 1129(b)(1) provides that a plan that satisfies all of the other applicable provisions of § 1129(a) may be confirmed despite the rejection of the plan by a class or classes. In order for such a plan to be confirmed under § 1129(b), the plan must meet two criteria: The plan (1) must not unfairly discriminate and (2) must be fair and equitable. *See* § 1129(b); *see also* Gary L. Kaplan, *Understanding the Rules of Bankruptcy Cramdown*, LAW360 (Sept. 4, 2013, 3:31 PM),

creditor may propose another plan[60]; however, competing plans in Chapter 11 bankruptcies are rare,[61] for the goal of the Chapter 11 plan of reorganization is to satisfy all classes of creditors to the best of the estate's ability.[62] All classes of creditors must approve the plan before the bankruptcy court has the final say in approving the plan of reorganization.[63]

The United States Bankruptcy Code provides a priority system for repayment of creditors.[64] First, the secured creditors obtain their collateral, pursuant to § 725.[65] Next, the unsecured creditors take in accordance with the priority scheme set forth by § 726.[66] Pursuant to this distribution scheme, tort victims are classified as unsecured, non-priority creditors; in other words, they are repaid only after the secured and priority creditors have been paid, and only if they have filed proofs of claim before the bar date.[67] In *Motors Liquidation*, for example, various tort claims were filed against GM. These claimants, under § 726's priority scheme, were last to recover from GM. However, in a Chapter 11 bankruptcy, any scheduled creditor (unless scheduled as disputed) is deemed to have allowed claims.[68]

Section 1129(a)(7) sets forth requisites to determine whether confirmation of the proposed Chapter 11 plan is in the "best interest of creditors."[69] Section 1129(a)(7) imports all of the Chapter 7 priority

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http://www.law360.com/articles/468678/9understanding-the-rules-of-bankruptcy-cramdown.

60 *See* § 1121.

61 Bret A. Maidman, *Chapter 11 Bankruptcy: An Overview*, NOLO, http://www.nolo.com/legal-encyclopedia/chapter-11-bankruptcy-overview.html (last visited Feb. 13, 2017).

62 *See* § 1129(a)(7) (commonly referred to as the "best interest of creditors test"). The "best interest of creditors test" guarantees that each individual creditor will receive at least as much in Chapter 11 reorganization as it would in Chapter 7 liquidation. *See* 7 HENRY J. SOMMER & RICHARD LEVIN, COLLIER ON BANKRUPTCY ¶ 1129.03 (16th ed. 2009).

63 *See* §§ 1125(a), 1126(c), 1129(a).

64 *See* § 507.

65 *See* § 725.

66 *See* § 726.

67 *See* § 726(a)(1); Christopher M.E. Painter, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times,* 36 STAN. L. REV. 1045, 1066 (1984).

68 *See* § 1111(a).

69 § 1129(a)(7). "The court shall confirm a plan only if all of the following requirements are met:

> (7) With respect to each impaired class of claims or interests—
>
> (A) each holder of a claim or interest of such class—
>
> (i) has accepted the plan; or
>
> (ii) *will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date*; or
>
> (B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the

rules explicated above.[70] The § 1129(a)(7) priority is a right of every creditor to assert in spite of voting.[71] Thus, a creditor may be in a class of creditors that has voted to confirm the plan, but nonetheless, the creditor can still block confirmation of the plan if that creditor, under the proposed Chapter 11 plan, would not receive at least what it would have received in a Chapter 7 liquidation, which is imagined to occur at the time of plan confirmation.[72]

While the Bankruptcy Code does provide for creditor protection of all classes, it is highly unlikely that the DIP will generate enough cash to repay all of its creditors.[73] Thus, tort victims being classified on the bottom of the totem pole will unlikely reap significant, let alone *any*, payment from the DIP.[74] This priority scheme set forth by § 726 illustrates why the ignition switch claimants in *In re General Motors Corp.* (*General Motors*) were left with no form of recovery for their injuries.[75]

D. *Section 363 of the United States Bankruptcy Code*

Section 363 is the controlling statute when the debtor seeks to sell all, or a substantial amount, of the estate's assets.[76] When large debtor corporations are faced with financial uncertainty and lack of capital, they turn to 363 sales for quick cash.[77] Traditionally, Chapter 11 bankruptcies are lengthy and are unconducive to the quick repayment of debts and increase of cash flow.[78] A sale under § 363, however, serves as a solution for the DIP to quickly repay debts to its creditors.[79] A 363 sale allows for a quick increase in cash flow by selling all, or a substantial

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property that secures such claims."

Id. (emphasis added); *see also Bankruptcy Basics*, *supra* note 52.

70 *See* §§ 507(a), 1129(a)(7); *supra* text accompanying notes 64–68.

71 CHARLES J. TABB, LAW OF BANKRUPTCY (HORNBOOK SERIES) 1059–60 (3d ed. 2003).

72 *See* § 1129(a)(7).

73 *See* Painter, *supra* note 67, at 1049–50.

74 *See id.* at 1049–50. The main reason for this is that the secured lenders have already encumbered nearly all of the assets before the bankruptcy petition is filed. "The low priority given to tort victims minimizes incentive for creditors of large corporations like GM to monitor the DIP's conduct for potential violations of tort law." Warner, *supra* note 31, at 541–42.

75 *In re* Gen. Motors Corp., 407 B.R. 463, 504–06 (Bankr. S.D.N.Y. 2009).

76 *See* § 363.

77 *See id.*; *see also* Warner, *supra* note 31, at 543; Painter, *supra* note 67, at 1066 ("The current priority structure, in which tort creditors are relegated to the status of unsecured creditors, undermines the effectiveness of the strict liability regime in precisely this manner.").

78 *See, e.g.*, Ind. State Police Pension Tr. v. Chrysler L.L.C. (*In re* Chrysler L.L.C.), 576 F.3d 108, 119 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010).

79 *See* J. Vincent Aug et al., *The Plan of Reorganization: A Thing of the Past?*, 13 J. BANKR. L. & PRAC. 3, 4–5 (2004).

amount of, assets at an auction.[80]

Section 363(f) sets forth the only five scenarios in which a purchasing entity can purchase all, or a substantial amount of the DIP's assets,

> free and clear of any interest in such property: . . . (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[81]

If one of § 363's aforementioned subprovisions are met, all, or a substantial amount, of the assets are sold "free and clear of any interest in such property."[82] Legal scholars and courts have disagreed on the interpretation of "interest," as it is not defined in the Bankruptcy Code.[83] The majority of courts follow the broad interpretation of the phrase "interest in property," and look beyond property interests.[84] While a traditional Chapter 11 confirmation plan generally has to be approved by all creditors,[85] a 363 sale need only be confirmed by the bankruptcy court.[86]

E. *The Doctrine of Successor Liability*

Typically, under a 363 sale, the buyer will not be liable for the seller's debts, liabilities, liens, encumbrances, or tortious conduct.[87] Federal courts differ on whether the successor liability doctrine can exist under the Bankruptcy Code.[88] Historically, courts have applied the equitable state law doctrine of successor liability[89] on a case-by-case

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80 *See* Aug, et al., *supra* note 79.

81 § 363(f); *see supra* note 6.

82 § 363(f); *see supra* note 6.

83 *See* Corcoran, *supra* note 50. "[T]he majority of courts have interpreted the authorization by Congress in § 363(f) as barring successor liability claims against the 363 Sale purchaser when the theory for liability is based on conduct carried out by the DIP prior to the filing of its bankruptcy petition ('successor liability claims')." Warner, *supra* note 31, at 543.

84 *See In re* Trans World Airlines, Inc., 322 F.3d 283, 286–90, (3d Cir. 2003); United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 582, 586 (4th Cir. 1996); Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1145–46 (6th Cir. 1991).

85 *But see supra* note 59.

86 *See* § 363(b).

87 § 363(f); *see supra* note 6.

88 *See In re Trans World Airlines, Inc.*, 322 F.3d at 286–87; *In re Leckie Smokeless Coal Co.*, 99 F.3d at 585; *In re Wolverine Radio Co.*, 930 F.2d at 1146–47.

89 *See* John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371, 372 (2011); *see also* Chi.

basis. The doctrine of successor liability seeks to "provide a necessary remedy to injured parties, often tort claimants," while also providing "clarity and certainty for business parties engaged in . . . corporate transactions."[90]

As the Bankruptcy 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.[91] Contrary to *Motors Liquidation*, the majority of courts have adopted an expansive reading of the "interest in such property" language of § 363.[92] These courts have generally concluded that the term "claim" in § 363 should be read in harmony with the definition of claim found in § 101(5) of the Bankruptcy Code.[93]

These courts also have read § 363's "interest in such property" language to reach interests beyond *in rem* interests.[94] Under property law, an *in rem* interest "[i]nvolv[es] or determin[es] the status of a *thing*, and therefore the rights of persons generally with respect to that *thing*."[95] If a plaintiff has an *in rem* right against a defendant, she is said to have a right in that thing.[96] In contrast, an *in personam* interest involves or determines the personal rights and obligations of the parties.[97] If a plaintiff has an *in personam* right against a defendant, she has the right to get a money judgment against the defendant. The principle of successor liability essentially makes the defendant's tort

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Truck Drivers v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995).

90 Matheson, *supra* note 89, at 372–73.

91 *See* Corcoran, *supra* note 50; *see also In re Leckie Smokeless Coal Co.*, 99 F.3d at 581–82 (stating that courts have not universally agreed on a definition of "interest" under § 363(f)); *In re* Taylor, 198 B.R. 142, 161–62 (Bankr. D.S.C. 1996) (discussing how courts interpret the term "interest" differently); Matthew T. Gunlock, *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 (2005) (noting that there has been significant debate on what constitutes an "interest" under § 363(f)).

92 *See In re Trans World Airlines, Inc.*, 322 F.3d at 288–89; *In re Leckie Smokeless Coal Co.*, 99 F.3d at 581–82.

93 *See* 11 U.S.C. § 101(5) (2012). The term "claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Id.; *see* Burton et al., *supra* note 9.

94 *In re Leckie Smokeless Coal Co.*, 99 F.3d at 582.

95 *In Rem*, BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added).

96 *See generally* Nicholas J. McBride, *Rights and the Basis of Tort Law*, *in* RIGHTS AND PRIVATE LAW 331, 347 (Donal Nolan & Andrew Robertson eds., 2011).

97 *Id.* at 349 n.48.

obligation "run with the land," and is, in other words, an *in rem* interest.[98] In effect, the doctrine of successor liability is conceptually identical to equitable servitudes.[99] An equitable servitude is an interest in real property, in other words, a promise to use the land in some way that is designed to be enforced with specific performance.[100] Equitable servitudes essentially offer plaintiffs equitable remedies, in addition to an enforceable money judgment.[101]

Applying these perspectives, successor liability claims constitute *in rem* "interest[s] in such property."[102] Therefore, under this definition, assets can be sold under § 363 "free and clear" of claims stemming from successor liability.[103]

Many commentators in support of this reading argue against successor liability claims within the bankruptcy context because the doctrine runs counter to core bankruptcy principles.[104] The Bankruptcy Code seeks to give debtors a "fresh start" while simultaneously maximizing the value of the debtor's estate and the proceeds available to creditors.[105] In order for the debtor to have a fresh start under Chapter 11, a plan of reorganization is needed, which calls for bargaining among creditors for a reduced payment on claims (unlike the discharge allowing for the debtor's fresh start under Chapter 7).[106] However, there are strong countervailing policy interests to such a bargaining process; for example, the need for certainty in transactions.[107] Throughout time,

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98 David Gray Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste Cleanup*, 50 L. & CONTEMP. PROBS. 119, 124 (1987).

99 *Cf. id.* at 123.

100 *Id.*

101 *Id.* at 124.

102 11 U.S.C. § 363(f) (2012); *see supra* note 6.

103 *See* Burton et al., *supra* note 9.

104 *Cf.* Douglas v. Stamco, 363 F. App'x 100, 102–03 (2d Cir. 2010).

> [T]o the extent that the "free and clear" nature of the sale . . . was a crucial inducement in the sale's successful transaction, it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would 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.

Id.; *see* Corcoran, *supra* note 50, at 749–50.

105 Warner, *supra* note 31, at 548 (citing Mitchell R. Julis, *Classifying Rights and Interests Under the Bankruptcy Code*, 55 AM. BANKR. L.J. 223 (1981)).

106 *See* NextWave Pers. Commc'ns, Inc. v. F.C.C., 254 F.3d 130, 155 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." (quoting H.R. REP. NO. 95-595, at 220 (1977))); *see also* Warner, *supra* note 31, at 548.

107 *See* Mark J. Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1561–62 (1984) ("Little effort is made to . . . prevent[] the rule of successor liability from otherwise reducing the free transferability of firms or their assets.").

courts have struggled to balance these countervailing interests.[108] There are four theories, however, under which courts have held purchasing companies liable under the successor liability doctrine.[109] These theories will later be explicated in detail,[110] and are at issue in the circuit split discussed next.

F. *Circuit Split*

Courts throughout the nation disagree on whether successor liability claims constitute "interests in such property" under § 363.[111] This issue of statutory interpretation has been directly addressed by three circuit courts of appeals: the Fourth Circuit in *In re Leckie Smokeless Coal Co.*[112]; the Third Circuit in *In re Trans World Airlines, Inc.*[113]; and the Second Circuit in *In re Chrysler L.L.C.*,[114] *Douglas v. Stamco*,[115] and most recently, *Motors Liquidation*.[116] The Third and Fourth Circuits have joined the majority of lower courts and have adopted an expansive reading of the "interest in such property" of § 363.[117] These courts have included successor liability claims to fall within the scope of § 363.[118] In the Second Circuit's recent *Motors Liquidation* decision, the court adopted a more narrow reading of § 363, barring protection of successor liability claims.[119] While not directly addressing this issue on point, the First[120] and Seventh[121] Circuits have

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108 *See* E.E.O.C. v. Vucitech, 842 F.2d 936, 944 (7th Cir. 1988) ("The entire issue of successor liability . . . is dreadfully tangled, reflecting the difficulty of striking the right balance between the competing interests at stake.").

109 *See generally* Matheson, *supra* note 89.

110 *See infra* Part II.

111 *See* Warner, *supra* note 31, at 543–44; Corcoran, *supra* note 50, at 719. *See generally* Matheson, *supra* note 89, at 372–73.

112 United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573 (4th Cir. 1996).

113 322 F.3d 283 (3d Cir. 2003).

114 Ind. State Police Pension Tr. v. Chrysler L.L.C. (*In re* Chrysler L.L.C.), 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010).

115 363 F. App'x 100 (2d Cir. 2010).

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

117 *See In re Trans World Airlines, Inc.*, 322 F.3d 283; *In re Leckie Smokeless Coal Co.*, 99 F.3d 573.

118 *See* sources cited *supra* note 117.

119 *See In re Motors Liquidation Co.*, 829 F.3d at 155–56.

120 *See* Western Auto Supply Co. v. Savage Arms, Inc. (*In re* Savage Arms Indus.), 43 F.3d 714, 721 (1st Cir. 1994) (noting that if successor liability is presumed to be an "interest" extinguished by a § 363 sale, then it cannot be extinguished without "appropriate notice"). The First Circuit here, solely for the purpose of argument, merely assumed that successor liability claims constituted "interests" under § 363 and could be extinguishable only after adequate "notice and hearing." *Id.* "[T]here can be no question that its claim could not be extinguished absent a showing that Western Auto was afforded appropriate notice in the particular circumstances." *Id.* (citing 11 U.S.C. § 1109(a) (2012)); *see also* Corcoran, *supra* note 50, at 739.

121 *See* Chi. Truck Drivers v. Tasemkin, Inc., 59 F.3d 48, 49–51 (7th Cir. 1995)

both suggested that a successor liability claim is not an "interest in property" under § 363. This Note further addresses the majority position first, and then the Second Circuit's recent interpretation in *Motors Liquidation*.

II. ANALYSIS

A. *Theories of Successor Liability*

Generally, when there is a sale or transfer of assets, such as a 363 sale, "the purchaser will not be liable for the seller's debts, liabilities, or tortious conduct."[122] The doctrine of successor liability is used by some jurisdictions as an exception to this general rule.[123] There are four principal theories under which courts hold a purchasing party liable under the successor liability doctrine.[124]

First, is the express or implied assumption of liabilities in an acquisition agreement.[125] Under this theory, the fact that the parties have not expressly assumed liabilities in the sale agreement does not determine whether a court can impose successor liability.[126] Even when the parties expressly *limit* the liabilities assumed by the purchaser in the terms of their acquisition agreement, under this theory, the doctrine of

(acknowledging that "a second chance is precisely the point of successor liability, and [that] it is not clear why an intervening bankruptcy proceeding . . . should have a *per se* preclusive effect on the creditor's chances [of recovery]"). Although *Chicago Truck Drivers* did not involve a 363 sale, the conclusion reached by the Seventh Circuit is of use to this discussion. *Id.* at 50 n.2. After the debtor filed for bankruptcy protection, a new entity "was incorporated for the purpose of obtaining the assets of [the debtor]." *See* Chi. Truck Drivers v. Tasemkin, Inc. 172 B.R. 877, 878 (N.D. Ill. 1994), *rev'd*, 59 F.3d 48 (7th Cir. 1995). "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." Corcoran, *supra* note 50, at 734 (citing *Chi. Truck Drivers*, 172 B.R. at 878). The successor liability claimants sought relief from the newly formed entity because they received no distribution on their Employee Retirement Income Security Act claims in the bankruptcy proceeding. *See Chi. Truck Drivers*, 59 F.3d at 49. "[T]he Seventh Circuit ultimately permitted the federal successor liability claimants to proceed with their complaint against the new entity." Corcoran, *supra* note 50, at 734.

122 Warner, *supra* note 31, at 549; *see* J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1, 6 (1995).

123 *See* Tucker, *supra* note 122, at 9–15.

124 While this list of theories is not exhaustive, the four theories discussed in this Note are: the express or implied assumption theory; the fraudulent conveyance theory; the de facto merger theory; and the mere continuation doctrine. *See* Tucker, *supra* note 122, at 9–13. For a more detailed discussion of these four successor liability theories, among others, see Warner, *supra* note 31, at 549–52.

125 *See* Matheson, *supra* note 89, at 371–72.

126 *See* Cyr v. B. Offen & Co., 501 F.2d 1145, 1151–54 (1st Cir. 1974); Warner, *supra* note 31, at 551.

successor liability overrides the agreement's language.[127] For example, when a debtor company contracts to sell its tangible assets to a purchasing company, the debtor company has granted an *in rem* interest to the purchasing company; thus, the two contracting companies cannot bilaterally agree that third parties (such as tort victims) forfeit their interest in the specific property.[128] Therefore, in this example, the purchaser could be held accountable for *any* of the selling debtor's liabilities.[129] This is the reasoning employed by the *Motors Liquidation* court.[130]

Second, courts will hold buyer companies liable when the § 363 sale is, in actuality, a fraudulent conveyance.[131] Third, is the de facto merger theory: when a transaction "has the economic effect of a statutory merger but that is cast in the form of an acquisition or sale of assets . . . ."[132] If the transaction is in substance a merger rather than a sale, the buyer will assume the seller's liabilities.[133] Lastly, courts have employed the mere continuation doctrine when holding the successor company liable for the buyer company's conduct.[134] Both the mere continuation theory and the de facto merger theory aim to prohibit entities that are reorganizing under the guise of a sale to avoid liabilities.[135] Interpreting "interest in such property" to include unsecured claims, such as successor liability claims, increases the likelihood of abusive 363 sales; notably, such an interpretation disincentivizes the debtor to reduce liabilities before it files for bankruptcy.[136] To the contrary, such an interpretation *encourages* the debtor to hold onto its liabilities before it files for Chapter 11. This Note focuses on the first of these four theories, as it was employed by the Second Circuit in *Motors Liquidation*.

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127 *See* Matheson, *supra* note 89, at 385–87; *cf.* Interview with David G. Carlson, Professor of Law, Benjamin N. Cardozo Sch. of Law, in N.Y., N.Y. (Nov. 30, 2016).

128 *See* Lucas v. Dorsey Corp., 609 N.E.2d 1191, 1201 (Ind. Ct. App. 1993) ("The fact that Dorsey and its predecessor, Daro, had an agreement whereby Dorsey was not to assume Daro's liabilities is not dispositive." (citing *Cyr*, 501 F.2d at 1152–54)).

129 *Id.*

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

131 *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 12 (AM. LAW INST. 1998).

132 *De Facto Merger*, BLACK'S LAW DICTIONARY (10th ed. 2014). The elements of a de facto merger are as follows:

> (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption by the purchaser of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operation.

New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 209 (2d Cir. 2006).

133 *See Nat'l Serv. Indus., Inc.*, 460 F.3d at 205.

134 *See* Matheson, *supra* note 89, at 391–94.

135 *See id.* at 392; *see also* Warner, *supra* note 31, at 552.

136 11 U.S.C. § 363 (2012); *see* Warner, *supra* note 31, at 560.

1. Successor Liability Claims as "Interests"

The majority of courts interpret the "free and clear" language of § 363 to include successor liability claims, contrary to the recent *Motors Liquidation* decision.[137] Courts employ a number of theories to support this inclusion, as seen in the following cases.

a. The Fourth Circuit

In *In re Leckie Smokeless Coal Co.*[138] (*Leckie Smokeless*), the Fourth Circuit Court of Appeals first addressed the issue of interpreting § 363's "interest in such property" language.[139] In this case, debtors Leckie Smokeless Coal Company, the New River Mineral Resources Company, and Gould Resources, Inc. (Coal Companies) filed for Chapter 11 bankruptcy protection.[140] The Coal Companies were affiliates of Leckie that owned leases of coal lands located adjacent to Leckie's property.[141] The Coal Companies urged the bankruptcy court not to hold the purchasers of the Coal Companies' assets (as successors in interest) jointly and severally liable for the Coal Companies' financial obligations to the 1992 United Mine Workers of America (UMWA) Benefit Plan (Plan)[142] and the UMWA Combined Benefit Fund (Fund),[143] both of which were established pursuant to the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act).[144]

The Plan and the Fund argued that the successor liabilities arising under the Coal Act were inextinguishable, pursuant to the "interest in such property" language of § 363.[145] The Plan and the Fund objected to

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137 *In re* Trans World Airlines, Inc., 322 F.3d 283, 286 (3d Cir. 2003); United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 583 (4th Cir. 1996).

138 99 F.3d 573 (4th Cir. 1996).

139 *Id.* at 581–82.

140 *See id.* at 577.

141 *Id.* ("Together, the three companies [had] been assigned 140 beneficiaries for purposes of Combined Benefit Fund liability and, with respect to the 1992 UMWA Benefit Plan, are the last signatory employers of 87 retirees.").

142 "The Plan provides health benefits to retirees who retired prior to September 30, 1994, and who, among other things, are not eligible to receive benefits from the Combined Benefit Fund." *Id.* (citing 26 U.S.C. § 9712(b) (2012)). "The Plan is financed by annual and monthly premiums paid by the beneficiaries' 'last signatory operators.'" *Id.* (citing §§ 9712(d)(1), (3)). "An operator's 'successor in interest' and 'related persons' are jointly and severally liable for the operator's premiums." *Id.* (citing §§ 9711(g)(1), 9712(d)(4)).

143 "The Fund provides health and death benefits to coal industry retirees who, as of July 20, 1992, were eligible for, and receiving, benefits under either the 1950 or the 1974 plan." *Id.* at 576 (citing §§ 9703(a), (f)). "The Fund is financed by annual per-beneficiary premiums paid in monthly installments by 'assigned operators.'" *Id.* (citing §§ 9704, 9706). "An assigned operator's 'related persons' are jointly and severally liable for the operator's premiums." *Id.* at 577 (citing § 9704(a)).

144 26 U.S.C. §§ 9701–9722; *see In re Leckie Smokeless Coal Co.*, 99 F.3d at 575.

145 *In re Leckie Smokeless Coal Co.*, 99 F.3d at 577.

the sale free and clear of such liabilities, and the proceeding was withdrawn from the bankruptcy court and brought to the Southern District of West Virginia.[146] The district court held that the language of § 363 authorized the bankruptcy court to permit the sale of the Coal Companies' assets free and clear of their Coal Act obligations.[147]

On appeal to the Fourth Circuit, the Plan and the Fund contended that their respective interests in receiving premium payments did not fall within the scope of the "interest in such property" language of § 363.[148] The *Leckie Smokeless* court, however, disagreed with the Plan and the Fund.[149] The court reasoned that the rights of the Plan and the Fund to collect Coal Act premiums constituted "interests in property" because the purchaser of the assets intended to use these rights in the same manner as the seller.[150] While Congress had not specifically defined "interest" under the Bankruptcy Code, the court believed that Congress did not intend to limit the scope to solely *in rem* interests.[151] Moreover, the *Leckie Smokeless* court declined to limit the scope of

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146 *Id.* at 577–78.

147 *Id.* at 578. The district court noted:

> If the proposed sale between Defendants . . . and the Buyer goes through, although the Buyer will not be contributing the Defendants' future obligations to the Funds, jobs will be created when the property is mined again and funds will be generated from which to pay some of Defendants' debts, including their past due Coal Act obligations. If the sale does not go through, no one will be in a position to contribute Defendants' future obligations to the Funds, no jobs will be created, and Defendants' debts will not be paid, at least not until Defendants' assets are sold in a piecemeal fashion, possibly generating less value than a sale such as this of all of Defendants' assets. The Court believes the lesser of these evils is the greater good.

Id.

148 *Id.* at 581.

149 *Id.* at 582.

150 *Id.* at 583; *see* Corcoran, *supra* note 50, at 731. The *Leckie* court further reasoned that these were "interests in such property" because such rights were:

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

In re Leckie Smokeless Coal Co., 99 F.3d at 582.

151 *Id.*

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

Id.; *see* Corcoran, *supra* note 50, at 730.

§ 363 to *in rem* interests.[152] The *Leckie Smokeless* court first interpreted the meaning of § 363's ambiguous "interest in property" language, and employed a broad interpretation to extinguish the purchasing company's liability.[153]

b. The Third Circuit

In *In re Trans World Airlines, Inc.*[154] (*Trans World*), the Third Circuit Court of Appeals affirmed the bankruptcy court's order approving the sale of assets of Trans World Airlines (TWA) to American Airlines (American), which extinguished American's liability for the Travel Voucher Program employment discrimination claims against TWA.[155] In 1976, the Equal Employment Opportunity Commission (EEOC) filed an action against TWA in the United States District Court for the Central District of California.[156] In 1977, TWA employee Linda Knox-Schillinger filed a suit on her own behalf, and on behalf of other female flight attendants, against TWA in the United States District Court for the Southern District of New York.

The primary allegation in both suits against TWA was that TWA's former maternity leave policy for flight attendants (which included placing females on leave immediately upon pregnancy) constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[157] In 1978, the two cases were consolidated and filed in the Central District of California. In 1995, almost twenty years later, the lawsuit settled.[158] Under the terms of the court-approved settlement agreement, TWA instituted the Travel Voucher Program and was required to provide ten travel vouchers for each covered pregnancy to class members who submitted a proof of claim form to the EEOC.[159] Many of the flight attendants that received these travel vouchers chose to save their vouchers for trips to be taken after retirement when they had more time to travel and would receive more favorable tax consequences for the use

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152 *See In re Leckie Smokeless Coal Co.*, 99 F.3d at 582; Corcoran, *supra* note 50, at 730.

153 *See In re Leckie Smokeless Coal Co.*, 99 F.3d at 581–82; Warner, *supra* note 31; Corcoran, *supra* note 50, at 730.

154 322 F.3d 283 (3d Cir. 2003).

155 *See id.* at 284–85.

156 *Id.* at 285.

157 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000(a)–(e) (2012)); *see also In re Trans World Airlines, Inc.*, 322 F.3d at 285.

158 *In re Trans World Airlines, Inc.*, 322 F.3d at 285.

159 *Id.*

> The agreement provided that travel vouchers could be used by the class member or her family at any time during her life subject to certain age limitations for dependent children. Under the program, anyone traveling on one of these vouchers could be bumped by a paying passenger. Approximately 2,053 class members each received on average twenty five vouchers under the settlement agreement.

Id.

of the vouchers.[160] As of March 2, 2001, twenty-nine discrimination charges had been filed against TWA with the EEOC.[161]

On January 10, 2002, TWA filed for Chapter 11 bankruptcy.[162] Months before filing for Chapter 11 bankruptcy, TWA's Board of Directors discussed potentially merging with, or selling its assets to, another airline.[163] American had expressed its interest in purchasing substantially all of TWA's assets.[164] On February 28, 2001, TWA's Board of Directors voted to accept American's proposal to purchase TWA's assets for $742 million (American Sale).[165] The EEOC and Knox-Schillinger class of plaintiffs objected to the American Sale. However, upon evidentiary hearings, the bankruptcy court approved the American Sale.[166] In approving the American Sale, the court extinguished successor liability on the part of American for any Travel Voucher Program claims, as well as any of the discrimination claims against TWA before the EEOC.[167] Immediately after the bankruptcy court entered the American Sale order, the EEOC appealed.[168] However, on October 11, 2001, the District Court of Delaware affirmed the bankruptcy court's decision that American would not assume the Travel Voucher Program and discrimination claims against TWA.[169]

On appeal to the Third Circuit, the EEOC and Knox-Schillinger class argued that their claims against TWA were not "interests in property" within the meaning of the phrase in § 363 of the Bankruptcy

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160 *Id.*

161 *Id.* "The charges alleged various violations of several federal employment discrimination statutes, including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act." *Id.* at 286.

162 *Id.*

163 TWA ended the year 2000 with $100 million in cash, which was $50 to $100 million less than it needed to survive its winter season. *See In re* Trans World Airlines, No. 01-56, 2001 WL 1820326, at *4 (Bankr. D. Del. Apr. 2, 2001).

164 *In re Trans World Airlines, Inc.*, 322 F.3d at 286.

165 *Id.*

166 *Id.* ("In approving the Sale Order, the Bankruptcy Court determined that there was no basis for successor liability on the part of American and that the flight attendants' claims could be treated as unsecured claims.").

167 *Id.*

> The Sale Order also enjoined all persons from seeking to enforce successor liability claims against American. The Court's order provided that: Pursuant to sections 105(a) and 363 of the Bankruptcy Code, all Persons are enjoined from taking any action against Purchaser or Purchaser's Affiliates including, without limitation, TWA Airlines LLC, to recover any claim which such Person had solely against Sellers or Sellers' Affiliates.

Id. at 286–87.

168 *Id.* at 287.

169 *Id.* ("The District Court affirmed the Bankruptcy Court's holding that the claims against [TWA] were 'interests in property' within the meaning of 11 U.S.C. § 363(f), and therefore, [TWA's] assets could be transferred free and clear of those claims.").

Code.[170] American, on the other hand, argued that the "interest in such property" language of § 363 should be broadly interpreted to bar *any* interest that could potentially attach to the property being sold.[171] The Third Circuit agreed with American.[172] The court noted a recent trend among its peer courts in broadly interpreting the language of § 363, not limiting its interpretation to solely *in rem* property interests.[173] In addition to following the trend, the court also relied on the Fourth Circuit's reasoning in *Leckie Smokeless* to interpret the claims as interests under § 363.[174]

Upon review of *Leckie Smokeless* and taking into account peer courts' recent broad interpretation of § 363's "interest in such property" language, the court decided that any interest "refer[s] to obligations that are connected to, or arise from, the property being sold."[175] Under this reasoning, the court explained, the claims arising from the Travel Voucher Programs, and the discrimination claims filed with the EEOC constituted interests.[176] The court here also noted that interpreting interests to only include *in rem* interests (such as liens), would be inconsistent with § 363, and would run contrary to the underlying purpose of the bankruptcy process.[177]

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170 *Id.* at 288. Appellants asserted that interests in property are limited to "liens, mortgages, money judgments, writs of garnishment and attachment, and the like, and cannot encompass successor liability claims arising under federal antidiscrimination statutes and judicial decrees implementing those statutes." *Id.*

171 *Id.*

172 *Id.* at 290.

173 *Id.* at 289 ("[T]he trend seems to be toward a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.'" (quoting 3 HENRY J. SOMMER & RICHARD LEVIN, COLLIER ON BANKRUPTCY ¶ 363.06[1] (16th ed. 2010)).

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

175 *Id.* (quoting Folger Adam Sec. Inc. v. DeMatteis/MacGregor JV, 209 F.3d 252, 259 (3d Cir. 2000)); *see also* Corcoran, *supra* note 50, at 731–32.

176 *See In re Trans World Airlines, Inc.*, 322 F.3d at 289–90.

> Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Furthermore, TWA's investment in commercial aviation is inextricably linked to its employment of the Knox-Schillinger claimants as flight attendants, and its ability to distribute travel vouchers as part of the settlement agreement. While the interests of the EEOC and the Knox-Schillinger class in the assets of TWA's bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, the reasoning of *Leckie* and *Folger Adam* suggests that they are interests in property within the meaning of section 363(f) in the sense that they arise from the property being sold.

Id. at 290.

177 *Id.* at 290. Section 363(f)(3):

2. Successor Liability Claims Fall Outside the Scope of "Interests"

a. The Second Circuit

The recent *Motors Liquidation* decision takes a position contrary to the majority of courts concerning the interpretation of § 363's "interest in such property" language and whether successor liability claims fall within the statute's scope.[178]

On July 5, 2009, the United States Bankruptcy Court for the Southern District of New York approved the 363 sale of Old GM's assets to New GM.[179] New GM assumed fifteen types of liabilities, pursuant to the terms of the Sale Agreement.[180] Specifically, New GM was liable for all accidents that occurred *after* the 363 sale's closing date.[181] The Sale Agreement was approved by the bankruptcy court, and New GM would be "free and clear" of all other liabilities of Old GM.[182]

On April 21, 2014, a class of plaintiffs, including those with claims arising from faulty ignition switches, initiated an adversary proceeding in the bankruptcy court, asserting economic losses from Old GM's faulty ignition switches.[183] On April 15, 2015, the bankruptcy court decided to enforce the Sale Agreement, in part.[184] The bankruptcy court held that New GM could not be sued for ignition switch claims that could have been brought against Old GM, unless those claims arose from New GM's own wrongful conduct.[185]

On appeal to the Second Circuit, a group of creditors, among others, argued that the liability arising from the ignition switch claims against Old GM should be assumed by New GM.[186] New GM contended that the "free and clear" provision of § 363 barred successor liability, as these ignition switch claims were interests under the statute.[187] Further, New GM argued that *In re Chrysler*[188] already decided that successor

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> [C]ontemplates that a lien is but one type of interest. Section 363(f)(3) provides: The trustee may sell property . . . 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 . . . .

Id. (quoting 11 U.S.C. § 363(f)(3) (2012)); *see also* Corcoran, *supra* note 50, at 731.

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

179 *See In re* General Motors Corp., 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

180 *In re Motors Liquidation Co.*, 829 F.3d at 147.

181 *Id.*

182 *Id.*

183 *Id.* at 150.

184 *See In re* Motors Liquidation Co. (*MLC II*), 529 B.R. 510 (Bankr. S.D.N.Y. 2015). The part of the Sale Agreement not enforced is not relevant to this Note's discussion.

185 *Id.* at 528.

186 *In re Motors Liquidation Co.*, 829 F.3d at 143.

187 *Id.*

188 Ind. State Police Pension Tr. v. Chrysler L.L.C. (*In re* Chrysler L.L.C.), 576 F.3d 108 (2d

liability claims were interests under § 363.[189] The *Motors Liquidation* court, however, rejected this argument because the United States Supreme Court vacated *In re Chrysler* after it became moot during the certiorari process.[190]

The *Motors Liquidation* court agreed with its peers that successor liability claims could be interests when they flow from the assets being sold,[191] but, the court added, these successor liability claims must still be considered "claims" under § 101(5) of the Bankruptcy Code.[192]

The court then addressed what claims can be barred under Chapter 11 *generally*.[193] A claim is a right to payment that arose before the filing of the petition.[194] If the right to payment is contingent on future events, such as the faulty ignition switch claims, the claim must instead derive from pre-petition conduct related to the contingent claim.[195] The Second Circuit, however, has not decided on whether pre-petition conduct not yet resulting in "tortious consequence to a victim" constitutes a valid § 101(5) claim.[196] In light of this uncertainty, courts require some minimum "contact"[197] or "relationship"[198] that makes identifiable the individual with whom the claim does or would rest.[199] The *Motors Liquidation* court then applied these aforementioned "claim" principles to the four types of ignition switch claims asserted against New GM: "(1) pre-closing accident claims, (2) economic loss claims arising from the ignition switch defect or other defects, (3) independent claims relating only to New GM's conduct, and (4) [u]sed [c]ar [p]urchasers' claims."[200]

First, the pre-closing accident claims, the court noted, were not

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Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010).

189 *In re Motors Liquidation Co.*, 829 F.3d at 154.

190 *Id.* at 154–55.

191 *In re Motors Liquidation Co.*, 829 F.3d at 155–56 ("Here, the bankruptcy court's power to bar 'claims' in a quick § 363 sale is plainly no broader than its power in a traditional Chapter 11 reorganization."); *see In re* Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2003); 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). *Compare* 11 U.S.C. § 363(f) (2012) ("free and clear of any interest in such property"), *with* § 1141(c) ("free and clear of all claims and interests").

192 *In re Motors Liquidation Co.*, 829 F.3d at 155.

193 Section 101(5) of the Bankruptcy Code defines claim as any "*right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . ." § 101(5)(A) (emphasis added).

194 *In re Motors Liquidation Co.*, 829 F.3d at 156 (citing Pension Benefit Guar. Corp. v. Oneida Ltd., 562 F.3d 154, 157 (2d Cir. 2009)).

195 *In re* Chateaugay Corp. (*Chateaugay I*), 944 F.2d 997, 1005 (2d Cir. 1991).

196 *In re Motors Liquidation Co.*, 829 F.3d at 156 (quoting *Chateaugay I*, 944 F.2d at 1004).

197 *Chateaugay I*, 944 F.2d at 1003–04.

198 LTV Steel Co. v. Shalala, (*In re* Chateaugay Corp.) (*Chateaugay II*), 53 F.3d 478, 497 (2d Cir. 1995).

199 *Id.* ("A claim will be deemed pre-petition when it arises out of a relationship recognized in, for example, the law of contracts or torts.").

200 *In re Motors Liquidation Co.*, 829 F.3d at 156.

only directly related to Old GM-built cars with ignition switch defects, but those plaintiffs' claims were properly considered tort claims that arose before the filing of the bankruptcy petition.[201] Those claims clearly fell within the scope of the Sale Agreement and thus, New GM would not be held liable for them.[202] Next, the court examined the economic loss claims stemming from the ignition switch defects.[203] These claims were also directly related to Old GM's automaker business, and, moreover, the plaintiffs came into contact with Old GM prior to the bankruptcy by simply owning Old GM cars.[204] The ignition switch defects at the root of these claims, however, came to light five years later; thus, they were contingent claims.[205] The court reasoned that even if the claimants did not know of the ignition switch defects, "Old GM's creation of [these] defect[s] fairly gave rise to these claims."[206] Therefore, these too were considered valid claims, pursuant to § 101(5) of the Bankruptcy Code, and fell within the broad scope of the Sale Agreement. As a result, New GM would not be held liable for these claims either.

According to the *Motors Liquidation* court, the next two categories of claims did not meet the Bankruptcy Code's limitations on what constitutes a claim.[207] The independent claims relating only to New GM's conduct are claims based only on New GM's *post*-petition conduct, and thus are not based on a right to payment that arose before the filing of petition, nor on pre-petition conduct.[208] These claims, therefore, fell outside the scope of the Sale Agreement's "free and clear" provision, and New GM could potentially be liable for such claims.[209]

The court then addressed the final category of claims asserted against New GM: the used car purchasers' claims.[210] These claimants purchased Old GM-built cars post-petition, without any knowledge of the ignition switch defect or potential claim against New GM.[211] In fact, as of the date of the bankruptcy filing, there were an *unknown number* of *unknown individuals* who would one day purchase Old GM vehicles on the secondary market.[212] Thus, there could have been no requisite contact[213] or relationship[214] between Old GM and these claimants to

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201 *Id.* at 156–57.
202 *Id.* at 156.
203 *Id.* at 157.
204 *Id.*
205 *Id.* (citing 11 U.S.C. § 101(5) (2012)).
206 *Id.* (citing *Chateaugay I*, 944 F.2d 997, 1005 (2d Cir. 1991)).
207 *See* § 101(5); *see also In re Motors Liquidation Co.*, 829 F.3d at 157.
208 *See* sources cited *supra* note 207.
209 *In re Motors Liquidation Co.*, 829 F.3d at 157.
210 *Id.*
211 *Id.*
212 *Id.*
213 *See supra* text accompanying notes 197–99.

establish a valid claim pursuant to § 101(5) of the Bankruptcy Code.[215] In sum, the Second Circuit refused to enjoin the independent claims, and enjoined the used car purchasers' claims.[216]

Next, the Second Circuit addressed the due process issue of adequate notice owed to the plaintiffs.[217] A fundamental requirement of due process in any proceeding is to inform all interested parties of the action with reasonable notice and afford them an opportunity to be heard.[218] Because Old GM knew or should have known of the ignition switch claims, the bankruptcy court held that the plaintiffs were entitled to actual or direct mail notice.[219] The ignition switch plaintiffs, however, only received publication notice.[220] The parties disputed whether these plaintiffs did, in fact, require more than publication notice.[221]

Facts reveal that Old GM knew of the faulty ignition switches almost immediately after installing them.[222] However, Old GM did not reveal—but should have—those facts during its bankruptcy.[223] In response, New GM contended that because these were contingent claims, the ignition switch plaintiffs were essentially "unknown creditors."[224] The Second Circuit rejected New GM's argument, holding that because contingent claims are still in fact claims, claimants are entitled to reasonable notice if the debtor knows of the claims.[225] In turn, the Second Circuit declined to shield New GM from liability for Old GM concealing claims against potential creditors.[226]

The court then addressed the question of prejudice—specifically whether prejudice is an "essential element" of procedural due process, and whether there was prejudice in the case at bar.[227] The court found that these ignition switch plaintiffs were, in fact, prejudiced for the foregoing reasons.[228] The court reasoned that had Old GM disclosed the ignition switch defects, and had those affected individuals known of the 363 sale and proceedings, the Sale Agreement, as it stood, may *not* have

214 *See supra* text accompanying notes 197–99.

215 *See* 11 U.S.C. § 101(5) (2012); *see also In re Motors Liquidation Co.*, 829 F.3d at 157.

216 *In re Motors Liquidation Co.*, 829 F.3d at 158.

217 *See id.*

218 Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

219 *In re Motors Liquidation Co.*, 829 F.3d at 158.

220 *Id.*

221 *Id.* at 159.

222 *Id.* at 160.

223 *Id.*

224 *Id.*

225 *Id.* ("Moreover, as discussed above, the only contingency was Old GM telling owners about the ignition switch defect—a contingency wholly in Old GM's control and without bearing as to *Old GM's* own knowledge." (emphasis added)); *see also* 11 U.S.C. § 101(5) (2012).

226 *In re Motors Liquidation Co.*, 829 F.3d at 160.

227 *Id.* at 161.

228 *Id.* at 163.

been approved.[229] The court did acknowledge that it would be speculative, at best, to say that the Sale Agreement would have definitely been rejected, but nonetheless, the plaintiffs were not given the opportunity to raise such concerns.[230] Contrary to this notion, the bankruptcy court concluded that it would have entered the Sale Agreement on the same terms even if the plaintiffs had been given an opportunity to be heard.[231] The Second Circuit disagreed with the bankruptcy court, holding that its enforcement of the Sale Agreement violated due process.[232] In response, the Second Circuit reversed the bankruptcy court's decision insofar as it enforced the Sale Agreement to enjoin claims relating to the ignition switch defect.[233]

B. *Section 363 and Successor Liability*

As previously discussed, the majority of courts interpret the "free and clear" language of § 363 to include successor liability claims, thus extinguishing liability for purchasing companies.[234] In *Leckie Smokeless*, the Fourth Circuit first held that "interests in property" were not solely limited to *in rem* interests, and thus found that the Fund's and the Plan's rights to collect Coal Act premiums constituted "interests in property."[235] Similarly, in *Trans World*, the Third Circuit found that the claims arising from the Travel Voucher Programs and the discrimination claims filed with the EEOC constituted "interests," for the claims were obligations connected to the property being sold.[236]

On the other hand, in *Motors Liquidation*, the Second Circuit held that the ignition switch claims against Old GM were *not* "interests" under § 363, and thus, under the doctrine of successor liability, New GM would be held liable for such claims.[237] The independent claims

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229 *Id.*

230 *Id.*

231 *See In re* General Motors Corp., 407 B.R. 463, 499–506 (Bankr. S.D.N.Y. 2009).

> The bankruptcy court failed to recognize that the terms of this § 363 sale were not within its exclusive control. Instead, the GM sale was a negotiated deal with input from multiple parties—Old GM, New GM, Treasury, and other stakeholders. The Sale Order and Sale Agreement reflect this polycentric approach: it includes some fifteen sets of liabilities that New GM voluntarily, and without legal compulsion, took on as its own.

In re Motors Liquidation Co., 829 F.3d at 163.

232 *Id.* at 166.

233 *Id.*

234 *See supra* Section II.A.1.

235 *See* United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 582–83 (4th Cir. 1996).

236 *See In re* Trans World Airlines, Inc., 322 F.3d 283, 289–92 (3d Cir. 2003).

237 *See In re Motors Liquidation Co.*, 829 F.3d at 154–57.

relating only to New GM's post-petition conduct and the used car purchasers' claims did not constitute valid claims under § 101(5), according to the Second Circuit; thus, these claims fell outside the scope of § 363's "free and clear" provision, leaving New GM potentially liable.[238]

Given § 363's implications on selling and purchasing companies, and § 363's relevance in the current legal landscape, it is evermore imperative that the ambiguous "free and clear" provision be clarified, and that the circuits' interpretation of the statute be universally accepted. Reconciling and weighing the reasoning employed by all circuits addressing this narrow issue undoubtedly presents difficulty and discord. Specifically, the complex facts and unprecedented enormity of GM's monumental bankruptcy presented this issue of statutory interpretation in a different light and circumstance than it previously had been analyzed. The unique facts of *Motors Liquidation* and magnitude of the bankruptcy undoubtedly influenced the Second Circuit's reasoning for reversing the bankruptcy court's decision.[239] While the facts are indeed distinct, the reasoning behind excluding successor liability claims from the scope of § 363 would ensure consistency, clarity, and honesty, if universally applied by all courts.

III. PROPOSAL

Upon review of the *Motors Liquidation* decision, this Note urges courts across the nation to universally interpret the "free and clear of any interest in such property" language of § 363 to *exclude* successor liability claims.[240] However, to ultimately resolve this issue of statutory interpretation, Congress should implement a federal successor liability statute to complement § 363 of the United States Bankruptcy Code, stating that when a company acquires all or substantially all of the assets of another company, by means of a 363 sale, claimants will have the statutory right to seek redress from the purchasing company, regardless of the type of claim (whether in contract or tort). Moreover, all federal and state common law theories of successor liability would be preempted by this statute, such as those introduced in Part II.[241] A complementary successor liability statute, such as the one proposed by this Note, would specifically delineate which liabilities the purchasing company would assume, providing for no unassumed transfer of liabilities otherwise. This would leave no room for interpretation, and

238 *See id.* at 157.
239 *See id.* at 166.
240 *See supra* Section II.B.
241 *See supra* Part II.

consequently no need for costly litigation. Therefore, implementing a federal successor liability statute would eliminate the ambiguity of § 363's "free and clear" provision. This Note will illustrate the effectiveness of a complementary federal successor liability statute by employing such a statute under the facts of *Leckie Smokeless*, *Trans World*, and *Motors Liquidation*.

While legal scholars and practitioners argue that the doctrine of successor liability disregards key principles of the Bankruptcy Code, there are, in fact, a number of policy considerations for excluding successor liability claims from the "free and clear" provision of § 363 and holding the purchasing company liable. One consideration often discussed is the implication of the Bankruptcy Code's priority scheme under § 507.[242] The priority scheme explicated in § 507 forms one of the bedrock principles of the Bankruptcy Code; it determines the order in which specific classes of creditors collect from the debtor's estate.[243] Most courts (such as the Fourth Circuit in *Leckie Smokeless*[244] and the Third Circuit in *Trans World*[245]) hold that allowing a successor liability claimant to proceed with her claim against the purchasing company implicates the priority scheme by elevating the claimant's status from its otherwise low-priority, unsecured claim. This reasoning, however, does not consider the protections of § 363(e) for those "interests in property" delineated under § 363(f).[246] If a successor liability claim is an "interest in property" under § 363(f), then such successor liability claimants are entitled "adequate protection" under § 363(e), thus enhancing their treatment compared to similarly situated non-priority creditors.[247] In other words, deeming a successor liability claim an "interest in property" for § 363(f) purposes actually runs afoul of § 507's priority scheme.[248] Implementing a federal successor liability statute to

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242 *See* 11 U.S.C. § 507 (2012).

243 *See id.*

244 *See supra* Section II.A.1.a.

245 *See supra* Section II.A.1.b.

246 Section 363(e) provides:

> Notwithstanding any other provision of this section, 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*. 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).

11 U.S.C. § 363(e) (emphasis added) (citing § 362); *see also* § 363(f).

247 *See* § 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)).

248 *See* § 363(f); § 507; *see also* § 363(e).

complement § 363, such as the one proposed in this Note, will eradicate this implication and preserve the Bankruptcy Code's priority scheme.

Next, as raised specifically in *Motors Liquidation*, the severe effect of barring future or contingent successor liability claims notably raises Fifth Amendment due process concerns.[249] For example, a successor liability claimant could not possibly have the opportunity for notice and hearing when her claim, at the time of the bankruptcy filing, has not yet occurred (as was the case in *Motors Liquidation*). Implicitly including successor liability claims to fit within § 363(f)'s definition of interest deprives future claimants of notice and an opportunity to be heard—their fundamental rights. The due process rights of future successor liability claimants should take priority over the Bankruptcy Code's authority. A federal successor liability statute that would complement § 363 would do just that: honor the claimants' due process rights, while also complying with the Bankruptcy Code.

Lastly, implementing a federal successor liability statute would allow for predictable, honest, and fair 363 sales and transactions.[250] By clearly delineating which liabilities will be assumed by the purchasing company, neither the selling, nor purchasing company are left in the dark. Such a proposed statute would curtail costly, unnecessary litigation over § 363's interpretation, while also incentivizing selling companies to be more forthright and disclose all current and potential liabilities. Doing so would also provide those injured successor liability claimants with a remedy they otherwise may not have received. Such a proposed statute would also provide uniformity to 363 sales; all purchasing companies, regardless of their estimated value, size, or any other form of metric, would assume the same liabilities. While some argue that excluding successor liability claims from the scope of § 363 would decrease the value of the debtor's estate, a complementary federal successor liability statute would inherently account for these costs; the costs associated with these liabilities would be baked into the negotiated sale price.

The positive effects of such a proposed statute would have been clearly evidenced in *Leckie Smokeless*, *Trans World*, and *Motors Liquidation*. In *Leckie Smokeless*, the Plan and the Fund would have received their guaranteed premium payments pursuant to the Coal Act.[251] The purchasing company, while negotiating with the Coal Companies, would have knowingly accounted for and assumed the Coal

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249 *See In re* Motors Liquidation Co., 829 F.3d 135, 158–61 (2d Cir. 2016).

250 These three policy considerations for implementing a federal successor liability statute to complement § 363 are not the only beneficial implications of doing so. This list is by no means exhaustive.

251 United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 575–76 (4th Cir. 1996).

Companies' Coal Act liabilities, the value of the Coal Companies' estate would not have been compromised, and the Plan and the Fund would have been rightfully compensated. In *Trans World*, had such a proposed successor liability statute been enacted, the flight attendants injured by the Travel Voucher Program and sexual discrimination would have been awarded the right to assert their claims against American, the purchasing company. While a reward would not have necessarily been guaranteed, the *right* to an award would have. Lastly, in *Motors Liquidation*, Old GM most likely would have been more forthright with knowledge of its faulty ignition switches. While of course speculative, it could be argued that had Old GM disclosed these defects originally, many of the following ignition switch defects would have been avoided. Had Old GM disclosed these defects and liabilities, New GM would knowingly assume these specific liabilities. Importantly, the ignition switch claimants (current or contingent) would have had the right of notice and hearing, and the right to a judicial remedy.[252]

As previously discussed, the majority of courts across the United States have expansively interpreted § 363's "free and clear" provision to encompass successor liability claims.[253] These courts—including the *Leckie Smokeless* and *Trans World* courts—have argued that the successor liability doctrine, in the context of bankruptcy, leads to inequitable results in 363 sales.[254] Additionally, these courts argue that interests under § 363 are not exclusively limited to *in rem* interests, for such an interpretation would directly contradict the language of § 363.[255] Proponents of an expansive reading also suggest that an interest is any obligation that is connected to, or arises from the property being sold, whether it be an *in rem* or *in personam* interest.[256]

CONCLUSION

While commentators and scholars argue that the successor liability doctrine runs counter to the underlying interests of the bankruptcy

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252 Had a federal successor liability statute been in place, these ignition switch claimants would have *originally* been afforded these rights without having to appeal to the Second Circuit Court of Appeals.

253 *See In re* Trans World Airlines, Inc., 322 F.3d 283, 290 (3d Cir. 2003); *In re Leckie Smokeless Coal Co.*, 99 F.3d at 582; Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1145–46 (6th Cir. 1991).

254 *See In re Trans World Airlines, Inc.*, 322 F.3d at 291–93; *In re Leckie Smokeless Coal Co.*, 99 F.3d at 586.

255 *See supra* text accompanying note 174.

256 *See* Susannah L. Baker, *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) (highlighting that "property" is interpreted broadly and includes both tangible and intangible property).

process,[257] stronger policy rationales, such as upholding due process rights and creating certainty in transactions, call for holding purchasing companies liable. A federal successor liability statute that complements § 363 would not only deter selling companies from fraudulently avoiding liability, but it would also assure purchasing companies of what specific liabilities they would assume upon purchase. Excluding successor liability claims from the scope of § 363's "free and clear of any interest in such property" language will lead to fairer and more certain transactions between selling and purchasing companies in the future.

257 *See* Matheson, *supra* note 89.