When the 363 Sale Is the Best Route

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FOREWARD

The two biggest events in a Chapter 11 case are:

1. The confirmation of a reorganization plan, and
2. The sale of major assets on a going concern basis.

The sale practice under section 363 of the Bankruptcy Code has continuously changed from that which was originally contemplated by its drafters, the bankruptcy courts, and even the lawyers practicing bankruptcy law when section 363 was enacted. If section 363 of the Bankruptcy Code is read literally, it contemplates only a notice of a sale outside the ordinary course of business and an opportunity for parties to be heard. There is nothing in the Bankruptcy Code requiring bidding (there is no mention of higher and better offers), stalking horses, or sale procedures orders; nor does section 363 specifically deal with such issues as environmental liabilities, toxic torts or successor liability in a sale context. The

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whole body of law and the bankruptcy sale processes were developed by judges and lawyers within the last twenty years, creating a practical and often times more efficient restructuring tool than a reorganization plan.

Since the Bankruptcy Code became effective in 1979, the bankruptcy sale process has evolved into what is effectively a plan equivalent process. Although Congress may not have contemplated that section 363 of the Bankruptcy Code would be used in this manner (and a debtor must be careful not to use the sale process to completely supplant the plan confirmation process and the creditor protections provided therein), in practice, debtors have been very successful in restructuring via the bankruptcy sale.

The underlying reason for the practical success of today's bankruptcy sale process is that it enables a bankruptcy court to approve a transaction that achieves one of the most fundamental goals of the Chapter 11 reorganization process: to expeditiously and effectively separate a business' past problems from its future prospects. Unlike a Chapter 11 plan, a bankruptcy sale can enable a debtor to achieve this goal without the pain, time, trouble and turmoil of the plan confirmation process.

Unfortunately, a bankruptcy sale cannot cure all of the woes of every debtor. Some issues require the flexibility of a Chapter 11 plan, and there are instances in which a 363 sale may not be as advantageous as other restructuring devices. This article discusses circumstances and issues to be considered when deciding whether a 363 sale is the best route.

I. FACTORS IN DETERMINING WHETHER A 363 SALE IS THE BEST ROUTE

A. Prepetition Planning

Although a 363 sale can be very appealing to many debtors and creditors alike in a Chapter 11 setting because a sale can be an efficient and meaningful step toward restructuring, a 363 sale may not always be the best alternative. Strategic presale (and often prepetition) planning is required. Following are some of the issues a business and its professionals should consider in deciding whether to conduct a 363 sale.

1. Considerations in Determining Whether a 363 Sale is the Best Route
    a. Is there a potential purchaser?
    b. Is a consensual restructuring possible?
    c. Does the distressed business have the necessary resources?

   d. Does the business have strategic value as a whole (i.e., going concern value versus individual asset liquidation value)?
   e. What is the nature of the business's liabilities?
   f. Are there any corporate governance issues limiting the ability to sell the business?
   g. Must shareholders approve the sale?

2. Key Advantages of a 363 Sale
   a. *Free and Clear of Liens and Claims*.

      A key benefit of a 363 sale is that a purchaser takes the assets free and clear of any liens and encumbrances.

   b. *Liability.*

      Outside of bankruptcy, there are greater risks under the "mere continuity doctrine," "substantial continuity doctrine," "successor liability doctrine," "de facto merger doctrine," and the Bulk Sale Act that purchasers of substantially all of an insolvent business's assets will inherit some or all of the business's liabilities.

   c. *Ability to Bind Non-Consenting Constituencies*.

      Many corporate charters require the approval of a majority of shareholders in order to sell substantially all of the assets of a company. In bankruptcy, such provisions are moot.

   d. *Ability to "Cherry Pick" Executory Contracts and Unexpired Leases*.

      Favorable contracts and leases can more easily be included in a 363 sale.

3. Disadvantages of a 363 Sale
   a. *Competing Bids*.

      The sale may not be consummated with the original stalking horse bidder.

   b. *Negative Publicity.*

      A sale outside of bankruptcy avoids any negative effects of a bankruptcy filing on the debtor's business operations.

   c. *Timing*.

      A sale outside of bankruptcy can often be accomplished more quickly and economically than a sale in bankruptcy.

d. *Plan of Reorganization May Offer Greater Flexibility.*

Notwithstanding the stringent requirements of plan confirmation process, purchasing assets through a plan may provide a purchaser with greater flexibility than that of a 363 purchaser due to the purchaser's ability to leverage favorable plan terms.

B. Near and Mid-Term Cash Flow Preparation

To determine whether a 363 sale is the best route, a debtor must consider its near and mid-term cash flow. It must determine, at the current burn rate, when it will run out of cash, and whether it can do anything to extend this time period. After making this determination, the debtor must decide whether there is an adequate amount of time to sell the business as a going concern.

C. Faith in the Ability of Management to Operate the Business

A review of a business's current management can often dictate whether a 363 sale is appropriate. A professional advising his or her client should gauge the abilities of the current management team (Is it a new management team? How well does management know the business and its operations? Are there allegations of fraud, dishonesty, or criminal conduct?) early in the representation. An analysis of management will not only enable an advisor to project a debtor's ability to reorganize, but will also give a professional some idea as to whether a debtor will remain a debtor-in-possession throughout a Chapter 11 case.

Section 1104 of the Bankruptcy Code has been recently amended to include the following:

> The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting… [1]

This addition to the Bankruptcy Code will certainly be a factor in presale planning.

D. Belief in Debtor's Numbers—Past and Future

If the debtor's books and records are unreliable, potential buyers may be unwilling to purchase the assets of the debtor.

E. Type of Business

1. Single Asset Real Estate
   - What is the property worth? Blighted area?
2. Dinosaur?
   - Is the business even marketable? Is it past its realistic lifespan (e.g., cobbling business)?
3. Good Business—Bad Position
   - One must also consider the root cause of the debtor's financial difficulties. Is the debtor's business inefficient? Does the debtor have a valid and feasible business plan? Is it a workable business model that has been negatively affected by external factors (e.g., fuel prices)?

F. Does the Judge Make a Difference in the Sale Strategy Decision?

Objectively, the determination of sale strategy would be the same in all bankruptcy courts across this nation. In practice, however, some courts are more willing to conduct expedient sales than others. A jurisdiction's local rules and custom may also play a factor in the sale strategy (Do the local rules permit expedited sales? Do the local rules contain oppressive procedures?). Similarly, as with almost any strategic decision, one should be educated about the judges within the district in which a case will be filed and, if possible, the specific judge who may preside over the case. Certain judges are more willing than others to approve certain actions, procedures, and fees. The court's availability may also be an issue (Query whether the court will be available to hear matters on an expedited basis?).

It is also worth noting that an increasing number of courts are creating virtual property exchanges on their court Web pages.[2] Such an option may prove to be favorable depending on the nature of the contemplated transaction.

II. SALE PROCEDURES

A bankruptcy court has broad discretion to conduct a sale in the manner it deems most appropriate.[3] Bankruptcy courts approve sale and bid procedures to facilitate the fair sale of the debtor's assets in order to maximize the value of those assets for the benefit of the estate.[4]

A. The Impact of Local Rules and Procedures[5]

There is no section of the Bankruptcy Code that requires a court to establish sale or bidding procedures in advance of the sale of estate assets.[6] However, the Federal Rules of Bankruptcy Procedure provide some guidance with respect to certain aspects of the sale, including issues relating to notice, timing and post-sale reporting.[7] Likewise, the local rules and procedures for each bankruptcy court often set forth a procedural protocol for sales conducted within their districts, which practices may differ drastically and can result in costly delay and even sanctions in some instances, if not followed. Therefore, it is especially important to refer to each court's local rules and the customary procedures required by each bankruptcy judge when establishing sale procedures and a sale strategy.

For example, unlike many courts, the local procedures for the United States Bankruptcy Court for the Western District of Pennsylvania require publication of a sale notice in both a county legal journal and a newspaper of general circulation no more than 20 and not less than five calendar days before the scheduled date of a sale. Failure to comply with this advertising requirement may result in a sale being postponed until the sale is properly advertised, which could be seriously detrimental to the debtor's efforts if timing contingencies exist or there are other exigent circumstances necessitating an expedited sale process. In addition, compliance could be challenging where county legal journals are published sporadically. Unlike the local practices of many courts, the local bankruptcy rules for the United States Bankruptcy Court for the Middle District of Pennsylvania state that bidding *must* take place outside the presence of the court. The local bankruptcy rules for the United States Bankruptcy Court for the Southern District of New York are more involved than other bankruptcy courts in that they set forth detailed guidelines for displaying the property to be sold, conducting the auction, post-sale reporting, advertising, and using appraisers and auctioneers. Also, the Bankruptcy Court for the Southern District of New York does not require an order of court to confirm a sale of property if no timely objection has been filed (although purchasers generally request entry of such an order). The bankruptcy courts in Delaware and the Western District of Tennessee have no local rules that expand Bankruptcy Rule 6004. The local rules for the United States Bankruptcy Court for the Northern District of Ohio expressly prohibit a court-appointed professional in the case, or any affiliate or family member of the professional, from purchasing or acquiring an interest in the assets sold. The local bankruptcy rules for the United States Bankruptcy Court for the Middle District of Tennessee limit the compensation of a real estate agent in relation to a sale of real property to no more than 6% on the first $100,000 and 4% on the balance of the proceeds of the sale, plus reasonable expenses, unless otherwise sought by motion. In Connecticut, the bankruptcy court ordinarily requires appraisals to be obtained and submitted to the court prior to the sale. In addition, the Connecticut local bankruptcy rules restrict percentage sales (i.e., sales on terms providing for a fixed percentage distribution to creditors), and even contain a sanctions section, which could include disqualification from future employment by bankruptcy estates for non-compliance.

It is clear that the procedures employed in 363 sales are locally driven. Despite the frequency of such sales in most bankruptcy cases, the sale process, and even the sale strategy, can differ considerably depending on the forum. Therefore, a prudent practitioner unfamiliar with the local practices of a forum will refer to the local rules, and even confer with local practitioners, prior to developing a sale strategy and procedures.

B. Stalking Horses

Debtors employ certain bidding mechanisms to encourage an initial, prospective purchaser, the "stalking horse," to submit an offer from which competitive bidding may commence (often in reliance upon the initial bidder's due diligence). These mechanisms, "stalking horse fees," often include, but are not limited to, "break-up" fees, "topping" fees and expense reimbursements to cover the costs and expenses associated with the due diligence and document preparation associated with the proposed sale. Stalking horse fees are most often bargained for in negotiations between the stalking horse and a seller, and are included in a purchase agreement that is submitted to the bankruptcy court for approval after notice and a hearing.

A break-up fee is usually a fee paid to an initial, potential purchaser of a business or certain assets "in the event that the transaction contemplated fails to be consummated and certain criteria in the purchase agreement are met."[8] The condition most commonly giving rise to the payment of a break-up fee is the seller's acceptance of a later bid.[9] A topping fee is an amount payable to the initial bidder equal to a certain percentage of the amount by which a prevailing bid cast by a third party exceeds the initial bidder's offer.[10] An expense reimbursement fee is a payment (usually capped) to the initial bidder of their fees and expenses.

The tests for considering when stalking horse fees are appropriate in a bankruptcy context vary from court to court. Some courts have determined the entitlement to break-up fees in the same manner as the right to such fees would be examined outside of a bankruptcy context—under the business judgment rule.[11] Courts have established additional tests for consideration, such as: (1) whether the relationship between the parties was tainted with self dealing; (2) whether the break-up fee hampers, rather than encourages, bidding; and (3) whether the fee is unreasonable in relation to the proposed purchase price.[12] Other courts look to whether the fees serve the best interests of the bankruptcy estate.[13] In *Hupp Industries*, for example, the court considered whether:[14]

(1) the requested fee correlates with a maximization of value to the debtor's estate;

(2) the terms were negotiated at arm's length;

(3) the requested fees were supported by the secured and unsecured creditors of the estate;

(4) the requested fees were reasonable and fair in relation to the proposed purchase price;

(5) the break-up fee was so substantial that it would "chill" bidding;

(6) safeguards beneficial to the debtor's estate existed; and

(7) unsecured creditors would be adversely impacted by objecting to requested fees.

Other courts employ the administrative expense standards of section 503 of the Bankruptcy Code.[15]

Regardless of which standard applies, if stalking horse fees are desired then it is recommended to move for approval of such fees prior to the expenses being incurred, especially if such protections are critical to the prospective buyer's commitment to proceed with the sale. A prospective buyer seeking additional protection also may wish to require the debtor to seek administrative priority treatment (or other security) for stalking horse fees to avoid potential priming objections by secured lenders.[16]

C. The Pure Public Sale

Normally, a sale of assets is driven by an offer from a prospective purchaser to a debtor or trustee, which offer, if acceptable to the debtor or trustee, is reduced to an asset purchase agreement to be presented to the bankruptcy court for approval. However, occasionally the circumstances dictate the need for a sale to be held without a purchase offer or a stalking horse, either because the assets are of such nominal value that the sale does not justify the time and expense associated with a more formal process or exigent circumstances exist (e.g., diminishing value of the debtor's assets, seasonal operations, rapid decline in the debtor's operations, the continuous accrual of interest on an oversecured loan, sale driven by secured lender seeking to credit bid, etc.) that create an environment for "bargain shopping." It is this latter scenario that presents potential challenges (as well as some benefits) that are not commonly encountered in an offer-driven sale process.

In a "pure" public sale, the debtor or trustee has greater freedom to dictate the terms of the sale due to the absence of the demands of a stalking horse. Costs such as break-up fees, topping fees, and expense reimbursements are optional (but often necessary). In addition, the debtor or trustee can largely reduce the costs associated with due diligence investigations and negotiating the asset purchase agreement. Also, this type of sale enables the debtor to quickly navigate the sale process, avoiding the many potential problems that can arise during a due diligence investigation. Conversely, the uncertainty of interest in the property could result in a great deal of pressure, and even resistance, from a secured lender lacking confidence in its collateral position. While a lender who is oversecured may have less concern with the uncertainties inherent in the pure public sale, lenders who believe they are not adequately protected or who are undersecured may not be as comfortable with this type of sale due to the uncertainty as to whether their claim will be bifurcated as a result of what may be perceived as a "fire sale." Additionally, in the pure public sale setting the seller must be ever more conscious not to chill potential bidding, resulting in the seller having less flexibility with respect to the sale procedures (e.g., such as choosing the type of auction ("open cry" or "sealed bid"), the forum (unless dictated under local rule), and the offering strategies (with or without reserve)).

If a sale is without a stalking horse, the debtor or trustee should try to advertise or market the sale as widely as possible, which may include:

(i) advertising in trade periodicals and newspapers;

(ii) providing notice to private equity groups, strategic buyers, and other investment groups known to acquire assets similar to those being sold;

(iii) employing a broker; or

(iv) even providing notice to industry competitors (depending on the debtor's goals in the case).

D. Must a Sale of Assets Be Subject to Higher and Better Offers?

Courts have regularly held that one of the overriding goals of a 363 sale is to "maximize the bidding, not to restrict it."[17] To that end, courts have refused to approve bid procedures that might chill bidder interest.[18] However, the Bankruptcy Code provides for the sale of assets by private or public sale.[19] Private sales, by definition, are generally not subject to higher and better offers. They are effectively closed sales subject to bankruptcy court approval. Although private sales generally are not subject to counteroffers from third parties and competitive bidding, they still are subject to such bidding in some jurisdictions pursuant to local rule. Review of the local rules and procedures of the forum in which one intends to hold a private 363 sale is recommended to determine whether a private sale can be truly private.

E. Roles of Other Professionals (e.g., the Investment Banker, Chief Restructuring Officer, etc.) and Coordination between Financial and Legal Advisors

Investment bankers, chief restructuring officers and financial advisors each may play a role vital to a successful sale process, depending on the needs of the debtor, the complexity of the proposed sale, and the type of assets being sold. However, the range of services these professionals provide can overlap, so it is important for a seller to define its needs prior to retaining additional professionals in a bankruptcy case. Generally, where the seller requires a buyer search and target services, including prospect solicitation and market canvassing, an investment banker can prove to be invaluable. Chief restructuring officers and financial officers are often used to provide financial analysis, business valuation, and assistance with due diligence, marketing, strategic planning, and even structuring the transaction.

Sellers and their advisors should understand that properly tailored dissemination of information will likely attract greater interest and more competitive bidding at an auction. The goal should be to provide potential buyers with enough information so that they understand both the potential risks and rewards the acquisition of the assets might bring. The debtor, in conjunction with its professionals, should determine the methodology for due diligence in the early stages of strategic planning, including who will be invited to undertake due diligence, what qualifications those potential buyers must possess, and how information will be presented. It should also be determined during these preliminary stages who will act as the primary conduit between the debtor and potential purchasers—the financial advisors or the legal advisors? Whoever is designated as the conduit should maintain that role throughout the sale process to maintain consistency in communications and to avoid confusion and misinformation. Finally, both financial advisors and legal advisors should assist in the preparation of management presentations in order to narrow the major issues and arm management with the information necessary to address difficult questions and potential problems that often arise during a sale.

III. FREE AND CLEAR SALE

A. Framework

A debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate…."[20] Such a sale of estate assets is free and clear of interests if one of the following conditions is met:[21]

(1) applicable non-bankruptcy 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.

B. Sales Over the Objections of the Secured Lender

Pursuant to section 363(f)(3), assets may be sold over the objection of the secured party if such party's interest is a lien, and the price at which the property is to be sold is greater than the aggregate value of all liens on such property. It is important to note that this section does not require that the secured party receive any sale proceeds. A secured party may, however, challenge the sale if the sales proceeds will not generate the "indubitable equivalent" of its lien on collateral.

Pursuant to section 363(f)(5), assets may be sold over the objection of a secured party if the secured creditor could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. "Money satisfaction" is generally interpreted to mean cash money rather than a mere promise to pay in the future.[22] Courts are divided, however, as to whether the statute requires a hypothetical payment that could fully satisfy the underlying debt.[23]

One court has concluded that a broad construction of subsection (f)(5) is inappropriate:

> While it is generally true that a secured lender is only entitled to the payment of his lien and can be required to accept full payment in satisfaction of his lien, this subsection ought not be construed so broadly so as to become a sufficient basis to always permit the sale of any property subject to a security interest. Such a construction would consume subsections 2, 3 and 4. Subsection 3 envisions a secured lender being paid in full, preferably at closing, if the collateral is sold. It recognizes the bargained-for position of the secured lender and balances his right to dispose of the collateral for his benefit pursuant to the terms of the negotiated security agreement and the right of the trustee to dispose of the collateral for the benefit of all creditors of the estate pursuant to the Bankruptcy Code. If the trustee will pay the secured lender in full, the secured creditor cannot be heard to complain and the trustee may sell the collateral for the benefit of the unsecured creditors. However, if the sale of the collateral will result in a deficiency, the secured creditor generally should be able to dispose of it according to the security agreement.[24]

Other courts have found that construing subsection (f)(5) too narrowly may be problematic because of the apparent redundancy to subsection (f)(3) where liens are at issue.[25]

Naturally, the likelihood of successfully selling estate property over the objections of a secured creditor holding an interest in the property to be sold is dependent upon the facts surrounding each case and sale, however, selling the debtor's assets over such objection is by no means uncommon.

C. Successor Liability

The general rule is that a purchaser of assets for fair consideration does not become liable for the seller's liabilities, even when the purchase includes substantially all of the assets of the seller.[26] The exceptions to that general rule are:

(1) where the purchaser expressly or impliedly agrees to assume such debts or other liabilities;

(2) where the transaction amounts to a consolidation or merger of the seller and purchaser;

(3) where the purchasing corporation is merely a continuation of the selling corporation; or

(4) where the transaction is entered into fraudulently in order to escape liability for such debts.[27]

Section 363(f) of the Bankruptcy Code provides that pursuant to one of the enumerated bases set forth therein, the trustee or debtor "may sell property… free and clear of any interest in such property of an entity other than the estate…."[28] The phrase "interest in such property" is not defined by the Bankruptcy Code, and bankruptcy courts have reached different conclusions regarding whether section 363(f) alone is sufficient to shield a successor from the obligations of its predecessor under other state and federal laws. Accordingly, prospective buyers should be cognizant of the risks of potential successor liability claims.

The United States Court of Appeals for the Third Circuit, in broadly interpreting the phrase "interest in property," determined that airline workers' employment discrimination claims against the Chapter 11 debtor-airline, as well as flight attendants' rights under a travel voucher program that the debtor-airline had established in settlement of a sex discrimination action, both qualified as "interests in property" under section 363(f), thereby defeating the successor liability claims of those employees.[29] Limiting the scope of "interest in property," the United States Court of Appeals for the Sixth Circuit has held that a Chapter 11 debtor's experience rating, for purposes of the Michigan Employment Security Act, was not an "interest," within the meaning of section 363(f), and therefore, the debtor's rating survived the sale of the debtor's radio station.[30] A more recent district court decision within the Sixth Circuit infers that where claims are more particularly identified in a sale order, section 363(f) could be used as a shield to successor liability.[31] Such was the reasoning employed in a recent decision by a court in the Seventh Circuit to shield the buyer from successor liability.[32]

Thus, while a 363 sale can generally limit successor liability, the ultimate determination of the court as to what constitutes an "interest" within the meaning of section 363(f) will be critical to the outcome.

D. Environmental Liabilities in a 363 Sale

Dealing with environmental obligations in a bankruptcy setting can prove to be difficult for both a debtor and its other creditors as issues relating to jurisdiction, sovereign immunity, ongoing compliance, and claim classification are common. These issues are equally present when a debtor attempts to sell property of the estate free and clear of all environmental claims and obligations under section 363 of the Bankruptcy Code. However, authority exists for the proposition that some environmental claims can be removed from the assets sold in a 363 sale. For instance, in *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*,[33] the court determined that while the bankruptcy court order approving the sale of the Chapter 11 debtor's assets free and clear of all claims might preclude suit against the purchaser for any claim that could have been brought against the debtor during the bankruptcy, the sale order could not preclude asserting future environmental claims against the purchaser. Based on this reasoning, arguably, assets could be sold free and clear of *pre-existing* claims. (Unfortunately, two difficult questions then arise: (1) Are the obligations to the environmental authorities *claims* or are they ongoing *obligations*, payable under state and federal law? and (2) When do environmental claims arise? Undoubtedly, these claim issues will be heavily contested by the environmental agencies involved in the case). In *In re Heldor Industries, Inc.*,[34] the court allowed the debtor to sell property under section 363 without complying with state environmental law when the state did not timely object to the sale. The sale order specifically said that the debtor's assets were being sold free and clear of all liens and expressly provided that the purchaser was not assuming any previous environmental liabilities.[35] The *Heldor Indust.* case was ultimately vacated on procedural grounds (other than notice).[36]

E. Tort Liabilities

Purchasers can be protected from successor tort liability in a 363 sale if those with claims have received notice of the bankruptcy sale.[37] However, as discussed in *White Motor Credit,* the court's power to sell free and clear is limited by its authority to affect claims.[38]

The court in *White Motor Credit* explained that the court's equitable power to sell free and clear must be interpreted consistent with its power to discharge claims under a plan of reorganization.[39] Section 1141 of the Bankruptcy Code delineates the effects of confirmation.[40] Section 1141(a) sets forth those who are bound by plan confirmation.[41] Section

1141(c) states that after confirmation "the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders and of general partners in the debtor."[42] Section 1141(d) "discharges the debtor from any debt that arose before the date of such confirmation."[43] Thus, it has been held that a sale conducted through the court's equitable powers can provide the debtor the same degree of relief effected by a sale in a plan of reorganization, and therefore, can affect claims arising prior to confirmation.[44]

It is more difficult to shield a purchaser from future claims in a 363 sale because courts are reluctant to classify a claim arising some time after the bankruptcy case as a "claim" or "interest" for purposes of selling assets free and clear.[45] Moreover, the most obvious concern of the courts with respect to future claims is that the holders of those claims are being divested of their interests without notice or an opportunity to participate in the underlying bankruptcy proceedings. Therefore, to alleviate these due process concerns to some degree (and potentially insulate a purchaser from successor liability claims), an interested buyer should require a seller to notice a sale in a manner calculated to reach as many potential claimants as possible, including the use of the Internet and publications with wide general circulation. While this tactic is not foolproof, it provides the seller and buyer with some ammunition in the event that a due process fight arises.

1. TOXIC TORTS

Toxic tort cases provide a landscape that differs from other types of bankruptcy cases in that there are potentially thousands of possible future claimants; many of whom have been exposed to toxic materials, are unaware of the exposure, and whose injuries will not manifest prior to the conclusion of the bankruptcy case (and therefore are unknown). As a result, it is difficult for a debtor to provide for a class of innumerable future creditors with an immeasurable pool of claims in a bankruptcy case. Moreover, absent adequate representation, courts are inclined to exclude future claimants from the effects of a bankruptcy proceeding altogether, which, by extension, would include the reach of a 363 sale order.[46]

In asbestos cases, future claimants usually have representation. In addition, asbestos trusts are often established by way of a reorganization plan. These trusts assume the liabilities of the debtor(s) and as a result, all claims, both present and future, are channeled to them.[47] Therefore, some of the due process concerns discussed above are alleviated to a great degree in asbestos cases.

A problem unique to asbestos cases occurs when a debtor seeks to sell substantially all of its assets by way of a pre-confirmation sale and later seeks the protections of a section 524(g) channeling injunction. Section 524(g) requires, inter alia, that an asbestos trust is to be funded in whole or in part by the securities of one or more debtors and the obligation to make future payments in relation thereto, including dividends.[48] If a debtor sells all of its assets, it could be faced with challenges to its entitlement to a section 524(g) channeling injunction because of the questionable value of its securities contribution. This position finds support in the dicta of the recent decision by the United States Court of Appeals for the Third Circuit in *In re Combustion Engineering, Inc.*,[49] where the *Combustion Engineering* court interpreted subsection 524(g)(2)(B)(i)(II) to require a debtor to have an ongoing business in order to be eligible for a channeling injunction. The court in *Combustion Engineering*, however, failed to specifically define what classifies as a "business," creating a strategic hurdle for debtors seeking to sell substantially all of their assets. The logical result of the gray area created by the *Combustion Engineering* court is that debtors will need to ask themselves: what estate assets can be sold while preserving (or leaving enough to create) an ongoing business that will be eligible for the benefits of a Section 524(g) channeling injunction? The term "business" is defined in *Black's Law Dictionary* as:

> Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. (Citation omitted). Enterprise in which person engaged shows willingness to invest line and capital on future outcome. (Citation omitted). That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest or for livelihood or profit.[50]

Undoubtedly, whether the leftovers from a 363 sale constitute an ongoing business will become a heavily contested issue going forward due to the ambiguities associated with what constitutes a "business" for purposes of section 524(g) of the Bankruptcy Code.

2. PRODUCT LINE LIABILITY

A minority of states, such as California, Washington, New Jersey, Pennsylvania, Massachusetts, Michigan, and Connecticut, recognize the product-line exception to successor liability.[51] The elements of the product-line exception commonly include:[52]

(1) the total or virtual extinguishment of tort remedies against the seller as a consequence of an asset sale;

(2) the buyer's continued manufacturing of the same product lines under the same product names;

(3) the buyer's continued use of the seller's corporate name or identity (and trading on the seller's good will); and

(4) the buyer's representation to the public (e.g., advertising) that it is an ongoing enterprise.

Whether a 363 sale can insulate a purchaser from product line liability claims is unclear.[53]

3. REDUCING THE RISKS BY WAY OF THE SALE ORDER

In order to reduce the risk associated with successor liability in a sale, the sale order should include, among other things,

(1) factual findings and decretal language specifically absolving the purchaser of successor liability;

(2) specific reference to the various claims or obligations of concern from which the purchaser seeks to take the assets free and clear (in additional to the general reference to liens, claims and encumbrances);[54]

(3) language enjoining any holder of a claim, lien, or interest from taking any action against the purchaser relating to said claim, lien, or interest;

(4) language indicating the purchaser's reliance on the determination that it will not be subject to successor liability;

(5) language specifically identifying the liabilities being assumed by the purchaser and those not being assumed by the purchaser;

(6) a factual finding that the buyer is a "good faith" purchaser; and

(7) language specifically reserving the bankruptcy court's jurisdiction to enforce the sale order.

Both the sale notice and the sale order should be provided to those parties identified in Bankruptcy Rules 2002 and 6004, including, but not limited to, all creditors, interest holders, and other parties in interest. In addition, when it is foreseeable that future claims may arise, publication of the sale notice in the areas where potential claimants may be found is recommended. Widespread publication of the sale notice will aid in defending due process challenges that may arise.

F. Labor Liabilities

A debtor can sell assets free and clear of labor-related liabilities pursuant to sections 105 and 363(f) of the Bankruptcy Code.[55] Notably, a successor employer is not automatically bound by its predecessor's collective bargaining agreements.[56] However, claims for unfair labor practices have been found to survive a sale.[57]

Collective bargaining agreements and legacy costs (such as retiree benefits and other welfare benefits) can hinder a seller's ability to market and sell its operations. Significant legacy and labor costs can deter potential buyers who are interested in operating the facilities for sale from participating in a sale process; and a debtor may not assign a collective bargaining agreement that purports to limit the assignee's responsibility thereunder.[58] Collective bargaining agreements often contain language requiring a successor or asset purchaser to either assume the obligations of the agreement or agree to deal exclusively with the union upon acquisition of the seller's assets in the negotiation of a new collective bargaining agreement. Likewise, although most welfare benefit plans are governed by the corresponding benefit plan documents, collective bargaining agreements often incorporate those welfare benefit plans (which incorporation naturally includes the liabilities arising from those plans).[59]

Although labor unrest can cut both ways for a prospective purchaser (depending on its willingness to act as the white knight), turmoil within the rank and file generally does not aid in the debtor's efforts to maximize value from the sale of its operating assets, especially where the debtor employs a specialized labor force. Therefore, absent an expression from the buyer of choice to assume the seller's labor liabilities, a seller may need to reject the collective bargaining agreements and/or terminate retiree welfare benefits prior to a sale of its operating assets.

Congress set forth procedures and standards for terminating collective bargaining agreements and retiree benefits in sections 1113 (rejection of collective bargaining agreements) and 1114 (payment of insurance benefits to retired employees) of the Bankruptcy Code.[60] Under certain circumstances, courts have found that welfare benefits can be terminated unilaterally where the welfare benefit plan explicitly provides for such termination.[61] However, sections 1113 and 1114 are usually the means by which a debtor rejects its collective bargaining agreements or terminates its retiree benefit plans.

Terminating retiree benefits or rejecting a collective bargaining agreement pursuant to the procedures set forth in both sections 1113 and 1114 is time-consuming. Both procedures are involved, requiring, inter alia, the exchange of information, considerable negotiation, and ultimately, court approval. Accordingly, a seller should consider the potential difficulties and timing elements related to terminating a collective bargaining agreement or retiree benefits well in advance of a scheduled sale if it believes such measures will be necessary.

V. ISSUES RELATING TO EXECUTORY CONTRACTS AND NON-RESIDENTIAL LEASES IN 363 SALES

Non-residential leases and executory contracts are governed by section 365 of the Bankruptcy Code. The sale of an executory contract or lease must comply with the requirements of section 365 for its assignment to a proposed purchaser.[62] Not all contracts can be sold as part of a sale of assets because some are non-assignable under section 365(c) of the Bankruptcy Code.[63] Non-exclusive copyright licenses may not be sold or assigned.[64] Non-executory contracts can be sold, even without assumption.[65]

Non-residential leases and executory contracts can provide considerable value to an asset sale as a buyer can often pick and choose those contracts that are most favorable to it. Typically, contracts to be purchased are specifically identified in the asset purchase agreement. Where a buyer is given the right to assume or reject, the buyer can often leverage more favorable terms with those third parties who wish to avoid having their contracts rejected. Cure costs can be paid in a variety of ways, including payment by the debtor from the proceeds, an adjustment to the purchase price, or simply by providing the third party to the contract or lease with adequate assurance that the buyer is financially capable of performing the contract.

Some courts have found that section 365 is the exclusive remedy available to a debtor/lessor in an unexpired leasehold situation.[66] However, more recently, the United States Court of Appeals for the Seventh Circuit arrived at a different conclusion.[67]

Section 365(h) of the Bankruptcy Code allows the lessee of a debtor to choose between the termination of its lease and the continuation of its unexpired leasehold if the debtor or trustee rejects the non-residential real property lease.[68] In *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC,* the Seventh Circuit Court of Appeals upheld a bankruptcy court's sale of assets, free and clear of the interests of the debtor's lessee to possess and use the leasehold property sold to a third party.[69] The Court of Appeals based its determination primarily on three factors: (1) that section 365(h) does not supersede section 363(f); (2) that 365(h)(1)(A) did not apply because that section only applies to those situations where the trustee or debtor rejects an unexpired lease of real property; and (3) that section 363(e) provides a mechanism for a lessee to protect its interests, (which subsection directs the bankruptcy court, on the request of any entity with an interest in property to be sold, to "prohibit or condition such… sale… as is necessary to provide adequate protection of such interest" and the debtor's lessee did not avail itself of this statutory protection.[70]

The effects of the *Precision* decision will likely be substantial for non-residential real property lessees. Arguably, the *Precision* decision has stripped such lessees of the statutory protections afforded to them by Congress in section 365(h). Likewise, it is foreseeable that under the *Precision* precedent, debtors are more likely to employ the use of section 363 of the Bankruptcy Code to eliminate unwanted leaseholds. Lessees should pay close attention to sale notices and consult with their counsel to determine whether affirmative steps are necessary to protect their interests.

CONCLUSION

Whether a 363 sale is the best route depends on the facts and circumstances of each case. A bankruptcy sale can be a valuable restructuring tool for a debtor when used in the right setting and properly conducted. An effective practitioner will not only analyze the business factors associated with a sale, but will be familiar with the federal and local bankruptcy rules governing the sale process and the related case law. Finally, a practitioner conducting a bankruptcy sale should recognize that the primary lesson to be learned from the 363 sale practice and related case law is that sales must be conducted in a way that is fair to all parties. This means not only that there be adequate notice, but also that all of the pertinent information is disclosed and all parties have an opportunity to fairly participate and be heard. These underlying principles have been repeated often and are the underlying premises for successful bankruptcy sales. A fair sale leads directly to a truly final sale that will withstand all appeals.

Research References

Norton Bankr. L. & Prac. 2d §§ 37:3, 37:22; 8 Norton Bankr. L. & Prac. 2d § 363; Bankr. Serv., L Ed § 20:41 to 20:124

West's Key Number Digest, Bankruptcy 🔑 3061, 3067, 3067.1, 3069

NOTES:

1. 11 U.S.C.A. § 1104(e).This amendment became effective upon enactment. Accordingly, if there are reasonable grounds to suspect that current members of the governing body of the debtor participated in actual fraud, dishonesty, or criminal conduct, the United States Trustee must move a court for a Chapter 11 Trustee.

2. See, e.g., United States Bankruptcy Court for the District of Massachusetts, http://www.mab.uscourts.gov/ntofsl.htm.

3. In re Farmland Industries, Inc., 289 B.R. 122, 40 Bankr. Ct. Dec. (CRR) 251 (B.A.P. 8th Cir. 2003).

4. In re Food Barn Stores, Inc., 107 F.3d 558, 564-65, 30 Bankr. Ct. Dec. (CRR) 549, 37 Collier Bankr. Cas. 2d (MB) 1247, Bankr. L. Rep. (CCH) P 77284 (8th Cir. 1997); In re Edwards, 228 B.R. 552, 561 (Bankr. E.D. Pa. 1998); In re Integrated Resources, Inc., 135 B.R. 746, 750, 22 Bankr. Ct. Dec. (CRR) 738 (Bankr. S.D. N.Y. 1992), order aff'd, 147 B.R. 650, 23 Bankr. Ct. Dec. (CRR) 1042 (S.D. N.Y. 1992).

5. References are made to local bankruptcy rules in effect as of December 31, 2005.

6. In re President Casinos, Inc., 314 B.R. 784, 786, 43 Bankr. Ct. Dec. (CRR) 181 (Bankr. E.D. Mo. 2004).

7. Fed. R. Bankr. P. 2002, 6004.

8. Integrated Resources, 135 B.R. 746, 750.

9. Integrated Resources, 135 B.R. 746, 750.

10. In re APP Plus, Inc., 223 B.R. 870, 874, 34 Bankr. Ct. Dec. (CRR) 1153, 42 Collier Bankr. Cas. 2d (MB) 964 (Bankr. E.D. N.Y. 1998).

11. In re 995 Fifth Ave. Associates, L.P., 96 B.R. 24, 28 (Bankr. S.D. N.Y. 1989).

12. Integrated Resources, 135 B.R. 746.

13. In re Hupp Industries, Inc., 140 B.R. 191, 194, 22 Bankr. Ct. Dec. (CRR) 1523 (Bankr. N.D. Ohio 1992); In re America West Airlines, Inc., 166 B.R. 908, 912, 25 Bankr. Ct. Dec. (CRR) 891, 31 Collier Bankr. Cas. 2d (MB) 27, Bankr. L. Rep. (CCH) P 75895, Fed. Sec. L. Rep. (CCH) P 98249 (Bankr. D. Ariz. 1994); Matter of Tiara Motorcoach Corp., 212 B.R. 133, 137, 31 Bankr. Ct. Dec. (CRR) 269 (Bankr. N.D. Ind. 1997).

14. Hupp Industries, 140 B.R. 191, 194.

15. See, e.g., In re O'Brien Environmental Energy, Inc., 181 F.3d 527, 533, 34 Bankr. Ct. Dec. (CRR) 879 (3d Cir. 1999) (the determination whether break-up fees or expenses are allowable under section 503(b) must be made in reference to general administrative expense jurisprudence. In other words, the allowance of break-up fees depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate.).

16. See, e.g., In re CXM, Inc., 307 BR 94, 42 Bankr. Ct. Dec. (CRR) 253, 51 Collier Bankr. Cas. 2d (MB) 1492 (Bankr. N.D. Ill. 2004) (upon consideration of the objection by a secured creditor, court denied payment of stalking horse fees as an administrative expense because the bidding procedures order did not establish that the bidder's interest in the sale proceeds was superior to claims held by an objecting secured creditor).

17. Matter of Ohio Corrugating Co., 59 B.R. 11, 13 (Bankr. N.D. Ohio 1985); In re Beck Industries, Inc., 605 F.2d 624, 637, 5 Bankr. Ct. Dec. (CRR) 459, 20 C.B.C. 659, Bankr. L. Rep. (CCH) P 67191 (2d Cir. 1979).

18. See e.g., President Casinos, 314 B.R. 784.

19. Fed. R. Bankr. P. 6004(f)(1).

20. 11 U.S.C.A. § 363(b)(1).

21. 11 U.S.C.A. § 363(f).

22. See, e.g., Gerdes v. Gerdes, 33 B.R. 860 (Bankr. S.D. Ohio 1983).

23. Compare, e.g., In re Healthco Intern., Inc., 174 B.R. 174, 176, 26 Bankr. Ct. Dec. (CRR) 318, 32 Collier Bankr. Cas. 2d (MB) 476, Bankr. L. Rep. (CCH) P 76200 (Bankr. D. Mass. 1994) (holding that the term "money satisfaction" means "a payment constituting less than full payment of the underlying debt"), with Matter of Stroud Wholesale, Inc., 47 B.R. 999 (E.D. N.C. 1985), aff'd, 983 F.2d 1057 (4th Cir. 1986) (holding that the term "money satisfaction" means "full satisfaction of creditors' interests" in liquidation sales).

24. In re Takeout Taxi Holdings, Inc., 307 B.R. 525, 533, 42 Bankr. Ct. Dec. (CRR) 238 (Bankr. E.D. Va. 2004).

25. See In re Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995); In re Terrace Chalet Apartments, Ltd., 159 B.R. 821, 829 (N.D. Ill. 1993).

26. See Kemos, Inc. v. Bader, 545 F.2d 913, 915 (5th Cir. 1977); Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 45 (2d Cir. 2003); Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145, 146 Prod. Liab. Rep. (CCH) P 11617 (6th Cir. 1987).

27. Fales Div. of Mathewson Corp., 835 F.2d 145, 146.

28. 11 U.S.C.A. § 363(f).

29. In re Trans World Airlines, Inc., 322 F.3d 283, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362 (3d Cir. 2003).

30. In re Wolverine Radio Co., 930 F.2d 1132, 1145-46, 21 Bankr. Ct. Dec. (CRR) 932, 24 Collier Bankr. Cas. 2d (MB) 1702, Bankr. L. Rep. (CCH) P 73898, Unempl. Ins. Rep. (CCH) P 21952 (6th Cir. 1991).

31. See Mickowski v. Visi-Trak Worldwide, LLC, 321 F. Supp. 2d 878, 885 (N.D. Ohio 2003) (sale of assets pursuant to section 363 of the Bankruptcy Code does not preclude successor liability claim of unsecured creditor against buyer absent bankruptcy court order expressly stating that sale was free and clear of unsecured claims).

32. Faulkner v. Bethlehem Steel/Intern. Steel Group, Bankr. L. Rep. (CCH) P 80290, 2005 WL 1172748 (N.D. Ind. 2005) (order provided that the transfer of the debtor's assets to the buyer would vest the buyer with all right, title, and interest in those assets free and clear of any other interests, claims or liens—including any claims arising under successor liability).

33. Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. Ind. 1996).

34. In re Heldor Industries, Inc., 131 B.R. 578, 22 Bankr. Ct. Dec. (CRR) 55 (Bankr. D. N.J. 1991), order vacated, 989 F.2d 702, Bankr. L. Rep. (CCH) P 75207 (3d Cir. 1993).

35. Heldor Indust., 131 B.R. at 582.

36. State of N.J., Dept. of Environmental Protection and Energy v. Heldor Industries, Inc., 989 F.2d 702, Bankr. L. Rep. (CCH) P 75207 (3d Cir. 1993).

37. See, e.g., In re White Motor Credit Corp., 75 B.R. 944, 16 Bankr. Ct. Dec. (CRR) 217, 17 Collier Bankr. Cas. 2d (MB) 293 (Bankr. N.D. Ohio 1987) (enjoining tort claims against section 363 asset purchaser for claims that arose post-sale but prior to confirmation of debtor's plan, where claimants had notice pre-confirmation).

38. White Motor Credit, 75 B.R. 944, 949.

39. White Motor Credit, 75 B.R. 944, 949.

40. 11 U.S.C.A. § 1141.

41. 11 U.S.C.A. § 1141(a).

42. White Motor Credit, 75 B.R. 944, 949-50.

43. White Motor Credit, 75 B.R. 944, 950.

44. White Motor Credit, 75 B.R. 944, 950; see also In re All American of Ashburn, Inc., 56 B.R. 186, 14 Collier Bankr. Cas. 2d (MB) 303 (Bankr. N.D. Ga. 1986), subsequently aff'd, 805 F.2d 1515, 16 Collier Bankr. Cas. 2d (MB) 210, Bankr. L. Rep. (CCH) P 71537 (11th Cir. 1986) (sale, free and clear of all claims pursuant to section 363(f), of assets used in manufacture of allegedly defective product precluded application of successor doctrine in products liability suit filed against purchaser of those assets where product liability cause of action arose prior to date of sale.).

45. See e.g., Matter of Mooney Aircraft, Inc., 730 F.2d 367, 374 Bankr. L. Rep. (CCH) P 69858 (5th Cir. 1984); In re Piper Aircraft Corp., 162 B.R. 619, 25 Bankr. Ct. Dec. (CRR) 193 (Bankr. S.D. Fla. 1994), opinion aff'd, 168 B.R. 434, 25 Bankr. Ct. Dec. (CRR) 1176, 31 Collier

Bankr. Cas. 2d (MB) 787, Bankr. L. Rep. (CCH) P 75994 (S.D. Fla. 1994), aff'd as modified, 58 F.3d 1573, 27 Bankr. Ct. Dec. (CRR) 694, 33 Collier Bankr. Cas. 2d (MB) 1751, Bankr. L. Rep. (CCH) P 76574 (11th Cir. 1995).

46. See In re UNR Industries, Inc., 224 B.R. 664, 671-672 (Bankr. N.D. Ill. 1998).

47. 11 U.S.C.A. § 524(g).

48. 11 U.S.C.A. § 524(g)(2)(B)(i)(II).

49. In re Combustion Engineering, Inc., 391 F.3d 190, 234, 43 Bankr. Ct. Dec. (CRR) 271, Bankr. L. Rep. (CCH) P 80206 (3d Cir. 2004), as amended, (Feb. 23, 2005).

50. Black's Law Dictionary, 1999 (6th ed. 1990).

51. Jo Ann J. Brighton, How Free Is "Free and Clear"? A Practical Guide to Protection Against Successor Liability When Purchasing Assets Out of a Bankruptcy Estate, 21-SEP Am. Bankr. Inst .J. 1 (WL) (September 2002).

52. Jo Ann J. Brighton, How Free Is "Free and Clear"? A Practical Guide to Protection Against Successor Liability When Purchasing Assets Out of a Bankruptcy Estate, 21-SEP Am. Bankr. Inst. .J. 1 (WL) (September 2002); see also Conway v. White Trucks, A Div. of White Motor Corp., 885 F.2d 90, 93 Prod. Liab. Rep. (CCH) P 12256 (3d Cir. 1989).

53. In re Savage Industries, Inc., 43 F.3d 714, 26 Bankr. Ct. Dec. (CRR) 480, 32 Collier Bankr. Cas. 2d (MB) 923, Bankr. L. Rep. (CCH) P 76303 (1st Cir. 1994) (The United States Court of Appeals for the First Circuit expressed no view as to whether 363(f) enables the bankruptcy court to extinguish state-law based successor "product-line" liability claims.); but see Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 163, 25 Bankr. Ct. Dec. (CRR) 965, 30 Collier Bankr. Cas. 2d (MB) 1763, Bankr. L. Rep. (CCH) P 75862 (7th Cir. 1994) (had plaintiff a remedy against the predecessor, successor products-liability against successor would be unavailable).

54. Seek such relief pursuant to *both* sections 105 and 363(f) of the Bankruptcy Code.

55. See e.g., In re Trans World Airlines, Inc., 322 F.3d 283, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362 (3d Cir. 2003) (363 order provided for delivery of the assets free and clear from all employee claims including, but not limited to, all asserted or unasserted, known or unknown employment related claims, payroll taxes, employee contracts, employee seniority accrued while employed with any of the sellers, and successorship liability accrued up to the date of closing of such sale); Cibulka v. Trans World Airlines, Inc., 92 Fed. Appx. 366 (8th Cir. 2004) (sale free and clear of employee's successor liabilities claim); Bethlehem Steel/Intern. Steel Group, No. 2:04-CV-34, (N.D. Ind. 2005) (sale order provided, inter alia, (1) that the transfer of assets was free and clear of any other interests, claims or liens, including any claims arising under successor liability; and (2) that the buyer would not have entered into the asset purchase agreement if the assets were not transferred free and clear of all interests of any kind or nature whatsoever, or if the buyer could be liable in the future for any interests, including any employment or labor agreements and any employment-related claims).

56. In re Allegheny Health Educ. and Research Foundation, 383 F.3d 169, 43 Bankr. Ct. Dec. (CRR) 174, 175 L.R.R.M. (BNA) 2840, Bankr. L. Rep. (CCH) P 80169, 150 Lab. Cas. (CCH) P 10393 (3d Cir. 2004); see also N. L. R. B. v. Burns Intern. Sec. Services, Inc., 406 U.S. 272, 281-91, 92 S. Ct. 1571, 32 L. Ed. 2d 61, 80 L.R.R.M. (BNA) 2225, 68 Lab. Cas. (CCH) P 12660 (1972).

57. In re Carib-Inn of San Juan Corp., 905 F.2d 561, 20 Bankr. Ct. Dec. (CRR) 1114, 134 L.R.R.M. (BNA) 2557, Bankr. L. Rep. (CCH) P 73426, 115 Lab. Cas. (CCH) P 10166 (1st Cir. 1990); cf. Golden State Bottling Co., Inc. v. N.L.R.B., 414 U.S. 168, 182 n. 5, 94 S. Ct. 414, 38 L. Ed. 2d 388, 84 L.R.R.M. (BNA) 2839, 72 Lab. Cas. (CCH) P 14124 (1973) (imposing successor liability for predecessor's unlawful discharge of employee).

58. See American Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 35 Bankr. Ct. Dec. (CRR) 299, 43 Collier Bankr. Cas. 2d (MB) 1, 162 L.R.R.M. (BNA) 2897, Bankr. L. Rep. (CCH) P 78050 (3d Cir. 1999).

59. See, e.g., McCoy v. Meridian Automotive Systems, Inc., 390 F.3d 417, 33 Employee Benefits Cas. (BNA) 2825, 176 L.R.R.M. (BNA) 2001, 2004 FED App. 0405P (6th Cir. 2004).

60. 11 U.S.C.A. §§ 1113 and 1114.

61. In re Unisys Corp. Retiree Medical Ben. ERISA Litigation, 58 F.3d 896, 908, 19 Employee Benefits Cas. (BNA) 1545 (3d Cir. 1995), but cf. In re White Farm Equipment Co., 788 F.2d 1186, 7 Employee Benefits Cas. (BNA) 1411, Bankr. L. Rep. (CCH) P 71104 (6th Cir. 1986); McCoy v. Meridian Automotive Systems, Inc., 390 F.3d 417, 33 Employee Benefits Cas. (BNA) 2825, 176 L.R.R.M. (BNA) 2001, 2004 FED App. 0405P (6th Cir. 2004).

62. In re Rickel Home Centers, Inc., 240 B.R. 826 (D. Del. 1998).

63. Matter of West Electronics Inc., 852 F.2d 79, 83, 18 Bankr. Ct. Dec. (CRR) 287, Bankr. L. Rep. (CCH) P 72351, 34 Cont. Cas. Fed. (CCH) P 75526 (3d Cir. 1988) (rejected by, In re James Cable Partners, L.P., 154 B.R. 813, 24 Bankr. Ct. Dec. (CRR) 530, 28 Collier Bankr. Cas. 2d (MB) 1677, Bankr. L. Rep. (CCH) P 75313 (M.D. Ga. 1993)) (applying, the "hypothetical test", whereby an assignment of an executory contract was invalid if precluded by applicable law); see also In re Sunterra Corp., 361 F.3d 257, 261, 42 Bankr. Ct. Dec. (CRR) 222, 51 Collier Bankr. Cas. 2d (MB) 1276, Bankr. L. Rep. (CCH) P 80068 (4th Cir. 2004); In re Catapult Entertainment, Inc., 165 F.3d 747, 750, 33 Bankr. Ct. Dec. (CRR) 1058, 41 Collier Bankr. Cas. 2d (MB) 858, Bankr. L. Rep. (CCH) P 77886 (9th Cir. 1999); In re James Cable Partners, L.P., 27 F.3d 534, 537 25 Bankr. Ct. Dec. (CRR) 1499, 31 Collier Bankr. Cas. 2d (MB) 1104 (11th Cir. 1994); compare Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 493, 30 Bankr. Ct. Dec. (CRR) 221, 37 Collier Bankr. Cas. 2d (MB) 588, 41 U.S.P.Q.2d (BNA) 1503, Bankr. L. Rep. (CCH) P 77242 (1st Cir. 1997) (abrogated by, Hardemon v. City of Boston, 1998 WL 148382 (1st Cir. 1998)) (rejecting the hypothetical test in favor of the actual test); see also In re Catapult, 165 F.3d 747, 749 n. 2 (collecting bankruptcy court decisions adopting actual test).

64. In re Buildnet, Inc., 2002 WL 31103235 (Bankr. M.D. N.C. 2002).

65. In re Qintex Entertainment, Inc., 950 F.2d 1492, 26 Collier Bankr. Cas. 2d (MB) 143, 21 U.S.P.Q.2d (BNA) 1775, Bankr. L. Rep. (CCH) P 74396 (9th Cir. 1991).

66. See e.g., In re Taylor, 198 B.R. 142, 164-67 (Bankr. D. S.C. 1996); In re Churchill Properties III, Ltd. Partnership, 197 B.R. 283, 29 Bankr. Ct. Dec. (CRR) 250, 36 Collier Bankr. Cas. 2d (MB) 664 (Bankr. N.D. Ill. 1996).

67. Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537, 41 Bankr. Ct. Dec. (CRR) 65, 49 Collier Bankr. Cas. 2d (MB) 1765, Bankr. L. Rep. (CCH) P 78836 (7th Cir. 2003).

68. 11 U.S.C.A. § 365(h).

69. Precision, 327 F.3d 537.

70. Precision, 327 F.3d 537, 547.