AMERICAN BANKRUPTCY INSTITUTE

2017 Southeast Bankruptcy Workshop

GM/Successor Liability Sale Issues: What Now?

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U.S. Bankruptcy Court (N.D. Ala.); Decatur

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CONCURRENT SESSION

2017

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SECOND CIRCUIT OPINION – SUMMARY OF ISSUES PRESENTED

- Argued: March 15, 2016
- Decided: July 13, 2016

- Second Circuit considered 3 sets of issues:
  - Did bankruptcy court have jurisdiction to enforce its own orders? [Yes]
  - Whether alleged due process violations would prevent "free and clear" provisions of Sale Order from being enforced by New GM? [Yes]

SECOND CIRCUIT OPINION – SUMMARY OF ISSUES PRESENTED

- Whether the bankruptcy court had the authority to rule on whether "would-be" claims against the GUC Trust were equitably moot. [No]
  - The court refused to reach the merits of this issue because it held that there was no case or controversy in that the ignition switch plaintiffs had not asserted any claims against the GUC Trust.
  - Therefore, the court held that there was no case or controversy on the GUC Trust issues and this portion of the bankruptcy court's order and opinion was merely an advisory opinion which was vacated by the court.

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GM DECISION – FACTUAL BACKGROUND – PRE-PETITION EVENTS

- Events leading up to bankruptcy
  - From 2007 to the middle of 2009, GM lost cash at a rapid rate
    - Lost $70 billion during this time period
  - Obtained Troubled Asset Relief Program ("TARP") relief
    - U.S. Government loaned Old GM $13.8 billion under TARP while Old GM was charged with devising a business plan to save the company.
    - While business plan was being vetted, government loaned another $600 million to back GM warranty claims.

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GM DECISION – FACTUAL BACKGROUND – BANKRUPTCY PETITION FILED AND 363 SALE

- GM forced to file bankruptcy
  - Files bankruptcy petition on June 1, 2009.
- GM files 363 motion on petition date
  - On the same day it files its voluntary petition, Old GM also files a motion seeking to sell substantially all of its assets to New GM – an new entity, which is majority owned by the U.S. Government.
  - Sale was scheduled to be heard and consummated on an expedited basis.

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GM DECISION – FACTUAL BACKGROUND – 363 SALE

- Expedited 363 Sale
  - Old GM provides actual notice of sale to certain creditors and also provides constructive notice (by publication).
  - Among those not provided with actual notice are potential creditors who own automobiles that, unbeknownst to them, may be subject to ignition switch defects that have never been revealed to them.
  - Over 850 objections to the sale are filed, however.

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GM DECISION – FACTUAL BACKGROUND – 363 SALE

- Sale process
  - Sale also resulted in negotiations among Old GM, New Gm and various groups of affected creditors.
  - Negotiations with creditor groups led to New GM assuming various categories of pre-sale claims, including personal injury and property damage claims as well as "Lemon Law" claims as a result of negotiations with various state attorneys general.
  - Court approved Sale on July 5, 2009 and overruled numerous objections in doing so.

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GM DECISION – FACTUAL BACKGROUND – POST-363 SALE

- Following court approval of the sale
  - New GM promptly closed on the sale and purchased substantially all of the assets of Old GM.
  - The residue of assets in Old GM – including $1.175 billion and other assets, including certain ownership interests in new GM, were transferred to the GUC Trust.
  - A proof of claim bar date was established and, again, no notice was provided to owners of cars with ignition switch defects.
  - After GM's Chapter 11 Plan was confirmed, GUC Trust was established and made distributions to unsecured creditors. As of the end of March, 2014, the GUC Trust had distributed over 90 percent of its assets.

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GM DECISION – FACTUAL BACKGROUND – IGNITION SWITCH DEFECT DISCLOSURE AND AFTERMATH

- In February, 2014, New GM disclosed the ignition switch defect and informed the National Highway Traffic Safety Administration ("NHTSA") that it would be recalling vehicles, including many vehicle that were originally manufactured by Old GM.
- Subsequent investigation revealed that, going back as far as 1997, Old GM knew or had reason to know of the defects.
- Cars containing the defect were manufactured as early as 2002.
- There was nothing to indicate that New GM was aware of these defects before the sale was consummated, although, following the sale, it is quite possible that many former Old GM employees who knew of the defect may have become New GM employees.

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GM DECISION – PROCEDURAL BACKGROUND – PLAINTIFFS ACTIONS AND BANKRUPTCY COURT OPINION

- Recall leads to plaintiffs' suits
  - Once news of the recall spread, suits against New GM were commenced by certain classes of ignition switch plaintiffs.
  - Class of plaintiffs
    - Included current owners asserting economic loss claims against GM, such as claims arising from the inconvenience and expense of having warranty work done.
    - Other claimants included pre-sale closing accident plaintiffs who did not receive notice of the defect.
    - Claimants also included second-hand owners as well as original owners.

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GM DECISION – PROCEDURAL BACKGROUND – BANKRUPTCY COURT OPINION

- Bankruptcy court decision
  - New GM sought relief from the bankruptcy court to enforce the Sale Order and enjoin the various law suits brought against it by the Plaintiffs
  - The Bankruptcy Court held:
    - The various ignition switch defect plaintiffs were "known" creditors entitled to actual notice of the bankruptcy sale and proof of claim bar date.
    - These creditors did not receive actual notice of these deadlines.

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GM DECISION – PROCEDURAL BACKGROUND – BANKRUPTCY COURT OPINION

- Bankruptcy Court Held (cont.)
  - With one exception, although the Plaintiffs were entitled to actual notice, there was no due process violation because the Plaintiffs did not suffer "prejudice" as a result of the failure to receive the required notice.
  - Lack of prejudice (according to the bankruptcy court) was that all of the arguments raised by the Plaintiffs (save one) had been considered and rejected by the court at the sale hearing and, therefore, they were not harmed by the lack of notice.
  - Court rejected "speculative" arguments by Plaintiffs that other similarly situated creditors had negotiated pre-sale deals resulting in New GM assuming their liabilities and that their failure to received notice deprived them of a similar opportunity.
  - The exception was for the argument that New GM should not be shielded from any independent claims arising from its post-sale conduct (as distinct from its liability for pre-sale claims against the Debtor), an argument not made at the sale hearing and one which the court deemed valid.

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GM DECISION – PROCEDURAL BACKGROUND – BANKRUPTCY COURT OPINION

- Bankruptcy Court Held (cont.)
  - Bankruptcy court further considered whether, having not received notice of the proof of claim bar date, the ignition switch plaintiffs could nonetheless assert claims against the GUC Trust.
  - Court's analysis of this issue was interesting given that the Plaintiffs had not sought relief against the GUC Trust nor sought to extend the proof of claim bar date.
  - Bankruptcy court held that the doctrine of equitable mootness barred the Plaintiffs from obtaining any recovery against the GUC Trust.

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GM DECISION – PROCEDURAL BACKGROUND – BANKRUPTCY COURT OPINION AND APPEAL

- Bankruptcy Court Held (cont.)
  - Equitable Mootness Analysis
    - Equitable mootness doctrine may be invoked in bankruptcy when a number of factors apply – focus is on the ability of a court to grant the movant/plaintiff effective relief without disrupting the re-emergence of the debtor and only where the remedies were pursued by the plaintiff/movant without diligence.
    - In this case, the court found that the expectations of the parties and delay in seeking recourse against the GUC trust rendered such claims equitably moot.
- New GM appealed and the bankruptcy court certified judgment for direct review by the Second Circuit.

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THE SECOND CIRCUIT OPINION

- Central portion of the appeal: Due Process
- The first sub-issue that the court addressed was the type of "interests" that a bankruptcy court "free and clear" order under section 363 can bar and whether the plaintiffs' various claims were, in fact, barred by the sale order.
- No precedent in Second Circuit as to whether "successor liability" claims are "interests" as to which a "free and clear" can bar.
- In re Chrysler had so held, but case was vacated by the Supreme Court (after the bankruptcy court decision in GM); the Second Circuit notes that Chrysler is no longer controlling precedent; but Court finds it "persuasive"

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THE SECOND CIRCUIT OPINION

- No dispute that 363(f) permits a sale free and clear of in rem interests
- Second Circuit notes that other courts have barred successor liability claims that relate to the ownership of property, such as
  - Coal Act obligations (Leckie Smokeless Coal Co, 4th Cir. 1996)
  - Airline travel vouchers (TWA, 3d Cir 2003)
  - License for future use of intellectual property when that property sold (Future Source, 7th Cir. 2002)
- Second Circuit concludes that successor liability claims can be "interests" when they flow from a debtor's ownership of transferred assets.

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THE SECOND CIRCUIT OPINION

- But successor liability claims must still qualify as "claims" under the Bankruptcy Code, which is a (1) right to payment, (2) that arose before the filing of the petition.
- If right to payment is contingent on future events, claim must result from pre-petition conduct giving rise to claim.
- There must also be some contact or relationship between the debtor and the claimant such that the claim is identifiable.

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THE SECOND CIRCUIT OPINION

- Applying these principals, the Second Circuit held that the Sale Order applied to the claims asserted by the pre-closing accident and economic loss plaintiffs, both of which had claims arising from the transferred assets, and both of which had contact with GM.
- With economic loss plaintiffs, the only contingency was GM telling the plaintiffs the defect existed.

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THE SECOND CIRCUIT OPINION

- At the same time, the independent claims do not meet the test, because based upon New GM conduct.
- Also, Used Car Purchaser claims not covered by the Sale Order; no contact or relationship with Old GM.

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THE SECOND CIRCUIT OPINION

- Next issue: whether due process violations of Old GM rendered the Sale Order unenforceable with respect to the claims of the economic loss plaintiffs and the pre-sale accident plaintiffs.
- What process is due?
- "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."
- General rule: publication notice not enough with respect to a person whose name and address are known or very easily ascertainable.

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THE SECOND CIRCUIT OPINION

- Second Circuit notes that if debtor provides notice consistent with due process, the Code affords "vast protections"; Court suggests that this creates an incentive for the debtor to be forthright;
- Second Circuit also states: "New GM essentially asks that we reward debtors who conceal claims against potential creditors."
- But is it Debtor or the purchaser that receives the "vast protections" in a sale context? Does Second Circuit correctly perceive the incentives or the "reward"?

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THE SECOND CIRCUIT OPINION

- This first part of this analysis was whether these plaintiffs were "known" creditors (those whose claims that the debtor knew about or should have known about) entitled to actual notice of the sale and, not "unknown" creditors entitled only to constructive notice.
- Second Circuit agreed with the bankruptcy court that these were known plaintiffs (and, even if they were not "known" the court held in the alternative that these were claims that Old GM should have known about) that were entitled to actual notice of the sale.
- Second Circuit notes that federal law requires automakers to keep records of the first owners of their vehicles.

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THE SECOND CIRCUIT OPINION

- In doing so, the Second Circuit, reviewing the record below, highlighted facts that were much more critical of Old GM's conduct than those recited in the bankruptcy court's decision.
- E.g.: "Old GM knew that the switch was defective, but it approved the switch for millions of cars anyway." Closing argument?

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THE SECOND CIRCUIT OPINION

- Next issue: whether the bankruptcy court had erred in finding that the lack of "prejudice" to these known creditors permitted the "free and clear" portions of the Sale Order to be enforced against them by New GM.
- In passing on this issue, the Second Circuit, noting a split in the case law, assumed (but did not decide) that a finding of prejudice is an essential element of a due process violation.
- In considering whether the plaintiffs were prejudiced, the court commented on the unique aspect of section 363 sale orders and how the objections raised often are not strictly legal objections but, rather, objections to sale orders that "sound in business reasons."

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THE SECOND CIRCUIT OPINION

- The court opined that a finding of prejudice will occur when the court cannot say, "'with fair assurance'" after reviewing the entire record and considering all that happened, that the judgment was not "substantially swayed by the error.'"
- In so doing, the Second Circuit effectively determined that the burden was on New GM to provide "fair assurances" to court that there was no prejudice to the plaintiffs, rather than burden falling on the plaintiffs to prove that there was.

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THE SECOND CIRCUIT OPINION

- Plaintiffs pointed to, among other things, the "deals" negotiated by various state attorneys general on "Lemon Law" claims, as well as the favorable treatment accorded to personal injury claimants and warranty claimants and argued that, if they too had been provided with actual notice, they also could have negotiated favorable concessions even if they may not have been legally entitled to these concessions.
- The Second Circuit wholeheartedly agreed. The court recounted the unique nature of the GM sale and bankruptcy and the political pressure that was brought to bear by the government and that could easily have been applied by the plaintiffs had the ignition switch defect been brought to light prior to the sale hearing.

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THE SECOND CIRCUIT OPINION

- Contrary to bankruptcy court approach, Second Circuit does speculate about what objections the plaintiffs would have asserted: "Perhaps they would have tried to identify some legal defect in the sale Order . . . "
- Consequently, the court concluded that "[u]nder these circumstances, we cannot be confident that the Sale Order would have been negotiated and approved exactly as it was if Old GM had revealed the ignition switch defect in bankruptcy" and reversed the bankruptcy court's decision because permitting New GM to enforce the Sale Order would violate the plaintiffs' Constitutional procedural due process rights.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Should there be a "prejudice" test at all?
  - Not every circuit requires a showing of "prejudice" in order to find a due process violation, including the First Circuit. See e.g., Perry v. Blum, 629 F.3d 1, 17 (1st Cir. 2010).
  - Second Circuit did not decide the issue – finding that even if a showing of prejudice was necessary; prejudice was found in this case.
  - Is the most important issue not whether a finding of prejudice is or is not necessary, but, rather, what the remedy is for a due process violation in a 363 sale context?
    - Why should those aggrieved be placed in better position than they would have been in had they been provided with notice?
      - Of course, as the Second Circuit noted, legal outcomes are difficult to predict and do not always follow a linear analysis of the legal issues at hand.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Is the Second Circuit's prejudice test reasonable and workable?
  - Arguments Against Test as Applied by Second Circuit
    - Test can be construed as creating a per se finding of prejudice anytime a potential outcome different than that which occurred in the bankruptcy court can be postulated.
    - Even if it is not tantamount to a per se finding of prejudice it is too speculative and unfairly favors the claimant.
    - Even if it is not a per se test, it is not fair (especially in a section 363 context) to place the burden of disproving a different speculative outcome on respondent, which this decision seems to do.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Arguments Against Test as Applied by Second Circuit (cont.)
  - The test is especially difficult if the Court is permitted to consider "practical" outcomes not predicted by a straight analysis of the legal issues that were presented below. Particularly in a section 363 sale, one can always imagine a scenario where a buyer could voluntarily assume an obligation where it was not legally obligated to do so, as such, the test really has no limits.
  - Although the "prejudice" test might make sense in the context of a typical law suit, where the party who fails to provide notice to a known creditor is the one who will suffer the consequences of such lack of notice, such test seems to have little application to a section 363 bankruptcy sale where the party who is adversely effected is not the party who knew (or should have known) of the creditor's existence but, rather, an arguably innocent buyer who was unaware of the creditor.
    - In such a case, perhaps a different "prejudice" test should apply.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Arguments Against Test as Applied by Second Circuit (cont.)
  - Decision places considerable risk on the purchaser of assets in bankruptcy, particularly one who: (a) simply did not know of the claims in question prior to the sale; and (b) may not have purchased the assets if it knew that it might be responsible for satisfying the claims in question. This decision arguably changes the "benefit of the bargain" made by the purchaser.
  - If such risk is to be borne by purchasers, this will "chill" bids in bankruptcy cases and thereby reduce creditors recoveries, which is not sound bankruptcy policy.
  - Decision unfairly places certain creditors in a better position than they would have been in had they been provided notice.
    - Even assuming a remedy was appropriate here, the court should place the claimants, at best, in the same position they would have been in had they received notice (perhaps a recovery that best approximates what a general unsecured creditor would have received)?

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Arguments For Prejudice Test as Applied by Second Circuit
  - The "Prejudice" test articulated by the Second Circuit highlights the importance not just of the right of a creditor to receive actual notice and object, but its right to be involved in all aspects of a legal proceeding where many potential outcomes are possible, including settlements.
    - A party who does not receive notice is permanently deprived of the right to participate in such a process and the Second Circuit correctly observed the unique opportunities that such a sale process affords a creditor may be irretrievably lost once the sale proceedings close.
- There is nothing whatsoever in the Second Circuit's opinion that creates a per se prejudice finding. Rather, it is a fact specific determination that will be different in every case.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Arguments For Prejudice Test as Applied by Second Circuit (Cont.)
  - In terms of burdens, why should the burden in showing a finding of prejudice be placed on the party that was the victim of a Constitutional violation? Rather, upon a showing that the requisite notice was not provided to the creditors, shouldn't the burden shift to the party seeking to enforce the order that there can be no reasonable likelihood of prejudice to the creditor?
  - The idea that the GM decision creates new or unusual Constitutional precedent is unfounded. It is well established that a party who is entitled to, but does not receive, actual notice of a proceeding is not bound by the outcome of that proceeding. So the result here simply follows this well-established precedent.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Arguments For Prejudice Test as Applied by Second Circuit (Cont.)
  - The notion that the case creates a per se prejudice test or, even short of that, an uncontrollable and speculative test that unfairly favors creditors is not borne out by the facts of this case.
    - Here, similarly situated creditors who were not legally entitled to the relief they were seeking (such as the claims of "Lemon Law" creditors) actually had New GM assume their claims. So it is more than reasonable to assume that the ignition switch claims also might have been assumed by New GM.
    - The proposition that New GM would have felt constrained to pick up the ignition switch claims is also supported by the vast publicity those claims generated when they finally were revealed and the intense scrutiny Old GM and New GM were under during the sale process. Even a potential delay in the sale process (which would have been expensive and resulted in more losses) could have resulted in New GM assuming these obligations.

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DISCUSSION POINTS – SECOND CIRCUIT'S "PREJUDICE" TEST

- Arguments For Prejudice Test as Applied by Second Circuit (Cont.)
  - It is not accurate to say that the result here provides the ignition switch creditors with a better outcome than could have been obtained in the bankruptcy case. New GM assumed similar liabilities.
  - From a policy perspective, sophisticated purchasers of businesses can better adjust for the risk of non-disclosure than can a claimant. Purchasers have the ability to conduct due diligence and, further, have the ability to adjust their purchase price based on this risk, and also adjust the timing and manner in which the purchase price is released to the debtor.

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DISCUSSION POINTS – SECOND CIRCUIT'S DECISION – POSSIBLE RAMIFICATIONS OF SAME

- Possible ramifications of second circuit's GM decision
  - Hidden issue of the claims of used car purchasers.
    - Court held that the sale order did not apply to or bar claims of used car purchasers. What does this mean?
      - Was this merely a drafting issue in that the sale order did not technically state that it barred the claims of owners of GM cars and future owners?
      - Or, does this mean that, regardless of the language contained in the sale order and asset purchase agreement, such order could not have bound future owners of the these vehicles because Old GM had no relationship with such parties? If so, weren't these "unknown" creditors for whom publication notice was sufficient?
        - This seems to raise a very significant issue in the context of widely distributed products subject to tort claims.

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DISCUSSION POINTS – SECOND CIRCUIT'S DECISION – POSSIBLE RAMIFICATIONS OF SAME

- Is this an "opening the floodgates" decision or a "one off" decision limited to its facts?
  - One could view this case as opening the floodgates to potential "known claimant" litigation because it arguably makes a finding of "prejudice" easy because one could always posit a scenario where a buyer voluntarily agrees to assume liabilities. How do you really disprove this?
  - This is more a "one off" decision driven by the unique facts of the case such as: (a) an expedited sale process; (b) clear wrongdoing by a debtor to conceal product defects; (c) unique government involvement that could have caused a buyer to assume liabilities it typically would never assume; (d) the length of time between the sale and recall disclosure by GM; and (e) the actual assumption by New GM of liabilities that a buyer would otherwise generally not assume. Bankruptcy courts, understanding the importance of "free and clear" orders to buyers may be reluctant to find prejudice in a typical sale case.

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SECOND CIRCUIT DECISION RAISES DILEMMA OF THE "TWO INNOCENTS"

- "Two Innocents" Problem
  - New GM was innocent in that it did not know of the ignition switch defect before buying Old GM's assets – it truly did not bargain for the liabilities which it now may be required to assume.
  - Ignition switch plaintiffs (and pre-sale accident victims) were likewise harmed in that they were not able to object to the sale or file proofs of claim.
- Classic 363 Sale Problem – the wrongdoer – Old GM – was liquidating and really did not suffer adverse consequences due to this lack of disclosure and notice. Its ox was not gored.
  - Can changes be made to 363 or other Bankruptcy Code provisions to better incentivize liquidating debtors to adequately notice creditors?

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SECOND CIRCUIT DECISION RAISES DILEMMA OF THE "TWO INNOCENTS"

- "Strategic considerations moving forward
  - In light of the Second Circuit's decision what can buyers do to help insulate themselves from this type of liability?
    - Could insist on larger hold-backs/escrows in sales of this nature. Problem is that if knowledge of the claim is really buried, it may be years before the issue comes to light and long after hold-backs are released. Perhaps a significant hold-back combined with extensive post-closing due diligence could help ameliorate the problem.
    - Detailed, pre-sale due diligence is very important. Do not treat the noticing of creditors as something that is merely the "debtor's problem." As this case shows, it can easily become the Buyer's problem too (in fact, it may chiefly be the buyer's problem).
      - Of course, in cases like the GM case, where the sale is expedited, extended due diligence may be impossible. Risk may, instead, have to be reflected in decreased purchase price.

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SECOND CIRCUIT DECISION – STRATEGIC CONSIDERATIONS MOVING FORWARD

- "Strategic considerations" moving forward
  - Buyers should be careful in granting pre-sale deals with creditors that provide for better treatment than the law would provide. Here, New GM's undoing (at least, in part) was that it gave other classes of creditors favorable deals, which led the Second Circuit to conclude that the ignition switch plaintiffs could have also negotiated such a deal. In fact, clear statements should be made in pre-sale declarations stating that buyer is not willing to assume any other liabilities than those that are being expressly assumed. Beware the slippery slope!
  - Whenever possible, structure post-sale activities in a way that lessens the likelihood of successor liability claims. This is not always possible (such as in the GM case) and may conflict with the business model moving forward, but be mindful of this risk.
  - Understand the business you are buying in great detail. Is this the type of business where undisclosed claims are likely to exist? If so, how can you help ensure that adequate notice of the sale is being provided?

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GM SAGA CONTINUES

- The GM bankruptcy court is in the process of hearing and resolving a motion filed in October of 2016 by new GM to enforce the bankruptcy court's prior orders, one of which was reversed, in part, by the Second Circuit's decision.
- In December of 2016, the court entered an order regarding five threshold issues that needed to be resolved with respect to whether certain claims being prosecuted against new GM in non-bankruptcy courts could proceed.
- The bankruptcy court recently entered an order addressing whether certain claims of the so-called "Pitterman Plaintiffs" can proceed to trial in the United States District Court for the District of Connecticut. Decisions with respect to other groups of plaintiffs were still pending as of the middle of June, 2017.

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GM SAGA CONTINUES (CONT'D)

- On the Pitterman Plaintiffs' threshold issues, the bankruptcy court held, in part, that:
  - The Pitterman Plaintiffs cannot pursue a claim against New GM based on Old GM's failure to recall or retrofit automobiles, reasoning that New GM, contractually, did not assume these liabilities and determining that this issue was resolved by the bankruptcy court's prior orders (neither of which was, apparently, the subject of the appeal to the Second Circuit).
  - Consistent with the Second Circuit's GM decision, however, claims against New GM for both failure to warn and failure to recall and retrofit GM vehicles based *solely* on New GM's alleged wrongful conduct can proceed. The court makes clear that, in light of the Second Circuit's decision, this ruling will apply to the Ignition Switch Plaintiffs as well as other plaintiffs.

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THIRD CIRCUIT PRECEDENT ON SUCCESSOR LIABILITY AND DUE PROCESS ISSUES IN THE CONTEXT OF § 363(F) FREE AND CLEAR SALES

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
Chemetron Corp. v. Jones 72 F. 3d 341 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996)	• The central issue was whether claimants were "known" claimants entitled to actual notice of bankruptcy proceedings or "unknown" creditors entitled only to notice by publication. *345-46.			• This case involved personal injury claimants who held claims against debtor arising from alleged exposure to toxins at sites formerly owned by the debtor and who did not file timely proofs of claim. Question was whether they were entitled to actual notice of the proof of claim bar date (which was not provided) or would only be entitled to publication notice (which was provided). Court observed that inadequate notice is a "defect which precludes discharge of a claim in bankruptcy." * 346.	• Note: This case has been widely cited for the proposition that, in the Third Circuit, a finding of prejudice is not required for the court to find a due process violation. But this case does not address the prejudice issue and any such analysis would be *dicta* as the court found that notice was appropriate in this case and, therefore, did not have to reach the issue of whether an additional finding of prejudice was required.
				• A "known" creditor is one whose identity is known or "reasonably ascertainable" by the debtor. * 346. A reasonably ascertainable creditor is one who can be identified through	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				reasonably diligent efforts. * 346. An open-ended investigation to identify creditors is not necessary; efforts beyond a careful investigation of a debtor's books and records are typically not required (*346-47), although the court indicates that the inquiry is fact-specific and an investigation of a debtor's books and records *may not* always be sufficient. (*347 n.2). But "reasonably ascertainable" does not mean "reasonably foreseeable," a construct that the court found would be entirely impractical. * 347	
				• Here, the court found that plaintiffs were not "known" creditors and, therefore, publication notice was sufficient for due process purposes. Plaintiffs in this case were difficult for the debtor to identify. They either visited or lived in two houses in the vicinity of debtor's	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				toxic waste sites, often with infrequent visits, and none lived in area at the time they sought to enforce their rights. The court was "hard-pressed to conceive of any way the debtor could identify, locate and provide actual notice to these claimants." * 347.	
In re Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252 (3d Cir. 2000)		• The main issue in this case was whether, under section 363(f), a debtor could sell an account receivable free and clear of certain contract affirmative defenses, such as recoupment and setoff, such that the purchaser of the receivable took "free and clear" of these defenses. The court holds that a sale of a receivable cannot be accomplished free and clear of defenses, including recoupment, but permits for the possible sale free and clear of a right of setoff that is not taken prior to the petition date.		• The court also addresses whether notice of a sale free and clear of "claims" was constitutionally sufficient and, if not, the consequences of such notice deficiency.	
		The court examines whether a sale free and clear of "interests" under			

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
		section 363(f) includes defenses. * 257-58. The court adopts the analysis found in 4th Circuit's decision in *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), *cert. denied*, 520 U.S. 1118 (1997), finding that the term "interest" means more than just *in rem* interests in property. *258-59. Rather, the term "interest" extends to obligations that are connected to, or arise from, the property being sold. *259. The court also cites two Virginia bankruptcy court decisions – *In re P.K.R. Convalescent Ctr., Inc. v. Virginia (In re P.K.R. Convalescent Ctr., Inc.)*, 189 B.R. 90 (Bankr. E.D. Va. 1995) and *WBQ P'ship v. Virginia Dep't of Medical Assistance Serv. (In re WBQ P'ship)*, 189 B.R. 97 (Bankr. E.D. Va. 1995) – for the proposition that, consistent with section			

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
		363(f)(5), the term "interest" encompasses any claim that can be reduced to a monetary satisfaction. * 259.			
		The court then considers whether defenses, such as setoff and recoupment, are "claims" which can be shed from the assets sold in a section 363 sale. The court holds that a defense of recoupment is not a claim – so a sale of a receivable cannot be accomplished free and clear of this defense - and court suggests that, generally, sales cannot be consummated free and clear of defenses. * 260-61.		• The court also finds that, even if a sale of a receivable could be accomplished free and clear of defenses, the notice provided to parties in this case – which said the sale would be free and clear of "interests" - did not give parties adequate notice that the sale might be free and clear of their affirmative defenses. For this reason too, those defenses were not waived. *265-66	
		With respect to a setoff, the court finds the defense can be asserted if the setoff was taken pre-petition. Court holds, however, that section 553(a) – which references sections 362 and 363 – permits a sale of property free and clear of setoff rights that are otherwise valid under that section. * 262-63.		• The court, however, further found that, on remand, the trial court should limit the setoff defense to setoffs taken pre-petition. * 265-66.	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003)		• At issue was whether claims against debtor TWA relating to the settlement of a prior sex discrimination suit (under which the settled parties were awarded travel vouchers) and pending discrimination claims filed with the EEOC were "interests" under section 363(f) such that these claimants could not assert these claims against American Airlines as the purchaser of TWA's assets under section 363 of the Bankruptcy Code.	• Claimants argue that their claims, and particularly successor liability claims, are not "interests" under section 363(f) of the Bankruptcy Code. * 288.		
		• Noting that some courts construe the term "interests" to mean only *in rem* property rights such as liens, the court observes that the case law is trending toward a more expansive definition that defines interests as encompassing all obligations that flow from the ownership of property. * 289. The court cites extensively from its decision in *Folger Adam*.	• Like the *Folger Adam* court before it, the court adopted the analysis found in the 4th Circuit's in *In re Leckie Smokeless Coal Co.*, in which the 4th Circuit held that, regardless of whether the purchasers were successors in interest of the debtor, section 363(f) could extinguish all successor claims by entering an order under section 363(f) transferring assets free		• Court supports its holding – that section 363(f) encompasses more than just *in rem* rights such as liens – by citing to Bankruptcy Code section 363(f)(3) which refers to liens as being but one of the types of interests that may be subject to a free and clear order; thus implying that there are "interests" aside from *in rem* interests, that may be stripped off the assets to be sold in a section 363(f) sale. *

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
			and clear of claims. * 289. The 3rd Circuit, like the 4th Circuit in *Leckie*, refuses to limit section 363(f) free and clear sales to *in rem* interests and expressly holds that it applies to permit sales "free and clear" of successor liability claims against the purchaser.. * 289-90.		290. • The court also reasons that allowing sales free and clear of general unsecured "claims" is consistent with the Bankruptcy Code's priority scheme – otherwise general unsecured creditors would be left with collection rights superior to those of more senior creditors. *See* * 291-92. • The court also rejects claimants' argument that section 363(f) does not apply to their claims because such claims are not entitled to a monetary satisfaction under section 363(f)(5), finding that such claims were reducible to, and could be satisfied by, a monetary reward. * 291.
JEN-WEN, Inc. v. Van Brunt (In re Grossman's Inc.), 607 F.3d 114 (3d Cir. 2010)	• This case is best known for overturning Third Circuit's oft-criticized "accrual test" for when a "claim" in bankruptcy arises, which former test was established in the case		• The fact that the plaintiff's claims arose pre-petition did not necessarily mean plaintiff's claims were discharged in bankruptcy, even though plaintiff did not		

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
	of *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985). The court holds that a personal injury "claim" (here, for asbestos exposure) arises for bankruptcy purposes when a claimant is exposed to a product or other conduct giving rise to the claim, even if the injury is manifested after the reorganization. * 125. In this case, plaintiff's claim for exposure arose in 1977, even though she first learned of her injuries in 2005, long after former debtor Grossman's had reorganized and emerged through a new, successor entity, JEN-WEN.		file a proof of claim or assert her rights in the bankruptcy case. * 125-26. Plaintiff was still entitled to notice and the debtor's possible failure to provide such notice would preclude a discharge of her claim in bankruptcy (quoting *Chemetron*). * 125-26. The court finds that the channeling injunction provisions of section 524(g) to be of no help to successor JEN-WEN, as the plan did not contain a channeling injunction. * 126-27.		
			• The court remands for a finding by the district court as to whether the notice of the claims bar date was sufficient for the plaintiff's claim to be discharged. * 127.		

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
			The court instructs that, in determining whether an asbestos claim has been discharged, the trial court "may wish to consider" numerous factors including the circumstances of claimant's exposure to asbestos, whether and when the claimant knew of its vulnerability, whether claimants were known or unknown creditors, whether they knew of the notice of bar date, and whether they had colorable claims at the time of the bar date. *127-28.		
In re NE Opco, Inc., 513 B.R. 871 (Bankr. D. Del. 2014)			• The issue in this case was whether plaintiff could assert wrongful termination and discrimination claims against the *buyer* for alleged wrongful conduct of the *buyer* occurring during the interval between the entry of the sale order and the closing of the sale.		
			• The court, relying on the *TWA* decision and		• The court reasons that shielding the buyer

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
			the bankruptcy court's decisions in *In re Christ Hospital*, 502 B.R. 158 (Bankr. D. N.J. 2013), *aff'd*, 2014 U.S. Dist. LEXIS 128409 (D. N.J. Sept. 12, 2014) and 2014 Bankr. LEXIS 2294 (Bankr. D. N.J. May 22, 2014), held that the 363(f) "free and clear" sale order cleansed the assets transferred to the buyer from all attendant liabilities. * 876. Thus, the court enjoined the plaintiff from asserting pre-closing claims against the buyer based on its *own* pre-closing conduct.		from pre-closing claims arising from its own conduct is consistent with the rationale for "free and clear" relief set forth in the *TWA* decision. According to the court, it preserves the priority scheme under the Bankruptcy Code by not permitting the plaintiff to obtain a full recovery against the purchaser while other creditors do not receive the same treatment (Query: if the claim is post-petition and is not against the debtor, how does it relate, in any way, to distributions made by the debtor's estate for claims against the debtor ?). Second, cutting off liability maximizes recoveries for the estate because the buyer provided consideration for the assets in exchange for an exclusion of related liabilities and a sale injunction (Query: so buyers get a free pass for their post-sale order, pre-closing conduct?). * 877.

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
Molla v. Admar, No. 11-6470, 2014 U.S. Dist. LEXIS 69564 (D. N.J. May 21, 2014)			• The issue here was whether an alleged injury suffered in the debtor's casino after the entry of a sale order but prior to closing could be asserted against the buyer of the casino and the former debtor.		
				• Plaintiffs argued, among other things, that they did not receive adequate due process in that they were not informed of the bankruptcy. *See* * 6-7.	
			• The court easily concludes that *TWA* controls and prevents plaintiffs from asserting claims against buyer for pre-closing conduct, finding that sale of assets was free and clear of such claims pursuant to sale order. *See* * 9-16. The court finds that the dual rationales behind *TWA* decision (maximizing value of sale assets and not altering Bankruptcy Code's priority scheme)	• Plaintiff cites *Grossman's* and *Chemetron* for the proposition that notice is required before discharging its claims. The court distinguishes these Third Circuit decisions on the ground that neither addressed the scope and effect of a free and clear order under section 363 – according to the court, those cases merely addressed discharge issues (Query: One could argue that *Grossman's* and	• The decision appears to gloss over the notice and due process issues raised by the plaintiffs - as if section 363(f) permits sales free and clear of claims without giving the requisite notice to claimants. Court also glosses over the fact that the claims may be direct claims against the buyer, not just successor liability claims based on claims originally asserted against the debtor.

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
			support its conclusion. * 10-11.	*Chemetron* more broadly address notice issues that should equally apply to sale orders).	

FOURTH CIRCUIT PRECEDENT ON SUCCESSOR LIABILITY IN THE CONTEXT OF § 363(F) FREE AND CLEAR SALES

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
Elliott v. GM LLC (In re Motors Liquidation Co.), 829 F.3d 135 (2d Cir. 2016), *cert. denied*, No. 16-764, 2017 WL 1427591 (Apr. 24, 2017)	• Successor liability claims must still qualify as "claims" under the Code. *155. • Though § 363(f) does not expressly invoke the definition of "claims," makes since to harmonize chapter 11 reorganizations and § 363 sales. *155. • A claim is: (1) a right to payment that (2) arose before the filing of the petition. *156. • Claim cannot include claimants who are completely unknown and unidentified as of the petition date and whose rights depend entirely on the fortuity of future occurrences. *156 • Some minimum contact required. *156	• "Rather than formulating a single precise definition for 'any interest in such property,' courts have continued to address the phrase 'on a case-by-case basis.'" *155. • At a minimum, "interest" refers to *in rem* interests in property, such as liens; but other courts have adopted broader definitions "encompass[ing] other obligations that may flow from ownership of the property." *155 (citing to *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996)). • "We agree that successor liability claims can be 'interests' when they flow from a debtor's ownership of transferred assets." *155.	• Court may approve a § 363 sale free and clear of successor liability claims if those claims flow from the debtor's ownership of the sold assets. *156	• Legal claims are sufficient "property" such that a deprivation would trigger due process security. • Once DP triggered, issue becomes what process is due. • Elementary and fundamental requirement of DP in any proceeding is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *158. • Adequacy of notice turns on what the debtor knew or, with reasonable diligence, should have known about the claim. *159. • Notice by publication insufficient with respect to a person whose name and address are known or very easily	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				ascertainable and whose legally protected interests are directly affected by the proceedings. *159. • Known/should've known claims: DP entitles claimants to actual notice. *159. • Unknown claims: publication notice suffices. *159. • Court did not decide whether prejudice is an essential element of procedural due process, noting split between courts.	
In re Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996)	• "Claim" considered in context of jurisdiction. • Claim depends on: (1) right to payment; and (2) right arose before petition date. • Right (stemming from Coal Act) in existence before petition date. • Claim existed as to future premium payments.	• Rejected district court's "unduly broad" definition of "a right to demand money from the debtor." *581. • Declined to limit scope of § 363(f) to *in rem* interests. *582. • Determined on case-by-case basis. *582. • Right to collect premium payments from debtors = interests in assets that debtors sold. *582. • Right grounded in fact that very assets were employed for coal	• Without determining whether were successors in interest, held that may extinguish the successor liability under § 363(f)(5). *585. • No real discussion of this because this finding wasn't appealed.	• Not at issue; notice and objections filed	• Sale of debtor's coal operations under § 363(f) was free and clear of successor liability otherwise arising under the Coal Act. • Benefit funds' rights to collect premium payments from the debtor were grounded in fact that debtor's assets were employed for coal mining purposes, making the right to collect premium payments an "interest" that was extinguished

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
		mining purposes. *582. • Because of relationship between (1) right to demand payment from debtors and (2) use to which debtors put their assets, there was an interest in those assets. *582			after the § 363(f) sale. Purchaser of coal operations not liable to benefit fund for the premiums.
In re Takeout Taxi Holdings, Inc., 307 B.R. 525 (Bankr. E.D. Va. 2004)				• Strict compliance with procedural matters when presenting a motion to sell free and clear is especially important because the trustee is disposing of the secured party's collateral or third party's interest in the property potentially without consent. • Rule 6004(a) - notice required in proposed sale; 6004(c) - motion to sell free and clear is a contested matter and requires serving lienholders and interest holders with the motion. • Rule 9014 - contested matters - relief is requested by motion upon reasonable notice and opportunity for hearing. Requires service in the manner set out in Rule 7004.	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				• Notice of the motion - different from service - is required to be given in accordance with Rule 2002. • COS for motion indicated motion was transmitted electronically only to UST and debtor's counsel; COS of notice of hearing indicated notice was mailed to certain creditors, but not all (notably, not mailed to two creditors holding unsecured nonpriority claims). • Notice of hearing and service of motion fatally flawed. • Motion itself inadequate because it fails to identify any secured creditor intended to be affected by the sale nor set forth any basis to support conclusion that liens were in bona fide dispute. • "Due process under the Fifth Amendment requires that a secured party whose collateral is about to be sold free and	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				clear of his lien be given fair notice of the intended action and an opportunity to be heard. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" • Where service by publication is permissible, the published notice must reasonably identify the respondent and nature of the claim. • In context of a motion filed under § 363(f), service in accordance with Rule 7004 satisfies requirement that interested parties be apprised. However, motion must also be sufficient to place creditor on notice that his liens are at issue --	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				such liens should be reasonably identified. The relief requested and basis for relief should be plainly stated. • Refers to Fourth Circuit case, *Cen-Pen Corp. v. Hanson*, 58 F.3d 89 (4th Cir. 1995), for providing insight into adequacy of pleadings. Fourth Circuit was troubled by provision in chapter 13 plan attempting to void lien, because it was not conspicuous, did not identify the creditor or alert creditor of its lien on debtor's property or alert creditor of the threat it faced. • "Constitutional due process is not simply satisfied by properly placing a piece of paper in the hands of the respondent. The paper served must contain adequate information. The content must be reasonably calculated to put the respondent on notice. The person whose interests are sought to be affected should be identified. In	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				this case, both the motion and the notice were designed for the general creditor body. Neither identified any individual secured creditor. The liens in jeopardy were not identified. Both reasonable identification of the creditors and their liens in issue are necessary elements of a proper motion." • Closely related to the failure to identify the secured creditors who are at risk and the challenged liens is the failure to assert sufficient grounds upon which relief may be granted. The trustee stated that he "questioned the validity of certain liens, and requests, therefore, that the sale be free and clear of liens, and that the liens attach to those proceeds." Memorandum at ¶ 3. (Docket Entry 28). The secured creditor is entitled to some information as to why the lien is challenged so	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				that he may defend his interests appropriately. Merely reciting this conclusion does not suffice to apprise the secured creditor of the basis for that conclusion. Nor is it immediately clear that questioning the validity of a lien rises to the standard set out in § 363(f)(4), that there be a "bona fide dispute."	
In re WBQ P'ship, 189 B.R. 97 (Bankr. E.D. Va. 1995)				• Due process requires notice that is reasonably calculated to apprise an interested party of pendency of action • In § 363(f) context, notice is sufficient if it includes the terms and conditions of sale, if it states the time for filing objections, and if selling real estate, generally describes the property. • Notice explained that assets being sold free and clear and that debtor will seek to preclude DMAS (Virginia Dept. of Medical Assistance Services) from exercising its state law recapture rights.	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				• Recapture right was a state law form of successor liability; § 363(f) preempted state law	
Magers v. Bonds (In re Bonds Distrib. Co., Inc.), No. 97-52130C-7W, 2000 WL 33682815 (Bankr. M.D.N.C. Nov. 15, 2000)					Determining whether a jury trial right exists with respect to claims based on "mere continuation" or "successor liability." Court found support for the proposition that the claims based on the doctrine are equitable in nature or derived from equitable principles. Because remedy sought (damages) was legal, there was a right to a jury trial. Court noted "scant authority" on the issue of jury trial rights in the context of successor liability.
Bes Enters. v. Natanzon, No. 06-870, 2006 WL 3498419 (D. Md. Dec. 4, 2006)					Issue: whether a bankruptcy court may authorize an asset sale free and clear of successor liability under § 363(f) where the successor entity's post-bankruptcy conduct allegedly constitutes an implied assumption of contractual obligations. Court declined to

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
					dismiss cause of action under Rule 12(b)(6), finding first that "at least one court has suggested that inadequate notice may prevent an order issued under § 363(f) from precluding claims based on successor liability," and stating that additional facts were needed to determine the scope of the sale order. Second, the court found that additional facts were needed to determine the particular "implied assumption of contract" claim was precluded by § 363(f). The court noted that, in other contexts, courts have suggested that § 363(f) sales do not preclude future claims arising after the conclusion of the bankruptcy proceeding, and a further issue was the nature of plaintiff's interest in the assets. Third, the court found that the development of factual and legal issues would enable it to evaluate policy concerns

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
					regarding successor liability claims in the § 363(f) context.
Zurich Am. Ins. Co. v. Tessler (In re J.A. Jones, Inc.), 492 F.3d 242 (4th Cir. 2007)				• Due process discussed in the context of filing a proof of claim after the claims bar date. • Claim cannot constitutionally be discharged unless debtor provides constitutionally adequate notice to the creditor of the debtor's bankruptcy proceeding, applicable filing dates and hearing dates. • Type of notice that is reasonable or adequate for purposes of satisfying due process requirement depends on whether a creditor is known or unknown to the debtor. • Known creditor: actual notice is required. • Unknown creditor: constructive notice - typically via publication - is generally sufficient. • An unknown creditor is one "whose identity or claim is wholly conjectural or	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				'whose interests or whereabouts could not with due diligence be ascertained.'" • Known claimants: claimants whose identities are actually known and claimants whose identities are "reasonably ascertainable." Creditor is reasonably ascertainable if debtor can uncover creditor's identity through reasonably diligent efforts. • No bright-line rule for determining whether creditor is known or unknown; analysis must focus on totality of the circumstances. Under facts of case, creditor (estate of accident victim; highly publicized accident) was either a known creditor or could have been ascertained with reasonably diligent efforts and was entitled to actual notice. Was not provided with actual notice, so bankruptcy court was correct in	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(F)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				allowing creditor to file claim beyond expiration of bar date and after confirmation of plan.	
Lane Hollow Coal Co. v. Dir., Office of Workers' Compensation Programs, 137 F.3d 799 (4th Cir. 1998)				"Core violations of due process [i.e., notice and the right to a hearing] are of another order. If there has been no fair day in court, the reliability of the result is irrelevant, because a fair day in court is how we assure reliability of results." - In *GM*, the court referred to the Fourth Circuit in *Lane Hollow* as a jurisdiction that does not require the showing of prejudice for a due process violation, because a due process violation cannot constitute harmless error.	

FOURTH CIRCUIT PRECEDENT ON SUCCESSOR LIABILITY -- IN GENERAL

CASE NAME	NOTES
Magers v. Bonds (In re Bonds Distrib. Co.), No. 97-52130C-7W, 2000 WL 33682815 (Bankr. M.D.N.C. Nov. 15, 2000)	▪ General rule in North Carolina is that the purchaser of all or substantially all of the assets of a corporation is not liable for the debts of the old corporation. ▪ Four exceptions: 1) Where there is an express or implied agreement by the purchasing corporation to assume the debt or liability; 2) Where the transfer amounts to a *de facto* merger of the two corporations; 3) Where the transfer of assets was done for the purpose of defrauding creditors; and 4) Where the purchasing corporation is a mere continuation of the selling corporation. ▪ A corporate successor is the "mere continuation" if only one corporation remains after the transfer of assets and there is an identity of stockholders and directors between the two corporations. Two additional factors: (a) whether there was inadequate consideration for the purchase; and (b) whether any elements of a good faith purchaser for value are lacking.
Royal Alliance Assocs., Inc. v. Branch Ave. Plaza, L.P., 587 F. Supp. 2d 729 (E.D. Va. 2008)	▪ Under Virginia law, a corporation that acquires the assets of another corporation does not automatically succeed to the predecessor's liabilities. ▪ Successor liability arises only under the same four exceptions highlighted in *In re Bonds*. ▪ Key element of "mere continuation" is a "common identity of the officers, directors, and stockholders in the selling and purchasing corporations." Mere continuation exception does not apply where the purchase is a bona fide, arms' length transaction. ▪ Elements of a *de facto* merger: 1) Continuity of ownership (*most important factor); 2) Cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; 3) Assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and 4) A continuity of management, personnel, physical location, assets and general business operation.
Smith v. Navistar Int'l Transp. Corp., 737 F. Supp. 1446 (D. Md. 1988)	▪ Ordinarily, a corporation acquiring the assets of another corporation does not become liable for the debts and liabilities of the predecessor corporation. ▪ Same four exceptions noted in *In re Bonds* and *Royal Alliance* apply. ▪ Absent agreement by the successor corporation, its conduct must manifest an intent to assume the tort liability of its predecessor, or the equities must be sufficiently strong to impose liability. ▪ Where the successor corporation is a substantial continuation of the selling corporation, courts have imposed liability to third parties on the successor corporation, even if doing so is contrary to the expressed intention of the parties under the agreement of transfer.

	▪ Notes that a small minority of jurisdictions has attached tort liability to the transfer of a product line, but declined to adopt that rule.

June 2, 2017

FIFTH CIRCUIT PRECEDENT ON SUCCESSOR LIABILITY AND DUE PROCESS IN THE CONTEXT OF §§ 363(F) AND 1141(C) FREE AND CLEAR SALES AND VESTING

CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
Matter of Crystal Oil Co., 158 F.3d 291 (5th Cir. 1998)	• A regulatory environmental claim arises when a potential claimant can tie the debtor to a known release of a hazardous substance • The question is whether, at the time of the bankruptcy, the claimant could have ascertained through the exercise of reasonable diligence that it had a claim against the debtor for a hazardous release • A *claim* is "reasonably ascertainable" if the debtor has in his possession *specific information* that reasonably suggests both (1) the claim for which the debtor may be liable, and (2) the entity to whom he would be liable.		• *Dicta*: If the debtor makes a material misrepresentation denying that it is the successor-in-interest, to the previous owner of the affected real property, then there may be a basis for finding that a claim against the debtor was not a "reasonably ascertainable"	• Debtor must provide actual notice of its bankruptcy to all "known creditors" in order to achieve a legally effective discharge of their claims • "Known creditors" include both claimants actually known to the debtor as well as those whose identities are "reasonably ascertainable" • A *creditor* is "reasonably ascertainable" if it can be discovered through "reasonably diligent efforts" • Claimants must be reasonably ascertainable *not* reasonably foreseeable	• Reorganized debtor filed a motion to reopen its bankruptcy case to enforce the confirmation order against a state regulatory agency from enforcing any claims that had been discharged. • Whether the claimant was reasonably ascertainable, thereby deserving of actual notice, is entirely an issue of fact and our standard of review therefore is one of clear error. • In bankruptcy cases, we owe substantial deference to the bankruptcy court's findings of fact. Here, the factual findings are not clearly erroneous and, given those findings, it is clear that the bankruptcy court did not err in concluding that the claims arose before confirmation and were dischargeable.

June 2, 2017

CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re Placid Oil Co., 753 F.3d 151 (5th Cir. 2014)	• Here, we clarify this Circuit's understanding of the rule of ***Crystal Oil***. • At a minimum, in order for a claim to be reasonably ascertainable, the debtor must possess "specific information" about a *manifested injury* to make the claim *more than merely foreseeable*. • The claim of a known creditor must be based on an *actualized injury* as opposed to *merely foreseeable*.			• The level of notice required by the Due Process Clause depends on whether a creditor is "known" or "unknown". • Known creditors include both claimants actually known to the debtor and those whose identities are "reasonably ascertainable" • A claimant is "reasonably ascertainable" if he can be discovered through "reasonably diligent efforts" • Bankruptcy policy concerns weigh heavily against defining known creditors as those with merely foreseeable claims. • *E.g.*, the debtor's knowledge of the claimant's exposure to asbestos and the dangers of asbestos are insufficient to make the party a known creditor • Unknown creditors are those whose interests are "conjectural," in the future, or, even if they could be discovered by investigation, are not known to the debtor in	• Placid confirmed its Plan of Reorganization in 1988; the confirmation order provided that all claims against Placid that arose on or before the confirmation date were forever discharged except for Placid's obligations under the Plan; and the Plan did not address potential future asbestos liability. • Plantiffs sued Placid in state court in 2004. • Placid moved to reopen its bankruptcy in 2008 and in 2009 filed an adversary proceeding to determine whether the Plaintiff's asbestos-related tort claims were discharged by the confirmation order. • *Held*: The bankruptcy court did not err in finding that the Plaintiffs were unknown creditors. Although Placid knew of the dangers of asbestos and of a Plaintiff's exposure, such information suggesting only a risk to the Plaintiffs, does not make the Plaintiffs known creditors because Placid had no specific knowledge of any actual injury to the Plaintiffs prior to its bankruptcy plan's confirmation. • *Dissent*: When an individual cannot recognize that she has a claim in a bankruptcy case, that person

June 2, 2017

CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				the due course of its business • If a debtor has "no contemplation" of a creditor's pre-petition claim, then that creditor is by definition unknown, and constructive notice discharges the claim upon confirmation. • Actual notice is required only for "known" creditors • Constructive notice satisfies due process where the claimant is unaware of any injury at the time notice is received • Publication in the WSJ is sufficient constructive notice to discharge the pre-confirmation claims of unknown creditors. Such notice need only inform claimants of the existence of the bankruptcy case, the opportunity to file proofs of claim, relevant deadlines, consequences of not filing a proof of claim and has proofs of claim should be filed.	is functionally incompetent to receive notice of the bankruptcy because, even if she in fact received notice of the proceedings, she would not have been able to recognize their effect on her or to understand that her rights could be affected by them. • *Dissent*: And, because there was no future-claims representative (functionally, a guardian *ad litem*) to represent her interests, the bankruptcy court erred in concluding that she received constitutionally adequate notice that her claim would be discharged in the bankruptcy if she did not participate in the proceedings. • *Dissent*: In sum, constructive notice by publication to asbestos-exposed individuals with unmanifested or latent mesothelioma, without the appointment of a representative for such future claimants, does not satisfy due process.

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CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re La Fuente Home Health Serv., Inc., 2017 WL 1173599, (Bankr. S.D. Tex. Mar. 28, 2017)	• Reviews and follows the ***Placid Oil*** analysis			• Reviews and follows the ***Placid Oil*** analysis	• Whether actual notice was given to a known creditor is a question of fact • Summary judgment denied both to the reorganized debtor and the claimants, because there remain genuine issues of material fact as to notice

CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re AMPAM Power Plumbing, L.P., 520 B.R. 553, 557 (Bankr. W.D. Tex. 2014)	• "Future claims" are those which arise from a debtor's pre-bankruptcy conduct but do not manifest any injury to claimants until after confirmation of the debtor's plan • Treatment of future claims involves two competing concerns: (1) the Bankruptcy Code's goal of providing a debtor with a fresh start by resolving all claims arising from the debtor's conduct prior to its emergence from bankruptcy; and (2) the rights of individuals who may be damaged by that conduct but are unaware of the potential harm at the time of the debtor's bankruptcy. • The Fifth Circuit adopts the "pre-petition relationship" test to determine how to define a future claim • Under the pre-petition relationship test, a claim arises at the time of the debtor's tortious conduct forming the basis of liability *only if* the claimant had some type of specific relationship with the debtor at that time • Attorney-client relationship meets the pre-petition relationship test			• The basis of liability here is work performed prior to the Confirmation Date, but the possible resulting injury from this conduct did not yet manifest itself before the Confirmation Date. • Under ***Placid Oil***, claimants are not deprived of due process even where, at the time they receive notice of the bankruptcy proceeding, they are unaware of any injury • Despite its latency in manifestation of any injury, a finding that the claims were discharged by the Confirmation Order does not violate due process rights of the claimant	• Bankruptcy courts in the Fifth Circuit maintain subject matter jurisdiction post-confirmation for matters such as enforcing and interpreting the scope of the debtor's discharge order, even after the bankruptcy case is closed.

CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re Strongbuilt Inc., 2009 WL 5873047 (Bankr. W.D. La. Aug. 26, 2009), *supplemented*, 2009 WL 5868575 (Bankr. W.D. La. Nov. 9, 2009)	• The codal definition of a claim is broad, but not so broad as to define a claim as "existent or non-existent" • Claimants' pre-petition purchase of product did not sufficiently establish the relationship necessary to cover claimants' products liability claim within the Plan, where injury arising from the product occurred post-discharge • The plan never defined nor dealt with "future claimants." • The debtor "is hoist on its own petard." It deliberately and narrowly defined its class of "product liability claimants" in its confirmed plan and public notices as those whose "injury arose prior to the Petition Date." • Additionally, the debtor cannot now rely on the broad § 101(5) definition of "claim" to bar a new claimants' action when the debtor so narrowly defined "products liability claimants," in its confirmed plan and public notices		• Under the Plan, the successor purchased all of the assets of the debtor while expressly excluding the transfer of any liability for any "claim" against the "debtor" • The plan definition of "claim" reverts to § 101(5) • The plan definition of "products liability claimants" is limited to those whose injury arose pre-petition • Even though the successor in interest purchased all assets of the debtor free and clear of any claim against the debtor, future claims against the successor in interest are permissible where the plan did not adequately address the disposition of future claims		• Debtor's confirmed plan defined "claims" and "Products Liability Claimant" but did not define nor deal with "future claimants" • Where the Plan included a class of "products liability claimants," but did not include a "future claimants" class, claimants' products liability action was not discharged

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CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re Oliver, 2017 WL 1323467 (Bankr. S.D. Miss. Apr. 10, 2017)				• Claimant received actual notice of this bankruptcy case when a creditor served its motion to lift the co-debtor stay on claimant's attorney. After receiving notice of a proceeding, a party has a duty of diligence to inquire about the status of the case. Parties have an affirmative duty to monitor dockets to keep apprised of the entry of the orders that they may wish to appeal. • Claimant was not entitled to notice of every finding in the bankruptcy case. • Claimant's attorney received electronic notice of every filing after he submitted a pleading using his or her login to the Court's electronic filing system. • Because his attorney was acting as his agent, the notices received by the attorney are imputed to the claimant.	• The bankruptcy court did not have jurisdiction to consider allegations of perjury and criminal bankruptcy fraud in connection with the underlying bankruptcy case

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CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
White v. Cone-Blanchard Corp., 217 F. Supp. 2d 767 (E.D. Tex. 2002)			• Defendant purchased some of a debtor's assets in a bankruptcy sale and then used those assets in the same business line in which the debtor formerly operated • Such a showing is insufficient to establish a successor products liability claim.		• The court is concerned with the public policy implications of imposing the bankrupt company's liabilities on a company willing to purchase its assets at a court-supervised bankruptcy sale. • To impose liability on the purchasing company merely for buying assets and then using them in the same manner as the selling company did, could greatly reduce the value of these assets, and thus have a potentially major impact on the effectiveness of bankruptcy as a debt collection system.
In re Mirant Corp., 389 B.R. 481 (Bankr. N.D. Tex. 2008)		• The term "interest" under § 363 means a third party's interest in property of the estate that is to be sold, used, or leased			

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CASE	"CLAIM" DISCUSSION	"INTEREST" DISCUSSION	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
In re Fairchild Aircraft Corp., 184 B.R. 910 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998)	• Future claims which arose out of the prepetition conduct of the debtor, but where the injuries and the manifestations of those injuries both occur post-confirmation, cannot be treated as "bankruptcy claims" unless the debtor takes the necessary steps to establish and deal with these predictable liabilities in the bankruptcy proceeding. • Because such future claims are not "bankruptcy claims," a bankruptcy court order confirming a plan cannot affect those liabilities.	• Section 363(f) does not authorize sales free and clear of "*any interest*," but rather of "*any interest in such property*." • These three additional words define the real breadth of *any interests*. • The sorts of interests impacted by a sale "free and clear" are *in rem* interests which have attached to the property. Section 363(f) is not intended to extinguish *in personam* liabilities. • Were we to allow "any interests" to sweep up *in personam* claims as well, we would render the words "in such property" a nullity. No one can seriously argue that *in personam* claims have, in themselves, an *interest in such property*.	• Successor liability does not create a new cause of action against the purchaser so much as it transfers the liability of the predecessor to the purchaser. • While successor liability may give a party an alternate entity from whom to recover, the doctrine does not convert the claim to an *in rem* action against the property being sold.	• In a products liability case, fair and adequate notice might include posting a notice of the potential defect on the product	• This case was vacated later on equitable grounds • The appealing party (the successor in interest) settled with the claimants after winning a favorable state court decision; however, the successor's appeal of the bankruptcy court's decision was still pending, though moot, because the underlying litigation had settled. • Consequently, the bankruptcy court vacated its earlier decision on equitable grounds. As Emily Litella would say, "*Never mind*." www.en.wikipedia.org/wiki/Emily_Litella

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ELEVENTH CIRCUIT PRECEDENT ON SUCCESSOR LIABILITY IN THE CONTEXT OF § 363(f) FREE AND CLEAR SALES, THE STATE LAW DOCTRINE OF SUCCESSOR LIABILITY, LABOR-RELATIONS ACTIONS, AND COMITY

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(f)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
ADT LLC v. NorthStar Alarm Services, LLC, 853 F.3d 1348 (11th Cir. 2017)				• Notice is a critical factor for imposing successor liability. • Pursuant to FED. R. CIV. P. 65 and common law there are two categories of nonparties that may be bound by an injunction: (1) a party who aids and abets the party bound by the injunction; and (2) a party in privity with the enjoined party. • Privity includes nonparty successors in interest and nonparties legally identified with the enjoined party. • "The concept of privity . . . is ultimately bounded by due process." *1352	• Successor was not bound by an injunction under a state law theory of de facto merger where there was no evidence that the successor knew of the injunction prohibiting the use of certain sales practices.

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(f)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
				• Privity '"represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close' to bind the nonparty to the injunction." *1352. • The extent to which a federal injunction applies to non-parties is governed not by state law, but by Rule 65(d) which "requires that a party have notice of an injunction before that party may be bound by the injunction."*1354	
Hatfield v. A+ Nursetemps, Inc., 651 Fed. Appx. 901 (11th Cir. 2016)			• "[T]he test for successor liability is fact specific and must be conducted in light of the facts of each case and the particular legal obligation which is at issue." *906	•The federal common law standard, a standard which is more favorable to plaintiffs in federal employment and labor relations actions, is applicable to FLSA claims for	• Holding company and new agency that had the same owner as a defunct staffing agency were successors-in-interest for claims arising under the FLSA.

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(f)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
			• An "employer may be a successor for some purposes and not others." *906	unpaid overtime compensation. • The federal successor-liability standard considers "whether: (1) 'the successor had notice of the pending' action; (2) 'the predecessor ... would have been able to provide the relief sought in the [action] before the sale'; (3) 'the predecessor could have provided the relief after the sale' (its 'inability to provide relief favors successor liability'); (4) 'the successor can provide the relief sought in the [action]'; and (5) 'there is continuity between the operations and work force of the predecessor and the successor.'"*907	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(f)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
Daewoo Motor America, Inc. v. General Motors Corp. (In re Daewoo Motor America, Inc.), 459 F.3d 1249 (11th Cir. 2006)	• Plaintiff could not collaterally attack Sale Order by bringing claims against the recipients of property transferred on approval by a Korean bankruptcy court. • Plaintiff's claims were entirely dependent on the alleged invalidity of transactions approved by the Korean court. • Post-confirmation claims were an impermissible collateral attack on the Korean bankruptcy court's order because the claims sought "to redistribute the assets that were transferred with approval of the court."*1260			•Plaintiff had sufficient notice of a Korean debtor's bankruptcy proceedings and the opportunity to participate therein to entitle the Korean court's order approving the sale of the manufacturer's assets and liabilities to international comity.	• Comity extended to successor liability claims seeking injunctive relief. • Factors for determining whether comity is appropriate include: "(1) whether the foreign court was competent and used proceedings consistent with civilized jurisprudence, (2) whether the judgment was rendered by fraud, and (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just." *1258 • In bankruptcy, "the extension of comity 'enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner.'"*1258

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(f)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
Clanton v. Inter.Net Global, L.L.C., 435 F.3d 1319 (11th Cir. 2006)			• Under New York law, an asset sale will give rise to successor liability under the following circumstances: (1) fraudulent transfer of assets; (2) de factor merger; (3) purchasing company was a mere continuation of the selling company; or (4) an express or implied agreement to assume a company's debts and obligations exists.		• Subsidiary did not assume a merger agreement or the debtor/buyer's holdback obligations arising under the agreement.
Evans Services, Inc. v. National Labor Relations Board, 810 F.2d 1089 (11th Cir. 1987)			• To hold a successor employer liable for the unfair labor practices of its predecessor employer, the NLRB must find that: (1) the new employer retains common aspects of the prior business sufficient to allow the legal conclusion of 'successorship;' and (2) the successor	• Successor employer had knowledge of its predecessor's unfair labor practices where the beneficial owner of the predecessor was also the chair of the predecessor's board of directors, its secretary-treasurer, and the mother of its president, who had committed the unfair labor practices.	

CASE	"CLAIM" DISCUSSION RE: JURISDICTION	"INTEREST" DISCUSSION RE: 363(f)	SUCCESSOR IN INTEREST	PROCEDURAL DUE PROCESS	OTHER
			knew of the unfair labor practices at the time it purchased the business		

GM/SUCCESSOR LIABILITY SALE ISSUES: THIRD CIRCUIT SURVEY

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2017 Southeast Bankruptcy Workshop

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***Chemetron Corp. v. Jones*, 72 F.3d 341 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996)**

The *Chemetron* court held the "reasonably ascertainable" test should be applied to determine whether creditors were "known" or "unknown" to the debtor and thus entitled to actual or publication notice of the claims bar date.

In *Chemetron*, Chemetron Corporation ("Chemetron") was a manufacturer that used depleted uranium in its operations. After Chemetron ceased operations, its manufacturing facility was demolished and some of this rubble was placed in a nearby landfill, which Chemetron also owned. Years later, Chemetron filed for chapter 11 bankruptcy through which a claims bar date was set. The bar date order required Chemetron to provide actual notice of the claims bar date to all known claimants against Chemetron and publish notice in national newspapers as notice to all other unknown claimants.

Almost four years after the claims bar date passed and nearly two years after the bankruptcy court confirmed Chemetron's plan of reorganization, 21 individuals (the "Plaintiffs") sued Chemetron (and the purchasers of the site of the old manufacturing facility and landfill), alleging injuries from exposure to toxic chemicals at the landfill, and sought the bankruptcy court's permission to file late claims. There were only two houses near the landfill, and out of the 21 Plaintiffs, only two individuals actually lived in these properties when Chemetron owned the site. The other 19 Plaintiffs visited the properties from multiple times per week to monthly to occasionally. All of the visits stopped three years prior to Chemetron filing for bankruptcy, and no Plaintiff lived near the landfill at the time of the bankruptcy.

The bankruptcy court, applying a "reasonably foreseeable" test, granted Plaintiffs' "motion to file late claims, finding that plaintiffs were known creditors entitled to actual notice of the bankruptcy proceeding and the bar claims date."[2] The district court reversed the bankruptcy court's grant of leave to file late claims and "held that plaintiffs were not known creditors and that publication notice was sufficient."[3]

The central issue on appeal was "whether plaintiffs were 'known' or 'unknown' claimants at the time of the bankruptcy court's order."[4] "Due process requires notice that is reasonably calculated to reach all interested parties, reasonably conveys all the required information, and permits a reasonable time for a response."[5] Thus, to satisfy due process for notice purposes, if Plaintiffs were known creditors, then they must have received actual notice of the bankruptcy and claims bar date, but if Plaintiffs were unknown, then publication notice was sufficient to satisfy due process.

In the case at hand, the Third Circuit held that it was clear error for the bankruptcy court to apply the broad "reasonably foreseeable" test to determine whether Plaintiffs were known claimants. The *Chemetron* court found that the "reasonably foreseeable" test was too broad of a standard to

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[2] *Chemetron Corp. v. Jones*, 72 F.3d 341, 345 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996).

[3] *Id*.

[4] *Id*.

[5] *Id.* at 346 (internal quotations omitted).

hold the debtor to and was practically difficult in its application. The *Chemetron* court also found that the "reasonably foreseeable" test "completely vitiate[d] the important goal of prompt and effectual administration and settlement of debtors' estates."[6]

The *Chemetron* court held that the correct test to apply to determine if a claimant is a "known creditor" is whether a creditor's "identity is either known or 'reasonably ascertainable by the debtor.'"[7] To determine whether a creditor is "reasonably ascertainable," the debtor must undertake a reasonably diligent search of the debtor's books and records, and only those creditors identifiable through such a search are "known" claimants. Moreover, the "reasonably ascertainable" standard does not require "a vast, open-ended investigation[,]" and "[a] debtor does not have . . . to search out each conceivable or possible creditor . . . ."[8] In the same vein, a creditor is "unknown" when its "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge of the debtor."[9]

In applying the "reasonably ascertainable" test to Plaintiffs, the *Chemetron* court found that Plaintiffs were unknown creditors. As unknown creditors not identifiable from a reasonable search of the debtor's books and records, Plaintiffs were only entitled to publication notice of the bankruptcy and claims bar date, which they received. Therefore, unless there were other grounds to grant Plaintiffs' motion for leave to file late claims besides the argument that Plaintiffs' were known creditors, Plaintiffs were not entitled to pursue their late claims.[10]

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[6] *Id.* at 347.

[7] *Id*. at 346.

[8] *Id*.

[9] *Id*. (internal quotations and brackets omitted).

[10] The *Chemetron* court vacated and remanded, for further consideration, the bankruptcy court's judgment on whether Plaintiffs' failure to file claims constituted "excusable neglect," which, if found, would permit Plaintiffs to pursue their late claims. *Id.* at 349.

***Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252 (3d Cir. 2000)**

The *Folger* court held that affirmative defenses, like recoupment, are not "interests" under section 363(f) of the Bankruptcy Code, and therefore, are not extinguished by a "free and clear" bankruptcy sale. The *Folger* court also held that notice of the section 363 bankruptcy sale was constitutionally inadequate as it did not provide sufficient notice to creditors that the sale would be free and clear of their affirmative defenses.

In *Folger*, Folger Adam Security, Inc. ("Folger") brought a declaratory judgment action against DeMatteis/MacGregor Joint Venture ("DeMatteis") for $370,446.67 in accounts receivable purchased by Folger "free and clear" of all claims and interests through the bankruptcy auction of debtors, Bayley and FAC. Pre-petition, DeMatteis contracted with Bayley and FAC to supply security equipment; Bayley and FAC claimed that DeMatteis did not pay the full amount for the delivered security equipment and DeMatteis claimed that the equipment was defective and delivered late. The district court granted Folger's motion for summary judgment, awarding Folger the amounts due related to the DeMatteis accounts receivable, and held that the bankruptcy sale to Folger was "free and clear of all rights of setoff, recoupment, counterclaim and other defenses and claims of DeMatteis."[1]

The issue on appeal was whether "any interest" in section 363(f) of the Bankruptcy Code included affirmative defenses, such as recoupment and setoff. The *Folger* court first noted that then-recent legal decisions tended to find the section 363(f) definition of "interest" was broader than only *in rem* property interests. Reviewing the Fourth Circuit's opinion in *In re Leckie Smokeless Coal Co.*,[2] however, the *Folger* court discussed that the *Leckie* court "rejected an unduly broad interpretation" of the phrase, "any interest in property," and that its "holding seems to suggest that the term 'any interest' is intended to refer to obligations that are connected to, or arise from, the property being sold."[3]

The *Folger* court next found that a defense is not a claim because "a claim requires an enforceable obligation of the debtor to pay the claimant."[4] Rather, defenses "seek[] to diminish a claim or to defeat recovery rather than to share in it[,]"[5] which is what DeMatteis was attempting to do through his assertion of the right of recoupment and setoff. Thus, on the issue of recoupment, the *Folger* court held that "recoupment is a defense and not an interest and therefore is not extinguished by a § 363(f) sale."[6]

With regard to setoff, DeMatteis claimed that property setoff prior to bankruptcy is property of the party asserting setoff, not estate property. Section 553 of the Bankruptcy Code provides that the right to setoff in bankruptcy cases is preserved with some exceptions, including where the

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[1] *Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 257 (3d Cir. 2000).

[2] 99 F.3d 573 (4th Cir. 1996).

[3] *Folger*, 209 F.3d at 258–59.

[4] *Id.* at 260.

[5] *Id*.

[6] *Id.* at 261.

trustee's rights are modified by section 362 or 363 of the Bankruptcy Code.[7] Here, the court specifically found that, due to this limitation, a debtor may extinguish a creditor's right of setoff pursuant to a sale under section 363 of the Bankruptcy Code, *unless* the setoff was taken prior to the bankruptcy (this latter exception applies because, if the setoff was taken prior to the bankruptcy, the debtor's claim has been extinguished and simply no longer exists post-petition).[8]

Finally, even if "any interest" as used in section 363(f) included affirmative defenses, the *Folger* court held that the notice of auction was insufficient to inform DeMatteis that it would be waiving affirmative defenses related to the debtors if it failed to object to the sale. The *Folger* court provided that "[d]ue process requires notice reasonably calculated, under all circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections."[9] Here, the notice "failed to convey the required information[,]" that the sale would be free and clear of affirmative defenses, "and, therefore, was constitutionally infirm."[10]

[7] *Id.* at 262.

[8] The *Folger* court remanded the setoff issue to the district court to determine whether setoff was taken pre-petition and to permit DeMatteis to supplement the record with any such evidence.

[9] *Id.* at 265 (internal quotations omitted).

[10] *Id*.

In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003)

The *TWA* court held that (i) the travel voucher program (the "Travel Voucher Program") instituted as part of a settlement agreement, and (ii) pending employment discrimination claims against the debtor, were "interests" under section 363(f) of the Bankruptcy Code and as such the debtor could sell its assets free and clear of any related successor liability.

One day after American Airlines ("American") agreed to purchase substantially all of Trans World Airlines' ("TWA") assets, subject to bankruptcy court approval, TWA filed for chapter 11 bankruptcy. Years before TWA filed for bankruptcy, however, class action and Equal Employment Opportunity Commission ("EEOC") suits against TWA for sex discrimination were settled, resulting in the Travel Voucher Program whereby TWA "provide[d] ten travel vouchers for each covered pregnancy to eligible class members."[1] Additionally, during TWA's sale process, the EEOC reported that 29 discrimination charges were pending against TWA.

The EEOC and the class action members objected to the 363 sale of TWA's assets, however, the bankruptcy court approved the sale, "determin[ing] that there was no basis for successor liability on the part of American[.]"[2] The district court subsequently affirmed the bankruptcy court's sale order, "finding that TWA's assets were properly transferred free and clear of (1) the Travel Voucher Program and (2) the charges of employer misconduct filed with the EEOC."[3]

At issue in the case was the definition of "interest in such property" as used in section 363(f) of the Bankruptcy Code—specifically whether the Travel Voucher Program and pending EEOC charges were "interests" that could be extinguished by TWA in a 363 sale. The *TWA* court discussed its decision in *Folger*, including its positive views of the Fourth Circuit's decision in *Leckie Smokeless Coal*, finding that case law was trending "toward a more expansive reading of 'interests in property' which encompasses other obligations that may flow from ownership of the property."[4] The *TWA* court further noted that "the term 'any interest' is intended to refer to obligations that are connected to, or arise from, the property being sold."[5]

The *TWA* court found, similarly to *Leckie*, that TWA's assets gave rise to the EEOC and class action claims, therefore, the claims were "interests" under section 363(f) of the Bankruptcy Code. In particular, the *TWA* court found that TWA only employed the EEOC claimants and class action members because TWA invested in the airline business, and without such investment, the "successor liability claims would not have arisen."[6]

The EEOC claimants and class action members also argued that their claims, including the vouchers, could not be extinguished under section 363(f) because, even assuming their claims

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[1] *In re Trans World Airlines, Inc.,* 322 F.3d 283, 285 (3d Cir. 2003). The vouchers issued under the Travel Voucher Program could be used at any point in the class member's lifetime. *Id*.

[2] *Id.* at 286.

[3] *Id.* at 287.

[4] *Id.* at 289 (internal quotations omitted).

[5] *Id.* (*citing Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 259 (3d Cir. 2000)).

[6] *Id.* at 290.

were "interests in property," their claims failed to satisfy any of the section 363(f)(1)–(5) conditions. Focusing on section 363(f)(5), the EEOC claimants and class action members argued that they could not be forced to accept money satisfaction on behalf of their claims. The *TWA* court held, however, that both the travel vouchers and EEOC claims could be monetarily valued and thus satisfied section 363(f)(5). The *TWA* court found that the travel vouchers represented the monetary value of a seat on a plane, and the vouchers had already been monetarily valued by TWA for tax purposes. Additionally, the *TWA* court found that the EEOC claims could be reduced to a monetary amount even if the claimants were seeking injunctive relief.

Lastly, the *TWA* court found that policy considerations of the Bankruptcy Code's priority scheme necessitated a holding that the 363 sale to American be free and clear of the Travel Voucher Program and EEOC claims. While acknowledging the importance of the claims alleged by the EEOC claimants and class action members, the *TWA* court noted that in a bankruptcy, "these claims are . . . [merely] general unsecured claims and . . . are accorded low priority."[7] Thus, "[t]o allow the claimants to assert successor liability claims against American while limiting other [equal or higher priority] creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme."[8] The *TWA* court also found it important that American was the only party to bid on TWA's assets and provide jobs for TWA employees. Without language in the bankruptcy court's order that the sale was free and clear of these successor liability claims, American may have reduced its bid or not bid at all. Therefore, "[g]iven the strong likelihood of a liquidation absent the asset sale to American, . . . [the *TWA* court] agree[d] . . . that a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of the [class action members] and the EEOC claimants, and to provide funding for employee-related liabilities . . . ."[9]

[7] *Id.* at 292.

[8] *Id*.

[9] *Id.* at 293.

JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.), 607 F.3d 114 (3d Cir. 2010)

The *Grossman's* court overruled the *Frenville* accrual test for determining when a claim arises and held that a "claim" in bankruptcy "arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code."[1]

In 1977, Mary Van Brunt purchased products from a Grossman's home improvement store that allegedly contained asbestos. Twenty years later, Grossman's filed for chapter 11 bankruptcy. During its bankruptcy case, Grossman's provided publication notice of the claims bar deadline and eventually confirmed a plan of reorganization (the "Plan"). During Grossman's bankruptcy, Ms. Van Brunt was unaware that she may have a claim against Grossman's as she did not exhibit any symptoms related to asbestos exposure until 2006—10 years after the Grossman's plan was confirmed. After Ms. Van Brunt was diagnosed with mesothelioma, she and her husband filed a state court action for tort and breach of warranty against 58 companies, including JELD-WEN, Inc. ("JELD-WEN") as successor-in-interest to Grossman's, alleging that her mesothelioma was linked to the purchase of asbestos-containing products purchased at Grossman's. JELD-WEN moved to reopen Grossman's chapter 11 case and sought a determination that the Plan discharged the Van Brunts' claims.

The bankruptcy court applied the Third Circuit's *Frenville*[2] test and held that the Van Brunts' claims arose after the Plan's effective date and therefore were not discharged by the Plan. The district court affirmed "the Bankruptcy Court's holding that the Van Brunts' tort claims were not 'claims' under 11 U.S.C. § 101(5)[,]"[3] and JELD-WEN appealed that decision.

The *Grossman's* court found that the district court and bankruptcy court were correct in determining that the Van Brunts' tort claims arose post-confirmation under the *Frenville* accrual test, which required courts to evaluate whether a valid claim existed depending on: "(1) whether the claimant possessed a right to payment; and (2) when that right arose as determined by reference to the relevant non-bankruptcy law."[4] The *Grossman's* court, however, evaluated the reasoning behind other circuits' "universal disapproval" of the *Frenville* accrual test and overruled *Frenville*, finding that "[t]he accrual test in *Frenville* does not account for the fact that a 'claim' can exist under the Code before a right to payment exists under state law."[5]

After overruling *Frenville*, the *Grossman's* court acknowledged that its decision affected other aspects of bankruptcy jurisprudence, principally that the dischargeability of a claim is affected by when the claim arose. Under section 1141(d)(1)(A) of the Bankruptcy Code, the debtor is discharged from pre-confirmation debts upon confirmation of a plan. Thus, "the determination

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[1] *JEN-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 126 (3d Cir. 2010).

[2] *Avellino & Bienes v. M. Frenville Co. (Matter of M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984).

[3] *Grossman's*, 607 F.3d at 118.

[4] *Id.* at 119–20 (internal quotations omitted).

[5] *Id.* at 121.

[of] when a claim arises has significant due process implications."[6] The due process implications are particularly evident "[i]f potential future tort claimants have not filed claims because they are unaware of their injuries, [and thus] they might challenge the effectiveness of any purported notice of the claims bar date."[7]

The *Grossman's* court then surveyed other court's decisions on the issue of when a claim arises under the Code and found that there was "something approaching a consensus among the courts that a prerequisite for recognizing a 'claim' is that the claimant's exposure to a product giving rise to the 'claim' occurred pre-petition, even though the injury manifested after the reorganization."[8] Applying this rationale to the Van Brunts' tort claims, the *Grossman's* court found that the claims arose in 1977 when Ms. Van Brunt was allegedly exposed to asbestos from products purchased at Grossman's.

The *Grossman's* court then found, however, that simply because the Van Brunts' tort claims arose pre-petition did not mean that such claims were discharged by the Plan as "[n]otice is an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality."[9] Moreover, "[w]ithout notice of a bankruptcy claim, the claimant will not have a meaningful opportunity to protect his or her claim. . . . [and] [i]nadequate notice therefore precludes discharge of a claim in bankruptcy."[10]

The *Grossman's* court found that whether the discharge of a claim satisfied due process depended on a variety of factors, including in the asbestos context:

> the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).[11]

Ultimately, the *Grossman's* court remanded the case to the district court to determine whether due process permitted the Van Brunts' tort claims to be discharged by the Plan.

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[6] *Id.* at 122.

[7] *Id*.

[8] *Id.* at 125.

[9] *Id.* at 125–26 (internal quotations omitted).

[10] *Id.* at 126 (internal quotations omitted). The *Grossman's* court engaged in a discussion of section 542(g) channeling injunctions and their "due process safeguards[,]" however, the Plan did not have a channeling injunction. *Id.* at 126–27.

[11] *Id.* at 127–28.

In re NE Opco, Inc., 513 B.R. 871 (Bankr. D. Del. 2014)

The *NE Opco* court held that claims arising from a buyer's own pre-closing conduct are extinguished upon the closing of a section 363(f) sale.

NE Opco, Inc. ("NE Opco") filed for bankruptcy in June 2013, and by August 2013 sought approval of three asset purchase agreements, including one with Cenveo Corporation and Cenveo, Inc. (collectively, "Cenveo"). The Cenveo sale order (the "Sale Order"), entered by the *NE Opco* court on September 12, 2013, contained customary "free and clear" language that all persons and entities released all liens and claims that "in any way relat[ed] to, the Debtors, the Purchased Assets, the operation of the Debtors' businesses before the Closing . . . ."[1] The Cenveo APA as approved by the Sale Order also expressly excluded all liabilities related to the employment, or termination thereof, of any employee. Concurrent with these sale events, a NE Opco employee, Torres, was on medical leave, scheduled to return to work on September 13, 2013. When Torres notified NE Opco in early September of his timetable to return to work, he was asked to complete a Cenveo job application, like all other NE Opco employees had done. When Torres attempted to return his completed Cenveo job application to Cenveo human resources, however, his application was denied and he was later terminated, effective September 13, 2013.

Torres sued Cenveo and NE Opco in California state court for various employment discrimination claims, and it was brought before the *NE Opco* court by Cenveo as a motion to enforce the Sale Order and related injunction. Torres' discrimination claims were categorized into two sets of claims against Cenveo: (i) pre-closing date claims related to his termination, and (ii) post-closing date claims for failure to hire Torres. Cenveo's central argument against Torres' claims was that under the Sale Order "Cenveo cannot be held liable for NE Opco's alleged conduct, either directly or as a successor, 'single enterprise' or 'joint employer' with NE Opco . . . ."[2] On the other hand, Torres' main argument was that he had "direct claims against Cenveo for Cenveo's pre-Closing, independent wrongdoing[]" as "Cenveo was his employer and/or that Cenveo was a prospective employer and that Cenveo discriminated against Torres because of his disability."[3]

The *NE Opco* court looked to the Third Circuit's decision in *In re Trans World Airlines*[4] and found that the decision established that section "363(f) cleanses and transfer[s] assets of any attendant liabilities, and allows the buyer to acquire them without fear that an estate creditor can enforce its claim against those assets . . . ."[5] Moreover, the *TWA* decision provided two underlying policy purposes for finding that a debtor can sell assets free and clear under section 363(f): (i) "it preserves the priority scheme of the Bankruptcy Code[;]" and (ii) "it maximizes the

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[1] *In re NE Opco, Inc.*, 513 B.R. 871, 873 (Bankr. D. Del. 2014).

[2] *Id.* at 875.

[3] *Id*.

[4] 322 F.3d 283 (3d Cir. 2003).

[5] *NE Opco, Inc.*, 513 B.R. at 876 (*citing Morgan Olson, LLC v. Frederico (In re Grumman Olson Indus., Inc.)*, 445 B.R. 243, 249 (Bankr. S.D.N.Y. 2011)).

value of the assets that are sold."[6] The *NE Opco* court found both of these policy goals were satisfied by a finding that the 363 sale to Cenveo was free and clear of Torres' claims because:

> Torres will not be able to circumvent the priority scheme of the Bankruptcy Code by asserting successor liability claims against Cenveo while other creditors satisfy their claims against the Debtors; and the Debtors received the maximum price for the assets because Cenveo was given some comfort through the injunction language contained in the Sale Order.[7]

Additionally, while *TWA* did not involve alleged wrongdoing of the buyer pre-closing, two courts within the Third Circuit held that section 363(f) foreclosed successor liability claims against purchasers for pre-closing actions.[8] In *Christ Hospital II*, the bankruptcy court applied *TWA* and "held that a section 363(f) finding cut off successor liability to the buyer for claims and interest arising out of the property being sold, including the employee's wrongful termination claim [which occurred post-entry of the sale order but pre-closing]."[9] Thus, with the above support, the *NE Opco* court held that Torres' pre-closing claims against Cenveo were extinguished by the section 363(f) sale.

With regard to Torres' post-closing claims against Cenveo, the *NE Opco* court held that it did not have jurisdiction to hear such claims because they were not affected by the section 363(f) "free and clear" finding as "[c]laims arising post-Closing are not claims against the Debtors' bankruptcy estate and cannot be barred by the Sale Order."[10]

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[6] *Id*.

[7] *Id*. at 877.

[8] *See In re Christ Hospital*, 502 B.R. 158 (Bankr. D. N.J. 2013); *In re Christ Hospital*, 2014 Bankr. LEXIS 2294 (Bankr. D. N.J. May 22, 2014) (hereinafter "*Christ Hospital II*").

[9] *NE Opco, Inc.*, 513 B.R. at 877.

[10] *Id.* at 878.

***Molla v. Admar*, No. 11-6470, 2014 U.S. Dist. LEXIS 69564 (D. N.J. May 21, 2014)**

The *Molla* court held that the buyer purchased the debtor's assets free and clear of claims that arose after the debtor filed for bankruptcy, including the plaintiffs' tort claim that occurred post-entry of the sale order but pre-closing.

In *Molla*, Adamar of New Jersey, Inc. (the "Debtor") was the owner of the Tropicana casino when it filed for bankruptcy in April 2009. On November 4, 2009, the bankruptcy court entered an order, pursuant to section 363(f) of the Bankruptcy Code, approving the sale of the Debtor's assets "free and clear" of all claims and interests. On March 8, 2010, the sale of Debtor's assets to Tropicana Corp. closed. On November 5, 2009, the day after the sale order was entered but pre-closing, plaintiff Mr. Molla alleged that he was assaulted at the Tropicana casino by casino security guards. Two years later, Mr. Molla and his wife (collectively, the "Plaintiffs") brought tort claims against the Debtor and Tropicana, including assault, battery, and loss of consortium.

The matter came before the *Molla* court on Tropicana's motion to dismiss Tropicana as a defendant in Plaintiffs' case, and the court granted Tropicana's motion. In holding that the Debtor's sale to Tropicana was free and clear of Plaintiffs' claims, the *Molla* court found that the Third Circuit's *TWA* decision controlled. The *Molla* court further supported its holding by citing to a decision from the Appellate Division of the New Jersey Superior Court, which considered the exact same question presented and related to the same section 363(f) bankruptcy sale.[1]

Plaintiffs also argued that they were not afforded adequate due process as they did not receive notice of the Debtor's bankruptcy. The *Molla* court, however, found that Plaintiffs' citations to *In re Grossman's Inc.*[2] and *Jones v. Chemetron Corp.*[3] were not applicable because those cases dealt with what notice was sufficient for a claim to be discharged in a bankruptcy, while the issue at hand was not discharge, but whether Tropicana could be liable for Plaintiffs' claims.

[1] *Dinielli v. Tropicana Hotel & Casino*, A-2869-12T4, 2014 N.J. Super. Unpub. LEXIS 46, *2 (N.J. Super. Ct. App. Div. Jan. 10, 2014) ("the bankruptcy court's order approving the sale of Adamar's assets to defendant pursuant to 11 U.S.C.A. 363(f) relieved defendant of any liability for plaintiff's personal injury claim.").

[2] 607 F.3d 114 (3d Cir. 2010).

[3] 72 F.3d 341 (3d Cir. 1995).

GM/SUCCESSOR LIABILITY SALE ISSUES: FOURTH CIRCUIT SURVEY

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In re Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996)

In re Leckie Smokeless Coal Co. involved separate cases, consolidated on appeal, in which chapter 11 debtor coal operators sought a declaration that the purchasers of their assets would not be jointly and severally liable as the debtors' successors in interest for the debtors' financial obligations under the Coal Act.

As a backdrop, the Coal Act[2] established certain obligations of coal operators to provide funding for benefits provided to retirees, and to that end, created the UMWA Combined Benefit Fund ("Fund") and the UMWA Benefit Plan ("Plan"). Pursuant to the Coal Act, an operator's "related persons" are jointly and severally liable for the operator's premiums. Included among an operator's "related persons" are successors in interest, left undefined by the Coal Act.

Upon filing for bankruptcy, the debtors sought to sell their assets free and clear of all successor liabilities that might arise under the Coal Act. The Plan and the Fund objected to the sales. The lower courts ultimately allowed the sales to proceed under 11 U.S.C. § 363(f).

The Fourth Circuit first considered whether the Coal Act financial obligations constituted a "claim" under the Bankruptcy Code, and found that they did:

> [T]he Coal Act was enacted prior to the dates on which the debtors filed for bankruptcy relief. Moreover, at the time those petitions were filed, it was established that, absent a change in the law, the debtors would be liable for future Coal Act premiums . . . .[3]

Accordingly, the Plan and the Fund "possessed a right to payment" that "arose before the filing of the petition."[4]

Next, the court discussed the confines of "interest in such property" under § 363(f). The court declined to adopt a strict interpretation encompassing only *in rem* interests, yet rejected the unduly broad interpretation adopted by the lower court of simply "a right to demand money from the debtor."[5] Instead, the court noted that the facts in each case will ultimately determine the boundaries of the phrase, and held that "[b]ecause there is therefore a relationship between (1) the Fund's and Plan's rights to demand premium payments from [debtors] and (2) the use to which [debtors] put their assets [coal mining purposes], we find that the Fund and the Plan have interests in those assets within the meaning of section 363(f)."

Finally, the court determined that, regardless of whether the § 363(f) purchasers were successors in interest under the Coal Act, the bankruptcy court had authority to extinguish Coal Act successor liability pursuant to § 363(f)(5).

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2 Specifically, the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722.
3 99 F.3d at 580.
4 *Id.*
5 *Id.* at 581-82.

In re Takeout Taxi Holdings, Inc., 307 B.R. 525 (Bankr. E.D. Va. 2004)

In *In re Takeout Taxi Holdings, Inc.*, the matter before the court was the chapter 7 trustee's motion to sell the debtor's assets free and clear pursuant to 11 U.S.C. § 363(f). The case is notable for the court's extensive discussion of procedural due process.

In light of the procedural requirements of the Federal Rules of Bankruptcy Procedure and the Constitution, the court found that the motion at issue was "fatally flawed" due to the lack of proper service on secured parties. Also defective was the notice of the motion, which omitted two creditors, and the motion itself, which failed to identify any secured creditors affected by the sale.

Although the court recognized that serving a § 363(f) motion in compliance with Rule 7004 will satisfy the requirement of apprising interested parties of a pending matter, the court stated that the motion itself must also adequately notify a creditor that its lien is at issue. "The relief requested and the basis for the relief requested should be plainly stated."[6] The court went on:

> Constitutional due process is not simply satisfied by properly placing a piece of paper in the hands of the respondent. The paper served must contain adequate information. The content must be reasonably calculated to put the respondent on notice. The person whose interests are sought to be affected should be identified.[7]

The court then recounted the various inadequacies present in the motion:

> [B]oth the motion and the notice were designed for the general creditor body. Neither identified any individual secured creditor. The liens in jeopardy were not identified. Both reasonable identification of the creditors and their liens in issue are necessary elements of a proper motion.[8]

Takeout Taxi serves as a reminder that a § 363(f) sale is a "powerful tool" available only in proper circumstances and in strict compliance with procedural requirements.[9]

6 307 B.R. at 532.
7 *Id.*
8 *Id.* at 532-33.
9 *Id.* at 536.

WBQ P'ship v. Va. Dep't of Med. Assistance Servs., 189 B.R. 97 (Bankr. E.D. Va. 1995)

Pertinent to our discussion, in *In re WBQ Partnership*, the court considered whether the term "interest" in 11 U.S.C. § 363(f) captured the Virginia Department of Medical Assistance Services' ("DMAS") statutory right of recapture. The right of recapture provided that if the purchase price of the debtor nursing home's assets exceeded the asset's depreciated basis, DMAS could "recapture" a portion of the realized gain. The statute creating this right also allowed DMAS to collect the recaptured depreciation from the purchaser if the seller failed to reimburse DMAS. In this case, the debtor nursing home sought to sell its nursing home assets free and clear of liens, including DMAS's right of recapture.

The court held that the proposed sale could go forward under § 363(f), and permanently enjoined DMAS from exercising its rights against the buyer. "In essence, DMAS's right of recapture runs with the property, so it is more than a mere claim against the debtor. DMAS's right of recapture is an 'interest in property' insofar as it grants DMAS the right to proceed against the transferee."[10] Additionally, the court briefly discussed due process requirements, and found that the debtor's notice was sufficient. The notice sufficiently included the terms and conditions of the sale, the time for filing objections, and generally described the property.

10 189 B.R. at 105.

Magers v. Bonds (In re Bonds Distrib. Co.), No. 97-52130C-7W, 2000 WL 33682815 (Bankr. M.D.N.C. Nov. 15, 2000)

The court in *In re Bonds* considered the interesting, yet rarely prompted, issue of whether a jury trial right exists with respect to claims based on "mere continuation" or successor liability. After indulging in a lengthy analysis of the Seventh Amendment right, the court concluded that the defendants were entitled to a jury trial. Although there was case law supporting the proposition that successor liability was an equitable doctrine, the remedy sought was monetary relief, which is legal in nature.

Also notable is the court's discussion of North Carolina law on "mere continuation" claims. The court stated that the general rule in North Carolina "is that the purchaser of all or substantially all the assets of a corporation is not liable for the debts of the old corporation,"[11] but noted four exceptions:

> (1) Where there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) where the transfer amounts to a *de facto* merger of the two corporations; (3) where the transfer of assets was done for the purpose of defrauding creditors; and (4) where the purchasing corporation is a "mere continuation" of the selling corporation.[12]

Further, under North Carolina law, a corporate successor is the "mere continuation" if "only one corporation remains after the transfer of assets and there is identity of stockholders and directors between the two corporations."[13] Additional factors to be considered include whether there was inadequate consideration for the purchase and whether any elements of a good faith purchaser for value were lacking.

11 2000 WL 33682815, at *10.
12 *Id.*
13 *Id.*

Bes Enters. v. Natanzon, No. 06-870, 2006 WL 3498419 (D. Md. Dec. 4, 2006)

In *Natanzon*, the defendant sought dismissal of the plaintiff's claim for successor liability against it, contending that the claim was barred by the bankruptcy court's previously entered order authorizing the sale of the debtor's assets to the defendant. The plaintiff in the case alleged that the defendant impliedly assumed certain of the debtor's contractual obligations following the bankruptcy. Ultimately, the court found that the facts needed further development and denied the motion to dismiss. Interestingly, the court also noted that dismissal was inappropriate because there was some issue with regard to whether the plaintiff had been inadequately noticed of the proposed sale, and referenced "at least one court [which] has suggested that inadequate notice may prevent an order issued under § 363(f) from precluding claims based on successor liability."

In addition, the court recognized that "[t]he underlying principle of § 363(f) is to permit sales free and clear of successor liability and therefore this section is frequently utilized by debtors needing to sell ongoing business before the often length bankruptcy process has been completed."[14] The court added that, although certain types of successor liability claims may be allowed to proceed against purchasers of assets, courts "carefully weigh the policy issues raised by the imposition of such liability," specifically considering whether the imposition of liability would discourage potential buyers in other § 363 sales. Another factor weighed by courts is whether allowing successor liability claims would frustrate the priority scheme set by the Code.

14 2006 WL 3498419, at *4.

Zurich Am. Ins. Co. v. Tessler (In re J.A. Jones, Inc.), 492 F.3d 242 (4th Cir. 2007)

In *Zurich*, a wrongful death claimant sought leave to file a proof of claim after the bar date had passed after the debtor failed to provide it with anything other than publication notice of the bankruptcy filing and claims bar date. The specific question considered by the court was whether the wrongful death claimant was a "known" creditor of the debtor entitled to actual notice.

The discharge provisions of the Code require constitutionally adequate notice to the affected creditor regarding the debtor's bankruptcy filing, filing deadlines and hearing dates. The type of notice required depends on whether a creditor is known or unknown; a known creditor must receive actual notice of the aforementioned events, whereas an unknown creditor may receive adequate notice by way of publication. The court distinguished unknown creditors, "whose identity or claim is wholly conjectural or 'whose interests and whereabouts could not with due diligence be ascertained,'" with known creditors, which include "claimants whose identities are actually known to the debtor, as well as claimants whose identities are 'reasonably ascertainable.'"[15] Further, the known creditor analysis focuses on the totality of circumstances in each case.

In this case, the Fourth Circuit affirmed the findings of the lower courts that the decedent was a known creditor that was entitled to actual notice of the debtor's bankruptcy filing, along with the filing deadlines and hearing dates. Supporting the determination of known creditor status was the fact that the incident leading to the wrongful death was extensive and tragic, and led to multiple injuries and several deaths which were well-publicized in local media outlets.

15 492 F.3d at 250.

Lane Hollow Coal Co. v. Dir., Office of Workers' Compensation Programs, 137 F.3d 799 (4th Cir. 1998)

The *Lane Hollow Coal* case was cited by the court in *Elliott v. GM, LLC* as an example of a jurisdiction that does not require the showing of prejudice for a due process violation. In this case, Lane Hollow Coal Company appealed an order of the Department of Labor's Benefits Review Board affirming the decision of an administrative law judge which had directed liability for black lung and survivor's benefits to rest upon Lane Hollow as the responsible operator. Lane Hollow was not notified of its potential liability, despite the filing of a claim under the Black Lung Benefits Act and a request for a hearing by the affected mineworker, for some 17 years after notice first could have been given. The court held that his delay was inexcusable and denied Lane Hollow due process of the law.

As stated by the Fourth Circuit, "[n]o 'process,' however thorough, can provide what is 'due' without notice to those who stand to lose out thereby."[16] The court also pointed out the circular reasoning behind requiring a showing of prejudice:

> Thus, it *may* be that Lane Hollow suffered no actual harm from the much-belated notice. Can this possibility excuse the delay? We think not; to excuse the delay would, in a Catch-22 fashion, rely upon Lane Hollow's inability to garner evidence in defense to justify denying it the opportunity to do so.
>
> Moreover, speculation about the would-have-been and could-have-been misconstrues the focus of our inquiry. In this core due process context, we require a showing that the notice was received too late to provide a fair opportunity to mount a meaningful defense; we do not require a showing of "actual prejudice" in the sense that there is a reasonable likelihood that the result of this claim would have been different absent the violation. *The Due Process Clause does not create a right to win litigation; it creates a right not to lose without a fair opportunity to defend oneself.*
>
> . . . .
>
> If there has been no fair day in court, the reliability of the result is irrelevant, because a fair day in court is how we assure the reliability of results.

16 137 F.3d at 807.

FIFTH CIRCUIT PRECEDENT ON SUCCESSOR LIABILITY AND DUE PROCESS IN THE CONTEXT OF §§ 363(F) AND 1141(C) FREE AND CLEAR SALES AND VESTING

CASE SUMMARIES

Matter of Crystal Oil Co., 158 F.3d 291 (5th Cir. 1998)

The Louisiana Department of Environmental Quality ("LDEQ") appealed the Fifth Circuit to find that the department's environmental damage claims against Crystal Oil Company ("Crystal Oil") were not discharged in bankruptcy.

Nearly a decade before Crystal Oil went into bankruptcy, the LDEQ received a report of environmental damage on shoreline land. At the edge of the site lay a sign reading "Crystal Oil Company". The LDEQ contacted Crystal Oil and asked whether the company currently or previously owned the land at issue. Crystal Oil management responded that, based on a search of in-house records, the company had never owned the property. Crystal Oil and the LDEQ did not communicate regarding this matter for another nine years.

In the interim, Crystal Oil filed for Chapter 11 bankruptcy. The company published notice of its bankruptcy in *The Wall Street Journal* and mailed notice of the claims bar date to hundreds of known creditors, including the Louisiana State Department of Conservation, a sister agency of LDEQ.

Approximately nine years after confirmation, Crystal Oil received notice from the LDEQ that the oil company may be held responsible for environmental damage to the shoreline property. Crystal Oil moved the bankruptcy court to reopen the bankruptcy in order to enforce the confirmation order by barring LDEQ's claims.

The LDEQ first argued, unsuccessfully, that it was not aware of its claim at the time of Crystal Oil's bankruptcy. The Fifth Circuit upheld the lower courts' rulings that LDEQ had information sufficient to alert the department to environmental damage, due to the discovery of waste oil at the shoreline site.

Second, LDEQ argued that it could not have known of any claim against Crystal Oil, because the company's management denied ownership of the shoreline property. The Court of Appeals found that although Crystal Oil represented it could find no evidence of the company's ownership the shoreline land, this was not a factual misrepresentation. Also, important was the bankruptcy court's conclusion that LDEQ had conducted a conveyance records search, which provided information tying Crystal Oil to the shoreline property. The Court of Appeals thus agreed that this information should have put LDEQ on the path towards Crystal Oil.

LDEQ's final argument was that it did not receive adequate notice of the bankruptcy. The appellate court agreed with the lower courts here as well—finding that one phone call from the LDEQ regarding Crystal Oil's ownership of the shoreline property was insufficient to notify the company of a potential environmental claim against it, particularly when a good faith search of company records on hand indicated that Crystal Oil had never owned the property at issue. Thus, actual notice was not required.

***In re Placid Oil Co.*, 753 F.3d 151 (5th Cir. 2014)**

In a case similar to *Crystal Oil*, in *In re Placid Oil Co.*, the Fifth Circuit again considered whether a claim against a reorganized oil company was barred by a previously entered confirmation order.

In *Placid*, the oil company filed for bankruptcy and 1986. Prior to entry of the confirmation order, the debtor published notice of the claims bar date in *The Wall Street Journal*. In 2004, a former Placid Oil employee brought a tort action against the oil company for his wife's death due to asbestos exposure, and for the employee's own illness, also caused by asbestos exposure.

Placid Oil agreed that the former employee and his wife were exposed to asbestos from the oil company's facilities, but argued that his tort claims were discharged.

Placid Oil had knowledge of the hazards of asbestos exposure by the early 1980s and, specifically of the former employee's exposure to asbestos; therefore, the former employee argued that he was not an unknown creditor.

The Court then considered whether the former employee was "reasonably ascertainable," a requirement to for "known creditors." The Court found that, in order for a creditor be known, the debtor must, at a minimum, have specific information related to the actual injury suffered by creditor. However, any information that makes a claim only conjectural is insufficient.

This decision was based on policy concerns favoring a fresh start for the debtor.

***In re La Fuente Home Health Serv., Inc.*, 2017 WL 1173599 (Bankr. S.D. Tex. Mar. 28, 2017)**

La Fuente Home Health Services, Inc. was a small business Chapter 11 debtor. Palmetto GBA, L.L.C., a Medicare collection company, was listed in the debtor's Schedules as an unsecured creditor. Palmetto was also listed in the creditors matrix.

When La Fuente filed its Disclosure Statement and Plan, it failed to file a certificate of service. When a hearing was held on the Disclosure Statement and Plan, neither Palmetto nor Human Health Services ("HHS") was notified. The debtor's Plan was confirmed without objection. Palmetto and HHS did not receive notice of entry of the final decree.

Approximately one year later, the debtor sought to reopen the bankruptcy to halt Palmetto's Medicare collection efforts. La Fuente moved for summary judgment, alleging Palmetto and HHS received notice of the bankruptcy on two occasions. First, via a letter to Palmetto indicating that bankruptcy had been filed and, second, via a postpetition fax to Palmetto stating that Palmetto's claim would be treated under the debtor's confirmed plan.

The Court found that, while this may be sufficient evidence to show that actual notice was provided to Palmetto, there was not yet sufficient evidence to prove that HHS also received actual notice of the bankruptcy, via its agent Palmetto. Accordingly, the Court denied the debtor's Motion for Summary Judgment. Trial is presently set for January 2018.

***In re AMPAM Power Plumbing, L.P.*, 520 B.R. 553 (Bankr. W.D. Tex. 2014)**

In this case, the debtor, a plumbing subcontractor, sought determination that a contractor's claim arose prepetition. The debtor and contractor entered into a contract for plumbing services postpetition, but pre-confirmation. The debtor substantially completed its work on the project prior to confirmation.

A few years after confirmation, the contractor sued the debtor-subcontractor for contractual indemnity and/or contribution relating to the project that occurred during the bankruptcy. The debtor reopened the bankruptcy and moved for summary judgment.

The Court granted the debtor's motion, finding that the contractor's claims at the time of the bankruptcy were future claims. "Future claims are those claims which arise from a debtor's pre-bankruptcy conduct but do not manifest any injury to claimants until after confirmation of the debtor's plan." The Court determined that the claim arose from the debtor's prepetition conduct because the debtor and contractor entered into a pre-confirmation contractual agreement of the debtor's substantial completion of work.

The contractor then argued that its due process rights were violated because it was unable to protect its right to assert its future claims. Citing *Placid Oil*, the Court disagreed.

***In re Strongbuilt Inc.*, 2009 WL 5873047 (Bankr. W.D. La. Aug. 26, 2009), *supplemented*, 2009 WL 5868575 (Bankr. W.D. La. Nov. 9, 2009)**

Strongbuilt Inc. was a supplier of hunting equipment. In bankruptcy, Strongbuilt sold most of its assets to a newly formed corporation, SBI. Postpetition, but prior to the entry of the final decree, an individual named Douglas Taylor fell from a Strongbuilt tree stand and sustained serious spinal injuries. Taylor filed a products liability lawsuit against Strongbuilt after entry of the final decree.

Strongbuilt's Plan specifically discharged the claims of Products Liability Claimants, defined as individuals suffering injuries that arose prepetition. SBI attempted to dismiss Taylor's claim by alleging it was discharged. SBI argued that because Taylor bought his deer stand prepetition, this contact was sufficient to fall within the Bankruptcy Code's broad definition of a "claim".

The Court disagreed, finding that because Strongbuilt's Plan narrowly defined Product Liability Claimant, this specific definition would override the Bankruptcy Code's broader definition of any "Claim." SBI could not now attempt to benefit from the Code's broader language, even though it argued that it was entitled to this protection due its purchase of Strongbuilt's assets free and clear of all "claims".

***In re Oliver*, 2017 WL 1323467 (Bankr. S.D. Miss. Apr. 10, 2017)**

In *In re Oliver*, the bankruptcy court denied a Motion to Reopen a Chapter 13 bankruptcy brought by the niece of the deceased debtor. The niece alleged that her uncle did not receive notice of a creditor's Motion to Lift Stay and, therefore, the creditor's actions were a stay violation. The niece asserted that service of the motion upon her uncle's attorney was insufficient. The Court swiftly rejected this argument, noting that the allegation betrayed a fundamental misunderstanding of due process in a bankruptcy proceeding.

***White v. Cone-Blanchard Corp.*, 217 F. Supp. 2d 767 (E.D. Tex. 2002)**

Blanchard-Windsor Corporation purchased a portion of the assets of the debtor (a machine company) during the pendency of the bankruptcy. Shortly thereafter, an employee of the debtor suffered severe injuries caused by a defect in the machine she operated at her employer's factory.

The employee sued Blanchard-Windsor Corporation, now operating as Cone-Blanchard Corporation, for products liability claims under the theory of successor liability. Cone-Blanchard argued that the plaintiff's claim was improper.

Applying Vermont law, the Court held that the asset purchase alone was insufficient to support a finding of a *de facto* merger of Cone-Blanchard with the debtor. In order to determine whether Cone-Blanchard was merely a continuation of the debtor, the Court considered whether the purchaser continued the debtor's corporate entity, and not merely its business operations. Because Cone-Blanchard did not purchase all of the debtor's assets, did not pay for the assets with its own stock, nor did it exchange any stock with the debtor, the Court found that there was no continuation of the debtor's corporate entity. It was also important that the debtor continued as a separate entity for four years after the sale of the assets. As a result, the Court held that Cone-Blanchard was not subject to successor liability.

***In re Mirant Corp.*, 389 B.R. 481 (Bankr. N.D. Tex. 2008)**

Though *In re Mirant* does not consider successor liability issues, this case is instructive on the interpretation of a § 363 "interests" within the Fifth Circuit.

Mirant New York LLC was a hydroelectric energy producer. When the company went into bankruptcy, it sold its membership interest in one of its subsidiaries to third-party purchaser, Alliance. Prior to the sale, counsel for Mirant and Alliance discussed important easement rights granted to Mirant's subsidiary. Crucial to this easement right was the attendant right to public access to the water, which was required in order for Alliance to continue to operate the property.

Prior to the sale, a New York court held that the easement could not be used for public access to water; however, Mirant did not inform Alliance of this decision. After the sale, Alliance argued that Mirant had violated the purchase agreement because Mirant agreed to sell the subsidiary free and clear under § 363(f).

The bankruptcy court found this contention was a misinterpretation of the extent of § 363. "Neither section 363 nor any other provision of the Bankruptcy Code gives the bankruptcy court the power to enhance or improve whatever ownership interest was held by the debtor prepetition that became property of the estate." The Court noted that a § 363 "interest" is a third party's interest in property to be sold, used, or leased. However, the authority to sell property free of such "interests" includes the ability to sell an interest in real property free of underlying property owner's rights. In this case, the property owner's right to grant the easement still existed, even though the New York court construed the easement to bar public access to the water.

***In re Fairchild Aircraft Corp.*, 184 B.R. 910 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998)**

Fairchild Aircraft Corporation manufactured small aircraft, including a civilian plane called the Fairchild 300. Production of the 300 ended in 1982 and the last model was sold out of inventory no later the 1985.

In 1990, Fairchild filed for bankruptcy. During bankruptcy, substantially all of the debtor's assets were sold to a group of investors, who formed a new company called Fairchild Acquisition, Inc. The sale agreement included language expressly disclaiming Acquisition's liability for any event which, at any time, results in the injury or death of any person caused by a defect in the manufacture, design, materials, or workmanship in a Fairchild product. The Plan was confirmed later that year.

Three years post-confirmation, four individuals died when a Fairchild 300 crashed. Acquisition was then sued as successor in interest to Fairchild on the basis of products liability. Of course, Acquisition disclaimed any liability, citing to the language of § 363(f), authorizing sales free and clear of "any interest in such property," as well as the disclaimer language in the sale agreement.

Applying the "relationship test," the court considered whether the four decedents had a bankruptcy "claim" that was addressed during Fairchild's bankruptcy. The conduct at issue was clearly prepetition conduct because the Fairchild 300 aircraft was only manufactured prepetition. The crash occurred post-confirmation and, therefore, the injury could not have manifested itself unless after the bankruptcy.

However, the Court found that the Chapter 11 trustee failed to take the necessary steps to establish these future liabilities as claims in the Fairchild bankruptcy. For example, there was no legal representative established to protect or provide for the interests of future claimants. As a result, the Court held these alleged "future claims" could not fairly be treated as bankruptcy claims that were discharged. Thus, these claims transferred to Acquisition through the bankruptcy sale and Acquisition could have successor in interest liability.

But wait…Acquisition immediately appealed the court's decision. In the interim, Acquisition settled with the families of the four decedents. Consequently, the foregoing decision was vacated as equitably moot. In the words of SNL's Emily Litella's "Never mind."

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