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When a business files a petition for relief under Chapter 11 of the Bankruptcy Code (the Code), it is frequently the case that multiple creditors present claims, sometimes competing claims, against the property of the debtor. For example, a debtor that is engaged in manufacturing goods, such as widgets, very likely has machinery and other industrial equipment that are essential to the production process. It is also likely that the debtor's machinery, equipment, and perhaps the factory itself are encumbered by competing interests of different creditors. Some creditors will possess properly perfected secured claims against specific pieces of property, such as the machinery and equipment required to produce the widgets or the finished widgets themselves. On the other hand, some creditors are unsecured and will assert general claims against the company itself. When secured creditors fight amongst each other (and with the throng of unsecured creditors) for the limited assets of a failing business, the potential for a contentious and protracted bankruptcy is obvious. Perhaps more importantly, the business debtor often has at least some assets that are valuable and attractive to potential purchasers, but these potential purchasers are often wary, and rightfully so, of acquiring assets that are either encumbered or subject to an adversary proceeding within a bankruptcy case, or both. Indeed, few things reduce the value of property like the prospect of contentious and prolonged litigation.

Both the debtor and its creditors want to maximize the value of the property being sold—maximizing the value of the bankruptcy estate is, after all, one of the few shared goals between the debtor and its creditors. Fortunately, § 363(f) of the Code permits a debtor to sell property "free and clear of any interest" in such property, despite the fact that multiple creditors may have adverse and competing interests

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in the property.[1] Section 363(f) provides a potentially elegant solution in the commercial creditor arena when all of the claims and interests of creditors are known and can be appraised with relative ease. On the other hand, § 363(f) solves problems less ably when the obligations of the debtor are unknown or when some creditors, such as tort claimants, are not yet ascertainable. In fact, the cause of action for some tort claimants does not arise until after the § 363 sale has been approved. This creates a vexing problem—a problem for which the Code does not provide a solution. This problem cannot be solved without a thorough analysis of the Code, case law interpreting various Code provisions, issues of state-law property rights, and the due process rights afforded in the Constitution. The overlay is particularly troublesome in the context of products liability cases because of successor liability issues. Additionally, § 363 only permits a sale free and clear of "interests in property"—a term not defined anywhere in the Code. The various Circuit Courts of Appeal and their respective lower courts have interpreted and applied the term interest in property in conflicting ways.[2] Finally, to the extent that an interest in property exists, some courts are failing to provide adequate protection of those interests as the Code requires.

This Article addresses two main issues: (1) what is an interest in property for purposes of § 363(f), and (2) if successor liability creates an interest in property, is it possible to have a sale free and clear of successor liability without providing adequate protection of that interest? This Article is primarily based on the Second Circuit's recent opinion in *In re Chrysler*[3] (*Chrysler*) and the Third Circuit's opinion in *In re Trans World Airlines* (*TWA*).[4]

1. 11 U.S.C. § 363(f) (2006).

2. *See, e.g.*, *In re* Leckie Smokeless Coal Co., 99 F.3d 573, 581 (4th Cir. 1996) (noting courts have not settled upon the definition of "interest in such property"); *see also In re* Taylor, 198 B.R. 142, 161–62 (Bankr. D.S.C. 1996) (discussing that courts differ in their definition of interest); Rachel P. Corcoran, *Why Successor Liability Claims Are Not "Interests in Property" Under Section 363(f)*, 18 AM. BANKR. INST. L. REV. 697, 757 (2010); Matthew T. Gunlock, Note, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in Their Interpretation of "Interests" Under Section 363(f) of the Bankruptcy Code*, 47 WM. & MARY L. REV. 347, 348 (2005) (stating that there has been much debate on what qualifies as an interest under § 363(f)).

3. *In re* Chrysler LLC, 576 F.3d 108 (2d Cir.), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009).

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

I. WHAT IS AN INTEREST IN PROPERTY FOR PURPOSES OF § 363(F)?

Section 363(f) allows a trustee to "sell property . . . free and clear of *any interest* in such property of an entity other than the estate."[5] Section 363(f) contains five prongs; only one prong, however, must be satisfied to meet the requirements of § 363(f).[6] Unfortunately, the language of § 363(f) does not define interest. In fact, the Code does not provide a uniform definition of interest.

Though there is no clear definition of interest in the Code, all bankruptcy courts uniformly agree that security interests and other liens are interests under § 363(f). The courts disagree, however, on many remaining issues related to interests in property with respect to § 363(f). Perhaps the narrowest view of interest is the view that only an in rem interest may be affected by a sale free and clear under § 363(f). Although several courts use the Latin phrase in rem when referring to the types of interests covered by § 363(f), there is no practical distinction between the phrases in rem and "interest in property," which is the precise language of § 363(f). The phrase in rem is used by courts to refer to an interest that is inextricably tied to a specific, ascertainable, and otherwise readily identifiable piece of property. *Black's Law Dictionary* defines in rem as "against a thing."[7]

One court succinctly summarized the applicability of § 363 with respect to tort claimants: "This section authorizes sales free and clear of specific interests in the property being sold; liens, for example. General unsecured claimants including tort claimants, have no specific interest in a debtor's property. Therefore, section 363 is inapplicable for sales free and clear of such claims."[8] This narrow view would make § 363 inapplicable to tort claims. In other words, a limited application of in rem would not deprive tort victims of asserting a cause of action after a § 363 sale.

Another court concluded that § 363(f) refers only to in rem interests that affect the property in question. That court reasoned that § 363(f) limits the interests that can be discharged to interests in such property.[9] That court held that applying § 363(f) to interests other than in rem interests would cause the "in such property" language to

5. § 363(f) (emphasis added).

6. *See id.*

7. BLACK'S LAW DICTIONARY 864 (9th ed. 2009).

8. *In re* White Motor Credit Corp., 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (citation omitted).

9. Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 917 (Bankr. W.D. Tex. 1995).

be superfluous.[10] Read in the negative, this means that in personam—against a person or entity—interests cannot be affected by a sale free and clear because in personam interests are not interests against specific property.

Several courts have disagreed, sometimes strongly, with this interpretation of § 363(f). Judge Fuentes, writing for the Third Circuit, observed, "Some courts have narrowly interpreted interests in property to mean *in rem* interests in property, such as liens. However, the trend seems to be toward a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.'"[11] Other courts have held that an interest in property is broader than a lien.[12] Bankruptcy Judge Bostetter noted:

> Since "lien" is a defined term under the Bankruptcy Code, it stands to reason that Congress would have used the term "lien" instead of "interest," had it intended to restrict the scope of § 363(f) to liens. Furthermore, § 363(f)(3) applies to situations in which "such interest is a lien," which suggests that liens constitute a subcategory of "any interest." Other courts have indicated that the term "interest" is broad, covering more than mere liens.[13]

But concluding that interest is broader than a lien does not necessarily mean interests extend to unsecured claims. It could, for example, extend only to ownership interests, such as those held by tenants in common or the partnership interest of a limited partner.

On the other hand, some courts have held that general unsecured claims do not constitute interests within the meaning of § 363(f).[14] Another court observed that while a few courts have held § 363(f) applies only to in rem interests, numerous other courts have interpreted the statute more broadly, applying it, for example, to product liability and employment discrimination claims.[15] A proper analysis of § 363(f) and an interpretation of interest, however, must apply the bedrock principle that "in bankruptcy cases, the rule of decision for the nature of rights and interests in property is furnished by state law where no controlling federal law would govern."[16]

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10. *Id.*

11. *In re* Trans World Airlines, Inc., 322 F.3d 283, 288–89 (3d Cir. 2003) (citations omitted).

12. *In re* 229 Main St. Ltd. P'ship, 262 F.3d 1, 6 (1st Cir. 2001).

13. *In re* WBQ P'ship, 189 B.R. 97, 105 (Bankr. E.D. Va. 1995).

14. *In re* Hutchinson, 5 F.3d 750, 756 (4th Cir. 1993).

15. Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp., 195 B.R. 716, 731 (Bankr. N.D. Ind. 1996).

16. *In re* Eveleth Mines, LLC, 312 B.R. 634, 650 (Bankr. D. Minn. 2004).

As is discussed further in this Article, whether a product liability or employment discrimination claim is an interest in property has serious ramifications for the parties involved as it relates to successor liability.

II. POLICY REASONS FOR § 363(F)

Section 363(f) is based on at least three public policy considerations with respect to successor liability claims. The first public policy reason is to induce potential buyers of assets that are currently subject to a bankruptcy case to go forward with an asset purchase agreement by providing finality to the asset sale. Second, the priority scheme of the Code is designed to treat like claims in an equal manner. Third, the value of the bankruptcy estate is maximized, which inures to the benefit of all creditors, when a purchaser of assets under a § 363 sale is shielded from all potential claims of any kind. In other words, a purchaser of assets is willing to pay more for the assets if the assets are not subject to potential claims of creditors.

The public policy considerations of § 363 were correctly stated by the Southern District of New York in response to an appellant's argument that the court should modify a small provision in a § 363 sale order. The court precisely and effectively illustrated the policy considerations:

> [W]e must leave the terms of sale undisturbed [to further] the policy of finality in bankruptcy sales. Moreover, it assists bankruptcy courts in maximizing the price for assets sold in such proceedings. Otherwise, potential buyers would discount their offers to the detriment of the bankruptcy's estate by taking into account the risk of further litigation and the likelihood that the buyer will ultimately lose the asset, together with any further investments or improvements made in the asset.[17]

Addressing the merits of an appeal from the denial of a stay order, that same court held that a reviewing court "may be powerless to undo or rewrite the terms of the consummated sale" because this "rule thus furthers the policy of finality in bankruptcy sales and assists the bankruptcy court to secure the best price for the debtor's assets."[18] Indeed, such a holding is consistent with the Second Circuit's *Chrysler* opinion, which held that a plaintiff's tort claim against the purchaser of a debtor corporation's assets at a § 363 sale was properly extinguished under § 363(f) because the plaintiff's claim was an otherwise

17. Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65, 81 (S.D.N.Y. 2010) (alteration in original) (quoting United States v. Salerno, 932 F.2d 117, 123 (2d Cir. 1991)).

18. Campbell v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43, 53 (S.D.N.Y. 2010).

non-priority, unsecured claim.[19] Moreover, allowing the plaintiff to proceed with the claim would be inconsistent with the Code's priority scheme.[20] That same court explained that the basis for excluding tort claims is grounded in the public policy considerations behind § 363(f):

> [T]o the extent that the "free and clear" nature of the sale (as provided for in the Asset Purchase Agreement ("APA") and § 363(f)) was a crucial inducement in the sale's successful transaction, it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code, which is to maximize the value of the assets and thereby maximize potential recovery to the creditors.[21]

This poses the question of whether it is reasonable to assume that a potential purchaser would pay a higher price for the debtor's assets if the risk of successor liability litigation was taken out of the equation. If there is greater risk and uncertainty surrounding property of the estate due to possible successor liability claims, might a potential buyer offer a lower purchase price to account for the increased risk of litigation? Of course, conventional business acumen and history undoubtedly suggest that this, in fact, would be the case. It is possible that a successor liability claim directly against the subsequent purchaser (via the seller) would have a so-called chilling effect on the transaction. Not all courts, however, recognize the so-called chilling effect that potential successor liability claims have on a bankruptcy estate. In a case involving approximately $300,000 in delinquent pension fund claims, the Seventh Circuit reasoned, as dictum:

> Of course, it is neither certain nor clear that the chilling effect need give us pause: purchasers can demand a lower price to account for pending liabilities of which they are aware, and under federal successorship principles will not be held responsible for liabilities of which they had no notice.[22]

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19. *In re* Chrysler LLC, 576 F.3d 108 (2d Cir.), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009).

20. Douglas v. Stamco, 363 F. App'x 100, 102–03 (2d Cir. 2010); *see In re* Trans World Airlines, Inc., 322 F.3d 283, 292 (3d Cir. 2003) ("To allow the claimaints to assert successor liability claims against [a purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme.").

21. *Douglas*, 363 F. App'x at 102–03 (footnote omitted); *see* Licensing by Paolo, Inc. v. Sinatra (*In re* Gucci), 126 F.3d 380, 387 (2d Cir. 1997) (stating that a sale pursuant to § 363 of the Code "maximizes the purchase price of assets because without this assurance of finality, purchasers could demand a large discount for investing in a property that is laden with the risk of endless litigation as to who has rights to estate property").

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

To be sure, the estate, debtor, and creditors all suffer when a purchaser demands a lower price to account for pending or future liabilities.

III. THE REQUIREMENTS OF § 363(F)

How is a debtor supposed to sell property when multiple parties are claiming an interest in the property? Section 363(f), which is written in the disjunctive, contains the answer:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[23]

Section 363(f) permits a debtor to sell property to a successor who can purchase the property with the assurance that a judicial order has removed all claims, interests, and liens from the property.[24] If one or more of the five criteria of § 363(f) are present, a judge may order property to be sold free and clear *of any interest*, even without the consent of secured creditors or other interested parties. Unsecured or undersecured creditors, of course, are still entitled to a pro rata share of the proceeds of the sale, but the subsequent purchaser of the property or assets is shielded from successor liability claims. In fact, a creditor generally may not sue the purchaser to recover losses against the successor entity after a § 363 sale.

IV. WHEN CAN SUCCESSOR LIABILITY ARISE?

Successor liability, broadly defined, is a well-established legal principle that can be used to extend liability, particularly in the context of products liability, to a party that otherwise may not have been directly connected to the harmful conduct alleged by a plaintiff. Although products liability is arguably the most recognizable context for successor liability claims, other forms of successor liability, including matters

23. 11 U.S.C. § 363(f) (2006).
24. *Id.*

related to environmental or labor claims, are also subject to § 363 sales.

Generally, a business that buys assets from a debtor ordinarily does not acquire liability to the seller's creditors simply by buying its assets.[25] This maxim, however, has several notable exceptions. If a buyer agrees to assume the seller's liability to third parties, it is, by reason of its agreement, liable for successor liability claims.[26] If a court decides that a purchaser should be treated as a successor to the transferor, it is liable for the transferor's debts as though they were its own.[27] There are three primary instances when a court will impose successor liability on the acquirer despite its lack of consent. Successor liability can be imposed when an acquirer purchases assets and the transaction "(1) amounts to a consolidation or merger (the de facto merger basis); (2) the transferee is merely a continuation of the transferor (the mere continuation basis); or (3) the transfer is entered into fraudulently in order to escape liability for such debts (the fraudulent transfer basis)."[28]

Naturally, a party that acquires assets from a debtor covets a judicial order approving a sale under § 363. Such order, generally speaking, prohibits third parties, known or unknown, from asserting potentially costly successor liability claims against the acquirer. Furthermore, an appeal from a § 363 sale confirmation order will very likely be dismissed as moot, assuming that the purchaser acted in good faith.[29] After an asset is acquired, the sale's proceeds are typically impounded subject to further court order until all claims against the asset can be resolved. After the various claims are resolved, the court will authorize a distribution to creditors. The Bankruptcy Court for the District of Arizona accurately and succinctly summarized the process of a § 363 sale: "Typically, the proceeds of sale are held subject to the disputed interest and then distributed as dictated by the resolution of the dispute; such procedure preserves all parties' rights by simply transferring interests from property to dollars that represent its value."[30] Once the property is unencumbered, the owner of the property can finally realize the property's full potential without enduring the inevitable delay, costs, and uncertainty of litigation.

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25. *See* Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745 (2003).

26. *In re* Air Passenger Computer Reservations Sys. Antitrust Litig., 724 F. Supp. 744, 753 (C.D. Cal. 1989).

27. Reilly, *supra* note 25, at 746.

28. *Id.* (internal quotation marks omitted).

29. § 363(m).

30. *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 590–91 (Bankr. D. Ariz. 2009).

V. *IN RE TRANS WORLD AIRLINES, INC.*

Before analyzing the Second Circuit's opinion in *Chrysler*, it is important to first understand the Third Circuit's holding in *TWA*.[31] The Second Circuit relied heavily on the Third Circuit's *TWA* opinion, particularly with respect to the interest in property analysis relating to successor liability. The disputed property interest in *TWA* was a travel voucher program made available only to select current and former TWA employees (the Knox–Schillinger class) as part of a comprehensive settlement between the Equal Employment Opportunity Commission (EEOC) and TWA. The settlement resolved a number of sexual harassment claims against TWA management.

Although TWA admitted no wrongdoing, the settlement provided that members of the Knox–Schillinger class would have the right to fly a specific number of flights for free and receive a small cash payment. The Third Circuit carefully analyzed whether the benefits provided under the settlement amounted to an interest in property under § 363. Reasoning that the benefits, while not property themselves, arose from the property being sold, presumably TWA's airplanes, the Third Circuit held that the benefits nevertheless were within the scope of § 363:

> While the interests of the EEOC and the Knox–Schillinger class in the assets of TWA's bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, . . . they are interests in property within the meaning of section 363(f) in the sense that they arise from the property being sold.[32]

To support its conclusion, the Third Circuit reasoned that limiting interests in property to in rem interests was too narrow: "[T]o equate interests in property with only *in rem* interests such as liens would be inconsistent with section 363(f)(3), which contemplates that a lien is but one type of interest."[33] On this point, the court was correct; there are, in fact, five situations in which the sale provisions of § 363(f) apply.[34]

While correct that § 363 contemplates multiple variations of property interests, the Third Circuit's reasoning was flawed because it never explained how the interests of the Knox–Schillinger class derived from the property being sold. The interests of the Knox–Schillinger class stemmed from the *actions*, i.e. the sexual harassment, of TWA employees, particularly management personnel, and

31. *In re* Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2003).
32. *Id.* at 290.
33. *Id.*
34. § 363(f)(1)–(5).

not from any particular piece of property.[35] The interests of the Knox–Schillinger class provided by the settlement agreement did not arise from the property, i.e the airplanes, being sold.[36] Indeed, if TWA never filed bankruptcy and continued as a going concern, the settlement would be funded from sales of airline tickets and not from the sale of the airplanes themselves. More specifically, the Knox–Schillinger class never received an interest in *any* specific or readily identifiable piece of property.[37] Unlike a secured creditor that is entitled to the proceeds from the collateral's sale—subject to the amount of its interest in the property—the Knox–Schillinger class was not entitled to the proceeds of any specific piece of property. Addressing this precise issue, one commentator noted:

> This fact, without more, does not imply that general unsecured claims, such as successor liability claims, are also included within the phrase "interest in property." Thus, without further explanation as to why general unsecured successor liability claims constitute "interests in property" under section 363(f), the Third Circuit has presented an unpersuasive argument.[38]

Although the Knox–Schillinger class did not have an interest in any specific property, the Third Circuit effectively gave the Knox–Schillinger class members an interest in the airplanes of TWA—a feat of analytical gymnastics that allowed the Third Circuit to hold that the flight attendants had interests in property that *were* subject to a § 363 sale.

The Third Circuit, however, subsequently betrayed the flaw in its own reasoning in its analysis of whether the same claims were subject to monetary satisfaction: "Had TWA liquidated its assets under Chapter 7 of the Bankruptcy Code, the claims at issue would have been converted to dollar amounts and the claimants would have received the distribution provided to *other general unsecured creditors on account of their claims*."[39] The Third Circuit concluded that in the event of liquidation, the Knox–Schillinger class would be treated like "other general unsecured creditors."[40] By definition, unsecured creditors do not have an interest or claim against a specific piece of property. The mere fact that the Knox–Schillinger class received a settlement entitling its members to a specific number of free stand-by flights does not mean that the class had an interest or claim to a particular seat on an

35. *In re Trans World Airlines, Inc.*, 322 F.3d at 285.
36. *See id.*
37. *Id.* at 288–90.
38. Corcoran, *supra* note 2, at 732.
39. *In re Trans World Airlines, Inc.*, 322 F.3d at 291 (emphasis added).
40. *Id.*

airplane, the plane itself, or any tangible property of TWA. To hold otherwise would either transform the Knox–Schillinger class members into secured creditors or, at the very least, cause their claims to be superior in priority compared to other general unsecured creditors.

VI. *IN RE CHRYSLER LLC*

One of the more public cases in recent years to address the relationship between successor liability and a § 363 sale involved the car manufacturer Chrysler.[41] Chrysler fought many politically charged battles (which are outside the scope of this Article) against secured creditors, including the United Auto Workers Union (UAW) and the Indiana State Police Pension Trust (the Indiana Pension Trust), in connection with a proposed sale of its business assets to Fiat, an Italian car manufacturer.

The Indiana Pension Trust, along with several other pension funds, held both secured and unsecured claims against Chrysler. The Indiana Pension Trust opposed Chrysler's proposed bankruptcy plan because, among other reasons, the Indiana Pension Trust would receive a payout of only twenty-nine cents on the dollar, while unsecured creditors, such as the UAW's health care trust, would receive a payout of roughly fifty-five cents on the dollar.[42] The Indiana Pension Trust acquired claims from other secured creditors in July of 2008 for approximately forty-three cents on the dollar. Less than a year later, however, the Indiana Pension Trust would face significant losses if Chrysler was sold to Fiat.

Despite the fact that the Indiana Pension Trust, along with other similarly situated creditors, had appointed an agent who affirmatively consented to the bankruptcy plan proposed by Chrysler,[43] the Indiana Pension Trust later objected to Chrysler's bankruptcy plan. The Indiana Pension Trust argued that the Chrysler bankruptcy plan was inconsistent with the absolute priority rule[44] of the Code because unsecured creditors would receive a bankruptcy dividend while secured creditors would not be made whole.

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41. *In re* Chrysler LLC, 576 F.3d 108 (2d Cir.), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009).

42. Whether such distribution violated the absolute priority rule and whether the unsecured creditors, particularly the UAW, contributed sufficient new value to the bankruptcy plan to receive such a distribution are outside the scope of this Article.

43. It may be argued, perhaps even likely, that the Indiana Pension Trust did not have standing to object to the bankruptcy plan since it previously appointed an agent to act on its behalf.

44. 11 U.S.C. § 1129(b) (2006).

The Chrysler sale order raises several significant legal issues. Many of the issues surround due process and notice requirements or involve state law and successor liability. The scope of this Article, however, is limited to the two main issues mentioned above: (1) what is an interest in property for purposes of § 363(f), and (2) if successor liability is an interest in property, is it possible to have a sale free and clear of successor liability without providing adequate protection of that interest? With respect to Chrysler, a proper analysis of the events that gave rise to the sale order that permitted Old Chrysler to be sold free and clear to New Chrysler under § 363 of the Code is particularly relevant.[45] Much debate arises on that issue since there is not a uniform definition of interest in the Code. The fact that courts across the country are split over its meaning only exacerbates the problem. The majority of courts faced with the issue have interpreted interests in property to include successor liability claims. Courts adopting the expansive view of interests in property overlook an important implication of their interpretation: if a successor liability claim constitutes an interest in property under § 363(f), the holder of that claim is entitled to adequate protection of that interest under § 363(e).[46]

In *Chrysler*, the Second Circuit furthered the analysis and reasoning of the Third Circuit's *TWA* opinion by concluding that "the term interest in property encompasses those claims that arise from the property being sold," and thus, the Second Circuit ordered the proposed § 363 sale free and clear of successor liability claims.[47] Although the *Chrysler* opinion was later vacated because the Supreme Court deemed the issues moot (while the petition for certiorari was pending, the sale closed), the Second Circuit, in no uncertain terms, reiterated its position that successor liability claims are interests in property under § 363(f). Less than a month after the Supreme Court vacated the *Chrysler* opinion, the Second Circuit's opinion in *Douglas v. Stamco*[48] was published. The *Douglas* case is particularly significant because it specifically addressed an issue that the Second Circuit evaded in the *Chrysler* case: Does a § 363 sale extinguish product lia-

45. For an in-depth and well-written analysis on this subject, see Corcoran, *supra* note 2.

46. *Id.* at 699 (requiring courts, upon request of an entity with an interest in property, to prohibit or condition sale or use of property being sold by a trustee in order to adequately protect interests in such property).

47. *Id.* at 732 (internal quotation marks omitted) (agreeing that proposed successor liability claims are interests in property because such rights are grounded in the property being sold, thus concluding the sale was free and clear of those claims).

48. Douglas v. Stamco, 363 F. App'x 100, 102–03 (2d Cir. 2010) (discussing how underlying public policy concerns disallowed plaintiff to proceed with a tort claim directly against the purchaser because it would be inconsistent with the Code's priority scheme because plaintiff's claim was a low-priority, unsecured claim).

bility claims that have yet to occur? In *Douglas*, the § 363 sale took place in 2001. Approximately four years after the § 363 sale took place, but *before* the debtor's bankruptcy case closed, a plaintiff was injured in an accident involving heavy machinery that was manufactured by the seller prior to the § 363 sale. The plaintiff brought suit in 2008, approximately seven years after the § 363 sale occurred and approximately three years after the accident. The district court found in favor of the defendant, and the plaintiff subsequently appealed to the Second Circuit. The Second Circuit affirmed the district court's finding that successor liability did not exist.[49] Much to the chagrin of bankruptcy practitioners, the holding of the Second Circuit is embodied in a summary order, which does not have precedential effect. The lack of precedential effect notwithstanding, the order was cited by the Southern District of New York in the General Motors bankruptcy matter.[50] Interestingly, the Second Circuit's subsequent decision in *Douglas* relied entirely on policy considerations rather than an analysis of the interests-in-property language of § 363(f).[51]

The Second Circuit relied on the Third Circuit's opinion in *TWA*, as well as the Fourth Circuit's *In re Leckie Smokeless Coal Co.* opinion,[52] to hold that claims arising from the property subject to sale may properly be considered interests in property.[53] Therefore, such claims may be subject to a § 363 sale.[54] Curiously, this is in direct conflict with *In re White Motor*. The *In re White Motor* court is one of a small number of lower courts that has directly ruled on the issue of whether successor liability claims are interests in property under § 363(f).[55] That court concluded, "General unsecured claimants including tort claimants, have no specific interest in a debtor's property. Therefore, section 363 is inapplicable for sales free and clear of such claims."[56] To be sure, the *In re White Motor* opinion is not binding on the Second Circuit. The Second Circuit, however, cited the *In re White Motor* opinion as one of a large minority of cases that expressed divergent views on what is an interest in property.[57] Unfortunately, the Second

49. *Id.* at 103.

50. Campbell v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43, 49–50 (S.D.N.Y. 2010).

51. *See* Corcoran, *supra* note 2.

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

53. *In re* Chrysler LLC, 576 F.3d 108, 125 (2d Cir.), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009).

54. *Id.* at 126.

55. *See In re* White Motor Credit Corp., 75 B.R. 944 (Bankr. N.D. Ohio 1987).

56. *Id.* at 948.

57. *In re Chrysler LLC*, 576 F.3d at 124 n.16.

Circuit's analysis and subsequent rejection of the reasoning used in *In re White Motor* was perfunctory to say the least.

Other lower courts agree that successor liability claims do not constitute interests in property.[58] Interestingly enough, the *In re White Motor* court, despite concluding that successor liability claims are not interests in property, ordered the sale free and clear of successor liability on public policy grounds.[59] The Second Circuit's *Chrysler* opinion, however, is fundamentally flawed because current and future tort claimants asserting successor liability claims do not have an interest in property within the meaning of § 363(f). An interest in property must exist in order for a court to order a sale pursuant to § 363(f).[60] Assuming, arguendo, that current and future tort claimants did have an interest in property within the meaning of § 363(f), the Chrysler Sale Order did not provide adequate protection for those interests. Consequently, the Sale Order did not comply with the Code's mandatory requirements when dealing with interests in property.

VII. THE SECOND AND THIRD CIRCUITS APPLIED THE WRONG ANALYTICAL FRAMEWORK

The Second Circuit's *Chrysler* opinion is deficient to the extent it held that future tort claimants, who are currently unknown and cannot receive notice that their claims will be extinguished under a § 363 sale, have an interest in property. The Second Circuit opinion delves into an analysis of claims and whether future tort claims are unsecured claims against Old Chrysler. The Second Circuit, however, applied the wrong analytical framework. The Second Circuit focused on claims against the debtor (Old Chrysler), but *the value of successor liability is the claim against the successor* (New Chrysler). In other words, the value of such a successor liability claim is against the buyer, not the seller.

The Second Circuit's analysis in *Chrysler* misses the point entirely insofar as successor liability is concerned. Furthermore, the opinion is

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

59. *In re White Motor Credit Corp.*, 75 B.R. at 948.

60. 11 U.S.C. § 363(f) (2006).

seriously limited in its application because the analysis is an assessment of *Old* Chrysler. The correct analysis requires an assessment of *New* Chrysler, the successor. The analysis regarding successor liability claims as unsecured claims or arguments about successor liability claims potentially violating the Code's priority scheme are simply irrelevant. Claims against Old Chrysler were worthless, and the Second Circuit recognized this fact. The Second Circuit noted, "[I]t is undisputed that little or no money will be available for damages even if suits against Old Chrysler succeed."[61] The Second Circuit simply applied the wrong analysis. The Second Circuit needed to decide if an unknown number of unidentifiable future tort claimants—who themselves may not know that they will have claims in the future—have an interest in property that is subject to the provisions of § 363 or, in the alternative, if such future tort claimants can assert claims against New Chrysler, not Old Chrysler. Furthermore, future tort claimants cannot, as a practical reality, have a claim against either Old Chrysler or New Chrysler because they have yet to suffer an injury or other harm. Indeed, it would be nonsensical to say that, at the time of the § 363 sale, a purchaser of a Chrysler vehicle manufactured before the bankruptcy petition was filed and who will suffer an injury at some undetermined time post-confirmation has an interest in property or claim against Chrysler. Such a hypothetical tort claimant does not have standing. As noted earlier, there are serious constitutional issues, specifically due process issues, implicated by such a holding. Indeed, these constitutional concerns are properly analyzed and explained by the Bankruptcy Court for the Southern District of New York in its *In re Grumman* opinion.[62]

Even if the Second Circuit applied the correct analytical framework and concluded that future tort claimants have interests in property that were subject to § 363, the Second Circuit's holding still violates the Code because the Second Circuit did not adequately protect such interests in property. The Second Circuit reasoned that future claimants would not receive a distribution from Old Chrysler and that adequate protection was therefore not required (courts usually look to see what such claims would be worth in a Chapter 7 liquidation).[63] The reasoning of the Second Circuit, however, is unpersuasive as much as it is incorrect for the reasons stated above. More specifically, the value of the successor liability claim is not what would be received

61. *In re Chrysler LLC*, 576 F.3d at 123 n.15.

62. *In re* Grumman Olson Indus., Inc., 445 B.R. 243 (Bankr. S.D.N.Y. 2011), *aff'd*, 467 B.R. 694 (Bankr. S.D.N.Y. 2012).

63. *In re Chrysler LLC*, 576 F.3d at 124–27.

from Old Chrysler, but what would be received from New Chrysler. Despite the inconsistent holdings of various courts regarding the definition of interest in property with respect to § 363, there is at least one court that fully appreciates the ramifications of the *TWA* and *Chrysler* cases and their respective ancestors and future progeny.

In October of 2009, John and Denise Frederico filed a personal injury action against Morgan Olson, LLC (Morgan) in New Jersey.[64] The Fredericos commenced an adversary proceeding in the Bankruptcy Court for the Southern District of New York because Morgan purchased the assets of Grumman Olson Industries Inc. (Grumman) in a § 363 sale order after Grumman filed for protection under the Code.[65] It is well settled that a bankruptcy court retains jurisdiction to interpret and enforce its prior orders, especially where the bankruptcy court expressly retained jurisdiction to do so.[66]

Mrs. Frederico was an employee of Federal Express and was critically injured in the fall of 2009 when her Federal Express truck collided with a telephone pole. The Federal Express truck was manufactured, at least in part, by Grumman in 1994—well before the bankruptcy petition was filed and long before the § 363 sale order was entered—and, apparently, was defective for several reasons. The Fredericos claimed that because the truck was produced and sold before the bankruptcy sale, a sale order under § 363 should not permit Morgan to escape liability for being a successor. The court was faced with a straightforward, threshold legal question: Does the sale order exonerate Morgan from liability to the Fredericos?[67] Much like a potential future tort claimant that suffered injuries as a result of a car manufactured by Chrysler would argue, the Fredericos' based their claim of successor liability on the fact that Morgan continued the same product line after the purchase, traded upon and benefitted from the goodwill of the product line, held itself out to potential customers as continuing to manufacture the same product line of Grumman trucks, and continued to market the line of trucks to Federal Express.[68]

To illustrate the importance of the issues surrounding future tort claimants who are injured after the consummation of a § 363 sale by a defective product manufactured and sold by a debtor prior to the bankruptcy, the Second Circuit suggested the following hypothetical in 1991:

64. *In re Grumman Olson Indus., Inc.*, 445 B.R. at 247.
65. *Id.*
66. Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009).
67. *In re Grumman Olson Indus., Inc.*, 445 B.R. at 247.
68. *Id.* at 250.

> Consider, for example, a company that builds bridges around the world. It can estimate that of 10,000 bridges it builds, one will fail, causing 10 deaths. Having built 10,000 bridges, it becomes insolvent and files a petition in bankruptcy. Is there a "claim" on behalf of the 10 people who will be killed when they drive across the one bridge that will fail someday in the future? If the only test is whether the ultimate right to payment will arise out of the debtor's pre-petition conduct, the future victims have a "claim." Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be on that one bridge when it crashes. What notice is to be given to these potential "claimants"? Or would it suffice to designate a representative for future victims and authorize the representative to negotiate terms of a binding reorganization plan?[69]

Unfortunately, the Second Circuit's hypothetical has become a stark reality for some tort claimants. To be sure, it will soon become a reality for plaintiffs injured by Chrysler vehicles manufactured before the bankruptcy sale but whose injuries occurred after the § 363 sale. The Fredericos' right to payment falls squarely within the above hypothetical. It represents "the extreme case of pre-petition conduct that has not yet resulted in any tortious consequences to a victim."[70]

The Bankruptcy Court for the Southern District of New York concluded that the § 363 sale order did not affect the rights of the Fredericos to sue Morgan under a theory of successor liability.[71] The court noted:

> Except for *Chrysler*, . . . every case that we have found addressing this issue has concluded for reasons of practicality or due process, or both, that a person injured after the sale (or confirmation) by a defective product manufactured and sold prior to the bankruptcy does not hold a "claim" in the bankruptcy case and is not affected by either the § 363(f) sale order or the discharge under 11 U.S.C. § 1141(d).[72]

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69. United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1003 (2d Cir. 1991).

70. *In re Grumman Olson Indus., Inc.*, 445 B.R. at 253.

71. *Id.* at 254.

72. *Id.*; *see, e.g.*, Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1277 (5th Cir. 1994) (observing that the definition of "claims" cannot be extended to cover future tort claimants who "were completely unknown and unidentified at the time [the debtor] filed its petition and whose rights depended entirely on the fortuity of future occurrences"); Schwinn Cycling & Fitness, Inc. v. Benonis, 217 B.R. 790, 797 (N.D. Ill. 1997) (holding that due process prevented discharge of a claim against a purchaser of the debtor's assets arising from post-sale, post-confirmation injury because claimants "had no notice, and no reason at the time, to present an interest in the bankruptcy proceedings or to take action in response to the threatened deprivation of their rights"); Taylor v. Strongbuilt Int'l, Inc. (*In re* Strongbuilt Inc.), No. 03-31317, 2009 WL 5873047, at *3 (Bankr. W.D. La. Aug. 26, 2009) (holding that the plan did not discharge the claim against

Fortunately for future tort claimants, Judge Bernstein's *In re Grumman* opinion refused to extend the reach of the bankruptcy court's § 363 sale order.[73] This decision effectively made an acquirer of a debtor liable for products produced by the debtor prior to the filing of the debtor's bankruptcy petition when such products cause an injury post-confirmation. In other words, if a debtor manufacturers a product prior to the bankruptcy, and if that same product causes an injury to a person or group of persons that had no legal way of asserting its claim during the bankruptcy proceedings, successor liability will apply to the subsequent purchaser of the debtor and its assets, even when a sale order provides otherwise. The relevant language from the Second Circuit's *Chrysler* opinion is as follows: "[W]e decline to delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as we are presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law."[74]

Some courts have concluded that current and future tort claimants have in personam claims against a debtor. This conclusion, however, applies the wrong analytical framework. As noted earlier, the value of a successor liability claim is against the subsequent purchaser, not the seller. The *TWA* court, for example, held that the claims of the

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debtor's successor for post-confirmation injury caused by a product the debtor manufactured pre-petition because "[t]o hold otherwise, would be to require the plaintiffs to presume an accident and estimate the cost of the damages of an injury that had not yet occurred and to have filed that claim"); White v. Chance Indus., Inc. (*In re* Chance Indus., Inc.), 367 B.R. 689, 709 (Bankr. D. Kan. 2006) (holding that confirmation discharge did not affect rights of a party injured post-confirmation on an amusement park ride manufactured by the debtor pre-petition where the debtor failed to give any notice of its intent to discharge future claims and failed to provide for a future claims representative or establish a fund to pay their claims); *In re* Hoffinger Indus., Inc., 307 B.R. 112, 114, 122 (Bankr. E.D. Ark. 2004) (declining to estimate the claims of people who will suffer future injuries resulting from swimming pools and associated products manufactured by the debtor pre-petition because "[t]he post confirmation person unknown, unborn, or about to take their first swimming lesson simply does not have a logical prepetition nexus to Hoffinger's products. Due process demands more . . ."); *In re* Kewanee Boiler Corp., 198 B.R. 519, 540–41 (Bankr. N.D. Ill. 1996) (holding that a party injured in a post-confirmation boiler room accident as a result of alleged defects in a boiler manufactured by the debtor pre-petition was not bound by discharge because he did not have a "right to payment," but even if he did, persons who might be injured in the future "could not be identified with enough specificity to allow them to be notified," the "[d]ischarge of their future claims would violate the Fifth Amendment because of fairness and due process concerns and would also violate bankruptcy notice requirements," and the debtor did not seek the appointment of a future-tort-claimants representative or establish a fund to pay their claims); Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 AM. BANKR. L.J. 339 (2004).

73. *In re Grumman Olson Indus., Inc.*, 445 B.R. at 255–56.

74. *In re* Chrysler LLC, 576 F.3d 108, 127 (2d Cir.), *vacated as moot sub nom.* Ind. State Police Pension Trust v. Chrysler LLC, 130 S. Ct. 1015 (2009).

Knox–Schillinger class were in personam claims against TWA despite the fact that such claims were not traceable or linked to any specific property or asset. The Third Circuit, however, amorphously connected the claims of the Knox–Schillinger class to the aircraft of TWA by noting that "the term any interest is intended to refer to obligations that are connected to, or arise from, the property being sold."[75] In a blistering opinion by the Bankruptcy Court for the District of Minnesota that declined to follow the reasoning put forth by the Third and Fourth Circuits, Chief Judge Kishel stated:

> The *TWA* court, however, does not overtly pass on the question of whether successor liability on account of the travel-voucher claims would have lodged against a purchaser of the debtor's assets, let alone whether the incipience of successor liability, figuratively floating over its debtor, somehow could have become choate and then attached to the transferred assets upon a sale.[76]

Inexplicably, the Third Circuit did not cite a scintilla of legal authority, statutory or otherwise, that would impose successor liability on a purchaser. In fact, the Third Circuit noted, "The Bankruptcy Court determined that there was no basis for successor liability on the part of American and that the flight attendants' claims could be treated as unsecured claims. In keeping with the Bankruptcy Court's conclusions, the Sale Order extinguished successor liability on the part of American . . . ."[77] Even if the Third Circuit believed that American Airlines' purchase of substantially all of TWA's assets was a mere continuation of the debtor and subject to successor liability, as noted above, the reasoning of the Third Circuit still fails because the proper starting point for determining what constitutes an interest is a matter of state law, unless controlling federal law exists.[78] As mentioned above, this is a hallmark principle of determining the scope of an interest.

VIII. INTERESTS IN PROPERTY MUST BE ADEQUATELY PROTECTED

Even if the Second Circuit was correct that the unascertainable future tort claimants, whose injuries have not yet occurred, have interests in property that may be sold free and clear, the court improperly authorized the § 363 sale because it failed to adequately protect the

75. *In re* Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2003) (quoting Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 259 (3d Cir. 2000)) (internal quotation marks omitted).

76. *In re* Eveleth Mines, LLC, 312 B.R. 634, 654 (Bankr. D. Minn. 2004).

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

78. Butner v. United States, 440 U.S. 48, 52–56 (1979).

interests of the future tort claimants. The Code is clear; if adequate protection cannot be provided, a § 363 sale must be prohibited.[79] The court did not provide adequate protection to future tort claimants despite the mandatory provisions of § 363(e); therefore, the Second Circuit improperly applied the Code's provision to the issues in *Chrysler*. At the very least, New Chrysler should not have been able to purchase the assets of Old Chrysler free and clear, at least with respect to the *future* tort claims.

The Code requires a court to provide adequate protection of an interest in property when such property will be sold free and clear of an interest.[80] Section 363(e) states:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, *shall* prohibit or condition such use, sale, or lease as is necessary to *provide adequate protection* of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).[81]

Adequate protection is defined by the Code in § 361.[82] Whenever adequate protection is required under § 362, § 363, or § 364, an interest in property must be adequately protected in one of the following manners:

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.[83]

79. 11 U.S.C. § 363(e) (2006).

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.* § 361.

83. *Id.*

In a well-known case involving both economic and noneconomic interests of the National Hockey League (NHL) and its contract with the Phoenix Coyotes, the Bankruptcy Court for the District of Arizona highlighted and discussed the mandatory requirements that the Code imposes when a § 363 sale is proposed. Section 363(e) requires the court "to provide adequate protection" of any interest in the property that is being sold free and clear.[84] That subsection expressly states, in mandatory and unambiguous language, that the court "shall prohibit or condition" the proposed sale "as is necessary to provide adequate protection of such interest."[85] The court held that the bid provided by PSE Sports and Entertainment LP (PSE) to purchase the Pheonix Coyotes and relocate them to Hamilton, Ontario must be denied with prejudice because the interests of the NHL could not be adequately protected as required by § 363(e) if the sale to PSE were approved.[86]

Judge Baum, writing for the Bankruptcy Court of Arizona, struggled to find a method or means that would adequately protect the NHL's noneconomic interests.[87] Because the court believed that the NHL's noneconomic interests could not be adequately protected, the court held that it was powerless, by the clear and mandatory language of § 363, to effectuate a sale to PSE.[88] Indeed, if adequate protection cannot be provided, the sale must be prohibited.[89]

Judge Baum's analysis is correct; this analysis, if followed by the Second Circuit in *Chrysler*, would have produced a diametrically different result. Even assuming the claims asserted against Chrysler by current and future tort claimants were interests in property, the lack of the ability to fashion adequate protection of those interests necessarily means the proposed sale could not be approved. Thus, if adequate protection cannot be provided with respect to an interest in property, the plain language of the Code prohibits a § 363 sale.

Regarding *Chrysler*, it is crucial to note that neither the Bankruptcy Court for the Southern District of New York nor the Second Circuit addressed the adequate protection issue. Perhaps even more perplexing is that the attorneys representing the current and future tort claimants *did not* raise the issue of adequate protection, which, based on a strict reading of the Code language, arguably excuses both courts' fail-

84. § 363(e).
85. *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 592 (Bankr. D. Ariz. 2009).
86. *Id.* at 593.
87. *Id.* at 591.
88. *Id.* at 592.
89. *Id.*

ure to address the adequate protection requirement. The Code states, "*on request* of an entity that has an interest in property . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."[90]

Because there was not one party with an interest in property that requested the court to condition the sale by providing adequate protection, it is arguable that neither court was obligated to address this major omission on the part of the lawyers for the current and future tort claimants.

When requested by a party in interest, however, adequate protection is mandatory.[91] As one commentator aptly noted, "[S]ection 363(e) would potentially grant general unsecured successor liability claimants enhanced treatment compared to similarly situated non-priority creditors, essentially turning on its head the argument that permitting imposition of successor liability claims against section 363(f) purchasers would upset Code priorities."[92]

Further addressing § 363(e)'s impact on unsecured creditors, Judge Leif M. Clark, writing for the Bankruptcy Court for the Western District of Texas, observed:

> [I]f unsecured creditors had an "interest in property" sufficiently cognizable that a special provision is required to achieve a sale "free and clear," then those selfsame creditors should also be entitled to adequate protection of those interests during the pendency of the case. But that notion too essentially renders the distinctions drawn in the Code a nullity.[93]

If current and future tort claimants are truly unsecured creditors because they do not have claims against specific, readily ascertainable property of the debtor, an argument could be made that such tort claimants have in personam claims against the debtor. On the topic of in personam claims and how such claims might eventually become interests in the estate, Judge Clark said:

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90. 11 U.S.C. § 363(e) (2006) (emphasis added).

91. Corcoran, *supra* note 2, at 755; *see In re Dewey Ranch Hockey, LLC*, 414 B.R. at 592 ("The requirement of adequate protection in Section 363(e) is mandatory. If adequate protection cannot be provided, such sale must be prohibited."); *In re* Metromedia Fiber Network, Inc., 290 B.R. 487, 491 (Bankr. S.D.N.Y. 2003) (recognizing adequate protection as mandatory and not discretionary when requested by a secured entity); *In re* Heatron, Inc., 6 B.R. 493, 494 (Bankr. Mo. 1980) (noting that adequate protection is mandatory when requested by entities with property interests, but its form and sufficiency is developed by the trustee).

92. Corcoran, *supra* note 2, at 755 (footnote omitted) (noting an entity with an interest in property may request adequate protection if such property is to be sold, used, or leased).

93. Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 918 (Bankr. W.D. Tex. 1995).

> [T]he argument unnecessarily (and perhaps impermissibly) blurs the distinction between secured and unsecured creditors' interests in the estate. Even though all creditors have an interest in the estate, they do not have the *interest in property* that would be cognizable under 506(a) for example. Otherwise, the distinctions drawn there between secured and unsecured claims would be all but obliterated.[94]

Judge Clark felt so strongly about his position that he quipped, "No one can seriously argue that *in personam* claims have, of themselves, an *interest in such property*."[95] Unfortunately, several courts, including the Second and Third Circuits, have disregarded Judge Clark's reasoning and strict construction of the Code with respect to successor liability issues.

Assuming future tort claimants have general unsecured claims, Judge Clark believes that such claims cannot be interests in property because such treatment would violate the Code's priority scheme of equality among similarly situated creditors.[96] Indeed, successor liability claimants with interests in property face a zero-sum game; one creditor or class of creditors must suffer for another class to benefit.

Assuming that tort claimants possess in personam claims, at least one court has held that § 363 sales that purport to absolve the successor of in personam claims are not absolute. In fact, *In re Grumman* was concerned with this very issue—To what extent may a bankruptcy court provide in personam relief to a buyer under § 363(f)? The court held that "§ 363(f) authorizes the Court to absolve the buyer of *in personam* liability for pre-confirmation claims in a chapter 11 case."[97] Of particular interest is that the *In re Grumman* opinion specifically mentions the Second Circuit's *Douglas* opinion and tries to limit and apply that case's holding narrowly.[98] The Second Circuit, however, gave no indication that the holding was to be construed narrowly. More specifically, the *In re Grumman* court stated:

> Given . . . the caution expressed by the Second Circuit in *Chrysler, Douglas v. Stamco* cannot be read to support [the successor's] overarching argument that a sale order under § 363(f) can exonerate a purchaser from *in personam* liability for future torts where the future victim had no meaningful opportunity to participate in the bankruptcy or prosecute his claim.[99]

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94. *Id.*

95. *Id.*

96. *Id.*

97. *In re* Grumman Olson Indus., Inc., 445 B.R. 243, 255 (Bankr. S.D.N.Y. 2011), *aff'd*, 467 B.R. 694 (Bankr. S.D.N.Y. 2012).

98. *Id.* at 256 n.10.

99. *Id.*

It is critical to note the timeline of the *Chrysler* and *Douglas* decisions. *Chrysler* was decided before *Douglas*, and the *In re Grumman* opinion, as noted above, was later vacated by the Supreme Court as moot. *Douglas* presented similar facts to *Chrysler* and was decided after the Second Circuit's *Chrysler* opinion was deemed moot—the Second Circuit clearly reaffirmed its position in *Chrysler* with its opinion in *Douglas*. Such a timeline of events draws into question the belief of the *In re Grumman* court that *Douglas* must be read with a limited, focused, and otherwise narrow holding.

IX. CONCLUSION

Although several district and circuit courts have examined the issues of successor liability in the context of § 363 sales, the overwhelming majority of courts that have examined the issues are failing to apply a proper analysis. There are at least two major errors that courts have consistently made when analyzing potential successor liability claims and § 363 sales. First, a court must determine whether the interest that is being sold free and clear is an interest in such property as used in § 363(f). If a court determines that the interest in question is the type of interest intended by Congress in § 363(f), a court must then adequately protect such interest pursuant to the unambiguous and mandatory language of § 363(e). A court is not permitted to authorize a sale free and clear of an interest in property if adequate protection cannot be provided. Additionally, a court may authorize only a sale free and clear of an interest in property—a court cannot sell free and clear of all possible interests that may exist. In fact, a court must adequately protect every interest that is stripped from the property being sold.

Perhaps the more critical error that courts commit when analyzing successor liability claims in the context of § 363 sales is the belief that the value of successor liability is against the original debtor. For example, the Second Circuit incorrectly focused on creditors receiving a distribution from Old Chrysler. To be sure, the value of successor liability claims is against the purchaser or newly reorganized debtor, not against the defunct debtor. The value is the ability of future tort claimants to seek monetary damages against the solvent successor.

The Second Circuit should have analyzed whether the current and future tort claimants had an interest in property under § 363(f), and it is likely that the analysis would be totally different for current tort claimants and future tort claimants. If such an interest existed, then the Second Circuit should have provided adequate protection for those interests. Nevertheless, the entity that should have been the fo-

cus of successor liability is New Chrysler, not Old Chrysler. Everyone agrees that Old Chrysler had little or no money to pay unsecured creditors, but tort claimants, particularly future tort claimants, present unique challenges to a court and cannot be simply labeled as unsecured creditors. As a practical reality, future tort claimants cannot have a claim against Old Chrysler, or any entity for that matter, until their injuries occur. Whether a bankruptcy court can eliminate successor liability, which is purely a nonbankruptcy, state-law issue, through § 363 sales is an issue that requires a much different analysis than most courts have conducted when presented with such issues.

Congress is clearly aware of the problem that future tort claimants face as evidenced by § 524(g) and its protection afforded to victims of asbestos injuries,[100] but Congress has yet to expand the powers of the Code to deal with other types of future tort claimants, such as those injured by Chrysler vehicles. Furthermore, a channeling injunction or special litigation trust could be created to manage the unique problems associated with successor liability and personal injury victims. On the other hand, perhaps the bigger problem lies in the fact that the majority of courts analyzing successor liability claims and future tort claimants is not properly applying the principles of the Code. Indeed, a proper interpretation and analysis of the current Code language, and not congressional intervention, appears to be the better solution.

100. 11 U.S.C. § 524(g) (2006).