

October 2005

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Repository Citation

Matthew T. Gunlock, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in Their Interpretation of "Interests" Under Section 363(f) of the Bankruptcy Code*, 47 Wm. & Mary L. Rev. 347 (2005), <https://scholarship.law.wm.edu/wmlr/vol47/iss1/7>

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

INTRODUCTION

The last several years have witnessed a markedly high number of corporate bankruptcy proceedings, including many high profile petitioners such as Enron, Adelphia Communications, WorldCom and Global Crossing.¹ Record numbers of public corporate bankruptcies were set in 2001 and again in 2002; during this time, 191 such companies filed for bankruptcy protection.² The bankruptcy process often involves the sale of corporate assets to raise money for creditors of the business, and the Bankruptcy Code³ offers two means by which a debtor or trustee may sell business assets: sections 363(b) and (f),⁴ which govern sales *prior to* approval of a reorganization plan, and sections 1123(a)(5)(D)⁵ and 1141(c),⁶ which govern sales made *pursuant to* a reorganization plan. Debtors and trustees most often prefer a pre-plan sale under § 363 because in comparison to sales pursuant to a reorganization plan, pre-plan sales impose the Bankruptcy Code's minimum notice and hearing requirements and, accordingly, are usually quicker and less expensive.⁷

1. Susan O'Connell & Jeffrey R. Bourassa, *Bankruptcy: Does Your Legal Team Include a Forensic Accountant?*, 22 AM. BANKR. INST. J. 38 (Apr. 2003).

2. *Id.*

3. The Bankruptcy Code is codified in Title 11 of the U.S. Code.

4. 11 U.S.C. § 363(b), (f) (2000).

5. 11 U.S.C. § 1123(a)(5)(D) (2000).

6. 11 U.S.C. § 1141(c) (2000).

7. See 11 U.S.C. §§ 1125 (postpetition disclosure and solicitation), 1126 (acceptance of plan), 1128 (confirmation hearing) (2000); FED. R. BANKR. P. 2002, 9006, 9007 (notice rules). Under a sale pursuant to a reorganization plan, all parties in interest must have twenty-five days' notice of a hearing covering the disclosure statement. FED. R. BANKR. P. 2002(b). Compiling and circulating the disclosure statement and reorganization plan, distributing and collecting ballots, and conducting hearings for the disclosure statement and plan confirmation

Section 363(f) of the Bankruptcy Code provides a mechanism by which a debtor's assets may be sold "free and clear of any interest in such property."⁸ Such a "free and clear" pre-plan sale under § 363(f) not only saves time and money in terms of decreased notice and hearing requirements when compared to a sale pursuant to a reorganization plan,⁹ but it also provides a valuable means to raise funds for the debtor because a purchaser of bankruptcy assets will pay more for the assets when they are sold without the risk of successor liability.¹⁰ Accordingly, the purchaser, debtor, creditors, and general public are beneficiaries of the "free and clear" sale process under § 363(f). There has been ample debate, however, with respect to what constitutes an "interest" within the meaning of § 363(f).¹¹

It has been argued that bankruptcy courts and other courts have adopted a far too expansive view of what falls within the definition of an "interest" and have thereby impermissibly extinguished certain claims that might otherwise be rightfully pursued against the purchaser of the bankruptcy assets.¹² In contrast, others have argued that successor liability in the context of § 363(f) amounts to a regulatory taking in violation of the Takings Clause of the Constitution and that "interest" should be construed broadly.¹³ Case law has provided little guidance as to whether the narrow or expansive interpretation of "interest" is more compelling.¹⁴ A

require substantial time and money. A motion to sell assets under § 363, in contrast, may be approved within twenty days or fewer and may be brought at any time after the bankruptcy petition is filed. 11 U.S.C. § 363 (2000). A debtor achieves essentially the same result under either a § 363(f) sale or a sale pursuant to a plan of reorganization.

8. 11 U.S.C. § 363(f) (2000).

9. See *supra* note 7 and accompanying text.

10. The rational economic actor will require a discount on the purchase price of assets not "free and clear" to account for the increased risk that the purchaser will face successor liability in the future.

11. See *infra* notes 12-15 and accompanying text.

12. See, e.g., George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 236-37 (2002) (arguing that bankruptcy courts have not followed the plain meaning of § 363(f)).

13. See, e.g., William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutional Use of Successor Liability to Create a New Class of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325, 356-64 (1996) (arguing that successor liability is an unconstitutional servitude on purchased property).

14. See, e.g., *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 581-82 (4th Cir. 1996) (holding that

proponent of either side of the argument has little difficulty in marshaling decisions supporting his particular view of what interpretation is proper, and there is currently a marked split in the bankruptcy courts and courts reviewing their decisions.¹⁵

The importance of determining whether an item falls within the definition of "interest" according to § 363(f) cannot be overemphasized. A specific court's interpretation of what constitutes an "interest" can mean the difference between the termination of a plaintiff's claim against a successor purchaser and unbounded successor liability for the purchaser of the bankruptcy assets. As sales pursuant to § 363(f) become more widespread as a means to liquidate debtors' assets quickly and efficiently without having to satisfy the extensive requirements of developing and implementing a reorganization plan under other provisions of the Bankruptcy Code,¹⁶ the importance of resolving the uncertainty will grow increasingly acute. Some courts have found certain liabilities to be categorically unseverable from purchased assets.¹⁷ Other courts have allowed *all* liabilities to be severed from the debtor's assets, regardless of character.¹⁸ Still other courts have permitted successor liability in some circumstances while disallowing it in others by finding subtle distinctions between facially similar cases.¹⁹

obligations owed to benefit plans under the Coal Industry Retiree Health Benefit Act of 1992 were interests that could be stripped by operation of § 363(f)). *But see, e.g.,* Fairchild Aircraft Inc. v. Campbell (*In re Fairchild Aircraft Corp.*), 184 B.R. 910, 932-34 (Bankr. W.D. Tex. 1995) (holding that a § 363 sale order did not protect the purchaser of a commuter aircraft business against products liability claims brought on behalf of persons injured after the sale from the crash of aircraft made long before the sale), *vacated by* 220 B.R. 909 (Bankr. W.D. Tex. 1998). For further commentary about *In re Fairchild Aircraft Corp.*, see Bruce H. White & William L. Medford, *Section 363 Sales: Let the Buyer Beware*, 21 AM. BANKR. INST. J. 28 (July-Aug. 2002).

15. *See supra* notes 12-13 and accompanying text.

16. *See supra* notes 5-6 and accompanying text.

17. *See, e.g., In re Fairchild Aircraft Corp.*, 184 B.R. at 917-18.

18. *See, e.g., Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1145-50 (6th Cir. 1991).

19. *See, e.g., ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 930-32 (7th Cir. 2003) (holding that a party that purchases an intellectual property asset pursuant to a § 363(f) sale is protected against a third-party claim that the third party owns the asset). *But see, e.g., Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994) (criticizing the notion that buyers in bankruptcy sales should be protected from all successor liability and declining to hold that bankruptcy courts can preclude claims of successor liability as a means to boost the proceeds from sale). "To do so [would provide] an advantage that asset sellers do

A recent Third Circuit decision, *Equal Employment Opportunity Commission v. Knox-Schillinger (In re Trans World Airlines, Inc.)*,²⁰ exemplifies the friction that plagues the interpretation of what constitutes an "interest" under § 363(f). This Note utilizes that case as an example for purposes of discussing the matter and for recommending a case law-driven means to minimizing some of the confusion in the interpretation and the application of § 363(f). Part I supplies a contextual background to *In re TWA*. Part II discusses § 363(f) generally and identifies the problems of statutory construction that have led to the controversy in its interpretation. Part III analyzes the reasoning of *In re TWA*, focusing particularly on the Third Circuit's broad interpretation of "interest" in contravention of the plain language of § 363(f). Part IV suggests that the result in *In re TWA*, although beyond the scope of the plain language of § 363(f), was based on the court's balancing of equitable circumstances within the case and when read in that context, was the correct result. Part IV contends further that bankruptcy courts and reviewing courts ought to ground such equity balances within preexisting equitable powers provided by the Bankruptcy Code rather than in amorphous discussions of public policy. This Note concludes that such an approach would do less violence to the plain language of § 363(f) than the practice used by the *In re TWA* court and those courts following similar approaches, while still maintaining ample flexibility for courts to serve the overall interests of the Bankruptcy Code.

I. PRELUDE TO A CONTROVERSY: THE PRE-PETITION SALE OF TWA ASSETS TO AMERICAN AIRLINES

On January 10, 2001, Trans World Airlines (TWA) filed a Chapter 11 bankruptcy petition.²¹ The United States' eighth-largest airline at the time, TWA had not earned a profit in more than ten years.²² In the spring of 2000, TWA determined that it could not continue to

not have outside the bankruptcy laws." Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716, 731 (Bankr. N.D. Ind. 1996).

20. 322 F.3d 283 (3d Cir. 2003).

21. *In re Trans World Airlines, Inc.*, No. 01-00056, 2001 Bankr. LEXIS 980, at *5 (Bankr. D. Del. Apr. 2, 2001).

22. *In re TWA*, 322 F.3d at 286.

operate independently and the company subsequently sought to enter a business combination—such as a merger with, or sale of assets to—a competing airline.²³ Throughout 2000, TWA was engaged in discussions with American Airlines regarding the formation of a prospective strategic partnership.²⁴

A week after proposing to purchase TWA's assets,²⁵ American Airlines agreed on January 9, 2001, "to a purchase plan subject to an auction and bankruptcy court approval."²⁶ Although TWA's assets were to be sold pursuant to a public bidding process, as of the deadline for the submission of bids, only American Airlines had offered an order-compliant bid.²⁷ The Board of Directors of TWA accepted American Airlines' proposal to purchase TWA's assets for \$742 million.²⁸

American Airlines purchased TWA's assets through a pre-petition sale process in accordance with the terms of § 363(f) of the Bankruptcy Code,²⁹ which allows for assets in bankruptcy to be sold "free and clear of any interest in such property" assuming certain preconditions are met.³⁰ Essentially, if the requirements of § 363(f) are satisfied, the bankruptcy court has the authority to sever "interests" from the assets so that the purchaser can take possession of them without fear of successor liability for such "interests."

The interests at issue in the *In re TWA* case were travel vouchers granted to TWA employees pursuant to the settlement of two class action lawsuits.³¹ The first suit claimed that TWA's maternity leave policy had violated Title VII of the Civil Rights Act of 1964.³² The second suit involved twenty-nine discrimination claims that had been filed against TWA with the Equal Employment Opportunity Commission (EEOC) alleging violations of several federal employ-

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 286-87.

30. 11 U.S.C. § 363(f) (2000).

31. *In re TWA*, 322 F.3d at 285.

32. *Id.*

ment discrimination statutes.³³ In approving the sale order conveying the assets of TWA to American Airlines, the bankruptcy court determined that § 363(f) had been satisfied and that there was no basis for successor liability attaching to American Airlines.³⁴ The United States District Court for the District of Delaware affirmed the bankruptcy court's order extinguishing the claims.³⁵ The United States Court of Appeals for the Third Circuit subsequently affirmed the district court's decision.³⁶

The Third Circuit's opinion likely will face ample scholarly criticism for its extremely broad interpretation of what constitutes an "interest" within the meaning of § 363(f).³⁷ Before discussing why the decision to strip the travel voucher and EEOC claims from TWA's assets, thereby precluding such claims from being enforced against American Airlines, will be subject to a high degree of criticism, it is worthwhile to discuss § 363(f) in a general sense to garner an overview of its basic doctrinal background.

II. SECTION 363(f): EXPEDIENT SALE MECHANISM OR A MEANS TO CIRCUMVENT VALUABLE PROVISIONS OF THE BANKRUPTCY CODE?

The sale of assets under the authority of § 363 of the Bankruptcy Code has become an increasingly important aspect of Chapter 11 filings.³⁸ The incidence of bankruptcy reorganizations has increased

33. *Id.* at 285-86 (noting alleged violations of Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).

34. *Id.* at 286. The order provided that

the free and clear delivery of the Assets shall include, but not be limited to, all asserted or unasserted, known or unknown, employment related claims, payroll taxes, employee contracts, employee seniority accrued while employed with any of the Sellers and successorship liability accrued up to the date of closing of such sale.

Id. at 286-87.

35. Equal Employment Opportunity Comm'n v. TWA, Inc. (*In re TWA, Inc.*), No. 01-0022 & 01-0026, 2001 U.S. Dist. LEXIS 25126, at *1 (D. Del. Oct. 11, 2001).

36. *In re TWA*, 322 F.3d at 293.

37. See generally Kuney, *supra* note 12, at 236-37 (contending that courts have interpreted "interest" too broadly to include "claims" from general unsecured claimants).

38. See *id.* at 242-43 (stating that the use of § 363(f) "has led to the rough-and-ready practice of ... throwing companies into bankruptcy merely to effect an asset sale of a business or division"); see also Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673 (2003) (arguing that the use of Chapter 11 to force asset sales has eclipsed the original purpose of Chapter 11); Elizabeth Warren & Jay L. Westbrook, *Secured Party in*

in the past several years in the wake of the September 11 terrorist attacks³⁹ and much ballyhooed corporate governance scandals⁴⁰ including—among others—Enron, WorldCom, Adelphia Communications, and Global Crossing.⁴¹ The costs associated with the development of a reorganization plan and a disclosure statement often push debtors in the direction of an asset sale as a means of maximizing asset value and quickly satisfying outstanding debts.⁴² Pursuant to § 363 of the Bankruptcy Code, if the trustee is authorized to operate the business of the debtor, the trustee may enter into transactions, including the sale or lease of property of the estate, and may use property of the estate, in the ordinary course of business, unless the court has ordered otherwise.⁴³ The trustee may conduct these transactions without the same expansive notice and hearing requirements that would otherwise be necessary in a reorganization proceeding under Chapter 11.⁴⁴

The express language of § 363(f) of the Bankruptcy Code provides that:

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—

Possession, 22 AM. BANKR. INST. J. 12 (Sept. 2003) (contending that Chapter 11 has become a vehicle for secured creditors to force the sale of assets as if the process were a federal judicial foreclosure proceeding rather than a reorganization).

39. See, e.g., Terry Maxon & Katie Fairbank, *Analysts Foresee Better Days Ahead for Travel, but Say More Shake-ups Likely*, DALLAS MORNING NEWS, Jan. 1, 2002, at C1 (noting that bankruptcies within the tourism industry increased in the wake of the terrorist attacks).

40. Rep. Michael Oxley, Press Conference at the National Press Club Luncheon (Mar. 1, 2004) (“[I]n late 2001 and in 2002, we saw \$7 trillion of market capitalization evaporate seemingly overnight. We faced unexpected bankruptcy after unexpected bankruptcy without knowing for sure how widespread the accounting and corporate governance problems really were.”).

41. See, e.g., O’Connell & Bourassa, *supra* note 1, at 38.

42. See Bodoh & Morgan, *supra* note 13, at 335; see also J. Vincent Aug et al., *The Plan of Reorganization: A Thing of the Past?*, 13 J. BANKR. L. & PRAC. 3, 4-5 (2004) (“A Section 363 sale is generally the preferred method for selling assets because it is quicker and less expensive, and provides a quick fix to address continuing losses, rapidly depleting assets, and loss of cash flow.”).

43. 11 U.S.C. § 363(b)(1), (f) (2000).

44. *Id.*

- 1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;^[45]
- 2) such entity consents;^[46]
- 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;^[47]
- 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.⁴⁸

The controversy with respect to § 363(f) has focused on the appropriate definition of "interest." The term "interest" is not defined within the Bankruptcy Code; therein lies much of the problem with judicial interpretation of § 363(f). The legislative history is clear that a mortgage or U.C.C. lien against property may

45. This subsection essentially requires courts to look to state statutory or common law principles of successor liability in an effort to determine whether such law would permit a severance of successor liability from the property at issue. Although the intricacies of state law successor liability could fill a treatise, only a cursory overview is necessary here. Interested readers are directed to the cited cases for further study.

Traditional notions of corporate common law hold that a purchaser generally is not responsible for the debts and liabilities of the selling entity. *See, e.g., Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988) (noting that "[w]hen no statutory merger or consolidation occurs, but one corporation buys all of the assets of another, the successor will not be saddled with the seller's liability except under certain conditions"). The rationale is that the debts and liabilities of the selling party do not attach to the assets, but to the corporate structure. Most jurisdictions have created four exceptions to the general "no liability" rule. *See Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977). The exceptions cover situations in which:

- (1) The purchaser expressly or impliedly assumes the liabilities of the seller. *See, e.g., Keller v. Clark Equip. Co.*, 715 F.2d 1280, 1289 (8th Cir. 1983).
- (2) The transaction constitutes a de facto merger or consolidation of the purchaser and seller corporations. *See, e.g., Leannais*, 565 F.2d at 439.
- (3) The successor is a mere continuation of the predecessor. *See, e.g., Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451, 1458-59 (11th Cir. 1985).
- (4) The transaction was entered into in an effort to avoid liabilities. *See, e.g., Schmoll v. ACandS, Inc.*, 703 F. Supp. 868, 872-74 (D. Or. 1988).

46. There is obviously no need to preclude the "free and clear" sale when the party holding the "interest" consents to its severance.

47. The use of the word "lien" is significant from a statutory language construction standpoint as it connotes that the other portions of § 363(f) apply to items *other than* "liens." This matter is discussed *infra* in text accompanying note 50.

48. 11 U.S.C. § 363(f) (2000).

be stripped under § 363(f).⁴⁹ Section 363(f)(3) specifically discusses “lien[s].”⁵⁰ If, however, a specific portion of § 363(f) was meant only to apply to “liens,” it must be concluded that the remaining portions of § 363(f) apply to “interests” *other than* liens, or, by implication, “liens” are but one subset of “interests.” The area at issue lies in determining what falls within the parameters of an “interest” and thus, what is properly strippable from bankruptcy assets pursuant to a sale in accordance with § 363(f).

The importance of what constitutes an “interest” under § 363(f) cannot be overemphasized. A specific court’s interpretation of what constitutes an “interest” can mean the difference between the termination of a plaintiff’s claim against a successor purchaser (thus decreasing the overall asset pool from which the claim can be satisfied) and unbounded successor liability of the purchaser of the bankruptcy assets. That is, if a plaintiff’s claim is held to be an “interest” that is properly strippable by a bankruptcy court under § 363(f), the plaintiff may only assert his claim against the sale proceeds. By contrast, if a plaintiff’s claim is held to be outside the scope of strippable “interests,” he may assert his claim against the purchaser of the bankruptcy assets under a theory of successor liability.⁵¹

Despite the fact that § 363(f) speaks only of an “interest,”⁵² some courts have routinely determined that it also may be used to strip “claims.”⁵³ From a statutory construction standpoint, however, it might be telling that the only provisions of the Bankruptcy Code that specifically authorize the sale of assets “free and clear” of “claims and interests” are § 1123(b)(4),⁵⁴ which permits the sale of

49. See H.R. REP. NO. 95-595, at 345 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6301-02.

50. 11 U.S.C. § 363(f)(3) (2000).

51. See *supra* note 45.

52. 11 U.S.C. § 363(f) (2000).

53. See, e.g., *Paris Mfg. Corp. v. Ace Hardware Corp.* (*In re Paris Indus. Corp.*), 132 B.R. 504, 507 (Bankr. D. Me. 1991) (finding that the “free and clear” sale provisions authorized the court to enjoin product liability claims against the purchaser); *Am. Living Sys. v. Bonapfel* (*In re All Am. of Ashburn, Inc.*), 56 B.R. 186, 191 (Bankr. N.D. Ga. 1986) (holding that product liability claims were precluded by a § 363(f) sale), *aff’d sub nom. Griffin v. Bonapfel* (*In re All Am. of Ashburn, Inc.*), 805 F.2d 1515 (11th Cir. 1986); *Rubinstein v. Alaska Pac. Consortium* (*In re New Eng. Fish Co.*), 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (finding that the § 363(f) sale was free and clear of Title VII discrimination and civil rights claims of debtor’s employees).

54. 11 U.S.C. § 1123(b)(4) (2000).

assets in the context of a plan, and § 1141(c),⁵⁵ which allows property to vest through a confirmed plan free and clear of “claims and interests.” That is, the argument goes, if the drafters of § 363(f) had intended it to apply to “claims,” they would have included language within that provision identical to that used in other areas of the Bankruptcy Code and, accordingly, the conspicuous absence of “claims” should be given effect by courts in their interpretation of § 363(f).

Furthermore, although the Code fails to define “interest,” it does define the term “claim” in § 101 as

[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or [a] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.⁵⁶

Had Congress intended for § 363(f) to apply to “claims,” it could have used the pre-defined word “claim” in its formulation of that section rather than the undefined term “interest.” Again, by implication, the absence of the word “claim” from the language of § 363(f) reflects a legislative intention to exclude “claims” from the operation of that section.⁵⁷

The appropriateness of the inclusion of “claims” within the purview of § 363(f) has been hotly debated. Proponents of one side of the argument emphatically believe that the inclusion of “claims” is wrong; they note that because pre-plan sales transpire on a more expedited basis and do not require extensive notice and multiple hearings that are part of the plan confirmation process, the

55. 11 U.S.C. § 1141(c) (2000).

56. 11 U.S.C. § 101(5)(A)-(B) (2000).

57. The author believes the latter argument (that the Code defines “claim” elsewhere) to be the most compelling evidence that § 363(f) does not contemplate “claims.” The former rationale (that the Code uses the terms “claims” and “interests” together elsewhere in the Code and, accordingly, such terms must be mutually exclusive) has been advanced by scholars, but it is noteworthy to mention that the other Chapter 11 contexts in which “claims” and “interests” appear together contemplate a means to distinguish the “interests” of equity stakeholders and the “claims” of creditors.

interests of some parties are subordinated inappropriately.⁵⁸ Those adopting this view argue that bankruptcy courts should return to a plain language interpretation of § 363(f), which would effectively require courts to narrow the scope of their interpretation of the section generally,⁵⁹ but broaden it in the specific area of traditional in rem property interests such as easements and covenants.⁶⁰ The foundation for this argument lies primarily upon the notion that to disallow successor liability in the bankruptcy law is to provide some benefit to asset purchasers that cannot be had outside the confines of bankruptcy proceedings.⁶¹

Other authors, adopting a contrary position, contend that the exclusion of claims from the operation of § 363(f) creates successor liability exposure to purchasers of bankruptcy assets amounting to a regulatory taking without compensation in violation of the Takings Clause⁶² of the Constitution.⁶³ Courts have failed to address

58. Kuney, *supra* note 12, at 272-86 (discussing the effect that inclusion of "claims" has on various stakeholders). The rejoinder to Professor Kuney's view, although significantly predating his article, was well stated by the Seventh Circuit in *Chicago Truck Drivers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 50 (7th Cir. 1995) ("[I]t is desirable, perhaps even necessary, to shield purchasers of failing businesses from liability incurred by the predecessors. Such protection is viewed as a means of encouraging market growth and the fluidity of corporate capital.").

59. Kuney, *supra* note 12, at 286-87.

60. George W. Kuney, *Further Misinterpretation of Bankruptcy Code Section 363(f): Elevating In Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Developments*, 76 AM. BANKR. L.J. 289 (2002) (arguing that in rem land interests should be interests that are stripped off under § 363(f)). To the extent that current judicial approaches vary from the plain language of § 363(f) and categorically exclude reciprocal easements and covenants from the operation of § 363(f) without resort to the equitable powers provision discussed *infra* Part IV, the author of this Note agrees with Professor Kuney. Kuney argues that bankruptcy courts are wont to ignore nonbankruptcy law mechanisms by which easements and covenants can be removed and that, as such, the courts are inappropriately failing to sever such "interests" pursuant to § 363(f)(1). *Id.* at 291.

61. See Kuney, *supra* note 12, at 235.

62. U.S. CONST. amend. V.

63. See Bodoh & Morgan, *supra* note 13, at 356-64. Bodoh and Morgan fail to discuss that the plain language of § 363(f) does not contain the word "claim." Kuney, *supra* note 12, at 258 n.91. Notwithstanding the omission, Bodoh and Morgan's overall rationale is compelling because sales pursuant to § 363(f), on the whole, provide a valuable and expedient means to liquidate debtor property. Although Bodoh and Morgan base much of their argument on "impermissible judicial activism," it may be argued that a court's failure to follow plain language would constitute similar "activist" conduct. See Bodoh & Morgan, *supra* note 13, at 353. For precisely this reason, this Note supports the broad operation of "free and clear" sales based not on the language of § 363(f) exclusively, but when § 363(f) is bolstered by additional equitable powers granted to courts elsewhere within the Bankruptcy Code. See *infra* Part IV.

this constitutional takings issue, but it is also important to mention that the takings analysis has a mirror image. That is, an inappropriate stripping of a claim through a § 363(f) sale could just as easily be construed as a constitutionally violative taking from the claimant who would otherwise seek to assert the claim.⁶⁴

What matters for purposes of the instant discussion is that reasonable minds have disagreed on the appropriate scope of the term "interest" under § 363(f). Case law in the area exemplifies the manifestation of such disagreement in spades.⁶⁵ Whatever a plain language reading of § 363(f)'s "free and clear" language may suggest,⁶⁶ a review of the decisions in this area reveals that a bankruptcy court's sales order pursuant to § 363(f) does not always operate as a complete bar to the imposition of future liability even in cases where the statutory language is directly quoted in the judicial order.⁶⁷ Some courts have found certain liabilities to be categorically unseverable from the purchased assets.⁶⁸ Other courts have reached exactly the opposite result.⁶⁹ Still other courts have parsed the language so as to permit successor liability in some

64. A more thorough analysis of the countervailing takings arguments is beyond the scope of this Note, but it is worthy to mention that the courts' failure to discuss the matter may well lie in the conundrum that would result from the takings analysis: A court passing on the takings issue would necessarily be addressing the "claim" as a potential taking of "property" and to identify the claim as an interest in property would allow the use of § 363(f) to strip the claim from the underlying property of the debtor. It would, of course, be this stripping of the claim that would give rise to the claim that such action was a taking in the first place. *See supra* note 13.

65. *See* United States Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (*In re* Leckie Smokeless Coal Co.), 99 F.3d 573, 581-82 (4th Cir. 1996) (holding that obligations owed under a retirement benefit plan were interests that could be stripped by § 363(f)). *But see* Fairchild Aircraft Inc. v. Campbell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 932-34 (Bankr. W.D. Tex. 1995) (holding that a § 363 sale order did not protect the purchaser against products liability claims), *vacated by* 220 B.R. 909 (Bankr. W.D. Tex. 1998).

66. *See supra* notes 45-48 and accompanying text.

67. *See, e.g.,* Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716, 733-35 (Bankr. N.D. Ind. 1996) (holding that despite the purchaser's contentions that it purchased the debtor's assets free and clear of all encumbrances, including environmental claims, successor liability was applicable to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) claims and that successor liability was not discharged by the debtor's bankruptcy sale).

68. *See In re* Fairchild Aircraft Corp., 184 B.R. at 917-18 (limiting § 363(f) to reaching only traditional in rem interests).

69. *See* Mich. Employment Sec. Comm'n v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1145-50 (6th Cir. 1991).

circumstances, while disallowing it in others.⁷⁰ Despite calls from some legal scholars for a return to a narrow plain language approach,⁷¹ bankruptcy treatises have noted that, generally, courts have taken a decidedly contrary approach, favoring a more expansive interpretation.⁷² Courts have seized upon authorities pointing in each direction and cited them as supporting authority for their decisions.⁷³

It was in this environment that the Third Circuit decided *In re TWA*, and it is within this same area of uncertainty that this Note discusses the court's reasoning.

III. *IN RE TWA*: UNCONVINCING REASONING BREEDS CONVINCING RESULTS

The appellants in *In re TWA*—the EEOC and the flight attendant class in possession of the travel vouchers—made two principal arguments regarding their claims.⁷⁴ First, they contended that their claims were “not interests in property within the meaning of [§ 363(f)] and that, therefore, these claims were improperly extinguished by the Sale Order.”⁷⁵ Appellants further asserted that “interests” within the meaning of § 363(f) were limited to “liens, mortgages, money judgments, writs of garnishment and attachment,

70. See, e.g., *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 930-32 (7th Cir. 2003) (holding that a party that purchases an intellectual property asset pursuant to a § 363(f) sale is protected against a third-party claim, provided that the third party was on notice of the proposed sale). But see, e.g., *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163-64 (7th Cir. 1994) (holding that the bankruptcy court lacked jurisdiction to enjoin a successor liability suit against the purchaser of the debtor's assets because the plaintiff's opportunity to pursue a legal remedy had been foreclosed by the debtor's liquidation).

71. See Kuney, *supra* note 12, at 237.

72. 3 COLLIER ON BANKRUPTCY ¶ 363.06[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed., rev. 2005).

73. See *infra* Part III.

74. *Equal Employment Opportunity Comm'n v. Knox-Schillinger (In re TWA, Inc.)*, 322 F.3d 283, 288 (3d Cir. 2003).

75. *Id.* Appellants also claimed that their claims were outside the scope of § 363(f)(5) because they could not be compelled, in a legal or equitable proceeding, to accept a money satisfaction of their interests. *Id.* American Airlines argued that appellants could be compelled to accept a money satisfaction of their claims. *Id.* The court dispensed with this portion of the appeal in a single paragraph and upheld the bankruptcy court's determination that because the travel vouchers and EEOC claims were both subject to monetary valuation, the condition of § 363(f)(5) had been satisfied. *Id.* at 290-91.

and the like, and cannot encompass successor liability claims arising under federal antidiscrimination statutes and judicial decrees implementing those statutes.”⁷⁶ Quite predictably, American Airlines argued that “while Congress did not expressly define ‘interest in property,’ the phrase should be broadly read to authorize a bankruptcy court to bar any interest that could potentially travel with the property being sold, even if the asserted interest is unsecured.”⁷⁷

The Third Circuit began its analysis by canvassing precedent and a treatise.⁷⁸ Although it acknowledged that some courts have narrowly interpreted “interests” to mean only in rem interests in property such as liens,⁷⁹ the court seized upon the language of the treatise that states, in pertinent part, that “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.’”⁸⁰

The court relied on two principal cases as the foundation for its ultimate decision to adopt an expansive reading of the term “interest.” One of these decisions was another Third Circuit case, *Folger Adam Security Inc. v. DeMatteis/MacGregor, JV*,⁸¹ in which the court determined that a § 363(f) sale of the debtor’s assets would *not* extinguish certain affirmative defenses, such as setoff and recoupment, to a breach of contract claim.⁸² Although the *Folger* decision actually limited the scope of § 363(f), the test adopted by the Third Circuit in *Folger* for determining whether an item was characterized properly as an “interest,” that is, whether the obligations “are

76. *Id.* at 288.

77. *Id.* at 288-89.

78. *Id.* at 288.

79. *Id.* (citing *Volvo White Truck Corp. v. Chambersburg Beverage, Inc.* (*In re White Motor Credit Corp.*), 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987)); *Rubinstein v. Alaska Pac. Consortium* (*In re New Eng. Fish Co.*), 19 B.R. 323, 326 (Bankr. W.D. Wash. 1982).

80. *In re TWA*, 322 F.3d at 289 (quoting 3 COLLIER ON BANKRUPTCY ¶ 363.06[1]) (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005); see also *WBQ P'ship v. Virginia Dep't of Med. Assistance Servs.* (*In re WBQ P'ship*), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995) (holding that Virginia's right to recover overpayments was an “interest”); *Am. Living Sys. v. Bonapfel* (*In re All Am. of Ashburn, Inc.*), 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (precluding plaintiffs from pursuing product liability claims against purchaser of bankruptcy assets).

81. 209 F.3d 252 (3d Cir. 2000).

82. *Id.* at 261.

connected to, or arise from, the property being sold,"⁸³ was the same as that utilized by the court in the *In re TWA* decision.⁸⁴

The other case relied upon by the *In re TWA* court, *United Mine Workers of American 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*,⁸⁵ was a Fourth Circuit decision that the Third Circuit had used earlier in its *Folger* decision.⁸⁶ In *Leckie*, the Fourth Circuit held that, irrespective of whether the purchasers of the debtors' assets were successors in interest, under § 363(f), the bankruptcy court could properly extinguish all successor liability claims against the purchasers arising under the Coal Industry Retiree Health Benefit Act (Coal Act) by entering an order transferring the debtors' assets free and clear of those claims.⁸⁷ Two employer-sponsored benefit plans that sought to collect Coal Act premium payments from the asset purchasers were held to have been asserting interests in property that had been terminated through the § 363(f) sale process, and, accordingly, their successor liability claims were not allowed to proceed.⁸⁸

The *In re TWA* court agreed with American Airlines' analogy between the claims in *Leckie* and those in the instant matter:

In each case it was the assets of the debtor which gave rise to the claims. Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Furthermore, TWA's investment in commercial aviation is inextricably linked to its employment of the [flight attendant plaintiffs' class] as flight attendants, and its ability to distribute travel vouchers as part of the settlement agreement. While the interests of the EEOC and the [flight attendant plaintiffs' 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.⁸⁹

83. *Id.* at 259.

84. *In re TWA*, 322 F.3d at 290.

85. 99 F.3d 573 (4th Cir. 1996).

86. *Folger*, 209 F.3d at 258-59.

87. *Leckie*, 99 F.3d at 585-87.

88. *Id.*

89. *In re TWA*, 322 F.3d at 290.

Following the case law analysis, the *In re TWA* court dissected the language of § 363(f).⁹⁰ The court determined that it would be inconsistent to equate "interests" in property with only in rem interests such as liens because the language of the section specifically provides for treatment of liens under subsection 363(f)(3).⁹¹ That is, if Congress had intended that § 363(f) be limited to "liens," it would not have created a subsection dealing exclusively with "liens."⁹² The court found that it was appropriate to view "liens" as a mere subset of "interests."⁹³

Finally, the *In re TWA* court embarked on what may only be described properly as a loose policy discussion under the subject heading "Other Considerations."⁹⁴ In that section, the court stated rather emphatically that "[e]ven were we to conclude that the claims at issue are not interests in property, the priority scheme of the Bankruptcy Code supports the transfer of TWA's assets free and clear of the claims."⁹⁵ Essentially, the court concluded that if the successor liability claims were allowed to proceed against American Airlines, the statutory scheme of prioritizing creditors' interests under the Bankruptcy Code would be disrupted. That is, allowing an unsecured claimant to proceed against the assets of a purchaser would effectively elevate the status of a general unsecured creditor over that held by secured creditors.⁹⁶ Following a § 363(f) sale, such secured creditors would be able to assert their interests only against the sale proceeds and the debtor's remaining estate.⁹⁷ The court specifically mentioned the fact that American Airlines was the only qualified bidder on TWA's bankruptcy assets and stated that "[t]he arguments advanced by appellants [did] not seem to account adequately for [this] fact."⁹⁸ From the language at the end of the

90. *Id.*

91. *Id.*

92. *Id.* (citing *WBQ P'Ship v. Va. Dep't of Med. Assistance Servs.* (*In re WBQ P'ship*), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995)).

93. *Id.* Curiously, the court failed to comment on the controversy regarding whether "claims" are also a subset of "interests."

94. *Id.* at 291.

95. *Id.*

96. *Id.* at 292.

97. *Id.*

98. *Id.* at 293.

opinion, it seems that the court's willingness to balance the equities of the case ultimately drove the final decision,⁹⁹ irrespective of statutory or case law authority:

Given the strong likelihood of a liquidation absent the asset sale to American ... we agree with the Bankruptcy Court 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 ... and to provide funding for employee-related liabilities, including retirement benefits.¹⁰⁰

This language clearly indicates that the court was balancing the equities in the case, but the court failed to make an explicit appeal to its equitable powers, thereby detracting from the case's value as precedent for the formulation of future bankruptcy court decisions.

IV. THE MISSING LINK: AN APPEAL TO EQUITABLE POWERS

What is missing from the Third Circuit's opinion is any *specific* discussion that might provide a firm grounding in the Bankruptcy Code for such a balancing of the case's equitable considerations. This Note contends that the result in the case was a good one overall.¹⁰¹ Certainly, the long-term macroeconomic and microeconomic effects of a major airline's bankruptcy cannot be overemphasized and, in light of the generally dismal economic conditions in the U.S. economy at the time of the *In re TWA* decision,¹⁰² the result in the case is unsurprising. What is surprising, however, is the apparent failure of the court to base what seems to be the driving rationale behind its decision—the overarching public policy concerns—on anything more than smoke and mirrors. Indeed, in a recent case, *In re Eveleth Mines LLC*,¹⁰³ the United States Bankruptcy Court for the District of Minnesota scathingly derided the

99. See Thomas D. Goldberg, *New Decisions Protecting Purchasers of Assets Under § 363 of the Bankruptcy Code*, 22 AM. BANKR. INST. J. 30, 30 (May 2003) (describing the *In re TWA* decision as having a "results-oriented undertone").

100. *In re TWA*, 322 F.3d at 293.

101. See also Goldberg, *supra* note 99, at 30 (noting that the results of *In re TWA* are "hard to argue with").

102. See *supra* notes 39-41 and accompanying text.

103. 312 B.R. 634 (Bankr. D. Minn. 2004).

line of reasoning adopted by the Third Circuit in *In re TWA* as being “built on an amorphously inclusive rationalization; it posits a loose sort of ‘but-for’ causality that is thrown up to identify the straw-built ‘interest’ that then is vanquished.”¹⁰⁴

To at least some degree, this criticism is well deserved. The *In re TWA* court’s inclusion of the EEOC and travel voucher “claims” within the scope of § 363(f)’s “interest” seems strained.¹⁰⁵ If all that is required of an item for it to be within the purview of § 363(f)’s meaning of “interest” is that it find some connection to the assets of the debtor, no matter how attenuated, then little would be beyond the scope of that section. If the debtor engaged any assets in its business operations, then it might be said that the “claim” or “interest” *arose* from those assets. If Congress had intended § 363(f) to provide utterly limitless power, we might have expected the language of that section to include a more exhaustive list of terms. For example, Congress could have drafted the language of § 363(f) in a manner that would allow for pre-plan asset sales to occur “free and clear of all interests, claims, and liens, both known and unknown.”

If it were not for the final portion of the opinion in which the court engaged in a non-explicit balancing of the equities—the “Other Considerations” section¹⁰⁶—we might well conclude that the *In re TWA* court saw no end to the definition of “interest” as provided by the language of § 363(f). In light of the “Other Considerations” section, however, it becomes apparent that the *In re TWA* court stopped somewhere short of an outright statement that § 363(f)’s language alone provides the authority for bankruptcy courts to extinguish “interests” in an infinitely expansive sense of that term. Actually, the court could not have concluded that § 363(f) was truly limitless without overturning its own decision in *Folger*,¹⁰⁷ a case cited approvingly for its “arising from” standard for determining what constitutes an “interest.”¹⁰⁸ Analysis of *In re TWA*, therefore,

104. *Id.* at 654.

105. *See supra* Part II (suggesting that plain language would not include the “claims” of unsecured creditors, such as tort claimants).

106. Equal Employment Opportunity Comm’n v. Knox-Schillinger (*In re TWA, Inc.*), 322 F.3d at 283, 291-93 (3d Cir. 2003).

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

108. *In re TWA*, 322 F.3d at 289-90 (citing *Folger*, 209 F.3d at 259); *see also* 3 COLLIER ON BANKRUPTCY, *supra* note 72, ¶ 363.06[1].

reveals that it remains unclear what, if not the plain language of § 363(f), gave the bankruptcy court the authority to sever the EEOC and travel voucher claims from the assets of TWA upon their sale to American Airlines and further, whether the court's action is defensible as a function of the overall goals of the Bankruptcy Code.

The *In re TWA* court's decision is defensible, but only when it is grounded within an honest discussion of the bankruptcy court's equitable powers. Furthermore, enough equitable powers already exist within the Code and are vested in bankruptcy courts generally to such an extent that the court in *In re TWA* could have reached its decision through § 363(f), at least when that section is coupled with § 105(a)'s grant of equitable powers.¹⁰⁹

Section 105(a) of the Bankruptcy Code reads as follows:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.¹¹⁰

Courts, scholars, and practitioners all greet the language of § 105(a) with some reservation because the breadth of power granted to bankruptcy courts by the section is not entirely clear.¹¹¹ Bankruptcy

109. See 11 U.S.C. § 105(a) (2000). This Note does not suggest that the result in *In re TWA* could have been reached through the operation of § 105(a) alone. The use of § 105(a) to accomplish goals not addressed elsewhere within the Code or not grounded in a specific Code provision has been widely, and deservedly, criticized. See *infra* note 111. See also *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988) (stating that the equitable powers of bankruptcy courts must be grounded in specific code sections). But see *Fairchild Aircraft Inc. v. Campbell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910, 933 & 933 n.28 (Bankr. W.D. Tex. 1995) (stating that § 105 may be utilized to enjoin successor liability claims but cannot bind future claimants who do not yet hold "claims" and are not part of the plan or sale process), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998). This Note merely suggests that the presence of § 105(a) illustrates the existence of equitable powers as a supplement to other Code provisions and encourages courts to discuss candidly the use of such powers in their interpretations of the plain language of § 363(f).

110. 11 U.S.C. § 105(a) (2000).

111. 2 COLLIER ON BANKRUPTCY ¶ 105.01[2] (Alan N. Resnick & Henry J. Sommer eds., 15th ed., rev. 2005) (noting that there are two competing "schools of thought regarding the breadth of section 105": an expansive view of the section, which argues that the section exists to plug any gaps in the Bankruptcy Code's statutory scheme, and a restrictive view, which

courts have been criticized for acting solely upon the powers granted by § 105(a) when they use that section to reach matters that perhaps would be otherwise beyond the scope of the Bankruptcy Code.¹¹²

Widespread criticism, however, does not render the language of § 105(a) meaningless. Rather, the language's inclusion within the Bankruptcy Code should serve as a reminder that, ultimately, bankruptcy courts are equitable in nature¹¹³ and that *all* of the Code's provisions are subject to a balancing of the equities in any case. It may be conceded that § 105(a) provides no affirmative grant of authority beyond that which is already granted by the Code's other provisions, but if the language of § 105(a) is to have any meaning at all, and particularly to critics of its widespread independent use, it must be that the section provides latitude to courts in their interpretation of a Bankruptcy Code that *must* be flexible from a purely pragmatic standpoint.¹¹⁴ This notion seems particularly apposite in cases involving the interpretation controversy of § 363(f).

argues that there are limits to the use of § 105).

[I]t should be universally recognized that the power granted to the bankruptcy courts under section 105 is not boundless and should not be employed as a panacea for all ills confronted in the bankruptcy case. Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code or mandates of other state and federal statutes.

Id.; see also *GAF Corp. v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 26 B.R. 405, 415 (Bankr. S.D.N.Y. 1983) ("Section 105 is not without limits. It does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules.") (quoting 2 COLLIER ON BANKRUPTCY, *supra*, ¶ 105.02).

112. See *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) ("[Section 105] does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."); *In re Transit Group, Inc.*, 286 B.R. 811, 815 (Bankr. M.D. Fla. 2002) ("As a general rule ... the equitable powers of bankruptcy courts must be exercised within the confines of the Bankruptcy Code. Thus, section 105(a) cannot be used to authorize any relief that is prohibited by another provision of the Code."); Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1361-69 (1993).

113. See *Young v. United States*, 535 U.S. 43, 50 (2002) ("[B]ankruptcy courts ... are courts of equity and 'apply the principles and rules of equity jurisprudence.'" quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)); *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990).

114. The entire bankruptcy process is essentially a compromise in that, in most cases, it seeks to satisfy the claims of numerous creditors within a finite asset pool.

It is also worthwhile to consider that § 363(f) originally arose from general equitable doctrine. A review of case law illustrates that as a matter of statute or under general equitable principles, the remedy afforded by § 363(f) has been a part of U.S. bankruptcy law for more than a century.¹¹⁵ Those readers who are troubled by this Note's recommendation that courts use equitable powers to expand and contract the meaning of "interest" in judicial interpretations of § 363(f) may find solace in the equity pedigree that marked that section's ancestors at common law. It would be difficult to contend broadly that § 363(f) lost its equitable character upon codification into its modern statutory form.

Most importantly, this Note proposes that bankruptcy courts can rightly consider "claims" in evaluating what should be stripped from bankruptcy assets in a free and clear sale even though § 363(f)'s language alone does not provide for such consideration.¹¹⁶ Consideration of "claims" is appropriate when conducted through the use of general equitable considerations inherent in all portions of the Bankruptcy Code. Courts should *expressly* evaluate the equities of each case, and if circumstances compel, as they did in *In re TWA*,¹¹⁷ the court should permit the sale of assets free of such "claims" and "interests" to facilitate a critical transaction that otherwise might not transpire,¹¹⁸ or at best, only transpire at a deep discount to account for risks of potential successor liability.¹¹⁹ Such a discount could inure to the detriment of the debtor, secured creditors, and the overall prioritization scheme of the Code as a whole,¹²⁰ while benefiting only a select few unsecured claimants. Conversely, if the interests of the claimants are of greater weight than the risk of a "market chilling" effect caused by the specter of successor liability, the court could refuse to grant the free and clear sale, or condition

115. See, e.g., *Van Huffel v. Harkelrode*, 284 U.S. 225, 227-29 (1931); *Ray v. Norseworthy*, 90 U.S. 128, (23 Wall) 134-35 (1874); *In re Waterloo Organ Co.*, 118 F. 904, 906 (W.D.N.Y. 1902).

116. See 11 U.S.C. § 363(f) (2000); *supra* notes 45-57 and accompanying text.

117. *Equal Employment Opportunity Comm'n v. Knox-Schillinger (In re TWA, Inc.)*, 322 F.3d 283 (3d Cir. 2003); see *supra* Part III.

118. *But see* Goldberg, *supra* note 99, at 30 (contending that it is probable that American Airlines would have consummated the transaction regardless of whether the claims at issue could be severed under the § 363(f) sales process).

119. See Bodoh & Morgan, *supra* note 13, at 358-59.

120. *Id.*

the sale upon a concession from the purchaser of the debtor's assets that successor liability claims are in no way precluded by operation of the court's sale order.

If a court were to follow the promoted approach, it would not necessarily be taking a different path than the *In re TWA* court, but it would at least be engaging in a candid and explicit equitable balancing process rather than the seemingly covert methodology employed by the Third Circuit in *In re TWA*.¹²¹ The law may never offer certainty in all cases, but it should, at the very least, be honest as to the means by which it reaches its conclusions.

CONCLUSION

"Free and clear" asset sales under § 363(f) of the Bankruptcy Code provide a valuable means for debtors to raise funds quickly to satisfy their financial obligations. The use of § 363(f) to strip assets of "liens" is well accepted,¹²² but whether "claims" can be stripped under that section is quite contested.¹²³ The word "interest" is not defined by the Bankruptcy Code and bankruptcy courts have varied as to whether they interpret "interests" as used in § 363(f) to include "claims."¹²⁴ Critics of the expansive interpretation of "interests" argue that such an interpretation does violence to the plain language of § 363(f) and injures unsecured claimants as a result.¹²⁵ Proponents of the expansive interpretation contend that to allow successor liability claims to proceed against the asset purchaser effectively allows for the interests of unsecured claimants to be inappropriately elevated above those of secured creditors in contravention of the overall prioritization scheme envisioned by the Bankruptcy Code,¹²⁶ and in some cases, may amount to an uncompensated taking in violation of the Constitution.¹²⁷

The Third Circuit decided *In re TWA* in 2003. In affirming the bankruptcy court and the district court, the Third Circuit settled on

121. See *supra* notes 104-07 and accompanying text.

122. See 11 U.S.C. § 363(f)(3); *supra* notes 45-47 and accompanying text.

123. See *supra* notes 12-15 and accompanying text.

124. See *supra* notes 12-15 and accompanying text.

125. See, e.g., Kuney, *supra* note 12.

126. See, e.g., Bodoh & Morgan, *supra* note 13.

127. *Id.* at 356-64.

a broad interpretation of “interest” under § 363(f) that allowed TWA’s asset sale to American Airlines to proceed “free and clear” of employee discrimination claims and liabilities for travel vouchers issued to a plaintiff class in settlement of an earlier lawsuit.¹²⁸ A reading of the *In re TWA* opinion reveals that the case was decided less on a purely statutory basis of § 363(f) than on a virtually covert balancing of the equitable circumstances present in the case.¹²⁹ Although this Note contends that the result reached by the Third Circuit in *In re TWA* ultimately was correct, the Note argues that the court’s reasoning would have had greater force if the court had expressly discussed its authority to resort to general principles of equity in deciding bankruptcy cases. Section 105(a) of the Bankruptcy Code provides equitable powers to bankruptcy courts. This Note concedes that, as a means to accomplish results beyond the scope of other provisions within the Bankruptcy Code, § 105(a) would be used incorrectly.¹³⁰ Section 105(a) may prove useful, however, as a means to provide additional latitude in cases involving “claims” of unsecured parties and “free and clear” asset sales pursuant to § 363(f).¹³¹

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128. Equal Employment Opportunity Comm’n v. Knox-Schillinger (*In re TWA, Inc.*), 322 F.3d 283 (3d Cir. 2003).

129. See *id.* at 291-93; *supra* notes 104-07 and accompanying text.

130. See *supra* notes 109-11 and accompanying text.

131. See *supra* notes 112-16 and accompanying text.

* I thank the following individuals: My wife, Danielle, for her continuing support; my parents, Thomas and Kimberly Gunlock, for their guidance; and William “Bud” Seall, a mentor and friend whose contributions to my legal career have been invaluable.