BANKRUPTCY LAW CONFERENCE

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STRUCTURING ASSET ACQUISITIONS FROM INSOLVENT SELLERS – BANKRUPTCY OPTIONS

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OVERVIEW OF ASSET SALES IN BANKRUPTCY

The Bankruptcy Code permits sales of assets of the estate in one of three ways. Assets can be sold pursuant to § 363 of the Bankruptcy Code (i) in the ordinary course of business under § 363(c), without notice or a hearing or (ii) other than in the ordinary course of business, under § 363(b), after notice and a hearing. Assets may also be sold in a Chapter 11 reorganization as part of a plan of reorganization under § 1123(a)(5). Part I below discusses sales pursuant to § 363(b); Part II discusses sales pursuant to a chapter 11 plan of reorganization; Part III discusses assignment of contracts as part of a sale; Part IV discusses successor liability and notice issues; and Part V provides a list of additional resources for various bankruptcy sale topics.

I. SECTION 363 SALES

Section 363(b) of the Bankruptcy Code provides that "the trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." The notice procedure for sales under § 363(b) is set forth in Bankruptcy Rules 2002, which requires 20 day notice, and 6004, which requires than any objection to a proposed sale be filed within five days before the date set for the proposed action or set by the court. An objection to the proposed sale is a contested matter governed by Bankruptcy Rule 9014. Although § 363(b)(1) speaks in terms of "notice and a hearing," the phrase, as defined by § 102(1), allows the court to authorize the sale of assets without an actual hearing if notice is properly given and no party in interest timely requests a hearing.

A. The Sale Process

The sales process begins when a so-called "stalking horse" bidder offers to buy a debtor's assets. The parties enter into an asset purchase agreement which is attached to a motion seeking bankruptcy court approval of the sale. The sale motion, which will seek authority to sell the assets free and clear of all liens and encumbrances (which shall attach to the proceeds), is noticed out to all creditors and parties in interest. Since the stalking horse offer is subject to higher and better counteroffers, the sale motion will also request that the court schedule an auction at which other potential buyers may bid on the assets.

1. Sales Free and Clear of Liens and Encumbrances

Pursuant to Code § 363(f), assets can be sold pursuant to § 363(b) "free and clear" of property interests in certain circumstances. In particular, Code § 363(f) provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –
>
> (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.

11 U.S.C.§ 363(f) (emphasis added). As the above underlined words make clear, § 363(f) states that property can be sold under § 363 free and clear only of any "interest." Nowhere does the Code explicitly authorize a § 363 sale to be made free of "claims." The terms are not interchangeable.

The term "interest", although not defined in the Code, is generally recognized to include a lien and other encumbrances on property. See Collier on Bankruptcy 363.06. Some courts have also concluded that the term is broad enough to include unsecured in personam liabilities of the seller. See In re Trans World Airlines, Inc. 322 F.3d. 283 (3d Cir. 2003) (assets sold free and clear of successor liability claims of TWA's employees); W.B.Q. Partnership v. Virginia Dep't of Medical Assistance Servs. (In re W.B.Q. Partnership), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995). Other courts, however, have refused to endorse a broad interpretation of § 363's plain language. See Fairchild Aircraft, Inc. v. Campbell (In re Fairchild Aircraft Corp.), 184 B.R. 910, 918 (Bankr. W.D. Tex. 1995) (plain language of statute is not broad enough to extinguish in personam liabilities). See also Michael H. Reed, Successor Liability and Bankruptcy Sales, 51 Bus. Law. 653, 665 n.62 ("There is nothing in the Code, however, to suggest that the term 'interest' was intended to embrace rights to payment, which are substantive nuclei of bankruptcy 'claims'.").

The term "claim" is defined by the Code as any right to payment or any right to an equitable remedy for breach of performance if the breach gives rise to a right to payment, whether contingent, fixed, liquidated, unliquidated, matured or unmatured, disputed or undisputed, reduced to judgment, legal, equitable, secured or unsecured[1]. As a general rule of

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[1] "Claim" is defined in 11 U.S.C. §,101(5) to mean:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

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

11 U.S.C. §01(5) (emphasis supplied). The intended breadth of this definition is emphasized in the legislative history to 11 U.S.C. §,101(5):

> By this broadest possible definition [of "claim"] and by the use of the term throughout the title 11 ..., the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 309 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 21 (1978).

thumb, a claim arising out of a transaction prior to the commencement of the bankruptcy proceeding is a prepetition claim; a claim arising from operative facts occurring after the commencement of the bankruptcy proceeding is a postpetition claim.

An interesting decision interpreting Section 363's breadth occurred in Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, 327 F3d 537 (7th Cir., 2003). In that case, the Seventh Circuit held that a debtor's court-approved sale of property "free and clear of all liens, claims, encumbrances and interests" pursuant to 11 U.S.C. § 363(f) eliminated the rights of a lessee under 11 U.S.C. § 365(h) to retain its rights under a lease rejected by a debtor. Prepetition, the debtor agreed to lease a portion of its property to one of its suppliers over a ten-year period for a nominal fee. After the bankruptcy filing, the bankruptcy court entered an order pursuant to § 363(f), approving the sale of substantially all of the debtor's assets "free and clear of all liens, claims, encumbrances and interests." The supplier, which had notice of the sale hearing, did not object. Subsequently, the lease was rejected and the buyer asserted ownership of the leased property "free and clear" of any rights of the supplier. The bankruptcy court held that, pursuant to § 363(f) and the terms of the sale order, the buyer had acquired the real property from the debtor free and clear of any rights of the supplier. The district court reversed but the Seventh Circuit reversed the decision of the district court and held that the supplier's rights to continued possession of the property under § 365(h) were "interests" that were extinguished by the sale.

2. Bidding Procedures and Devices

Concurrently with the sale motion, the debtor will file a motion seeking court approval of certain bidding procedures. These may include overbid protection, break-up fees, topping fees, bidding increments, deadlines for filing counteroffers and the auction procedures. Generally, courts will approve protections and fees for the stalking horse bidder if the debtor can show that the stalking horse would not have entered into the purchase agreement without such protections and if they are in the best interests of the estate. The court will usually approve the protections and fees provided that they are fair and reasonable and that they are not likely to have a chilling effect on other potential buyers. Some courts, however, require proof that the fees provided a substantial and actual contribution to preserve the bankruptcy estate.

3. The Auction and Sale Hearing

The bidding procedures order will require that potential buyers submit counteroffers for the assets by a deadline which is usually shortly prior to the auction. Generally, only those parties who submitted timely and qualified counteroffers will be allowed to participate in the auction. Bidding at the auction commences with the highest counteroffer received. Participants may be required to submit sealed bids or the auction may be conducted with open bidding, depending on the debtor's request (and sometimes the court's preference). The debtor will seek approval of the sale of its assets to the party who submitted the "highest and best" offer by the conclusion of the auction.[2] It is important to note that "highest and best" does not simply mean

[2] It is possible, however, for bidding to be reopened after the conclusion of the auction. In a recent case, Corporate Assets, Inc. v. Paolin, 368 F.3d 761 (7th Cir. 2004), the debtor requested a second auction be held when, after the conclusion of the first auction, a buyer indicated it would have paid more than the prevailing bidder if it had known

the highest offer—sometimes the debtor (usually in consultation with the creditors' committee) will determine that a slightly lower offer is in the best interests of the estate.

At the sale hearing, the judge will need to find that the following legal standard has been met: (i) the sale accomplishes a "sound business purpose"; (ii) accurate and reasonable notice was provided to all creditors and parties-in-interest; (iii) the price is fair and reasonable; and (iv) the sale was conducted in good faith. The judge will also need to make sure that the sale does not attempt to dictate the terms of any future plan of reorganization or liquidation. At the hearing, the judge will also consider all timely filed objections to the sale, including objections to the assumption and assignment of certain executory contracts and the transfer of the assets free and clear of liens and encumbrances, claims of collusion, or lack of good faith on the part of the buyer. If the judge approves the sale and all objections have been overruled or otherwise disposed of, the judge will enter an order approving the sale. The Federal Rules of Bankruptcy Procedure require that all sales be stayed for 10 days following the order in case an appeal is filed. This requirement may be (and frequently is) waived in the sale order in which case the parties may consummate the sale immediately upon entry of the order.

II. SALES UNDER A CHAPTER 11 PLAN

Section 1123(a)(5) of the Bankruptcy Code provides that a plan may be implemented by means of a "sale of all or any part of the property of the estate, either subject to or free of any lien." Section 1141(c) states that "property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." § 1123(a)(5) (emphasis added). This language is broader than the language in § 363(f) discussed above. Because of the broader statutory language in §1141(c), many commentators have noted that it might be preferable for a buyer to acquire assets under a plan under § 1129 rather than pursuant to a sale under § 363(f). Another advantage is that the debtor is exempt from payment of taxes on the sale pursuant to §1146(c). One disadvantage of sales through a plan is that the plan confirmation process often takes longer to complete than a § 363 sale.

A. The Plan Process

Debtors who seek to sell their assets through a plan often do so by means of a "pre-packaged" plan which is filed on the same day as their chapter 11 petition or shortly thereafter.

1. Debtor's Exclusivity Right

The debtor has an exclusive right to file a plan of reorganization during the first 120 days of a bankruptcy case. The Bankruptcy Court, however, may extend or reduce the 120-day period upon timely request. Once the debtor's exclusivity period expires, any creditor or other party-in-interest may file a plan of reorganization. The plan of reorganization is essentially a contract between the debtor and its creditors which provides for the treatment of their claims.

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the prevailing bidder from the first auction was again the prevailing bidder, but had to pay significantly more money. The prevailing bidder, seeking to pay only the amount of its successful bid at the first auction, appealed the judge's allowance of the second auction. The Seventh Circuit upheld the court's re-opening of the auction.

2. Plan Voting

Once a plan has been filed, and before votes of creditors can be solicited, a disclosure statement approved by the Bankruptcy Court must be provided to all holders of claims or interests in the debtor's estate. The disclosure statement must set forth the terms of the plan, as well as sufficient information to allow the holders of claims and interests to make an informed decision as to whether to vote for or against the plan. Creditors whose rights are adjusted by the plan of reorganization are eligible to vote in connection with the plan. In order for a class of claims to accept the plan, votes representing at least two-thirds an amount of the claims voted, and more than one-half in number of the creditors actually voting in that class must be cast for acceptance of the plan. Acceptance by a class of interest (equity holders) requires an affirmative vote by two-thirds in amount of the allowed interest actually voting in connection with the plan.

3. Plan Confirmation

Once a plan has been proposed, there are two methods by which it can be confirmed. The "acceptance" methods requires that all impaired classes of claims or interests have voted in the requisite number an amount to accept the plan. The "cramdown" method requires at least one class of impaired claims (but not interests) to have voted in the requisite number an amount to accept the plan and requires the plan to meet certain other requirements set forth in Section 1129(b) of the Bankruptcy Code. In either event, the Bankruptcy Code requires that each creditors must be paid at least as much as it would have received in a Chapter 7 liquidation case in addition to full payment of priority claims.

B. **Discharge of Claims**

A reorganized debtor typically receives a discharge upon confirmation of a plan. The statutory authority for discharge is 11 U.S.C. § 1141(d)(1)(A), which provides: "Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation . . . ." Discharge of prepetition debts results regardless of whether a proof of claim was filed or deemed filed, whether the claim was allowed, or whether the claimant accepted the plan. The confirmation of a plan does not discharge an individual debtor from certain nondischargeable debts under the Code, nor does it discharge a corporate debtor if the debtor does not engage in business after the consummation of the plan.

The substantial uncertainty that exists concerning the treatment of future claims in bankruptcy proceedings essentially concerns the dischargeability of such claims. See generally Ralph Mabey and Jamie Andra Gavrin, Constitutional Limitations on the Discharge of Future Claims in Bankruptcy, 44 S. Car. L. Rev. 745 (1993). Whether a predecessor's bankruptcy discharge precludes assertion of a claim against a successor depends in part on whether the claimant had a bankruptcy claim that was addressed adequately in the insolvency proceeding. See Ninth Avenue Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. Ind. 1996) ("It appears that while the bankruptcy courts might have the power to sell assets free and clear of any interest that could be brought against the bankruptcy estate during bankruptcy, either through Section 363(f) or through the powers of the bankruptcy court under other sections of the Code, a

sale free and clear does not include future claims that did not arise until after the bankruptcy proceeding is concluded.").

III. ASSIGNMENT OF EXECUTORY CONTRACTS IN BANKRUPTCY ASSET SALES

As part of the sale of its assets, a debtor will usually assign some or all of its contracts and leases to the buyer. The Bankruptcy Code ("Code") contains special provisions regarding executory contracts, which apply regardless of whether the assets are sold through a 363 sale or a plan. Although there is no definition of an executory contract in the Code, it is generally regarded as a contract on which performance is due to some extent on both sides. A contract that has been terminated or that has expired before the commencement of a bankruptcy case is not executory. The Code nullifies any provision in a contract that allows a nondebtor to terminate the contract on the grounds of the insolvency or bankruptcy filing of the debtor.

Under section 365 of the Code and with court approval, a debtor may: (i) reject an executory contract; (ii) assume an executory contract; or (iii) in a Chapter 11 proceeding, if the debtor neither rejects nor assumes a contract, let the contract "ride through" the reorganization and leave the rights of the parties thereunder unchanged upon the emergence of the debtor from Chapter 11. With limited exceptions and subject to certain requirements, the debtor may assume any executory contract even though the debtor is, at the time, in default under such contract. Upon assumption, the agreement is in full force and effect and binding on the debtor as well as on the non debtor; a debtor who assumes a contract receives not only the benefits of the contract, but also must undertake any burden or obligations under the contract.

A. <u>Assumption</u>

The Code provides no specific statutory requirements for assuming a contract where the debtor is not in default, other than the requirement of court approval. Where there is a default, however, the debtor must provide the non debtor with adequate assurance that it will (i) promptly cure the default; (ii) promptly compensate the non debtor for any actual pecuniary loss resulting from the default; and (iii) perform its future obligations to the non debtor under the contract. The adequacy of these assurances is governed by the standard of commercial reasonableness, and thus the debtor does not have to make a showing of absolute certainty that its performance will always be satisfactory to the non debtor.

1. <u>Curing the Default</u>

The debtor may cure defaults under an executory contract by rendering all performances then due under the contract. There are certain defaults, however, that the debtor need not cure for it to assume the contract. Defaults arising from a breach of a contractual provision relating to the commencement of a bankruptcy case, the appointment of a bankruptcy trustee or the insolvency or financial condition of the debtor at any time prior to the closing of the case need not be cured for the debtor to assume the contract or release. Although the Code does not specify the types of contract provisions which relate to the "financial condition" of the debtor, essentially default provisions based on a debtor's profits or revenues are likely to be considered provisions related to the debtor's financial condition. Contract provisions creating defaults

solely because of the debtor's insolvency are unenforceable under the Code. Often, the financial circumstances leading to bankruptcy preclude the debtor from being able to cure defaults by rendering performance. Consequently, the debtor may defer its cure but must provide adequate assurance of its future ability to effect the cure. The Code contains no standards for determining what constitutes adequate assurance of prompt cure, and therefore a "prompt cure" will depend on the circumstances of each case.

Section 365(b)(2)(D) provides that a debtor need not cure a default "relating to the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform non-monetary obligations under the executory contract or unexpired lease." In Worthington v. Claremont Acquisition Corporation, Inc. (In re Claremont Acquisition Corp., Inc., 113 F.3d 1029 (9th Cir. 1997), the court held that the word "penalty" applied to both the word "rate" and the word "provision" so that a debtor could not assume a contract without curing non-monetary defaults, even if such defaults were "historical facts" and incapable of being cured. The First Circuit, however, recently took a contrary position and held that a debtor could assume a contract even if there was a non-monetary default that was incapable of being cured. Eagle Insurance Company v. BankVest Capital Corp. (In re Bankvest Capital Corp., 360 F.3d 291 (1st Cir. 2004).

2. Compensate for Actual Pecuniary Loss

The debtor must also provide adequate assurance that it will compensate the non debtor for any actual pecuniary loss resulting from defaults under the contract in order to assume that contract. Generally, the case law suggests that the debtor's cure of defaults in most instances moot any claim for actual pecuniary loss.

3. Adequate Assurance of Future Performance

Finally, in order to assume a contract the debtor must provide adequate assurance of future performance thereunder. A court's determination of whether a debtor has complied with this requirement may be based upon, among other things, whether the debtor's financial data indicates its ability to generate an income stream sufficient to meet its obligations, the general economic outlook in the debtor's industry, and the presence of a third party guaranty. The words "adequate assurance" are to be given a practical construction and a determination of what constitutes adequate assurance of future performance is determined under the facts of each particular case.

B. **Assignment**

Under the Code, the debtor has the authority to assume and then assign an executory contract. Generally, anti-assignment clauses in executory contracts are not enforceable. Except as discussed below, the debtor is free to assign a contract if it cures prior defaults and compensates the non debtor for pecuniary losses, and the assignee provides adequate assurance of future performance under the contract. Upon assignment, the debtor has no further obligation under the agreement.

C. Restrictions on Assumption and Assignment

The general rules regarding assumption and assignment are subject to one provision that has had significant importance to the determination of IP rights in bankruptcy. Specifically, Section 365(c)(1) of the Code recognizes that certain types of contracts should not be subject to assumption and assignment over a licensor's objection when applicable nonbankruptcy law excuses the nondebtor from accepting performance. The classic example of a contract that is not subject to assumption and assignment is a personal services contract. State law allows a nondebtor to refuse acceptance of performance from anybody other than the original contracting party -- and the Code honors that result. Litigation has occurred over what other type of law excuses acceptance of performance. The law seems well settled that a non-exclusive patent or copyright license agreement may not be assigned by the debtor licensee without the consent of the licensor unless the license itself permits such assignment. See Everex Systems, Inc. v. Cedtrak Corp., 89 F3d 673 (9th Cir. 1996); In re Education Media, Inc., 210 B.R. 237 (Bankr. S.D.N.Y. 1997).

Section 365(c)(1) has been used successfully by some licensors to prevent not only assignment of their IP licenses, but to also prevent mere assumption by the debtor. Three circuit courts of appeal (see In re Sunterra Corp., 361 F.3d 257 (4th Cir. 2004); In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999), cert dismissed, 528 US 924 (1999); In re James Cable Partners, L.P., 27 F.3d 534 (11th Cir. 1994)) and the Bankruptcy Court for Delaware (see In re Access Beyond Technologies, Inc., 237 B.R. 32 (Bankr. D. Del 1999) have concluded that a debtor that has no ability to assign an IP contract also lacks the ability to assume such a contract. These decisions place incredible leverage in the hands of licensors by allowing them to seek to obtain control of the license once a licensee files. Other courts have rejected that approach and instead allow a debtor to assume an IP license if it has no actual intent to assign but instead will continue to perform itself. See Institute Pasteur v. Cambridge Biotech Corp., 104 F.3d 489 (1st Cir. 1997), cert. denied, 521 U.S. 1120 (1997).

IV. BUYING THE ASSETS AND NOT THE LIABILITITES

In any sale context, a critical issue affecting the amount of the purchase price is the amount of any liabilities of the seller the buyer will assume. The general rule, in and outside bankruptcy, is that an asset acquirer does not assume any liabilities of the seller. Four traditional exceptions to this rule exist: (1) where the purchaser agrees, expressly or impliedly, to assume the obligations of the seller; (2) where the purchaser is deemed to constitute a mere continuation of the seller; (3) when the transaction is entered into fraudulently to escape liability; and (4) when the transaction amounts to a consolidation or de facto merger. A fifth exception, known as the product line exception, also has been recognized by courts in some states when a purchaser acquires a manufacturing business and continues the output of its line of products. See generally Ray v. Alad (Ray v. Alad), 19 Cal. 3d. 22 (1977).

If the purchase of assets falls within one of these exceptions, the purchaser may be liable as successor of the seller for a broad range of liabilities under state and federal law including liability for unpaid pension contributions, environmental torts, violations of the Fair Labor Standards Act, misrepresentations, fraud, RICO, federal and state usury laws, violations of federal lending laws and products liability.

Because the scope of the successor liability risk affects a buyer's purchase price decision, parties to a bankruptcy proceeding have an interest in understanding the risk and minimizing the risk to allow maximization of the estate's assets. Notice is critical to any buyer's attempt to avoid assuming unwanted liabilities. This Part discusses recent decisions regarding three central concepts about notice: (i) a purchaser of assets cannot successfully disclaim successor liability without any notice to the court or creditors; (ii) a judicial blessing of a successor liability disclaimer that is made without adequate notice to creditors is attackable; and (iii) adequate notice is the fundamental method of protecting the due process rights of creditors.

A. Disclaimers of Successor Liability Made Without Any Notice to the Court and/or Creditors are Subject to Attack

The risk of successor liability is substantial when notice, sufficient to satisfy due process standards, has not been provided to a debtor's creditors. The First Circuit made that point clear in Western Auto Supply Company v. Savage Arms, Inc. (In re Savage Industries, Inc.), 43 F.3d 714 (1st Cir. 1994). In that case, Savage Industries, Inc. ("Savage"), a firearms manufacturer, filed for Chapter 11 relief in February, 1988 in the United States Bankruptcy Court for the District of Massachusetts. In July, 1989, the Bankruptcy Court approved a sale of substantially all of Savage's assets to Savage Arms, Inc. ("Buyer"), a newly incorporated entity. The sale closed in November 1989 pursuant to the terms of an asset transfer agreement that was negotiated by the parties after the court's July 1989 sale approval order. Under the terms of the sales agreement, Buyer assumed liability for certain pending product liability claims asserted against Savage, but Buyer explicitly disclaimed all liability for any other product liability claim. Immediately after the sale, Savage ceased to operate and, without interruption, Buyer took up the manufacture of identical lines of firearms previously produced by Savage.

Meanwhile, in May 1989, a consumer ("Claimant") was injured by a firearm manufactured by Savage. One year after the closing of the asset transfer sale, Claimant brought a product liability action in Alaska state court against Savage and the retailer who had sold the firearm. The retailer then filed a third-party complaint against Buyer alleging that Buyer was liable under the theory of successor product line liability as recognized by Alaska state law. In June, 1991, the Bankruptcy Court approved Savage's Chapter 11 liquidation plan, which made no provision for contingent product liability claims disclaimed by Buyer. Buyer then requested declaratory and injunctive relief from the Bankruptcy Court supervising the Debtor's Chapter 11

The Bankruptcy Court enjoined the retailer from further prosecuting the third-party action, reasoning that Claimant's claim arose before the asset sale and Claimant was restricted to a pro rata share of the net proceeds from the asset sale. The Bankruptcy Court held that Buyer's explicit disclaimer in the asset transfer agreement had to be given full effect, at least in the absence of collusion, in order to prevent circumvention of the priority scheme of the Bankruptcy Code and the chilling of asset sales. The District Court concluded that the Bankruptcy Court lacked jurisdiction to enjoin prosecution of the Alaska state court action and vacated the injunction.

The First Circuit affirmed the District Court's order, concluding that the Bankruptcy Court erred when it enjoined the action against Buyer. The First Circuit determined that neither the retailer nor Claimant were afforded appropriate notice of either the Chapter 11 proceeding or

the asset sale. The First Circuit believed that the existence of forty four pending product liability claims at the time of the asset sale strongly suggested that Savage was or should have been on notice that certain types of firearms and thus, distributors, were "prominent candidates for future indemnification claims." Id. at 721. The First Circuit's decision makes clear that a complete failure to provide notice to creditors of a successor liability disclaimer will not pass constitutional muster and will leave a successor entity exposed. Yet, the decision provides no guidance as to the type and manner of notice that should have been provided to the Claimant and retailer. Instead, the Court's decision appears fixated on its conclusion that the Buyer's non assumption of liability claims based on Savage's pre petition conduct was a "closet term" in a "privately negotiated" agreement that was never disclosed to the Court or any other party. 43 F.3d at 723. As the First Circuit's decision makes clear, a purported disclaimer of successor liability made without notice to the court or creditors is ineffective.

B. Disclaimers of Successor Liability Approved by the Court are also Subject to Attack in the Absence of Proper Notice to Creditors

Moreover, even disclosure to and court approval of a liability limiting provision cannot infringe the due process rights of successor liability claimants. The Seventh Circuit made that point clear in a decision relating to the Chapter 11 case of Cary Metal Products, Inc. ("Cary") which, as debtor in possession, sold all of its assets to Zerand-Bernal Group, Inc. ("Zerand"). The sale agreement was subject to entry by the bankruptcy court of an order approving the sale "free and clear of any liens, claims or encumbrances of any sort or nature" and reserving jurisdiction in the bankruptcy court to enjoin "any products liabilities claims arising prior to the Closing or relating to sales made by [Cary] prior to the Closing." Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161 (7th Cir. 1994). Thereafter, Cary and the creditors' committee jointly filed and obtained confirmation of a plan providing for the liquidation of Cary and the establishment of a trust fund to pay out the proceeds from the sale to Zerand. The plan was then consummated, with all proceeds from the sale being distributed to Cary's creditors. Four and a half years after the sale, Ronald Cox, who had been injured by a machine manufactured and sold by Cary before the sale to Zerand, filed suit against Cary, Zerand and others in federal district court in Pennsylvania. Zerand then filed an adversary complaint in bankruptcy court in Chicago, seeking to reopen the bankruptcy proceeding and asking that Cox be enjoined from proceeding against Zerand in Pennsylvania. The bankruptcy court (which had originally entered the above order) held it lacked jurisdiction, and the district court affirmed.

The Seventh Circuit also affirmed, reasoning that the products liability suit neither arose in nor was related to Cary's bankruptcy case within the meaning of 28 U.S.C. § 1334(b). Specifically, the Seventh Circuit held that the products liability suit against Zerand was neither a claim by or against the debtor; that while all assets had been sold free from all liens and other encumbrances, Cox was not trying to enforce a lien; that even under 11 U.S.C. § 524(d), the discharge operated as injunction only against suing the debtor; and that allowing the bankruptcy court blanket power to enjoin all future lawsuits would allow the parties to bankruptcy sales to extinguish the rights of third parties without notice to them or any consideration of their interests.

The Seventh Circuit has suggested that even proper notice to creditors may not necessarily protect against successor liability claims. The Court's suggestion was made in Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v.

Tasemkin, Inc., 59 F.3d 48 (7th Cir. 1995), which involved a secured party's foreclosure action -- not an acquisition. In that case, two months after Tasemkin Furniture Company, Inc. ("Old Tasemkin") filed for bankruptcy relief, New Tasemkin, Inc. ("New Tasemkin"), a company owned by the daughter-in-law of the owner of Old Tasemkin, was incorporated and acquired the security interest in Old Tasemkin's assets from Old Tasemkin's secured lender. New Tasemkin then obtained relief from stay, foreclosed on its collateral and obtained Old Tasemkin's assets. The bankruptcy case was then closed. Union pension funds ("Funds") with claims against Old Tasemkin received no dividend. Two years after closure of the bankruptcy case, the Funds filed suit against New Tasemkin on the theory of successor liability. The District Court dismissed the suit.

The Seventh Circuit reversed, noting that successor liability under federal common law allows lawsuits even against "even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was 'substantial continuity in the operation of the business after the sale.'" 59 F.3d at 49. The Court held that the Funds could pursue a lawsuit under successor liability against New Tasemkin despite the fact that the Funds had participated in the bankruptcy. Although the District Court had held that a suit under successor liability would allow a creditor to circumvent the Bankruptcy Code's priority scheme, the Court of Appeals found that "a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a per se preclusive effect on the creditor's chances." Id. at 51.

C. What Type of Notice and Notice to Whom?

The above decisions emphasize that a bankruptcy asset sale does not constitute a magic wand that automatically dispenses with the need for due process. Indeed, the decisions clearly hold that the risk of successor liability claims is minimized when the due process rights of creditors during the bankruptcy proceeding have been protected. A good starting point for understanding due process is the Third Circuit's decision in Chemetron Corporation v. Jones, 72 F.3d 341 (3d Cir. 1995), cert. denied, 116 S.Ct. 1424 (1996).

In that case, Chemetron Corporation ("Chemetron"), an owner and operator of a landfill which received radioactive rubble, filed a Chapter 11 petition in 1988. Thereafter, the bankruptcy court fixed a claims bar date and required (1) that actual notice be provided to all persons known to have claims against Chemetron and (2) that constructive notice be provided to all other claimants by publication of notice in the national editions of the New York Times and Wall Street Journal. In addition to complying with the order, Chemetron voluntarily published notice in several other local newspapers.

Nineteen months after confirmation of the Chemetron plan, various plaintiffs sued Chemetron in state court. Chemetron moved to dismiss arguing that the claims had been discharged in bankruptcy. The claimants then filed a motion in bankruptcy court seeking permission to file late claims. The bankruptcy court found that the claimants (former residents and occasional visitors to the area near the landfill), were known creditors entitled to actual notice of the bankruptcy proceeding and the claims date, and granted the motion to file late claims. The district court reversed.

The Third Circuit affirmed the district court's decision, ruling that the central issue was whether the claimants were known or unknown claimants to Chemetron since that determined the amount of notice to be afforded to the claimants:

According to the Third Circuit, the Bankruptcy Court improperly used a "reasonably foreseeable" test to determine whether the plaintiffs were known or unknown creditors, in lieu of the proper "reasonably ascertainable" test. According to the Third Circuit, the Bankruptcy Court's reasonably foreseeable test "would place an impossible burden on debtors." 72 F.3d at 347. Because none of the plaintiffs currently lived near the site, the Court found itself "hard pressed to conceive of any way the debtor could identify, locate and provide actual notice to these claimants." Id. The Court rejected the plaintiffs' contention that Chemetron should have conducted a title search to determine the identities of possible claimants. In sum, the Court concluded that the constructive notice provided to the plaintiffs was constitutionally sufficient.4

In Kewanee Boiler Corp. v. Smith (In re Kewanee Boiler Corp.), 198 B.R. 519, 530 (Bankr. N.D. Ill. 1996), twenty months after confirmation, a boiler manufactured by the debtor in 1952 allegedly malfunctioned causing plaintiff injury. Plaintiff filed a complaint in state court against the reorganized debtor, which in turn filed an adversary proceeding in the bankruptcy case seeking an order enjoining plaintiff from collecting on his claim outside of the bankruptcy case and determining that plaintiff held a pre-petition claim that had been discharged in connection with the confirmation of the plan of reorganization.

The Bankruptcy Court, weighing in on the future claims issue, concluded that, despite the broad definition of the term "claim" in the Bankruptcy Code, plaintiff had no such claim because he had no right to payment "at any time prior to Debtor's confirmation and therefore had no pre-petition or pre-confirmation claim under [§ 101(5)]." Moreover, the Court held that even if plaintiff could be deemed to hold some sort of contingent claim, constitutional issues of due process would be implicated that would bar efforts to enjoin him. The Court noted the impossibility of providing any meaningful notice to people who do not yet know they suffer from an injury and that, in any event, no such notice was attempted.

The Court also noted that the confirmed plan did not take steps to limit its liability to future tort victims through any special provision for them in the plan. No fund was provided for distribution to these future claimants. No claims were ever filed on behalf of possible future claimants and a legal representative was not appointed. The plan itself never expressly provided for payment to a future class of claimants who had at that time not been injured by the products manufactured before bankruptcy was filed, but would or might be injured thereafter.

198 B.R. at 539. See also Fairchild Aircraft Incorporated v. Campbell (In re Fairchild Aircraft Corp.), 184 B.R. 910 (Bankr. W.D. Tex. 1995) (holding that claims made as a result of an aircraft crash did not constitute "bankruptcy claims" of a kind which could be affected by the plan confirmation order because no proof of claim had been filed on behalf of such future claimants, no legal representative had been appointed to protect their interests and there was no assurance that the interests of such future claimants were treated properly in the bankruptcy proceeding).

There is no consensus in the courts about who is entitled to what type of notice. Each case presents a unique fact pattern that leaves room for interpretation of any general rules. In the final analysis, the answer to the question "who gets what notice?" must be based on an analysis that considers the cost of providing additional types of notice to creditors, the risk that notice alone may later be deemed inadequate to have cut off a creditor's rights, and the size of the risk that successor liability claims will materialize.

V. ASSET SALE RESOURCES

A. Break-up Fees

1. Allowed

(a) In re American Shipyard Corp., 229 B.R. 551 (Bankr. D.R.I. 1998) (refusing to reconsider award of $175,000 break-up fee despite the fact that, in light of evidence presented as to out-of-pocket expenses sustained by stalking horse totaled only $85,000, court probably would not have approved the fee; "this Court hopefully has learned from what was probably a mistake here, and next time we will wait until all of the facts and figures are in before determining the alleged value of an alleged stalking horse.").

(b) In re Summerfield Pine Manor, 219 B.R. 637 (Bankr. 1st Cir. 1998) (bankruptcy court approved break-up fee and denied motion for mandatory abstention, appellate panel affirmed bankruptcy court's denial of motion).

(c) In re Integrated Resources, Inc., 135 B.R. 746 (Bankr. S.D.N.Y. 1992) (approving 1.6% break-up fee in $565 million transaction) aff'd 147 B.R. 650 (S.D.N.Y. 1992) appeal dismissed on jurisdictional grounds 3 F.3d 49 (2d Cir. 1993).

(d) In re APP Plus, Inc., 223 B.R. 870 (Bankr. E.D.N.Y. 1998) ($250,000 break-up fee allowed in $20 million transaction).

(e) In re 995 Fifth Avenue Assoc., 96 B.R. 24 (S.D.N.Y. 1989) ($500,000 break-up fee allowed in $76 million transaction).

2. Disallowed

(a) In re Public Service Co. of N.H., 160 B.R. 404 (Bankr. D. N.H. 1993) (break-up fee disallowed; unsuccessful bidder did not obtain court approval prior to applying for fee).

(b) Matter of Tiara Motorcoach Corp., 212 B.R. 133 (Bankr. N.D. Ind. 1997) (disallowing $200,000 break-up fee in $2.8 million transaction).

(c) In re America West Airlines, Inc., 166 B.R. 908 (Bankr. D. Ariz. 1994) (court disapproved break-up fee as unreasonable in amount and unnecessary to induce bidding).

B Minimum Overbid

1. M.L.B.R. 6004-1(a)(2)(B) (no court approval required for minimum increases that do not exceed 5 percent of he original purchase price).

2. Allowed

(a) In re APP Plus, Inc., 223 B.R. 870 (Bankr. E.D.N.Y. 1998) ($600,000 minimum overbid allowed in $20 million transaction).

(b) In re Integrated Resources, Inc., 135 B.R. 746 (Bankr. S.D.N.Y. 1992) aff'd 147 B.R. 650 (S.D.N.Y. 1992) appeal dismissed on jurisdictional grounds 3 F.3d 49 (2d Cir. 1993) ($15 million overbid requirement allowed in $565 million transaction).

(c) In re Crowthers McCall Pattern, Inc., 114 B.R. 877 (Bankr. S.D.N.Y. 1990) (minimum overbid of $500,000 allowed in $45 million transaction).

(d) In re Financial News Network, Inc., 1991 WL 127524 at *1 n.5 (Bankr. S.D.N.Y. May 10, 1991), aff'd 134 B.R. 737 (S.D.N.Y. 1991), aff'd 980 F.2d 165 (2d Cir. 1992) ($10 million overbid requirement).

3. Disallowed

(a) In re Twenver, Inc., 149 B.R. 954 (Bankr. D. Colo. 1992) (rejecting $100,000 minimum bid in $450,000 transaction).

C. Bidding Increments

1. Allowed

(a) In re APP Plus, Inc., 223 B.R. 870 (Bankr. E.D.N.Y. 1998) ($100,000 bidding increments allowed in $20 million transaction).

2. Disallowed

(a) In re Hupp Indus., Inc., 140 B.R. 191, 195 (Bankr. N.D. Ohio 1992) (bid increment minimum of $300,000 in $4,750,000 transaction held arbitrary and unreasonably high).

D. Topping Fees

1. Allowed

(a) In re Financial News Network, Inc., 1991 WL 127524 at *1 n.5 (Bankr. S.D.N.Y. May 10, 1991), aff'd 134 B.R. 737 (S.D.N.Y. 1991), aff'd 980 F.2d 165 (2d Cir. 1992) (approving topping fee of 10% of overbid).

2. Disallowed

(a) In re Twenver, Inc., 149 B.R. 954 (Bankr. D. Colo. 1992) (rejecting $50,000 topping fee in $450,000 transaction).

(b) In re APP Plus, Inc., 223 B.R. 870 (Bankr. E.D.N.Y. 1998) (disallowing $550,000 topping fee).

(c) In re Biderman, 203 B.R. 547 (Bankr. S.D.N.Y. 1997) (denying topping fee of $2 - $3.8 million in $233 million transaction).

E. No-Shop Clauses

1. Allowed

(a) In re Crowthers McCall Pattern, Inc., 114 B.R. 877 (Bankr. S.D.N.Y. 1990) ("To be sure, provisions such as these may deter other bidders somewhat . . . [b]ut such limited deterrence is often necessary to bring prospective bidders to the table with serious bids.").

2. Disallowed

(a) In re Biderman Indus. U.S.A., 203 B.R. 547 (rejecting no-shop clause in case where there was manifest self-dealing).

F No-Cooperation Clauses

1. Disallowed

(a) In re Biderman Indus. U.S.A., 203 B.R. 547 (rejecting no-cooperation clause in case where there was manifest self-dealing).

G. Bidding Issues

1. Late Bidders - the court is not required to accept the highest offer, and need not act "in an irregular fashion merely to gain a few extra dollars." In re Gil-Bern Indus., Inc., 526 F.2d 627 (1st Cir. 1975).

2. Relative Bidders (bids made relative to other parties' bids, e.g. "Ten percent more than Party B's bid.") In In re Mark Bell Furniture Warehouse, Inc., 992 F.2d 7 (1st Cir. 1993), the Court accepted a relative bid ($1,000 plus Party B's bid), but the decision was appealed and dismissed for lack of standing.

3. Non-Conforming Bidders (bidders who fail to follow sale notice requirements). In In re Financial News Network, Inc., 126 B.R. 152 (S.D.N.Y. 1991) the bankruptcy court rejected a counterbid higher than 10 million because it was nonconforming. The District Court reversed, holding that rigidity in applying sale procedures should give way to benefit of creditors.

4. Low Bidders - In appropriate circumstances, court may approve a lower bid based on factors such as "societal need." In re After Six, Inc., 154 B.R. 876 (Bankr. E.D. Pa. 1993).

H. Standards for 363(b) Sale

1. Sound Business Purpose--In re Lionel Corp, 722 F.2d 1063, 1071 (2d Cir. 1983)(factors include assets' proportional value to estate as a whole; likelihood that in near future plan of reorganization would be proposed and confirmed; effect of the proposed disposition of assets on future plans of reorganization; the value of proceeds to be obtained and whether the asset is increasing or decreasing in value).

2. Fair and reasonable price—In re Abbotts Dairies of Pennsylvania, Inc., F.2d 143, 149 (3d. Cir. 1986)(finding that "[g]enerally speaking, an auction may be sufficient to establish that one has paid 'value' for the assets of a bankrupt");

3. Good Faith—255 Park Plaza Assocs. Ltd. Pshp. v. Connecticut Gen. Life Ins., 100 F.3d 1214 (6th Cir. 1996) (To constitute lack of good faith, a court must find "fraud or collusion between the purchaser and the seller or the other bidders, or that the purchaser's actions constituted 'an attempt to take grossly unfair advantage of other bidders.").

4. Notice—M.R.R. Traders, Inc. v. Cave Atlantique, Inc., 788 F.2d 816 (1st Cir. 1986)(bankruptcy court properly vacated sale order where notice of sale had been improper). See also Cedar Island Builders, Inc. v. South County Sand and Gravel Co., 151 B.R. 298, 302 (D.R.I. 1993)(sale order vacated where debtor failed to provide notice by publication as required by local rule).

Approval Order

1. In re Tri-Cran, Inc., 98 B.R. 609, 617 (Bankr. D. Mass. 1989) ("The Bankruptcy Court can not vacate a sale conducted pursuant to 11 U.S.C. section 363(b) if that sale was not stayed pending appeal unless the party seeking to vacate the sale proves that the purchaser did not purchase in good faith.").

2. In re Mark Bell Warehouse, Inc., 992 F.2d 7(1st Cir. 1993) (absent stay pending appeal, Bankruptcy Code precludes appellate relief invalidating sale to "good faith purchaser."

3. In re Stadium Management Corp., 895 F.2d 845 (1st Cir. 1989) (absent stay of order confirming sale, court must dismiss pending appeal as moot once sale becomes final; court has no remedy that it can fashion even if it would have determined the issues differently).

4. Greylock Glen v. Community Savings Bank, 656 F.2d 1 (1st Cir. 1981) (affirming order that bank which conducted foreclosure sale and purchased property for an amount in excess of appraisers' value was a good faith purchaser).

5. Perlman v. Catapult Entertainment Inc., (In re Catapult Entertainment Inc.) 1999 WL 33702 19th Cir. 1999) (debtor in possession may not assume a non-exclusive patent license over licensor's objection).

I. Appeal

1. In re Saco Local Dev. Corp., 19 B.R. 119 (Bankr. 1st Cir. 1982). (a sale order is a final order and therefore immediately appealable).

2. In re CGI Indus., Inc., 27 F.3d 296, 299 (7th Cir. 1994) ("The request for a stay is not simply another formality to be observed in perfecting an appeal. A stay serves to maintain the status quo pending appeal, thereby preserving the ability of the reviewing court to offer a remedy and holding at bay the reliance interests in the judgment that otherwise militate against reversal of the sale.").

3. In re Saco Local Dev. Corp., 19 B.R. 119, 121 (Bankr. 1st Cir. 1982) ("[W]hen an order confirming a sale to a good faith purchaser is entered and a stay of that sale is not obtained, the sale becomes final and cannot be reversed on appeal.").

J. Exclusivity

1. Relevant Statutes: 11 U.S.C. §§1121(b), (c) & (d)

(a) The debtor has a 120 day exclusive period to propose a plan and a 180 day exclusive period to obtain acceptances of the plan.

(b) The debtor's exclusive periods may be extended after notice and hearing for cause, if the request for extension is made prior to the expiration of the period(s).

(c) Competing plans may be filed by parties in interest if the debtor has not filed a plan within the 120 day exclusive period or, if filed, the plan has not been accepted by all impaired classes under the plan within the 180 day exclusive period.

2. Cases

(a) In re Trainer's, Inc., 17 B.R. 246 (Bankr. E.D. Pa. 1982) - Cause to extend exclusive periods exists when the debtors were making substantial efforts to sell assets as a going concern and needed additional time to conclude negotiations.

(b) In re Crescent Manufacturing, Inc., 122 B.R. 979 (Bankr. N.D. Ohio 1990) - Prospective purchaser of debtor's assets had no standing (in its status as a prospective purchaser alone) to object to the debtor's motion to extend the time in which the debtor had an exclusive right to solicit acceptances of the debtor's plan, because the prospective reorganization had no effect on the purchaser's interests.

(c) Tranel v. Adams Bank & Trust Co. (In re Tranel), 940 F.2d 1168 (8th Cir. 1991) - Debtor who filed plan after the 120 day exclusive filing period, but before the expiration of the 180 day exclusive solicitation period, and who failed to gain acceptance of the plan with the 180 day period could not prevent parties in interest from filing competing plans; In re Mother Hubbard, Inc., 152 B.R. 189 (Bankr. W.D. Mich. 1993) - Court granted permission under F.R.B.P. 3016(a)(abrogated in 1996) to creditor to file competing plan when the debtor had failed to obtain acceptances of plan from all impaired classes within the debtor's 180 day exclusive solicitation period.

K. Filing of Competing Plans

1. Relevant Statutes

(a) 11 U.S.C. §1121(c) - Competing plan may be filed only by a party in interest.

(b) See also Committee Note to 1996 amendment to F.R.B.P. 3016 - The committee abrogated former Rule 3016(a), in which the court's permission was required to file a competing plan, because the committee was concerned that the requirement of prior court approval could have the effect of extending the debtor's exclusive periods without satisfying the requirements for an extension in 11 U.S.C. §1121(d).

2. Cases

(a) In re Landmark Park Plaza Limited Partnership, 167 B.R. 752 (Bankr. D. Conn. 1994) - When the debtor fails to propose a plan during the debtor's 120 day exclusive period and failed to request extension of exclusive periods, the debtor's rights are diminished and the court should permit competing plans from parties in interest, in order to encourage good faith, non-frivolous plans that will maximize the benefits of Chapter 11 for all creditors. As a result, the court permitted the filing of a creditor's plan filed 24 days prior to the confirmation hearing on the debtor's plan, and shortened the disclosure statement and voting periods on the

competing plan to permit a confirmation hearing on the same date as the debtor's confirmation hearing.

(b). Mid-Continent Racing & Gambling Co. I v. Sunflower Racing, Inc. (In re Sunflower Racing, Inc.), 218 B.R. 972 (D. Kan. 1998) - The bankruptcy court is not required to put competing plans on the same confirmation track as the debtor's plan, and may exercise its discretion to schedule different, later disclosure statement and confirmation hearings for a competing plan in appropriate circumstances.

(c) In re Rook Broadcasting of Idaho, Inc., 154 B.R. 970 (Bankr. D. Idaho 1993) - A purchaser of claims of creditors of the debtor had standing as a "party in interest" to file a competing plan proposing purchase of all of the debtor's assets; however, the purchaser of the debtor's assets in the debtor's plan did not have standing to object to the proposed disclosure statement for the competing plan; Accord In re First Humanics Corp., 124 B.R. 87 (Bankr. W.D. Mo. 1991).

L. Plan of Reorganization v. §363 Motion to Sell

1. Cases

(a) In re Embrace Systems Corp., 178 B.R. 112 (Bankr. W.D. Mich. 1995) - Sale of all or substantially all of the debtor's assets may be done under 11 U.S.C. §363 instead of through a plan of reorganization when a sound business purpose dictates such action; however, when the bankruptcy court is concerned about fairness and disclosure to creditors, it has the discretion to require that the sale be done through a plan.

(b) Committee of Equity Security Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063 (2nd Cir. 1983) - In considering whether a plan or §363 motion should be used to sell the debtor's assets, the bankruptcy court may consider the following non-exclusive factors: (i) proportionate value of asset(s) to the debtor's estate as a whole; (ii) amount of elapsed time since the filing of the Chapter 11 petition; (iii) the likelihood that a plan will be proposed or confirmed in the near future; (iv) the effect of the sale on a future plan; (v) the appraisal of the property to be sold v. the proceeds to be received from the sale; (vi) whether the asset is increasing or decreasing in value; and (vii) the type of disposition proposed - sale, lease or use of the property. Accord Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986).

(c) In re Noran & Wagner Chartered, 88 B.R. 85 (Bankr. D. Md. 1988); In re Condere Corp., 228 B.R. 615 (Bankr. S.D. Miss. 1998) - A §363 sale motion for substantially all of the debtor's assets is permissible in lieu of a plan if the motion is properly noticed to all creditors and contains at least the following information to compensate for the lack of a formal disclosure statement: (i) a statement that the debtor is liquidating its business; (ii) disclosure of the full terms of the sale

and the identity of the purchaser; (iii) an explanation of the effect of sale as terminating the debtor's ability to continue in business; and (iv) an explanation of why the proposed sale is reasonable and why the sale is in the best interests of the bankruptcy estate.

(d) Institutional Creditors of Continental Airlines v. Continental Airlines, Inc. (In re Continental Airlines, Inc.), 780 F.2d 1223 (5th Cir. 1986) - A person who objects to a §363 sale motion on the grounds that approval of the sale is not sought through a plan must specify what protection in the plan process is being denied through the motion process.

M. Plan Confirmation Statutes

1. 11 U.S.C. §1129(a)(1) - (a)(13) - Each element of statute must be met in order for bankruptcy court to confirm plan, including good faith, feasibility, and disclosure of insiders who the reorganized debtor will employ and the nature of their compensation.

2. 11 U.S.C. §1129(b)(2)(A)(ii) - A plan is fair and equitable with respect to an objecting secured creditor if the plan provides for the sale, subject to the creditor's right to credit bid its claim pursuant to 11 U.S.C. §363(k), of any property that is subject to the creditor's lien securing its claim, free and clear of such lien, with such lien to attach to the proceeds of the sale.

3. 11 U.S.C §1129(c) - Bankruptcy Court may confirm only one plan, and if two or more plans meet the criteria for confirmation, the court must consider the preferences of the creditors and equity security holders of the debtor in deciding which plan to confirm.

N. Plan Confirmation Cases

1. Good Faith

(a) Big Shanty Land Corp. v. Comer Properties, Inc., 61 B.R. 272 (N.D. Ga. 1985) - A debtor's and its purchaser's failure to disclose four documents which disclosed side deals (benefiting the debtor's sole shareholder and president) to sale of stock of the debtor required finding that the debtor's plan was not proposed in good faith.

(b) In re Kings Gate Apartments, Ltd., 206 B.R. 233 (Bankr. W.D. Okla. 1996) - A debtor proposed in good faith its plan to sell its sole asset (a subsidized apartment building) to a purchaser who planned to raze the building and construct a supermarket, despite HUD's argument that the debtor intended that its plan circumvent the debtor's agreements with HUD regarding the debtor's provision and maintenance of subsidized housing on the property.

2. Feasibility

(a) In re Sunflower Racing, Inc., 219 B.R. 587 (Bankr. D. Kan. 1998) - The debtor's plan proposing the sale of the debtor's racing track to an Indian tribe which planned to build a casino on the property was not feasible because the tribe's ability to perform the purchase and to build the casino were dependent and contingent upon uncertain federal and state government approvals of the tribe's purchase of the property and its casino development on the property.

(b) In re Kings Gate Apartments, Ltd., 206 B.R. 233 (Bankr. W.D. Okla. 1996) - The debtor's plan was feasible despite the debtor's on-going dispute with HUD and likelihood of HUD's assertion of non-dischargeable equitable remedies against the debtor in the future; feasibility is measured on the date of the confirmation hearing.

3. Secured Creditor Cram Down

(a) In re Realty Investments Ltd. V., 72 B.R. 143 (Bankr. C.D. Cal. 1987) - First mortgagee's plan could not be confirmed when the sale proposed in the plan contemplated the purchaser's assumption of the first mortgagee's lien on the debtor's real estate, but denied the second mortgagee the right to credit bid its secured claim and paid administrative, priority and unsecured creditors proceeds of the sale instead of the second mortgagee.

4. Confirmation of Competing Plan

(a) In re South Aiken Ltd., 121 B.R. 7 (Bankr. W.D. Pa. 1990) - The competing plan of the first mortgagee on the debtor's real estate confirmed instead of the debtor's plan when the mortgagee proposed an immediate sale of the debtor's sole asset to purchaser while the debtor proposed a two year marketing period in which to sell its real estate.

(b) In re Union Meeting Partners, 160 B.R. 757 (Bankr. E.D. Pa. 1993) and 165 B.R. 553 (Bankr. E. D. Pa. 1994), aff'd 52 F.3d 317 (3rd Cir. 1995) - Bankruptcy court did not confirm either the debtor's plan or its secured creditor's plan in either case. In the first case, the court held that the secured creditor's plan (in which it proposed that it purchase the debtor's real estate in exchange for its secured claim and a 25% payment to unsecured creditors) came closest to confirmation, and would be confirmed if the non-recourse secured creditor eliminated its unsecured claim (which it lost because it proposed a sale of the property on which it had a lien - 11 U.S.C. §1111(b)(1)(A)(ii)) and put a more realistic value on its secured claim. In the second case, the court again held that the secured creditor plan came closest to confirmation, but held that the new plan - which provided a 5 % payment to the debtor's unsecured creditors but denied the creditors recourse against the debtor's general partners - did not provide the creditors with as much of a dividend as they would receive in a Chapter 7 liquidation.

(c) Connecticut General Life Insurance Co. v. Hotel Assocs. of Tuscon (In re Hotel Assocs. of Tuscon), 165 B.R. 470 (Bankr. 9th Cir. 1994) - The bankruptcy court must make specific findings under 11 U.S.C. §1129(c) regarding the preferences of creditors and equity security holders when it confirms one plan over another competing plan.

O. Post Confirmation Statutes

1. 11 U.S.C. §1127 - Provides that modification of a confirmed plan is permitted prior to substantial consummation of the plan. The contents of the modified plan must comply with 11 U.S.C. §§1122 and 1123, and must meet the standards for plan confirmation under 11 U.S.C. §1129. The proponent of the modification must provide disclosure to affected classes in accordance with 11 U.S.C. §1125, and affected classes must be given the opportunity to change their votes for the plan as modified.

2. 11 U.S.C. §1142 - Requires that the debtor and any entity organized to carry out the confirmed plan shall effectuate the plan, and gives the court the power to make appropriate orders to effectuate the plan and its provisions.

3. 11 U.S.C. §1144 - Confirmation of a plan may be revoked if confirmation obtained by fraud, upon request by a party in interest within 180 days after entry of confirmation order and after notice and a hearing.

P. Post Confirmation Cases

1. Effectuation of Confirmed Plan

(a) In re Sugarhouse Realty Corp., 192 B.R. 355 (E.D. Pa. 1996) - The purchaser under a confirmed plan could not withdraw from agreement to purchase the debtor's real estate on the grounds that the committee failed to obtain a signature on a necessary agreement and that the purchaser post-confirmation had discovered the presence of hazardous waste on the debtor's land. The court analogized the plan to an offer to purchase which the creditors accepted and the bankruptcy court approved. In the process in which the plan was approved, the parties anticipated that certain signatures might not be obtained and made provision for such an event. Moreover, the purchaser was required to complete its due diligence on the purchaser prior to confirmation; if it desired to withdraw from the purchase, it should have done so at the confirmation hearing.

(b) Official Committee of Unsecured Creditors v. Siskind (In re Erie Hilton Joint Venture), 137 B.R. 165 (Bankr. W.D. Pa. 1992) - Individuals who agreed to fund payments under the debtor's confirmed plan could held liable (in the creditors committee's adversary proceeding) to pay the amounts due under the terms of the plan.

(c) Beal Bank, SSB v. Jack's Marine, Inc., 201 B.R. 376 (E.D. Pa. 1996) - The court cannot rewrite a confirmed plan on grounds of perceived inequities, but may clarify a plan when it is silent or ambiguous. The bankruptcy court's order requiring the debtor's secured creditor to assign its liens to the debtor's new lender after payment of the secured claim pursuant to the plan constitutes a "clarification" of the plan rather than a modification.

2. Modification of Confirmed Plan

(a) In re Temple Zion, Inc., 125 B.R. 910 (Bankr. E.D. Pa. 1991) - The court permitted the debtor to modify its confirmed plan to extend the closing date for the sale of certain of its property under the plan while paying the debtor's secured creditor adequate protection payments during the delay. The court found that the plan had not been substantially consummated, that the modified plan met the tests for confirmation and cram down in 11 U.S.C. §1129, and that new disclosure under §1127 was unnecessary when only one creditor was affected by the modification.

(b) In re Mount Vernon Plaza Community Urban Development Corp. I, 79 B.R. 305 (Bankr. S.D. Ohio 1987) - If the proposed modification of a confirmed plan does not adversely change the treatment of any creditor under the plan, no modified disclosure statement is necessary under §1127.

(c) In re Chisholm, 156 B.R. 336 (Bankr. M.D. Fla. 1993), as modified 157 B.R. 710 (Bankr. M.D. Fla. 1993) - A debtor's proposed modification of its confirmed plan by which the debtor seeks merely to substitute a new buyer for the original buyer under the plan ordinarily would be permissible; however, the debtor's motion would not be allowed when the debtor's modification is designed to cut off and foreclose post-confirmation rights of the original buyer.

3. Revocation of Confirmed Plan

(a) Tenn-Fla Partners v. First Union National Bank of Florida, 229 B.R. 720 (W.D. Tenn. 1999) - The district court affirmed the bankruptcy court's order revoking a confirmed plan when the bankruptcy court found that the debtor had intentionally concealed contacts from interested buyers and anticipated post-confirmation sale of its property and bonds at a price higher than the debtor's represented value of the property and bonds at the confirmation hearing.