

No. 05-628

IN THE
SUPREME COURT OF THE UNITED STATES

ACME CHEMICAL INDUSTRIAL PRODUCTS, INC.,

Petitioner,

v.

JEAN TIEN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

TEAM NO. 35
Counsel for Petitioner

February 6, 2006

QUESTIONS PRESENTED

- 1) Whether the equitable powers of the federal courts include the power to order the remedy of substantive consolidation of debtor estates under the Bankruptcy Code.

- 2) Whether the power to sell assets free and clear of interests under § 363(f) of the Bankruptcy Code permits a sale free and clear of successor liability claims.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported at ___ F.3d ___ (13th Cir. 2005). The opinion of the United States District Court for the District of Kelly is unreported.

STATUTES INVOLVED

This case involves 11 U.S.C. § 363 of the Bankruptcy Code. These are reprinted at Appendix A, infra, pp. viii to xi. Other supporting statutes cited are reprinted in Appendix B, infra, pp. xii to xix.

STATEMENT OF THE CASE

I. OPERATIVE FACTS

Acme Chemical Industrial Products, Inc. (hereinafter “ACME”) and its subsidiaries, Trona Ash Products Company, Inc. (hereinafter “TAPCO”) and Chemical America Product Company, Inc. (hereinafter “CAPCO”) filed voluntary bankruptcy petitions under Chapter 11 of the Bankruptcy Code (hereinafter “Code”) in the District of Kelly on August 20, 2004.

At the time of the filing, ACME, in conjunction with its subsidiaries, was a world-wide leader in production and distribution of soda ash and calcium chloride. Soda ash, produced by TAPCO, is compound widely used in the chemical industry. The calcium chloride produced by CAPCO is primary used as a road stabilizer and de-icing agent. ACME exclusively marketed and distributed the products while the subsidiaries produced and processed the chemicals. ACME was the sole purchaser of each subsidiary’s product at prices set by the respective CEOs; however, these prices did not always reflect market value. In addition to being the sole customer of each subsidiary, ACME managed the day-to-day operations of each company, which included processing, sales, marketing, and finance. The three corporations shared a centralized cash management system overseen by ACME. TAPCO and CAPCO shared the same board of directors and corporate officers. Several of these officers also sat on ACME’s board of directors. The senior managers of the subsidiaries were also employees of ACME. Both subsidiaries paid ACME fees relating to its administration of the operations, but this amount did not always accurately reflect the value of those services.

Sales of calcium chloride have risen over the past several years due to increased global consumption. This increase has not outpaced ACME’s losses, however, as the price of soda ash has fallen sharply over the past three years due to reduced demand. The drop in demand for soda

ash, combined with continually rising energy costs, led to ACME's financial distress. Furthermore, Jean Tien (hereinafter "Respondent") and other female employees filed a class action suit against CAPCO alleging employment discrimination based on gender. Because of its troubles, ACME defaulted on its primary credit agreement with Giantbank, N.A., resulting in cross-default of its other credit agreements. ACME currently owes over \$700 million to its creditors. ACME negotiated with several lenders in an effort to facilitate an out-of-court reorganization. After extensive negotiations, ACME, TAPCO, and CAPCO determined that Chapter 11 bankruptcy would provide the best venue for accomplishing its goal of reorganization.

ACME continued to sustain losses after filing bankruptcy and concluded a sale of the entities would be the best course of action. ACME's aggressive marketing campaign for its sale garnered its highest bid from Sousa Industries, Inc. (hereinafter "SOUSA") for a figure slightly above the market price of the assets. SOUSA conditioned its bid upon the sale of the three companies as a going concern and insulation from liability from the class action suit against CAPCO.

II. PROCEDURAL NATURE OF THE CASE

To better facilitate sale of the assets to SOUSA, ACME moved to substantively consolidate its bankruptcy estate with the bankruptcy estates of its debtor subsidiaries and for court authorization to sell its assets free and clear of all liens, claims, and encumbrances under 11 U.S.C. § 363(f). Respondent and other members of her class objected and moved to withdraw reference of the bankruptcy estates of ACME, TAPCO, and CAPCO from the bankruptcy court. This motion was granted and the case was withdrawn to the United States District Court for the District of Kelly pursuant to 28 U.S.C. § 157(d). After the District Court heard testimony and

oral arguments, it granted ACME’s motion to consolidate and sell its assets free and clear. Upon appeal to the United States Court of Appeals for the Thirteenth Circuit, the orders of the District Court were reversed and remanded. This appeal follows.

STANDARD OF REVIEW

Federal appellate courts should only overturn a lower court’s findings of fact if they are clearly erroneous. See Hirschfeld v. Spanakos, 104 F.3d 16, 19 (2d Cir. 1997). Conclusions of law are reviewed *de novo*. See Keach v. U.S. Trust Co., 419 F.3d 626, 634 (7th Cir. 2005). The Eleventh Circuit Court of Appeals held that “abuse of discretion” is the proper standard of review for orders of substantive consolidation, because the power to grant substantive consolidation is equitable and discretionary. See Reider v. Fed. Deposit Ins. Corp., 31 F.3d 1102, 1105 (11th Cir. 1994); see also In re Permian Producers Drilling, Inc., 263 B.R. 510, 514-515 (Bankr. W.D. Texas 2000).

SUMMARY OF THE ARGUMENTS

I. SUBSTANTIVE CONSOLIDATION IS APPROPRIATE AND AVAILABLE TO FEDERAL COURTS

The United States District Court for the District of Kelly granted Petitioner’s motion to substantively consolidate the bankruptcy estates of ACME, CAPCO, and TAPCO. This decision relied on the fact that the Debtors essentially operated as one unit and disentangling their affairs would be prohibitively expensive. Upon review, the United States Court of Appeals for the Thirteenth Circuit reversed, holding that this Court’s decision in Grupo Mexicano S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), precluded the use of substantive consolidation as an equitable remedy because it did not exist at the time of the Judiciary Act of 1789.

The Court of Appeals incorrectly held that substantive consolidation is not an available remedy and never reached the question of whether it is permissible in this case.

The facts of this case weigh heavily in favor of substantive consolidation. Courts have used substantive consolidation when the affairs of inter-related corporations are so entangled that the time and expense necessary to sort them out is so substantial as to threaten the recovery of all creditors. ACME, CAPCO, and TAPCO's inter-corporate associations were so complex that the cost of untangling them would be "prohibitively expensive."

ACME and its subsidiaries operated as one entity and creditors reasonably relied upon the appearance of a single entity in extending credit to the Debtors. This reasonable reliance justifies consolidation so that all similarly situated creditors are treated equally. No trade creditor opposed consolidation. Respondent and other class members, involuntary creditors who did not rely upon the separateness of the Debtors, are the only creditors who opposed substantive consolidation.

Substantive consolidation also accomplishes the goals of equity and the Bankruptcy Code because it avoids harm to creditors, maximizes the recovery for the estates, maintains the jobs of the Debtors' employees, and continues production of the Debtors' important products.

The Court of Appeals erroneously construed this Court's decision in Grupo Mexicano in reaching its decision that substantive consolidation is not available as a remedy in federal courts. Grupo Mexicano cannot be read as to eliminate all equitable remedies not in existence in 1789, but rather that equitable remedies in actions at law are limited. Because bankruptcy is inherently equitable, bankruptcy courts are not similarly constrained.

Furthermore, Grupo Mexicano did not explicitly deny the use of equitable remedies judicially created prior to this Court's decision. Substantive consolidation is a well recognized doctrine that has been widely applied in the Courts of Appeal since this Court's decision in

Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941). Grupo Mexicano does not expressly deny this remedy to the federal courts.

Irregardless of Grupo Mexicano, a statutory basis for substantive consolidation exists in the general equity powers bestowed upon the bankruptcy court by 11 U.S.C. § 105(a). Congress expressly authorized expansion of equitable remedies in the context of bankruptcy. Section 105(a) allows substantive consolidation pursuant to 11 U.S.C. § 1123(a)(5)(C).

Public policy dictates that federal courts be endowed with equitable powers not in existence in 1789 since the modern corporate structure is significantly more complex and varied than in 1789. Limiting equitable remedies to those available in 1789 would render the courts ineffective in the corporate context of today.

II. SALE OF ACME’S ASSETS FREE AND CLEAR OF RESPONDENT’S CLAIMS IS PERMITTED UNDER 11 U.S.C. § 363

Section 363(f)(5) of the Code permits the sale of the debtor’s assets “free and clear of any interest in such property” if “such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”

To maximize the proceeds of the sale of its assets, ACME needs to sell them free and clear of Respondent’s employment discrimination claims. Otherwise, the sale price will have to be substantially discounted for the estimated amount of damages. Such a price reduction will reduce the recovery of all the other similarly situated unsecured creditors.

Respondent’s employment discrimination claims are “interests in property” under § 363(f). The claims stem from Respondent’s employment position, which exists because CAPCO had assets that needed to be managed and operated; therefore, the claims arise from the property to be sold and are “interests in property.”

Respondent can be compelled to accept monetary satisfaction of her claims. It is presumed that she and the class seek monetary compensation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003e et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Since most Title VII cases award equitable restitution and the Equal Pay Act only provides for the illegally denied pay differential, Respondent and her class can be compelled to accept monetary satisfaction.

Furthermore, the doctrine of successor liability does not prevent ACME from selling its consolidated assets free and clear of Respondent's claims. Generally, the liabilities of a transferor do not pass to the transferee upon transfer of assets. There are only five enumerated exceptions to this general rule. Even though successor liability could attach to the sale of ACME's consolidated assets, § 363(f)(5) of the Code permits a sale which absolves purchasers of successor liability. Therefore, successor liability does not prevent ACME from selling its assets free and clear.

The goal of bankruptcy is to treat similarly situated creditors equally. If Respondent's claims remain attached, then ACME must reduce its sale price to SOUSA. If a monetary award is given in their employment discrimination suit, Respondent and the other class plaintiffs will be able to potentially recover in full against SOUSA, while other general unsecured creditors will take a much smaller pro rata share. Alternatively, if the sale price to SOUSA remains the same, but a portion is set aside in escrow to pay Respondent's claims, the same result occurs: Respondent recovers in full while other similarly situated creditors recover reduced shares. The bankruptcy scheme does not permit full recovery for one unsecured creditor while the rest take reduced amounts for their claims. Therefore, the only way to ensure the equal treatment of all

creditors it to permit ACME to sell its assets free and clear and give all unsecured creditors, including Respondent, rights to the proceeds of the sale.

ARGUMENT

SUBSTANTIVE CONSOLIDATION OF THE DEBTORS' ESTATES

I. COURTS HAVE ADOPTED SEVERAL DIFFERENT STANDARDS TO DETERMINE WHEN SUBSTANTIVE CONSOLIDATION IS APPROPRIATE

The majority of courts agree that substantive consolidation is an available equitable remedy, although they have not reached a consensus on how to apply the doctrine. See Bruce H. White & William L. Medford, Substantive Consolidation Redux: Owens Corning, 24 Am. Bankr. Inst. J., Nov. 2005, 30. One court even stated that “as to substantive consolidation, precedents are of little value.” In re Crown Mach. & Welding Inc., 100 B.R. 25, 27-28 (Bankr. D. Mont. 1989). Since credit arrangements exist in many forms, the courts must tailor this type of remedy on a case-by-case basis to further the ultimate goal of bankruptcy: the equitable treatment of creditors. Alexander v. Compton (In re Bonham), 229 F.3d 750, 764-765 (9th Cir. 2000).

The lack of doctrinal uniformity presents a challenge to a court trying to determine if the particular circumstances of a case warrant consolidation of debtor estates. As substantive consolidation has evolved, three prevailing tests have emerged from the federal appellate courts: a “factor based” approach, Fish v. East, 114 F.2d 177 (10th Cir. 1940), the Augie/Restivo test, Union Sav. Bank v. Augie/Restivo Baking Co., Ltd., 860 F.2d 515 (2d Cir. 1988), and the Auto-Train test, Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.), 810 F.2d 270 (D.C. Cir. 1987).

The United States Court of Appeals for the Tenth Circuit first developed an analytical test for substantive consolidation when it considered ten different factors in determining whether to disregard the corporate entities of a parent corporation and its subsidiary in Fish v. East, 114 F.2d at 191. Some of the factors included the parent and the subsidiary sharing common directors and officers, the parent corporation paying all the salary and expenses of the subsidiary, and the subsidiary conducting virtually all of its business with the parent corporation. Id. Subsequent courts have used these factors in a variety of forms, some creating additional factors to consider, others omitting factors. See Eastgroup Properties v. Southern Motel Ass'n, 935 F.2d 245, 250 (11th Cir. 1991) (analyzing, in addition to the Fish factors, four additional factors: 1) whether the estates are commonly owned, 2) whether the estates had common officers, 3) whether the entities had written agreements about management and operation of the business assets and whether funds flowed between the two, and 4) whether the two entities operated out of the same central office and whether any employees performed tasks for both companies); Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085, 1093 (1st Cir. 1983) (considering five factors); Holywell Corp. v. Bank of New York, 59 B.R. 340, 347 (S.D. Fla. 1986) (adopting a seven factor approach, but noting “not all of which must be found to support consolidation”); In re Donut Queen, Ltd., 41 B.R. 706, 709 (Bankr. E.D.N.Y. 1984) (using seven factors); In re Vecco Constr. Indus., 4 B.R. 407, 410 (Bankr. E.D. Va. 1980) (considering seven factors). Courts have used the various factors “[a]s an aid to (but not as a substitute for) making th[e] determination of the balance of equities for and against substantive consolidation,” since they provide a guide for objectively analyzing the interrelatedness of the entities. Holywell, 59 B.R at 347.

The approach adopted by Fish and its progeny has received criticism because there is not a clear standard as to how the factors should be applied and whether the presence of each factor should be considered equally or certain factors carry greater weight than others. See Sabin Willett, The Doctrine of Robin Hood: A Note on Substantive Consolidation, 4 DePaul Bus. & Com. L.J. 87, 102 (Fall 2005).

These criticisms resulted in a line of Second Circuit that eventually evolved into a two-pronged analysis in Union Sav. Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co.), 860 F.2d 515 (2d Cir. 1988). See also Talcott v. Wharton, 517 F.2d 997 (2d Cir. 1975); Flora Mir Candy Corp. v. R.S. Dickson & Co. (In re Flora Mir Candy Corp.), 432 F.2d 1060 (2d Cir. 1970); Chem. Bank New York Trust Co. v. Kheel, 369 F.2d 845, 847 (2d Cir. 1966); Soviero v. Franklin Nat'l Bank of Long Island 328 F.2d 446 (2d Cir. 1964).

The Second Circuit determined that “[the previously used] considerations are merely variants on two critical factors: (i) whether creditors dealt with the entities as a single economic unit and ‘did not rely on their separate identity in extending credit’; or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors.” In re Augie/Restivo, 860 F.3d at 518 (internal citation omitted).

The Court of Appeals for the D.C. Circuit adopted a different approach when it addressed what should be considered when deciding if substantive consolidation is appropriate in Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.), 810 F.2d 270 (D.C. Cir. 1987). The court developed a liberal balancing test that compares the benefits of consolidation with the harm it may bring to objecting parties, stating that “[t]he proponent must show not only a substantial identity between the entities to be consolidated, but also that consolidation is necessary to avoid some harm or to realize some benefit.” Id.

The Third Circuit Court of Appeals recently conducted an extensive examination of the history of substantive consolidation and the various tests applied when reviewing an order for consolidation in In re Owens Corning 419 F.3d 195 (3d Cir. 2005). The court expressed a preference for Augie/Restivo approach and held that a proponent of substantive consolidation must prove “(i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, *or* (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.” Id. at 211. However, the court noted that issues of substantive consolidation should be considered within the context of the principles the remedy is meant to advance, such as prohibiting offensive consolidation to disadvantage a group of creditors, respecting entity separateness, determining whether the harms to be remedied were caused by the debtors, and refusing consolidation when it would merely benefit administration. Id. at 211. One commentator has noted that this test, while somewhat following Augie/Restivo, has created a more stringent standard for substantive consolidation. White & Medford, supra at 47.

Thus, even though courts have adopted various standards for substantive consolidation, the remedy has maintained its equitable origins to the end that *all* creditors of consolidated debtors are treated equally.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT CONSOLIDATION OF ACME AND ITS SUBSIDIARIES IS APPROPRIATE

It is unclear what test, if any, the District Court used in granting ACME’s motion to consolidate because the Court of Appeals never reached the question of whether consolidation was appropriate. Tien v. Acme Chem. Indus. Products, Inc., ___ F.3d ___, ___ (13th Cir. 2005). ACME and its subsidiaries flagrantly disregarded corporate boundaries to such a degree that it is

the poster-child for substantive consolidation and the harms it is designed to address. Petitioner asserts that the findings of fact by the District Court overwhelmingly reinforce that it properly concluded the Debtor estates of ACME and its subsidiaries should be consolidated.

A. ACME and Its Subsidiaries Operated as a Single Entity

The interrelatedness of ACME and its subsidiaries is clear and unmistakable. The Debtors operated as a single economic unit so much so that, as Judge Schmid noted in dissent, “[t]o the rest of the world, ACME and its two subsidiaries operated as a single global producer of soda ash and calcium chloride.” Tien, ___ F.3d at ___, *22 (J. Schmid, dissenting). While courts and the Code generally respect the separateness of entities, the degree to which the Debtors operated as a single entity precisely presents the “compelling circumstances” which trigger the need for equitable remedies, including substantive consolidation. See In re Owens Corning 419 F.3d at 211.

The business practices of ACME and its subsidiaries made it difficult to determine where one company ended and another began. ACME was the sole customer of each subsidiary, often purchasing their products at below market value. They managed the day-to-day operations of both subsidiaries, services for which they were paid but for which the payment did not reflect the true value of the services provided. ACME also operated a central cash management system used to pay the salaries and expenses of CAPCO and TAPCO, and employed the senior managers of both subsidiaries. The boards of directors of the three corporations significantly overlapped, as the members of CAPCO’s and TAPCO’s boards were identical, and some of those directors also served on ACME’s board.

B. The Debtors’ Creditors Relied on the Unity of the Entities

The interrelated operations of the Debtors are not only significant because they acted as a single entity, but also because “the numerous trade creditors of ACME, TAPCO, and CAPCO did not rely upon the independence of the companies when extending credit, but rather treated the companies as a single unit.” Tien, ___ F.3d at ___, *8. See also In re Owens Corning 419 F.3d at 211; In re Augie/Restivo, 860 F.3d at 518. Consolidating the Debtors’ estates comports with the expectation of the lenders who treated the corporations as one entity, and “fulfilling those expectations is...important to the efficiency of credit markets.” In re Augie/Restivo, 860 F.3d at 519. Although the pro rata distribution to ACME’s and CAPCO’s creditors would be decreased after consolidation, not a single trade creditor of ACME or CAPCO objected to consolidation, indicating their acknowledgement that substantive consolidation is in their best interests.

In fact, the only creditors opposing consolidation are the statutory claimants represented by Respondent, who as involuntary creditors could not have relied on the separateness of the Debtors. The court in In re Owens Corning implied that tort and statutory claimants, such as the class plaintiffs here, should not be considered when determining whether or not to consolidate. See 419 F.3d at 212, n.21. Respondent should not be able to defeat consolidation solely on the basis of her class’ impairment when doing so would result in significant injury to the trade creditors that relied on ACME and its subsidiaries as one “indistinguishable entity.” Id.

C. Equitable Considerations Mandate Consolidation of the Estates

Consolidation of the Debtors’ estates also accomplishes the goals of equity and the Code because it avoids harm to creditors and maximizes the recovery for the estates. See In re Auto-Train Corp., 810 F.2d at 276. The District Court found that without consolidation of the estates, a hypothetical distribution would result in TAPCO’s creditors receiving approximately seven cents on the dollar while ACME’s and CAPCO’s creditors would receive between fifty and

seventy-five cents on the dollar. Tien, ___ F.3d at ___, *22 (J. Scmid, dissenting). The resulting inequitable treatment of similarly situated creditors is inapposite to the goals of the Code and “[t]o subject these trade creditors to such a small distribution when they believed they were dealing with ACME would be unconscionable.” Id. (J. Scmid, dissenting). Although the creditors of ACME and CAPCO will receive reduced pro rata shares if the estates are consolidated, “equity is not helpless to reach a rough approximation of justice to some rather than deny it to all.” Chem. Bank of New York, 369 F.2d at 847. Consolidation, therefore, results in justice to all the trade creditors since they are all similarly situated and all relied on the unity of the Debtor corporations.

Even though consolidation is not appropriate merely to reduce the administrative costs of the estates, In re Owens Corning 419 F.3d at 211, the expansive entanglement of the Debtors’ affairs mandates consolidation in this case. The District Court found not only that untangling the multitude of inter-corporate transactions would be “prohibitively expensive” to administration of the case, but also that “[i]t would be virtually impossible to apportion the sale proceeds between the companies in any principled manner.” Tien, ___ F.3d at ___, *8. The Debtors paid salaries and expenses using a central cash management system operated by ACME that and routinely engaged in complex inter-company loans and guarantees that were poorly documented. Entanglement such as this has been recognized as a factor strongly favoring consolidation. See In re Augie/Restivo, 860 F.3d at 518-19. Reducing administrative costs through consolidation is a benefit that will flow equally to *all* creditors, resulting in a higher pro rata distribution for each.

Furthermore, balancing of the equities in this case must go beyond considering the Debtors and the creditors. The employees of ACME and its subsidiaries also have a vested interest in the consolidation of the estates. SOUSA has indicated that upon purchase of the

assets as a unit, it will maintain operation of the Debtors' facilities, allowing the majority of the employees to retain their jobs, accomplishing one of the major goals of Chapter 11 reorganization. See H.R. Rep. 95-595 at 220 ("the purpose of a business reorganization case... is to restructure a business's finances so that it may continue to operate [and] provide its employees with jobs"). Additionally, the proposed sale to SOUSA ensures that TAPCO and CAPCO will continue to generate their respective products which are important to American industry and the public at large, a goal intended by the Code. See In re The Landing, 156 B.R. 246, 249 (Bankr. E.D. Mo. 1993) (noting Chapter 11 proceedings are intended "to allow a debtor...to continue to offer its goods and services and otherwise provide a benefit to the community"). Soda ash, of which TAPCO is one of only six producers in the United States, is an important chemical compound not only used to manufacture glass, soaps and a variety of other widely used products, but also plays a role in environmental and public protection by removing sulfur from smokestack emissions and facilitating water treatment and oil refining. The calcium chloride produced by CAPCO helps stabilize American roadways and keeps them free by melting snow and ice. The importance of both products, combined with maintaining the workforce of the corporations, should be considered in the equitable determination of consolidation.

The equitable considerations and principles to be advanced through substantive consolidation are clearly present in the case *sub judice* and therefore the District Court's order granting consolidation was proper.

III. SUBSTANTIVE CONSOLIDATION OF THE DEBTOR ESTATES IS AN EQUITABLE REMEDY AVAILABLE TO THE FEDERAL COURTS

A. Grupo Mexicano Only Limits Equitable Remedies in Actions Solely at Law

In holding that substantive consolidation is not an available equitable remedy, the Court of Appeals heavily relied on this Court's decision in Grupo Mexicano S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). The court reasoned that “[i]n the absence of 18th Century English law precedent for an order of the substantive consolidation of distinct bankruptcy estates, such an equitable remedy is simply not available.” Tien, __ F.3d at __ *15. This reasoning, while seemingly sound, ignores a vital procedural point of Grupo Mexicano which distinguishes it from the case at bar.

This Court held in Grupo Mexicano that a district court did not have the equitable jurisdiction and power to issue a preliminary injunction prohibiting the defendant from transferring assets in which no lien or equitable interest existed. See Grupo Mexicano, 527 U.S. at 339-40. The holding rested on the fact that the Federal Judiciary Act of 1789 only granted jurisdiction to “suits...in equity” and that this jurisdiction “is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” Id. at 318 (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).

After a lengthy discussion, this Court determined that because there was no remedy in the Court of Chancery that resembled a preliminary injunction where no lien or equitable interest in the property is claimed, the district court lacked the equitable power to grant such an injunction. Id. at 339-40. However, the decision must not be read to confine the equitable remedies available in federal court in all cases, but rather, only in cases where plaintiff has not raised a cause of action in equity.

This is made clear by Grupo Mexicano's distinguishing of Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). See 527 U.S. at 324-25. In Deckert, this Court approved a preliminary injunction prohibiting one of the defendant corporations from transferring assets. Id. at 286. The plaintiffs, purchasers of contract certificates, sought equitable rescission of a fraudulent sale based on the Securities Act of 1933 and restitution from a third party corporation, The Pennsylvania Company for Insurances on Lives and Granting Annuities (hereinafter Pennsylvania). Id. at 285. Because the defendant corporations were likely insolvent or near insolvency, the district court enjoined defendant Pennsylvania from transferring a fixed amount assets in order to protect the plaintiffs. Id. at 286. After reversal of the orders by the court of appeals, this Court reinstated all the orders of the district court, including the injunction against Pennsylvania. Id. at 291.

It should be noted that the injunction approved in Deckert is remarkably similar to the one denied in Grupo Mexicano. In both cases, the plaintiffs had "no legal or equitable interest" in the funds sought to be enjoined. Neither the plaintiffs in Deckert nor the plaintiff in Grupo Mexicano had yet received judgment against the defendants and both parties had a high likelihood of success in their respective case, as evidenced by both district court judges' initial grant of an injunction. Under Deckert, it appears that the equitable remedy of a preliminary injunction prohibiting transfer of assets by a defendant prior to judgment is permissible in federal court.

Grupo Mexicano, however, distinguished Deckert on the grounds that the plaintiffs in Deckert had stated a cause of action in equity, rescission of a contract, as opposed to the Grupo Mexicano plaintiffs, who sought legal enforcement of a debt. Grupo Mexicano, 527 U.S. at 325. Distinguishing Deckert, without overruling it, undermines the entire premise of the majority

decision in Grupo Mexicano. Under Grupo Mexicano's analysis, it stands to reason that as long as the original cause of action is one in equity, then equitable remedies are available to the plaintiffs whether or not they were available in the English Court of Chancery at the time of the Judiciary Act of 1789.

Extending this reasoning to the case *sub judice*, bankruptcy courts should not be limited to equitable remedies available in 1789 since they “are essentially courts of equity, and their proceedings inherently proceedings in equity.” Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934). Because all bankruptcy cases are inherently equitable, just as the cause of action in Deckert was equitable, bankruptcy courts are not limited by this Court's decision in Grupo Mexicano to equitable remedies available at the time of the United States' split from England.

B. Grupo Mexicano Does Not Expressly Forbid Previously Used Equitable Remedies Not in Existence in 1789

Although Grupo Mexicano attempts to limit federal courts to only equitable remedies available in 1789, it does not expressly forbid the use of equitable remedies judicially created prior to this Court's decision. Because substantive consolidation has been recognized since the early 1940's, Grupo Mexicano does not remove it from the equitable powers available to the federal courts.

Substantive consolidation has been endorsed as an equitable remedy in the United States since this Court's decision in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941). In Sampsell, this Court held that the assets and debts of a corporation wholly owned by a debtor and his family could be combined with the bankruptcy estate. Id. at 221. This Court noted that “[t]he power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete.” Id. at 219 (citing Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1939); Pepper v. Litton, 308 U.S. 295 (1939); Bird & Sons Sales

Corp. v. Tobin, 78 F.2d 371 (8th Cir. 1935)). Although referring to the pre-1978 version of the Code, the majority stated a maxim that is just as applicable today: “the theme of the Bankruptcy Act is equality of distribution.” Id.

Since Sampsell, courts in almost every circuit have worked to further refine the notion of substantive consolidation. The Fourth Circuit quickly followed this Court’s lead in 1942 when it determined that a bankrupt Virginia corporation’s estate should be consolidated with the bankruptcy estate of its Delaware parent company in Stone v. Eacho, 127 F.2d 284, 290 (4th Cir. 1942). The court discussed the bankruptcy courts as being “clothed with all the powers of a court of equity” and said since a corporate entity could be disregarded upon appropriate facts, the court

[could not] see why the same power does not exist in a court or why the law does not impose upon a court the same duty in a receivership matter when, as here, the facts are substantial enough to justify, indeed to compel, a finding that the five corporations were so identified with the parent corporation as to be a part of it.

Id. at 289.

After Stone, substantive consolidation was dormant for several decades. See In re Owens Corning, 419 F.3d 195, 207 (3d Cir. 2005). It reappeared in a line of Second Circuit cases during the 1960’s, starting with Soviero v. Franklin Nat’l Bank, 328 F.2d 446 (2d Cir. 1964). , Under a theory of corporate veil piercing, the court affirmed, with little discussion, a bankruptcy court order requiring thirteen subsidiaries of the corporate debtor to turnover all of their assets to the trustee. Id. at 448-49. Several decisions over the next eleven years in the Second Circuit helped establish substantive consolidation as a modern equitable remedy. See generally Chem. Bank New York Trust Co. v. Kheel, 369 F.2d 845 (2d Cir. 1966); Flora Mir Candy Corp. v. R.S.

Dickson & Co. (In re Flora Mir Candy Corp.), 432 F.2d 1060 (2d Cir. 1970); Talcott v. Wharton, 517 F.2d 997 (2d Cir. 1975).

Since that time, eight other circuits have adopted substantive consolidation as a potential remedy, indicating overwhelming acceptance of this power in equity. See In re Owens Corning, 419 F.3d at 207 (citing Fed. Deposit Ins. Corp. v. Hogan (In re Gulfco Inv. Corp.), 593 F.2d 921 (10th Cir. 1979); Pension Benefit Guar. Corp. v. Ouimet Corp., 711 F.2d 1085 (1st Cir. 1983); Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp.), 810 F.2d 270 (D.C. Cir. 1987); Eastgroup Properties v. Southern Motel Assoc. (In re Gainesville P-H Properties, Inc.), 935 F.2d 245 (11th Cir. 1991); Dorado v. Giller (In re Giller), 962 F.2d 796 (8th Cir. 1992); First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs. Inc.), 974 F.2d 712 (6th Cir. 1992); Reider v. Fed. Deposit Ins. Corp. (In re Reider), 31 F.3d 1102 (11th Cir. 1994); Alexander v. Compton (In re Bonham), 229 F.3d 750 (9th Cir. 2000)). The Third Circuit Court of Appeals, examining the history of substantive consolidation, stated that “[n]o court has held that substantive consolidation is not authorized,” In re Owens Corning, 419 F.3d at 208, while the Ninth Circuit declared that “even though substantive consolidation was not codified in the statutory overhaul of the bankruptcy law in 1978, the equitable power *undoubtedly* survived enactment of the Bankruptcy Code. *No case has held to the contrary.*” In re Bonham, 229 F.3d at 765 (emphasis added).

The manner in which courts over the last four decades have widely accepted, almost without question, the doctrine of substantive consolidation indicates that it is an equitable remedy which should not be lightly set aside simply because this Court, which implicitly established substantive consolidation in Sampsell, determined that federal courts lack the power to issue preliminary injunctions against property in which the party seeking the injunction has no

lien or equitable interest. “What the Court has given as an equitable remedy remains until it alone removes it or Congress declares it removed as an option.” In re Owens Corning, 419 F.3d at 209.

C. Bankruptcy Courts Have Express Authorization to Use Equitable Powers Not in Existence in 1789 Pursuant to 11 U.S.C. § 105(a)

Notwithstanding this Court’s decision in Grupo Mexicano, bankruptcy courts are granted the power to substantively consolidate two or more debtors through the general equity powers bestowed upon the court by 11 U.S.C. § 105(a). The statute provides that “[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

This Court recognized in Grupo Mexicano that “[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position than [the Court] to perceive them and to design an appropriate remedy.” 527 U.S. at 333. It is clear that Congress, in enacting § 105 of the Code, acknowledged that bankruptcies could present obstacles that required flexible equitable remedies in order to accomplish the overarching goals of the Code. Legislative history indicates that Congress was aware that “[t]he variety of legal issues encountered [in bankruptcy] is almost endless.” H.R. Rep. No. 95-595, at 10 (1977). This acknowledgement that the legal issues presented to bankruptcy courts may be novel, coupled with the enactment of § 105(a), indicates Congressional authorization for bankruptcy courts to develop equitable remedies as necessary “to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.” Pepper v. Litton, 308 U.S. 295, 304-05 (1939). Section 105(a), therefore, essentially mandates that a “bankruptcy court is not confined to traditional

equity jurisprudence” and thus falls outside the scope of the Supreme Court’s ruling in Grupo Mexicano. In re Dow Corning Corp., 280 F.3d 648, 657 (6th Cir. 2002).

The Court of Appeals attempted to limit the equitable power of the bankruptcy court to substantively consolidate debtors under § 105(a) by noting that the statute requires the action be taken “to carry out the provisions of this title.” 11 U.S.C. § 105(a). The court stated since “the remedy of substantive consolidation is a modern creature of federal common law, and does not exist within the confines of the Bankruptcy Code as an equitable remedy for courts to utilize, section 105(a)” does not authorize substantive consolidation. Tien v. Acme Chem. Ind. Products, Inc., ___ F.3d ___, ___ *16 (13th Cir. 2005). However, careful investigation of the Code reveals a section permitting consolidation of two or more debtors.

Section 1123(a)(5)(C) of the Code allows a plan of reorganization to provide for adequate means of implementing the plan through “consolidation of the debtor with one or more persons.” Although the legislative history indicates that Congress enacted this section with railroad mergers in mind, H.R. Rep. No. 95-595, 406, (1977), the statutory language makes no such distinction. It can be presumed that Congress knew how to limit such a provision to railroads if it was their intent since other provisions of the Code are specific to either individual debtors or corporate debtors. See 11 U.S.C. § 1123(a)(6) (providing for amending the charter of a corporate debtor); 11 U.S.C. § 1123 (a)(8) (providing for payment to creditors of earnings of an individual debtor for services performed).

The plain text of § 1123(a)(5)(C) exhibits no limitations and thus is applicable in the case *sub judice*. Consequently, the Court of Appeals’ determination that substantive consolidation “does not exist within the confines of the Bankruptcy Code” is erroneous. Therefore, it is clear

the District Court's use of the equitable powers of § 105(a) to grant substantive consolidation was appropriate.

At least one court has examined this issue and determined that § 1123(a)(5)(C) provides statutory authority for the equitable remedy of substantive consolidation pursuant to § 105(a) of the Code. In In re Stone & Webster, Inc., 286 B.R. 532, 545 (Bankr. D. Del. 2000), the United States Bankruptcy Court for the District of Delaware determined that substantive consolidation is permitted within the context of a Chapter 11 bankruptcy. The court, in addressing a motion by the Official Committee of Equity Security Holders objecting to substantive consolidation, first noted that other “[c]ourts have held that [§ 1123(a)(5)(C)] of the Bankruptcy Code indicates Congress’ intent that a Chapter 11 debtor may merge or consolidate with other entities, including other debtors, as part of the reorganization process.” Id. at 541 (citing In re Affiliated Foods, Inc., 249 B.R. 770 (Bankr. W.D. Mo. 2000) and In re Ltd. Gaming of America, Inc., 228 B.R. 275 (Bankr. N.D. Okla. 1998)). The court then addressed the Committee’s argument that Grupo Mexicano prohibited substantive consolidation, stating that “[b]ecause substantive consolidation is expressly authorized by statute, viz. § 1123(A)(5)(C), the decision of Grupo Mexicano cannot be read to prohibit consolidation in the plan formulation and confirmation process in a Chapter 11 case.” In re Stone & Webster, Inc., 286 B.R. at 541.

The court also found it irrelevant that a plan of reorganization had not yet been confirmed, as is the situation in this case. Although a plan has not yet been proposed by the Debtors, any plan that might be proposed will provide for the sale of the assets of all three Debtors as a “unit” to SOUSA. Any such plan would require a provision substantively consolidating the bankruptcies of each Debtor. The court in In re Stone & Webster noted that “it is not at all unusual for a plan proponent, or a plan opponent, to seek a determination prior to the

plan confirmation hearing as to the legitimacy of a particular provision of a proposed plan.” *Id.* at 542. Even though the Debtors in this case are seeking a substantive consolidation order prior to the plan rather than a ruling on whether consolidation is permissible in the context of the liquidation plan to be proposed, that distinction is less a matter of substance than it is of form.

D. Modern Corporate Structures and Forms Make Limiting Equity Jurisprudence to Remedies Available in 1789 Impractical

It is clear that modern corporate structures are unlike any seen at the time of the split of the United States and England. The present day business landscape is littered with a seemingly incalculable number of corporations, whereas in the late eighteenth century most business was conducted through private contract. See James Willard Hurst, *The Legitimacy of the Business Corporation* 14 (1970). The post-Revolutionary period from 1780 to 1801 saw only 317 corporations chartered by state legislatures, an amount paltry in comparison to the number of modern corporations. *Id.* In addition, the idea of the parent-subsidary corporate structure was non-existent in 1789. The first time a corporation was permitted to own stock in another corporation did not occur until 1832, and this structure remained rare until late in the nineteenth century. See J. Maxwell Tucker, *Development: Grupo Mexicano and the Death of Substantive Consolidation*, 8. Am. Bankr. Inst. L. Rev. 427, 444 (2000).

This historical perspective emphasizes that courts would be rendered lame in the corporate context if the equitable remedies available to them are confined to those remedies available in 1789. “A dynamic equity jurisprudence is of *special importance* in the commercial law context.” *Grupo Mexicano*, 527 U.S. 308, 337 (J. Ginsburg, dissenting) (emphasis added). This idea was embraced by this Court in *Union Pac. R.R. Co. v. Chicago, R.I. & P.R. Co.*, 163 U.S. 564, 600-01 (1896), when it was noted that the emerging complexities in corporate organizations and relationships had fostered the expansion of equitable remedies. If this Court

were to adopt the Thirteenth Circuit’s reading of Grupo Mexicano, federal courts would have little to no equitable power over the corporations of today, rendering them essentially useless in the vast field of commercial law. Therefore, in order for the federal judiciary to sustain viable power in the field of corporations, it is essential that this Court uphold the equitable power of substantive consolidation and remand this case so the Court of Appeals may determine that substantive consolidation is appropriate in this case.

§ 363(f) SALE OF ASSETS

I. ACME’s SALE OF SUBSTANTIALLY ALL ITS ASSETS FREE AND CLEAR TO SOUSA IS PERMITTED UNDER 11 U.S.C. § 363(f)

SOUSA has offered to purchase ACME, TAPCO, and CAPCO’s assets as a going concern for an amount above market price. This offer is conditioned upon either SOUSA’s insulation from Respondent’s claims, a significant reduction in the purchase price, or the establishment of an escrow account setting aside funds to pay the potential damages from Respondent’s class action. This sale is critical to successfully facilitate ACME’s consolidated Chapter 11 reorganization.

Section 363(f) of the Code reads as follows:

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).

The sale of assets free and clear of all claims is permitted in § 363(f) of the Code. In order to promote bankruptcy's goal of treating similarly situated creditors equally, maximizing the amounts each creditor will recover, and using judicial resources efficiently, the holding of the Court of Appeals must be reversed and ACME must be permitted to sell its assets pursuant to § 363(f).

A. Section 363(f) is Necessary to Maximize the Recovery of All Creditors

Congress enacted § 363(f) to facilitate the efficient sale of the debtor's assets in order to maximize their value to the bankruptcy estate and the amount recovered by creditors. Section 363(f) gives a trustee or a Chapter 11 debtor-in-possession the power to sell the debtor's assets free and clear of any claims, facilitating an economically efficient disposition of the assets. The assumption is that without this power, the market value of the debtor's assets would fall dramatically, for no rational buyer would purchase the assets unless they were discounted for at least the amount of the known claims and the estimated value of unknown claims. See Gekas v. Pipin (In re Met-L-Wood Corp.), 861 F.2d 1012, 1019 (7th Cir. 1988); In re 18th Ave. Dev. Corp., 14 B.R. 862 (Bankr. S.D. Fla. 1981). The ability of a debtor-in-possession to sell its assets free and clear removes the worry of subsequent suits and claims for a potential buyer. See In re Sax, 796 F.2d 994, 998 (7th Cir. 1986). Thus, the debtor-in-possession's ability to realize the optimal value of the assets turns directly on the ability to sell the property free and clear of "any interest in such property."

This Court has long recognized the ability to sell assets free and clear of existing claims. See Van Huffel v. Harkelrode, 284 U.S. 225 (1931); Mellen v. Moline Malleable Iron Works, 131 U.S. 352 (1889); First Nat'l Bank of Cleveland v. Shedd, 121 U.S. 74 (1887). The ability

for debtors-in-possession and trustees to sell assets free and clear is also endorsed by Congress, as evidenced by the enactment and retention of § 363 in the Code.

Section 363(f) helps protect unsecured creditors like the Respondent. Selling the debtor's assets free and clear of claims increases the proceeds received; thus the debtor-in-possession can distribute more money to unsecured creditors like Respondent than he/she would be able to otherwise, adequately protecting unsecured creditors' interests. If Respondent's claims remain attached, the selling price of the consolidated assets as a going concern will fall dramatically. In the words of the Court of Appeals, the discount ACME would have to give SOUSA if the claims remain attached to the assets is "substantial." Tien v. Acme Chem. Indus. Products, Inc., ___ F.3d ___, ___ *5 (13th Cir. 2005). If the claims remain attached, it will either cause a significant reduction in the sale price or will result in the sale of the assets piecemeal, both of which will reduce the unsecured creditors' recovery. While selling the assets as a going concern will maintain the Respondent's claims, this would violate the primary goal of the Code of equal treatment of similarly situated creditors. Alternatively, selling the assets piecemeal will extinguish Respondent's claims and significantly harm the remaining unsecured creditors.¹ Thus, the sale of the assets free and clear ultimately works in Respondent's best interests and results in the equitable treatment of all unsecured creditors.

B. Respondent's Claims Against CAPCO are Interests in Property Under § 363(f)

The language of § 363 limits the debtor-in-possession to selling assets free and clear of claims that constitute an "interest in property." Respondent's employment discrimination claims against CAPCO qualify as "interests in property" as that phrase has been interpreted under § 363(f) since their claims only exist because of the property; therefore ACME can sell its assets free and clear of these claims.

¹ A discussion of successor liability and the situations under which it attaches follows below.

Respondent and others in her class were initially hired and employed by CAPCO in order to operate CAPCO's factory. Their claims arose from their employment positions with the company. As the Third Circuit stated in In re Trans World Airlines, Inc., 322 F.3d 283 (3d. Cir. 2003),

[h]ad [CAPCO] not invested in [its] assets, which required the employment of the . . . claimants, those successor liability claims would not have arisen. Furthermore, [CAPCO's] investment in [its factory] is *inextricably linked* to its employment of the . . . claimants as [factory workers.] While the interests of the [claimants] in the assets of [CAPCO's] bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, the reasoning of Leckie and Folger Adam suggests that *they are interests in property within the meaning of section 363(f) in the sense that they arise from the property being sold.*

Id. at 290 (emphasis added).

The facts of Trans World are analogous to the case at bar. Like ACME, TWA had employment discrimination cases pending against it, it was best to sell its assets in order to satisfy its creditors, including the discrimination claimants, and it had no better alternatives than to sell substantially all its assets free and clear to a buyer who was willing to take the unhindered assets. This Court should adopt the sound reasoning of the Third Circuit and hold that the employment discrimination claimants' interests are indeed interests in property under § 363(f). The TWA decision was prudent and no reason exists why ACME should be denied this mechanism.

The Third Circuit is not the only court that has adopted a broad interpretation of "interests in property." "[T]he trend seems to be in favor of a broader definition that encompasses other obligations that may flow from ownership of the property." 3 Collier on Bankruptcy, ¶ 363.06[1], at 47 (Lawrence P. King, 15th ed. 2005). See also Faulkner v. Bethlehem Steel/Inter'l Steel Group, No. 2:04-CV-34 PS, 2005 WL 1172748, at *3 (N.D. Ind.

April 27, 2005) (holding that racial discrimination claim arises from assets being sold and is an interest in property); Myers v. U.S., 297 B.R. 774 (S.D. Cal. 2003) (finding a personal injury claim arising from toxic spill is an interest in property); Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.), 327 F.3d 537 (7th Cir. 2003) (stating that lessee's possessory interest is an interest in property); United Mine Workers of America 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 582 (4th Cir. 1996) (finding the fund and plan's right to collect premiums under Coal Act is an interest in property); In re P.K.R. Convalescent Centers, Inc., 189 B.R. 90, 92-94 (Bankr.E.D.Va.1995) (holding a claim of depreciation recapture is an interest in property); In re WBQ P'ship, 189 B.R. 97 (Bankr.E.D.Va.1995) (noting the right of depreciation recapture is an interest in property).

C. Respondent Can Be Compelled to Accept Monetary Satisfaction of her Claims

Respondent and her class allege employment discrimination based on sex against CAPCO under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003e et seq., and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Neither the District Court nor the Court of Appeals specified the damages sought by Respondent, but the Court of Appeals did state that "if the discrimination plaintiffs prevail their *recoveries* will be substantial." Tien v. Acme Chem. Indust. Products, Inc., ___ F.3d ___, ___ *5 (13th Cir. 2005) (emphasis added). It can be assumed that Respondent is seeking monetary relief and fall within the purview of § 363(f)(5).

Under Title VII, a claimant may seek relief as provided under 42 U.S.C. § 2000e-5(g), which permits the court to "order . . . any other equitable relief as the court deems appropriate." Title VII, as evidenced above, provides for equitable relief. The equitable remedies typically granted under Title VII are monetary in nature, such as front pay and back pay as forms of restitution. Thus, even though Respondent may be entitled to equitable restitution, it is still a

monetary award. See Curtis v. Loether, 415 U.S. 189, 196 (1974); Sparrow v. Comm’r of Internal Revenue, 949 F.2d 434, 436, 438 (D.C. Cir. 1991); Cleverly v. W. Elec. Co., 69 F.R.D. 348, 351 (W.D. Mo. 1975).

The Equal Pay Act of 1963, 29 U.S.C. § 206(d), prohibits employers from paying workers of one sex less than equally situated and skilled workers of the opposite sex. The remedies available under this provision are liquidated damages, the amount of which is the pay differential they were illegally denied. Such a remedy necessarily requires monetary satisfaction. See Miranda v. B.B. Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992); Thompson v. Comm’r of Internal Revenue, 866 F.2d 709 (4th Cir. 1989).

Courts have understood the requirement of § 363(f)(5) that a claimant “could be compelled” to accept monetary satisfaction of its claim under does not necessarily indicate that a claimant will in fact be permitted to recover.

The phrase "could be compelled" only requires "that the interest in question be subject to final satisfaction on a hypothetical basis, not that there be an actual payment in satisfaction of the interest from the proceeds of the sale in question."

In re Gulf States Steel, Inc., 285 B.R. 497, 508 (Bankr. N.D. Ala. 2002) (citing In re Healthco, Int’l, 174 B.R. 174, 176 (Bankr. D. Mass. 1994)) (emphasis added). Since Respondent seeks monetary damages and her claim is “subject to final satisfaction on a hypothetical basis,” it follows that Respondent and her class can be compelled to accept monetary satisfaction of their claims; thus ACME’s assets are capable of being sold free and clear under § 363(f)(5).

D. Doctrine of Successor Liability Does Not Affect ACME’s Ability to Sell Assets Free and Clear Under § 363(f)

The doctrine of successor liability is a state law theory that is used primarily to protect consumers who have been injured by a company’s defective products when said company sells

all its assets to a new company. See Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1994); Shannon v. Samuel Langston Co., 379 F.Supp. 797 (W.D. Mich. 1974); Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977). The purpose of successor liability is to provide an injured party with relief when it would be unavailable without imposing liability upon the purchaser of the assets.

Generally, a transferee is not liable for the debts and liabilities of the transferor. Courts have recognized several situations that are exceptions to this general rule: when fraudulent transfers occur, Blanc v. Paymaster Mining Co., 30 P. 765 (Cal. 1892), when the purchase agreement expressly or impliedly assumes liability, Swayze v. A.O. Smith Corp., 694 F. Supp. 619, 622 (E.D. Ark. 1988), when a de facto merger occurs with the sale, Leannais v. Cincinnati, Inc., 565 F.2d 437, 439 (7th Cir. 1977), when the sale constitutes a “mere continuation” of the previous entity, Armour-Dial, Inc. v. Alkar Eng’g Corp., 469 F. Supp. 1198, 1201-02 (E.D. Wis. 1979), and when the transferor’s product line is continued by the transferee, Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977). These are the only exceptions to the general rule that have been articulated by the courts.

It is clear that outside of bankruptcy the sale of ACME to SOUSA would constitute a continuation of the entity and successor liability would attach to the assets sold. However, the Code provides in § 363(f)(5) that a bankruptcy court may “issue a free and clear order *absolving purchasers of successor liabilities*[.]” United Mine Workers of America 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 579 (4th Cir. 1996) (emphasis added). The doctrine of successor liability should not be considered in determining whether assets may be sold since the Code provides for extinguishment of the liability. Therefore, the sale of ACME’s consolidated assets without attachment of successor liability is appropriate within bankruptcy.

E. Unsecured Creditors Will Be Prejudiced if Respondent's Claims Remain Attached to the Assets or if an Escrow Account is Used to Pay Respondent's Damages

The goal of bankruptcy is to treat similarly situated creditors equally. Respondent and her class are contingent, unliquidated, general unsecured creditors. If their claims remain attached and they receive a monetary award in their employment discrimination suit, Respondent and the other class plaintiffs will be able to potentially recover in full against SOUSA. The bankruptcy scheme does not permit full recovery for one unsecured creditor while the rest take reduced amounts for their claims.

SOUSA's CEO, Michael Sousa, testified in the District Court that he is willing to purchase ACME's assets with Respondent's claims attached if ACME either establishes an escrow account using proceeds of the sale for the estimated amount needed to pay Respondent's damages if she prevails or if the purchase price is discounted by the estimated amount of the claims. Setting aside a portion of the proceeds of the sale in an escrow account is not proper. Just as it is inequitable to permit Respondent's claims to remain attached, it is also inequitable to set aside a large portion of the sale proceeds with which to pay the Respondent's damages to the detriment of other similarly situated unsecured creditors. Respondent would recover more than her pro rata share at the expense of all the other general unsecured creditors in contravention of the policies of the Code.

The character of Respondent's claims should not afford her and the class any more protection under the Bankruptcy Code than any other general unsecured creditor. Both of Respondent's causes of action come are statutorily based. Modern bankruptcy is also based in the United States Code. If Congress intended to subrogate one statutory scheme to another, it would have stated as such, which it has not done. Furthermore, this Court has held that the

sovereign immunity of states, one of the founding doctrines of our nation, does not override the ability of a bankruptcy trustee to avoid preferential transfers. Cent. Virginia Comm. Coll. v. Katz, No. 04-885, 2006 WL 151985, at *11 (U.S. 2006) (stating that the first Congress' enactment of bankruptcy legislation "was understood to carry with it the power to subordinate state sovereignty, albeit within [the] limited sphere [of *in rem* actions]"). The logical conclusion from this is that Respondent's employment discrimination claims do not necessarily trump the goals of bankruptcy.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

Team No. 35
Counsel for Petitioner

APPENDIX A

United States Code

Title 11. Bankruptcy

Chapter 3. Case Administration

Subchapter IV. Administrative Powers

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into

transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only--

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and
(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

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

(f) 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.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection

(b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

- (1)** partition in kind of such property among the estate and such co-owners is impracticable;
- (2)** sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
- (3)** the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4)** such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section--

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

APPENDIX B

United States Code
Title 11. Bankruptcy
Chapter 1. General Provisions
§ 105. Power of court

(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.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest--

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

United States Code
Title 11. Bankruptcy
Chapter 11. Reorganization
Subchapter II. The Plan
§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall--

- (1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;
- (2) specify any class of claims or interests that is not impaired under the plan;
- (3) specify the treatment of any class of claims or interests that is impaired under the plan;
- (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;
- (5) provide adequate means for the plan's implementation, such as--
 - (A) retention by the debtor of all or any part of the property of the estate;
 - (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
 - (C) merger or consolidation of the debtor with one or more persons;
 - (D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;
 - (E) satisfaction or modification of any lien;
 - (F) cancellation or modification of any indenture or similar instrument;
 - (G) curing or waiving of any default;
 - (H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;
 - (I) amendment of the debtor's charter; or
 - (J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;
- (6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;
- (7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and
- (8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may--

- (1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;
- (2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
- (3) provide for--
 - (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate;or
- (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;
- (4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;
- (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and
- (6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

United States Code

Title 28. Judiciary and Judicial Procedure

Part I. Organization of the Courts

Chapter 6. Bankruptcy Judges

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;
- (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
- (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

- (3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.
- (4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).
- (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

- (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
- (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.