

No. 05-628

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2005

IN THE MATTER OF ACME CHEMICAL INDUSTRIAL PRODUCTS, INC., Debtor
ACME CHEMICAL INDUSTRIAL PRODUCTS, INC.,

Petitioner

v.

JEAN TIEN

Respondent

On Appeal from the United States Court of Appeals
Thirteenth Circuit

BRIEF FOR THE RESPONDENT

Team 34
Counsel for the Respondent

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 order of the United States District Court of Kelly removing the bankruptcy cases from the Bankruptcy Court is unreported. Additionally, the order of the United States District Court granting substantive consolidation and permitting the sale of assets free and clear of all liens and encumbrances is unreported. As such no opinions are available. The decision of the Circuit Court of Appeals for the Thirteenth Circuit is also unreported; however, it is set out in the order dated October 17, 2005 of Case No. 05-4080.

STATEMENT OF JURISDICTION

Rule VIII of the Official Rules of the Fourteenth Annual Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition waives a formal statement of jurisdiction and thus the statement of jurisdiction is omitted.

FEDERAL STATUTES AND REGULATIONS INVOLVED

The relevant sections of the following federal statutes, which are referenced in the brief, appear in Appendix A: 11 U.S.C. § 105(a); 11 U.S.C. § 302; 11 U.S.C. § 363(f); 11 U.S.C. § 1123; and 28 U.S.C. § 1331. 29 C.F.R. § 825.107 appears in Appendix B.

STATEMENT OF THE CASE

Acme Chemical Industrial Products, Inc. (hereinafter “ACME”) serves as a marketer and distributor of soda ash and calcium chloride. (Decision and Order at 2-3.)¹ ACME’s two wholly-owned subsidiaries, Trona Ash Products Company, Inc. (hereinafter “TAPCO”) and Chemical American Product Company (hereinafter “CAPCO”), serve as the producers of soda ash and calcium chloride, respectively. (R. at 3).

ACME, CAPCO, and TAPCO (hereinafter the “Debtors”), while inter-related, recognize basic corporate formalities. (R. at 8). ACME has the overall responsibility for managing the daily operations of CAPCO and TAPCO. (R. at 5). Furthermore, even though creditors approached the Debtors as a unit, the respective trade creditors of the subsidiary obtained guarantees from ACME. (R. at 8).

Several years ago, some female employees of CAPCO, including Jean Tien, (collectively, the “Plaintiffs”), filed a class action suit against CAPCO in the District of Kelly alleging sex and gender discrimination. (R. at 5). This lawsuit is still pending.

Despite the pending litigation against CAPCO, it has been doing very well in the market. (R. at 5). However, TAPCO’s sales suffer from a decreasing price for soda ash. (R. at 5). Overall, operating costs continue to rise resulting in a minimal to non-existent profit margin for TAPCO (R. at 5). As a result of TAPCO’s hardships, ACME defaulted on its primary credit facility with Giantbank, N.A. and the initial default caused a cross-default in ACME’s other existing credit facilities. (R. at 5-6). Therefore, on August 20, 2004, the Debtors filed petitions under Chapter 11 of the Bankruptcy Code in the District of Kelly. The Bankruptcy Court administratively consolidated the bankruptcy estates of the Debtors (R. at 6).

¹ The Decision and order dated October 17, 2005 in Case No. 05-4080 of the Thirteenth Circuit Court of Appeals is hereinafter referred to as “R”.

During the early months of bankruptcy, the Debtors experienced continued losses and decided to sell their businesses. (R. at 6). Sousa Industries, Inc. (hereinafter “SOUSA”) placed the highest bid for the companies, wanting to purchase the assets of all three companies “as a unit.” (R. at 6). SOUSA, aware of the pending gender discrimination and equal pay lawsuit against CAPCO, insisted the sale be structured to insulate it from successor liability. (R. at 6). SOUSA offered to purchase the businesses for a price slightly above fair market value. If SOUSA purchases the companies, it intends to continue the operations of the companies undisturbed, including retention of the majority of the three companies’ labor forces. (R. at 8). SOUSA initially refused to consummate the sale unless the court enter a final non-appealable order holding the sale free and clear of the discrimination claims. (R. at 8-9). However, on cross-examination, SOUSA admitted it would consider purchasing the business if the court adjusted the sale price to account for the potential liability. (R. at 9).

On December 20, 2004, in order to effectuate the sale to SOUSA, ACME filed a motion with the Bankruptcy Court requesting the Bankruptcy Court to substantively consolidate its estate with the estates of CAPCO and TAPCO. (R. at 6). In the same motion, ACME requested that the Bankruptcy Court authorize the sale of substantially all of the Debtors’ assets to SOUSA free and clear of all liens, claims, and encumbrances, including the CAPCO claims raised in the pending litigation, pursuant to § 363(f) of the Bankruptcy Code.² (R. at 7).

Plaintiffs in the CAPCO discrimination lawsuit filed objections to ACME’s motion. (R. at 7). Plaintiffs also filed a motion in the U.S. District Court for the District of Kelly seeking to withdraw the reference of the Debtors’ bankruptcy cases from the Bankruptcy Court. (R. at 7). On January 6, 2005, the District Court granted the Plaintiffs’ motion. On March 14, 2005, the

² Hereinafter “Bankruptcy Code” refers to 11 U.S.C. §§ 101, *et seq.* (2005).

District Court granted ACME's motions to substantively consolidate the Debtors' estates and to sell the assets free and clear of all liens. (R. at 7).

On March 20, 2005, Jean Tien appealed the District Court's ruling with the Court of Appeals for the Thirteenth Circuit. (R. at 9). On October 17, 2005, the Thirteenth Circuit reversed the decision of the District Court in its entirety. (R. at 9).

The Debtors appealed the Thirteenth Circuit's decision and filed a petition for Writ of Certiorari. On December 10, 2005 the Supreme Court of the United States granted Certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals for the Thirteenth Circuit properly found that federal courts do not possess either the express equitable powers under the Bankruptcy Code or the inherent equitable powers to substantively consolidate the Debtors' estates. Nowhere in the Bankruptcy Code is the term "substantive consolidation" used to grant courts the power to consolidate the estates of multiple debtor entities. Because the Bankruptcy Code's § 105(a) grant of equitable power must be exercised to further provisions of the Bankruptcy Code and no code section explicitly grants the courts such power, a court may not substantively consolidate debtors' estates. Further, the courts' inherent equitable powers are limited to either those remedies existing at the enactment of the Judiciary Act of 1789 or to those explicitly created by statute. Because bankruptcy courts created the equitable remedy of "substantive consolidation" in the mid 1960's, a court's use of the remedy exceeds its powers granted under the Judiciary Act of 1789.

The Court of Appeals for the Thirteenth Circuit also properly found that the assets may not be sold free and clear of any possible successor liability claims under § 363(f) of the Bankruptcy Code because the plain language of the statute will not permit a sale free and clear of

in personam claims. Furthermore, the sale should not be conducted free and clear of all successor liability claims because public policy dictates that in order to deter tortfeasors from certain activity, successor liability should follow a company that is being sold as essentially the same business unit. As such the court properly denied the motion to substantively consolidate the Debtors' estates and the motion to sell the assets free and clear of the successor liability claims.

ARGUMENT

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE REMEDY OF SUBSTANTIVE CONSOLIDATION IS NOT AVAILABLE BECAUSE THIS REMEDY IS NOT AVAILABLE AT LAW OR AT EQUITY.

Whether federal courts possess the power to order the remedy of substantive consolidation of the Debtors' estates is a question of law. The Supreme Court reviews conclusions of law *de novo* and findings of fact under a clearly erroneous standard. *Refinery Holding Co., LP v. TRMI Holdings, Inc. (In re El Paso Refinery, LP)*, 302 F.3d 343, 348 (5th Cir. 2002).

Federal courts undoubtedly possess both equitable and legal powers. 28 U.S.C. § 1331 (2005). Before a federal court may exercise its equitable powers, there must be no "complete and adequate remedy at law." *Payne v. Hook*, 74 U.S. 425, 430 (1869). The application of this principle must take into account the character of the case, the nature of the remedy at law and a measure of the efficiency of justice to be carried out. *Id.* This Court later explained the "complete and adequate" element to mean that the remedy at law must be as practical and efficient to accomplish justice as the remedy in equity, otherwise the remedy in equity may be exercised. *Oelrichs v. Spain*, 82 U.S. 211, 228 (1872) (citing *Boyce's Ex'rs v. Grundy*, 28 U.S. 210, 215 (1830)). In *Oelrichs*, this Court found the remedy at law inadequate because even after

a suit at law, a suit in the court of equity would be required to determine the final rights to the proceeds. *Oelrichs*, 82 U.S. at 228. However, when a remedy at law is available and reaches the same just result, courts must proceed at law rather than at equity. *Heine v. The Levee Comm'rs*, 86 U.S. 655 (1874). Generally, remedies at law governing bankruptcy are found in the Bankruptcy Code.

A. The power to order substantive consolidation is not present within the Bankruptcy Code.

Congress does not expressly address the concept of “substantive consolidation” within the Bankruptcy Code. See *In re Standard Brands Paint Co.*, 154 B.R. 563 (Bankr. C.D. Cal. 1993); *In re Augie/Restivo Baking Co.*, 860 F.2d 515 (2d Cir. 1988) (stating that substantive consolidation is merely a creation of judicial gloss). Since its enactment, courts have regularly held that the Bankruptcy Code binds and confines bankruptcy law. See generally *Disch v. Rasmussen*, 417 F.3d 769 (7th Cir. 2005). Because Congress did not provide for the remedy of substantive consolidation within the Bankruptcy Code, courts should not be allowed to infer its existence.

Congress alone has the power to legislate. In the bankruptcy arena, Congress has done this through enactment and revisions to the Bankruptcy Code. Occasionally cases will present circumstances or situations that are not explicitly addressed within the Bankruptcy Code. This often causes circuit splits. When these splits occur, Congress typically revises the Bankruptcy Code. These revisions resolve circuit splits and give courts codified principles establishing the contours of particular rules.

The absolute priority rule is an example of this congressional reaction to inconsistencies in case law. This Court examined this in *Norwest Bank Worthington v. Ahlers*, stating, “[t]he absolute priority rule...had its genesis in judicial construction of the undefined requirement of

the early bankruptcy statute that reorganization plans be ‘fair and equitable.’ The rule has since gained express statutory force, and was incorporated into Chapter 11 of the Bankruptcy Code adopted in 1978.” *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) (citing *Northern Pacific R. Co. v. Boyd*, 228 U.S. 482, 504-505 (1913); *Louisville Trust Co. v. Louisville, N.A. & C.R. Co.*, 174 U.S. 674, 684 (1899)).

However, unlike the absolutely priority rule, “substantive consolidation was not codified by the Bankruptcy Reform Acts.” *In re Bonham v. Compton*, 229 F.3d 750, 763 (9th Cir. 2000). But, “related provisions allowing for procedural consolidation or joint administration” were codified. *Id.*

Congress knew that courts were occasionally substantively consolidating estates. If Congress intended to make this practice a part of bankruptcy law, as it did with joint administration and the absolutely priority rule, it would have codified substantive consolidation. Because Congress chose not to codify substantive consolidation in any of the Bankruptcy Reform Acts, including the newly enacted 2005 Bankruptcy Code, it is evident that substantive consolidation was not intended by Congress.

1. Section 105(a) does not expressly grant courts the equitable power to substantively consolidate debtor estates.

As mentioned above, the concept of substantive consolidation does not appear anywhere within the Bankruptcy Code. Most courts acknowledge this fact. *See e.g. Bonham*, 229 F.3d at 763. Because substantive consolidation is not expressly addressed within the Bankruptcy Code, courts enforcing this concept attempt to find some provision within the Bankruptcy Code upon which to “hang the hat” of substantive consolidation. Most courts chose to use § 105(a) in an attempt to justify substantive consolidation. *See e.g. In re Standard Brands Paint Co.*, 154 B.R. at 567. However, this attempt misconstrues the power of § 105(a) of the Bankruptcy Code.

Section 105(a) states: “[t]he court may issue any order, process, or judgment that is necessary and appropriate to carry out the *provisions of this title*.” 11 U.S.C. § 105(a) (2005) (emphasis added). Cases utilizing this section to justify substantive consolidation state that this section grants bankruptcy courts an equitable power to administer this remedy. However, the words “of this title” place express limitations upon the equitable powers of the bankruptcy courts. Section “105(a)’s equitable scope is plainly limited by the provision of the Code.” *In re Smart World Technologies, LLC, v. Juno Online Services, Inc.*, 423 F.3d 166 (2nd Cir. 2005) (holding that the bankruptcy court erred by using § 105(a) to provide a basis upon which to grant appellees standing in the suit). Other courts examining § 105(a) have concluded the same. “The statute does not authorize the bankruptcy courts to create substantive rights...that otherwise would have not existed.” *In re Southmark Corp., v. Grosz*, 49 F.3d 111, 116 (5th Cir. 1995). “[A] bankruptcy court is simply not authorized to do whatever is necessary to reach an equitable result; it may only do whatever is necessary to enforce the Code.” *In re Fesco Plastics Corp, Inc.*, 996 F.2d 152, 157 (7th Cir. 1993). Therefore, § 105(a) cannot be viewed as simply giving broad discretion to courts to enact any means they find equitable.

Section 105(a) contains limitations for a reason. Holding that courts must use § 105(a) in very limited circumstances, the Seventh Circuit stated, “[o]therwise, there is a real risk that more particular restrictions found throughout the Code would amount to nothing, because the court could always use the residual equitable authority of § 105(a).” *Disch*, 417 F.3d at 777. Taking this argument to its logical extreme, one could argue that the entire Bankruptcy Code could become obsolete or overridden by § 105(a) if it is read as granting sweeping equitable powers to the bankruptcy courts to do what ever they believe is “equitable”. This is a slippery slope and

therefore, the expansion of § 105(a) power should not be allowed and § 105(a) should be limited to the confines of the Code.

In recent years, there has been a great deal of speculation regarding the overuse and abuse of § 105(a) powers by bankruptcy judges. See Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 Ariz. St. L.J. 793 (2003). Some of these abuses include: partial discharge of student loans, grants of substantive consolidation, and first day orders. *Id.* at 805-819. These abuses have been discussed and criticized at length by noteworthy bankruptcy scholars. *Id.* In a presentation addressing the powers of the court, Steve Nickels tackled the abuses of § 105(a) by bankruptcy judges stating that the use of § 105(a) often oversteps constitutional boundaries and therefore breaches the separation of powers. Steve Nickels, Address at Workshop for Bankruptcy Judges, Sponsored by the Federal Judicial Center Education Program: *Powers of the Court* (July 25, 2001). From these dialogues, it is evident that § 105(a) is often used to justify remedies not contemplated within the Bankruptcy Code.

However, § 105(a) remains a pertinent section within the Bankruptcy Code and vests some equitable powers within the bankruptcy courts. In many cases, courts have correctly utilized the power granted under § 105(a) to enforce “provisions of” Title 11. In *United States v. Energy Resources*, this Court recognized a correct use of the power conferred by § 105. 495 U.S. 545 (1990). The Court stated, “[T]he Bankruptcy Code does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund. The Code, however, grants the bankruptcy courts residual authority to approve reorganization plans including ‘any...appropriate provision not inconsistent with the applicable provision of this title.’” *Id.* at 549. In *Energy Resources*, the Court used § 105 to implement this

approval. This is an appropriate use of § 105(a) power because reorganization is indeed a provision of the Bankruptcy Code, the enforcement of which is allowed under § 105(a).

However, substantive consolidation is not a “provision of [the] title”, instead, it is a “substantive right” not contemplated by the Code, therefore, it cannot be enforced using § 105(a). *In re Geiger Enterprises*, 635 F.2d 106 (2d Cir. 1980). Using § 105(a) to justify substantive consolidation is, in fact, an abuse of the court’s equitable powers.

2. Section 1123(a)(5)(C) does not contemplate substantive consolidation.

Most courts acknowledge that § 105(a) must be used in conjunction with a specific provision of the Code; therefore, many courts have attempted to find a specific section of the Code that contemplates substantive consolidation between debtor entities. *See e.g. In re Standard Brands Paint Co.*, 154 B.R. at 567. Many cases have attempted to state that § 1123(a)(5)(C) is the section of the Code being enforced through the remedy of substantive consolidation. *See id.* However, this reliance upon § 1123(a)(5)(c) is wholly misplaced because § 1123(a)(5)(C) does not contemplate *substantive* consolidation and the “consolidation” it does contemplate can only be facilitated within the confines of a reorganization plan.

Section 1123(a)(5)(C) states that a Chapter 11 plan, “shall provide adequate means for the plan’s implementation such as- (c) merger or consolidation of the debtor with one or more persons.” 11 U.S.C. § 1123(a)(5)(C). Although the word “consolidation” is utilized in this section, this “consolidation” is not *substantive* consolidation. Courts should not read words into the Code that are simply not present. If Congress intended that substantive consolidation be allowed within the confines of a plan, Congress would have stated this specifically within § 1123(a)(5)(C). However, it did not use the word “substantive” in this section.

“Consolidation”, distinct from substantive consolidation, implies the combining of two businesses under the laws of merger and acquisition. This is evident because the word “consolidation” in § 1123 is juxtaposed to the word “merger” which is also a business term for combining businesses. In this context, a consolidation occurs when two businesses merge together to form one entirely new business. This type of consolidation is very different than substantive consolidation and therefore, this section cannot be read to allow substantive consolidation.

Not only does § 1123 not contemplate *substantive* consolidation, the type of “consolidation” that is mentioned in § 1123 can only be facilitated within a Chapter 11 reorganization plan. Section 1123 specifically states what can occur under a reorganization plan. For a number of reasons, reorganization within a plan cannot be done in the absence of a plan. One reason for this is that a reorganization plan provides specific safeguards to protect creditors. First, creditors have the ability to vote and approve a reorganization plan. This gives creditors leverage and protection against unfair proposals. Also, before a plan is implemented, the debtor must prove that it meets the liquidation test, meaning that the creditors receive at least as much money as it would if the debtor conducted a Chapter 7 liquidation. Because of the lack of safeguards outside a reorganization plan, remedies available inside a plan must remain therein.

3. No Code section provides a basis for substantive consolidation that can be “enforced” through § 105(a).

Various other sections of the Code mention the word “consolidation”. However, none of these sections provide a basis for substantive consolidation of two debtor entities under § 105(a).

Administrative consolidation is allowed under Federal Rules of Bankruptcy Procedure Rule 1015, and is referred to as “joint administration.” However, administrative consolidation and substantive consolidation are not interchangeable. Administrative consolidation is a

procedural measure used to enhance judicial efficiency, while substantive consolidation impacts substantive rights of the debtors and creditors. *Geiger v. Central Trust Co.*, 635 F.2d 106 (2d Cir. 1980). Although Rule 1015 allows for administrative consolidation, in a note to this rule, the Advisory Committee states that rule 1015 is only codifying administrative consolidation and not substantive consolidation. *See* Official Advisory Committee note to Federal Rule of Bankruptcy Procedure Rule 1015 (1983). Although this note has no precedential value, it does acknowledge that there is indeed a difference between administrative and substantive consolidation and that these two terms should not be used interchangeably.

Another section that mentions “consolidation” is § 302. Section 302 contemplates the consolidation of the estates of a husband and wife. However, this type of consolidation is indeed specific to married couples.

Sometimes the Code explicitly provides bankruptcy courts with a much-needed power in one arena, but then fails to provide this power in another. One might think that bankruptcy courts would take the hint, recognizing a congressional intention to limit their power. Code section 302 provides that bankruptcy cases of spouses may be consolidated into a single case. But the Code does not provide elsewhere for consolidation of cases.

Bogart, Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall, 35 *Ariz. St. L.J.* 793, 810 (2003). Courts even disapprove consolidation under § 302 if any of the creditors suffer disadvantage from the consolidation. *In re Birch*, 72 B.R. 103 (Dist. N.H. 1987). Because this limited section is specifically applicable only to married couples’ estates, it cannot be used in conjunction with § 105(a) to validate substantive consolidation of corporate entities.

Because § 105(a) is limited to enforcement of the Bankruptcy Code and the Bankruptcy Code is devoid of a section granting the power to substantively consolidate, using § 105(a) to justify this remedy is indeed an abuse of judicial power and should not be allowed.

Because no provisions of the Bankruptcy Code permit substantive consolidation, no remedy at law exists to order substantive consolidation.

B. Federal courts' inherent equitable powers do not include the power to substantively consolidate bankruptcy estates.

If the court finds no remedy at law, the court may exercise its equitable powers. The equitable powers of the federal courts find their roots in the Judiciary Act of 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330 (1999); *Atlas Life Ins. Co. v. W.I. Southern Inc.*, 306 U.S. 563, 568 (1939). However, a court may not exercise these powers in a vacuum without reference to principles of law or limitations construed by courts. Equitable remedies may be exercised only within the confines of those principles existing at the time of the Judiciary Act of 1789.

Equity does not provide a court with unfettered power; rather a court must act within the constraints of equitable principles existing at the time of the Judiciary Act of 1789. *Grupo*, 527 U.S. at 318; *Atlas*, 306 U.S. at 659-60; *Payne*, 74 U.S. at 430; *In re Sawyer*, 124 U.S. 200, 209 (1888). In order to understand this limitation on the equitable powers of the courts it is necessary to understand the historical evolution of equity.

The Court of Chancery in England administered cases of equity. The Court of Chancery had its origin sometime in the early 14th Century. *Halsbury's Laws of England* §652 (Lord Hailsham of St. Marylebone ed. 4th ed., 1992). The need for courts of equity arose from instances where corruption or mistake in the courts of law required redress. *Id.* The Court of Chancery was originally designed as a special arm of the King or sovereign. *Id.* English law recognized that the Chancellor was never free to follow his own opinion as to what was proper, rather he must apply principles of justice. *Id.* at 607. American law recognized the English system whereby the Chancellor may sit as a representative of the sovereign and thereby exercise the

King's prerogative as *parens patriae*. *Fontain v. Ravenel*, 58 U.S. 369, 384 (1855). However, the will of the king devolved to the people of the states and the will of the people is now made known to us through the acts of the legislature. *Id.*

With regard to a court's equitable power, the ultimate source is the Judiciary Act of 1789 wherein Congress granted courts equitable powers. Not long after the enactment of the Act, the Court struggled to define which body of equitable principles the federal courts should adopt. Should it be a state court's equitable power or should it be some other pre-existing powers? When state courts were formed, they varied greatly as to the adoption of equity. Some states created courts of equity while others created none, relying solely on remedies at law. *Fenn v. Holme*, 62 U.S. 481, 485 (1859). If federal courts adopted the principles of equity in the state in which they sat, they may not be permitted to exercise any equitable powers and thus Congress' Act would be ineffective. *Id.* The Court declared the laws of equity to be applied were the laws from England, the country from which we derive our concept of equity. *Id.* It also serves to make the principles applied to the citizens of the United States uniform. *Payne*, 74 U.S. at 430.

When the Court is presented with an attempt to expand its equitable jurisprudence to remedies unknown prior to 1789, the Court must decline to do so. For instance, when asked, as a court sitting in equity, to issue a writ of habeas corpus this Court refused because the remedy did not exist at the time of the Judiciary Act of 1789. *Sawyer*, 124 U.S. at 209-10. At the enactment of the Judiciary Act of 1789, equitable powers were limited to rights of property, "unless enlarged by statute." *Id.* Thus, in order for a federal court to exercise its equitable powers, the remedy requested must have existed at the enactment of the Judiciary Act of 1789, because the remedies existing were what the people, acting through Congress, understood equity to mean. However, the Court recognized that as the king may speak through his Chancellor, the people

may speak their will through congressional acts and the acts may thus be carried out by the courts. *Fontain*, 58 U.S. at 384.

Some may declare that the equitable remedies to be rendered merely need to comply with the principles of equity, and not the exact body of law existing at the time of the Judiciary Act of 1789. *Grupo*, 527 U.S. at 336. Such premise seems to be consistent with the principle that equity should not be so rigid; rather it should be flexible “in the increasing complexities of modern business relations.” *Union Pac. R. Co. v. Chicago, Rock Island and Pac. Railway Co.*, 163 U.S. 564, 600-01 (1896). However, such assertion fails to recognize that *Union Pacific* dealt with an issue of specific performance, a remedy existing well over a hundred years before the enactment of the Judiciary Act of 1789. *See* Halsbury’s § 660, n. 5. Thus it could be construed that *Union Pacific* stands for the proposition that equitable remedies existing at the enactment of the Judiciary Act of 1789 should not remain static but should be developed to meet the complex modern business relationships.

Such a proposition begs the question, what of new equitable remedies? The people, the *parens patriae*, speak through Congress to enact new forms of equitable remedies. *See Grupo*, 527 U.S. at 333 (declaring the expansion of vast equitable powers to be left with Congress). Otherwise, what would result? Equity will be expanded at the will of the judge who surely cannot be said to speak for the people of the United States. It is also interesting to note that English courts present a similar proposition. In a case where the court was asked to expand an equitable principle which, prior, applied only to land, the court declined to do so because “[t]he creation of new rights and remedies is a matter for Parliament, not the judges.” *Western Fish Products Ltd v. Penwith District Council*, [1981] 2 All ER 204 at 218.

Because there is no remedy at law to order substantive consolidation, federal courts are thus free to exercise their inherent powers of equity if they existed at the time of the Judiciary Act of 1789. Admittedly, it would be impossible to find “substantive consolidation” existing as an equitable remedy, but it may be possible to find some remedy existing in principle. However, no one has found a remedy matching substantive consolidation as J. Maxwell Tucker declared that “[s]uch precedent does not appear to exist.” *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427, 442 (Winter, 2000).

After inquiry, it is easy to see why equitable remedies before 1789 did not include the consolidation of two corporate debtors’ estates. The Bubble Act of 1720 Act of Geo. 1, c. 18 made partnerships with freely transferable shares, the ancient forerunner to the modern corporation, illegal. Mark Gillen, *History of the Corporation*, <http://www.law.uvic.ca/mgillen/315/documents/Ch11-History.pdf>. Furthermore, business organizations were rare even in America prior to the late 1870s. David A. Skeel, Jr., *Debt’s Dominion: A History of Bankruptcy Law in America*, 35 (2001). Therefore, it is easy to see why any remedy resulting in the consolidation of corporate entities would not have developed prior to 1789. Any remedy resulting in assets being turned over from one person to another could be accomplished through equitable principles relieving victims of fraud by restitution of property. Halsbury’s § 664.

Because an equitable remedy was not available at the time of enactment of the Judiciary Act of 1789, one must turn to the sovereign for direction. In the United States, the sovereign speaks through its legislature, Congress. Thus, the exercise of a remedy like the modern concept of substantive consolidation presented before this court must be enacted by statute.

C. *Sampsell v. Imperial Paper and Color Corporation* was a proper exercise of the Court's inherent equitable power because the Court corrected circumstances of fraud.

Many courts today incorrectly rely upon *Sampsell v. Imperial Paper and Color Corp.*, as the first case involving substantive consolidation. 313 U.S. 215 (1941). Upon review of the facts underlying *Sampsell*, it is easy to see why the action taken may be a proper execution of the bankruptcy court's equitable power, but the modern notion of substantive consolidation is an expansion inconsistent with the powers either existing at the time of the Judiciary Act of 1789 or any subsequent express statute from Congress.

The facts provided in the *Sampsell* decision are somewhat vague; but reference to the Court of Appeals for the Ninth Circuit opinion's facts help shed light upon the circumstances leading to the debtor's declaration of bankruptcy. On April 1, 1933, the debtor dissolved a partnership. *Imperial Paper and Color Corp. v. Sampsell*, 114 F.2d 49, 50 (9th Cir. 1940). The partnership owed over \$100,000 to Standard Textile Products Company (hereinafter "Standard"), so the debtor assumed the debt by executing two promissory notes to Standard. *Id.* On that same day Standard executed a distributing agent agreement with the debtor whereby the debtor agreed to pay over to Standard all net proceeds. *Id.* In 1936, it appears the debtor wanted to expand his business to include the sale of wall paper and he sought to secure a distribution arrangement with Imperial Paper, however, Imperial Paper refused to enter into such arrangement until the debtor paid in full the debt it owed to Standard. *Id.* The debtor never satisfied the debt to Standard. Rather the debtor created a corporation wholly owned by himself, his wife, and his son. *Id.* The debtor then transferred all personally owned wall paper inventory into the corporation in exchange for a note which was likely never paid. *Imperial*, 114 F.2d at 52. The corporation then acquired a distribution arrangement with Imperial. The Court, in its subsequent decision, focused on the fact that Imperial knew the debtor created the corporation in order to avoid paying

the debt owed to Standard and possessed knowledge of its fraudulent character. *Sampsell*, 313 U.S. at 217.

The issue appealed after the bankruptcy court's decision to merge the corporation and the debtor was not whether it was appropriate for the referee to consolidate the debtor and the corporation. *Id.* at 218-19. Rather, the issue appealed was whether Imperial properly asserted a priority claim or whether the claim was a general unsecured claim. *Id.* at 219. The Court focused its decision on the fraudulent nature of the debtor's transfer of the inventory to the corporation. *Id.* The real issue at hand was whether Imperial could maintain a priority claim against the consolidated debtor because it knew of the fraudulent character of the corporation. *Id.* at 221. Considering principles of equity involving fraudulent transfers the Court found Imperial's claim lacked any equitable entitlement to priority. *Sampsell*, 313 U.S. at 221.

At the heart of this matter is a fraudulent transfer. In order to deal equitably with all creditors involved³ the Court looked to principles of equity dating back to the statute of 13 Eliz. c. 5 (1570). Thus, it exercised equitable principles known at the time of the enactment of the Judiciary Act of 1789. Its exercise would be consistent with *Grupo*'s belief that "[t]he law of fraudulent conveyances and bankruptcy was developed to prevent such conduct," and new forms of equitable remedies were not. *Grupo*, 527 U.S. at 322.

Sampsell is thus distinguishable because it could be an appropriate exercise of the bankruptcy court's equitable powers. However, the question is not before this Court. The Debtors' situation is inherently different from *Sampsell* because the record is devoid of any allegations of fraud. This Court must instead decide whether, merely because of complex inter-company transaction between the Debtors, it would be equitable to the creditors involved to treat

³ Were the Court to have overturned the consolidation of the debtor or to approve the priority status of Imperial, it would mean that Imperial, who dealt fraudulently with respect to Standard's rights, would receive a windfall.

them all as one corporation. This highlights one of the most crucial criticisms of “equity”. Who defines whether the result of modern substantive consolidation is dealing justice?

[E]quity cannot be unbounded, without risking a throwback to those days in Sixteenth Century England when -- in light of the vast discretion exercised by the Chancellor -- it was said of the English Court of Chancery that equity is as long as the Chancellor's foot, be it long or short, on such an uncertain measure, so goes equity.

Bishop v. Nat'l Health Ins. Co., 344 F.3d 305, 306 (2d Cir. 2003) (citing John Selden, Table Talk 43 (Frederick Pollock, ed. 1927) in Zechariah Chafee, Jr. & Sidney Post Simpson, Cases on Equity 6 n. 8 (2d ed. 1946)). Certainly, this Courts decision in *Sampsell* is not binding upon the facts of this case.

Overall, the remedy of substantive consolidation is not within the inherent or express powers of the federal courts and therefore is not a remedy available to federal courts.

II. EVEN IF THIS COURT ALLOWS SUBSTANTIVE CONSOLIDATION AS A REMEDY INHERENT IN THE EQUITABLE POWERS OF THE BANKRUPTCY COURT, THE DEBTORS SHOULD NOT BE GRANTED THIS REMEDY UNDER THE FACTS OF THIS CASE.

If this court determines that it is within the inherent powers of the bankruptcy court to order substantive consolidation, this remedy should not be available to ACME in this case because the circumstances of this case do not meet commonly applied criteria for substantive consolidation.

As previously mentioned, various circuit courts allow substantive consolidation. Within circuits allowing substantive consolidation, there exist two primary tests for determining whether a debtor is allowed this remedy, one from the United States Court of Appeals for the District of Columbia Circuit,⁴ and the other from the Second Circuit.⁵ See J. Maxwell Tucker, *Grupo*

⁴ See *In re Augie/Restivo Baking Co.*, 860 F.2d 515 (2nd Cir. 1988).

⁵ See *Drabkin v. Midland-Ross corp. (In re Auto-Train Corp.)*, 810 F.2d 270 (D.C. Cir. 1987).

Mexicano and the Death of Substantive Consolidation, 8 Am. Bankr. Inst. L. Rev. 427, 433 (2000). There is also a recent Third Circuit decision that presents a third test for substantive consolidation.

Under the District Circuit Test, “the proponent of a motion for substantive consolidation must demonstrate: (1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or to realize some benefit.” *In re Reider v. FDIC*, 31 F.3d 1102, 1108 (11th Cir. 1994) (citing *Drabkin v. Midland-Ross Corp. (In re Auto-train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987)). In *Drabkin*, the court held that if a creditor demonstrates reliance upon the credit of one entity and establishes that it would be prejudiced from consolidation, then the court can only order substantive consolidation if it determines that the benefits of substantive consolidation will “heavily outweigh the harm.” 810 F.2d at 276.

The Second Circuit Test is very similar to the DC Circuit’s. It allows for substantive consolidation under either of “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.” *Federal Deposit Insurance Corporation v. Colonial Realty Co.*, 966 F.2d 57, 61 (2nd Cir. 1992) (quoting *In re Augie/Restivo Baking Co., Ltd.*, at 518).

More recently, in *Owens Corning*, 419 F.3d 195, the Third Circuit “crafted precedence that gives guidance [as to when substantive consolidation is appropriate] but refrains from creating an inclusive list of factors for consideration.” See Bruce H. White, et al., *Substantive Consolidation Redux: Owens Corning*, Am. Bankr. Inst. J., 24-9 ABIJ 30 (November 2005). The Third Circuit stated, “what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (1) pre-petition they disregarded separateness so

significantly [that] their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (2) post-petition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.” *Owens Corning*, 419 F.3d at 211.

All three of these tests embody the same set of principles that advance the goals of the Bankruptcy Code and protect creditors’ rights. Although each test is slightly different, all three focus on two main concepts: first, what entity the creditors believed they were dealing with, and second whether substantive consolidation will benefit all of the creditors. Courts agree that “only through a searching review of the record, on a case-by-case basis, can a court ensure that substantive consolidation effects its sole aim: fairness to all creditors.” *Bonham*, 229 F.3d at 765.

Furthermore, “substantive consolidation should not be used as a mere device of convenience, e.g., to overcome accounting difficulties, where it would unfairly impair the vested rights of some of the creditors.” *In re Augie/Restivo*, 860 F.2d at 518. Because of the possibility for such inequities, it should be used sparingly. *Chemical Bank New York Trust Co. v. Kheel*, 369 F.2d 845, 847 (2d Cir. 1966).

In light of this, it is evident that even if the remedy of substantive consolidation is available, ACME and its subsidiaries do not qualify for such remedy.

First, creditors of TAPCO and CAPCO did not believe that they were dealing with ACME itself. This is evidenced by the fact that trade creditors of the subsidiaries asked for and “customarily” received guarantees from ACME regarding their credit to CAPCO and TAPCO. (R. at 8). One entity cannot and does not give guarantees on its own debts. If the CAPCO and TAPCO creditors truly believed that they were indeed dealing with ACME and not with one of its subsidiaries, then the received guarantees would be unnecessary and superfluous.

Second, substantive consolidation would not benefit all creditors in this situation. In fact, both creditors of CAPCO and TAPCO would be harmed by this action. Because CAPCO has realized increased sales during the past several years, and is doing well in the market, its debt/asset ratio is much greater than that of TAPCO or ACME. Therefore, if no consolidation occurs, the creditors of CAPCO would be entitled to a greater settlement after bankruptcy. If this Court was to substantively consolidate the estate of CAPCO with that of TAPCO and ACME, it would lessen the pro rata share of the money available for CAPCO creditors during the bankruptcy. Therefore, substantive consolidation would harm CAPCO creditors.

Not only would substantive consolidation harm CAPCO creditors, it would also harm some of TAPCO's trade creditors. Trade creditors of TAPCO who asked for and received guarantees from ACME currently have greater leverage than those unsecured creditors who did not establish guarantees from ACME. However, if substantive consolidation occurs, all guarantees from ACME will be extinguished and therefore, guaranteed creditors will be treated as if they were general unsecured creditors. *See e.g. In re Bonham*, 229 F.3d 750. This would obviously harm the guaranteed creditors of TAPCO.

Overall, neither of the two requisite factors for substantive consolidation are present in this case. CAPCO and TAPCO creditors did not believe they were dealing with ACME, nor does the application of substantive consolidation in this case generate more benefit than harm for all creditors. Therefore, application of substantive consolidation is not warranted under these particular facts.

III. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT SUCCESSOR LIABILITY CLAIMS CANNOT BE EXTINGUISHED UNDER § 363(F) OF THE BANKRUPTCY CODE BECAUSE EXTINGUISHING SUCH CLAIMS WOULD BE INCONSISTENT WITH BOTH THE PLAIN MEANING OF THE STATUTE AND THE UNDERLYING PURPOSE OF SUCCESSOR LIABILITY.

A. The plain language of § 363(f) of the Bankruptcy Code extinguishes only in rem interests in assets being sold.

The statutory language of § 363 (f) of the Bankruptcy Code clearly states that assets may be sold free and clear of “any interest in such property.” Congress deliberately stated that the interest must exist in *property* and not in anything else. Some courts improperly disregard the words “in such property,” thereby reading § 363(f) too broadly. The Third Circuit interpreted § 363(f) as barring “any interest that could potentially travel with the property being sold, even if the asserted interest is unsecured.” *In re: Trans World Airlines, Inc.*, 322 F.3d 283, 288 (3d Cir. 2003).

Congress purposely places every word in a statute. The words “[‘any interest’] cannot be read in isolation.” *Fairchild Aircraft, Inc. v. Cambell*, 184 B.R. 910, 917 (Bankr. W.D. Tex. 1995), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex 1998).⁶ One must read the words “any interest” along with the rest of § 363(f) of the Bankruptcy Code. The express language of §363(f) allows a trustee to transfer title to the purchasing corporation free and clear of any interest “in such property.” These three words “define the real breadth” of the statute. *Fairchild*, 184 B.R. at 910. Property interests are defined as interests “in rem.” Therefore, these limiting words, “in such property,” demonstrate Congress’ intent that § 363(f) apply only to in rem interests in property. To allow “any interests” to include in personam claims, courts would

⁶ Although the court vacated its original order, it made clear the original order was to retain its precedential value. *In re Fairchild Aircraft Corp.*, 220 B.R. at 917 n. 10.

“render the words ‘in such property’ a nullity.” *Id.* By focusing solely on in rem interests, Congress placed boundaries around § 363(f) and courts, in turn, cannot overstep them.

In this case, the interest in question is not an in rem interest, nor a lien on property as contemplated by § 363(f). Plaintiffs are not “attempting to enforce a lien” when they bring successor liability claims. *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994). In contrast, successor liability claims are not based on any specific property owned by the bankrupt company. Consequently, “while successor liability may give a party an alternative entity from whom to recover, the doctrine does not convert the claim to an in rem action running against the property being sold.” *Fairchild*, 184 B.R. at 920. Successor liability claims are in personam claims and cannot be extinguished by the plain language of § 363(f) of the Bankruptcy Code.

B. The absence of express bankruptcy provisions requires the application of relevant non-bankruptcy law.

Because § 363(f) should not extinguish successor liability claims in the bankruptcy context, applicable federal statutes and case law dealing with successor liability should determine the outcome of the present case.

“[A]s a general rule, a corporation which acquires another corporate entity’s assets does not assume the seller’s liabilities.” *Savage Indus. V. Western Auto Supply Co.*, 43 F.3d 714, 717 n. 4 (1st Cir. 1994). However, there are several exceptions to the rule outside the bankruptcy context. *Id.* An asset purchasing corporation may be held liable for the unknown or contingent claims of its predecessor where the transaction is, in fact, a consolidation or merger between two entities or the asset purchasing corporation is a mere continuation of the predecessor. *Id.* In addition, to protect federal rights or advance public policies, the federal successor liability doctrine allows lawsuits against even a genuinely distinct purchaser of a business if the successor

had notice of the claim before acquisition and there was “substantial continuity in the operation of the business before and after the sale.” *Chicago Truck Drivers*, 59 F.3d 48, 49 (7th Cir. 1995).

Commonly used factors to determine whether there is a substantial continuation of the business after the sale include: “substantial continuity of the same business operations, use of the same plant, continuity of the work force, similarity of jobs and working conditions, similarity of supervisory personnel, similarity in machinery, equipment, and production methods, similarity of products or services, and the ability of the predecessor to provide relief.” 29 C.F.R. 823.107 (2006). Bankruptcy courts hearing cases dealing with successor liability claims of employment discrimination under Title VII should apply and balance these eight factors. The balancing and application of these and similar factors found in other state and federal court opinions ensure a fair and equitable outcome in each successor liability lawsuit.

In the instance before this Court, SOUSA will continue the business as a successor in interest. SOUSA will continue the Debtors’ operations undisturbed, therefore the personnel, products, operations and plants will remain constant. SOUSA admits to knowledge of the claims yet wants to use the Bankruptcy Code to evade successor liability under non-bankruptcy law because the companies will be operated as substantially the same operation. While the Bankruptcy Code may permit alteration of results under non-bankruptcy law, in this instance and other instances involving successor liability the Court should not interpret § 363(f) to permit the undoing of the significant social policies underlying the doctrine of successor liability.

C. Successor liability claims should not be extinguished by § 363(f) of the Bankruptcy Code because the doctrine of successor liability advances public policy.

One of the justifications for successor liability is to avoid the “virtual destruction of the plaintiff’s remedies against the original [business] caused by the successor’s acquisition of the business.” *Nelson v. Tiffany Indus.*, 778 F.2d 533, 535-36 (9th Cir. 1985). Society has an interest

in “preventing tortfeasors from externalizing the costs of their misconduct by selling their assets free of any liabilities and distributing the proceeds to their shareholders. *EEOC v. Vucitech*, 842 F.2d 936, 944 (7th Cir. 1988). Allowing tortfeasors to avoid liability through the use of § 363(f) of the Bankruptcy Code encourages careless and reckless behavior on the part of employers and manufacturers. Tortfeasors should be held accountable for their actions, and not be allowed to evade liability through application of the Bankruptcy Code.

Some courts mistakenly reasoned that successor liability in the bankruptcy context would permit claimants to “assert their claims against purchasers of the bankrupt’s assets, while relegating lienholders to the proceeds of the sale” this assertion “elevates claims that have not been secured or reduced to judgment to a position superior to those that have.” *Forde v. Kee-Lox Mfg.*, 437 F. Supp. 631, 633 (W.D.N.Y. 1977). Successor liability claims do not, in fact, disturb the priority scheme of the Bankruptcy Code. “Once a bankruptcy proceeding is complete and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their force.” *Chicago Truck Drivers*, 59 F.3d at 49. Successor liability does not affect the priority of creditors who receive proceeds from the sale of assets in bankruptcy. If a company’s assets are allowed to be transferred “free and clear” of successor liability claims through the use of § 363(f), the policies underlying the doctrine of successor liability will be undermined.

CONCLUSION

The Court of Appeals for the Thirteenth Circuit properly held that federal courts do not have the power to order substantive consolidation. Nowhere in the Bankruptcy Code is the term “substantive consolidation” used to grant courts the power to consolidate the estates of multiple

debtor entities. Furthermore, substantive consolidation is not within the inherent power of the courts, which are limited to either those remedies existing at the enactment of the Judiciary Act of 1789 or to those explicitly created by statute.

The Court of Appeals for the Thirteenth Circuit also properly found that the district court may not sell the assets free and clear of any possible successor liability claims under § 363(f) of the Bankruptcy Code because the plain language of the statute will not permit a sale free and clear of *in personam* claims and public policy indicates the same.

Therefore, Respondent asks the Supreme Court to affirm the holdings of the Court of Appeals for the Thirteenth Circuit.

APPENDIX A

11 U.S.C. § 105(a).

Power of court

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.

11 U.S.C. § 302. Joint cases

(a) A joint case under a chapter of this title [11 USCS §§ 101 et seq.] is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title [11 USCS §§ 101 et seq.] constitutes an order for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

11 U.S.C. § 363(f). Use, sale, or lease of property

(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.

11 U.S.C. § 1123(a). Contents of plan

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

(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;

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX B

29 C.F.R. 825.107 What is meant by "successor in interest"?

(a) For purposes of FMLA, in determining whether an employer is covered because it is a "successor in interest" to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

- (1) Substantial continuity of the same business operations;
- (2) Use of the same plant;
- (3) Continuity of the work force;
- (4) Similarity of jobs and working conditions;
- (5) Similarity of supervisory personnel;
- (6) Similarity in machinery, equipment, and production methods;
- (7) Similarity of products or services; and
- (8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a "successor in interest" exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a "successor in interest," employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single

employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.