
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,

-versus-

JEAN TIEN,
Respondent.

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

BRIEF FOR RESPONDENT

Team Number 20
Attorneys for the Respondent

QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER SUBSTANTIVE CONSOLIDATION OF DEBTOR ESTATES IS A VALID EXERCISE OF FEDERAL COURTS' GENERAL EQUITABLE POWERS UNDER THE BANKRUPTCY CODE.**

- I. WHETHER SUCCESSOR LIABILITY CLAIMS CONSTITUTE INTERESTS IN PROPERTY AS CONTEMPLATED BY SECTION 363(F) OF THE BANKRUPTCY CODE.**

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OPINIONS BELOW

By order and decision dated January 6, 2005, the United States District Court for the District of Kelly granted the Respondent's motion and withdrew reference to the Bankruptcy Court as set forth in the record. (R. 7) The District Court's decision dated March 14, 2005, which granted the Petitioner's motion, is unreported and set forth in the Record. (R. 7) The United States Court of Appeals for the Thirteenth Circuit's decision, which reversed the District Court, Jean Tien v. Acme Chemical Industrial Products, Inc. (In the Matter of Acme Chemical Industrial Products, Inc.) No. 05-4080 (13th Cir. Oct. 17, 2005) is unreported and set forth in the Record. (R. 2-25)

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is waived pursuant to Rule VIII of the Fourteenth Annual Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition.

STATUTORY PROVISIONS

The following federal statutes are relevant to the facts of this case and set forth in the appendices:

11 U.S.C. § 101, 11 U.S.C. § 105, 11 U.S.C. § 363, 11 U.S.C. § 506, 11 U.S.C. § 1123, 11 U.S.C. § 1126, 11 U.S.C. § 1129, 11 U.S.C. § 1141, and 28 U.S.C. § 1651.

STATEMENT OF THE CASE

This appeal involves the bankruptcy proceedings of three debtor estates: parent company Acme Chemical Industrial Products, Inc.'s (hereinafter "ACME") and its two subsidiaries, Trona Ash Products Company, Inc. (hereinafter "TAPCO") and Chemical America Product Company, Inc. (hereinafter "CAPCO"). CAPCO produces calcium chloride, a compound used for de-icing

and binding roads and highways. (R. 3) TAPCO is one of six companies in the United States which produces soda ash, a compound used to make glass, certain chemicals, soaps, detergents, synthetic rubber, and explosives. (R. 3) ACME is responsible for marketing and distributing CAPCO and TAPCO products. (R. 2-3)

The Respondent in this case is Jean Tien, an employee of CAPCO. Two years ago, she and several other employees (hereinafter “the Discrimination Plaintiffs”) filed suit against CAPCO asserting claims for unlawful sexual harassment and for failure to pay them “equal pay” for “equal work” under Title VII of the Civil Rights Act of 1964, and the Equal Pay Act of 1963. (R. 5) Two years later, ACME, TAPCO and CAPCO filed bankruptcy in the District of Kelly. (R. 5) The discrimination lawsuit remains pending, but if the Discrimination Plaintiffs prevail, they will receive a substantial recovery. (R. 5)

Over the past two years, several events led to the financial demise of ACME and TAPCO. (R. 5) First, the price of soda ash fell from \$110 per ton to \$75 per ton due to a reduced national demand. (R. 5) Future forecasts predict prices could plunge further to \$60 per ton in 2006. (R. 5) Second, the production costs for both soda ash and calcium chloride drastically increased due to increased energy prices. (R. 5) As a result, ACME’s profits attributed to TAPCO greatly diminished, eventually causing ACME to default on its primary line of credit. (R. 5-6) Although profits attributable to both the production and distribution for CAPCO remained strong, ACME determined its best alternative was a formal restructuring process under Chapter 11 of the Bankruptcy Code (hereinafter “the Code”). (R. 6)

After commencing bankruptcy proceedings, ACME and TAPCO competitor Sousa Industries, Inc. (hereinafter “SOUSA”) offered to purchase the assets of all three debtors. (R. 6) However, SOUSA conditioned its offer on two terms: (1) purchasing the assets of all three

debtor estates and (2) insulating SOUSA from any future liability resulting from the Discrimination Plaintiffs' Title VII claims. (R. 6) To satisfy SOUSA's offer, ACME filed a motion with the Bankruptcy Court requesting: (1) substantive consolidation of all three debtor estates into "one unit" and (2) a sale of the assets "free and clear of all interests, liens, claims and encumbrances" under § 363(f) of the Code, including the Discrimination Plaintiffs' Title VII claims. (R. 7)

Seeking to protect their rights of recovery, the Discrimination Plaintiffs objected to ACME's motion and requested that the honorable Kristopher Villarreal of the United States District Court for the District of Kelly withdraw reference of the debtor estates from Bankruptcy Court (R. 7) The District Court agreed to withdraw reference and proceeded to hear testimony regarding substantive consolidation and the proposed asset sale. (R. 7) Citing reasons of economic efficiency and creditor fairness, the District Court granted ACME's motions in the entirety. (R. 7)

Disagreeing with the District Court's decision, the Respondent filed a timely appeal in the United States Court of Appeals for the Thirteenth Circuit. (R. 9) The Court of Appeals determined that the District Court lacked the authority to order substantive consolidation and to authorize the sale of assets free and clear of the discrimination claims. (R. 9-19) ACME appealed the Thirteenth Circuit's decision and this Court granted Certiorari to consider the following questions: (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; and (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 the discrimination claims. (R. 1)

SUMMARY OF THE ARGUMENT

As the Thirteenth Circuit correctly held, modern substantive consolidation is not a valid exercise of the District Court's statutory or equitable powers. First, modern substantive consolidation is not a part of traditional equity jurisprudence. Traditional equitable authority is limited to the remedies exercised in England by the Court of Chancery in 1789. However, substantive consolidation was not created until the mid-Twentieth Century by judges seeking to avoid the high costs of administering intertwined debtor estates. However, without an 18th Century precedent, the remedy is not a valid exercise of traditional equitable powers. Second, substantive consolidation is not a valid exercise of power pursuant to § 105(a) of the Code. That provision only authorizes remedies needed to carry out or implement other Code provisions. However, substantive consolidation is not referenced, contemplated or condoned in the Code. Simply put, substantive consolidation is a powerful remedy outside the confines of either source of authority. The federal courts are powerless, in the name of equity, to misconstrue the Bankruptcy Code or create remedies unknown to traditional equity jurisprudence.

ACME's request for substantive consolidation and an unconfirmed asset sale bypasses creditor protections set forth in the provisions of the Code governing the Chapter 11 confirmation process. Specifically, the Respondent will lose the right to vote on the terms of the plan, to propose alternative options, and for an opportunity to be heard regarding the discrimination claims. The Code affords creditors the right to have a voice in deciding the terms of a plan; however, it does not grant debtors the power to bypass those protections and independently dictate such terms. Thus, substantive consolidation or an unconfirmed asset sale is not proper at this time.

The Code provides two options for selling assets free and clear of claims or interests: (1)

confirmed sales as set forth in § 1141(c) and (2) pre-plan sales under § 363(f). Courts have greater latitude through plan sales, authorizing sales free and clear of “claims and interests,” while § 363(f) authorizes only sales free and clear of “interests in such property.” Confirmed plan afford greater due process by conducting multiple hearings before disposing of claims and interests. On the other hand, pre-plan sales allow debtor-estates to sell property expeditiously when required to satisfy the best interests of creditors. Pre-plan sales only permit the disposal of specific, or *in rem*, interests in property. To dispose of general claims, or *in personam* claims, debtor’s must use the confirmation process. Courts may not bypass the confirmation process by disposing of *in personam* claims through a § 363(f) sale.

Decisions regarding the interpretation of § 363(f) asset sales have diverged into two conflicting schools of thought. One interprets the statute narrowly, holding that sales are limited to *in rem*, or specific interests in property. The other interprets the language broadly, holding that any claim or interest is disposable under § 363(f).

The narrow view provides the most sound and logical method for interpreting § 363(f). Congress explicitly limited sales free and clear under § 363(f) by excluding the word “claim” from the statutory language. Section 363(f) allows a sale free and clear of “interests in such property” whereas § 1141(c) allows sales free and clear of “claims and interests.” The plain language of the two statutes evidences the explicit intent of Congress to exclude general “claims” from § 363(f). Under that interpretation, the Discrimination Plaintiffs claims against CAPCO may not be disposed of because they are not interests in property as contemplated by § 363(f).

In sum, the Thirteenth Circuit Court of Appeals correctly reversed the District Court’s decision granting the Petitioner’s motion for substantive consolidation and § 363(f) sale of assets. This Court should affirm that decision in its entirety.

ARGUMENT

I. FEDERAL COURTS LACK THE STATUTORY OR EQUITABLE POWER TO ORDER SUBSTANTIVE CONSOLIDATION OF DEBTOR ESTATES

Substantive Consolidation is a powerful remedy which disregards the fundamental principals of limited liability by consolidating the assets and debts of separate business entities. Eastgroup Props. v. S. Motel Ass'n., Ltd., 935 F.2d 245, 248 (11th Cir. 1991). The result is a common fund of assets and a single body of creditors for purposes of settling claims and voting on plans. Alexander v. Compton (In re Bonham), 229 F.3d 750, 764 (9th Cir. 2000). The modern version of substantive consolidation resembles a corporate merger, except the rights of creditors—rather than shareholders—are affected: “[s]ubstantive consolidation enables a bankruptcy court to disregard separate corporate entities, to pierce their corporate veils in the usual metaphor, in order to reach assets for the satisfaction of debts of a related corporation.” Id. (internal quotations omitted).

The purpose of substantive consolidation is the equitable treatment of all creditors. Id. Although, no matter how good the intentions, substantive consolidation usually benefits some creditors at the expense of others. In re Sneider Bros., Inc., 18 B.R. 230, 234 (Bankr. N.D. Mass. 1982). This happens because the separate debtors generally have different asset-to-debt ratios. In re DRW Prop. Co., 54 B.R. 489, 495 (Bankr. N.D. Tex. 1985). Creditors involved with debtors having a lower asset-to-debt ratio realize the potential for gain and use substantive consolidation “to enhance their position by corraling unencumbered assets of other entities.” Sabin Willett, The Doctrine of Robin Hood a Note on “Substantive Consolidation”, 4 DePaul Bus. & Com. L.J. 87, 88 (2005)(internal quotations omitted). Plainly, that practice is not justified in the name of equity. As Judge Friendly once put it, “equality among creditors who have lawfully bargained for different treatment is not equity but its opposite.” In re DRW Prop.

Co., 54 B.R. at 495 (quoting Chem. Bank N.Y. Co. v. Kheel, 369 F.2d 845, 848 (2d Cir. 1966)).

Despite its prejudices towards certain plaintiffs, the most troubling aspect of substantive consolidation is that it lacks a valid source of judicial power. Most Circuits rely on their status as a “court of equity” or § 105(a) as the authority for modern substantive consolidation. Union Sav. Bank v. Augie/Restivo Banking Co. (In re Augie/Restivo Banking Co.), 860 F.2d 515, 518 (2d Cir. 1988). But that reliance is misplaced for two reasons. First, § 105(a) only supplies equitable authority for implementing express provisions of the Code. New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.), 351 F.3d 86, 92 (2d Cir. 2003)(explaining that the purpose of § 105(a)) is for carrying out the provisions of the Bankruptcy Code, rather furthering the purpose of the Code or doing the right thing) Second, even sitting as courts of equity, federal courts lack the power to “create remedies previously unknown to equity jurisprudence.” Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999). Simply put, Modern substantive consolidation is not within the confines of either authority.

A. General Equitable Powers Do Not Authorize Substantive Consolidation, a Modern Remedy that is Separate and Independent of Traditional Equitable Jurisprudence

The federal courts possess a limited amount of general equitable power. Those powers derive from two sources: (1) Article III of the United States Constitution¹ and (2) and the Judiciary Act of 1789.² E.g., Id. at 318. Article III provides that federal courts have jurisdiction over “cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, and their Authority.” Id. The Judiciary Act of 1789 codified the powers granted by Article III. Alexander Hamilton explained the limitations of

¹ U.S. Const. art. III, § 2.

² Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

equitable authority as follows: "[t]he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." Mo. v. Jenkins, 515 U.S. 70, 133 (1995) (citing *The Federalist* No. 78, at 526 (Alexander Hamilton)). Thus, the general equitable powers are limited to the *law* and not a judge's personal discretion.

As explained in Grupo Mexicano, that equitable *law* consists of the remedies devised and administered by the English Court of Chancery in 1789. Grupo Mexicano, 527 U.S. at 318. Grupo Mexicano, involved a Mexican company which announced its plan to use valuable notes received from the Mexican government to satisfy debts with Mexican creditors, leaving nothing for American creditors. Id. at 311. The American creditors filed suit in the district court seeking contract damages and a preliminary injunction preventing the Mexican company from transferring the notes. Id. The district court recognized the dilemma faced by American creditors and granted the American creditors a preliminary injunction. Id. at 312. On appeal, the Second Circuit affirmed the injunction; however, on subsequent appeal, this Court reversed. Id.

Justice Scalia, writing for the majority, held that a preliminary injunction freezing assets is beyond the equitable authority of the federal courts. Id. at 322. After surveying the history of similar remedies, the Court noted that pre-judgment actions were limited to creditors "who had already obtained a judgment establishing the debt." Id. at 319. The Court acknowledged that equity is a flexible concept, however, within the federal system, "that flexibility is confined within the broad boundaries of traditional equitable relief." Id. at 332. Because a pre-judgment remedy was unknown to traditional equitable jurisprudence, the Court determined that the judiciary branch had "no authority to craft a 'nuclear weapon' of the law like the one advocated here." Id. at 333. The Court concluded that Congress is in a much better position to realize the

need to depart from past practice and “to design the appropriate remedy.” Id.

Relying heavily on Grupo, the Court of Appeals below correctly held that substantive consolidation is not a valid exercise of the District Court’s equitable power because the modern remedy lacks an 18th Century English law precedent (or statutory authority). (R. 15)

Undoubtedly, the modern corporate structure needs remedies tailored to today’s market-place. But the debate over the proper form and substance of those remedies “should be conducted and resolved where such issues belong in our democracy: *in the Congress.*” Id. at 333. (emphasis added). The federal courts lack power to independently depart from the established equitable practices and order substantive consolidation, a remedy which was unavailable in 1789.³

1. Substantive Consolidation was Not Available in 1789 and Therefore is not a Valid Exercise of General Equitable Power Today

Federal judges created the modern version of substantive consolidation—the version proposed by ACME’s motion—in the mid-Twentieth Century. In re Owens Corning, 419 F.3d 195, 206 (3d Cir. 3005). As corporate entities became more popular, courts began encountering circumstances of fraud and abuse which justified disregarding the shelters and protections offered by limited liability. F.D.I.C. v. Colonial Realty Co. 966 F.2d 57, 60 (2d Cir. 1992). Courts responded by developing doctrines which shareholders of limited liability protection when they use corporate structures to facilitate fraud. See Id.

Originally, substantive consolidation or “consolidation” was a valid application of

³ This proposition has been strongly by several publications which provide a through examination of the history and development of substantive consolidation. See generally Douglas Baird, Substantive Consolidation Today, 47 B.C. L. Rev. 9 (2005); J. Maxwell Tucker, Grupo Mexicano and the Death of Substantive Consolidation, 8 Am. Bankr. Inst. L. Rev. 427 (Winter 2000); Sabin Willett, The Doctrine of Robin Hood A Note on “Substantive Consolidation”, 4 DePaul Bus. & Com. L.J. 87, 88 (2005); Christopher Predko, Substantive Consolidation Involving Non-Debtors: Conceptual and Jurisdictional Difficulties in Bankruptcy, 41 Wayne L. Rev. 1741 (1995).

fraudulent-conveyance law to the corporate setting. See e.g., Sampsell v. Imperial Paper & Color Corp., 318 U.S. 215 (1941). For example, in Sampsell this Court approved the Ninth Circuit’s use of “consolidation” where a corporation developed a subsidiary for the following purposes: (1) continuing the business of an insolvent parent company, (2) sheltering the insolvent’s assets from bankruptcy proceedings, or (3) defrauding creditors. Id. at 218.

Courts often cite the Sampsell opinion as support for the validity of modern substantive consolidation. In re Owens Corning, 419 F.3d at 207. However, modern consolidation is not analogous to Sampsell. There, the Court was approving “consolidation” to prevent a parent debtor from hiding assets in an affiliate that was “nothing but a sham and a cloak” developed by the parent company “for the purpose of hindering, delaying and defrauding his creditors.” Sampsell, 318 U.S. 215 at 217. The intent was to protect creditors from debtors who abused corporate formalities and used the structure of limited liability to make fraudulent conveyances. Also, the objecting creditor knew about the fraudulent nature of the subsidiary. Id. This Court has not approved a federal court’s use of equitable powers to order modern substantive consolidation, a remedy separate and distinct from fraudulent-conveyance law.

Between the 1940s-1960s, courts began applying state-law remedies such as “veil piercing,” equitable subordination, or turnover. See e.g., Stone v. Eacho (In re Tip Top Tailors, Inc.), 127 F.2d 284 (4th Cir. 1942). Federal courts examined the state doctrines and developed their own common-law variation. Fish v. East, 114 F.2d 177 (10th Cir. 1940). For example, in Fish the Tenth Circuit extended the fraudulent-conveyance theory in support of compelling “turnover” relief for a parent company against its bankrupt subsidiary. Id. The court established ten elements to determine whether a corporate subsidiary is a mere “instrumentality” of its parent:

1. The parent owns all or a majority of the capital stock of the subsidiary;
2. There are common directors and officers;
3. The parent corporation finances the subsidiary;
4. The corporation is responsible for incorporation of the subsidiary;
5. The subsidiary has grossly inadequate capital;
6. The parent company pays the salaries or expenses or losses of the subsidiary;
7. The subsidiary has no independent business from the parent;
8. The subsidiary is commonly referred to as a subsidiary or as a department or a division of the parent;
9. Directors and executive officers of the subsidiary do not act independently but take direction from the parent; and
10. The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

Id. at 191. The court determined that when these elements are present, the “corporate entity may be disregarded where not to do so will defeat public convenience, justify [a] wrong or protect fraud.” Id. As late as 1964, substantive consolidation still required a fraudulent conveyance.

Accord Baird, supra, at 15.

2. The Supreme Court has Never Approved Substantive Consolidation as a Remedy Distinct from Fraudulent-Conveyance Law

In the 1960s, federal courts departed from traditional—and valid—equitable remedies, and crafted their own version of corporate disregard. Chem. Bank N.Y. Trust Co., 369 F.2d at 847. Courts began justifying substantive consolidation for purposes of judicial and economic efficiency, rather than as a means for combating corporate fraud or abuse:

[w]here the interrelationships of the group are hopelessly obscured and the time and expense necessary even to attempt to unscramble them so substantial as to threaten the realization of any net assets for all the creditors, equity is not helpless to reach a rough approximation of justice to some rather than deny any to all.

Id. The result is a modern federal version of substantive consolidation distinct from its predecessor—fraudulent-conveyance law.

The departure from the traditional remedy of fraudulent conveyance was not a valid exercise of equitable powers and cannot survive this Court’s opinion in Grupo Mexicano.

Modern substantive consolidation goes in the opposite direction of the state-law doctrines and fraudulent-conveyance law; instead of protecting creditors from share-holder fraud, it redistributes the rights of innocent creditors. In re Owens Corning, 419 F.3d at 206. Simply put, federal courts “have no authority to craft a nuclear weapon” like the law of modern substantive consolidation. See Grupo Mexicano, 527 U.S. at 332. The expenses of sorting out corporate interrelationships may be a tedious and expensive process, however, absent an express statute, federal courts are limited to traditional remedies. Any departure from past practice should be conducted and resolved by Congress. Id.

At first, one might reason that Grupo Mexicano is not applicable to the case at hand because of the factual differences between the pre-judgment injunction and substantive consolidation. However, Grupo Mexicano’s holding is not limited to the validity of the pre-judgment injunction alone. Id. Instead, the Court flatly rejected both an expansive view of equity to grant relief outside of traditional remedies and its application to the pre-judgment injunction: “[t]his expansive view of equity must be rejected. Joseph Story’s famous treatise reflects what we consider the proper rule, both with regard to the *general role of equity* in our government of laws, not of men, and with regard to its application in the very case before us. . . .” Id. at 322. Further, this Court and others have cited the Grupo Mexicano case in a variety of contexts for the basic proposition that a federal court’s equitable powers are limited to traditional equity jurisprudence. Cf; Vieth v. Jubelirer, 541 U.S. 267 (2004)(plurity)(voter rights case); Great West Life and Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (holding that 18th Century limitation on equitable powers applies to equitable powers exercised under ERISA); Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001) (citing in support for proposition that federal common-law making in the context of maritime law must be used only to

harmonize express federal statutes); Johnson v. Collins Entm't Co., 199 F.3d 710, 715 (4th Cir. 1999) (order enjoining unlawful gaming practices not a valid exercise of equitable power because the remedy was traditionally unavailable).

3. Federal Courts may Not Use Their Equitable Powers to Modify State Law by Creating New Property Interests

Not only do federal courts lack the authority to create non-traditional remedies, they also are prohibited from creating a federal common-law variation of remedies which modify the legal rights created by state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The rule also applies to the determination of property interests in bankruptcy proceedings. Butner v. US, 440 U.S. 48, 55 (1979); Raleigh v. Ill. Dept. of Revenue, 530 U.S. 15, 21 (2000)(stating that “the basic federal rule in bankruptcy is that state law governs the substance of claims”)(internal quotations omitted). In Butner, this Court explained that property interests are governed by state law and a federal court may not employ equitable rules to modify those rights:

Property interests are created and defined by state law. Unless some federal interest requires a different result, ***there is no reason*** why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy.

Butner, 440 U.S. at 55 (internal citations omitted) (emphasis added).

The Butner Court addressed the issue of “whether a security interest in property includes rents and profits derived from that property.” Id. at 57. The Court held that those property interests are questions of state law and, thus, should be answered by state law. Id. at 51.

Although Congress has plenary power to create the laws of bankruptcy, state laws are overruled only to the extent they actually conflict with the Bankruptcy Act. Id. at 54, fn.9. The Court rejected the Third and Seventh Circuits federal rule of equity which superceded state law by

giving the lien holder interests in rents even if the applicable state law did not. Id. The Court explained that Congress had the power, under the Constitution, to create a bankruptcy statute which modifies the property interests created by state law. Id. However, for a number of reasons, Congress chose not to exercise this power, thus, it is inferred that Congress intended for state law to govern. Id. at 55. The Court concluded that undefined considerations of equity do not justify departing from the applicable state law.

Under the Butner analysis, the district court improperly used substantive consolidation, a federal rule of equity, to supercede state-law property rights. The district court is limited to the specific Code provisions and applicable state-law remedies. Under the general state-law principals of limited liability, TAPCO and ACME creditors do not have a property interest in the assets of CAPCO.⁴ The district court may not create a property interest by virtue of general equitable considerations. As explained by Justice Souter, if there is not a claim prior to bankruptcy “there is no claim for a bankruptcy court to either recognize or reject.” Raleigh, 530 U.S. at 26 (holding that absent a modification expressed by the Code, state law governed burden of proof on tax claim in bankruptcy).

Also, the Butner opinion explains that the Code’s silence on an issue is not a license, nor a justification for a federal court, to create an equity rule which replaces state-law remedies which authorize disregard for corporate separateness. As the Butner Court explained, the Code’s silence on an issue of property rights indicates just the opposite; in the absence of a federal statute to the contrary, state law is binding. Butner, 44 U.S. at 55.

Justice Schmid, in his dissent below, erroneously suggests that because “the bankruptcy

⁴ The Respondent acknowledges that it is possible one of the state-law disregard doctrines may apply to the facts of this case, however, the Petitioner has not raised those arguments on appeal or in the proceedings below. Thus, the Respondent is unable to offer any position as to whether a particular doctrine is or is not applicable in this case.

court's equitable power to substantively consolidate survived the enactment of the Bankruptcy Code," it is codified by the general equitable powers provision, § 105(a) of the Code. (R. 20) But as explained in Butner, the Code's silence on substantive consolidation is not a stamp of validation.⁵ The policy explained by both Butner and Raleigh dictates that if state law governs an issue, and Congress chooses to supercede that law, it will expressly do so. See Raleigh, 530 U.S. at 26; Butner, 44 U.S. at 55. Thus, the Code's silence on pre-plan substantive consolidation indicates that Congress intended for courts to defer to state law. Further, § 105(a) does not supercede state-law. That proposition begs the question. If Congress intended to incorporate or disclaim substantive consolidation, it would have done so expressly; until then, federal courts are bound by the traditional and state-law remedies which consolidate assets and liabilities.

B. Section 105(a) Does Not Authorize Federal Courts to Create or Order Substantive Remedies Not Otherwise Available in the Code

The Court of Appeals correctly rejected ACME's argument that § 105(a) authorized the district court to order substantive consolidation. (R. 15) Section 105(a) is not a license carry out federal common-law or the general principals of bankruptcy. In re Dairy Mart Convenience Stores, Inc., 351 at 92. Instead, it grants equitable powers to carry out the provisions expressly codified by the Code:

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

⁵ See Fed. R. Bankr. P. 1015 advisory committee's note (explaining that substantive consolidation is not authorized nor permitted by the rule since it depends on the substantive rights of the creditors).

rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (emphasis added). This Court has clarified that equitable powers “can only be exercised within the confines of the Bankruptcy Code.” Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988). Both the plain language and history of the section indicate that it does not grant the authority to make substantive law nor a “roving commission to do justice.” U.S. v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986)).

The plain-meaning of the “provisions of this title” language denotes a set of remedies selectively established by Congress, and a court cannot legislate by adding to them. Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002). The Bankruptcy Code sets out in great detail the rights and remedies available when administering a debtor estate. Id. Courts readily admit that substantive consolidation, which has a “disarmingly innocent sound,” is not a procedural remedy, but “a measure vitally affecting substantive rights.” In re DRW Property Co., 54 B.R. at 494 (citing In Re Flora Mir Candy Corporation, 432 F.2d 1060, 1062 (2d Cir. 1970)). Thus, by implementing substantive consolidation—a *substantive* remedy—without proper authority, courts are assuming the role of Congress and exercising legislative powers.

Also, the history of § 105(a) confirms that its purpose is carrying out the specific code provisions. The section grants courts equitable power similar to the equitable powers granted by the All Writs Act.⁶ The All Writs Act enables federal courts to issue “all writs necessary or appropriate in aid of their respective jurisdiction.” 28 U.S.C. § 1651 (2000); See U.S. v. N.Y. Tel., 434 U.S. 159, 172-78 (1977). The basic purpose of the statute is to aid federal courts in exercising jurisdiction conveyed by other provisions of law. In re Previn, 204 F.2d 417, 418 (1st Cir. 1953). Likewise, the purpose of Section 105(a) is to carry out the provisions of the

⁶See H.R. Rep. No. 95595, at 316-17 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6273-74 (“Section 105 is similar in effect to the All Writs Statute . . .”).

Bankruptcy Code.

1. Substantive Consolidation is Not Within the Purview of §105(a) Because it is Not Affiliated with an Express Code Provision

Despite its plain language, courts often rely on §105(a) as authority to grant substantive consolidation without referencing another provision of the Code. See In re Bonham, 229 F.3d at 764; Colonial Realty Co., 966 F.2d at 59; In re Augie/Restivo Banking Co., 860 F.2d at 518 n.1. For example, in Colonial Realty Co., the Second Circuit ordered consolidation based on § 105(a)'s general equitable authority and “in light of the general principals and rules of equity.” Colonial Realty Co., 966 F.2d at 59. The court does not reference another Code provision that substantive consolidation would “implement” or “carry out.” Id. at 60. As explained by the Second Circuit in a subsequent case, the equitable power conferred by § 105(a) must be used in conjunction with another Code provision:

The equitable power conferred . . . by § 105(a) is the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing. This language suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.

In re Dairy Mart Convenience Stores, Inc., 351 F.3d at 92 (internal quotations omitted).

2. Section 1123(a)(5)(C) Does Not Authorize Substantive Consolidation Outside of an Approved Plan

The Respondent acknowledges that § 1123(a)(5)(C) allows for consolidation as a measure for implementing a plan. But the section does not authorize substantive consolidation independent of a confirmable plan—which requires acceptance by the requisite majorities.

Accord Tucker, supra, at 448-49. The statute provides:

- (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall-
- (5) 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) (2000) (emphasis added). The plain language indicates Congress intended the § 1123(a)(5)(C) as a tool for implementing a confirmed plan. In re Stone & Webster, 286 B.R. 532, 541 (Bankr. D. Del. 2002). The courts may not use its equitable power “to produce a result contrary to specific legal provisions.” In re Stevenson, 138 B.R. 964, 967 (Bankr. D. Idaho 1992).

C. Substantive Consolidation is Not Proper Outside of a Chapter 11 Plan Because it Deprives the Discrimination Plaintiffs of Their Rights to Vote on the Provision or Propose Alternative Plans Concerning Consolidation

The Code specifies certain requirements for developing and confirming a Chapter 11 plan. In re Mother Hubbard, Inc., 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993). Courts frequently discuss the requirements as implementing a “creditor democracy” which protects the creditors’ substantive rights. Id.

By ordering substantive consolidation outside of the “creditor democracy,” the District Court divested the Discrimination Plaintiffs of the rights insured through the Code’s confirmation process. Specifically, they lost their right to vote on the substantive consolidation provision, the full benefit of the “best interests test,” and the right to propose an alternative plan without a substantive consolidation provision. As recently noted by the Seventh Circuit, “[t]he fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.” In re Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004) (internal quotations omitted). Thus, the District Court is powerless in the name of equity to order substantive consolidation—a remedy not authorized by the Code—to deprive the Respondent of the statutory protections specifically enacted to protect creditors.

1. The Respondent has a Fundamental Right Under the Code to Vote on the Terms of the Chapter 11 Plan

If all three estates are substantively consolidated prior to the plan, the voting classes will consist of ACME, TAPCO, and CAPCO creditors collectively, rather than individually. In effect, it would deprive the Respondent of the right to vote on a plan involving CAPCO individually, the corporation which employed the Discrimination Plaintiffs. The voting provisions of the Code provide creditors with the statutory right to vote on the terms of the plan.⁷ Those provisions provide creditors with a chance to participate in the reorganization process, a system which vitally affects their recovery rights: “[n]otions of fundamental fairness will not normally tolerate a potential claimant’s rights being affected without its having had any way of participating in or being involved in the process.” In re Fairchild Aircraft Corp., 184 B.R. 910, 928 (Bankr. W.D. Tex. 1995) (rejecting 363(f) sale of assets to bypass plan confirmation). And where the Code plainly creates a substantive right, “a bankruptcy court cannot expand or contract that right implicitly through use of equitable powers.” Carter v. Peoples Bank & Trust Co. (In re BNW), 201 B.R. 838, 847 (Bankr. D. Ala. 1996).

ACME’s motion would deprive the Discrimination Plaintiffs of their right to participate in reorganization by voting on substantive consolidation, a remedy which will vitally effect their recovery rights. A hypothetical calculation predicts that consolidation would devalue the asset pool for CAPCO, while inflating the asset pool for ACME and TAPCO. Is this result justified in the name of equity? Surely equity does not justify consolidating a profitable company with a growing market demand for its products to be consolidated with an insolvent parent company

⁷ In order to be confirmed, a unanimity of all classes must vote to accept. 11 § 1129(a)(8) (2000). Under § 1126(c), a class accepts a plan “if holders of more than half of its member, holding at least two-thirds of the amount of claims voting accept.” 3 Collier on Bankruptcy ¶ 1129.03[8] (15th ed. 2003).

and unrelated subsidiary without a chance to vote on that decision.

In DRW Property Co., the court recognized these same inequities and refused to grant substantive consolidation outside of a confirmable Chapter 11 plan. In re DRW Property Co., 54 at 494. The court explained that substantive consolidation would eliminate present creditors from voting on a plan which would radically restructure their rights and preclude them from raising alternative methods of reorganization. Id. The court noted that if the debtor wished to reorganize as a single entity, it should submit a proposal including recommendations of the Investors Committee and the IRS. Id. The court concluded that, lacking compelling equitable considerations, granting substantive consolidation was improper where it would dictate the terms of a plan which otherwise might not be approved by the voting process. Id.

Likewise, ACME's substantive consolidation motion would impose substantive consolidation, a term which might not otherwise be approved by the creditors. (R. 22) At a minimum, CAPCO creditors should have the option propose and vote on alternative plans. In re Mother Hubbard, Inc., 52 B.R. at 196 (explaining that alternative plan options encourage principals of competitor democracy because "a competing plan allows each individual creditor to decide which plan best comports with its respective economic interests").

2. ACME's Substantive Consolidation Motion Would Deprive the Respondent of the Full Benefit of the "Best Interests Test"

ACME's motion will also deprive the Respondent of the benefits allotted to by the "best interest test" set forth in Section 1129(a)(7). 11 U.S.C. § 1129(a)(7) (2000). The "best interest test" is "a cornerstone of chapter 11 practice," which guarantees each creditor "that it will receive at least as much in reorganization as it would in liquidation." 3 Collier on Bankruptcy ¶ 1129.03[7] (citing 11 U.S.C. 1129(a)(7)). The "best interest test" requires that each member of an impaired class either (1) accept the plan or (2) receive property which has a present value

equal to the distribution the objecting creditor would receive if the debtor were liquidated under Chapter 7. Id.

In order to have a Chapter 11 plan confirmed, CAPCO must satisfy this test by proving the Respondent would receive property not less than the value she would receive if the *debtor*—CAPCO—were liquidated. Substantive consolidation will circumvent the benefits of by rule by combining CAPCO’s assets with the more insolvent ACME and TAPCO. Once again, the Respondent will be deprived of the creditor protections though ACME’s pre-plan motion.

The Court of Appeals correctly preserved the Respondent’s right to vote and receive the benefit of the “best interest test” by acknowledging that § 105(a) does not authorize courts to create remedies which bypass the Chapter 11 confirmation process. Allowing pre-plan substantive consolidation, enables courts to use their general equitable powers to override creditor protections specifically legislated by Congress.

II. FEDERAL COURTS MAY NOT USE SECTION 363(F) TO BYPASS CHAPTER 11 REORGANIZATION THEREBY DISPOSING OF THE RESPONDENT’S DISCRIMINATION CLAIMS

Much like the limitations of § 105(a) within the confines of substantive consolidation, Courts may not use this power, nor the power in § 363(f) as a mechanism to bypass a Chapter 11 confirmation plan. 11 U.S.C. § 363(f) (2000). By permitting § 105(a) to essentially supplant the statutory language of § 363(f), courts are—in a sense—endorsing “fast-financing,” which, arguably, is a cause for the increase in Bankruptcy filings today. In light of Arthur Anderson, Enron, and WorldCom, should courts encourage expediency over accuracy and efficiency? This simply cannot be. The facts of this case show no compelling reasons why this asset sale must be performed under § 363(f) rather than the Chapter 11 confirmation process.

A. Congress Did Not Intend Section 363(f) to Circumvent the Chapter 11 Reorganization Process

The Code provides two approaches for a Chapter 11 debtor or trustee to sell assets free and clear of interests. The first approach is set forth in § 363(f), which governs pre-plan sales and imposes only minimal notice requirements to creditors. The second approach is provided in §§1123(a)(5)(D) and 1141(c), which lays out a much more extensive notice and hearing process. 11 U.S.C. § 1123; 11 U.S.C. § 1141 (2000). The second approach governs the Chapter 11 planning process of reorganization, commonly referred to as *confirmation*. See 11 U.S.C. § 1123; 11 U.S.C. § 1141.

The courts have greater latitude in the confirmation process for approving sales free and clear of “claims and interests,” while § 363(f) allows only for sales free and clear of “interests.” 11 U.S.C. § 1141(d); 11 U.S.C. § 363(f). Accordingly, the scope and authority of § 363(f) is not as broad as that provided for in the confirmation process. Congressional intent is apparent based solely on the plain language of these sections of the Code. As process and the opportunity for a hearing increases, Congress provides greater authority for the courts to dispose of claims and interests in property. As process and the opportunity to be heard decreases, Congress provides that the court may only dispose of *interests* in property—not claims.

At the outset, it is important to point out that the Discrimination Plaintiffs are creditors with a valid claim within the meaning of the Code. Defining the terms *creditor*, *claim*, and *interest* are of pivotal importance for understanding the purpose of § 363(f). The Code explicitly sets forth a definition for the former two terms; however, the Code provides no such guidance for the latter term, *interest*.

The Code defines a *creditor* as an “entity that has a claim against the debtor that arose at

the time of or before the order for relief concerning the debtor.” 11 U.S.C. § 101(10) (2000). A *claim* is a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . .” 11 U.S.C. § 101(5) (2000). The Discrimination Plaintiffs have a pending Title VII claim against CAPCO for alleged sex and gender discrimination. Thus, the Discrimination Plaintiffs are plainly creditors with a valid claim as defined under the Code.

B. Congress Limited Sales ‘Free and Clear’ Under Section 363(f) by Excluding the Word ‘Claim’

This Court stated in Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961), when construing the meaning of one term in a statutory phrase, “[w]e look first to the face of the statute.” Words “do[] not stand alone, but gather[] meaning from the words around [them].” Id. “The maxim *noscitur a sociis*, that a word is known by the company it keeps, . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” Id. Thus, all statutory analyses begin with the statutory language itself.

Section 363(f) of Chapter 11 of the United States Bankruptcy Code states that

The trustee may sell property . . . 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). Further, the language provided in § 1141(c) states “the property dealt with

by the plan is free and clear of all *claims and interests* of creditors, equity security holders, and of general partners in the debtor.” 11 U.S.C. § 1141(c). (emphasis added).

The question here centers on the intended and effectual meaning of *interests*—more specifically on the phrase *interests in such property*—as set forth in § 363(f). *Id.* A *claim* and an *interest* are, without question, different words and accordingly have different meanings. The term *interest* has many meanings as applied in varying legal scenarios. Black’s Law Dictionary recognizes that, within the context of property, an *interest* is a “right, privilege[], power[], [or] immunity.” Black’s Law Dictionary 812 (6th ed. 1991). A *claim* is defined as a “demand as to one’s own or as one’s right.” *Id.* Thus, an *interest* signifies a greater value or significance. A *claim* might become an *interest* when reduced to judgment. However, standing alone, a claim does not rise to the level of an *interest in property*.

Further, as the literal language of the Code shows, the drafters intended greater authority for courts conducting sales through the confirmation process. As such, § 1141(c) permits sales free and clear of both “claims and interests,” while § 363(f) permits sales free and clear only of “interests in such property.” 11 U.S.C. § 1141(c); 11 U.S.C. § 363(f). In other words, the drafters recognized the increased need for process when disposing of mere *claims*. Congress acknowledged this when drafting § 363(f) and, accordingly, excluded claims from sales free and clear therein.

Such an analysis of the intended meaning of § 363(f) is of great importance given the fact that ACME’s motion before this Court requests “the sale of assets free and clear of all interests, liens, *claims* and encumbrances under § 363(f) of the Bankruptcy Code.” (R. 7) (emphasis added) The respondent makes no argument concerning the sale of *interests, liens* and

encumbrances.⁸ These interests requested for disposal by ACME’s motion are likely all under the authority of § 363(f). The problem arises with the inclusion of the term *claims* into ACME’s requested § 363(f) sale. The addition of this word by ACME is nothing short of an attempt to supplant the specific language of § 363(f). Such an addition to the language of the statute unnecessarily—and more importantly—impermissibly broadens the scope of judicial authority and misinterprets Congressional intent.

Additionally, the Thirteenth Circuit properly recognized, all § 363(f) sales are subject to the approval of § 363(e) which requires that courts “shall prohibit or condition . . . [the] sale [or proposed sale of property] . . . as is necessary to provide adequate protection of [an] interest” for any “entity that has an interest in property” 11 U.S.C. § 363(e). Again, the drafters of the Code plainly acknowledge that in order for a court to dispose of a claim free and clear of an interest, the creditor must have an interest *in the property* in question at the time of the filing.

C. Section 363(f) Provides the Power to Dispose of ‘In Rem’ Interests But Not of the Discrimination Plaintiffs’ ‘In Personam’ Claims

Courts have constantly wrestled with the interpretation of *interest in such property*. The dispute centers on whether both *in personam* and *in rem*, or specific interests are within the authority of § 363(f). *In rem* is defined as a “technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be

⁸ See 11 U.S.C. § 363(f)(3) stating a “trustee may sell property . . . free and clear of any interest in such property . . . if . . . such interest is a lien” Furthermore, liens, security interests and other formal encumbrances against the assets of a company have almost uniformly been recognized as subject to § 363(f). *In re Eveleth Mines, LLC*, 312 B.R. 634, 650 (Bankr. D. Minn. 2004). A “lien” is defined in the Code as a “charge against or interest in property to secure payment of a debt or performance of an obligation.” 11 U.S.C. § 101(37) (2000). Thus, the Code specifically recognizes a “lien” to be an “interest in property” and should accordingly be included under the purview of § 363(f).

in personam.” In re Metromedia Fiber Network, Inc., 299 B.R. 251, 272 (Bankr. S.D. N.Y. 2003) (quoting Black’s Law Dictionary 900 (4th ed. 1951)).

Two varying schools of thought exist regarding whether courts interpret *interests in such property* broadly or narrowly. See United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 581-82 (4th Cir. 1996), cert denied, 520 U.S. 1118 (1997) (hereinafter “Leckie”); Fairchild, 184 B.R. at 918. The broad interpretation, as set forth in Leckie, finds no distinction between the terms *claims* and *interests*. Under the Leckie analysis, the court authorizes the sale of *any interest*, rather than *any interest in such property*. This argument discredits the specific language chosen by the drafters of the Code, implying that the exclusion of the word *claim* in § 363(f) was a mistake or inadvertent inaction.

On the other hand, the narrow interpretation, set forth in Fairchild, takes a more literal and deferential approach to the drafters’ choice of words. Fairchild, 184 B.R. at 918. The Fairchild court rejected the broad interpretation of *interest* finding it “inconsistent with the plain language of the [Code].” Id. The narrow approach is more consistent with this Court’s opinion in Jarecki, because it looks to what is *included* in the statute rather than what was *excluded*. Jarecki, 367 U.S. at 307 (emphasis added). “The sorts of interests impacted by a sale ‘free and clear’ are *in rem* interests which attach to the property. Section 363(f) is not intended to extinguish *in personam* liabilities.” Fairchild, 184 B.R. at 917-18. Thus, § 363(f) “does not authorize sales free and clear of *any interest*, but rather of *any interest in such property*. These three additional words define the real breadth of *any interests*.” Fairchild, 184 B.R. at 917. (emphasis in original).

Thus, the competing interpretations of § 363(f)’s meaning of *interests in such property*

create a polarizing effect: one desiring a broad judicial freedom to sale *any* interest free and clear, the other authorizing only sales free and clear of *in rem* interests.

1. Fairchild Provides the Most Sound and Logical Method for Section 363(f) Interpretation

The Fairchild court’s analysis of § 363(f) is an excellent example of a proper interpretation of an asset sale under that section. Fairchild dealt with a products liability claim brought on behalf of the deceased passengers on an airplane that crashed, manufactured by Fairchild Aircraft. Fairchild, 184 B.R. 910. After the sale of the airplane, but prior to the crash, Fairchild Aircraft filed for Chapter 11 relief. Id. The assets of Fairchild Aircraft were eventually sold to Fairchild Acquisition, Inc. (“FAI”). Id. The court used the confirmation process set out in § 1141(c) to authorize the sale of assets free and clear. Id. at 914. Although the facts of Fairchild deal with a confirmed plan sale, the § 363(f) analysis is nonetheless, without fault.

Judge Clark, writing for the majority, stated “[p]roperty is never ‘subject to’ [*in rem*] interests absent the debtor’s consent to a security interest or the creditor’s attachment of the property resulting in a lien.” Fairchild, 184 B.R. 927. Moreover, “[b]ankruptcy cannot, and should not, do the impossible. It cannot and should not insulate a debtor from all . . . bad things . . .” Id. This analysis is appropriate because it most accurately interprets the plain intent of § 363(f) by holding that only specific, or *in rem* interests, are disposable in a pre-plan sale of assets.

Applying the Fairchild analysis to this case, ACME is unable to sale the assets of CAPCO free and clear of the Discrimination Plaintiffs claims because they are not *in rem* interests in property. CAPCO never consented to any secured interests, liens, or encumbrances on the assets of the company on behalf of the Discrimination Plaintiffs. Again, the plain language of § 363(f) must be given effect by the courts. The Discrimination Plaintiffs make no

contention that courts should not have the power to dispose of in personam claims; they simply point out that, under the current statutory scheme, no such authority is expressly provided under § 363(f). Therefore, under the plain language of § 363(f), coupled with the analysis in Fairchild, this Court should affirm the decision of the Thirteenth Circuit.

2. The Fourth Circuit’s Decision in *Leckie* Relies on Fragmented, Flawed, and Faulty Analysis

The court in Leckie addressed whether the purchaser of a bankrupt coal mine’s assets would remain liable for the debtor’s obligations under the Coal Act for certain benefit plans established to provide health and death benefits to former miners. Leckie, 99 F.3d at 575-77. The Coal Act required each mine management company to fund their own benefits as well as those of retired miners whose last employer went out of business. Id. Each mining company was jointly and severally liable for the costs of those benefits. Id. Further, the burdens of the Coal Act directly influenced the mining company’s use of the mines, thus, the court reasoned that such a burden “in those assets [was] within the meaning of section 363(f).” Id., at 582. Thus, the court concluded that liability followed the mining assets, not the company or its actions. Id. at 575-77

Essentially, the Leckie holding posits an erroneous test: a claimant has an interest in such property under § 363(f) when (1) there is a relationship between the employees’—or beneficiaries—right to demand payments from the debtors and (2) to exercise some form of influence or control over the debtor’s assets. In re Trans World Airlines, Inc., 322 F.3d 283, 289 (3d Cir. 2002) (citing Leckie, 99 F.3d at 573). The Leckie court acknowledged that their interpretation varied from the plain meaning of the words selected by Congress: “the plain meaning of the phrase ‘interest in such property’ suggests that not all general rights to payment are encompassed by the statute” Leckie, 99 F.3d at 582.

However, the court proceeded to ignore this interpretation holding “Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to *in rem* interests . . . and we decline to adopt such a restricted reading of the statute here.” Id. This interpretation is completely contrary to statutory interpretation principles set forth by this Court. Where statutory language is plain and the meaning is clear, courts should not search for legislative intent beyond the express terms of the statute and must give effect to the language as written, rather than determining what the law should be. 82 C.J.S. Statutes § 321 (2005) (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); Conn. Nat. Bank v. Germain, 503 U.S. 249, 254 (1992)). Thus, the Leckie court’s analysis is flawed because it “searches for legislative intent beyond the express terms” of § 363(f). Id.

Leckie relied on a Virginia bankruptcy court decision permitting a sale free and clear of an unsecured lien.⁹ Leckie, 99 F.3d at 582; See P.K.R. Convalescent Ctrs. v. Commonwealth of Va., Dep’t of Medical Assistance Servs. (In re P.K.R. Convalescent Ctrs.), 189 B.R. 90, 92-94 (Bankr. E.D. Va. 1995). However, that reliance was misplaced. The court in In re P.K.R. Convalescent Ctrs. stated “[s]ection 363(f) addresses sales free and clear of *any* interest.” In re P.K.R. Convalescent Ctrs., 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) (citing In re Manning, 37 B.R. 755, 759 (Bankr. D. Colo. 1984), aff’d in part, vacated in part, 831 F.2d 205 (10th Cir. 1987)). Unfortunately, the P.K.R. court failed to include the full text of the Manning court, upon which *it* relied.

The Manning court continued on to include the magical three words “in such property.”

⁹ In fact, although no cases are found directly on point, § 363(f) should also probably include such “interests in such property” as covenants, easements and other related property interests. The problem arises when courts attempt to stretch the boundaries of the term “interests” beyond those explicitly provided for in the Code.

In re Manning, 37 B.R. 755, 759 (Bankr. D. Colo. 1984).¹⁰ The P.K.R. court mistakenly omitted these three important words. Thus, the P.K.R. language, relied upon by the Leckie court, was based on a fragmented analysis, creating a windfall effect on the interpretive analysis of § 363(f).

Building on the fragmented analysis of Leckie, the Third Circuit in TWA, borrowed from Collier’s treatise on bankruptcy the assumption that “the trend seems to be toward a more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of the property.’” TWA, 322 F.3d at 289 (citing 3 Collier on Bankruptcy ∂ 363.06[1]). The TWA court expanded on the Leckie decision holding that “[h]ad TWA not invested in airline assets, which required the employment of the . . . claimants, those successor liability claims would not have risen.” TWA, 322 F.3d at 290. Further, the court reasoned that “[w]hile the [claimant’s] interests . . . in the assets of TWA’s bankruptcy estate are not . . . *in rem* interests, the reasoning of Leckie . . . suggests that they are interests in property within the meaning of section 363(f).” TWA, 322 F.3d at 290. Therefore, TWA is nothing more than an extension of faulty analysis applied in Leckie.

Finally, Fairchild actually predicted, considered, and rejected the analysis adopted in Leckie. The court stated

One could plausibly argue that, in bankruptcy at least, entities with otherwise purely *in personam* claims against a prepetition debtor might, via the bankruptcy filing, acquire an “interest” in the bankruptcy estate (which consists essentially of the debtor’s assets). This interest in the estate’s assets might be thought of as *in rem*, bringing the unsecured creditor’s claim within the sweep of section 363(f), and providing an important linchpin for the ‘discharge of future claims’ argument

[However, such an] argument unnecessarily (and perhaps impermissibly) blurs the distinction between secured and unsecured creditors’ interests in the estate. Even though all creditors have an interest in the estate, they do not have the *interest in property* that would be cognizable under [§] 506(a) for example . . .

¹⁰ The court specifically acknowledged liens as a subset of *interests in property* and concluded that such liens were under the control of § 363(f). In re Manning, 37 B.R. at 759.

. If unsecured creditors had an ‘interest in property’ sufficiently cognizable that a special provision is required to achieve a sale ‘free and clear,’ then those selfsame creditors should also be entitled to adequate protection of those interests during the pendency of the case.

Fairchild, 184 B.R. at 918. In other words, adopting a broad interpretation of § 363(f) impermissibly blurs the distinction between secured and unsecured creditors’ interests in the debtors estate. The Fairchild decision remains a valid opinion for purposes of its § 363(f) analysis.¹¹ Although, Leckie rejected Fairchild, in a recent decision, the court in In re Eveleth Mines, LLC, 312 B.R. 634, 654 (Bankr. D. Minn. 2004) denounced the reasoning adopted by the Third and Fourth Circuits in TWA and Leckie as being “built on an amorphously inclusive rationalization; it posits a loose sort of ‘but-for’ causality that is thrown up to identify the straw-built ‘interest’ that then is vanquished.” Id.

3. Successor Liability is Not an “Interest in Such Property” and Cannot be Disposed of Under Section 363(f)

Fairchild stands for the proposition that all sales free and clear of “interests in such property,” as contemplated by § 363(f) should include only *in rem*, or specific interests in property. Fairchild, 184 B.R. at 918; See also 11 U.S.C. § 363(f). The Thirteenth Circuit adopted this reasoning stating that “[s]ection 363(f) authorizes the sale of assets free and clear of specific interests in the property being sold. General, unsecured claimants, like the discrimination plaintiffs in this case, have no specific interest in a debtor’s property.” (R. 18) Accordingly, the Thirteenth Circuit refused to “strip away” the Discrimination Plaintiffs’ claims “in contemplation of a sale of assets to SOUSA.” (R. 18) The Thirteenth Circuit’s holding is completely consistent with the sound logic and reasoning set forth in Fairchild.

¹¹ “Although the Court vacated its original order because the parties settled the case, it made clear that the original opinion should retain its precedential value.” (R. 17, fn 3) (citing In re Fairchild Aircraft Corp., 220 B.R. at 917 n. 10).

Judge Schmid, writing the dissent in the Thirteenth Circuit’s decision, misconstrues the Congressional intent of § 363(f) and also bases his argument of the fragmented, faulty, and flawed analysis of Leckie. The assertion that employment discrimination claims are somehow interests in property simply has no merit. Judge Schmid correctly argues that SOUSA would be liable under the doctrine of successor liability without a sale free and clear. (R. 23-34) However, the dissent goes a step further to suggest that the Discrimination Plaintiffs’ claims are implicit evidence that the concept of successor liability follows the assets rather than the company. In other words, under the erroneous analysis of the dissent, without a sale free and clear, if SOUSA would be liable for a judgment awarded to the Discrimination Plaintiffs, then the claims are in fact interests in such property as contemplated under § 363(f). The dissent adopts the language of Leckie finding this connection an acceptable “nexus” for an interest in property. However, this argument is nothing short of a quantum leap, finding no basis in legal merit, logic or reasoning. Allowing the sale of assets free and clear of successor liability under § 363(f) provides a benefit to SOUSA that cannot be had outside the confines of bankruptcy proceedings. See George W. Kuney, Misinterpreting Bankruptcy Code Section 363(f) and Understanding the Chapter 11 Process, 76 Am. Bankr. L.J. 235 (2002).

This is not to say that bankruptcy courts should be indefinitely restricted from the power to sell property with “no strings attached,” but such a decision is for the legislature to decide—or clarify. Fairchild, 184 B.R. at 918-19. The courts are “only to give effect to the policy choices already made in the existing statute.” Id. Accordingly, this Court should follow the policy set forth in § 363(f) that “interests in such property” include *in rem*, or specific interests, but not *in personam* claims. Id.

In sum, if such demand remains for a process of reorganization by non-plan sale,

Congress should expressly provide proper procedural protections to enhance the fairness and efficiency of the non-plan sales process. See George W. Kuney, Let's Make It Official: Adding an Explicit Preplan Sale Process as an Alternative Exit From Bankruptcy, 40 Hous. L. Rev. 1265 (2004).¹² The analysis is one of provision rather than prohibition. The Respondent does not argue that Congress should PROHIBIT pre-plan sales—only that such pre-plan sales are not PROVIDED. Therefore courts are compelled to effectuate the statutes as intended by Congress. Accordingly, any interpretive change of the Code must come from Congress—NOT the courts.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the holding of the United States Court of Appeals for the Thirteenth Circuit with respect to (1) substantive consolidation, and (2) sales free and clear of interests as contemplated by § 363(f).

Respectfully Submitted,

Counsel for Petitioner

¹² Prof. Kuney has written several articles in support of the Fairchild analysis and in opposition to the broad interpretation of § 363(f) set forth in Leckie and TWA. See also George W. Kuney, Hijacking Chapter 11, 21 Emory Bankr. Dev. J. 19 (2004).

APPENDIX A

11 U.S.C. § 101 (2000)

§ 101. Definitions

In this title the following definitions shall apply:

□

(5) The term "claim" means--

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

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

□

(10) The term "creditor" means--

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

□

(37) The term "lien" means charge against or interest in property to secure payment of a debt or performance of an obligation.

APPENDIX B

11 U.S.C. § 105 (2000)

§ 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.

APPENDIX C

11 U.S.C. § 363 (2000)

§ 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 D

11 U.S.C. § 506 (2000)

§ 506. Determination of secured status

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or state statute under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless--

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

APPENDIX E

11 U.S.C. § 1123 (2000)

§ 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.

APPENDIX F

11 U.S.C. § 1126 (2000)

§ 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if--

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such

claims or interests.

APPENDIX G

11 U.S.C. § 1129 (2000)

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests--

(A) each holder of a claim or interest of such class--

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a

claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive--

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash--

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired

under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims--

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests--

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the

avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

APPENDIX H

11 U.S.C. § 1141 (2000)

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not--

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if--

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual--

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if--

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

(ii) modification of the plan under section 1127 is not practicable; and

(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that--

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt--

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor--

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

APPENDIX I

28 U.S.C.A. § 1651 (2000)

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.