

CASE NO. 05-628

**In the
SUPREME COURT OF THE UNITED
STATES**

October Term 2005

In the Matter of Acme Chemical Industrial Products, Inc., Debtor

Acme Chemical Industrial Products, Inc.,

Petitioner,

v.

Jean Tien,

Respondent.

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

BRIEF FOR RESPONDENT

February 4, 2006

**Team #30
Counsel for Respondent
Jean Tien**

QUESTIONS PRESENTED

1. Under federal law, does federal court equity power exclude the authority to order the remedy of substantive consolidation of bankruptcy debtor estates?
2. Does the power to sell assets free and clear of interests under § 363(f) of the Bankruptcy Code permits a sale free and clear of successor liability claims arising from a Title VII employment discrimination case?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Kelly has been reported. The opinion of the United States Court of Appeals for the Thirteenth Circuit is set out in the Decision and Order, No. 05-4080.

STATEMENT OF JURISDICTION

In accordance with Rule IV of the Rules of the Twelfth Annual Judge Conrad B. Duberstein National Bankruptcy Moot Court Competition, a formal statement of jurisdiction has been omitted.

STATUTES INVOLVED

The relevant sections of the federal statutes, which are referenced in the brief, appear in Appendix A.

STATEMENT OF THE CASE

Two years ago, Jean Tien and several other female employees filed a class action suit against the Chemical America Product Company, Inc. (hereinafter “CAPCO”) asserting their employer created a hostile work environment for its female employees and also failed to pay its female employees equal pay for equal work. (R. 5).

CAPCO is incorporated in the State of Kelly, and its production facility is located in Manistee, Michigan. (R. 3-4). CAPCO is a wholly-owned subsidiary of Acme Chemical Industrial Products, Inc. (hereinafter “ACME”). (R. 3). ACME is incorporated in the State of Kelly and in addition to CAPCO is also the parent company of Trona Ash Products Company, Inc. (hereinafter “TAPCO”) . (R. 3).

CAPCO produces calcium chloride, or CaCl_2 . (R. 3). Calcium chloride has many uses including use as a “de-icing” product for roads and highways in the United States. (R. 3). It is

also used to increase roadway load bearing capacity and promotes resistance to potholing. (R. 3). CAPCO and ACME have realized strong profits from the production of calcium chloride over the past few years. (R. 5).

Increased industrial development and modernization throughout Southeast Asia and South America during the past ten years, and the continued expansion of the infrastructures in the countries located throughout these regions have resulted in increased demand for calcium chloride worldwide. (R. 4). As a result, in addition to its steady and profitable sales in the United States, CAPCO has realized increased international sales during the past several years. (R. 5). CAPCO's calcium chloride production facility has been ACME's most profitable subsidiary because of its domestic success and increased international sales. (R. 4-5).

It is in this context that Jean Tien and the other plaintiffs have brought their employment discrimination claims against CAPCO. (R. 5). The lawsuit remains pending, awaiting resolution of the Petitioner's bankruptcy proceedings, but if the plaintiffs prevail their recoveries will be substantial. (R. 5).

TAPCO, the other subsidiary of ACME, produces soda ash at a facility located in Green River, Wyoming. (R. 4). ACME primarily serves as the marketer and distributor for both CAPCO and TAPCO. (R. 3). ACME purchases all the products of CAPCO and TAPCO, and in turn sells the products internationally. (R. 4). CAPCO and TAPCO share the same corporate officers, board of directors, senior management teams. (R. 4). All three companies use a centralized cash management system that is operated by the parent corporation, ACME. (R. 4).

ACME is responsible for daily operations of ACME, CAPCO, and TAPCO. (R. 4). The CEO's of the CAPCO and TAPCO set the price ACME will pay for the products. (R. 4). The set price does not always reflect current market prices. (R. 4). ACME also charges CAPCO and

TAPCO for the management services it performs, and those charges do not always reflect the true value of those services. (R. 4).

Overall the three companies have worked closely together, yet all three companies have recognized basic corporate formalities. (R. 8). Many trade creditors have extended credit based on the three companies' unity. (R. 8). Often creditors believed they were dealing with ACME rather than one of its subsidiaries because ACME has customarily guaranteed and often paid the trade debt owed by CAPCO and TAPCO. (R. 8).

Since Jein Tien and the other female plaintiffs that worked for CAPCO filed suit the overall financial strength of ACME has diminished because of the poor earnings of TAPCO. (R. 5). The production and distribution of calcium chloride at CAPCO's facility in Michigan remains strong. (R. 5). TAPCO has realized some profit from soda ash production in the past few years, but the average soda ash price has fallen from \$110 per ton in June of 2003 to \$75 per ton in the third quarter of 2004 due to reduced demand in the United States. (R. 5). Market forecasts predict that the domestic price of soda ash could sit at \$60 per ton by the second quarter of 2006. (R. 5). Conversely, a competitor of ACME (Sousa Industries, Inc.) expects the market to improve in the near future as a result of newly tightened state and federal environmental regulations that would require businesses to use more soda ash to meet these environmental regulations. (R. 8).

Even though CAPCO was seeing increased sales, the low profits realized by TAPCO caused ACME to default on its primary credit facility with Giantbank, NA. (R. 5). This default caused a cross-default in ACME's other existing credit facilities and the amounts owed by ACME were accelerated. (R. 6). ACME currently owes its various lenders in excess of \$700 million. (R. 6).

After beginning discussions with its various creditors, ACME decided the best way to restructure was to file for relief under Chapter 11 of the Bankruptcy Code. (R. 6). ACME's filing occurred on August 20, 2004, and the next day the bankruptcy estates of CAPCO, TAPCO, and ACME were administratively consolidated. (R. 6).

Because of SOUSA continued poor performance, ACME unilaterally decided the best course of action was to sell the entire business to the highest bidder. (R. 6). The highest bid was received by Sousa Industries, Inc. (hereinafter "SOUSA") a competitor of TAPCO in the soda ash industry. SOUSA's bid was for a price slightly above fair market value of the assets. (R. 8). SOUSA desired to purchase all of the assets of all three companies "as a unit" and intends to retain the majority of the three companies' labor forces, with exception of the directors and officers. (R. 6, 8). On December 20, 2004, ACME filed a motion requesting the Bankruptcy court substantively consolidate the bankruptcy estates of CAPCO, TAPCO, and ACME. (R. 6).

In the absence of substantive consolidation, the District Court found that:

...the general unsecured creditors of ACME would get between 50 and 60 cents on the dollar, the general unsecured creditors of CAPCO would get between 65 and 75 cents on the dollar and the general unsecured creditors of TAPCO would get about seven cents on the dollar. Consolidating the estates would yield a distribution of approximately 60 cents on the dollar for the general unsecured creditor body.

(R. 22-23).

SOUSA also sought to avoid successor liability of the Title VII discrimination claims and will not pursue CAPCO, TAPCO and ACME unless there is an entry of a final non-appealable order from the bankruptcy court holding the sale to be free and clear of the discrimination claim. (R. 8). In the alternative, SOUSA has admitted that it would consider purchasing the businesses assets and liabilities if the purchase price were reduced by the amount of women's discrimination claims, or an amount was set aside in escrow to cover these claims. (R. 9).

ACME seeks to ensure the arrangement with SOUSA is accomplished and filed a motion on December 20, 2004 requesting the Bankruptcy Court authorize the sale of all the assets of CAPCO, TAPCO and ACME to SOUSA free and clear of all liens, claims, and encumbrances, including Jean Tien and the other women's employment discrimination claims. (R. 6-7). Additionally, in order to please SOUSA, in the same motion, ACME requested the court to substantively consolidate CAPCO, TAPCO and ACME into one bankruptcy estate. (R. 6).

Jean Tien, and several of the named plaintiffs in the Title VII lawsuit filed objections to ACME's motions and the case was move to the United States District Court for the District of Kelly.¹ (R. 7). On February 9, 2005, the District Court heard testimony and oral argument with respect to ACME's motions and by order and decision dated March 14, 2005, the District Court granted ACME's motion in its entirety. (R. 7). The District Court found that "ACME, TAPCO, and CAPCO routinely participated in complex inter-company loans and transactions in their day-to-day business operation and these transactions were poorly documented and accounted for." (R. 7). The District court also noted that "it would be prohibitively expensive to unravel all of the inter-corporate dealings and determine the true state of affairs of each company." (R. 8).

On March 20, Jean Tien filed a timely appeal of the District Court's decision with Thirteenth Circuit of the United States Court of Appeals. (R. 9). The Thirteenth Circuit reversed the District Courts decision on both issues of substantial consolidation and the sale of the three company's assets free and clear of the discrimination claims. (R. 18).

¹ This case reached the District Court because the Respondent filed a motion with the United States District Court for the District of Kelly seeking to withdraw the reference to the ACME, TAPCO, and CAPCO's bankruptcy cases from the Bankruptcy Court pursuant to 28 U.S.C. 157(d). (R. 7). The District Court granted this motion on January 6, 2005 noting that the District Court was the more appropriate forum to address any issues of successor liability under federal law. (R. 7).

SUMMARY OF THE ARGUMENT

Federal courts do not have equity power to order the remedy of substantive consolidation of bankruptcy debtor estates, because substantive consolidation is not expressly authorized by statute or rule, was not a judicial remedy available in the English Court of Chancery in 1789, and is not authorized by section 105 of the Bankruptcy Code.

The courts and commentators suggest that these three sources—express statutory authority, federal common law, and section 105 of the Bankruptcy Code—are the sole potential sources of power from which the equitable remedy of substantive consolidation could have derived.

Because none of these potential sources actually provides the requisite authority for the remedy of substantive consolidation, it does not exist. But even if the Court finds that the federal courts possess the authority to order substantive consolidation, the Court should not allow it to be ordered in this case, because this case does not involve circumstances justifying its use and its application to this case would be inequitable.

Additionally, section 363(f) of the Bankruptcy Code authorizes the bankruptcy courts, assuming certain conditions are met, to allow the sale of property “free and clear of any *interest in such property* of an entity other than the estate.” While the Code does not define the kinds of “interests in property” that the statute is intended to encompass, case law in many jurisdictions has made it clear that general unsecured claims do not fall within this meaning.

Furthermore, section 363(f) should not be used unless a “substantial business reason” exists. Here, because the Petitioner’s claim is unsecured, arising from a sex and gender discrimination class action suit, it is not an “interest in such property” for purposes of section

363(f). As such, this Court should not allow the pre-plan sale of Petitioner’s assets free and clear of such claims.

STANDARD OF REVIEW

In civil appeals, a lower court’s findings of facts are accorded special deference, and will not be disturbed on appeal unless the findings are “clearly erroneous.” *Hirschfeld v Spanakos*, 104 F.3d 16, 19 (2d Cir. 1997). However, a district court’s conclusions of law are reviewed *de novo*, and an appellate court need not pay any level of deference to a lower court’s conclusions of law. *Keach v United States Trust Co.*, 419 F.3d 626, 634 (7th Cir. 2005).

ARGUMENT

I. UNDER FEDERAL LAW, FEDERAL COURT EQUITY POWER EXCLUDES THE AUTHORITY TO ORDER THE REMEDY OF SUBSTANTIVE CONSOLIDATION OF BANKRUPTCY DEBTOR ESTATES

Federal courts do not have equity power to order the remedy of substantive consolidation of bankruptcy debtor estates, because substantive consolidation is not expressly authorized by statute or rule, was not a judicial remedy available in the English Court of Chancery in 1789, and is not authorized by section 105 of the Bankruptcy Code.

The courts and commentators suggest that these three sources—express statutory authority, federal common law, and section 105 of the Bankruptcy Code—are the sole potential sources of power from which the equitable remedy of substantive consolidation could have derived. *See, e.g., In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005); *Class Five Nevada Claimants v. Dow Corning Corp., (In re Dow Corning Corp.)*, 280 F.3d 648 (6th Cir. 2002); *Alexander v. Compton, (In re Bonham)*, 229 F.3d 750 (9th Cir. 2000); *In re Stone & Webster, Inc.*, 286 B.R. 532 (Bankr. D. Del. 2002); J. Maxwell Tucker, *Grupo Mexicano and the Death of Substantive Consolidation*, 8 Am. Bankr. Inst. L. Rev. 427 (2000).

Because none of these potential sources actually provides the requisite authority for the remedy of substantive consolidation, it does not exist. But even if the Court finds that the federal courts possess the authority to order substantive consolidation, the Court should not allow it to be ordered in this case, because this case does not involve circumstances justifying its use and its application to this case would be inequitable. A simple explanation of what substantive consolidation is should assist the Court in appreciating the Respondent's further arguments.

The circuit courts describe substantive consolidation as a device serves to, among other things, pool the assets and liabilities of distinct but related corporations and combine the corporations' creditors for purposes of voting on reorganization plans. *See, e.g., In re Bonham*, 229 F.3d 750, 764. It enables the combined debtors to satisfy the combined creditors' claims out of the single, combined fund of assets. *Id.* The main purpose of substantive consolidation is, allegedly, the "equitable treatment of all creditors." *Id.* (quoting *Union Sav. Bank v. Augie/Restivo Baking Co.*, (*In re Augie/Restivo Baking Co.*), 860 F.2d 515, 518 (2d Cir. 1988)).

Proponents of substantive consolidation agree that it is equitable in nature and that the authority for ordering it is contained in the bankruptcy courts' "general" equity powers. *Talcott, Inc. v. Wharton (In re Continental Vending Mach. Corp.)*, 517 F.2d 997, 1000 (2d Cir. 1975). They also agree that the bankruptcy courts' equity powers are limited—not to be used in any manner to circumvent the Bankruptcy Code. *Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005). As the Court of Appeals for the Thirteenth Circuit so aptly concluded below on the question of "whether a bankruptcy court's equitable power extends so far as to order the substantive consolidation of two or more bankruptcy estates[,] . . . [f]or the reasons that follow, this Court [should conclude] that it does not." (R. 11.) But if the Court finds that a bankruptcy

court's equity power does extend so far, the Court should find that the order should not have been allowed in this case.

- A. The federal courts do not have equity authority to order substantive consolidation, because it is not expressly authorized by federal statute or Rule of Bankruptcy Procedure.

Substantive consolidation is not expressly authorized in the Bankruptcy Code, any other statutory provision, or the Rules of Bankruptcy Procedure. *Fed. Deposit Ins. Corp. v. Colonial Realty Co.*, 966 F.2d 57, 59 (2d Cir. 1992) (quoting *In re Augie/Restivo Baking Co.*, 860 F.2d at 518). It is a judicially created remedy with its genesis in state corporate law “alter ego” and “instrumentality” theories.² See, e.g., *In re Owens Corning*, 419 F.3d at 207; *Soviero v. Franklin Nat'l Bank of Long Island*, 328 F.2d 446, 447-448 (2d Cir. 1964); *Stone v. Eacho, (In re Tip Top Tailors, Inc.)*, 127 F.2d 284, 287-289 (4th Cir. 1942); *Fish v. East*, 114 F.2d 177, 191 (10th Cir. 1940).

While substantive consolidation is contemplated by Chapter 11 of the Bankruptcy Code, it is clear that as a remedy apart from a plan of reorganization, no federal statute or rule expressly authorizes the infamous remedy of substantive consolidation. See e.g., *In re Bonham*, 229 F.3d at 763-764; *Colonial Realty Co.*, 966 F.2d at 59; *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, (Bankr. W.D. Tex. 2000); *In re Circle Land and Cattle Corp.*, 213 B.R. 870 (Bankr. D. Kan. 1997); *In re Standard Brands Paint Co.*, 154 B.R. 563, 567 (Bankr. C.D. Cal. 1993); *In re F.A. Potts & Co.*, 23 B.R. 569 (Bankr. E.D. Pa. 1982). The statute closest to an express grant of authority for substantive consolidation is the reorganization plan provisions of section 1123. 11

² Substantive consolidation is most closely related to, and possibly derives from, the turnover order, which is the remedy requiring a parent corporation (or subsidiary) that has attempted to defraud its creditors through fraudulent conveyances to its subsidiary (or parent) to turn its assets over to the bankruptcy trustee of the bankrupt corporation's estate for allocation to creditors under a reorganization plan. *Fish v. East*, 114 F.2d 177 (10th Cir. 1940); accord *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941). The judiciary's misapprehension of the underlying rationale for the existence of the turnover-type remedy, and its resulting misapplication of the

U.S.C.A. § 1123(a)(5)(C) (West 2004 & Supp. 2005). Although Petitioner will likely ask the Court to find authority for substantive consolidation in section 1123, Petitioner's application of section 1123 is flawed, because section 1123 does not authorize pre-confirmation consolidation and to find that it does would erode the requirements and protections of Chapter 11 plans.

Section 1123 provides that “[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation, such as . . . merger or consolidation of the debtor with one or more persons.” *Id.* While it is true that some courts have dodged the absence of any actual authority for pre-confirmation substantive consolidation and grounded their use of the remedy on this provision, *See, e.g., In re Stone & Webster, Inc.*, 286 B.R. at 540-541, there are at least two problems with this approach.

First, section 1123 provides no authority for that maneuver. Under the familiar maxim of statutory construction, *expressio unius est exclusio alterius*,³ substantive consolidation cannot be ordered outside of a confirmed reorganization plan. *See generally Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (noting that the maxim of *expression unius* “has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence”).

Second, using section 1123 as a stepping stone for substantively consolidating estates outside of a plan erodes the requirement that a consolidation be part of a confirmed reorganization plan. Erosion of that requirement is harmful to creditors, because pre-confirmation consolidation bypasses the requirements that the debtor's plan and its proponent comply with chapter 11, which includes creditor voting requirements, fairness requirements, and

doctrine of substantive consolidation to cases like the one at bar, is discussed below at section I. D. of Respondent's brief.

³ “[T]o express or include one thing implies the exclusion of the other.” Black's Law Dictionary 476 (abr. 7th ed. 2000).

priority protection. *See, e.g., Pension Benefit Guar. Corp., Cont'l Air Lines, Inc. v. Braniff Airways, Inc., (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983); 11 U.S.C.A. § 1129 (West 2004 & Supp. 2005).

These problems have solutions. First, with regard to section 1123's failure to authorize pre-confirmation consolidation, it is clear that section 1123 is the only Code provision mentioning substantive consolidation. Congress made a conscious choice not to specifically authorize pre-confirmation consolidation at the time it enacted section 1123 and at the time it authorized procedural consolidation. *See In re Bonham*, 229 F.3d at 763 (recognizing that "substantive consolidation was not codified by the Bankruptcy Reform Acts of 1978 or 1994 . . . as were related provisions allowing for procedural consolidation").

The circuits have agreed that "[w]hen a specific Code section addresses an issue, a court may not employ its equitable powers to achieve a result not contemplated by the Code." *In re Fesco Plastics Corp.*, 996 F.2d 152, 154 (7th Cir. 1993) (citing *In re Morristown & Erie R.R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989); *accord Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1198 n.10 (7th Cir. 1989); *In re FRG, Inc.*, 124 B.R. 653, 659 (Bankr. E.D. Pa. 1991)). Since section 1123 addresses the issue of substantive consolidation, and is the only section that does so, a court cannot, under section 105 or any other grant of equitable jurisdiction, order the remedy outside confirmation of the reorganization plan. To do so would be to disregard the plain construction of the statute and employ equitable powers to achieve a result not contemplated by the Code—i.e., consolidation outside of a confirmed plan.

The Petitioner will argue that it was unnecessary for Congress to specifically authorize pre-plan substantive consolidation, because by not including it in the Bankruptcy Code Congress was merely recognizing the bankruptcy courts' inherent equity powers under section 105.

Petitioner will contend that Congress' choice not to codify the remedy is actually a ratification of the remedy, which has been used by the federal courts for decades, since if Congress had chosen to limit the remedy's use to a confirmed plan, it could have done so. Perhaps if Petitioner's underlying premises were correct, this argument might have merit. But, as discussed below, the federal district and bankruptcy courts do not have equitable jurisdiction, under section 105 or under general equity powers, to order substantive consolidation.

As for the second problem with pre-confirmation consolidation—disregard of creditor protections—contrary to what some courts and Petitioner would think, substantive consolidation in the confirmation context is not comparable to consolidation outside of that context. For one thing, ordering consolidation outside the confirmation context circumvents the protections afforded to impaired classes of claimants. 11 U.S.C.A. § 1129(7) (permitting confirmation of a reorganization plan *only if* every requirement of section 1129 is satisfied, including the requirement that “each holder of a claim or interest of [each impaired class]” accept the plan or accept other arrangements in lieu thereof); 11 U.S.C. § 1126(c) (2000).

Under Chapter 11, a plan must be confirmed if 1) it receives the affirmative vote of each impaired creditor class or 2) it “garners the support of at least one impaired class and meets the criteria for cram down in section 1129(b).”⁴ *In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 758 (Bankr. S.D.N.Y. 1995) (noting that a plan cannot be confirmed “absent the affirmative vote of at least one impaired class (not counting the votes of insiders or those impaired classes that are deemed to reject)). These Code requirements afford significant protection to dissenting,

⁴ Under 11 U.S.C. section 1126(c), a “class of claims has accepted a plan if such plan has been accepted by creditors . . . 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.” Moreover, section 1126(g) provides that “a class is deemed not to have accepted a plan if such plan provides that the claims . . . of such class do not entitle the holders of such claims to receive or retain any property under the plan on account of such claims.”

impaired claimants that courts ignore when they grant substantive consolidation outside of a confirmed reorganization plan.

Even under the “cram down” provisions, in which a majority of impaired creditors are forced to accept the debtor’s plan, impaired creditors are given significant protection. *See* 11 U.S.C.A. § 1129(b)(1). In the cram down provisions, the Code provides that “with respect to each class of claims . . . that is impaired under, and has not accepted, the plan,” a court will only confirm the plan “if the plan does not discriminate unfairly, and is fair and equitable.” *Id.*⁵

Courts allowing substantive consolidation outside of a confirmed reorganization plan would ignore a significant portion of chapter 11, including the dissenting classes’ rights to withhold approval of the plan.⁶ Disregarding Chapter 11 creditor protections is disturbing for at least two reasons. First, it destroys Code section 1129 by deleting one of the required elements of a confirmed plan—approval of at least one class of impaired claimants. Whenever a debtor wishes to choose consolidation in providing “adequate means” for implementing its reorganization plan, 11 U.S.C.A. § 1123(a)(5)(C), it can completely circumvent section 1129 by asking the court to grant a motion for substantive consolidation before the plan is confirmed.

The second problem with disregarding the creditor protections of Chapter 11 is that if consolidation is allowed before confirmation, then all creditors of each corporation will be combined for voting purposes. *In re Augie/Restivo Baking Co.*, 860 F.2d at 517. The problem with this is that the votes of a particular group of creditors, the Respondents in this case, will be

⁵ 11 U.S.C.A. section 1129(b)(2)(B) provides that “[f]or the purpose of [subsection (b)(1)], the condition that a plan be fair and equitable with respect to a class includes the following requirements: . . . (B) [w]ith 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 . . . that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim . . . any property.”

⁶ But that is precisely what the Bankruptcy Court for the District of Delaware did when it blithely dismissed the distinction between pre-confirmation consolidation and consolidation under section 1123. *In re Stone & Webster*,

diluted by the consolidation,⁷ making it impossible for the claimants to vote against the plan.⁸

Both of these results are inappropriate in light of the rule that “it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to provide them adequate protection.” *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988) (citing 11 U.S.C. § 1126).

Finally, in addition to the absence of statutory authority for pre-confirmation consolidation, the Bankruptcy Rules do not authorize such consolidation. Fed. R. Bankr. P. 1015 Advisory Committee’s Note (2001); *In re Stone & Webster, Inc.*, 286 B.R. at 539. In fact, the advisory committee notes state that the Bankruptcy Rules do not authorize or prohibit consolidation of debtor estates. Fed. R. Bankr. P. 1015 Advisory Committee’s Note. The advisory committee even suggests that “[c]onsolidation of the estates of separate debtors may sometimes be appropriate, as when the affairs of an individual and a corporation owned or controlled by that individual are so intermingled that the court cannot separate their assets and liabilities.” *Id.* But in making this assessment, the advisory committee is just reiterating the case law. *See Id.* The fact remains that there is neither statutory authority nor authority under the rules for pre-confirmation consolidation.

Inc., 286 B.R. at 541 (commenting that the court had “some difficulty understanding” the Equity Committee’s position regarding the difference between section 1123 consolidation and an order of substantive consolidation).

⁷ Consolidation under the confirmed plan provisions of the Code seems to mitigate this problem to some degree by providing that “a plan may place a claim . . . in a particular class only if such claim . . . is substantially similar to the other claims or interests of such class.” 11 U.S.C. § 1122(a) (2000). *But see In re Dow Corning Corp.*, 280 F.3d at 661 (noting that section 1122(a) “does not demand that all similar claims be in the same class. . . . [T]he bankruptcy court has substantial discretion to place similar claims in different classes”). Although it is possible that, even if the bankruptcy court did not order consolidation, the Respondents could still be diluted by the bankruptcy court’s decision not to put all of CAPCO’s claimants into one class, that result would be highly unlikely. First, without the consolidated estate, there would be fewer unsecured creditors to group together that could dilute the Respondents. Second, a court would not likely succeed in dispersing CAPCO’s claimants, because to do so would be contrary to the purposes of the Code.

⁸ Respondents could be diluted, because when the debtor finally gets around to crafting its reorganization plan, the plan could lump the Respondents together with other unsecured creditors that could make the Respondents minority claimants. If they are diluted in this way, it will be difficult or impossible for them to obtain the necessary majority numbers—one-half in number and two-thirds in amount of claims—to withstand a proposed plan. Unfortunately,

The Petitioner will argue that the Advisory Committee notes under Rule 1015 support its position that substantive consolidation is appropriate in this case. *See In re Stone & Webster, Inc.*, 286 B.R. at 539 (reasoning that the “Advisory Committee . . . believed that substantive consolidation was readily available under the Bankruptcy Code”). But the committee’s comments on what it perceives to be the state of the law has no bearing on whether the federal courts have the authority to order the remedy. An argument based on the Rules of Bankruptcy Procedure or its Advisory Committee’s Notes misses the point. The Petitioner must look elsewhere for authority. Unfortunately for the Petitioner, no such authority exists.

- B. Because bankruptcy courts are units of the federal district courts and, therefore, have the same equity power as federal district courts, Grupo Mexicano applies with equal force to them in forbidding equitable remedies unknown to the English Court of Chancery at the time the two countries were separated.

The United States Supreme Court has declared that federal courts’ equity jurisdiction “is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.” *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939)).

It is undisputed that substantive consolidation was not part of that system of judicial remedies. *See, e.g., In re Bonham*, 229 F.3d at 764 (noting that “the substantive consolidation of two estates was first tacitly approved by the Supreme Court” in *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941)).

when courts order substantive consolidation before a plan has been confirmed, claimants like the Respondents will never have the opportunity to exercise their right to oppose the consolidation.

After the Supreme Court's decision in *Grupo Mexicano*, 527 U.S. 308, substantive consolidation is no longer available as an equitable remedy, because it is neither expressly authorized by statute nor was it made available before the nineteenth century. Under *Grupo Mexicano*'s rule that today's federal courts cannot exercise equitable authority unless such authority was exercised by the English Chancery Court in 1789, 527 U.S. at 318, or created by act of Congress, the remedy of substantive consolidation cannot survive. Cf. *In re Dow Corning Corp.*, 280 F.3d 648 (reasoning that if there is authority under the Bankruptcy Code for substantive consolidation, then inquiry into the limitations on federal courts' general equitable powers under *Grupo Mexicano* is unnecessary). It is unpersuasive for Petitioner to merely argue that "[n]o court has held that substantive consolidation is not authorized." *In re Owens Corning*, 419 F.3d at 208 (citing *In re Bonham*, 229 F.3d at 765). Neither is it any answer that substantive consolidation has existed for decades in the federal system. See *In re Stone & Webster, Inc.*, 286 B.R. at 539-540 (recognizing that substantive consolidation has been allowed "by courts in the bankruptcy context for more than half a century"). Without either express statutory authority, authority under *Grupo Mexicano*, or authority under section 105's narrow grant of equitable powers, substantive consolidation is an impermissible usurpation of federal court power.

In the federal system, the "district courts . . . have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). District court jurisdiction over civil actions includes the authority to administer both legal and equitable remedies. 28 U.S.C. § 1331 Revision Notes (noting that the words "'all civil actions' were substituted for 'all suits of a civil nature, at common law or in equity' to conform with Rule 2 of the Federal Rules of Civil Procedure"). Bankruptcy courts are, and have always been, in one form or another, part of the district courts. See Act of Apr. 4, 1800, ch. 19, § 2, 2 Stat. 19,

21 (repealed 1803); Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843); Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 545 (repealed 1978); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2668 (repealed 1984), Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 336 (1984); 28 U.S.C. § 151 (2000).

Because bankruptcy courts are “units” of the federal district courts, they are courts of equity like the district courts are. *Local Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934) (reasoning, at a time when the district courts and not separate units thereof exercised bankruptcy jurisdiction, that “courts of bankruptcy are essentially courts of equity”). Their equity power is derivative of the federal district courts’ equity power. *Id.* They have no equity power independent of the district courts.⁹ A review of the historical development of the federal district court system, and of the bankruptcy court as a unit of that system, is helpful to understand the origin of bankruptcy courts’ equity power and the limits on that power. *See* Tucker, *supra*.

When Congress acted pursuant to its constitutional authority, U.S. Const. art. III, § 1, and enacted the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789), it established the first round of federal district courts and circuit courts of appeal. Tucker, *supra* at 437-38. Congress bestowed upon these inferior courts the authority to administer “that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress.” *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 164-165 (1939).

Congress enacted the first bankruptcy laws in 1800, bestowing upon the district courts the authority to administer bankruptcy proceedings. § 2, 2 Stat. at 21. With the enactment of each

⁹ This is accurate, even considering 11 U.S.C.A. § 105 (West 2004 & Supp. 2005), which embodies the special, limited-scope equitable power addressed below.

new federal bankruptcy law,¹⁰ Congress perpetuated the district courts' authority "at law and in equity . . . to exercise original jurisdiction in bankruptcy proceedings." § 2, 30 Stat at 545; *Pepper v. Litton*, 308 U.S. 295, 303-304 (1939). Finally, in 1984, after its failed attempt in the 1978 Act to bestow upon the bankruptcy courts the "powers of a court of equity," § 241(a), 92 Stat. at 2671, Congress officially established bankruptcy courts as "units" of the federal district courts authorized to exercise district court power. 28 U.S.C. § 151 (2000).¹¹

While the Bankruptcy Reform Act of 1978 expressly endowed bankruptcy courts with the "powers of a court of equity," § 241(a), 92 Stat. at 2671, that Act was short lived. In its 1984 revision of Title 28, which repealed the 1978 Act, Congress divested the bankruptcy courts of the "powers of a court of equity." Tucker, *supra* at 437. Congress never reinvested the bankruptcy courts, as courts distinct from the district courts, with equity power. *Id.* In place of a new statutory grant of equity power, Congress gave the bankruptcy courts a new role as units of the district courts. 28 U.S.C. § 151.

In the 1984 act, Congress gave the district courts "original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a) (2000). Congress also authorized the district courts to delegate to the bankruptcy units the power to adjudicate cases under title 11. 28 U.S.C. § 1334(b). As units of the federal district courts, and as courts to whom is delegated the authority to adjudicate bankruptcy cases, bankruptcy courts share in the status of the district courts as arbiters of the judicial power of the United States in bankruptcy cases. 28 U.S.C. § 151

¹⁰ Statutes relevant to the history of Congressional bestowal of equity power on federal district courts sitting as bankruptcy courts were enacted in 1800, § 2, 2 Stat. 19 (repealed 1803); 1841, § 6, 5 Stat. 440 (repealed 1843); 1898, § 2, 30 Stat. 544 (repealed 1978); 1978, § 241(a), 92 Stat. 2668, 2671 (repealed 1984); and 1984, § 104(a), 98 Stat. 333 (1984).

¹¹ Repeal of the 1978 Act was precipitated by the Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court found unconstitutional Congress' attempt in the 1978 Act to bestow Article III judicial power upon the bankruptcy courts without making them Article III courts, including providing other perquisites of Article III courts.

(stating that “[e]ach bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding”).

As a result of the foregoing, bankruptcy courts lack general equitable power that is separate and distinct from those equitable powers held by the district courts. District court equity jurisdiction derives from the Judiciary Act of 1789 and includes only those powers that were exercised in England in 1789 and any other powers specifically authorized by Congress. A bankruptcy court’s equity power is the same as a district court’s equity power. Those powers do not include the authority to order the remedy of substantive consolidation. If they have any equitable power outside of the general federal equitable power delimited by *Grupo Mexicano*, it must come by act of Congress. *See, e.g., Grupo Mexicano*, 527 U.S. at 333.

The Petitioner has no legitimate argument in opposition to the clear relationship between the district courts and the bankruptcy courts and their common source of equity jurisdiction. *But see In re Owens Corning*, 419 F.3d at 209 (attempting to distinguish between district court equity power and bankruptcy court equity power on the grounds of “extensive history of bankruptcy law and judicial precedent”). The fact that bankruptcy courts have the same equity powers as the district courts have annihilates the Petitioner’s contention that bankruptcy is unique and is not subject to the *Grupo Mexicano* limitations on district court equity power. *But see Id.* What makes Petitioner’s argument so vulnerable is its ultimate reliance on the fact that courts have indeed ordered substantive consolidation in the past rather than a showing that they were authorized by law to do so. Petitioner cannot seriously contend that bankruptcy court equity power derives from a source wholly independent of the source of district court equity power. Therefore, its argument must fail.

- C. Bankruptcy courts are not authorized under 11 U.S.C. section 105 to order the remedy of substantive consolidation.

Section 105 of the Bankruptcy Code does not provide authority for the extraordinary remedy of substantive consolidation, *but see, e.g., In re Augie/Restivo*, 860 F.2d at 517 n.1 (noting that “the power to consolidate substantively [is] in the court’s general equitable powers as set forth in 11 U.S.C. § 105”), because that section is merely an express confirmation of the equitable powers already vested in the bankruptcy courts as branches of the district courts.

The circuits that approve of the doctrine of substantive consolidation would ascribe bankruptcy court equitable power to order the remedy to 11 U.S.C.A. § 105(a). *See, e.g., In re Bonham*, 229 F.3d at 764 (citing *In re Augie/Restivo*, 860 F.2d at 518 n.1). But section 105 is not a grant of general equity power, but a grant of specific equity power to fulfill the specific 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 (2d Cir. 2003); *In re Fesco Plastics Corp.*, 996 F.2d at 154. It is clear that Congress never intended section 105 to be an extraordinary grant of equity power, but an expression of Congress’ intent that bankruptcy courts have the equity powers available to the federal district courts.¹² S. Rep. No. 95-989, at 51 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837; H.R. Rep. No. 95-595, at 342 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298.

Section 105 provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C.A. § 105(a). In addition to the legislative history of section 105, its plain language suggests its limited scope. The Supreme Court picked up on its limited scope when it reasoned that the bankruptcy courts’ equitable powers “must and can only be exercised within the confines of the Bankruptcy Code.”

¹² Because, under section 105, bankruptcy courts have the equity powers available to the federal district courts, section 105 is clearly not a grant of equity power independent of the federal courts upon which the Petitioner can rely in arguing that *Grupo Mexicano* does not apply to the bankruptcy courts.

Ahlers, 485 U.S. at 206; *see also In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 830-831 (1st Cir. 1990) (reasoning that a bankruptcy court’s section 105 power “cannot be used in a manner inconsistent with the commands of the Bankruptcy Code”).

The exercise of equitable powers within the confines of the Bankruptcy Code allows a court to carry out “the provisions of the Bankruptcy Code, rather than to further the purposes of the Code generally.” *Smart World Techs., LLC v. Juno Online Servs., Inc. (In re Smart World Techs., LLC)*, 423 F.3d 166, 184 (2d Cir. 2005); *accord In re Fesco Plastics Corp.*, 996 F.2d at 154. It also limits a bankruptcy court’s discretion to alter the relationships between creditors and debtors and to create substantive rights not otherwise available.

For example, it is clear that bankruptcy courts cannot, under the auspices of section 105, “create substantive rights that are otherwise unavailable under applicable law.” *Southmark Corp. v. Grosz (In re Southmark Corp.)*, 49 F.3d 1111, 1116 (5th Cir. 1995); *accord In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d at 92. The courts have understood that substantive consolidation is “no mere instrument of procedural convenience . . . but a measure vitally affecting substantive rights.” *Flora Mir Candy Corp. v. R.S. Dickson & Co.*, 432 F.2d 1060, 1062 (2d Cir. 1970). Therefore, section 105 cannot be used to order substantive consolidation when to do so would disrupt creditors’ rights under a confirmed plan.

What Petitioner will likely argue in opposition relates to the bankruptcy court’s authority under section 105 to achieve the purposes of the Code. What it will claim, and what most circuits claim, is that the main purposes of substantive consolidation are to enhance “the value of the assets available to creditors,” *In re Owens Corning*, 419 F.3d at 211, and to achieve “fairness to all creditors.” *Colonial Realty Co.*, 966 F.2d at 61 (stating that the sole aim of substantive consolidation is “fairness to all creditors”). By permitting consolidation in this case, Petitioner’s

unsecured creditors as a whole, to say nothing of its secured creditors, will be better off. Its unsecured creditors will get a better return on the dollar. (R. 22-23.) Petitioner will contend that section 105 is the grant of general equitable powers that authorizes substantive consolidation in order to achieve the purpose of fairness to creditors. *Fed. Deposit Ins. Corp. v. Colonial Realty Co.*, 966 F.2d at 61 (citing *Drabkin v. Midland-Ross Corp., (In re Auto-Train Corp.)*, 810 F.2d 270, 276 (D.C. Cir. 1987)).

The problems with the Petitioner's argument is that it is premised on a general purpose—"fairness to all creditors"—rather than a specific statutory provision. Such reasoning is faulty in light of cases like *In re Smart World*, 423 F.3d at 184. What is worse is that the Petitioner has asked the trial court below to issue an order under section 105 that is inconsistent with section 1123. Namely, to order substantive consolidation outside the context of a confirmed reorganization plan. Moreover, as pre-confirmation consolidation is not one of the provisions of the Bankruptcy Code, and as its use is an attempt to create substantive rights unavailable under the current Bankruptcy Code, a bankruptcy court is not authorized to order it. *But see In re Stone & Webster, Inc.*, 286 B.R. at 540-41 (concluding that section 1123 expressly authorizes pre-confirmation consolidation and, therefore, determining the scope of section 105 power is unnecessary). Petitioner would ask the Court to authorize the creation of substantive rights for the Petitioner and destruction of substantive rights for the Respondent without any authority for such a request. The Court should deny such an unjust request.

D. Substantive consolidation should not be granted in this case, because this case does not involve the policy considerations for which the remedy was created and would lead to an inequitable result.

Even if the Court finds that substantive consolidation is authorized under federal law, the Court should limit its application under the well-known maxim that where the reason of the rule

does not exist, the rule itself should not apply. *City of Lincoln, Neb. v. Ricketts*, 84 F.2d 795, 799 (8th Cir. 1936). Substantive consolidation emerges as a remedy from cases in which corporate debtors attempted, through fraud or other wrong behavior, to convey their property to a subsidiary or other corporation in order to avoid obligations to creditors. *In re Owens Corning*, 419 F.3d at 205-06; *In re Standard Brands Paint Co.*, 154 B.R. at 567 (citing *Sampsell*, 313 U.S. 215) (affirming bankruptcy referee’s consolidation of the debtor’s individual estate with the debtor’s wholly-owned, non-debtor subsidiary “to avoid the prejudice that would otherwise have been suffered by creditors of the debtor due to the fact that the debtor had fraudulently conveyed assets to the corporation to seek to hinder his creditors”).

Every circuit agrees that *Sampsell*, a turnover order case, “spawned the concept of consolidation.” *In re Owens Corning*, 419 F.3d at 205 (admitting that substantive consolidation “goes in a direction different (and in most cases further) than” the remedies of veil piercing, equitable subordination, and turnover). What the courts of appeal have done is turn this remedy on its head. They have allowed debtors to use it offensively to the detriment of creditors, rather than reserving it for the situations in which it is equitable to use it—situations in which a creditor is being defrauded by a debtor who seeks to hide assets from the creditor. But, as the Third Circuit expressed, the remedy will “[remain] until [the Supreme Court] alone removes it or Congress declares it removed as an option.” *Id.* at 209.

In certain limited circumstances, such as those in which substantive consolidation originated, a pre-confirmation turnover order or consolidation order may be appropriate to prevent debtors from insulating their “money through transfers among inter-company shell corporations with impunity.” *In re Bonham*, 229 F.3d at 764. But courts should limit such orders to these kinds of situations and not permit them in cases such as the one at bar in which

the Petitioner is seeking to eliminate Respondent's claims through its consolidation and sale plan. The Court should put an end to debtors' abuse of the remedy as a sword against creditors and reaffirm the remedy's rightful place as a shield against attempted debtor misconduct. *In re Owens Corning*, 419 F.3d at 216.

II. A PENDING SEX AND GENDER DISCRIMINATION CLAIM IS NOT AN "INTEREST IN SUCH PROPERTY" UNDER §363(F) OF THE BANKRUPTCY CODE, AND, AS SUCH, THE ASSETS OF A CAPCO CANNOT BE SOLD FREE AND CLEAR OF SUCH A CLAIM.

Section 363(f) of the Bankruptcy Code authorizes the bankruptcy courts, assuming certain conditions are met, to allow the sale of property "free and clear of any *interest in such property* of an entity other than the estate." 11 U.S.C. § 363(f) (2000) (emphasis added). The Code does not, however, define the kinds of "interests in property" that the statute is intended to encompass. Accordingly, there has been ample debate with respect to what constitutes an "interest" within the meaning of section 363(f). While certain items, such as liens held by secured creditors, are definitely "interests in property," potential successor liability claims do not constitute such an "interest in property" within the meaning of section 363(f), and even if they are "interests in property," it is not proper to allow a section 363(f) when a "substantial business reason" does not exist. Accordingly, CAPCO's business can not be sold free and clear of the claims asserted by the discrimination plaintiffs, particularly, that asserted by the Respondent.

A. The Respondent's unsecured claim is not an "interest in such property" under section 363(f).

In essence, if the requirements of section 363(f) are satisfied, a bankruptcy court has the authority to sever "interests" from the assets so that the purchaser can take possession of them without fear of successor liability for such "interests." A court's interpretation as to what constitutes an "interest" can, therefore, be of paramount importance in determining whether a

plaintiff's claim against a successor purchaser is terminated or whether successor liability will apply to the purchaser of the bankruptcy assets.

The express language of section 363(f) provides:

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

1. applicable nonbankruptcy law permits sale of such property free and clear of such interest;
2. such entity consents;
3. such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
4. such interest is in bona fide dispute; or
5. such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f) (2000).

In the proceedings below, as addressed by the Court of Appeals for the Thirteenth Circuit, the critical issue here is “whether the pending employment discrimination claims against CAPCO constitute “interests” in property” as contemplated by section 363(f). *In Re Acme Chemical Industrial Products*, Case No. 05-4080, at 17. While the Bankruptcy Code fails to define the term “interest,” courts have likewise “not yet settled upon a precise definition of the phrase ‘interest in such property.’” *United Mine Workers of America v. Leckie Smokeless Coal Co.*, (*In Re Leckie Smokeless Coal Co.*), 99 F.3d 573, 581 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118, 117 S.Ct. 1251, 137 L.Ed.2d 332 (1997). As a result, several different approaches have been taken.

Courts taking a narrow interpretation of the statute have limited the phrase “interest in such property” to *in rem* interests which have attached to the property, i.e., liens and security interest. *See Fairchild Aircraft Inc., v. Campbell (In Re Fairchild Aircraft Corp.)*, 184 B.R. 910, 917-918 (Bankr.W.D.Tex. 1995), *vacated on other grounds*, 220 B.F. 909 (Bankr. W.D. Tex.

1998).¹³ As the court in *Fairchild* explained, “section 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 interest*.” *Id.* (emphasis in original). Thus, the only interests impacted by a sale “free and clear” are *in rem* interests. *Id.* Section 363(f) was simply “not intended to extinguish *in personam* liabilities.” *Id.* Allowing “any interests” to include *in personam* claims would “render the words ‘in such property’ a nullity.” *Id.* In our current case, such an approach would render Respondent’s Title VII claim outside the scope of section 363(f).

Other courts have held similarly. See *In Re White Motor Credit Corp.*, 75 B.R. 944 (Bankr.N.D.Ohio 1987). In *White Motor*, unsecured creditors of the debtor attempted to sue the purchaser of assets of the debtor under section 363(f) on the theory of successor liability. *Id.* at 947. The purchaser, however, predictably argued that such claims were precluded because “federal bankruptcy law precludes imposition of successor liability in bankruptcy cases.” *Id.* at 948. The court rejected this argument, noting that general unsecured interests do not fall within the scope of those interests that can be discharged pursuant to §363(f). *Id.* Indeed, the court held, section 363(f) “authorizes sales free and clear of *specific* interests in property being sold; liens for example.” *Id.* (emphasis added). The court further noted that “general unsecured claimants, including tort claimants, have no specific interest in a debtor’s property. Therefore, section 363 is inapplicable for sales free and clear of such claims.” *Id.*

Relying on *White Motor*, the court in *Mickowski v. Visi-Trak Worldwide, LLC*, 321 F.Supp.2d 878 (E.D. Ohio, 2003) further addressed how to deal with unsecured claims. In that case, the court addressed a tort victim’s successor liability claim based on a pre-bankruptcy federal court judgment against the predecessor company. *Id.* at 882. The court held that

¹³ As noted by the court below, “[a]lthough the court in *Fairchild* vacated its original order because the parties settled the case, it made clear that the original opinion should retain its precedential value.” *In Re Acme Chemical*

“although a judgment can give rise to a judicial lien as defined by 11 U.S.C. § 101(36), for purposes of this motion, the judgment did not ripen into a lien.” *Id.* at 883.¹⁴ Noting that the original judgment was an unsecured claim, the court further elaborated, stating that “a sale of assets under §363(f) is free and clear of secured claims only. It does not extend to unsecured claims.” *Id.*; see also *Michigan Employment Security v. Wolverine Radio Co., Inc.*, (*In Re Wolverine Radio Co.*), 930 F.2d 1132 (6th Cir. 1991) (relying on *White Motor* to conclude that the “experience history” of debtor was not an interest in property).

While the Bankruptcy Code fails to define the term “interest,” some courts, as well as the Petitioner in this case, have attempted to expand the term to also include “claims.” See, e.g. *P.K.R. Convalescent Centers, Inc. v. Commonwealth of Virginia, Department of Medical Assistance Service*, 189 B.R. 90, 94 (E.D. Virginia 1995) (any interest in property that can be reduced to a money satisfaction constitutes a claim under section 363(f)); *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d. Cir. 2003) (obligations that are connected to or arise from the property being sold fall within the scope of “any interest” of 363(f), and can be extinguished pursuant to the statute).

Courts that have taken this narrow approach have noted that “the term ‘any interest’ is intended to refer to obligations that are connected to, or arise from, the property being sold.”

Trans World Airlines, 332 F.3d at 289. However, as one commentator has stated:

If all that is required of an item for it to be within the purview of section 363(f)’s meaning of “interest” is that it find some connection to the assets of the debtor, no matter how attenuated, then little would be beyond the scope of that section.

Matthew T. Gunlock, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in their Interpretation of “Interests” Under Section 363(f) of the Bankruptcy*

Industrial Products, Case No. 05-4080, n. 3 at 17, citing *In re Fairchild Aircraft Corp.*, 220 B.R. at 917 n. 10.

Code, 47 Wm. & Mary L. Rev. 347, 363 (2005). Recent cases have also scathingly derided the reasoning adopted by the Third Circuit in *Trans World Airlines*. See *In re Eveleth Mines LLC*, 312 B.R. 634 (Bankr. D. Minn. 2004) (the reasoning in *Trans World Airlines* is 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”). Nevertheless, even if this Court were to adopt such a broad approach, the requisite relationship from *Trans World Airlines* does not exist here.

While the two above-mentioned approaches seem to be contradictory, other courts have seemed to take more of a “middle of the road” approach. In *Leckie Smokeless*, the Fourth Circuit held that the statute should not be interpreted so broadly that it includes anyone who has a general right to payment from the debtor and it should not be interpreted so narrowly that it only includes *in rem* interests. 99 F.3d at 582. However, the court observed that creditors holding unsecured claims do not have an interest in the property of the estate even though they have a claim against the estate. *Id.* at 581, citing *Yadkin Valley Bank & Trust Co. v. McGee (In Re Hutchinson)*, 5 F.3d 750, 756 (4th Cir. 1993). As such, they do not fall within the meaning of section 363(f). *Id.* Taking this approach, the Respondents unsecured Title VII claim could not be extinguished by section 363(f).

Furthermore, from a statutory construction standpoint, it is interesting to note that only two provisions of the Bankruptcy Code specifically authorize the sale of assets “free and clear” of both “claims and interest,” namely 11 U.S.C. § 1123(b)(4) (2000), permitting the sale of assets in the context of a confirmed plan, and 11 U.S.C. § 1141(c) (2000), allowing property to vest through a confirmed plan free and clear of “claims and interests.” As one commentator has

¹⁴ “The term ‘judicial lien’ means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C.A. § 101 (36)

suggested, “if the drafters of §363(f) had intended [the word “interest] to apply to ‘claims,’ they would have included language within that provision identical to that used in other areas of the Bankruptcy Code and, accordingly, the conspicuous absence of “claims” should be given effect by courts in their interpretation of §363(f).” Matthew T. Gunlock, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in their Interpretation of “Interests” Under Section 363(f) of the Bankruptcy Code*, 47 Wm. & Mary L. Rev. 347, 356 (2005). In other words, by implication, the absence of the word “claims” from the language of section 363(f) reflects a legislative intention to exclude “claims” from the operation of that section. *Id.*

Despite the absence of the word “claims” in section 363(f), some courts have approved of preplan sales free and clear of claims. *See Trans World Airlines*, 322 F.3d at 289. To paint with such a broad brush while interpreting section 363(f) would be an unjustifiable expansion of the powers Congress intended the bankruptcy courts to possess.

Other courts have agreed with the commentators. The language of section 363(f), read in conjunction with other provisions of the Bankruptcy Code, establishes that “interests in property” are lines, mortgages, money judgments, writs of garnishments and attachment, and the like, and cannot encompass successor liability claims arising under federal antidiscrimination statutes and judicial degrees implementing those statutes. *See Folger Adam Sec., Inc., v. DeMatteir/MacGregor, JV*, 209 F.3d 252, 258, 259-60 (3d Cir. 2000). As stated above, the language from section 1141(c) confirms the propriety of a narrow reading of section 363(f). Therefore, section 363(f) must be limited in its terms to “interests in property” and cannot be expanded to capture the successor liability claims being brought here.

Finally, 11 U.S.C. section 363(f) was enacted in 1978, well after the enactment of Title VII and most other antidiscrimination statutes, with their attendant principles of successor liability. Presumably, in enacting section 363(f), Congress was aware of these principles and if it had desired, could have made it clear that they were trumped by the “free and clear” provision. See *Miles v. Apex Marine Corp.*, 489 U.S. 19, 32 (1990). However, it did not. Thus, it would be too large of a stretch to interpret the generic phrase “interest in such property” as crippling, in the bankruptcy context, a settled body of law concerning successor liability.

Here, Jean Tien, the Respondent, as well as several other female employees of CAPCO, filed a class action suit against CAPCO in the District Court of Kelly pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. §206(d), *et seq.* (R. 5). In this suit, the discrimination plaintiffs alleged sex and gender discrimination, asserting that “CAPCO created a hostile work environment with respect to its female employees and also failed to pay them ‘equal pay’ for ‘equal work.’” (R. 5). At the time of the filing of the bankruptcy proceedings for ACME, CAPCO, and TAPCO, the class action suit remained pending. (R. 5). If able to prevail, the discrimination plaintiffs will receive a “substantial recovery.” (R. 5).

Because the claim asserted by the Respondent against the Petitioners is unsecured, it does not fall within the meaning of “an interest in such property” under section 363(f). As seen in *Fairchild*, such an *in personam* interest is not to be treated as an *in rem* interest. It is simply not a *specific* interest in the property being sold.

In addition, as seen in *Mickowski*, although a judgment on the pending class action suit against CAPCO could give rise to a judicial lien, such claim has not ripened into a lien at this time. The possibility that it may some day become a lien is not sufficient reason to treat it as a

lien in this current proceeding. Likewise, under the approach adopted by the court in *Leckie Smokeless*, the Respondent's unsecured claim could not be extinguished by section 363(f) of the Bankruptcy Code.

While the Respondent possesses a claim against Petitioners, this alone should not be enough to open the floodgates of section 363(f), allowing, in essence, the Respondent's unsecured claim to be washed completely away. Just as damaged levies should be repaired before the arrival of a hurricane, this Court should take the necessary prophylactic measures to stop improper interpretation of section 363(f).

B. Even if this Court concludes that a Title VII claim is an "interest in property," it is not proper to use a preplan sale in this case.

Section 363(b) provides "[t]he trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b) (2000). A sale of all assets is allowed only if it is first determined that there is a substantial business reason why the debtor in possession, or the trustee, need to deviate from the normal process of a chapter 11 reorganization plan. *In re Lionel Corporation*, 722 F.3d 1063, 1071 (2d Cir. 1983) (requiring a "good business reason" to grant such an application). In making such a decision, a court should look at (1) the amount of time elapsed since the petition was filed, (2) the proceeds to be obtained from the disposition compared to appraisals of the property, (3) whether the assets were increasing or decreasing in value, and (4) whether parties opposing the sale produced evidence that the sale was not justified. *See In re Thomson McKinnon Sec., Inc.*, 120 B.R. 301, 308 (Bankr.S.D.N.Y.1990); *see also In re Oneida Lake Dev., Inc.*, 114 B.R. 352, 355-56 (Bankr.N.D.N.Y.1990).

Additionally, the courts are concerned that a section 363 does not short circuit the Chapter 11 provisions and allow the debtor to side-step these safeguards. *See Official Committee*

of Unsecured Creditors v. Cajun Electric Power Cooperative (In re Cajun Electric Power Cooperative, 119 F.3d 349 (5th Cir. 1997) (essentially stating the court was comfortable allowing a section 363 sale as long as it did not interfere with rights that only could be explored in the plan approval process). The concern that the use of a section 363 sale will distort the rights allowed in Chapter 11 occurs anytime there are pre-plan transactions such as use, sale or lease of estate property under section 363(b), settlement, abandonment of property under section 554, or a transaction out of the ordinary course of business under section 1108. *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 885 (Bankr. D.N.Y. 1990). Here, a section 363(f) sale should not be allowed because there is not a substantial business reason to allow the sale. Although TAPCO has experienced continuing losses during the early months of the bankruptcy proceeding, TAPCO is still realizing “minimal, if any, profit” from its production. (R. 5). TAPCO has been realizing this profit for the past “few years.” (R. 5). If they have not found it necessary to sell the assets in the past, and if the situation has not changed (other than the employment discrimination claims against CAPCO), then there is little force to an argument that suddenly there is a substantial business reason to sell. It thus appears that the “substantial business reason” to sell under section 363(f) is to eliminate the employment discrimination claims. Such a reason is not sufficient in and of itself.

In addition, in this case the use of pre-plan sale of all the assets to SOUSA under section 363 is improper because creditors such as Jean Tien will not have the normal protections allowed under a fully considered Chapter 11 plan. If all the assets are sold under a section 363(f) plan, Jean Tien’s employment discrimination claim becomes meaningless. Selling the CAPCO free and clear of all its assets would leave her without recourse, in a position she did not willingly place herself in. Alternatively, under a Chapter 11 reorganization plan, the court could provide a

possible recourse for the damages she has suffered. The problem with allowing this section 363(f) sale to go through at this point is the court does not have enough facts to determine CAPCO, TAPCO, and ACME's full financial status. All the court knows at this point is that "ACME currently owes its various lenders well in excess of \$700 million." (R. 6). As such, allowing a section 363(f) sale would not be appropriate.

CONCLUSION

The Respondent respectfully requests that this Court sustain the holding of the United States Court of Appeals for the Thirteenth Circuit.

APPENDIX A

→§ 101 (36). Definitions

In this title the following definitions shall apply:

(36) The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

→§ 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.

→§ 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

→§ 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.

→§ 1122. Classification of claims or interests

- (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
- (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

→§ 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.

→ § 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.

→ § 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).

→ § 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.

→ § 1331. Federal question

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

→ § 1334. Bankruptcy cases and proceedings

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
- (c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--
(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.