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Reconciling Bankruptcy Law and Corporate Law Principles: Imposing Successor Liability on GM and Similar "Sleight-of-Hand" 363 Sales

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RECONCILING BANKRUPTCY LAW AND CORPORATE LAW PRINCIPLES: IMPOSING SUCCESSOR LIABILITY ON GM AND SIMILAR "SLEIGHT-OF-HAND" 363 SALES

ABSTRACT

It was only June 2009 when General Motors filed for chapter 11 bankruptcy protection after suffering through the crippling financial effects of the 2008 financial crisis. Now in 2016, General Motors has entered what some have called its renaissance period with flourishing sales and increased profitability. Meanwhile, thousands of vehicle owners who were harmed by defective General Motors vehicles have been barred by 11 U.S.C. § 363(f) of the Bankruptcy Code from seeking an equitable remedy from the now thriving company. This result is largely due to § 363(f), which allows for assets to be sold in bankruptcy free from all liabilities including the tort claims of those injured or harmed by defective vehicles.

This Comment argues that those harmed by General Motors' defective vehicles should have access to an equitable remedy via the successor liability doctrine. The successor liability doctrine allows for an asset purchaser to be accountable for the liabilities of the seller under certain circumstances. Successor liability has been scantly applied to § 363 sale purchasers. However, this Comment contends that General Motors' § 363 sale was a "sleight-of-hand' transaction which allowed the corporation to essentially sell its assets to itself and escape most of its liabilities. This Comment explains that the successor liability doctrine was intended to prohibit these "sleight-of-hand" transactions. Furthermore, this Comment discusses how to reconcile the language of § 363(f) of the Bankruptcy Code, and the objectives of the bankruptcy process in general, with the goals of the successor liability doctrine. Finally, this Comment proposes to amend the Bankruptcy Code to internalize the cost of harm of defective products and ensure due process for consumers.

INTRODUCTION

To date, General Motors ("GM") has recalled over two and a half million vehicles due to defective ignition switches that have been linked to at least twenty-nine deaths.[1] Investigative reports indicate that the company was likely aware of the manufacturing defects for over a decade.[2] For years, evidence connecting the defects to accidents involving GM vehicles was largely ignored.[3] Given that GM was likely aware of the defective ignition switches for years, it begs multiple questions, including why did it risk incurring a mountain of tort liability by leaving millions of these dangerous, defective vehicles in the hands of consumers? And, why did no one else call attention to the matter?[4]

To answer these questions requires a look to the 2008 financial crisis and the integral part that the U.S. federal government had in all aspects of GM's financial rehabilitation. On December 31, 2008, the U.S. Treasury Department extended $13.4 billion to GM, making the U.S. federal government the largest stakeholder in the corporation.[5] Under the terms of the government financing agreement, GM had to present a plan for long-term viability in an effort to rebuild and restructure. Unsatisfied with GM's viability plan, President Obama announced on March 30, 2009, that GM's efforts fell short of justifying the continued use of taxpayer dollars and gave the company sixty days to adopt drastic changes, or face bankruptcy.[6] On June 1, 2009, GM filed for chapter 11

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1 Gregory Wallace, *GM Ignition Switch Death Toll Climbs to 29*, CNN (Oct. 20, 2014, 5:59 PM), http://money.cnn.com/2014/10/20/news/companies/general-motors-feinberg-claims/index.html.

2 Michael A. Fletcher, *General Motors Recalls Another 2.7 Million Vehicles*, WASH. POST (May 15, 2014), http://www.washingtonpost.com/business/economy/general-motors-recalls-another-27-million-vehicles/2014/05/15/f8bce616-dc40-11e3-bda1-9b46b2066796_story.html.

3 *See, e.g.*, Tom Krisher & Amy Forliti, *Families of Teens Killed in Wisconsin Crash Drop lawsuit Against GM; Will Consider Settlement*, U.S. NEWS (Sept. 24, 2014, 7:07 PM), http://www.usnews.com/news/business/articles/2014/09/24/teen-crash-victims-families-drop-suit-against-gm (discussing the case of an eighteen year old and a fifteen year old killed in a car crash involving a Chevrolet Cobalt (Chevrolet is a subsidiary of GM) where a state trooper discovered the connection between the defective ignition switch and the crash—the company and government regulators ignored the trooper's findings for years).

4 In 2014, GM spent an estimated $2.5 billion recalling vehicles. *See* Joann Muller, *GM Profit Plunges on Recall Costs; $400 Million Set Aside for Victims*, FORBES (July 24, 2014, 8:58 AM), http://www.forbes.com/sites/joannmuller/2014/07/24/gm-profit-plunges-on-recall-costs-400-million-set-aside-for-victims/.

5 *In re* Gen. Motors Corp., 407 B.R. 463, 477 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.* Campbell v. Motors Liquation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom.* Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65 (S.D.N.Y. 2010), *enforcement denied sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

6 Sheryl G. Stolberg & Bill Vlasic, *President Gives a Short Lifeline to Carmakers*, N.Y. TIMES (Mar. 30, 2009), http://www.nytimes.com/2009/03/31/business/31auto.html?pagewanted=all&_r=0; *see* GENERAL

bankruptcy in the Southern District of New York.[7] GM's bankruptcy filing showed that its liabilities were more than double its assets, with $82.3 billion in assets and $172.8 billion in liabilities.[8]

Before the company had even filed for bankruptcy, GM had already entered into a proposed sale agreement under § 363(b) of the Bankruptcy Code, which allowed the company to restructure its debts by selling substantially all of its assets (the "363 Sale").[9] The bankruptcy court approved GM's prepackaged 363 Sale on July 5, 2009.[10] The court referred to the asset purchasing entity as "New GM," and referred to the selling entity as "Old GM."

Under § 363(f) of the Bankruptcy Code, all assets sold in a 363 Sale are "free and clear of any interest in such property. . . ."[11] Thus, New GM received substantially all of the company's assets while Old GM held on to most of the company's burdensome liabilities, allowing New GM to continue operating free from past debts.[12] GM's 363 Sale was a quintessential "sleight-of-hand transaction," in which a debtor is permitted to internally restructure under the guise of an asset sale. Old GM assumed all future liability claims from incidents that occurred prior to the bankruptcy filing date, and successor liability claims against New GM were barred.[13]Consequently, § 363(f) has had the effect of barring the victims of GM's defective vehicles from seeking an equitable remedy.

New GM contends the 363 Sale created a "bankruptcy shield" from product liability claims filed against the company.[14] These arguments have been largely

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MOTORS CORP., RESTRUCTURING PLAN FOR LONG-TERM VIABILITY (2008), http://online.wsj.com/public/resources/documents/gm_restructuring_plan120208.pdf.

7 *Gen. Motors Corp.*, 407 B.R. at 477.

8 Voluntary Petition at 18, *In re* Gen. Motors Corp., 407 B.R. 463, 477 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.* Campbell v. Motors Liquation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom.* Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65 (S.D.N.Y. 2010), *enforcement denied sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

9 *Gen. Motors Corp.*, 407 B.R. at 477.

10 "Prepackaged" means the sale was agreed to before the filing of GM's bankruptcy petition.

11 11 U.S.C. § 363(f) (2012).

12 *Id.*; Kevin Krolicki & David Bailey, *GM Exits Bankruptcy*, REUTERS (July 10, 2009, 7:20 PM), http://www.reuters.com/article/2009/07/10/us-gm-idUSTRE5690JO20090710.

13 *Gen. Motors Corp.*, 407 B.R. at 477 (noting that Old GM will retain "product liability claims arising out of products delivered prior to the Closing. . . ."); *see also* Stephen J. Lubben, *G.M.'s Bankruptcy Will Probably Shield It from Most New Claims*, N.Y. TIMES (Apr. 23, 2014 3:43 PM), http://dealbook.nytimes.com/2014/04/23/g-m-s-bankruptcy-will-probably-shield-it-from-most-new-claims/.

14 *See In re* Motors Liquidation Co., 513 B.R. 467, 469, 476–77 (Bankr. S.D.N.Y. 2014); Paul M. Barret, *GM Plays Legal Games with Its Recall Liability: Four Blunt Points,* BLOOMBERG BUS., (Apr. 21, 2014),

successful in barring successor liability.[15] However, at the time of this publication, the Second Circuit was considering whether successor liability claims should be allowed against New GM.[16]

The policies behind allowing companies like GM to apply § 363(f) to bar tort victims from an equitable remedy must be re-evaluated. When large corporations like GM assemble dangerous, defective products, they should not have the option to discharge future tort liability without proper notice and reasonable compensation to all affected consumers. This Comment uses the case of GM (including its bankruptcy filing, allegations of fraud against the corporation, and underlying product liability claims against the corporation) as an illustrative example of why large corporate manufacturers who engage in a "sleight-of-hand" 363 Sale should be held accountable using the doctrine of successor liability. The imposition of successor liability would force those firms to internalize the cost of harm of defective products and ensure due process for consumers

Part I of this Comment provides a brief overview of chapter 11 bankruptcy protection and the use of 363 Sales. Part II of this Comment introduces the doctrine of successor liability and argues that § 363 should be amended to allow for the imposition of successor liability against firms that enter into "sleight-of-hand" 363 sale transactions. Part III further discusses how the doctrine can be reconciled with the language of § 363(f) and the underlying purpose of the bankruptcy process.

I. OVERVIEW OF CHAPTER 11 AND 363 SALES

This Section gives a brief overview of chapter 11 bankruptcy, the use of 363 Sales in bankruptcy, and the rise of 363 Sales of substantially all of a company's assets. Finally, this Section turns to GM's path to bankruptcy, its subsequent substantial 363 Sale, and how the terms of the sale have barred

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http://www.bloomberg.com/bw/articles/2014-04-21/gm-plays-legal-games-with-its-recall-liability-four-blunt-points.

15 *See Motors Liquidation Co.*, 513 B.R. at 469, 476–77 (enforcing the injunctive provisions of GM's 363 Sale and barring product liability claims based upon the theory of successor liability). In 2015, Judge Gerber of the Bankruptcy Court for the Southern District of New York opened the door ever so slightly for claimants by allowing punitive damage claims against New GMs but only to the extent that the damages were based on the knowledge or conduct of New GM. *See In re* Motors Liquidation Co., 541 B.R. 104, 125 (Bankr. S.D.N.Y. 2015). However, Judge Gerber held that New GM could be responsible for claims based on knowledge or conduct by Old GM which was "inherited" by New GM under nonbankruptcy law. *Id.* at 143.

16 *See* Brief for Ignition Switch Pre-Closing Accident Plaintiffs at 10, *In re* Motors Liquidation Co., No. 15-2844-bk (2d Cir. Nov. 16, 2015).

successor liability claims against GM, thus preventing victims of GM's defective vehicles from seeking equitable relief.

A. Chapter 11 Bankruptcy Protection

Failing corporations often must decide whether to file for bankruptcy protection. Filing for chapter 11 bankruptcy allows the debtor to reorganize its debts, while continuing to operate, use, and sell its assets throughout the bankruptcy process. The debtor begins the chapter 11 process by filing a bankruptcy petition with the court. The filing triggers an automatic stay against all creditors, freezing debt collection and allowing breathing room for the debtor-in-possession ("DIP").[17] A DIP must then propose a plan to its creditors outlining how it will repay them.[18] Only the DIP may file a plan for reorganization during the first 120 days. If all classes of creditors do not accept the DIP's plan after 180 days from the petition date, then a creditor may propose an alternate plan.

The Bankruptcy Code sets out a priority system that dictates the order in which creditors are repaid.[19] Tort victims are considered unsecured non-priority creditors, meaning they are only repaid after all other secured and priority creditors have been repaid.[20] DIPs usually cannot generate enough cash to repay all creditors who file claims against the estate and so tort claimants often end up with little or no payment.[21] The low priority given to

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17 11 U.S.C. § 362 (2012); *see* 11 U.S.C. § 1101(1); ROBERT R. BLISS & GEORGE G. KAUFMAN, U.S. CORPORATE AND BANK INSOLVENCY REGIMES: AN ECONOMIC COMPARISON AND EVALUATION 11 (2006), https://www.chicagofed.org/digital_assets/publications/working_papers/2006/wp2006_01.pdf ("[The automatic stay gives the bankruptcy court] time to collect and validate claims, to determine the best way to dispose of assets in an orderly, non-fire-sale manner, and to treat all like-priority creditors equally. Stays prevent creditor runs and keep contracts in force—the counter party is bound by the contract; claims on the insolvent firm remain pending; and collateral may usually not be liquidated. This facilitates the coordination of creditor claims.").

18 *See* 11 U.S.C. § 1121(a) ("The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.").

19 11 U.S.C. § 507 (establishing that administrative expenses defined in 11 U.S.C § 503(b) will receive first priority, followed by secured claims, and then general unsecured claims).

20 Christopher M.E. Painter, *Tort Creditor Priority in the Secured Credit System*, 36 STAN. L. REV. 1045, 1066 (1984) ("The current priority structure, in which tort creditors are relegated to the status of unsecured creditors, undermines the effectiveness of the strict liability regime in precisely this manner.").

21 *Id.* at 1049–50.

tort victims minimizes incentive for creditors of large corporations like GM to monitor the DIP's conduct for potential violations of tort law.[22]

While the priority system does not favor tort claimants, the Bankruptcy Code does provide safeguards to protect the interests of all creditors. For example, a debtor must send a disclosure statement to all of its creditors.[23] The disclosure statement must be executed in good faith and it must provide creditors with adequate information about the debtor's finances and proposed reorganization that will allow creditors to make an informed decision about whether they want to approve the plan.[24] The disclosure and adequate information requirements protect creditors by allowing them to make an accurate valuation of the debtor and its assets and liabilities.[25] The Bankruptcy Code further requires that all classes of creditors generally must accept a proposed plan before the plan can be confirmed by the bankruptcy court, though there are some exceptions.[26] Once a plan is confirmed, the debtor and all creditors, including tort creditors, are bound to the plan.[27]

Large corporate debtors that have considered bankruptcy protection are often in desperate need of a quick solution for their increasing liabilities and low cash flows.[28] Traditional reorganizations are time-intensive and not conducive to quickly increasing cash flows and repaying debts.[29] Due to the

22 *See* Note, *Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541, 2542–43 (2003) (discussing the effects of a priority system which alters the incentives for creditors to monitor the risk of a debtor's chosen course of conduct).

23 *See* 11 U.S.C. §§ 1125(a), 1126(c), 1129(a)(3).

24 11 U.S.C. § 1125(a).

25 *See id.*; *In re* Monnier Bros., 755 F.2d 1336, 1342 (8th Cir. 1985) ("The primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan."). While § 1125(a) explicitly states that a formal valuation of the debtor's assets is not required for there to be adequate information in the disclosure statement, this Comment suggests that a disclosure statement which provides adequate information allows creditors to assess what they consider an accurate valuation of the estate's assets.

26 *See* 11 U.S.C. § 1129(a)(8).

27 *Id.*; 11 U.S.C. § 1128(a) (describing when the court will approve the plan); 11 U.S.C. § 1141(a) (establishing that the confirmed plan binds parties to the bankruptcy case including but not limited to the debtor and any creditor).

28 *See* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014) (describing the Chrysler bankruptcy); *see also 20 Largest Public Company Bankruptcy Filings 1980–Present*, BANKRUPTCYDATA.COM, http://www.bankruptcydata.com/Research/Largest_Overall_All-Time.pdf (last visited Feb. 10, 2016).

29 The process for a DIP to achieve a confirmable chapter 11 plan was made much more difficult by the Bankruptcy Abuse Protection and Consumer Protection Act of 2005. *See* Douglas E. Deutsch & Michael G. Distefano, *The Mechanics of a § 363 Sale*, AM. BANKR. INST. J. (Feb. 2011), http://www.chadbourne.com/files/Publication/4dbdca20-38ed-4d4c-bc04-a637b7a6997d/Presentation/PublicationAttachment/962b73fc-

lengthy and complicated nature of a traditional chapter 11 reorganization proceeding, debtors have increasingly relied on 363 Sales for a boost of capital to help fund the rest of the reorganization process.[30]

A 363 Sale allows a debtor to quickly pay off its debts by selling its assets at an auction.[31] While the creditors and those who hold an interest in the DIP's estate must confirm a traditional chapter 11 plan, a 363 Sale must only be approved by the bankruptcy court.[32]

Under § 363(f), all assets sold in a 363 Sale are "free and clear of any interest in such property. . . ."[33] Commentators disagree on the meaning of "interest in property" because it is not clearly defined under federal law.[34] While there is little case law on the subject, the majority of courts have interpreted the authorization by Congress in § 363(f) as barring successor liability claims against the 363 Sale purchaser when the theory for liability is based on conduct carried out by the DIP prior to the filing of its bankruptcy petition ("successor liability claims").[35] While the Supreme Court has held that

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20b1-4652-88a3-a8b84134f4b8/blocks%202-11.pdf; *see, e.g.*, *In re* Chrysler LLC, 576 F.3d 108, 119 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010) (finding that Chrysler's continuing loses of over $100 million per day meant that it "fit the paradigm of the melting ice cube").

30 *See* Hon. J. Vincent Aug, et al., *The Plan of Reorganization: A Thing of the Past*, 13 J. BANKR. L. & PRAC. 3, 4–5 (2004) ("A Section 363 sale is generally the preferred method for selling assets because it is quicker and less expensive, and provides a quick fix to address continuing losses, rapidly depleting assets, and loss of cash flow.").

31 *In re* Gen. Motors Corp., 407 B.R. 463, 477 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.* Campbell v. Motors Liquation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom.* Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65 (S.D.N.Y. 2010), *enforcement denied sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

32 11 U.S.C. § 1129(a)(8); 11 U.S.C. § 363(b) (the debtor "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . .").

33 11 U.S.C. § 363(f).

34 Rachel P. Corcoran, *Why Successor Liability Claims are Not "Interests in Property" Under Section 363(f)*, 18 AM. BANKR. INST. L. REV. 697, 719 (2010).

35 These courts follow the broad interpretation for the phrase "interest in such property," and find the scope of the authorization to reach beyond in rem interests. *See, e.g.*, Douglas v. Stamco, 363 F. App'x 100, 102 (2d Cir. 2010) (finding that the plaintiffs successor liability claim failed due to policy concerns); *In re* Chrysler LLC, 576 F.3d 108, 115 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010) (describing the "free and clear" provisions in § 363(f) as applying to "liens, claims and liabilities"); *In re* Trans World Airlines, Inc., 322 F.3d 283, 286 (3d Cir. 2003) (finding successor liability claims to be interests in property under § 363(f)). *But see* Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) (holding that a 363 Sale will not bar successor product liability claims). Some commentators have argued that in the context of successor liability and bankruptcy, an "interest in such property" should never be interpreted as including successor liability claims. *See generally id.* at 725(arguing that federal courts should turn to state law and find that an "interest in such property" does not include successor liability claims because no state law includes successor liability claims as an "interest in such property"). The term "in rem" is used to describe an action or claim in any real or personal property, while the term "in personam" is used to describe a legal action or claim

state law is controlling when a property interest is not defined under federal law, few courts have actually looked to state law when determining if successor liability claims constitute interest in property under § 363(f).[36]

Recent history has shown that 363 Sales have been increasingly used to sell all or substantially all of the DIP's assets outside of a reorganization plan ("Substantial 363 Sales").[37] Substantial 363 Sales can be quick, with the entire process often taking less than three months, and in some cases even taking as little as five days.[38] Most of the bankruptcy courts that have confirmed these 363 Sale transactions have done so because there was a potential for large groups of individuals to be financially harmed if the DIP were to cease operations.[39] A Substantial 363 Sale has many advantages over a traditional asset sale that occurs outside of bankruptcy. Creditors favored by the priority system are more willing to provide long-term financing when a DIP proposes a Substantial 363 Sale.[40] Substantial 363 Sales maximize the value of the DIP's assets to the benefits of creditors looking to be paid because assets are sold free and clear of any preexisting liabilities.[41]

against an individual. *See Action in Rem*, BLACK'S LAW DICTIONARY 36 (10th ed. 2014) (defining "action in rem" as "[a]n action determining the title of property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property" and an "action in personam" as "[a]n action brought against a person rather than property.").

36 Barnhill v. Johnson, 503 U.S. 393 (1992); Corcoran, *supra* note 34.

37 363 Sales of All or Substantially All Assets in Large Public Company Bankruptcies, as a Percentage of Cases Disposed, by Year of Case Disposition, UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE, http://lopucki.law.ucla.edu/tables_and_graphs/363_sale_percentage.pdf, (last visited Apr. 30, 2016).

38 *See In re* Lehman Bros. Inc., 458 B.R. 134 (Bankr. S.D.N.Y 2011).

39 *See, e.g.*, *In re* Gen. Motors Corp., 407 B.R. 463, 477 (Bankr. S.D.N.Y. 2009) ("[T]he 363 sale would thereby preserve the going concern value; avoid systematic failure; provide continuing employment; protect the many communities dependent upon the continuation of GM's business, and restore consumer confidence."), *aff'd sub nom.* Campbell v. Motors Liquation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom.* Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65 (S.D.N.Y. 2010), *enforcement denied sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

40 Deutsch & Distefano, *supra* note 29.

41 *See In re* Chrysler LLC, 576 F.3d 108, 116 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010) ("A § 363 sale can often yield the highest price for the assets because the buyer can select the liabilities it will assume and purchase a business with cash flow (or the near prospect of it)."); Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531, 535 (2009) ("In particular, the ultimate goal is maximizing the value of the estate, to increase the return to creditors." (citing *In re* Chung King, Inc., 753 F.2d 547, 549 (7th Cir. 1985))).

B. GM's Path to Bankruptcy and 363 Sale

During the late 1990s, the American automobile manufacturing industry, led by GM, faced increased competition from automobile manufacturers abroad.[42] GM utilized a largely outdated mode of manufacturing and struggled to minimize its costs to compete with foreign manufactures.[43] GM also had difficulty maintaining its healthcare obligations to current and former employees, which led to the company agreeing to make healthcare contributions totaling $20.56 billion.[44] The company was essentially bleeding cash and the credit market could only serve as a temporary "band-aid" for the problems of the company, which was in desperate need of restructuring.[45] The economic crisis of 2008 and the frozen credit markets all but ensured GM's eventual collapse.[46]

Seeking a quick solution and hoping to avoid a traditional bankruptcy plan confirmation, GM turned to § 363 of the Bankruptcy Code to relieve its financial distress.[47] The GM 363 Sale was unique in that the sale was for substantially all of the corporation's assets and yet the company continued its operations after the confirmation of the sale.[48] New GM received substantially all of the company's assets while Old GM held on to most of the company's burdensome liabilities, allowing New GM to continue operating free from past debts.[49] GM's 363 Sale was essentially a "sleight-of-hand transaction," in which GM used an asset sale to relieve itself from debt and restructure without a chapter 11 plan of reorganization.

The original Master Sale and Purchase Agreement outlined that Old GM would retain liabilities including "product liability claims arising out of products delivered prior to the Closing" but New GM succumbed to pressure from the federal government and agreed to assume future liabilities caused by

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42 Edward J. Estrada, *The Immediate and Lasting Impacts of the 2008 Economic Collapse—Lehman Brothers, General Motors, and the Secured Credit Markets*, 45 U. RICH. L. REV. 1111, 1127 (2011).
43 *Id*.
44 *Gen. Motors Corp.*, 407 B.R. at 477 (noting that GM entered into a settlement agreement with the United Auto Workers to create a new retiree benefit plan that the UAW would control and GM would make fixed and capped contributions totaling $20.56 billion in principal amount over the term of the plan).
45 *Id.* ("GM cannot survive with its continuing losses and associated loss of liquidity, and without the governmental funding that will expire in a matter of days.").
46 *Id*.
47 *Id*.
48 *See id*.
49 11 U.S.C. § 363 (2012); Krolicki & Bailey, *supra* note 12.

vehicles manufactured by Old GM.[50] However, the final 363 Sale Order included injunctive provisions barring all future litigations claims "of any kind whatsoever, including rights based on any theory of successor or transferee liability. . . against the Purchaser, its successors or assigns, its property, or the Purchased Assets . . . ."[51] GM's 363 Sale also included provisions outlining that New GM would not be considered a "legal successor," the product of a "de facto merger," or a "mere continuation" of Old GM.[52] Consequently, despite New GM's agreement with the federal government, all tort victims of Old GM are barred from an equitable remedy.

Six years after GM's 363 Sale, GM has recalled more than two and half million vehicles due to faulty ignition switches.[53] To date, twenty-seven deaths have been linked to the defective ignition switches.[54] Most of the vehicles recalled by GM were manufactured before GM filed for bankruptcy.[55] Consumer injuries and deaths have led to at least fifty-nine class action suits against GM.[56] GM has acknowledged that it was aware of the ignition switch defect prior to filing for bankruptcy.[57] Some have even accused GM's legal department of covering up the manufacturing defect.[58] Despite GM's

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[50] Order (I) Authorizing Sale of Assets Pursuant To Amended And Restated Master Sale and Purchase Agreement with NGMCO, Inc., a U.S. Treasury-Sponsored Purchaser; (II) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases In Connection with the Sale; and (III) Granting Related Relief at 29, *In re* Gen. Motors Corp., 407 B.R. 463, 477 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.* Campbell v. Motors Liquation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom.* Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65 (S.D.N.Y. 2010), *enforcement denied sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015); Mike Spector, *GM Agrees to Liability for Defects After Bankruptcy*, WALL ST. J. (June 29, 2009), http://online.wsj.com/articles/SB124614495545265019.

[51] *In re* Motors Liquidation Co., 513 B.R. 467, 474 (Bankr. S.D.N.Y 2014).

[52] *Id*.

[53] Jessica Dye, *Deaths Linked to GM Ignition-Switch Defect Rise to 27*, REUTERS (Oct 13, 2014), http://www.reuters.com/article/2014/10/13/us-gm-recall-fund-idUSKCN0I21JU20141013.

[54] *Id*.

[55] *Ignition Recall Safety Information*, GENERAL MOTORS, http://www.gmignitionupdate.com/product/public/us/en/GMIgnitionUpdate/index.html (last visited Apr. 28, 2016).

[56] Hilary Stout & Bill Vlasic, *Hoping to Fend Off Suits, G.M. Is to Return to Bankruptcy Court*, N.Y. Times, (May 1, 2014), http://www.nytimes.com/2014/05/02/business/hoping-to-fend-off-suits-gm-to-return-to-bankruptcy-court.html?_r=3.

[57] Aimee Picchi, *GM Lawyer Says Staff Failed in Ignition-Switch Defect*, CBS NEWS (July 17, 2014), http://www.cbsnews.com/news/gm-lawyer-says-staff-failed-in-ignition-switch-defect/.

[58] *Id*.; *see* 18 U.S.C. § 157 (2012) (defining bankruptcy fraud under federal law). The question of whether New GM committed bankruptcy fraud hinges on whether a court can find that the corporation purposively gave misleading statements regarding information they knew to be true. *See* 18 U.S.C. § 157. Federal prosecutors have been looking to build a case against GM, but it seems unlikely that a court would ever find that GM committed fraud. Emily Flitter & Karen Freifeld, *Exclusive: Prosecutors' Case Against GM Focuses on Misleading Statements*, REUTERS (Jul. 14, 2014), http://www.reuters.com/article/2014/07/14/us-

knowledge of the defect, and the serious harm it has caused consumers, New GM petitioned the bankruptcy court to enforce a "bankruptcy shield" against all claims for economic loss resulting from the ignition switch recall.[59]

In 2014, in *In re Motors Liquidation Co.*, Judge Gerber of the Bankruptcy Court for the Southern District of New York enforced the injunctive provision in New GM's 363 Sale, barring successor liability claims against New GM relating to damages incurred as a result of the defective ignition switch installed in the plaintiff's vehicle.[60] Judge Gerber reasoned that the plaintiff's successor liability claim was explicitly barred by GM's 363 Sale's injunctive provision because the allegations in the plaintiff's complaint "were undertaken by Old GM before New GM was created . . . ."[61] This reasoning seems to misinterpret the plaintiff's successor liability claim as a new claim against New GM, rather than a claim against Old GM transferred to its successor under the doctrine.[62] Additionally, by focusing on the injunctive provision in GM's sale agreement, Judge Gerber sidestepped the question of whether § 363(f) permits successor liability claims against 363 Sale purchasers.[63]

In 2015, Judge Gerber again held that successor liability claims against New GM were barred by the 363 Sale, even though New GM had acknowledged that some of its employees had knowledge of the ignition switch defect.[64] The decision was certified for direct review by the Second Circuit, and as of date of this publication, a decision is pending.[65]

C. Treatment of Successor Liability Claims by Bankruptcy Courts

The difficult task of balancing the competing policies imposing successor liability is further enhanced when examined in the context of bankruptcy.[66]

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gm-recall-probes-idUSKBN0FJ0AW20140714. The remedy in such a situation is unclear, as New GM could essentially argue that any remedy should come from the essentially lifeless Old GM. A full analysis of a possible bankruptcy fraud case against New GM is outside the scope of this Comment, but there are important lessons that should be accounted for when considering the implications of 363 Sales.

59 Nick Brown & Jessica Dye, *GM's Fate in Hands of Bankruptcy Judge–Again*, REUTERS (May 1, 2014), http://www.reuters.com/article/2014/05/02/us-gm-recall-hearing-idUSBREA4101L20140502.

60 513 B.R. 467, 476 (Bankr. S.D.N.Y. 2014).

61 *Id.*

62 *See infra* Section II.A Successor Liability as a Solution for Sleight-of-Hand 363 Sales; *In re* Motors Liquidation Co., 513 B.R. 467, 476 (Bankr. S.D.N.Y. 2014).

63 *Motors Liquidation Co.*, 513 B.R. at 476.

64 *In re* Motors Liquidation Co., 529 B.R. 510, 557 (Bankr. S.D.N.Y. 2015).

65 *Id.*

66 *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) (describing the competing theories that justify the Bankruptcy Code's goal of a "fresh start" for the debtor).

The goals of the Bankruptcy Code are to give struggling debtors a "fresh start" while maximizing the value of the debtor's estate and the proceeds available to creditors by coordinating the orderly distribution of the debtor's assets in accordance with the Bankruptcy Code.[67] In the context of a chapter 7 bankruptcy proceeding, the concept of a "fresh start" implies that the individual debtor's past debts and liabilities will be discharged.[68] Unlike the discharge allowing for the debtor's "fresh start" in chapter 7 bankruptcy, the theory of a "fresh start" under chapter 11 is more aligned with a reorganization plan including the process of bargaining with creditors for a reduced payment on claims.[69] The "fresh start" policy goal therefore differs remarkably for a corporate debtor in chapter 11, as a discharge of debt is not a prerequisite for a successful rehabilitation of the corporate debtor.[70]

Federal courts have found different answers as to whether successor liability can exist under the Bankruptcy Code.[71] Federal courts that have reached the same conclusion have taken very different avenues of in getting there.[72] As previously discussed, federal courts had historically struggled to answer whether a successor liability claim is an "interest in property" under § 363(f) and therefore barred.[73] In recent cases the majority of bankruptcy courts have denied successor liability claims reasoning that the Bankruptcy Code preempts the successor liability doctrine.[74]

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67 Mitchell Julis, *Classifying Rights and Interests Under the Bankruptcy Code*, 55 AM. BANKR. L.J. 223 (1981) (describing the Bankruptcy Code's goals as including providing a fresh start to the debtor, maximizing the value of the estate, and treating all parties with any claims to the estate fairly).

68 *See* 11 U.S.C. § 727 (2012).

69 *See* NextWave Pers. Commc'ns, Inc. v. F.C.C., 254 F.3d 130, 155 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003) ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business' finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179)) (quotation marks omitted).

70 Ashley J. Austin, Comment, *Food for Thought: The Efficiencies Achieved by Trimming an Industry at Overcapacity Through Mergers vs. Chapter 11 Reorganizations*, 25 EMORY BANKR. DEV. J. 147, 196 n.161 (2008) ("Chapter 11 reorganization allows creditors to be paid a fraction of what they are owed so that the company can have a fresh start in the market.").

71 *See* Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) (interpreting a 363 Sale as only extinguishing liens against the debtor, and holding that a successor liability claim is not barred as a result); Morgan Olson LLC v. Frederico (*In re* Grumman Olson Indus.), 467 B.R. 694, 706 (S.D.N.Y. 2012) (refusing to enforce an injunction that would enjoin the successor liability claim because doing so would violate the plaintiffs' Fifth Amendment due process rights).

72 Nathan F. Coco, *An Examination of Successor Liability in The Post-Bankruptcy Context*, 22 J. CORP. L. 345, 352 (1997) (alteration in original).

73 *See supra* Part I. Overview of Chapter 11 and 363 Sales.

74 *See* Corcoran, *supra* note 34, at 747 (discussing the reasoning behind finding preemption of successor liability by the bankruptcy code and arguing that the federal courts that employ this line of reasoning to bar

II. A SOLUTION FOR SLEIGHT-OF-HAND 363 SALES

The successor liability doctrine has been used in the corporate law context to impose liability on traditional asset purchasers when certain requirements are met. This Part of the Comment will explain why successor liability should be imposed on GM and similar "Sleight-of-Hand" Substantial 363 Sale transactions. First, this Part will describe the doctrine of successor liability and trace its development. Second, this Part will argue that if a transaction like GM's Substantial 363 Sale was entered into outside of the bankruptcy context, then most courts would find that successor liability must be imposed under existing corporate law principles. Third, this Part will argue that in the context of a hypothetical Substantial 363 Sale similar to the size and facts of the GM case, bankruptcy courts should embrace those same corporate law principles and allow for the imposition of successor liability against the purchaser. Finally, this Part will argue that the imposition of successor liability on transactions similar to GM's Substantial 363 Sale can be reconciled with the policy goals of the Bankruptcy Code.

A. The Doctrine of Successor Liability

When considered under a corporate law context, the facts behind GM's Substantial 363 Sale align squarely with the goals of successor liability and the types of behavior that the doctrine was intended to prevent.

As a general rule, when there is a sale or transfer of assets, the purchaser will not be liable for the seller's debts, liabilities, or tortious conduct.[75] The successor liability doctrine is an exception that some jurisdictions have created to the general rule.[76] Successor liability is an equitable state-law doctrine that the courts have applied on a case-by-case basis.[77] The doctrine of successor

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successor liability claims are incorrect in their interpretation). The Supreme Court has said that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws." Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 505 (1986) (citing 28 U.S.C. § 959(b)). *But see In re Grumman Olson Indus.*, 467 B.R. at 701 (stating that the federal courts are in general agreement that the Bankruptcy Code preempts state successor liability law).

[75] J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization law, and the Just Demand that Relief be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEV. J. 1, 6 (1995).

[76] *Id.* at 9–15 (noting that these exceptions have been based upon a fraudulent transfer, an express or implied assumption theory, a de facto merger, a "mere continuation" theory, or a product line exception theory).

[77] *See* Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995) (noting that "[s]uccessor liability is an equitable doctrine"); John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371, 372 (2011). The doctrine of successor liability exists

liability does not create a new claim against the purchasing party but rather transfers liability from a seller to the purchaser.[78]While the theories of successor liability vary in their application across jurisdictions, they are all based on the need to limit the extent that a property transferor can "effectively avoid all of its liabilities through transactional sleight-of-hand, leaving creditors and other claimants without a viable remedy."[79]

The doctrine of successor liability "seek[s] to balance two competing, and often conflicting, policy goals: to provide a necessary remedy to injured parties, often tort claimants, and to provide transactional clarity and certainty for business parties engaged in fundamental corporate transactions."[80] The need for certainty in transactions is based upon the policy goal of promoting the free alienability of assets. In other words, the policy goal of promoting the ability of an asset owner to sell his or her assets is advanced when the value of the asset can be clearly established by a potential purchaser. Because of these competing policy interests, the courts have applied the successor liability doctrine with great discretion.[81] There are four major theories under which the courts hold a purchasing party liable under the successor liability doctrine.[82]

First, one of the more straightforward applications of the successor liability doctrine is the express or implied assumption of liabilities in an acquisition agreement.[83] As in the case of GM's 363 Sale, an acquisition agreement purporting to assume certain liabilities will expressly indicate all assets that are

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under federal common law as well. The rule for successor liability under federal common law is arguably broader than under state law. *See* Coco, *supra* note 72, at 349 ("[I]n order to protect federal rights or effectuate federal policies, [successor liability] allows lawsuits against even a genuinely distinct purchaser if (1) the successor had notice of the claim before acquisition and (2) there was substantial continuity in the operation of the business before and after the sale." (quoting *Chi. Truck Drivers*, 59 F.3d at 49)).

[78] *In re* Fairchild Aircraft Corp., 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998) (citing 15 WILLIAM MEADE FLETCHER ET AL., CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (perm. ed. 1983)).

[79] Coco, *supra* note 72, at 346.

[80] Matheson, *supra* note 77, at 372–73 ("Little effort is made to satisfy two policy goals: compensating plaintiffs as if the damage-causing business had not terminated; and preventing the rule of successor liability from otherwise reducing the free transferability of firms or their assets." (citing Mark J. Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559, 1561–62 (1984))).

[81] *See* E.E.O.C. v. Vucitech, 842 F.2d 936, 944 (7th Cir. 1988) ("The entire issue of successor liability . . . is dreadfully tangled, reflecting the difficult of striking the right balance between the competing interests at stake.").

[82] Tucker, *supra* note 75, at 9–15 (noting that these exceptions have been based upon a fraudulent transfer, an express or implied assumption theory, a de facto merger, a "mere continuation" theory, or a product line exception theory).

[83] Matheson, *supra* note 77, at 384–87.

not assumed by the purchaser.[84] The fact that the parties have not expressly agreed to the assumption of liabilities is not dispositive on whether a court can impose successor liability.[85] The assumption of liabilities can either be express or implied.[86] Thus, even when parties to a transaction expressly limit the liabilities transferred from the seller to the purchaser in the terms of their agreement, under this theory, a court could hold the purchaser accountable for any of seller's liabilities.[87]

Second, courts have imposed successor liability when they determine that a sale is actually a fraudulent conveyance carried out to avoid liability.[88] While actual intent is not required, courts have generally required that the purchaser had actual knowledge that they partook in a fraudulent conveyance.[89]

A third variation of the successor liability doctrine is the de facto merger exception.[90] Under the de facto merger theory, a court will look for commonality between the two parties of the transaction and examine whether the transaction resembles a merger more than a sale.[91] If the transaction resembles a merger, the successor will not be protected from liability.[92] While the application of the de facto merger rule has varied, courts have generally looked for the following elements:

> (1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3)

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84 *Id*.

85 *Id.* at 387.

86 *See id.* at 384–87.

87 *Id.* at 387.

88 *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (AM. LAW INST. 1998) (explaining that successor liability will be imposed when the sale "results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor").

89 Actual knowledge is required to find that the transaction was actually fraudulent. A transaction can also give rise to successor liability when the court finds that the transfer was constructively fraudulent. *See* 11 U.S.C. § 548(a)(1)(A)–(B) (2012); UNIF. FRAUDULENT TRANSFER ACT § 4(a)(1) (2014) (actual fraud), UNIF. FRAUDULENT TRANSFER ACT § 7 (constructive fraud); *see generally* BFP v. Resolution Trust Corp., 511 U.S. 531, 536 (1994).

90 *See Merger*, BLACK'S LAW DICTIONARY 8 (10th ed. 2014) (defining a "de facto merger" as "[a] transaction that has the economic effect of a statutory merger but that is cast in the form of an acquisition or sale of assets or voting stock); Welco Indus., Inc. v. Applied Cos., 617 N.E.2d 1129, 1134 (Ohio 1993) (describing a de facto merger under Ohio law as "a transaction that results in the dissolution of the predecessor corporation and is in the nature of a total absorption of the previous business into the successor").

91 Kelly v. Kercher Mach. Works, Inc., 910 F. Supp. 30, 35 (D.N.H. 1995) ("The de facto merger exception permits the court to hold a purchaser of business assets liable for the conduct of the transferor corporation if the parties have achieved 'virtually all the results of a merger,' even if they have not observed the statutory requirements of a *de jure* merger.").

92 *Id*.

> assumption by the purchaser of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operation.[93]

When a court finds that a sale satisfied the elements of a de facto merger, the purchaser will assume the debts and liabilities of the seller as a matter of law.[94]

A fourth exception that allows for successor liability is the "mere continuation" exception.[95] The mere continuation theory allows for the imposition of liability on an asset purchaser if a court finds that the transaction caused substantial commonalities between the seller and the purchaser.[96] The mere continuation theory and the de facto merger theory both look for a certain level of continuity between the buyer and the seller.[97] Furthermore, from a mass-tort perspective, both theories are aimed at prohibiting an entity from engaging in reorganization under the guise of an asset sale for the purpose of avoiding liabilities.[98]

In 1977, in *Ray v. Alad*, the California Supreme Court expanded the successor liability doctrine by developing the "product-line exception."[99] While the mere continuation and the de facto merger exceptions focus on the overall continuity of the seller and buyer, the "product-line exception" focuses on whether the seller and purchaser of manufacturing assets manufacture a substantially similar defective product.[100]

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93 Matheson, *supra* note 77, at 387 (quoting New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 209 (2d Cir. 2006)).

94 *Id.* at 387–88; *see* Michael Carter, *Successor Liability Under CERCLA: It's Time to Fully Embrace State Law*, 156 U. PA. L. REV. 767, 776–77 (2008) (discussing why an asset sale is generally preferred over a statutory merger or the purchase of a controlling interest in stock).

95 RESTATEMENT (THIRD) OF TORTS, *supra* note 88.

96 *See Continuation of the Predecessor*, Prod. Liab. Rep. (CCH) ¶ 30,031G, 2009 WL 4026879 (2009) ("the 'mere continuation' exception applies when there has been a formal redesignation [sic] of the predecessor corporate entity but little or no change in underlying substance"). The court will look for the following factors when determining if the asset purchaser is a mere continuation: "(1) the continued use of the seller's name, facilities, and employees, (2) common identity of the stockholders or management of the buyer and the seller, and (3) whether only one corporation is in existence after the sale of assets." Matheson, *supra* note 77, at 391–92.

97 These two theories are so similar that some courts have treated them as only theory of successor liability. *See, e.g.*, Cargo Partner AG v. Albatrans Inc., 207 F. Supp. 2d 86 (S.D.N.Y. 2002), *aff'd*, 352 F.3d 41 (2d Cir. 2003).

98 *See* Matheson, *supra* note 77, at 390–91.

99 560 P.2d 3, 5 (Cal. 1977).

100 *Id.* at 11 ("[A] party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired.").

In *Ray*, the purchaser of a manufacturing company continued to manufacture its predecessor's defective ladder under the same name and utilized the same employees employed by the predecessor.[101] After the sale, an individual was injured by the seller's defective ladder and sued the successor.[102] The California Supreme Court held that strict tort liability must be imposed against a successor when the successor acquires a manufacturing business and continues to manufacture a defective product-line of the predecessor.[103] The *Ray* court found three factors to be dispositive:

> (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading rule, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.[104]

By developing the product-line exception, the court in *Ray* sought to maximize the incentives for manufacturers to protect "otherwise defenseless victims" by producing better, safer products.[105]

B. Successor Liability as a Solution for Sleight-of-Hand 363 Sales

This section of the Comment will explain why successor liability should be imposed on parties like GM that carry out sleight-of-hand Substantial 363 Sale transactions. Successor liability laws work to prevent sleight-of-hand transactions by corporations looking to escape liability by entering into an asset sale. GM's Substantial 363 Sale should be considered a sleight-of-hand transaction because it allowed GM to relieve itself of its liabilities and because of the substantial commonality between Old GM and New GM. In the context of a Substantial 363 Sale similar in nature and scale to the GM case, bankruptcy courts should embrace the corporate law principles that allow for the imposition of successor liability against the purchaser.

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101 *Id.* at 6.

102 *Id.* at 5.

103 *Id.* at 6; *see* Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 365, 373 (1996) ("[T]he product line doctrine focuses on the continuity of the products manufactured by the successor corporation with those of the predecessor rather than on continuity of the operations of the business as a whole.").

104 560 P.2d at 8–9.

105 *Id.* at 10 (citing Price v. Shell Oil Co., 466 P.2d 722, 726 (Cal. 1970)).

1. *363 "Sleight-of-Hand" Sale Transactions Should Not Be Considered Actual Sales*

A traditional plan of reorganization ensures the orderly distribution of a debtor's estate in an effort to maximize the value of the estate so that each creditor is paid to the fullest extent possible. Traditional reorganization serves the underlying goals of the bankruptcy system: protecting the rights of all creditors and trying to make them whole. Debtors have long used § 363 to sell a portion of their assets to generate cash for their reorganization plans. The legislative history of § 363 shows that Congress intended to protect the collateral of each creditor in the course of a 363 Sale.[106] However, § 363 removes many of the protections for creditors that are in place under the rest of the Bankruptcy Code. For example, 363 Sales do not incorporate the disclosure requirements of 11 U.S.C. § 1125. Disclosure requirements further the goals of tort law by compelling companies seeking bankruptcy protection like GM to internalize the costs created by the defective products it manufactured.[107]

With few safeguards in place for all creditors, the 363 Sale process is susceptible to abuse by the debtor and unsecured creditors are left vulnerable.[108] Unsecured creditors are unable or simply unwilling to protect their interests by taking part in a 363 Sale.[109] As a result, a 363 Sale can disproportionately advantage the debtor and select creditors.[110]

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106 *See* H.R. Rep. No. 95-595, at 181–84 (1977).

107 *See generally Switching Priorities*, *supra* note 22.

108 A 363 Sale does not afford creditors the same voting rights and disclosure requirements that are afforded to them in a traditional chapter 11 process. *See* Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel), 722 F.2d 1063 (2d Cir. 1983). When a 363 Sales for substantially all of the debtor's assets impermissibly affects the absolute priority rule (referred to as a "*sub rosa* plan"), the Supreme Court has held that such plans are allowed when there is a sufficient "business justification." *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 37 n.2 (2008); *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 272 (2002).

109 Kuney, *supra* note 108, at 279–280 ("The increase in preplan sales would appear to negatively impact the ability of these low priority creditors to meaningfully participate in the proceedings and look after their interests, to the extent they are so inclined . . . . Although creditors' committees and their counsel ensure some protections, the speed at which preplan sales proceed certainly makes it less likely that individual creditors will be able to meaningfully participate." (citing Lynn M. LoPucki, *The Debtor in Full Control-Systems Failure Under Chapter 11 of the Bankruptcy Code*?, 57 AM. BANKR. L.J. 247 (1983))).

110 *See* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales,* 106 MICH. L. REV. 1, 30–31 (2007) (discussing how senior lien holders hold advantages in a 363 Sale); Joseph Warburton, *Understanding the Bankruptcies of Chrysler and General Motors: A Primer*, 60 SYRACUSE L. REV. 531, 547 (2010) (stating that "[s]cholars disagree about whether the . . . GM 363 sale constituted [a] reorganization that should have been conducted pursuant to plan confirmation procedures instead of section 363 asset sales. In other words, were the section 363 transactions true asset sales or were they disguised reorganizations?").

Commentators argue that the debtor's interest in quickly generating cash and relieving debt through an asset sale, combined with the deficiencies already described of the 363 Sale process, have caused the 363 Sale to create a situation of asymmetric information between the debtor and its smaller creditors. In these situations, large corporate debtors often abuse the interests of smaller creditors who are not aware of the actual affairs of the debtor.[111] The larger the debtor, the greater the likelihood that a fast-paced 363 Sale will negatively impact a substantial pool of uninformed creditors.[112]

The lack of safeguards can become particularly problematic when a debtor uses a 363 Sale to sell substantially all of its assets. Substantial 363 Sales by large corporations have become increasingly common. Despite the benefits and increasing use of Substantial 363 Sales, using a 363 Sale to sell substantially all of a debtor's assets can subvert the goals of the chapter 11 reorganization process.[113] With less judicial oversight than traditional chapter 11 reorganization, Substantial 363 Sales open the door to sleight-of-hand transactions in which debtors escape their obligations to creditors by essentially purchasing all of their own assets debt-free. When a successor in a 363 Sale receives all of its predecessor's assets free and clear of liabilities, and retains the same shareholders and management as its predecessor while continuing operation, then this should be seen as distorted reorganization tool rather a traditional asset sale.[114]

While GM's 363 Sale purported to cause a sale of assets from an entity referred to as Old GM to a newly formed entity, it would be irrational and inequitable to classify this transaction as a traditional asset sale. On March 30, 2011, the day after GM's chapter 11 plan was confirmed, the automaker did not continue its operations as New GM. The automaker known to millions continued its operations as GM, and most of its employees and management remained with the company. The White House acknowledged that GM's operations would in large part not be changed upon its bankruptcy filing.[115]

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[111] Kuney, *supra* note 108, at 282–83 (arguing that the quick resolution that a 363 Sale offers to a large corporate debtor who possesses "independent inside knowledge" is more like to increase the potential of individuals involved with the operations of the debtor to take advantage of smaller creditors that do not have access to the same type of information).

[112] Jacoby & Janger, *supra* note 28, at 899–902.

[113] Kuney, *supra* note 108, at 235–36.

[114] *See* Warburton, *supra* note 110.

[115] *Obama Administration Auto Restructuring Initiative General Motors Restructuring*, WHITE HOUSE, http://www.whitehouse.gov/the-press-office/fact-sheet-obama-administration-auto-restructuring-initiative-general-motors (last visited Apr. 28, 2016).

The facts around GM's current success further support the notion that its 363 Sale was more in line with a reorganization than an asset sale. Only two years after GM escaped bankruptcy, the company posted its highest annual profits ever recorded.[116] The recent success and newfound profitability can be attributed to the bankruptcy process allowing the company to restructure itself by reducing its plants, renegotiating its labor contracts, and disbanding some of the weaker automobile brands in its portfolio.[117] These maneuvers are all characteristic of a reorganization.

Outside of the Bankruptcy Code, the 'term "reorganization" is defined as:

> a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred . . . .[118]

While § 368 of the Internal Revenue Code is directed towards the tax free status of corporate transactions, one court noted that "[t]he purpose of this section of the statute is 'to permit changes in corporate structure that are primarily changes in form similar to statutory mergers . . . .'"[119] In the other words, the term "reorganization," at least in the manner it is defined in the tax code, describes the case of GM, where at least one or more of GM's shareholders remained in control after the approval of its 363 Sale. In a reorganization, the transferor or its shareholders retain control even after transferring the corporation, much like in a merger.[120] By this logic, GM's 363 Sale was a reorganization because its shareholders remained in control of the company.

Some commentators view Substantial 363 Sales as impermissible *sub rosa* plans since they allow debtors to circumvent the protections and procedures afforded to creditors under the Bankruptcy Code, procedures that were meant to perpetuate a fair and orderly reorganization of the bankruptcy estate.[121]

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[116] Chris Isidore, *GM Posts Record Profits 2 Years After Bankruptcy*, CNN (Feb. 16, 2012), http://money.cnn.com/2012/02/16/news/companies/gm_earnings/.

[117] *Id*.

[118] 26 U.S.C. § 368(a)(1)(D) (2012).

[119] *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1018 (D. Mass. 1989).

[120] *Id.* (stating that reorganization "permit[s] changes in corporate structure that are primarily changes in form similar to statutory mergers . . . .") (quotation marks omitted).

[121] Motorola, Inc. v. Official Comm. of Unsecured Creditors (*In re* Iridium Operating LLC), 478 F.3d 452, 466 (2d Cir. 2007) ("The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, '"short circuit the requirements of [C]hapter 11 for

There is no statutory test in the Bankruptcy Code for when any 363 Sale is permissible, which have caused courts to apply varying rules for determining whether a 363 Sale amounts to an impermissible *sub rosa* chapter 11 plan.[122]

By no measure was GM's 363 Sale a traditional asset sale. "New GM" was not a new and separate entity that purchased GM's assets to incorporate into its own corporate structure and operations. Post-sale, the automaker known to millions worldwide as GM continued operating under largely the same management, with most of the same employees. The White House even acknowledged that the bankruptcy process would not in large part change GM's operations.[123]

The federal government, GM's largest creditor, exerted force on the bankruptcy court to push GM's 363 Sale through. The 363 Sale was informally agreed to by the parties prior to filing for bankruptcy and GM's other creditors were not given the opportunity to assess whether the value of the sale was fair and equitable to all parties involved.[124] The federal government disproportionately benefitted from the sale over other creditors.[125] When a massive corporation like GM files for bankruptcy, as well as the case of Chrysler, the creditor that was disproportionately advantaged also was its largest (the U.S. government). In both cases, the government became

confirmation of a reorganization plan.'" (quoting Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re* Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir.1983))); Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 267 (2012) ("The most common criticism of 363 sales is that they circumvent the procedural protections of Chapter 11, particularly its disclosure and voting requirements."); Craig A. Sloane, *The Sub Rosa Plan of Reorganization: Side-Stepping Creditor Protections in Chapter 11*, 16 BANKR. DEV. J. 37 (1999) ("Essentially, the concern regarding a plan sub rosa arises when a debtor in bankruptcy seeks to enter into a transaction outside of a plan of reorganization that could have a significant effect upon the bankruptcy case and the bankruptcy estate."); *see Sub Rosa*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "*sub rosa*" as "[c]onfidential; secret; not for publication").

122 *See generally* Jacoby & Janger, *supra* note 28.

123 *See Obama Administration Auto Restructuring Initiative General Motors Restructuring*, *supra* note 115.

124 *See* Barry E. Adler, *A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors*, 18 AM. BANKR. INST. L. REV. 305, 314–19 (2010).

125 *In re* Gen. Motors Corp., 407 B.R. 463, 473 (Bankr. S.D.N.Y. 2009), *aff'd sub nom.* Campbell v. Motors Liquation Co. (*In re* Motors Liquidation Co.), 428 B.R. 43 (S.D.N.Y. 2010), *and aff'd sub nom.* Parker v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), 430 B.R. 65 (S.D.N.Y. 2010), *enforcement denied sub nom. In re* Motors Liquidation Co., 529 B.R. 510 (Bankr. S.D.N.Y. 2015); *In re* Chrysler LLC, 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010). *See* LoPucki & Doherty, *supra* note 110 (discussing how senior lien holders hold advantages in a 363 Sale); Warburton, *supra* note 110 ("Scholars disagree about whether the . . . GM 363 sale constituted [a] reorganization that should have been conducted pursuant to plan confirmation procedures instead of section 363 asset sales. In other words, were the section 363 transactions true asset sales or were they disguised reorganizations?").

concerned that liquidation of the debtor will be a precursor to financial disaster, leading to the "too big to fail" or "melting ice cube" phenomena.[126] The court in each case noted the potential for lost jobs and the effect that liquidation could have on the rest of the economy.[127]

These suggestions in isolation should not justify the speed with which the 363 Sale took place. While the economic effects of a hypothetical liquidation of GM are outside the scope of this Comment, it suffices to acknowledge that the "too big to fail" mentality diminishes the incentives of firm managers of large corporations like GM to avoid detrimental decisions that might lead the corporation into bankruptcy. The "too big to fail" mentality also gives incentive to firm managers to abuse the bankruptcy system without repercussion. GM's 363 Sale transaction allowed GM to reorganize while avoiding the requirements of a traditional chapter 11 plan of reorganization. It is questionable whether it was necessary to bypass most of the chapter 11 requirements in order for GM to financially recover, but it is clear that doing so came at the expense of countless individuals harmed by GM's defective vehicles.

2. The Detrimental Effect of Sleight-of-Hand 363 Sales on Tort Claimants

The Bankruptcy Code's rules for the priority of creditors' claims do not favor tort creditors.[128] The "too big to fail" or "melting ice cube" justification should be weighed against the tremendous social costs that arise from firms avoiding tort liabilities, and forcing consumers injured by their product to internalize the cost of their harm.[129] The Bankruptcy Code and its priority scheme applicable under chapter 11 bankruptcy filings are not favorable towards tort creditors.[130] Some scholars have argued that tort-liabilities should be treated differently than other unsecured creditors, and the priority scheme should be changed to reflect the importance of deterring the debtor from externalizing costs to potential tort claimants.[131] The availability of a 363 Sale further disadvantages both present and future tort claimants in bankruptcy, due

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126 *See* Jacoby & Janger, *supra* note 28, at 899 (describing struggling corporate debtors and the melting-ice-cube justification); *see also* Mike Ramsey & Alex Ortolani, *GM Rises After Pelosi Urges Industry Aid Plan Passage,* BLOOMBERG (Nov. 12, 2008, 4:21 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6QTsj05Md04&refer=home.

127 *Gen. Motors Corp.*, 407 B.R. at 484–85.

128 *See Switching Priorities*, *supra* note 22.

129 *See* Jacoby & Janger, *supra* note 28.

130 *Switching Priorities*, *supra* note 22.

131 *See id*.

in large part to any deterrent function on the debtor's harmful behavior being largely eliminated.[132] In the case of GM, where the 363 Sale was informally agreed to by the parties prior to GM's bankruptcy petition being filed, the creditors were not afforded the procedures that assured the value of the sale was fair and equitable to all parties involved.[133]

Commentators have argued that the Bankruptcy Code's preference for secured creditors over tort claimants and other unsecured creditors is the most efficient outcome in bankruptcy, but there has been little empirical research to support this hypothesis.[134] The failure to prioritize tort claimants in effect fails to consider the social costs of forcing tort claimants to internalize the cost of harm caused by the debtor. To reverse this effect, some scholars have argued that tort-liabilities should be treated differently than other unsecured creditors and that the priority rules lead to reflect the importance of deterring the debtor from externalizing costs to potential tort claimants.[135]

However, this would not address the ways in which Substantial 363 Sales can further disadvantage present and future tort claimants. If a 363 Sale purchaser can simply assert that the sale created a "bankruptcy shield," prohibiting all tort-liability, it eliminates any deterrent function that an amended priority scheme would have on the debtor's harmful behavior.[136]

Since the Bankruptcy Code's priority scheme devalues tort claims and Substantial 363 Sales further diminish a socially optimal outcome for tort victims, a carefully crafted rule of successor liability must be applied to force corporate debtors engaged in "sleight-of-hand" 363 Sale transactions to internalize the cost of their social harms while still enhancing the goals of bankruptcy. Commentators have suggested various changes, ranging from altering the priority of tort claims, allowing shareholder liability, or allowing a "bankruptcy tax" that would force for firms to pay for the lack of any tort deterrence in the bankruptcy system.[137]

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[132] *See id.* at 2550 ("Knowing that bankruptcy is an option, and knowing that bankruptcy rules allow for pro rata payment of unsecured debt (including tort debt) followed by discharge of that debt, firms are not forced to account for the full risk of accidents.").

[133] *See* Adler, *supra* note 124.

[134] *Switching Priorities*, *supra* note 22, at 2552.

[135] *See id*.

[136] *See id.* at 2550 ("Knowing that bankruptcy is an option, and knowing that bankruptcy rules allow for pro rata payment of unsecured debt (including tort debt) followed by discharge of that debt, firms are not forced to account for the full risk of accidents.").

[137] *Id.* at 2561–64.

3. *Deterring Large Corporations from Sleight-of-Hand 363 Sales*

The successor liability doctrine offers a safeguard to unsecured creditors like tort claimants who otherwise lack protection in sleight-of-hand 363 Sales. However, courts and commentators have reached conflicting conclusions regarding whether a successor liability claim is an "interests in such property," and thus barred by § 363(f).[138] "Despite the courts' broad interpretation of "interests in such property," some commentators advocate for a narrow approach. One commentator argues that the words "'define the real breadth' of the provision, demonstrate that Congress intended for § 363(f) to apply only to in rem interests."[139] The potential for abusive 363 Sales is heightened when § 363(f) is interpreted to include unsecured claims like successor liability claims as an "interest in such property."[140] Such an interpretation does not follow the plain meaning of the statue and it diminishes the debtor's incentive to actively reduce its liabilities before filing for bankruptcy. In cases like GM, there are strong negative implications resulting from a broad interpretation of "interests in such property" under § 363(f). A broad interpretation effectively bars tort victims from an equitable remedy by creating a situation of asymmetric information and perverse incentives, and allows larger creditors to abuse the interests of smaller creditors like tort claimants, who are not aware of the actual affairs of the debtor.[141]

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[138] These courts follow the broad interpretation to the phrase "interest in such property," and find the scope of the authorization to reach beyond in rem interests. *See, e.g.*, Douglas v. Stamco, 363 F. App'x. 100, 102 (2d Cir. 2010) (finding that the plaintiffs successor liability claim failed due to policy concerns); *In re* Chrysler LLC, 576 F.3d 108, 115 (2d Cir. 2009), *vacated as moot*, 592 F.3d 370 (2d Cir. 2010) (describing the "free and clear" provisions in § 363(f) as applying to "liens, claims and liabilities"); *In re* Trans World Airlines, Inc., 322 F.3d 283, 286 (3d Cir. 2003) (finding successor liability claims to be interests in property under §363(f)). *But see* Zerand-Bernal Grp., Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994) (holding that a 363 Sale will not bar successor product liability claims). Some commentators have argued that in the context of successor liability and bankruptcy, an "interest in such property" should never be interpreted as including successor liability claims. *See generally* Corcoran, *supra* note 34, at 725 (arguing that federal courts should turn to state law and find that an "interest in such property" does not include successor liability claims because no state law includes successor liability claims as an "interest in such property"). The term "in rem" is used to describe an action or claim in any real or personal property, while the term "in personam" is used to describe a legal action or claim against an individual. *See* BLACK'S LAW DICTIONARY*, supra* note 35 (defining "action in rem" as "[a]n action determining the title of property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property" and an "action in personam" as "[a]n action brought against a person rather than property.").

[139] Coco, *supra* note 72, at 354 (quoting Fairchild Aircraft, Inc. v. Cambell, 184 B.R. 910, 917 (Bankr. W.D. Tex. 1995), *vacated by* 220 B.R. 909 (Bankr. W.D. Tex. 1998)).

[140] 11 U.S.C. § 363 (2012).

[141] This Comment suggests that these pervasive incentives likely contributed to the recent findings that GM concealed any knowledge that it had of its defective vehicles for over a decade. *See* Flitter & Freifeld, *supra* note 58.

The disclosure requirements of 11 U.S.C. § 1125 further the goals of tort law by compelling companies seeking bankruptcy protection like GM to internalize the costs created by the defective products it manufactured.[142] Without this control on large corporate debtors to internalize the costs of harm created by their own conduct, and in contrast to the interpretation of § 363(f) by the Bankruptcy Court of the Southern District of New York, successor liability should be imposed on the company exiting bankruptcy so that the costs are equitably distributed between the corporation and those harmed by its vehicles.[143] A carefully designed rule allowing for the imposition of successor liability against the purchaser in a 363 Sale when the purchaser is found to be a continuation of the debtor would deter potential debtors from entering into a "sleight-of-hand" 363 Sale for the sole purposes of escaping liability. This justification has been used for the imposition of successor liability after sales have been employed in many contexts outside of bankruptcy.[144] A manufacturer like GM will only correct defects when the cost of future liabilities by accident victims is less than the cost of implementing a higher standard of care. An interpretation of § 363(f) that would bar successor liability claims would drastically reduce the cost of future liabilities and increase the value of the corporation as an asset.[145]

III. Reconciling the Doctrine of Successor Liability with the Goals of the Bankruptcy Process

Commentators have frequently argued against successor liability in the context of bankruptcy proceedings, claiming that the doctrine runs counter to the primary goals of Bankruptcy Code.[146] While some have considered it difficult to reconcile the policies of successor liability with the policy goals of the bankruptcy process, certain changes to the Bankruptcy Code would preserve the policy goals of bankruptcy while disincentivizing corporations from seeking bankruptcy for the purpose of discharging tort liability. The bankruptcy cases of GM and Chrysler were unique due to the substantial size

142 *See generally Switching Priorities*, *supra* note 22.

143 *See In re* Motors Liquidation Co., 513 B.R. 467 (Bankr. S.D.N.Y. 2014).

144 *See* Delta Health Grp., Inc. v. U.S. Dep't of Health and Human Servs., 459 F. Supp. 2d 1207, 1223 (N.D. Fla. 2006) ("[S]uccessor liability for . . . existing debts is used as a means to curb fraud and sham transactions . . . .") (quotation marks omitted); E.E.O.C. v. Vucitech, 842 F.2d 936, 944 (7th Cir. 1988) ("In favor of successor liability is the interest in preventing tortfeasors from externalizing the costs of their misconduct by selling their assets free of any liabilities and distributing the proceeds to their shareholders.").

145 11 U.S.C. § 363(f).

146 *See* Corcoran, *supra* note 34, at 749.

of the debtor and the background of the 2008 financial crisis. It is the position of this Comment that, while the facts of the GM bankruptcy and ensuing product recall are without precedent, Congress should act in order to alter the incentive structure for other large firms entering bankruptcy to externalize the cost of future harm by abusing the 363 Sale option.

Successor liability laws allowing for claims against GM are not preempted by § 363 of the Bankruptcy Code and are all to some degree based upon the policy of limiting companies from engaging in a purported asset sale that resembles a merger more than it does a sale.[147] The objective of these laws is to deter companies from seeking to avoid liabilities by engaging in mergers or internal reorganizations that are masked as traditional asset sales. In the context of firms like GM, "[t]he purpose underlying successor liability is to protect defenseless victims of manufacturer's defects and spread the cost of compensation throughout society."[148]

Outside of 363 Sales, in a traditional reorganization the Bankruptcy Code allows for the use of a "merger or consolidation"[149] or a transfer of all or substantially all of the debtor's assets, and authorizes the sale of stock to another other entity while in bankruptcy.[150] Commentators argue that the use of this language in the Bankruptcy Code conflicts with successor liability laws. This argument follows that successor liability law are preempted by the Bankruptcy Code because the Bankruptcy Code authorizes this same type of de facto merger that the successor liability is intended to prevent. This argument focuses on the central policies of successor liability and the Bankruptcy Code, claiming that they conflict because the imposition of successor liability disallows the debtor to be "free and clear" of future interest and cannot be reconciled with the Bankruptcy Code's policy goal of maximizing the value of the debtor's estate.[151]

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[147] *See supra* Part I.C. Treatment of Successor Liability Claims by the Bankruptcy Courts.

[148] Volvo White Truck Corp. v. Chambersburg Beverage (*In re* White Motor Credit Corp.), 75 B.R. 944, 950 (Bankr. N.D. Ohio 1987).

[149] 11 U.S.C. § 1123(a)(5)(c).

[150] Tucker, *supra* note 75, at 30 ("If the Bankruptcy Code allows a plan to propose a sale that otherwise constitutes a de facto merger, 'notwithstanding otherwise applicable nonbankruptcy law,' any state law permitting recovery against the successor interferes with the flexibility permitted by the Bankruptcy Code." (quoting 11 U.S.C. § 1123(a))).

[151] *See White Motor Credit Corp.*, 75 B.R. at 950 ("A primary purpose of the Bankruptcy Code is to grant debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))).

It is this Comment's contention that there is no clear intent by Congress in the text of the Bankruptcy Code to preempt state successor liability laws in 363 Sales involving all or substantially all of the debtors assets by the language in § 363(f).[152] As a matter of statutory interpretation, Congress has used clear language in the Bankruptcy Code when it has intended to preempt state law.[153] If Congress intended for the "free and clear" authorization in § 363(f) to displace state successor liability law, it would have included language that indicates such an intent to do so.[154] In the context of bankruptcy, when a provision of the Bankruptcy Code does not elicit Congress' intent to preempt state law, then courts should follow the presumption against inferring preemption.[155] Congress did include indication of its intent in § 363(f)(1), which authorizes a 363 Sale "free and clear" when "applicable nonbankruptcy law permits sale of such property free and clear of such interest."[156] By permitting the application of state law, the clear language of § 363(f)(1) suggests that state successor liability laws should apply.[157]

Avoiding an argument on Congressional intent, various courts and commentators have suggested that the Bankruptcy Code preempts state successor liability law because the policy goals of the Bankruptcy Code cannot be reconciled with state law doctrine.[158] The next section of this Comment will illustrate that this argument fails to properly balance the extent of any disruption to the Bankruptcy Code's policy goals against the social benefits

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[152] Integrated Sols., Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487, 493 (3d Cir. 1997) (comparing the clear Congressional intent to preempt state law in § 1123 with the lack of intent shown in § 363).

[153] *See id*. ("The clear lack of Congressional intent [in § 363] to preempt state law restrictions on transferring property of the estate is even more telling given the explicit language that Congress uses when it intends to displace state nonbankruptcy law in other provisions of the Bankruptcy Code.").

[154] *See id*. ("Notwithstanding any otherwise applicable nonbankruptcy law, a [reorganization] plan shall . . . .") (citing 11 U.S.C. § 1123(a)) ("Notwithstanding any otherwise applicable nonbankruptcy law, a [reorganization] plan shall . . ."); 11 U.S.C. § 541(c)(1) ("[A]n interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in . . . applicable nonbankruptcy law (A) that restricts or conditions transfer of such interest by the debtor"); 11 U.S.C. § 363(l) ("Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, . . . notwithstanding any provision in . . . applicable law that is conditioned on the insolvency or financial condition of the debtor, . . .").

[155] *See Integrated Sols., Inc.*, 124 F.3d at 493 ("[S]trong presumption against inferring Congressional preemption in the bankruptcy context." (citing *In re* Roach*,* 824 F.2d 1370, 1373–74 (3d Cir.1987)).

[156] 11 U.S.C. § 363(f)(1) (2012).

[157] *Id*.

[158] *See* Volvo White Truck Corp. v. Chambersburg Beverage (*In re* White Motor Credit Corp.), 75 B.R. 944, 950 (Bankr. N.D. Ohio 1987) (arguing that preemption applies because "[t]he federal purpose of final resolution and discharge of corporate debt is clearly compromised by imposing successor liability on purchasers of assets when the underlying liability has been discharged under a plan of reorganization").

caused by the allowances of successor liability tort claims and the changes in incentives to large firms.[159]

A. Priority Scheme of the Bankruptcy Code

The imposition of successor liability can be reconciled with the priority scheme established by the Bankruptcy Code.[160] The imposition of successor liability does not share a direct connection to the distribution of the estate, especially considering that the successor liability claims arise after the 363 Sale has been ordered and the bankruptcy plan has been confirmed. Courts have often relied on the notion that successor liability claims affect the Bankruptcy Code's priority scheme, with little analysis supplementing its conclusion.[161] For example, in *In re White Motor Credit Corp.*, the court followed this justification for not imposing successor liability and stated:

> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy Code.[162]

Overall, a court's analysis of allowing successor liability claims should vary substantially based upon when the issue is raised. Lower federal courts have held differently on the matter, and the Supreme Court has not yet heard a matter regarding the manner which federal courts should handle future claims.

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[159] As this Comment argues, allowing successor liability will incentivize large firms to internalize the cost of the harms it causes.

[160] 11 U.S.C. § 507 (setting the priority and order of the payment of unsecured claims).

[161] *See In re* Chrysler LLC, 576 F.3d 108, 126 (2d Cir. 2009) (claiming that the imposition of successor liability on the purchaser would violate the priority scheme of the Bankruptcy Code), *vacated on other grounds by* 592 F.3d 370 (2d Cir. 2010); *In re* Trans World Airlines, Inc., 322 F.3d 283, 291 ("Even were we to conclude that the claims at issue are not interests in property, the priority scheme of the Bankruptcy Code supports the transfer of TWA's assets free and clear of the claims."); *In re* Lady H Coal, Co., Inc., 199 B.R. 595, 605 n.6 (Bankr. S.D. W. Va. 1996) ("It is conceptually difficult to understand how an unsecured creditor can assert that they are to be excluded from the definition of 'interests' as utilized in the Bankruptcy Code in § 363(f). Such exclusion would result in an unsecured creditor later asserting the same claim against a good faith purchaser, which would disrupt, and give priority and preference to an unsecured creditor."); Am. Living Sys. v. Bonapfel (*In re* All Am. of Ashburn, Inc.), 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) ("There is no suggestion of Congressional intent to apply the successor doctrine to elevate product liability claims above their status under the Bankruptcy Code.").

[162] 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987).

In *Douglas v. Stamco*, the Second Circuit weighed in on the issue of future claims, and held on a summary judgment order, that allowing future claims would go against the policies of the Bankruptcy Code.[163] In *Douglas*, the plaintiff was injured in 2001 by a machine that was manufactured by the debtor, prior to an approved 363 Sale of the debtor's assets.[164] The plaintiff filed suit in 2005, after the 363 Sale was ordered, but prior to the close of the bankruptcy case, against the 363 Sale purchaser.[165] The court reasoned that "[a]llowing the plaintiff to proceed with his tort claim directly against [the 363 Sale purchaser] would be inconsistent with the Bankruptcy Code's priority scheme because a plaintiff's claim is otherwise a low-priority, unsecured claim."[166]

The Second Circuit used circular reasoning with regards to the effect that the plaintiff's claim would have on the priority scheme of the Bankruptcy Code.[167] The Court failed to consider the fact that "the predecessor entity . . . survived the asset sale as a bankrupt entity," meaning that the priority scheme had already been applied to the debtor's estate and would in no way be affected by the court allowing the plaintiff's claim against the successor.[168]

Other courts have recognized the logical flaw in the Second Circuit's reasoning. Prior to the Second Circuit's summary judgment order in *Douglas*, the Seventh Circuit in *Zerand-Bernal Group* disagreed with the argument that it should enjoin a successor liability claim because the allowance of such a claim would disrupt the priority scheme of the Bankruptcy Code.[169] The *Zernard-Bernal* case involved a plaintiff asking for injunctive relief from a state-law successor liability claim made in federal court.[170] While the court held that it would not enjoin the state-law successor liability action because it did not have jurisdiction over the matter, the court stated in dicta that a

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163 363 F. App'x 100 (2d Cir. 2010).

164 *Id.* at 101.

165 *Id.*

166 *Id.* at 102 (citing 11 U.S.C. § 507(a) (2006); *Trans World Airlines, Inc.*, 322 F.3d at 292 ("To allow the [plaintiff] to assert successor liability claims against [the purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme.").

167 *Douglas*, 363 F. App'x at 101.

168 *Id.*

169 23 F.3d 159 (7th Cir. 1994).

170 *Id.* at 161.

successor liability claim could not affect the size of the debtor's estate available to the creditors since the estate had long been distributed.[171]

The *Zernard-Bernal* Court's holding that it did not have bankruptcy jurisdiction over the issue of successor liability is central to the idea that the question of successor liability is distinct from the distribution of the estate.[172] The court implied that the only way a court would have federal bankruptcy jurisdiction over the matter was if the asset purchaser could revoke its sale agreement as a result of the court's decision.[173] If a party seeking to impose successor liability files suit prior to the entry of the sale order, then the imposition of successor liability should be considered a threat to the plan and the priority scheme of the Bankruptcy Code.[174] When a successor liability claim is pursued after the distribution of the debtor's estate, then the successor liability claim would not be detrimental to the priority scheme of the Bankruptcy Code.[175]

B. Preserving the Debtor's Fresh Start

The question of how the imposition of successor liability will affect the Bankruptcy Code's goal of preserving the debtor's "fresh start" is also dependent on when the issue is evaluated. If the issue were evaluated after the distribution of the debtor's estate, then the bankruptcy process policy goal of preserving the "fresh start" of the debtor would not be harmed by allowing successor liability claims against a 363 Sale purchaser. The "fresh start" goal is

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171 *Id.* at 162–64 ("[T]he [state-law successor liability claim] cannot possibly affect the amount of property available for distribution to [the debtor]'s creditors . . . [when] [a]ll of [the debtor]'s property has already been distributed . . . .").

172 *Id.* at 164.

173 *Id.* at 163. The Supreme Court recently held that federal courts do have jurisdiction under federal bankruptcy law to review their post orders. *See* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151 (2009). It is questionable whether the *Travelers* holding answered whether federal courts have jurisdiction to review successor liability claims against an asset purchaser, but the discussion regarding jurisdiction of these claims is outside the scope of this Comment. *See* 557 U.S. at 155 ("Our holding is narrow. . . . On direct review today, a channeling injunction . . . would have to be measured against the requirements of § 524 (to begin with, at least). . . . [W]e do not address the scope of an injunction authorized by that section.").

174 *Zerand-Bernal Grp.*, 23 F.3d at 164 ("An attack on a sale agreement that is the core and premise of a plan of reorganization is an attack on the plan itself, because the sale could not be undone without rescinding the plan, and an order confirming a plan becomes irrevocable (barring fraud) 180 days after its entry, 11 U.S.C. § 1144 . . . .").

175 *See* Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 50 n.2 (7th Cir.1995) ("[T]his case does not directly implicate the Bankruptcy Code, since the underlying bankruptcy proceeding is long over.").

meant to preserve the estate of the *debtor* rather than being geared towards preserving the financial well-being and independence of the successor.[176]

If evaluated at the time of the bankruptcy proceeding, then an argument that liability on the *successor* would impact the "fresh start" of the debtor relies on a misinterpretation of the doctrine of successor liability. In a situation where the injury did not occur until after confirmation of the bankruptcy, tort claimants who are defined as individuals harmed as a result of pre-bankruptcy conduct by the debtor, do not have a claim to any liability against the debtor until the injury actually occurs.[177] At the time of the bankruptcy case, the future claimant would not a have a claim under the Bankruptcy Code, and therefore would not be considered part of the debtor's estate.[178]

After a 363 Sale is approved, the bankruptcy plan is confirmed, and the debtor has received a discharge. The discharge is largely synonymous with a "fresh start" and is an important function of the Bankruptcy Code because it bars actions by future claimants against the debtor.[179] Importantly, the discharge only works to bar actions against the debtor and not against any other entity.[180] Therefore, the future imposition of successor liability on a 363 Sale purchaser will not affect the debtor's "fresh start."[181]

C. Maximizing the Value of the Estate Should be Balanced Against the Limited Amount of Creditors Who Will See Such Value

The most often used criticism of allowing successor liability in context of bankruptcy is the effect that it will have on the maximization of the value of the debtor's estate. This criticism coincides with the notion that potential 363 Sale purchasers would be less likely to acquire any assets when they cannot

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176 *See* Clark v. Rameker, 134 S. Ct. 2242, 2248 (2014) (describing the policy goal of Bankruptcy Code of preserving the *debtor's* the "fresh start") (emphasis added); Jackson, *supra* note 66 (discussing the policy objective of preserving the *debtor's* "fresh start") (emphasis added).

177 *In re* Grumman Olson Indus., Inc., 467 B.R. 694, 704 (S.D.N.Y. 2012) ("Generally, courts have held that future claims cannot be considered 'claims' that are dealt with and discharged by a confirmation plan.").

178 *Id*.

179 11 U.S.C. § 524 (2012) (describing the effects of a discharge being granted).

180 *Id.* ("[D]ischarge of a debt of a debtor does not affect the liability of any other entity, or the property of any other entity for, such debt.").

181 Michael L. Tuchin & Martin R. Barash, *Protecting the Rights of Claimants That Are Excluded from the Bankruptcy Process: The Survival of Successor Liability and Alternative Means of Recovery*, 8 J. BANKR. L. & PRAC. 273, 274 (1999) ("[T]his [fresh start] critique is overstated, if not altogether wrong.").

properly value the costs of future liabilities, including tort liabilities.[182] This Comment contends that this argument is exaggerated and fails to consider other economic incentives that affect a buyer's decision to participate in the transaction. In the context of a 363 Sale, value maximization coincides with encouraging bidding on the debtor's assets and not "chilling bids."[183] In any case, the extent that a purchaser of assets was induced to finalize the transaction as a result of the assets being sold free and clear of future tort liability attached to the assets seems questionable at best.

Courts have failed to sufficiently analyze the issue of value maximization. The Second Circuit has stated:

> to the extent that the 'free and clear' nature of the sale . . . was a crucial inducement in the sale's successful transaction, it is evident that the potential chilling effect of allowing a tort claim subsequent to the sale would run counter to a core aim of the Bankruptcy Code, which is to maximize the value of the assets and thereby maximize potential recovery to the creditors.[184]

It is accurate to say that the free and clear provisions of § 363(f) do increase the value of the estate of the debtor.[185] The analysis by the Second Circuit seemed to suggest that any reduction of value, no matter the extent of the reduction, would run counter to the Bankruptcy Code and would require the court to block any or all future interests or claims. This Comment suggests that Congress did not intend for § 363(f) to bar all types of claims against the purchaser in a 363 Sale.[186] In drafting § 363(f), and qualifying its application only to "interests in such property," Congress indicated a clear intent to promulgate some sort of boundary to the application of this provision.[187] This Comment takes the position that the value created by the "free and clear" provisions must be weighed against the value created in changing the incentives for firms prior to entering bankruptcy as well as the value created for otherwise unprotected tort claimants. A bankruptcy court's power to enforce the "free and clear" provision ultimately stems from the equity powers granted to the court by the Bankruptcy Code. For the application of the "free

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182 *See In re* Chrysler, 576 F.3d 108, 126 (2d Cir. 2009) ("The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the Sale."), *vacated on other grounds*, 592 F.3d 370 (2d Cir. 2010).

183 Kling, *supra* note 121, at 280–84 (discussing the affecting bid-chilling in 363 Sales).

184 Douglas v. Stamco, 363 F. App'x 100, 102–03 (2d Cir. 2010).

185 The estate's value will increase due to future liabilities not being accounted for in the valuation.

186 11 U.S.C. § 363(f) (2012).

187 *Id*.

and clear" provision to be applied equitably to all parties, courts should evaluate the bid chilling affect and lost value against the interests of future tort claimants. This is almost impossible for a court to do in the case where a judge would not have adequate information to weigh the interests of future tort claims.

A quick "sleight-of-hand" Substantial 363 Sale similar to GM's case further prohibits judges from weighing future tort claimants' interests, since it allows firms to escape accurately disclosing and evaluating future tort liabilities. This Comment suggests that Congress should correct this information failure by amending § 363 to allow for successor tort liability claims under a carefully crafted successor liability rule that incorporates elements of the "mere continuation" rule and the product-line exception. This hybrid successor liability exception will be narrow in scope so as not to affect the goals of the Bankruptcy Code, but sufficient to protect against companies like GM from concealing information regarding potential harm to consumers for over ten years.

D. Internalizing the Costs of Harm with Successor Liability

The successor liability doctrine advances the objectives of tort law by compelling the successor manufacturer to internalize the costs of victims injured by its defective products.[188] "[T]ort law serves an important deterrent function by making harmful activities more expensive, and thereby less attractive to the extent of the accident costs they cause."[189]

When a company implements a higher standard of care in the manufacturing of its product, potential defects would be minimized, thus decreasing the amount of future accidents by consumers. If a company decreases the amount of accidents that would likely occur in the future, then the company would decrease the costs of future tort liabilities relating to accidents by consumers. Unfortunately, there are also costs for a company to implement a higher level of care in the manufacturing process. If the costs of implementation of a higher standard of manufacturing are greater than the cost

188 *Switching Priorities*, *supra* note 22, at 2546 ("For tort to accomplish its primary goal, firms must internalize the cost of accidents: only when businesses internalize costs will they take the socially optimal level of precautions ex ante.").

189 Matheson, *supra* note 77, at 408 (citing Timothy J. Murphy, Comment, *A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash*, 71 MARQ. L. REV. 815, 821–22 (1988), (quoting Guido Calabresi, *The Costs of Accidents* 26 (1970))).

of future tort liabilities, then the company will likely choose the status quo, and abstain from improving standards and correcting defects. The assets of a manufacturing company would be severely devalued if successor liability claims would be allowed against the purchaser. By forcing the potential-seller to deal with the costs of this asset devaluation, the purchaser will look to cure any defects in manufacturing and implement a higher standard of care.[190]

An argument against the deterrence effect on successor manufacturers would be that the successor has no ability to limit the potential for future liabilities associated with defective products that were manufactured by its predecessor.[191] This argument misses a crucial factor of the doctrine of successor liability being based upon a balancing of equitable principles.[192] By finding that imposing liability on a successor that continues to manufacture a product that was first manufactured by its predecessor and is considered defective or is likely to cause injury to defenseless victims, the court is essentially balancing the policy aims of deterring harmful activity (i.e., the manufacturing of defective products) and the notion that tort-liability should be imposed on the party responsible for the injury.

It is correct that the successor would have no actual control over the extent of future accidents costs associated with the products that were manufactured by its predecessor, but it would have control over the legal imposition of liability associated with those claims. If a successor chooses to cure the defect in the product and implements a higher standard of care in its manufacturing process, then the court should refuse to impose successor liability claims under those circumstances. A court's imposition of successor liability on a successor that continues to manufacture a defective product accounts for the fact that in some situations the successor's cost of correcting a defective product are so low that but for the imposition of successor liability, the successor manufacturer would not have chosen to remedy such a defect. The impositions

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[190] *Id.* at 408 n.165 ("If manufacturers know they will be liable for the costs of accidents their products cause, the deterrence theory encourages manufacturers to make safer products in order to avoid the extra costs of accidents." (citing Murphy, *supra* note 189, at 838 n.157)) (quotation marks omitted).

[191] *Id.* at 408 ("The successor has had no part in creating the injurious product and has no ability to limit future injuries resulting from prior defects. By using the successor as a conduit in an attempt to pass the cost of injuries through to the predecessor, current successor liability law fails to force the full cost of claimants' injuries to be borne by defective manufacturers." (citing Michael D. Green, *Successor Liability: The Superiority of Statutory Reform to Protect Products Liability Claimants*, 72 Cornell L. Rev. 17, 35–36 (1986))).

[192] Marie T. Reilly, *Making Sense of Successor Liability*, 31 HOFSTRA L. REV. 745, 746 (2003) ("[The] imposition of successor liability seems to be an application of a court's equitable power to elevate substance over form." (citing Pepper v. Litton, 308 U.S. 295, 312 (1939))).

of successor liability alters the incentive of the successor manufacturer to change its product, which will result in future consumers being able to avoid harm.[193]

E. Proposal for a Hybrid Successor Liability Rule

A hybrid successor liability law, which incorporates aspects of the "mere continuation" exception and the product line exception, is needed to alter large firm manufactures like GM to conceal future liabilities by increasing the present costs for those firms to continue to operate. A hybrid successor liability law rule would protect tort victims and would hold against criticism that it would cut against the goals of bankruptcy. While the "mere continuation" or the de facto exception for successor product liability could succumb to criticisms that it bars exactly what bankruptcy seeks to accomplish, a hybrid rule can be reconciled with the Bankruptcy Code as it would specifically target firms that have the potential to create harm through the manufacturing of a large volume of products.[194] When balancing the equities of the decreased value of the estate and the decrease in costs to future tort victims, a court should find that the imposition of this hybrid successor tort liability law would provide for a more efficient outcome that would protect consumers and still allow for the debtors "fresh start".

F. Policy Considerations Above and Beyond the Goals of Bankruptcy

The effect of § 363(f) in barring future successor liability claims also raises Fifth Amendment Due Process concerns.

In the case of GM, consumers who purchased a recalled vehicle prior to the petition filing date and were injured after the filing date are future claimants who have not yet been injured and are inherently unknown and unidentifiable at the time of the filing. As previously discussed, it would be incorrect to construe these future claimants as having had cognizable claims under the Bankruptcy Code against the estate during the time of the bankruptcy case.[195] Due Process and the requirement of notice is a critical component of Bankruptcy.[196] Courts have analyzed the requirement of notice by evaluating

193 *See, e.g.*, Ray v. Alad Corp., 560 P.2d 3, 5 (Cal. 1977).

194 *See supra* Part II.A. for a discussion about the doctrine of Successor Liability.

195 *In re* Grumman Olson Indus., Inc., 467 B.R. 694, 704 (S.D.N.Y. 2012) ("Generally, courts have held that future claims cannot be considered 'claims' that are dealt with and discharged by a confirmation plan.").

196 *Id.* at 706.

the opportunity that a claimant had to participate in the bankruptcy case.[197] The Bankruptcy Code often requires a "notice and hearing" before a bankruptcy court can affect the rights of a party.[198] A future claimant could not possibly have the opportunity for notice and hearing when their claim (i.e. injury due to product defect) has not yet occurred. Courts are beginning to acknowledge the Due Process concerns that arise when the "free and clear" provision is applied in a manner that extinguished future successor liability claims.[199]

In *In re Grunman Olson Industries,* the court held that enforcing a § 363 Sale order by enjoining a state law tort suit brought by the plaintiff "would deny [the plaintiff] due process and violate the Bankruptcy Code's requirements of notice and opportunity to be heard for those affected by a bankruptcy court's ruling."[200] The court found that the purchasers of defective vehicles that had not yet been recalled did not have a contingent claim at the time of the filing of the petition.[201] The court explained that future claims that were not at least contingent could not be classified as claims under the Bankruptcy Code.[202]

In *In re Old Carco LLC*, the court held that the ejection of a tort suit against the successor in interest to a bankrupt debtor who manufactured recalled vehicles that caused injury did not violate due process because of the pre-petition relationship between the plaintiff and the debtor.[203] The Court determined that the prior relationship meant that the plaintiff had at least a contingent claim at the time the petition was filed, partly due to recalls being published prior to the petition date.[204]

In cases like GM, it would be hard to find that the individuals who suffered injuries from a defective product after the confirmation of the bankruptcy plan had a "contingent claim" that was at the time of the bankruptcy case.[205] Ultimately a claimant who is injured after a bankruptcy confirmation by a product manufactured prior to the petition date could not possibly have notice

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197 *See* Wright v. Corning, 679 F.3d 101, 103–04 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1239 (2013) ("The Plan provided for the discharge of all claims relating to the Debtors under the Bankruptcy Code that arose before the Confirmation Date.").

198 *Grumman Olson Indus., Inc.*, 467 B.R. at 706.

199 *Id*.

200 *Id.* at 711.

201 *Id*.

202 *Id*.

203 492 B.R. 392, 403 (S.D.N.Y. 2013).

204 *Id*.

205 *In re* Chateaugay Corp., 944 F.2d 997, 1004 (2d Cir. 1991).

of his claim being unsecured against the debtor. By applying the "free and clear" provisions in a manner that enjoins successor liability claims from claimants who were injured after the confirmation of the bankruptcy, serious Due Process concerns arise as these future claimants had no right to redress of their claim during the administration of the bankruptcy case. These individuals Due Process rights should trump the Bankruptcy Code's grant of authority under § 363(f) as being interpreted to discharge future tort claims.

CONCLUSION

The federal courts should apply a carefully crafted rule for successor liability in order to protect against issues that arise in cases similar to GM's 363 Sale. The product-line exception for successor liability and the mere continuation theory would be a sufficient starting point for addressing those sorts of issues.[206] The product-line exception for successor liability is based upon the premise of altering a company's incentive structure in choosing whether or not to correct the manufacturing of a defective product. The combination of these rules would work to effectively prevent a "sleight-of-hand" Substantial 363 Sale from being utilized to mask an internal restructuring as a traditional asset purchase and sale to avoid liability. The due process rights of future claimants who never had notice of their claim against the debtor should trump the grant of authority in § 363 to discharge their claim against the successor in interest.[207]

The goals of bankruptcy and successor liability can be balanced when successor liability is applied appropriately. The hybrid rule, which incorporates elements of the mere continuation and product line exception, allows for the proper balance of these policies. A successor liability rule that is similar to the hybrid rule proposed in this Comment, and one that is applied in a manner that inhibits companies from masking future liabilities, would not undercut the goal of maximizing the value of the estate. While evidence of this sort of behavior by large manufacturing companies is not readily apparent, certain factors including the continuation of conduct by the successor, the continuation of it operations, combined with continued manufacturing of the same product that caused injury, would be telling as to the probability of an intention to avoid liability. In sum, successor liability would prevent a future case like GM, where the company is now experiencing record profits while the families of the

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206 Ray v. Alad Corp., 560 P.2d 3, 5 (Cal. 1977).

207 11 U.S.C. § 363 (2012).

at least 17 people killed from GM's defective vehicles are barred from any equitable remedy.

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* Executive Articles Editor, *Emory Bankruptcy Developments Journal*; J.D. Candidate, Emory University School of Law (2016); B.S., *magna cum laude*, Florida State University (2013). I would like to thank Professor Michael Kang for his guidance and support during the writing of this Comment. I also would like to thank the staff of the *Emory Bankruptcy Developments Journal* for their valuable and diligent contributions in editing this Comment for publication. Finally, I would like to give a special thanks to my family, my fiancé, and my dog Gizmo for their constant support and encouragement throughout all of my endeavors. This Comment is dedicated to my late father Jack David Warner, an outstanding lawyer, father, and family-man, who forever positively impacted my life and those close to him.