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Bankruptcy Law Reporter™

What You Don't Know Can Hurt You: Successor Liability and Sec. 363 Asset Sales

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In the past 20 years, Bankruptcy Code Section 363(b)[1] asset sales have grown significantly in popularity, becoming an increasingly common event in Chapter 11 proceedings.[2] The frequent use of the Section 363(b) sale as a merger and acquisition technique is not difficult to understand. By permitting buyers to purchase assets "free and clear" of liens and other interests, the Section 363 sale can be attractive for all parties and stakeholders—reducing buyer risk while maximizing value for corporate creditors.

Buyers, however, should not confuse the advantages of a Section 363(b) sale with an assurance of risk-free investment, especially when applicable state law could impose successor liability on an asset buyer under "product line" or other similar theories. Although bankruptcy courts have broad statutory power to reduce the risk of such liability, the courts' ability to eliminate claims can be overestimated.

The U. S. Bankruptcy Court for the Southern District of New York provided an important reminder of this point in the recent case of *In re Grumman Olson Industries, Inc.*[3] Ruling against Morgan Olson, LLC—the purchaser of Grumman Olson's truck-body manufacturing business—the court held that a sale order that appeared to protect the purchaser from successor liability could not preclude future tort actions arising from defective products sold prior to the sale order, but that caused harm only after entry of that order. The ruling highlights the need for thorough legal and business due diligence in Section 363 deals.

This article will use the *Grumman* decision as an opportunity to explore the boundaries of a bankruptcy court's power under Section 363 to insulate an asset buyer from successor liability with respect to harm that has not occurred until after entry of the sale order. We also examine the practical lessons of *Grumman*, and discuss how practitioners might better anticipate, evaluate, and mitigate the threat of successor liability in the Section 363 sale context.

Successor Liability in Non-Bankruptcy Asset Deals

Generally, under state law, liabilities of the seller do not become the purchaser's in an asset sale, except to the extent that the purchaser explicitly assumes such liabilities. In situations where a corporation sells all its assets and liquidates promptly after the closing, this general rule can work a harsh result because persons harmed by the pre-sale activities of the seller no longer have an existing entity from which they can recover damages. Therefore, courts have, on a case-by-case basis, developed certain exceptions to the general rule, including the doctrines of (i) fraudulent transaction, (ii) de facto merger, (iii) mere continuation, and (iv) product line continuation.[4]

Under the fraudulent transaction doctrine, courts have imposed successor liability on asset purchasers when the court determines that the transaction was essentially a sham, effected to enable the seller to escape liabilities. Courts have typically analyzed the transaction "for certain 'badges of fraud' which might include: (1) a close relationship among the parties to the transaction; (2) a secret and hasty transfer not in the usual course of business; (3) inadequacy of consideration; (4) the transferor's knowledge of the creditor's claim and the transferor's inability to pay it; (5) the use of dum-

[1] 11 U.S.C. § 363(b).

[2] Statistics from the UCLA-LoPucki Bankruptcy Research Database show that Section 363(b) asset sales were involved in 0% of large public company bankruptcies in 1993-1996, compared with 32% and 23% in 2008 and 2009, respectively. Statistics *available at* http://lopucki.law.ucla.edu/tables_and_graphs/363_sale_percentage_graph_4-6-2011.pdf.

[3] *In re Grumman Olson Industries, Inc.*, 445 B.R. 243 (Bankr. S.D.N.Y., 2011)

[4] In addition, certain statutory regimes can lead to successor liability for an asset purchaser. *See e.g.*, 42 U.S.C. § 9607 (imposing clean up liability on the "owner" or "operator" of a facility regardless of the when the contamination occurred).

mies or fictitious parties; and (6) retention of control of the property by the transferor after the conveyance.''[5]

In applying the de facto merger doctrine, courts have held purchasers liable where parties to an M&A transaction have structured it nominally as an asset sale, but effected a deal that more closely resembles a merger. Courts adhering to this theory have held that the substance of a business combination transaction should outweigh the form in determining whether purchasers remain liable for the liabilities of their sellers. The application of the doctrine has varied widely, and determinations have been fact-specific. In making such a determination, courts have generally looked at four central factors: (i) the continuity of the enterprise, (ii) the continuity of ownership, (iii) the dissolution of the transferor, and (iv) an assumption by the buyer of the obligations and liabilities necessary for the continuation of the ordinary business operations associated with the assets.[6]

Under the mere continuation doctrine, an asset purchaser may become liable for the seller's liabilities if there are substantial similarities in the ownership and control of the business before and after the asset transfer. In applying this doctrine, courts have focused on certain objective continuities, including whether the buyer retains the seller's (i) name, (ii) location, (iii) employee base, (iv) services or products, and (v) management structure.[7] As a threshold matter, some courts have required that there be continuation in the identity of stockholders and directors in order for the mere continuation theory to apply.[8] As is obvious from the factors, there is significant overlap between the de facto merger and mere continuation doctrines, and cases often proceed under both theories.

The product-line continuation exception is a controversial extension of the de facto merger and mere continuation doctrines that has been adopted in a minority of states. Established in the 1977 decision, *Ray v. Alad Corporation*,[9] the doctrine imposes successor liability on asset purchasers who continue to manufacture transferred product lines with minimal alteration. Unlike the mere continuation doctrine, there is no requirement that stockholders and directors remain the same before and after the asset sale. The *Ray* court pointed to three key policy justifications underlying this broader exception:

- the buyer should be liable if the transaction caused the seller's existence to cease and in doing so destroyed a plaintiff's remedies against the seller;
- the buyer should be liable because it has a greater ability to absorb the risk of harm for the defective products than does the injured party; and
- the buyer should be liable because in continuing the product line with minimal alteration, the buyer benefits from the goodwill accumulated by the seller.[10].

In bankruptcy proceedings, however, policies that arguably support successor liability collide with the objectives of maximizing recoveries to stakeholders (who themselves have been harmed by the debtor's financial failure) and ensuring that recoveries are paid in accordance with the absolute priority rule.[11]

'Free and Clear' Sales Under Section 363(f)

Section 363 of the Bankruptcy Code provides an M&A technique that can reduce successor liability risks to purchasers in asset sales. Under Section 363(b), the ''trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.''[12] Subject to the satisfaction of certain conditions,[13] Section 363(f),[14] authorizes the ''trustee'' to sell such property ''free and clear of any interest in such property'' held by an entity other than the debtor's estate.

The power of the free-and-clear doctrine, and the definition of its limits, rests on the definition of the term ''interest'' as it is used in Section 363(f). The proper definition has been, and continues to be, the subject of significant debate among courts, academics and practitioners. While the legal community remains divided on the issue, an initial inclination toward a narrow definition has generally given way to a broader interpretation.[15]

Under the narrow view, Section 363(f) provides only *in rem* relief, extinguishing claims against the transferred property itself, and not against the purchaser.[16] As the court noted in *Grumman*, ''by its terms, § 363(f) cleanses the transferred assets of any attendant liabilities, and allows the buyer to acquire them without fear that an estate creditor can enforce its claim against

[5] Stuart Gordon, Matthew Spero and and Michael Cannata, *Successor Liability: Corporate Asset Buyers Beware*, Law 360 (2009), citing *Kaur v. Royal Arcadia Palace Inc.*, 2007 U.S. Dist. Lexis 94556 (E.D.N.Y. 2007), *available at* http://www.rivkin.com/assets/pubs/downloads/Law360-SuccessorLiability.pdf.

[6] Samuel Mason and Adam Weinstock, *Successor Liability in Asset Acquisitions: Clarifying the De Facto Merger Exception*, Bloomberg Law Reports, Jan. 9, 2010.

[7] Lawrence Katz, *Taking the Success Out of Successor Liability*, American Bankruptcy Institute Spring Meeting (2008), *available at* http://www.abiworld.org/committees/newsletters/assetsales/vol5num3/TakingSuccess.pdf.

[8] *Id.*

[9] 560 P.2d 3 (Cal. 1977).

[10] Angela Whittaker-Pion and Timothy M. Hurley, *Effect of Product Line Successor Liability Exception*, Law 360 (2009), *available at* http://www.milesstockbridge.com/pdfuploads/607_EffectOfProductLineSuccessorLiabilityException1.pdf

[11] Bankruptcy courts apply the absolute priority rule to allocate recoveries among the stakeholders in the debtor's estate. Absent contrary agreement, senior creditors are paid before junior creditors, junior creditors are paid before holders of senior equity interests, and holders of senior equity interests are paid before holders of common equity.

[12] In Chapter 11 proceedings in which no trustee has been appointed, this authorization extends to the debtor.

[13] The authority to sell assets ''free and clear of any interest'' under Section 363(f) may be exercised only if (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) the entity holding such interest consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) the entity holding such interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

[14] 11 U.S.C. § 363(f).

[15] Robert M. Fishman and Matthew A. Swanson ''*What is your interest in Section 363(f)?*'' Norton Annual Survey of Bankruptcy Law, 317-322 (2008), *available at* http://www.shawgussis.com/news/Fishman-Swanson.pdf. [Hereinafter Fishman and Swanson].

[16] *Id.*

those assets."[17] Essentially this view interprets the word "interest" to include only the various "sticks in the bundle" of property interests such as mortgages, liens, Article 9 security interests, dower, curtesy and the like.

Courts taking a broader view, however, have interpreted Section 363(f) to authorize the bankruptcy court not only to provide *in rem* relief but also to grant *in personam* protection similar to that of post-confirmation relief under Bankruptcy Code § 1141(c),[18] which states that "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors . . . .."[19] Section 101(5)(A) of the Bankruptcy Code,[20] defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." As the *Grumman* court notes, when defining the term "claim" "Congress selected the broadest possible definition to ensure that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.' "[21] Thus, reading the term "interest" in Section 363(f) as if Congress had written "claim and interest" authorizes a bankruptcy court to insulate a purchaser in a Section 363(b) asset sale from a host of state-law successor liability claims.

In providing such relief, Section 363(f) promotes two interrelated objectives central to the bankruptcy process. First, as the U.S. Court of Appeals for the Second Circuit noted in *Douglas v. Stamco*, the "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."[22] Second, the broad interpretation of the term "interest" protects the order of priority in which creditors of the debtor receive payment. As the U.S. Court of Appeals for the Third Circuit explained in *In re Trans World Airlines, Inc.*, "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."[23]

Bankruptcy courts have used this broad statutory power to extinguish myriad claims that may have otherwise survived under state law theories of successor liability. For example the U.S. Court of Appeals for the Third Circuit set aside employment-related successor liability claims following the Section 363(b) sale of the assets of Trans World Airlines, agreeing with TWA and purchaser American Airlines that "while Congress did not expressly define 'interest in property,' the phrase should be broadly read to authorize a bankruptcy court to bar any interest that could potentially travel with the property being sold, even if the asserted interest is unsecured."[24]

Similarly, the U.S. Court of Appeals for the Second Circuit affirmed a bankruptcy court's power to extinguish claims in the Section 363(b) sale of Chrysler's assets, barring both environmental and existing product liability claims.[25] Notably, however, the court declined to opine on the issue of future tort claims. Despite a sale order that, by its terms, barred the right to pursue claims "on any theory of successor or transferee liability, whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated"[26] the court was unwilling to extinguish all future claims. The court "decline[d] to delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as [it was] presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law."[27]

The Problem of the Unknowable Claim

Prior to the *Grumman* decision, courts had struggled with the analogous problem of debtors that had reorganized under Chapter 11, only to face subsequent tort claims brought by victims of defective products produced by the debtor before the filing of a bankruptcy petition. Such claims fall into two general categories. The first consists of claims by plaintiffs who were injured by a harmful product prior to filing of a bankruptcy petition, but whose symptoms did not manifest themselves until after the debtor emerged from Chapter 11. The classic example is asbestos, where exposure to the product (and the initial cellular injury) may occur years prior to the manifestation of symptoms. The second category consists of claims by victims who are first injured by a defective product that was manufactured by the seller only after the reorganized seller emerges from bankruptcy.

While the case law remains somewhat unsettled, courts have been more willing to bar post-confirmation claims in the first category. In such cases, the claim is viewed as having arisen at the time of exposure to the harmful product, i.e. pre-petition. As the court in *Grumman* explained:

> Although the claimants, particularly in asbestos cases, may not be identifiable during the bankruptcy case or aware of the pre-petition exposure to the debtor's product or the fact of their injury, courts have dealt with due process concerns caused by the discharge of their claims through the appointment of a future claims representative to protect their interests and the creation of a trust to pay their claims.[28]

The second category of successor liability claims arises from products that do not cause harm upon exposure, but the use of which nonetheless creates a high likelihood of future injury. In these scenarios the identity of future claimants is unknown at the time that the debtor emerges from bankruptcy, because injury has not yet occurred. The U.S. Court of Appeals for the Second Circuit, analyzing successor environmental liabili-

[17] *Grumman*, 445 B.R. at 249.
[18] 11 U.S.C. § 1141(c).
[19] Fishman and Swanson at 317-322.
[20] 11 U.S.C. § 101(5)(A).
[21] *Grumman*, 445 B.R. at 250, citing *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1003 (2d Cir. 1991).
[22] 363 Fed.Appx. 100, 103 (2010) U.S. App. LEXIS 2107 (2d Cir. Feb. 1, 2010).
[23] *Id.*, citing *In re Trans World Airlines, Inc.* , 322 F.3d 283, 292 (3d Cir. 2003).
[24] *Trans World*, 322 F.3d at 287.
[25] *In re Chrysler, LLC*, 576 F.3d 108 (2d Cir. 2009).
[26] *Id.* at 126.
[27] *Id.*
[28] *Grumman*, 445 B.R. at 251.

ties in *In re Chateaugay Corporation*, described the more general problem as follows:

> Consider, for example, a company that builds bridges around the world. It can estimate that of 10,000 bridges it builds, one will fail, causing 10 deaths. Having built 10,000 bridges, it becomes insolvent and files a petition in bankruptcy. Is there a "claim" on behalf of the 10 people who will be killed when they drive across the one bridge that will fail someday in the future? If the only test is whether the ultimate right to payment will arise out of the debtor's pre-petition conduct, the future victims have a "claim." Yet it must be obvious that enormous practical and perhaps constitutional problems would arise from recognition of such a claim. The potential victims are not only unidentified, but there is no way to identify them. Sheer fortuity will determine who will be on that one bridge when it crashes. What notice is to be given to these potential "claimants"?[29]

In the process of grappling with the difficulties posed by what has become known as the "*Chateaugay* hypothetical," courts have developed several related tests to determine whether a potential future claim has risen to the level of a "claim" under the Bankruptcy Code. In *Chateaugay*, the court applied a "fair contemplation" test to the environmental claims at issue in order "to distinguish between contingent or unmatured claims, which are claims within the meaning of [the Bankruptcy Code], and potential future tort claims, which are not. Under that test, a contingent or unmatured obligation is a claim if the occurrence of the contingency or future event that would trigger liability was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created."[30] The *Chateaugay* court acknowledged, however, that "the concepts of maturity and contingency were not readily transferable to future tort claims whose victims are totally unaware of injury and a tortfeasor."[31]

Three years after the *Chateaugay* decision, the U.S. Bankruptcy Court for the Southern District of Florida, considering the case of *In re Piper Aircraft*, in which Piper Aircraft sought relief from successor liability after the confirmation of its plan of reorganization, acknowledged it was facing a direct test of the *Chateaugay* hypothetical:

> The problem posed by [the Chateaugay] hypothetical has become reality here. We know that some planes in the existing fleet of Piper aircraft will crash, and we know that there may be injuries, deaths and property damage as a result. We also know that under theories of negligence and products liability, Piper, if it remains in existence, would be liable for some of these damages. Even so, there is no way to identify who the victims will be or to identify any particular prepetition contact, exposure, impact, privity or other relationship between Piper and these potential claimants that will give rise to these future damages.[32]

In response, affirming the decision of the bankruptcy court, the U.S. Court of Appeals for the Eleventh Circuit established a two-pronged, hybrid test:

> [A]n individual has a. . .claim against a debtor manufacturer if (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. The debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct.[33]

By introducing a pre-petition conduct element to the fair contemplation test, *Piper* provides an effective filter to separate out the truly unknowable claim. Under the *Piper* test, an individual injured after the debtor emerges from bankruptcy, by products manufactured before emergence and who had no pre-petition relationship with the debtor does not hold a "claim" under the Bankruptcy Code. It is the holders of this class of unknowable future claimants that the court in *Piper*, and subsequently *Grumman*, sought to protect.

The *Grumman* Case

Grumman extended the application of the *Piper* test to the Section 363(b) asset sale context. The claim at issue in *Grumman* arose in 2009, when Denise Frederico struck a telephone pole in a Federal Express truck, leaving her with serious injuries. Frederico claimed that defects in the body of the truck caused the crash. The truck body was manufactured by Grumman in 1994, eight years before Grumman filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Southern District of New York. In 2003, seven months after Grumman filed its petition, the court entered a sale order approving the Section 363(b) sale of certain of Grumman's "Lot 2" assets, including the truck-body product line which, six years later, would allegedly lead to Frederico's accident. The sale order included a broad release of Morgan Olson, the purchaser of the Lot 2 assets, from *in personam* successor liability:

> [T]he Purchaser shall have no liability or responsibility for any liability or other obligation of the Debtor arising under or related to the Lot 2 Assets other than for the purchase price payable under the Lot 2 APA. Without limiting the effect of the foregoing, the transfer of the Lot 2 Assets . . . will not subject the Purchaser to any liability for claims against the Debtor or the Lot 2 Assets, including, but not limited to, claims for successor or vicarious liability, by reason of such transfer under the laws of the United States, any state, territory or possession thereof or the District of Columbia applicable to such transactions. The Purchaser shall not be deemed, as a result of the consummation of the transaction contemplated by the Lot 2 APA to: (a) be the successor of the Debtor; (b) have, de facto or otherwise, merged with or into the Debtor; (c) be a mere continuation or substantial continuation of the Debtor or the enterprise of the Debtor; or (d) be responsible for any liability of the Debtor or for payment of any benefit accruing to the Debtor, except as specifically provided for in the Lot 2 APA.[34]

The sale order language was drafted specifically to address theories of successor liability extant under state law. When Frederico brought suit against Morgan

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[29] *In re Chateaugay Corporation*, 944 F.2d 997, 1003 (2d. Cir. 1991).
[30] *Grumman*, 445 B.R. at 252.
[31] *Id.*
[32] *In re Piper Aircraft Corp.*, 162 B.R. 619, 627 (Bankr. S.D-.Fla.1994).
[33] *Piper*, 58 F.3d at 1577 (footnote omitted).
[34] *Grumman*, 445 B.R. at 246.

Olson in New Jersey in 2009 under a product-line continuation theory, Morgan Olson moved to re-open the case in bankruptcy court, arguing for summary judgment based on the release provided in the sale order.

Frederico's claim in *Grumman* epitomizes the due process and practical risks identified by the U.S. Court of Appeals for the Second Circuit in *Chateguay*. The sale order purported to bar recourse for a class of future claimants, the identity of whom was unknown at the time of the sale order but whose identity would later emerge as defects in the products sold by Grumman years before its bankruptcy caused injury. The court, applying the *Piper* test, found that while the sale order extinguished all existing claims at the time of the sale, it could not extinguish the claim of Denise Frederico, who had no prepetition contact with Grumman and who could not have known at the time of the sale that she might some day in the future be injured in an accident involving a product manufactured by Grumman.

The *Grumman* court placed no weight on the language of the sale order entered by the bankruptcy court in *Chrysler*, instead aligning with cases in the *Piper* line that have held "for reasons of practicality or due process, or both. . .[that] a person injured after the sale. . .by a defective product manufactured and sold prior to the bankruptcy does not hold a claim in the bankruptcy case and is not affected by the § 363(f) sale order or the discharge order under 11 U.S.C. § 1141(d)." The court focused extensively on the due process problems implicated by the case, noting that the Bankruptcy Code expressly requires "the trustee or debtor in possession to provide parties in interest with adequate notice and an opportunity to be heard before their interests may be adversely affected."[35] The court noted that Section 363(b) reinforces this requirement, mandating notice and a hearing before assets can be sold outside of the ordinary course of business. The court concluded "that a sale order under § 363(f) that purports to free a purchaser from the debtor's liabilities does not bind parties in interest that did not receive appropriate notice of the sale."[36]

Given that the Fredericos neither held a claim at the time of the sale, nor received notice of such sale, the court held that its 2003 sale order could not bar the Frederico's 2009 claim. The court declined to decide the merits of the Frederico's underlying claims under any state law theory of successor liability, remitting determination of that question to the New Jersey trial court.

Lessons of *Grumman*

Grumman is a reminder that potential purchasers in a Section 363(b) asset sale must do their best to anticipate, evaluate, and mitigate the threat of successor liability regardless of the breadth of release language that they are able to obtain from the bankruptcy court in the sale order.

Anticipation and Evaluation

Grumman first and foremost highlights the necessity of meticulous legal and business due diligence in Section 363(b) sales. In our experience, over-eager purchasers often think that they are safe in focusing only on the adequacy of the assets for which they are bidding in Section 363(b) sales, giving short shrift to liability concerns because of a misunderstanding of the effect of the sale order on potential successor liability. While the timeline for such diligence is sometimes compressed, failure to assess adequately the potential for future tort claims carries significant risk.

Proper diligence in such sales should include a survey of the states in which the target assets operate and an initial evaluation of the state-law successor liability theories in those states, under which future claimants may bring suit.[37] In addition, the assets themselves should be scrutinized for future claims risk. If product-liability claims are a significant concern, diligence should take into account the number of products produced, the breadth of their distribution, the nature of the products, their propensity to cause injury, and both their intended and unintended uses. If the risk profile for future claims after initial analysis appears high, potential buyers should consider a variety of diligence approaches, including but not limited to:

- A detailed litigation profile of the target assets or products to evaluate (i) which assets or products have generated claims in the past, (ii) whether such claims have been successful, (iii) the magnitude of defense costs, and (iii) the magnitude of settlements and judgments has the seller has paid regarding the assets.
- A litigation profile of the industry in which the assets or products are used to evaluate the frequency and exposure associated with claims against similar and related assets or products.
- Engagement of actuarial experts to determine the statistical likelihood of future claims and related monetary exposure.[38]

Mitigation

Once diligence is complete and the risk of future tort claims analyzed, buyers might take one of two approaches to the problem. The first and much more traditional approach is to monetize the risk and adjust the price that one is willing to bid accordingly.[39] We recognize that this is often easier said than done, because in a hotly contested Section 363 auction, the motivation to prevail in the auction generally pushes bid prices up, not down. However, if the market for the target's assets is rational (and we are not saying that it always is), then all bidders should be engaging in a similar process of risk identification, quantification and commensurate bid adjustment.

A second, potential approach has been suggested by some commentators[40] and was hinted at by the court in *Grumman*, when it noted that Ms. Frederico's ability to recover for her injuries was not preserved by the cre-

[35] *Grumman*, 445 B.R. at 253.

[36] *Id.*

[37] Of course, in many cases, such as *Grumman*, where the products manufactured by the debtor are mobile, claims could arise under the law of the jurisdiction in which an injury occurs, which means that a purchaser could be exposed to a successor liability claim under the most liberal standard extant anywhere in which the products are used.

[38] Foley and Lardner, LLP, *Buying Assets From a Company in Chapter 11* (2009), *available at* http://www.foley.com/files/tbl_s31Publications/FileUpload137/5648/Chapter11_WP.pdf.

[39] *Id.*

[40] *Id.*

ation of a trust fund and the appointment of a future claims representative.[41] As the court noted, ''[w]hile such protective measures do not necessarily transform a non-claim into a claim, the absence of these protective measures exacerbates the evident unfairness that results from treating their rights as claims under the Sale Order.''[42] Such devices, which one does see in Chapter 11 plans, are not common features of Section 363(b) asset sales. The court's mention of this technique in the Section 363 context may have been either interesting *dictum* or, perhaps, a suggestion of a possible future path for the mitigation of successor liability risk.

41 *Grumman*, 445 B.R.at 254.

42 *Id*.

Conclusion

Section 363(b) asset sales, while providing significant advantages in risk reduction for buyers, cannot wholly eliminate the threat of future claims. However, by combining a sale order drafted as broadly as the case law will bear with careful diligence and well-crafted mitigation measures, counsel for buyers can assist their clients in obtaining the maximum protection from this increasingly popular M&A technique.

   ISSN 1044-7474