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Cover Page Footnote

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IMPROVING BANKRUPTCY SALES BY RAISING THE BAR: IMPOSING A PRELIMINARY INJUNCTION STANDARD FOR OBJECTIONS TO § 363 SALES

Matthew A. Bruckner[+]

Over the past thirty years, bankruptcy sales have become a vitally important aspect of bankruptcy practice.[1] This Article focuses on asset sales that occur

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1. *See* Douglas G. Baird, *Lessons From the Automobile Reorganizations*, 4 J. LEGAL ANALYSIS 271, 272 (2012) (noting that "[s]ales are the norm in large reorganizations" in Chapter 11 bankruptcy proceedings); *see also* Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 674 (2003) (citing data finding that the majority of large Chapter 11 cases in 2002 resulted in sales); Stephanie Ben-Ishai & Stephen J. Lubben, *Sales or Plans: A Comparative Account of the "New" Corporate Reorganization*, 56 MCGILL L.J. 591, 597 (2011) (stating that Chapter 11 cases often result in Quick Sales). *But see* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 42–44 (2007) (stating that the number of bankruptcy sales decreased drastically between 2003 and 2006).

outside the context of a plan of reorganization and are conducted pursuant to § 363 of the Bankruptcy Code (Quick Sales).[2] Section 363(b)(1) of the United States Bankruptcy Code (the Bankruptcy Code)[3] provides the statutory foundation for Quick Sales, permitting the debtor-in-possession[4] to use, sell, or lease all or part of the property of the bankruptcy estate outside of the ordinary course of business.[5] Most Quick Sales are conducted pursuant to § 363(f), which allows a debtor-in-possession to sell assets of the estate "free and clear" of non-estate interests if the sale meets one of the conditions outlined under § 363(f).[6] Section 363(f) is a "powerful tool" that permits a debtor-in-possession to maximize the estate's recovery from an asset without becoming unduly entangled in controversies concerning the existence, validity, and priority of third-party interests in the property to be sold.[7] It also allows a

2. Quick Sales can occur in rapid fashion. *See In re* Chrysler LLC, 405 B.R. 84, 93, 96 (Bankr. S.D.N.Y. 2009) (describing how a debtor was required to exit bankruptcy in forty-two days), *aff'd,* 576 F.3d 108 (2d Cir. 2009), *vacated as moot,* 592 F.3d 370 (2d Cir. 2010); *see also In re* Gulf Coast Oil Corp., 404 B.R. 407, 423 (Bankr. S.D. Tex. 2009) (reasoning that the "need for speed" in selling may be evidenced by a variety of factors, including impending adverse market conditions); ELIZABETH J. AUSTIN ET AL., N.Y.C. BAR COMM. ON BANKR. & CORPORATE REORGANIZATION, CORPORATE BANKRUPTCIES: TRENDS IN ASSET SALES AND LIQUIDATIONS § 2 (2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071875CorporateBankruptciesTrendsinAssetSalesandLiquidations.pdf (noting that Quick Sales are often completed in less than sixty days).

3. This Article uses the terms "Bankruptcy Code" and "Code" to refer to the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598, 92 Stat. 2549 (codified in scattered sections of 11 U.S.C.).

4. Although § 363 speaks only in terms of a trustee, the Bankruptcy Code confers the trustee's powers to sell property of the estate to a debtor-in-possession. *See* 11 U.S.C. § 1107(a) (2006); *see also* Philip A. Schovanec, *Bankruptcy: The Sale of Property Under Section 363: The Validity of Sales Conducted Without Proper Notice*, 46 OKLA. L. REV. 489, 490–91 (1993) (stating that a debtor-in-possession's interest in the property to be sold is protected by § 363).

5. 11 U.S.C. § 363(b)(1) (2006).

6. Section 363(f) provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Id.; *see also, e.g.*, *In re* Collins, 180 B.R. 447, 450 (Bankr. E.D. Va. 1995) (noting that, because § 363(f) is written in the disjunctive, the trustee must only satisfy one of the enumerated conditions).

7. *See, e.g.*, D'Antonio v. Bella Vista Assocs., LLC (*In re* Bella Vista Assocs., LLC), No. 07-18134, 2007 WL 4555891, at *4 (Bankr. D.N.J. Dec. 18, 2007) ("The goal of section 363(f)(4) is to allow[] the sale of property subject to dispute 'so that liquidation of the estate's assets need not be delayed while such disputes are being litigated.'" (alteration in original) (quoting *In re* Durango Georgia Paper Co., 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005)); *In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *13 (Bankr. D.N.J. June 26, 2006) (holding

debtor-in-possession to expeditiously sell estate assets for the highest available price early in the process and to resolve most controversies at a later date.[8] The overriding concept is to allow the debtor-in-possession to convert distressed properties into liquid assets quickly and distribute them to the estate's creditors through a confirmed plan.[9] Today, the vast majority of large, Chapter 11 cases involve the sale of all or a part of those companies through the Quick Sale process.[10] There are sharp divisions among bankruptcy scholars as to whether the increased use of Quick Sales heralds "The End of Bankruptcy,"[11] but it is undisputed that such sales occur more frequently than ever before; as many as two-thirds of all large bankruptcy cases now involve a Quick Sale.[12] However, instead of injecting itself into the debate about whether Quick Sales are desirable or appropriate, this Article takes as its starting point that such sales occur regularly and have become increasingly important.[13] Instead, this Article focuses on, and seeks to improve, the procedure by which Quick Sales occur.

An apparent tension exists, however, between § 363 of the Bankruptcy Code and Rule 7001(2) of the Federal Rules of Bankruptcy Procedure (FRBP). Section 363(b) allows a debtor to sell property of the estate by filing a sale

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that a trustee's satisfaction of § 363(f) allowed for a Quick Sale); *In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002) (stating that § 363(f)(4) is intended to allow property sales amid a dispute); *In re* Oneida Lake Dev., Inc., 114 B.R. 352, 356 (Bankr. N.D.N.Y. 1990) (stating that § 363(f) authorizes a debtor to sell free of encumbrances).

8. 11 U.S.C. § 363(f).

9. *See, e.g.*, *In re* Chrysler LLC, 405 B.R. 84, 93, 96–97 (Bankr. S.D.N.Y. 2009), *aff'd* 576 F.3d 108 (2d Cir. 2009), *vacated as moot,* 592 F.3d 370 (2d Cir. 2010); *In re NJ Affordable Homes*, 2006 WL 2128624, at *13 (stating that a Quick Sale was "the only plan capable of benefitting the largest number of injured parties").

10. *See* Baird & Rasmussen, *supra* note 1, at 674 (stating that "in 84% of all large Chapter 11s from 2002, the investors entered bankruptcy with a deal in hand or used it to sell the assets of the business"). *But see* LoPucki & Doherty, *supra* note 1, at 42–44 (suggesting that 2002 represented a high-water mark for bankruptcy sales and therefore Baird and Rasmussen's focus on the period leading up to 2002 is misleading).

11. *See* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 751 (2002) (analyzing Chapter 11 as a tool for selling assets); *see also* Elizabeth B. Rose, Comment, *Chocolate, Flowers, and § 363(b): The Opportunity for Sweetheart Deals Without Chapter 11 Protections*, 23 EMORY BANKR. DEV. J. 249, 252 (2006) ("[P]ermitting the use or sale of the debtor's assets outside of a reorganization plan has been debated since 1938 . . . .").

12. *See* Ben-Ishai & Lubben, supra note 1, at 597 ("[A]pproximately two-thirds of all large bankruptcy proceedings involv[e] a sale of the firm, as opposed to a more traditional reorganization plan."); *see also* Baird & Rasmussen, *supra* note 1, at 675 (showing that fifty-six percent of Chapter 11 proceedings from a 2002 sample were sales); Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839, 840 (2004). *But see* LoPucki & Doherty, *supra* note 1, at 42–44.

13. *See* Lubben, *supra* note 12, at 840; *see also* Rose, *supra* note 11, at 250 (claiming that the current rules governing the approval of § 363 sales are "grossly insufficient").

motion with the court.[14] Motion practice is an expeditious procedural mechanism and, by allowing Quick Sales to proceed by motion, Congress evidenced its recognition that Quick Sales sometimes need to occur rapidly.[15] By contrast, FRBP 7001(2) requires a debtor-in-possession to initiate a trial-like procedure—known as an adversary proceeding—in order to "determine the validity, priority, or extent of [an] interest in property."[16] Parties-in-interest have seized on this tension to assert that, if they claim some interest in the property to be sold, the debtor cannot sell that property until an adversary proceeding determines the extent of their interest.[17] However, these objections are sometimes raised for purely strategic reasons by parties without an interest in seeing the debtor successfully reorganize and, for the reasons discussed below, these objections rarely require the court to substantially delay a Quick Sale.[18] Unfortunately, courts differ when confronted on whether to require an ex ante adversary proceeding before approving a Quick Sale.[19]

Strategic objections can cause substantial inefficiencies in a Quick Sale case.[20] Strategic objections are a serious concern, particularly when the objecting party bears little of the downside risk if its objection destroys the debtor-in-possession's ability to reorganize. Not only is delay potentially expensive, it is also unjustified in many cases. Consequently, the Bankruptcy

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14. 11 U.S.C. § 363(b) (2006).

15. *See* discussion *infra* Part II.

16. FED. R. BANKR. P. 7001(2); *see, e.g.*, *In re* Whitehall Jewelers Holdings, Inc., No. 08-11261, 2008 WL 2951974, at *6 (Bankr. D. Del. July 28, 2008) (reasoning that a lien can only be invalidated through a Rule 7001(2) adversary proceeding); *cf. In re* Mansaray-Ruffin, 530 F.3d 230, 234 (3d Cir. 2008) (concluding that a lien's validity must be resolved through a Rule 7001 adversary proceeding); *In re* Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990) (declaring that the courts must resolve a challenge to a lien's validity or existence in an adversary proceeding and not in the confirmation process).

17. *See, e.g.*, Darby v. Zimmerman (*In re* Popp), 323 B.R. 260, 269–70 (B.A.P. 9th Cir. 2005); *In re Whitehall Jewelers*, 2008 WL 2951974, at *4 (holding that the debtors could not sell property before determining if it was property of the estate).

18. *See* discussion *infra* Part III.

19. *Compare In re* Robotic Vision Systems, Inc., 322 B.R. 502, 508 (Bankr. D.N.H. 2005) (finding that no dispute existed because there was no adversary proceeding), *and In re* Olympia Holding Corp., 129 B.R. 679, 681 (Bankr. M.D. Fla. 1991) (concluding that the property was subject to a bona fide dispute contemplated under § 363(f)(4) because an answer disputing ownership was filed in a separate adversary proceeding), *with* Moldo v. Clark (*In re* Clark), 266 B.R. 163, 171–72 (B.A.P. 9th Cir. 2001) (deciding that the court must first determine whether property to be sold is property of the estate before a trustee can sell the disputed property), *and In re Whitehall Jewelers*, 2008 WL 2951974, at *4 ("A bankruptcy court may not allow the sale of property as 'property of the estate' without first determining whether the property is property of the estate.").

20. *Cf.* Ion Media Networks, Inc. v. Cyrus Select Opportunities Masterfund Ltd. (*In re* Ion Media Networks, Inc.), 419 B.R. 585, 597 (Bankr. S.D.N.Y. 2009) (finding that a subordination agreement limiting a party's ability to object to a plan of reorganization should be enforced).

Code contemplates that courts need not resolve most objections to bankruptcy sales before the sale is approved.[21]

This Article is concerned primarily with instances where an objecting party seeks to improve its bargaining position vis-à-vis the debtor by raising the specter of delay, rather than vindicating a right or interest provided by the bankruptcy laws. Strategic objections are troublesome because even a brief delay in consummating a Quick Sale may destroy a tremendous amount of value for the estate's creditors as a whole or can force a company to liquidate[22] instead of allowing it to reorganize.[23] At times, it may be difficult to distinguish between *legitimate* objections and *strategic* objections because the differences often relate to the objecting parties' subjective intent.[24] The ideal solution, therefore, does not require a bankruptcy judge to attempt to decipher the subjective intent of objecting parties. Rather, the ideal solution can be applied in all circumstances and filters out strategic objections while giving due consideration to legitimate objections.

The current situation is far from ideal and is due, in part, to § 363(f) being one of the most frequently misconstrued Bankruptcy Code provisions.[25] Although courts generally require debtors-in-possession to make, at minimum,

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21. 11 U.S.C. § 363(f) (2006); *see also* Russell A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction in Terms?*, 10 BANKR. DEV. J. 47, 90 (1993-1994) (noting that, in some instances, sales may need to occur before the court resolves objections).

22. *See* Baird, *supra* note 1, at 10 (finding that liquidation causes a realization of only ten percent of the company's book value).

23. *See* H.R. Rep. No. 95-595, at 220 (1997), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 (stating that parties traditionally view reorganizations as superior to liquidation because assets are more valuable when used in their corresponding industries than when sold for scrap); *see also* Rose, *supra* note 11, at 271 (arguing that the fundamental policy of preserving business value is implicit in Chapter 11 bankruptcy). A Quick Sale may allow a debtor to capture most or all of the value that would occur in a reorganization because it permits the debtor to sell to a buyer who values the debtor's assets as a going concern, rather than merely for their liquidation value. *See* William T. Bodoh et al., *The Parameters of the Non-Plan Liquidating Chapter Eleven: Refining the* Lionel *Standard*, 9 BANKR. DEV. J. 1, 11 (1992) (proposing that a debtor have the option to choose a Quick Sale); *see also* George W. Kuney, *Let's Make it Official: Adding an Explicit Preplan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1269 (2004) (proposing the adoption of a Quick Sale plan in the Bankruptcy Code); Rachael M. Jackson, Comment, *Responding to Threats of Bankruptcy Abuse in a Post-Enron World: Trusting the Bankruptcy Judge as the Guardian of Debtor Estates*, 2005 COLUM. BUS. L. REV. 451, 496 (2005) (asserting the Code's preservation of asset value must be made in good faith in order for Chapter 11 to apply). *But see* LoPucki & Doherty, *supra* note 1, at 22–24 (citing an empirical study finding that the recoveries in bankruptcy sales from 2000 to 2004 of large public companies was approximately half that of reorganization cases).

24. For the purposes of this Article, "legitimate objections" are those objections in which a party is seeking to vindicate some right or interest protected by the Bankruptcy Code or the Bankruptcy Rules.

25. John Collen, *What Do the Subsections of Section 363(f) Really Mean? A Primer on Selling Free and Clear of Interests*, 6 J. BANKR. L. & PRAC. 563, 563 (1997).

a prima facie case justifying a Quick Sale,[26] a uniform standard for approving contested Quick Sales has not yet emerged.[27] The lack of a clear standard has resulted in inconsistent judgments,[28] which implicitly encourage parties to raise strategic objections that are designed to cause delay or otherwise muddle the Quick Sale process, rather than represent a party's attempt to vindicate its rights.[29]

This Article focuses on, and seeks to improve, the procedure by which Quick Sales occur.[30] This Article suggests that the best solution would require bankruptcy courts to apply a preliminary injunction standard, specifically the Leubsdorf-Posner formulation,[31] to evaluate the merits of Quick Sale objections.[32] When ruling on a Quick Sale objection, a bankruptcy court should make two determinations: (1) the likelihood that each side will succeed

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26. *See, e.g.*, Federico v. McGranahan (*In re* Federico), No. 08-2182, 2009 WL 2905855, at *3 (E.D. Cal. Sept. 8, 2009); *In re* Whitehall Jewelers Holdings, Inc., No. 08-11261, 2008 WL 2951974, at *4 (Bankr. D. Del. July 28, 2008); *In re* Robotic Vision Sys., Inc., 322 B.R. 502, 508 (Bankr. D.N.H. 2005).

27. *Compare In re* Robotic Vision Sys., Inc. 322 B.R. at 506 (concluding that "a *bona fide* dispute exists when there is an objective basis for either factual or legal dispute as to the validity of an interest in property" and that the dispute is raised at minimum in a pleading or in an argument), *and In re* Olympia Holding Corp., 129 B.R. 679, 681 (Bankr. M.D. Fla. 1991) (concluding that the property was subject to a *bona fide* dispute within the meaning of § 363(f)(4) because the trustee filed an answer disputing the objecting party's claims of ownership in a separate adversary proceeding), *with* Anderson v. Conine (*In re* Robertson), 203 F.3d 855, 863 (5th Cir. 2000), Darby v. Zimmerman (*In re* Popp), 323 B.R. 260, 266 (B.A.P. 9th Cir. 2005) (stating that before getting to § 363(f), a determination must be made to see if the property is property of the estate), Moldo v. Clark (*In re* Clark), 266 B.R. 163, 171–72 (B.A.P. 9th Cir. 2001) (finding that the court must first decide whether the property to be sold is property of the estate before the trustee could sell it), *In re Whitehall Jewelers*, 2008 WL 2951974, at *4 ("A bankruptcy court may not allow the sale of property as 'property of the estate' without first determining whether the property is property of the estate."), *and In re* Coburn, 250 B.R. 401, 403 (Bankr. M.D. Fla. 1999).

28. George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 272–73 (2002) (characterizing the standards as vague and calling bankruptcy courts the "auction houses of choice" where financially unstable businesses go to barter their assets).

29. Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J. L. BUS. & FIN. 258, 275 (2012).

30. Of course, if Quick Sales are not normatively desirable, obstructionism and delay could be perceived as efficiency maximizing. To the extent that the growing importance of the Quick Sale mechanism is not normatively desirable, however, the appropriate solution is to amend the Bankruptcy Code. As discussed further *infra*, strategic objections to Quick Sales can have distortionary effects and should not be encouraged.

31. *See infra* Part IV(b).

32. Although there is a "dizzying diversity of formulations" of the requirements for a preliminary injunction, Lea B. Vaughn, *A Need for Clarity: Toward a New Standard for Preliminary Injunctions*, 68 OR. L. REV. 839, 846 (1989), this Article argues that the appropriate standard in the Quick Sale context is the Leubsdorf-Posner formulation. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589 (7th Cir. 1986); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541–42 (1978).

on the merits and (2) the amount of irreparable harm that each side will suffer in the event the court acts on merits that later prove to be false.[33] Following these determinations, the court should multiply the expected loss and the likelihood of success on the merits, and then adopt the course of action suggesting the smaller probable loss.[34] This solution differs from many of the current approaches by placing the burden on the objecting party to demonstrate why a Quick Sale should be delayed (instead of requiring the debtor to show why it should be approved), thereby filtering out many strategic objections and ensuring that legitimate objections receive the degree of procedural protection that they are entitled to receive. Moreover, adopting a preliminary injunction standard for evaluating the merits of Quick Sale objections should deter parties-in-interest from attempting to muddle the sale process.[35]

Part I of this Article provides an overview of the Quick Sale process and explains why bankruptcy sales often must be concluded rapidly if they are to benefit the estate. Part II provides a brief overview of the two primary procedural tracks on which most bankruptcy matters proceed. Part II also explains why Quick Sales were designed to be resolved through the more expeditious procedural track, known as a "contested matter," and why pushing Quick Sales onto the slower procedural track, known as an "adversary proceeding," is generally unnecessary or inappropriate. Part III analyzes several cases involving objections to Quick Sales and concludes that the current, muddled regime for analyzing Quick Sales increases the risk of strategic behavior. Part IV then suggests a formulation of the preliminary injunction standard advocated by Judge Richard Posner and Professor Leubsdorf is the appropriate standard to use when evaluating objections to Quick Sales because it is capable of filtering out or preventing strategic objections without harming parties with legitimate objections.

I. HOW BANKRUPTCY SALES WORK

Sections 1123(b)(4) and 363(b)(1) of the Bankruptcy Code provide independent bases for a trustee[36] to sell property of the bankruptcy

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33. *See Am. Hosp. Supply Corp.*, 780 F.2d at 594; *see also* Leubsdorf, *supra* note 32, at 541–42. This iteration of the preliminary injunction standard differs from the traditional formulation; however, its focus on error-minimization makes it ideal for the Quick Sale context. *See infra* Part IV (providing further discussion).

34. Leubsdorf, *supra* note 32, at 542.

35. *Id.* at 565.

36. For the purposes of this Article, the term "trustee" refers to either a case trustee appointed by the court or a debtor-in-possession acting as a fiduciary for the estate's creditors who has all the rights and duties of a court-appointed trustee. The Bankruptcy Code generally allows the debtor in a Chapter 11 case to remain in possession and control of the estate's assets, and imposes a fiduciary duty on the debtor-in-possession to act at the behest of the estate's creditors. *See* 11 U.S.C. § 1107(a) (2006); *see also* Schovanec, *supra* note 4, at 491 (outlining the powers entrusted to a trustee).

estate[37] outside of the ordinary course of business.[38] Passage of the Bankruptcy Reform Act of 1978 (the 1978 Act) liberalized the process by which a debtor-in-possession may use, sell, or lease property of the estate outside the ordinary course of business.[39] The 1978 Act granted bankruptcy courts enormous discretion to approve Quick Sales, even where a debtor seeks to sell all or substantially all of its assets or to sell itself as a going concern.[40] Despite this apparent discretion, bankruptcy courts have voluntarily cabined their authority to approve Quick Sales by requiring, among other things, that: (1) a sound business reason exist for the sale;[41] (2) adequate and reasonable

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37. 11 U.S.C. § 541(a) (2006) (providing that the "estate is comprised of all the following property: . . . all legal or equitable interests of the debtor in property as of the commencement of the case"); *see also* Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (holding that state law determines what constitutes "property" and "interests in property"); Butner v. United States, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."); Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (*In re* Koreag, Controle et Revision S.A.), 961 F.2d 341, 349 (2d Cir. 1992) ("[A]lthough federal bankruptcy law determines the outer boundary of what may constitute property of the estate, state law determines the 'nature of a debtor's interest' in a given item." (citations omitted)). Some courts have described § 541(a) as "expansive" in scope and that "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *In re* Yonikus, 996 F.2d 866, 869 (7th Cir. 1993) (citing *In re* Anderson, 128 B.R. 850, 853 (D.R.I. 1991)). Moreover, one of the basic objectives of Chapter 11 is the maximization of property available to satisfy creditors, thereby suggesting that "property of the estate" should be construed broadly. *See* Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 57 (2008) (Breyer, J., dissenting).

38. *See* 11 U.S.C. § 363(b) (2006) (stating that the use, sale, or lease of property of the estate that occurs in the ordinary course of business does not require judicial authorization); *see also Piccadilly Cafeterias, Inc.*, 554 U.S. at 37 n.2 (2008); Ben-Ishai & Lubben, *supra* note 1, at 596; Robert M. Fishman & Gordon E. Gouveia, *What's Driving Section 363 Sales After Chrysler and General Motors?*, 19 J. BANKR. L. & PRAC. 4 Art. 2, 1–2 (2010) (discussing the frameworks for selling outside the ordinary course of business).

39. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; *see also* Todd L. Friedman, *The Unjustified Business Justification Rule: A Reexamination of the* Lionel *Canon in Light of the Bankruptcies of Lehman, Chrysler, and General Motors*, 11 U.C. DAVIS BUS. L.J. 181, 185, 191–92 (2010) (arguing that sales may be approved if: (1) a sound business reason exists; (2) there is adequate notice to interested parties; (3) the price is fair and reasonable; and (4) the sale is conducted in good faith).

40. *See* Rose, *supra* note 11, at 249–50, 252–53 (concluding that a plain reading of the statute permits a sale of all or substantially all of a debtor's assets outside of a plan of reorganization and without complying with Chapter 11's "numerous and intricate requirements for plan confirmation"); *see also* Bodoh et al., *supra* note 23, at 4–5 (noting that the Second Circuit argued against the imposition of rigid rules for bankruptcy sales outside the ordinary course of business so long as there is an articulable business justification).

41. For example, the Second Circuit has stated that good business factors include:

> proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals

notice be given, including full disclosure of the sale terms and any insider relationships;[42] (3) the sale price is fair and reasonable;[43] and (4) the proposed buyer proceed in good faith.[44] These requirements mirror the requirements to confirm a plan of reorganization.[45]

Even so, Quick Sales are the preferred method of selling estate assets.[46] At times, debtors need to sell property of the estate very quickly to preserve the going-concern value of a business or deteriorating asset. In such cases, time is of the essence. This helps explain the preference for Quick Sales, which are "undeniably faster and less costly" than sales pursuant to a plan of reorganization.[47]

> of the property, which of the alternatives of use, sale or lease the proposal envisions and, . . . whether the asset is increasing or decreasing in value.

Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983).

42. *See, e.g.*, *In re* Naron & Wagner, Chartered, 88 B.R. 85, 88 (Bankr. D. Md. 1988) (holding that notice should inform all parties-in-interest of the sale's impact).

43. *See, e.g.*, Mission Iowa Wind Co. v. Enron Corp. (*In re* Enron Corp.), 291 B.R. 39, 43 (S.D.N.Y. 2003) (requiring the bankruptcy court to analyze whether the sale price was fair and reasonable); *In re* Channel One Commc'ns, Inc., 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990); *In re* George Wash. Chevrolet, Inc., 118 B.R. 99, 102 (Bankr. E.D. Mo. 1990); *In re* Indus. Valley Refrigeration & Air Conditioning Supplies, Inc., 77 B.R. 15, 21 (Bankr. E.D. Pa. 1987).

44. *See, e.g.*, *In re* Abbotts Dairies of Pa., Inc., 788 F.2d 143, 149 (3d Cir. 1986); *In re Indus. Valley Refrigeration*, 77 B.R. at 20–21; Friedman, *supra* note 39, at 191–92 (outlining the four-fold standard including a good faith purchase).

45. *See* 11 U.S.C. § 1125(b) (2006) (requiring a disclosure statement containing adequate information to be submitted after notice and a hearing). A plan of reorganization must also be proposed in good faith. 11 U.S.C. § 1129(a)(3) (2006); *see also* Rose, *supra* note 11, at 263 ("[C]ourts have resisted an unbridled use of nonreorganization sales" through the "emergency doctrine, the sub rosa doctrine, and the business justification test.").

46. *See, e.g.*, *In re* Chrysler LLC, 576 F.3d 108, 119 (2d Cir. 2009), *vacated as moot,* 592 F.3d 270 (2d Cir. 2010); Bay Harbour Mgt. v. Lehman Bros. Holdings, Inc. (*In re* Lehman Bros. Holdings, Inc.), 415 B.R. 77 (S.D.N.Y. 2009); *In re* Humboldt Creamery, LLC, No. 09-11078, 2009 WL 2820610, at *1–2 (Bankr. N.D. Cal. Aug. 14, 2009); *In re* Boogaart of Fla., Inc., 17 B.R. 480, 484 (Bankr. S.D. Fla. 1981) ("Where . . . the value of the assets is rapidly decreasing . . . liquidation of assets prior to the proposal and confirmation of plans of reorganization may be desirable because it will ultimately increase the amounts distributed to creditors after [liquidating] plans are confirmed."); *see also* Bodoh et al., *supra* note 23, at 9 (noting that, when asset values are declining rapidly, a delay for a plan of reorganization would be substantially harmful).

47. *See* Rose, *supra* note 11, at 26 ("[Section] 363 sales offer a drastically accelerated approval process when compared to [C]hapter 11 plan confirmation and attract debtors seeking to complete quicker and less expensive transactions."); *see also* James Patrick Shea et al., *Pushing the Limits of § 363—Is Confirmation Obsolete in the Asset Sale Case?*, 14 J. BANKR. L. & PRAC. 2 Art. 2, app. A (2005) (stating that sales are "[u]ndeniably faster and less costly" than sales pursuant to a plan of reorganization, which is a notably "[s]lower, more cumbersome process"). Other justifications for Quick Sales also exist. *See In re* Rausch Mfg. Co., 59 B.R. 501, 503 (Bankr. D. Minn. 1985) (approving sale because the buyer intended to maintain the debtor as a business entity that employed people in the community); *see also In re* Brethren Care of South Bend, Inc., 98 B.R. 927, 935 (Bankr. N.D. Ind. 1989) (holding that keeping a nursing home

This point cannot be over-emphasized. A sale of assets may need to be consummated quickly because, among other possible reasons, the assets to be sold are deteriorating rapidly in value,[48] the only willing and available purchaser is unwilling to delay the sale,[49] because debtor-in-possession financing is about to run out and no further financing is available,[50] or, for reasons specific to the individual case, there is insufficient time to allow for conversion to and liquidation under Chapter 7.[51] If the trustee cannot complete the sale quickly, it may not occur at all or it may yield a significantly lower return to the estate, harming creditors in the process.[52] In some cases, the sale of assets is the only available source of cash to fund the debtor's ongoing operations, and the failure to consummate the sale may deprive the estate of necessary working capital.[53]

If present, any of these concerns can threaten a debtor's ability to reorganize and leave the debtor-in-possession with no option but to liquidate estate assets at fire-sale prices.[54] In addition, Quick Sales allow the estate to sell assets at a price that, at least theoretically, takes into consideration the going-concern value of those assets.[55] The value of distressed companies often diminishes

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operating for its residents constituted a good business reason for approving a Quick Sale); Coastal Indus., Inc. v. IRS (*In re* Coastal Indus., Inc.), 63 B.R. 361, 368 (Bankr. N.D. Ohio 1986) (noting that hundreds of people would lose their jobs without the Quick Sale).

48. *See* supra note 10 and accompanying text; *see also* Ben-Ishai & Lubben, *supra* note 1, at 597.

49. *See, e.g.*, *In re* Chrysler LLC, 405 B.R. 84 (Bankr. S.D.N.Y. 2009), *aff'd,* 576 F.3d 108 (2d Cir. 2009); *vacated as moot,* 592 F.3d 270 (2d Cir. 2010); *In re* Thomson McKinnon Sec., Inc., 120 B.R. 301, 308–09 (Bankr. S.D.N.Y. 1990) (determining that it was appropriate to approve the sale's terms rather than risk loss of the debtor's last remaining asset).

50. *See, e.g.*, Order (A) Approving Bid Procedures Relating to Sale of Substantially All of the Debtors' Assets; (B) Scheduling a Hearing to Consider the Sale and Approving the Form and Matter of Notices; (C) Establishing Procedures Relating to Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, Including Notice of Proposed Cure Amounts; and (D) Granting Relating Relief, *In re* Eclipse Aviation Corp., No. 08-13031 (MFW) (Bankr. D. Del. Dec. 23, 2008); *In re* Brookfield Clothes, Inc., 31 B.R. 978, 986 (Bankr. S.D.N.Y. 1983).

51. *See* Bodoh et al., *supra* note 23, at 7 ("[C]onversion to [C]hapter 7 may be more expensive than a section 363 sale of substantially all of the debtor's assets."); *see also In re* Alves Photo Service, Inc., 6 B.R. 690, 694 (Bankr. D. Mass. 1980) (finding that purported savings would not offset additional costs of a Quick Sale and liquidation was an unacceptable route).

52. *In re* Naron & Wagner, Chartered, 88 B.R. 86, 90 (Bankr. D. Md. 1988); *see also* Bodoh et al., *supra* note 23, at 7 (asserting that the decrease in value of the debtor's assets would constitute a justifiable business concern for a Quick Sale).

53. *See In re* Ionosphere Clubs, Inc., 100 B.R. 670, 675–76 (Bankr. S.D.N.Y. 1989) (allowing a Quick Sale so that capital could be raised to meet financial obligations to creditors).

54. *See* Baird, *supra* note 1, at 10 ("The rule of thumb when you liquidate a company is that you realize ten percent of book value.").

55. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527–28 (1984) (considering all parties involved when determining how best to preserve the going-concern of a debtor's assets); *see also* D'Antonio v. Bella Vista Assocs., LLC (*In re* Bella Vista Assocs., LLC), No. 07-18134, 2007

quickly as key employees leave, customers cease ordering, and accounts receivable become more difficult to collect.[56] In order to maximize the going-concern value of the assets (or company) to be sold, it is often necessary to complete a sale quickly.[57] Bankruptcy judges are attuned to a debtor-in-possession's need to act quickly and often approve Quick Sales in as little as sixty to ninety days.[58]

Recognizing the need for speed, Congress enacted § 363(f) of the Bankruptcy Code, which allows a debtor-in-possession to expeditiously sell estate assets for the highest available price, and resolve controversies concerning the existence, validity, and priority of liens and other interests in the property to be sold at a later date.[59] Section 363(f) helps generate the highest possible price because it allows the debtor-in-possession to sell property of the estate free and clear of any interests in such property.[60] A free and clear sale is important to buyers who want to obtain clean title to the assets being sold—title that is unencumbered by potential liens or other claims of interest.[61] In turn, the ability to deliver an unencumbered title to property can allow the bankruptcy estate to generate a higher sale price, which maximizes the return to the estate's creditors.[62] These points help explain the preference

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WL 4555891 (Bankr. D.N.J. Dec. 18, 2007); Bodoh et al., *supra* note 23, at 11 (noting that, in some cases, delay of the sale of debtor's assets could cause a collapse of its business); Kuney, *supra* note 23, at 1282–83 (noting that the least expensive and time-consuming method of resolving bankruptcies is preferable).

56. *In re* Chrysler LLC, 576 F.3d 108, 119 (2d Cir. 2009) (characterizing such companies as "melting ice cube[s]" and noting the company's going-concern value was reduced each day it did not sell), *vacated as moot,* 592 F.3d 270 (2d Cir. 2010).

57. *See, e.g.*, *In re* Oneida Lake Dev., Inc., 114 B.R. 352 (Bankr. N.D.N.Y. 1990) (approving a § 363(b) sale where the court was persuaded that doing so would maximize the value to the estate).

58. *See* AUSTIN ET AL., *supra* note 2, at 2 (noting that orderly Quick Sales are often completed in less than sixty days); *see also In re* Gulf Coast Oil Corp., 404 B.R. 407, 420 (Bankr. S.D. Tex. 2009) (stating that the typical sale under § 363 is completed in less than ninety days).

59. *See, e.g.*, *In re Oneida Lake*, 114 B.R. at 354–56. The goal of § 363(f)(4) is to allow "the sale of property subject to dispute 'so that liquidation of the estate's assets need not be delayed while such disputes are being litigated.'" *In re Bella Vista*, 2007 WL 4555891, at *4 (citing *In re* Durango Georgia Paper Co., 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005)); *see also In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002).

60. 11 U.S.C. § 363(f) (2006). Moreover, the debtor-in-possession "often has the specialized knowledge and industry contacts, through experience or previous efforts to solicit a buyer, necessary to sell the business in a manner that realizes an amount closer to the market value." Bodoh et al., *supra* note 23, at 12.

61. *See* Collen, *supra* note 25, at 564; *see also* Rose, *supra* note 11, at 259–60 (discussing the benefits for both debtors and asset purchasers of § 363(m) in providing finality to a § 363(b) sale).

62. *See e.g.*, *In re Oneida Lake*, 114 B.R. at 356–58; *see also* Collen, *supra* note 25, at 564 (observing that avoiding liens can help the debtor realize the best sale price).

for Quick Sales, which are "undeniably faster and less costly" than sales pursuant to a plan of reorganization.[63]

Section 363(f) is a key statutory base for approving Quick Sales. Section 363(f)(4) provides that a debtor-in-possession may sell property of the estate "free and clear of any interest in such property of an entity other than the estate, only if . . . such interest is in bona fide dispute."[64] This language furthers one of the goals of § 363(f), which is to allow "the sale of property subject to dispute 'so that liquidation of the estate's assets need not be delayed while such disputes are being litigated.'"[65] Thus, this provision allows the expeditious sale of assets even when ownership is disputed.

In order to qualify for the protection afforded by § 363(f)(4), courts should require only that the debtor-in-possession demonstrate that "there is an objective basis for either a factual or legal dispute as to the validity of the asserted interest."[66] This is a low threshold and should not require a court to resolve the underlying dispute or determine the probable outcome; instead, it must only determine that a dispute exists.[67] Importantly, a "free and clear" Quick Sale allows a debtor-in-possession to return an asset quickly to productive use while ensuring a party's interests that property is adequately

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63. Shea et al., *supra* note 47, at app. A.

64. 11 U.S.C. § 363(f)(4).

65. D'Antonio v. Bella Vista Assocs., LLC (*In re* Bella Vista Assocs., LLC), No. 07-18134, 2007 WL 4555891, at *4 (Bankr. D.N.J. Dec. 18, 2007) (citing *In re* Durango Georgia Paper Co., 336 B.R. 594, 597 (Bankr. S.D. Ga. 2005)); *see also In re* Gulf States Steel, Inc. of Ala., 285 B.R. 497, 507 (Bankr. N.D. Ala. 2002).

66. *In re* Taylor, 198 B.R. 142, 162 (Bankr. D.S.C. 1996); *see also In re* Gaylord Grain L.L.C., 306 B.R. 624 (B.A.P. 8th Cir. 2004) (defining "*bona fide* dispute" in similar terms); *In re Bella Vista*, 2007 WL 4555891, at *4; *In re* Downour, No. 06-30854, 2007 WL 963258, at *1 (Bankr. N.D. Ohio Mar. 28, 2007); *In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *10 (Bankr. D.N.J. June 29, 2006) (noting that the Bankruptcy Code does not define "*bona fide* dispute"); *In re Gulf States Steel*, 285 B.R. at 507 (holding that the trustee has the burden to prove the existence of a bona fide dispute); Kuney, *supra* note 28, at 247 n.44 (noting that most courts consider whether a "bona fide dispute" exists under the objective test and "that the 'subjective' test of *In re* Johnston Hawks, Ltd., 49 B.R. 823 (Bankr. D. Haw. 1985) has been largely discarded.").

67. *In re Downour*, 2007 WL 963258, at *1. Courts generally have not required a party to commence an action, but merely require that a debtor-in-possession make a prima facie showing that a dispute exists and that such dispute could be meritorious. *See In re Gaylord Grain*, 306 B.R. at 628; *see also In re* DVI, Inc., 306 B.R. 496, 503–04 (Bankr. D. Del. 2004) (holding that even if the debtor arguably held the creditor's property in constructive trust, the existence of a bona fide dispute permits the property to be sold under § 363(f)(4)); *In re Oneida Lake* 114 B.R. at 358 (holding that § 363(f)(4) is satisfied "even though the Debtor has not as yet commenced the adversary proceeding" to avoid the creditor's lien); Collen, *supra* note 25, at 574–75 ("[O]nce a party states that it disputes a lien, it follows tautologically that the lien is 'in dispute.'").

protected.[68] By quickly returning assets to productive use, Quick Sales provide both a social and a private benefit.[69]

Unfortunately, courts have often misconstrued § 363(f).[70] For example, courts have disagreed as to whether a dispute as to ownership can qualify as a bona fide dispute within the meaning of § 363(f)(4) and whether the dispute must relate to the "validity or existence of an interest" or only to the amount of the lien or other claimed interest.[71] As a result, courts sometimes allow such disputes to delay Quick Sales.[72] The reason that courts misconstrue § 363(f) so frequently is not because confusion exists about whether an ownership dispute can qualify as a bona fide dispute within the meaning of § 363(f)(4), but whether the courts can resolve ownership disputes within the contested-matter framework at all.[73]

The ability to rapidly conclude an asset sale enables a debtor-in-possession with limited resources to sell its business as a going concern and thereby preserve value.[74] Quick Sales are often more advantageous vehicles for debtors-in-possession seeking to sell estate assets than sales consummated pursuant to a plan of reorganization.[75] One chief advantage is that, after providing the requisite notice and opportunity for a hearing, these out-of-plan sales require only court approval to proceed, rather than going through the more time-consuming plan confirmation process.[76] Because plan confirmation is not required for a Quick Sale, a court can often complete Quick Sales in less than sixty days.[77]

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68. *See* Kuney, *supra* note 28, at 248.

69. *Id.* "Free and clear" sales are "an expeditious method to clear title to a disputed asset" that provide a social benefit through economic efficiency without material harm to property owners because sale orders generally provide for replacement liens on the proceeds of the sale. *Id.*

70. *See, e.g.*, Moldo v. Clark (*In re* Clark), 266 B.R. 163, 171–72 (9th Cir. 2001); Darby v. Zimmerman (*In re* Popp), 323 B.R. 260, 266 (B.A.P. 9th Cir. 2005).

71. *See supra* note 27 and accompanying text.

72. *See infra* Part III.

73. *See In re* Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990) (holding that claim allowance and lien valuation do not place in issue the basis of the lien itself, unlike a dispute as to the "validity, priority, or extent of a lien" where the former may be resolved by motion and the latter can only be resolved in an adversary proceeding.); *see also* Collen, *supra* note 25, at 563.

74. *See In re* Gulf Coast Oil Corp., 404 B.R. 407, 420 (Bankr. S.D. Tex. 2009) (noting that § 363 sales are commonly completed in less than ninety days); *see also* AUSTIN ET AL., *supra* note 2, at 2 (stating that sales are often completed within sixty days of the petitioning date).

75. *See* supra note 47 and accompanying text.

76. *See* Jackson, *supra* note 23, at 461–62 (noting that the plan confirmation process may span several years); *see also* Rose, supra note 11, at 250 (arguing that Quick Sales are "attractive to debtors because of their ease, speed[,] and finality"); Jessica Uziel, Comment, *Section 363(b) Restructuring Meets the Sound Business Purpose Test with Bite: An Opportunity to Rebalance the Competing Interest of Bankruptcy Law*, 159 U. PA. L. REV. 1189, 1191 (2011).

77. *See supra* note 74 and accompanying text.

II. QUICK SALES AND BANKRUPTCY PROCEDURE

Bankruptcy litigation generally occurs along one of two procedural tracks: one quick and one slow.[78] The vast majority of bankruptcy litigation, including contested Quick Sales, occurs within the expeditious contested-matter procedural framework.[79] In contrast to adversary proceedings, which are similar to civil actions in federal district court and require the filing of a complaint, answer, counterclaim, crossclaim, and third-party practice,[80] the contested-matter procedural framework dispenses with such requirements in favor of a simple motion procedure.[81] Under the contested-matter procedural framework, notice of a Quick Sale need only be given twenty-one days before a hearing and, if no objection is received, the court may enter an order approving the sale without a hearing.[82] In appropriate cases, the bankruptcy court may shorten this already brief notice period even further.[83]

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78. Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 38–39 (2001) (outlining both adversary proceedings and contested matters generally).

79. *See* FED. R. BANKR. P. 6004; *see also* FED. R. BANKR. P. 9014 advisory committee's note ("Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter."); Klein, *supra* note 78, at 39 (arguing that contested matters are, "by a wide margin, the most common form of bankruptcy litigation"); Robert W. Lawless, *Realigning the Theory and Practice of Notice in Bankruptcy Cases*, 29 WAKE FOREST L. REV. 1215, 1272 (1994) ("The bankruptcy rules require that a debtor move for a 'free and clear' sale as a contested matter.").

80. SLW Capital, LLC v. Janica Mansaray-Ruffin (*In re* Mansaray-Ruffin), 530 F.3d 230, 234 (3d Cir. 2008) ("An adversary proceeding is essentially a self-contained trial—still within the original bankruptcy case—in which a panoply of additional procedures apply."). An adversary proceeding employs essentially the same rules of procedure as a federal civil action, but it is tried in the federal bankruptcy court instead. Klein, *supra* note 78, at 38. Like a federal civil case, the filing of a complaint and serving of a summons, which defendants must answer, initiates adversary proceedings. *In re* Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990). After the defendant responds, pretrial procedure begins, followed by discovery and formal trial. An adversary proceeding concludes with judgment or with dismissal. *See, e.g.*, *id.*; *see also* Klein, *supra* note 78, at 38–39.

81. *See* Klein, *supra* note 78, at 44 n.53 (noting that an answer is required in adversary proceedings but not in contested matters); *see also* Johnson v. TRE Holdings LLC (*In re* Johnson), 346 B.R. 190, 195 (B.A.P. 9th Cir. 2006) (discussing whether filing of an in rem order acts as a stay of proceedings).

82. FED. R. BANKR. P. 2002(a), (f); *see also* Judith Greenstone Miller & Marc M. Bakst, *Sales of Real Estate and Other Property of Bankruptcy Estates Under the Revised Local Bankruptcy Rules of the U.S. Bankruptcy Court for the Eastern District of Michigan*, 26 MICH. REAL PROP. REV. 19, 20 (1999).

83. FED. R. BANKR. P. 6004(d) (permitting the court to enter an order of sale of property under $2,500 if no objection is filed within fifteen days of notice).

The contested-matter framework offers a more streamlined process compared to the adversary proceeding framework.[84] For example, Professors Douglas Baird and Edward Morrison found that the average length of an adversary proceeding in the Bankruptcy Court for the Northern District of Illinois—from time of filing until resolution—has varied from about ten months in 1993 to about seven-and-a-half months in 2002.[85] In contrast, courts almost always resolve contested matters more expeditiously and at a lower cost.[86] The differences are stark. As such, bankruptcy courts should carefully scrutinize attempts by creditors to force any matter out of the contested-matter framework and into the adversary proceeding framework.

A company's size or the nature of the assets being sold does not determine the choice of whether to proceed along the fast or slow tracks. Even very large companies can be sold in "blindingly fast" fashion.[87] The debtor may even sell its entire business as a going concern.[88] One example, *In re Lehman Brothers Holdings Inc.*, is one of the largest bankruptcy cases ever filed. In that case, the debtors filed for bankruptcy in September 2008, listing assets in excess of \$630 billion.[89] Within one week, Barclays purchased substantially all of the debtors' assets and most of its liabilities.[90] The Lehman estate and Barclays subsequently litigated a number of issues, but the sale was not delayed while the numerous points of contention were concluded in a separate adversary proceeding.

84. *See* Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 951–52 (2005); *see also* Ericka F. Johnson, *Due Process and 363 Sales of Consignment Goods*, ABI COMMITTEE NEWS (Nov. 2008), *http://www.abiworld.org/committees/newsletters/Young/vol6num4/due.html* (noting that adversary proceedings, because of their foundation in the Federal Rules of Civil Procedure, cause many cases to take months to resolve).

85. *See* Baird & Morrison, *supra* note 84, at 966.

86. *See* Lubben, *supra* note 12, at 840 ("Today's [C]hapter 11 is a swift, market-driven process that quickly moves troubled companies into more capable hands."); *see also* Shea, *supra* note 47, at app. A.

87. *See* Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 728 (2010) (noting that Chrysler recently completed its trip through Chapter 11 in "blindingly fast" fashion); *see also* Rose, *supra* note 11, at 269.

88. *See, e.g.*, Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 58 (2008) (Breyer, J., dissenting); *In re* General Motors, 407 B.R. 463, 493 (Bankr. S.D.N.Y. 2009), *aff'd,* 430 B.R. 65 (S.D.N.Y. 2010).

89. *See* Bay Harbour Mgt., L.C. v. Lehman Bros. Holdings, Inc. (*In re* Lehman Bros. Holdings, Inc.), 415 B.R. 77, 79 (S.D.N.Y. 2009); *see also* David Teather et al., *Barlcays to Buy Lehman Brothers Assets*, THE GUARDIAN (Sept. 16 2008), http://www.guardian.co.uk/business/2008/sep/16/barclay.lehmanbrothers1 ("Lehman listed assets of \$639bn, making it the biggest bankruptcy filing ever, 10 times the size of the energy firm Enron when it went bust in late 2001.").

90. *In re Lehman Bros. Holdings*, 415 B.R. at 82.

Section 363(b) allows a debtor to sell property of the estate by filing a sale motion with the court.[91] FRBP 7001(2) requires that a debtor-in-possession commence an adversary proceeding to "determine the validity, priority, or extent of [an] interest in property."[92] Parties-in-interest have seized on the apparent tensions between the Code and the FRBP to assert that the property cannot be sold until the debtor's interest in it is determined in an adversary proceeding.[93] Some courts have found such arguments persuasive.[94] These courts have refused to approve Quick Sales until the debtor has proven that the property to be sold is "property of the estate."[95]

Courts that have halted the Quick Sale process to require adversary proceedings have typically done so because they believe FRBP 7001(2) requires that an adversary proceeding be commenced to "determine the validity, priority, or extent of [an] interest in property."[96] Such courts are correct that FRBP 7001(2) requires an adversary proceeding, but they are incorrect as to when the determination of the extent of the debtor's interest must occur.[97] The determination may, but need not, precede the consummation of a Quick Sale, particularly when the failure to sell estate assets quickly may have significant deleterious effects on the estate and its creditors.[98] Such courts appear to take an unduly narrow view of when ownership interests may be resolved.[99]

Rather than requiring a pre-sale adversary proceeding to resolve such objections, courts should consider, as some already do, the question of what constitutes "property of the estate" as a "threshold question," which may be addressed within the contested-matter procedural framework.[100] This

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91. 11 U.S.C. § 363(b) (2006).

92. *See supra* note 16 and accompanying text.

93. *See, e.g.*, Federico v. McGranahan (*In re* Federico), No. 08-2182, 2009 WL 2905855, at *2–3 (E.D. Cal. Sept. 8, 2009) (dismissing plaintiffs' argument that sale orders issued without an adversary proceeding were void); *In re* Whitehall Jewelers Holdings, Inc., No. 08-11261, 2008 WL 2951974, at *6–7 (Bankr. D. Del. July 28, 2008).

94. *See In re* DVI, Inc., 306 B.R. 496, 501–02 (Bankr. D. Del. 2004) (explaining the majority and minority views of courts on this issue).

95. *Id.* at 504.

96. *See supra* note 16 and accompanying text.

97. *See, e.g.*, *In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *10 (Bankr. D.N.J. June 26, 2006) (finding that the court need only determine if a dispute *exists*).

98. *See* Eisenberg & Gecker, *supra* note 21, at 90 (recognizing congressional support for ex post hearings in limited emergency circumstances).

99. This is particularly true because many asserted rights can be appropriately addressed post-sale.

100. *See In re* Balco Equities Ltd., 323 B.R. 85, 92 (Bankr. S.D.N.Y. 2005) (allowing the sale but requiring the proceeds to be held in escrow until the objecting party's property interest was determined in an adversary proceeding); *see also In re* Petition of KPMG, Inc., 284 B.R. 765, 769 (Bankr. W.D.N.Y. 2002) ("Expeditiousness for the benefit of the estate in such instances sometimes requires a 'contested matter' approach to the threshold question of whether the

interpretation is supported by a review of the Bankruptcy Rules, which were amended to clarify that "an adversary proceeding is not required to effect [a] sale."[101] Bankruptcy Rules 6004(c) and 9014 clarify "whatever confusion existed under former Rule 701, which categorized a sale of property free and clear as an adversary proceeding, and successor Rule 7001, which did not specify such a sale as an adversary proceeding."[102] Furthermore, the legislative history of the Bankruptcy Act bolsters this interpretation.[103]

Additionally, a prior determination of the "validity, priority, or extent" of the estate's interest in property is unnecessary in the Quick Sale context because § 363(e) requires interested parties in a Quick Sale be provided "adequate protection."[104] By providing an objecting party with adequate protection, the debtor protects that party in the event that the court later determines that the objecting party had some interest in the property that was sold. Even though a Quick Sale does not fully and finally determine the "validity, priority, or extent of [that] interest in property," providing adequate protection ensures that the objecting party will be minimally affected by a Quick Sale.[105] Therefore, a pre-sale adversary proceeding is not required when an objecting party has received adequate protection.[106] In addition, § 363(b) itself further undermines the supposed need for a pre-sale proceeding by allowing the debtor to sell "property of the estate" by motion.[107] This right would be sharply limited if

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asserted adverse interest rises to the level entitled to Rule 7001 'Adversary Proceeding' protections to accord Due Process."). *But see* Moldo v. Clark (*In re* Clark), 266 B.R. 163, 171–72 (9th Cir. 2001) (explaining that the court must decide the "threshold question" of whether the property to be sold is property of the estate before the trustee can sell the disputed property free and clear of liens and interests); *see also* Darby v. Zimmerman (*In re* Popp), 323 B.R. 260, 266 (B.A.P. 9th Cir. 2005) (remanding the case to bankruptcy court to determine "property of the estate," which the Ninth Circuit said should have been decided before the proceeding).

101. *See* Nathan M. Eisler, *Section 363—Use, Sale or Lease of Property*, 1988 ANN. SURV. OF BANKR. LAW 349, 359 (1988); *see also* Robin E. Phelan & Susan L.S. Ernst, *Solomon's Capitulation: Current Developments Regarding the Automatic Stay, Adequate Protection and the Use of Collateral*, 426 PLI/Comm 157, 300 (1987).

102. *See* Eisler, *supra* note 101, at 359.

103. 124 Cong. Rec. 32392 (1978) (statement of Rep. Don Edwards) (remarking that, in limited emergency situations, an action will be required before a hearing is appropriate, but that a full hearing will be available after the fact); 125 Cong. Rec. 33993 (1978) (statement of Sen. Dennis DeConcini) (citing Representative Edwards' remarks on pretrial actions).

104.

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e) (2006).

105. FED. R. BANKR. P. 7001(2).

106. *Id.*

107. 11 U.S.C. § 363(b).

the courts required a debtor-in-possession to initiate an adversary proceeding to resolve every objection to the sale.

III. OBJECTIONS TO QUICK SALES

Bankruptcy laws attempt to balance the numerous competing interests and policy objectives that exist in large corporate bankruptcy cases.[108] A common result is that certain sections of the Bankruptcy Code and the FRBP consider how to harmonize competing demands within the context of a particular case. Bankruptcy courts repeatedly confront the tension between promoting expeditious resolution of cases and providing sufficient procedural protections to parties. For example, § 363 and case law interpreting that section demonstrate that bankruptcy courts are concerned with maximizing the value of the bankruptcy estate by quickly converting distressed estate assets into a readily distributable fund for creditors; however, they are also tasked with ensuring that all affected parties-in-interest receive adequate procedural protection for their legitimate interests in the Quick Sale.[109] The twin goals of § 363 often appear to suggest different courses of action.

Sales concluded pursuant to a plan of reorganization are often too slow to respond to the business realities of many situations because of the lengthy delays inherent in the process of plan confirmation itself.[110] The length of the process does not generally relate to the sale of assets. The plan confirmation process is long because of the procedural requirements, such as soliciting votes on a plan of reorganization[111] and plan confirmation hearings.[112]

Section 363 sales require none of these delays. The ability to rapidly conclude a sale is one of the reasons Quick Sales have become so popular in recent years.[113] Debtors frequently suggest that it is imperative for the

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108. *See* Lawless, *supra* note 79, at 1216 (noting the unique power of bankruptcy courts to bind disparate interests).

109. The bankruptcy laws are not necessarily equivalent to constitutional requirements. Sometimes they provide more than is required and, at other times, they fail to withstand constitutional scrutiny. *Compare* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378 (2010) (concluding that actual notice, even absent service of a summons and a complaint, satisfied due process), *with* Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011) (finding that the bankruptcy court exceeded its constitutional authority when it issued a final judgment on a "non-core" proceeding).

110. *See* Jackson, *supra* note 23, at 461–62 (noting that the plan confirmation process may span several years); *see also* Uziel, *supra* note 76, at 1191 (suggesting that Quick Sales are streamlined because they avoid confirmation by various creditors).

111. 11 U.S.C. § 1125 (2006).

112. 11 U.S.C. § 1128 (2006).

113. *See* Ben-Ishai & Lubben, *supra* note 1, at 596–97; *see also* Eisenberg & Gecker, *supra* note 21, at 86–88 (recognizing that non-plan sale hearings generally require "fast attention, but a hearing in a few days to a week will [normally] suffice"); David A. Skeel, Jr., *Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare*, 2009 MICH. ST. L.

bankruptcy courts to sell some or all of their assets quickly[114] and they have often succeeded in convincing courts to approve a Quick Sale by likening their assets to a "melting ice cube" and claiming there was "no time to spare" in approving a sale of the estate's assets.[115]

However, even if there is "no time to spare," it is always the case that courts must afford parties-in-interest the procedural protections necessary to safeguard their legitimate rights.[116] At a minimum, due process requires affording parties-in-interest notice of the proposed sale and the opportunity to be heard.[117] Further protection may also be warranted, such as closely scrutinizing the proffered "business judgment" of the debtor-in-possession or loosening restrictions found in bid-procedure orders to encourage more robust bidding.[118] However, affording parties-in-interest the appropriate degree of procedural protection should not usually require debtors to initiate an adversary proceeding in order to complete a Quick Sale.

A. Objections Other than Those Requesting an Adversary Proceeding

Generally, objections that can be resolved within the contested-matter procedural framework are less troublesome because they are less likely to cause significant delay.[119] Thus, they are usually not objections made for strategic purposes. For example, parties-in-interest might object to a sale because they believe that the procedures for bidding on the estate's assets are

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REV. 1187 (comparing the bankruptcy proceedings of Lehman Brothers with Chrysler and General Motors).

114. *See* Skeel, *supra* note 113, at 1189, 1199 (citing Chrysler's bankruptcy proceeding as an example of the urgency asserted by companies in court).

115. *See, e.g.*, Ind. State Police Pension Trust v. Chrysler, LLC (*In re* Chrysler LLC), 576 F.3d 108, 119 (2d Cir. 2009) ("Chrysler fit the paradigm of the melting ice cube."), *vacated as moot,* 592 F.3d 270 (2d Cir. 2010); *In re* Humboldt Creamery, LLC, No. 09-11078, 2009 WL 2820610, at *1–2 (Bankr. N.D. Cal. Aug. 14, 2009); *see also* Skeel, *supra* note 113, at 1199 (discussing the "melting ice cube" theory and the "no time to spare" narrative).

116. When an objecting party claims that the potential sale price for the debtor's assets is likely to be too low because of insider dealing or a lack of good faith, courts have generally scrutinized such transactions more closely and required a heightened level of disclosure. *See, e.g.*, Mission Iowa Wind Co. v. Enron Corp. (*In re* Enron Corp.), 291 B.R. 39, 43 (S.D.N.Y. 2003); *see also* Rose, *supra* note 11, at 261.

117. 11 U.S.C. § 102(1)(A) (2006) (requiring "such notice as is appropriate in the particular circumstances"). In some cases, "appropriate notice would be the functional equivalent of information that would be included in a disclosure statement." Rose, *supra* note 11, at 261 (citing *In re* Naron & Wagner, Chartered, 88 B.R. 85, 89 (Bankr. D. Md. 1988)). Heightened notice may be appropriate particularly when, as in *In re Naron & Wagner*, the debtor seeks to sell substantially all of its assets in a private sale to insiders, and where the proposed purchase price is sufficient only to pay off an asserted claim and nothing would pass through to other creditors. *Id.* at 88.

118. *See, e.g.*, *In re Enron Corp.*, 291 B.R. at 43 (remanding the case to bankruptcy court for failing to scrutinize the debtor's business judgment).

119. Eisenberg & Gecker, *supra* note 21, at 92–93.

too restrictive and will inhibit bidding, resulting in a below-market price.[120] They might also object because the proposed purchase price for the assets or the price they are expected to fetch at auction is too low.[121] It is also common for parties-in-interest to object to a Quick Sale claiming that a secured creditor is attempting to force through a sale too quickly and that a more fulsome (and longer) process would serve to maximize value for the estate.[122] Unsecured or subordinated creditors commonly assert that the secured creditors are pressuring the debtor to accept the first offer that exceeds the amount the secured creditors are owed, even though that offer is below the assets' "true value," thereby limiting the recovery of subordinate creditors.[123]

Standard bid and sale procedure orders already provide creditors substantial protection and are approved almost universally in Quick Sale cases.[124] Typical orders require the identification of an initial "stalking horse" bidder and provide for the solicitation of competing bids and a public auction.[125] To encourage the initial bidder to invest sufficient energy and resources to make the highest possible bid for the debtor's assets, bid-procedure orders usually allow the debtor-in-possession to pay the reasonable expenses of the stalking horse in formulating its initial bid.[126] As an added incentive, bid-procedure orders commonly provide for the payment of a break-up fee of between one

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120. *See* LoPucki & Doherty, *supra* note 1, at 37–39.

121. *Id.* (concluding that bankruptcy sales typically realize a fraction of the going-concern value of a company and that reorganization of such companies would typically result in greater rates of recovery for creditors). When issues of insider dealings or lack of good faith are raised, courts normally scrutinize the proffered business judgment of the debtor-in-possession more closely. *See, e.g.*, *In re Enron Corp.*, 291 B.R. at 43; *see also* Rose, *supra* note 11, at 261.

122. In *In re Lionel Corp.*, the court made it clear that the appeasement of a major creditor was not a sufficient business justification to sell assets pursuant to § 363(b). Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1070–72 (2d Cir. 1983); *see also In re* Fremont Battery Co., 73 B.R. 277, 279 (Bankr. N.D. Ohio 1987) (finding no justifiable business reason for authorizing a debtor's proposed sale because, among other reasons, it would benefit only one creditor). Some academics have suggested that the bankruptcy courts have corrupted themselves in an attempt to compete for large bankruptcy cases, and, as a result, Quick Sales providing unjustifiably small recoveries are regularly, but inappropriately, approved. *See* LoPucki & Doherty, *supra* note 1, at 39–41.

123. *In re* Bos. Generating, LLC, 440 B.R. 302, 333–34 (Bankr. S.D.N.Y. 2010); Baird, *supra* note 1, at 19 ("Because they do not gain from postponing a sale and face all the downside if things go worse than expected, the secured creditors have an incentive to force through a speedy sale.").

124. One of the most common ways to resolve these types of objections is to weaken the protections offered in those orders to the initial bidder, usually referred to as the "stalking horse" bidder. *See* Robert G. Sable et al., *When the 363 Sale Is the Best Route*, 15 J. BANKR. L. & PRAC. 2 Art. 2, 4–5 (2006) (describing tools that debtors use to encourage initial bidders, or "stalking horses," such as covering costs of due diligence and document preparation).

125. Ben-Ishai & Lubben, *supra* note 1, at 597 (suggesting that the bidding procedures establish a structure for soliciting bids and an auction if competing bids are received).

126. *See* Sable et al., *supra* note 124, at 4–5.

and three percent of the purchase price in the event that an alternative bidder wins at auction.[127] Other common provisions include overbid requirements, minimum bid increments, and a requirement that all bids conform to the initial bid.[128] In addition to protecting the stalking horse, however, these provisions can potentially chill bidding because they require any alternative bidders to top the stalking horse's bid by at least those amounts.[129] Therefore, a common solution to sale objections of the sort mentioned above is to weaken the protections offered to the stalking horse bidder.[130] Nevertheless, where the estate's assets have been marketed sufficiently, appropriate bid protections can provide assurance to the bankruptcy judge that enough was done to achieve the best price.[131] If the assets have not been marketed sufficiently, the court may need to delay an auction to generate sufficient interest in the assets and ensure that the debtor obtains the best available price for its assets.[132]

By eliminating overbid requirements and other assorted bid protections, a bid-procedure order can be sufficiently modified to encourage more active bidding for the estate's assets.[133] In addition, such orders often provide creditors with the ability to credit bid[134] or to submit competing bids.[135] When coupled with an aggressive and extensive pre-sale marketing campaign, such efforts are generally found sufficient to establish that the debtor has obtained the best available price for its assets.[136] Such efforts may also be sufficient to

127. *See* Ben-Ishai & Lubben, *supra* note 1, at 601 n.47 (citing Pam Huff, *Court-Supervised Mergers and Acquisitions Opportunities for Knowledgeable Buyers in Distressed Markets*, BLAKES (Oct. 16, 2007), *available at* http://www.blakes.com/English/view_disc.asp?ID=1813); *see also* Sable et al., *supra* note 124, at 4–5.

128. Ben-Ishai & Lubben, *supra* note 1, at 601.

129. Michael S. Haber, *Asset Dispositions in a Bankruptcy Case: Guidelines for the Successful Stalking Horse*, TRUST THE LEADERS (2004), http://www.sgrlaw.com/895.

130. *See* Sable et al., *supra* note 124, at 4–5.

131. *See In re* Bos. Generating, LLC, 440 B.R. 302, 324 (Bankr. S.D.N.Y. 2010) (finding that a "heavily marketed" sale with informed buyers ensured fair value).

132. *See* Baird, *supra* note 1, at 25 ("[I]f the secured creditor has done too little [to market the assets] before bankruptcy, allowing it to jam through a sale is inherently problematic.").

133. *See id.* at 10–11 (criticizing the procedures adopted in the *Chrysler* bankruptcy cases for not doing enough to affirmatively welcome non-conforming bids that contemplated liquidating the company).

134. *See* 11 U.S.C. § 363(k) (2006).

135. Ben-Ishai & Lubben, *supra* note 1, at 597.

136. *See, e.g.*, *In re Bos. Generating, LLC*, 440 B.R. at 324 (finding that a "heavily marketed" sale with informed buyers ensured fair value); D'Antonio v. Bella Vista Assocs., LLC (*In re* Bella Vista Assocs., LLC), No. 07-18134, 2007 WL 4555891, at *14 (Bankr. D.N.J. Dec. 18, 2007) (finding a widely publicized auction is sufficient to establish that fair value has been paid); Coastal Indus., Inc. v. IRS (*In re* Coastal Indus., Inc.), 63 B.R. 361, 369 (Bankr. N.D. Ohio 1986); *see also* Baird, *supra* note 1, at 25 (concluding that, when a firm has been shopped and all options explored, extensive bankruptcy procedures posed by secured creditors are unnecessary).

demonstrate that objecting parties are not irreparably harmed by the sale.[137] Therefore, instead of delaying the sale, the most common type of Quick Sale objections can be resolved appropriately by modifying the bid-procedure order to encourage more active bidding, which helps to ensure that the assets are sold for their market value.[138]

A common variation on the objection that secured creditors are attempting to rush through a sale at below-market prices is a parties-in-interest's claim that the value of the estate would be maximized by selling the property at a later date, when, for example, the market for the asset to be sold has improved.[139] Objectors often suggest that the debtor is being shortsighted by not waiting for that improvement to occur.[140]

These objections are often grounded in the perception that the secured creditors have too much influence over the debtor.[141] Indeed, secured creditors often do hold significant sway over a debtor, particularly if they have provided the debtor-in-possession financing on which the debtor is relying or if they have liens on the debtor's cash collateral.[142] And it may be true that a Quick Sale will be detrimental to the junior parties, but it is unclear that better options are available.[143]

As noted above, when cash begins to run short, the most important issue is whether the debtor can afford to delay and who should fund any ongoing losses during that delay.[144] As a practical matter, a business that hopes to take advantage of its going-concern value needs to remain a going concern. The business needs to fund the expenses forcontinuing its operations, and will normally need to use its cash collateral to do so. A debtor's cash reserves are

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137. *See* Baird, *supra* note 1, at 27–28.

138. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle Street P'ship, 526 U.S. 434, 457 (1999) ("[T]he best way to determine value is exposure to a market."); *see also* Baird, *supra* note 1, at 10–12.

139. *See, e.g.*, *In re* Bos. Generating, LLC, 440 B.R. 302, 316 (Bankr. S.D.N.Y. 2010) (asserting that the debtors were "selling their assets at an inopportune time" because they were motivated by the "improper purpose of securing tax benefits for a non-Debtor parent entity").

140. *See, e.g.*, *id.* at 328 n.24 (providing reasons why the sale should be delayed).

141. *See* Baird, *supra* note 1, at 25 (describing the control the secured creditor has in such situations).

142. *Id.* at 18–19. The days in which the "old managers of a financially distressed business called the shots" is long past. *Id.* at 18. These days, "secured creditors begin to control the governance of the business" well in advance of any bankruptcy filing. *Id.* at 18–19 (citing "a growing body of empirical work on this issue").

143. *Id.* at 19. The costs of a sale at fire-prices are borne by the junior investors; however, because secured creditors bear the risk of asset depreciation caused by delay, it is not clear that a court should prefer the junior creditors' interests over those of senior creditors. *See* Baird, *supra* note 1, at 19.

144. AUSTIN ET AL., *supra* note 2, at 8; *see also In re* Gen. Motors Corp., 407 B.R. 463, 490 (Bankr. S.D.N.Y. 2009) (noting that one factor in whether to approve a Quick Sale is whether there is material risk that by deferring the sale, "the patient will die on the operating table").

normally subject to its senior lenders' security interests, and the Bankruptcy Code severely limits a judge's ability to authorize the use of encumbered cash without the secured creditors' consent.[145] Sophisticated secured creditors often refuse to consent unless the bankruptcy judge approves a proposed Quick Sale on the secured creditors' terms.[146] It may simply be impossible to devise procedures that adequately protect the secured creditors' priority position and their right to control the use of their collateral, while also protecting the junior creditors' position by ensuring that estate assets are sold for the highest theoretically available price.[147]

B. Objections That the Property To Be Sold Is Not "Property of the Estate"

The most potent objection to a sale is that the property to be sold is not "property of the estate." In other words, the objecting party may claim that the property is not the debtor's to sell. These objections are potentially potent because objectors usually urge the court to require the debtor-in-possession to commence a pre-sale adversary proceeding to determine the extent of the estate's interest, if any, in the property to be sold.[148] Objections of this sort seek to convince the court to move the Quick Sale from the expedient procedures that accompany contested matters to stop allowing the debtor to use the expedient procedures that accompany contested matters and instead use the more cumbersome adversary proceeding track.[149] These objections threaten to delay the sale while ownership issues are litigated in an adversary proceeding, which can potentially impose tremendous costs on other creditors of the estate.[150]

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145. *See* 11 U.S.C. § 364(d)(1) (2006).

146. *See* Baird, *supra* note 1, at 19–20 (asserting that judges prefer this rather than having the case "explode into thousands of contentious lawsuits over the wreckage that follows in the wake of a piecemeal liquidation").

147. *See Id.* at 20 (discussing the importance of protecting the junior investors while ensuring that the senior creditors are paid in full); *see also In re Gen. Motors*, 407 B.R. at 490 (noting that a Quick Sale may be appropriate where: (1) the estate lacks the liquidity to survive until plan confirmation; (2) the sale opportunity may not still exist at the time of plan confirmation and a satisfactory alternative sale opportunity or stand-alone plan alternative that is equally desirable may be unavailable; and (3) there is "a material risk that by deferring the sale, the patient will die on the operating table").

148. *See, e.g.*, *In re* Whitehall Jewelers Holdings, Inc., No. 08-11261, 2008 WL 2951974, at *4 (Bankr. D. Del. Jul. 28, 2008); *see also In re* Interiors of Yesterday, LLC, No. 02-30563LMW, 2007 WL 419646, at *6 (Bankr. D. Conn. Feb. 2, 2007).

149. *See, e.g.*, *In re Interiors of Yesterday*, 2007 WL 419646, at *6; *In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *11 (Bankr. D.N.J. June 29, 2006); *In re* Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990).

150. *In re Whitehall Jewelers*, 2008 WL 2951974, at *7 (noting that the debtors would need to commence more than 120 adversary proceedings in order to resolve ownership claims involving the disputed property).

If an estate's assets are deteriorating rapidly in value, the mere threat of delay can be powerful because even a minor delay can jeopardize a tremendous amount of value for the estate's other creditors.[151] For example, if the debtor has obtained only enough debtor-in-possession financing to conclude a relatively expedient sale process, a short delay could jeopardize the debtor's ability to reorganize.[152] A debtor-in-possession lender demanding the debtor conclude an asset sale on an aggressive timeline is unlikely to fund ongoing (and often money-losing) operations while the debtor resolves the ownership claims of third-parties in an adversary proceeding.[153] And even if a debtor-in-possession was willing to extend additional funds, the lender is normally entitled to repayment of those sums ahead of other creditors of the estate.[154] Given the foregoing, it is a significant cause for concern that the bankruptcy courts sometimes allow creditors to delay the Quick Sale process.[155]

In some cases—even after the debtor made a prima facie[156] showing that the property is property of the estate—courts have refused to approve the Quick Sale.[157] In other cases, despite the existence of a bona fide dispute within the meaning of § 363(f)(4), some courts have delayed a Quick Sale and forced the debtor-in-possession to initiate multiple adversary proceedings to resolve the disputed ownership claims before the sale.[158] Yet, on similar facts, courts have

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151. *See, e.g.*, Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 58 (2008) (Breyer, J., dissenting).

152. *Id.* (noting that an immediate sale opens up funds for reorganization); *see also* AUSTIN ET AL., *supra* note 2, at 3 (noting that some businesses may shut-down if they are delayed in selling assets).

153. AUSTIN ET AL., *supra* note 2, at 2. In the recent economic downturn in the United States, debtor-in-possession financing became noticeably more difficult to obtain, and, even where it was available, the lender often used "the provision of DIP financing to influence the timeline and outcome of the [C]hapter 11 case." *Id.* at 2.

154. *See, e.g.*, 11 U.S.C. §§ 364(c), (d) (2006).

155. *See, e.g.*, *In re Whitehall Jewelers*, 2008 WL 2951974, at *7; *see also* Darby v. Zimmerman (*In re* Popp), 323 B.R. 260, 269 (B.A.P. 9th Cir. 2005) (concluding the purchaser "took the entire risk that the estate did not have good title—or, for that matter, *any* title" to sell). At least one other court has allowed the sale of property via quitclaim deed specifically because the debtor was selling only its interest, to the extent it had one, and did not specifically warrant that it had any interest to convey. Gorka v. Joseph (*In re* Atlantic Gulf Communities, Corp.), 326 B.R. 294, 301 (Bankr. D. Del. 2005). In addition, the court in *In re Balco Equities Ltd.* expressed no concerns similar to those expressed by the *Popp* court when it held that the trustee could sell real property purportedly owned by the debtor subject to a third party's alleged lien. 323 B.R. 85, 92 (Bankr. S.D.N.Y. 2005). The court required only that the proceeds be held in escrow as adequate protection for the objecting party until the court resolved the adversary proceeding addressing the third party mortgagee's claimed interest in the land. *Id.*

156. *See supra* note 26 and accompanying text.

157. *See, e.g.*, *In re* Coburn, 250 B.R. 401, 403–04 (Bankr. M.D. Fla. 1999).

158. *See, e.g.*, *In re Popp*, 323 B.R. at 270 (holding that a bankruptcy court must determine who owns the property before it is sold); *In re Whitehall Jewelers*, 2008 WL 2951974, at *6–7

often approved Quick Sales.[159] When courts have approved the sale, it was typically based on the recognition that a delayed sale would irreparably harm creditors.[160]

For instance, in *In re NJ Affordable Homes Corp.*, the bankruptcy court approved the sale of hundreds of parcels of real property free and clear of all liens, claims, and interests despite the objections of several creditors who claimed to be the record title owners of certain parcels that were slated to be sold.[161] The court determined that "the mere fact that title to a property is in the name of an investor does not mean that [the debtor] does not have an equitable interest in the property."[162] Because the trustee made a prima facie showing of ownership, the court refused to halt the sale while ownership rights were resolved in an adversary proceeding, despite colorable claims of ownership by the objecting parties.[163] The court asserted that it was neither workable nor necessary to permit discovery and hold hearings with respect to the disputed properties in the time available before the sale.[164]

When courts refuse to approve a Quick Sale even after a prima facie showing that the property to be sold belongs to the estate, which satisfies § 363(f)'s requirement that a bona fide dispute exists, they allow objecting parties to unnecessarily and inappropriately derail the Quick Sale process. And they do so based on a limited showing that there is some hypothetical issue that could harm the objecting party.[165] For example, in *In re Popp*, the Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court's

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(noting that the debtors would need to commence more than 120 adversary proceedings before they could sell the disputed property); *In re* DVI, Inc., 306 B.R. 496, 504 (Bankr. D. Del. 2004).

159. *See, e.g.*, *In re* Downour, No. 06-30854, 2007 WL 963258, at *2 (Bankr. N.D. Ohio Mar. 28, 2007) (finding that an expedited sale of assets was appropriate and a bona fide dispute existed); *In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *13 (Bankr. D.N.J. June 26, 2006); *In re Balco Equities*, 323 B.R. at 92; *In re* Wells, 296 B.R. 728, 734 (Bankr. E.D. Va. 2003); *In re* Olympia Holding Corp., 129 B.R. 679, 681 (Bankr. M.D. Fla. 1991).

160. *See In re NJ Affordable Homes*, 2006 WL 2128624, at *13; *see also In re* Boogaart of Fla., Inc., 17 B.R. 480, 484 (Bankr. S.D. Fla. 1981) ("Where . . . the value of assets is rapidly decreasing . . . , liquidation of assets prior to the proposal and confirmation of plans of reorganization may be desirable because it will ultimately increase the amounts distributed to creditors after [liquidating] plans are confirmed."); Bodoh et al., *supra* note 23, at 10 (citing *In re* Naron & Wagner, Chartered, 88 B.R. 86, 90 (Bankr. D. Md. 1988)) (describing a case where the court determined that delay of the Quick Sale would cause the company's daily operations to cease and cause damage to the estate's value).

161. 2006 WL 2128624, at *1, *9.

162. *Id.* at *8.

163. *Id.* at *8 n.13.

164. *Id.*

165. *See* Darby v. Zimmerman (*In re* Popp), 323 B.R. 260, 270 (B.A.P. 9th Cir. 2005) (reversing the bankruptcy court's Quick Sale approval).

decision to approve a Quick Sale of real property through a grant deed,[166] despite the bankruptcy court's finding that the debtor had at least "some interest in the property," and the purchaser had taken "the entire risk that the estate did not have good title—or, for that matter, *any* title."[167] The Bankruptcy Appellate Panel reversed because: (1) it would be incongruous to grant the sale motion while an adversary proceeding determining the full extent of the parties' ownership rights was already pending; and (2) it avoided piecemeal litigation by determining ownership of property before allowing the sale.[168] The court suggested that it "must seek to promote consistent and unfragmented decision-making when faced with the need to determine predicate issues such as property ownership in the Section 363 context."[169] Thus, despite the prior determination that the debtor had at least some interest in the property to be sold, the Bankruptcy Appellate Panel halted the sale of the debtor's interests until the parties resolved their ownership dispute over the property.[170]

Like the Ninth Circuit Bankruptcy Appellate Panel in *In re Popp*, the Third Circuit—one of the most influential circuits for bankruptcy cases—has adopted a creditor-friendly reading of FRBP 7001(2).[171] In *In re Mansaray-Ruffin*, a divided Third Circuit panel appeared to adopt a per se rule that prevents the sale of property pursuant to § 363 without a prior determination of whether the property to be sold is property of the estate.[172] This appears to be a somewhat novel reading[173] of FRBP Rule 7001(2) and has been scaled back in

166. *Id.* at 264, 270 (finding that a grant deed is akin to a quitclaim deed and purports to transfer only such interest as the transferor possesses).

167. *Id.* at 270. *But see* Gorka v. Joseph (*In re* Atlantic Gulf Communities, Corp.), 326 B.R. 294, 301 (Bankr. D. Del. 2005) (finding that the issuance of a quitclaim deed would not adversely affect a party's right to assert an ownership interest in the disputed property and that the trustee had no interest to convey to the purchaser).

168. *See In re Popp*, 323 B.R. at 269–70. *But see* White v. Official Comm. of Unsecured Creditors (*In re* Cadkey Corp.), 317 B.R. 19, 23–24 (D. Mass. 2004) (holding that the bankruptcy court did not abuse its discretion in allowing a qualified sale of property of the estate and determining that the objecting party's intellectual property rights could be resolved at a subsequent hearing).

169. *In re Popp*, 323 B.R. at 270.

170. *Id.* at 265, 270.

171. *See* SLW Capital, LLC v. Mansaray-Ruffin (*In re* Mansaray-Ruffin), 530 F.3d 230, 233–35, 237–38 (3d Cir. 2008).

172. *Id.* at 235, 237–38, 242 (characterizing the invalidation of a lien on debtor's property by a creditor as being a matter of great consequence).

173. *See In re* Whitehall Jewelers Holdings, Inc., No. 08-11261, 2008 WL 2951974, at *6 (Bankr. D. Del. July 28, 2008) (stating that, before the decision in *Mansaray-Ruffin*, "courts have routinely disregarded [FRBP] Rule 7001(2) in matters similar to the one at issue"); *see also In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *10–11 (Bankr. D.N.J. June 29, 2006); *In re* Bedford Squares Assocs., L.P., 247 B.R. 140, 145 (Bankr. E.D. Penn. 2000); *In re* Collins, 180 B.R. 447, 452 n.8 (Bankr. E.D. Va. 1995) (citing *In re* Oneida Lake Dev., Inc. 144

subsequent decisions.[174] The *In re Mansaray-Ruffin* decision stands in stark contrast to the permissive language used by courts within the Second Circuit.[175]

The ad hoc, case-by-case approach that courts have taken on this issue creates unpredictability and encourages costly and time-consuming litigation. The ambiguity caused by this ad hoc approach creates openings for parties to raise strategic objections. Courts need to adopt a systemic approach that employs a clear, uniform, and strict standard in order to reduce the number of strategic objections.

C. Decreasing the Risk of Gamesmanship

Although some Quick Sale objections are legitimate, parties-in-interest sometimes object with the intent of delaying the sale in order to improve their bargaining position.[176] These strategic attempts to extort a delay-avoidance presumably are an important reason why bankruptcy courts should carefully scrutinize all Quick Sale objections and, whenever possible, reserve litigation until after the sale. Although judges should employ their sound judicial wisdom to ferret out strategic objections, they should not be the sole line of defense against such gambits. Unless courts adopt systemic rules to prevent attempts to extract payments outside the normally applicable rules, parties-in-interest will continue raising the specter of delay in an attempt to extract extra-legal payments.[177]

B.R. 352, 358 (Bankr. N.D.N.Y. 1990)) (holding that § 363(f)(4) was satisfied even though an adversary proceeding had not yet commenced).

174. *See, e.g.*, United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378 (2010) (finding that, when analyzing a due process claim, the main focus is notice); *In re* Borkowski, 446 B.R. 220, 224 (Bankr. W.D. Pa. 2011) (citing *Espinosa* and recognizing that "whether the procedural rules were precisely followed" is not the proper question when considering a due process violation, but whether the party had notice and the opportunity to object); *cf. In re* Wilson, 409 B.R. 72, 77–78 (Bankr. W.D. Pa. 2009) (finding that an adversary proceeding is not required by Rule 7001(2) where collateral valuation occurred through the Chapter 13 confirmation process); *In re* Kemp, 391 B.R. 262, 264–65 (Bankr. D.N.J. 2008) (noting that the *Mansaray-Ruffin* decision distinguished between lien invalidation and lien stripping, where the latter "does not constitute either a challenge to the validity or the extent of the lien under Rule 7001(2)").

175. *See In re* Interiors of Yesterday, L.L.C., No. 02-30563, 2007 WL 419646, at *7 (Bankr. D. Conn. Feb. 2, 2007) (noting that, instead of *requiring* an adversary proceeding, "the Trustee *might* have to commence adversary proceedings . . . because the issue likely *may not* be amenable to resolution in the context of a [§] 363 motion." (emphasis added)).

176. *See* JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 426 (2d Cir. 2005) (noting that the "alleged ownership claim [was] simply a creditor's thinly veiled attempt to extract partial payment from the debtor" outside of the normally applicable rules).

177. *Id.* at 427.

The current system implicitly encourages strategic objections. For example, in *In re Eclipse Aviation Corp.*, an ad hoc group of depositors (the Objecting Parties) objected to the debtors' attempt to sell partially completed aircraft because they argued the aircraft were not property of the estate and could not be sold under § 363(f).[178] The Objecting Parties asserted that they were the aircraft's owners.[179] However, the aircraft in question were still on the assembly line and, in most cases, were not even completely built, let alone airworthy.[180] The aircraft had very little value unless they could be completed and FAA certifications were obtained.[181] The only party who appeared able to do so was the potential purchaser.[182] Selling the aircraft at auction with the rest of the debtors' assets would preserve the debtors' going-concern value and appeared to be the only way to maximize value for all creditors, including the Objecting Parties.[183] Rather than attempting to maximize the value of the estate for the benefit of all creditors, the Objecting Parties appeared to be maneuvering to improve their bargaining position vis-à-vis the debtors by contesting the debtors' right to sell "their" aircraft.

Ultimately, the court refused to allow the Objecting Parties to derail the sale.[184] The court required only that replacement liens would attach to the proceeds of the sale and the parties could litigate over the proceeds at a later date,[185] recognizing that a delayed sale was in no one's interest and that the Objecting Parties' asserted interests could be adequately protected.[186] Because there has been no systemic approach for resolving Quick Sale objections, the

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178. *See* Objection of the Production Line Group to Motion of the Debtors for Orders ¶¶ 20–21, at 7–8, *In re* Eclipse Aviation Corp., No. 08-13031 (Bankr. D. Del. Jan. 15, 2009) [hereinafter Objection of the Production Line Group]. The Objecting Parties all asserted similar claims involving an ownership interest, equitable lien, or special property right and commenced (or threatened to commence) adversary proceedings on those grounds against the debtors. *Id.* at 8–10.

179. *Id.* at 8 n.3.

180. See id. ¶ 6, at 3 (noting that most of the airplanes were still under construction when the debtor entered bankruptcy).

181. *Id.* ¶ 47, at 18.

182. *Id.* ¶¶ 40–43, at 15–17.

183. Preserving the going-concern value of a debtor's assets is one of the primary objectives of business bankruptcy. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527–28 (1984); *see also* Kimon Korres, Note, *Bankrupting Bankruptcy: Circumventing Chapter 11 Protections Through Manipulation of the Business Justification Standard in § 363 Asset Sales, and a Refined Standard to Safeguard Against Abuse*, 63 FLA. L. REV 959, 975 (2011) (discussing the "primary objection of business organization in bankruptcy").

184. Order (A) Authorizing the Debtors to Sell Substantially All of Their Assets Free and Clear of All Liens, Claims and Encumbrances, (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (C) Granting Related Relief ¶ 2, at 16; ¶ 54, at 38, *In re* Eclipse Aviation Corp., No. 08-13031 (Bankr. D. Del. Jan. 23, 2009).

185. *Id.* ¶ 15, at 23–24.

186. *Id.* ¶ K, at 6–8; ¶FF, at 14–15.

parties in this and other cases have been forced to rely solely on bankruptcy judges to ensure that debtors can fulfill their fiduciary duty to maximize the value of the estate.[187]

Bankruptcy courts should view objections that the property to be sold is not "property of the estate" skeptically, because such objections are sometimes made strategically. More importantly though, courts should impose a uniform standard with a high bar for Quick Sale objections. Setting a high threshold for objections would encourage parties to carefully consider whether they should seek such relief in the first instance.[188] If parties-in-interest choose not to commence such actions, the burdens on the judiciary will be reduced, increasing access to justice for parties with colorable arguments.[189] Unless bankruptcy courts impose a high burden on parties-in-interest who make Quick Sale objections, the courts will continue to implicitly encourage specious arguments and frivolous, vexatious litigation. The solution advocated in this Article should reduce the risk of gamesmanship by discouraging parties-in-interest from bringing frivolous litigation because courts that follow the proposed standard will make it clear that specious objections are unlikely to succeed.

The Bankruptcy Code suggests that Quick Sales should occur within the expedient contested-matter procedural framework.[190] Some courts have balked at making the necessary threshold determinations without the additional procedural protections that are generally available in an adversary proceeding, but this reaction is an error.[191] Although the term "property of the estate" appears to require some sort of "antecedent determination of property

187. FRBP 9011(a)(1) is also a possible mechanism for handling strategic objectors, which requires objections to "not be[] presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FRBP 9011(a)(2) requires that all "claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Although FRBP 9011 sanctions may be appropriate in particularly egregious cases, they are an ex post solution that relies on deterrence to create ex ante compliance. *See generally* Penrod W. Keith, *Rule 9011 and Its Interpretation in 10th Circuit Courts* (Am. Bankr. Inst., 2005), *available at* http://www.abiworld.org/BestofABI/2006/materials/kpenrod_CRIMES.pdf (discussing Tenth Circuit case law interpreting various sections of Rule 9011). As discussed below, one advantage of the preliminary injunction standard is that it would eliminate strategic objections without causing inappropriate delay in the Quick Sale. Sanctions imposed only after potential bidders have been scared by strategic objectors will be cold comfort to parties-in-interest.

188. Vaughn, *supra* note 32, at 844.

189. *Id.*

190. *See* FED. R. BANKR. P. 6004; *see also* Lawless, *supra* note 79, at 1272 ("The bankruptcy rules require that a debtor move for a 'free and clear' sale as a contested matter.").

191. See *supra* note 100 and accompanying text.

interests,"[192] such determinations need not fully and finally resolve the issue. In such cases, adversary proceedings are not required. Rather, whether the property "is or could become property of the bankruptcy estate" requires only a "threshold determination."[193] Given the foregoing, it appears that § 363(f) provides the statutory authority justifying the imposition of a preliminary injunction standard on challenges to the estate's authority to seek a Quick Sale.

IV. RAISING THE BAR FOR QUICK SALE OBJECTIONS

Given the competing policy objections implicit in the bankruptcy laws, it is unsurprising that judges often emphasize one policy goal over another in their decisions.[194] However, when Quick Sales are unnecessarily delayed, the delay can jeopardize a significant amount of value for creditors.[195] Additionally, the unpredictability created by the current ad hoc, case-by-case approach creates uncertainty, inefficiency, and encourages creditors to engage in gamesmanship.[196] A systemic approach is needed. It would increase predictability while decreasing the type of costly and time-consuming litigation that the current approaches have created.[197] Finally, clarity in this area should decrease the incidence of gamesmanship by parties-in-interest.

The appropriate standard should balance the need to provide sufficient procedural protection to creditors while allowing Quick Sales to proceed along

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192. Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (*In re* Koreag, Controle et Revision S.A.), 961 F.2d 341, 348 (2d Cir. 1992). *In re Koreag* arose in the context of a turnover action in a § 304 cross-border case. *Id.* at 344, 348. Different issues are raised in a turnover action than in the Quick Sale context. *See* JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 426 (2d Cir. 2005) (holding that the "antecedent" determination of property ownership was necessary before turning over property to a foreign proceeding for ultimate distribution to creditors in that foreign proceeding).

193. *In re* Robotic Vision Systems, Inc., 322 B.R. 502, 508 (Bankr. D.N.H. 2005) (citing Warnick v. Yassian (*In re* Rodeo Canon Dev. Corp.), 362 F.3d 603, 608 (9th Cir. 2004); Moldo v. Clark, 266 B.R. 163, 172 (B.A.P. 9th Cir. 2001)).

194. Where Congress imposes conflicting mandates, courts often attempt to reach the appropriate result on a case-by-case basis. *See, e.g.*, *In re* Antonelli, 148 B.R. 443, 447 (D. Md. 1992).

195. *See supra* notes 22–23 and accompanying text.

196. Predictable regimes provide "overall clarity and certainty to all parties." John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89, 95 (2006).

197. A case-by-case approach prevents the bankruptcy regime from achieving one of its central objectives: achieving efficient and expedient judicial resolution of disputes at minimal cost. *See* Edna Sussman, *Examining the Enforceability of Arbitration Agreements in the Context of Bankruptcy Proceedings*, 15 INT'L BAR ASS'N ARBITRATION NEWS 187, 189 (2010); *see also* Vaughn, *supra* note 32, at 840–41 (arguing that the lack of consistency has created havoc that courts fail to confront). Section 363(m) already provides a significant degree of protection for an asset purchaser in a Quick Sale. 11 U.S.C. § 363(m) (2006) (according a good faith purchaser protection regardless of knowledge of an appeal). Eliminating unnecessary pre-sale litigation, however, remains aspirational at this point.

the expeditious track that Congress intended for them.[198] This Article suggests that the appropriate balance in most cases is achievable by requiring objecting parties to meet a preliminary injunction standard in order to move Quick Sales from the expedient procedural track onto the cumbersome adversary proceeding track.[199] Imposing the suggested standard would also help to effectuate Congress' intention for § 363(f), which is to promote the "alienability of property of the estate right up to the constitutional limit of the Fifth Amendment's 'takings' clause, regardless of whoever else may have an interest in that property."[200] In addition to representing a "pragmatic and realistic" approach to problems inherent in Quick Sales and promoting the free alienability of property, imposing the suggested standard ought to provide sufficient procedural protection for parties-in-interest.[201]

Although there are a "dizzying diversity of formulations" of the preliminary injunction requirements,[202] courts have traditionally required a party seeking a preliminary injunction to demonstrate: (1) a probability of success on the merits; (2) irreparable injury; (3) that the balance of harms favors the party seeking the injunction; and (4) that the injunction serves the public interest, where applicable.[203] Various courts have stated the test differently and some combine the second and third inquiries.[204] In every case, the burden of establishing an entitlement to the preliminary injunction rests with the party seeking that injunction.[205] In part, the traditional test was said to have been

198. *See* Eisler, *supra* note 101, at 359 (arguing that Rules 6004(c) and 9014 clarify "whatever confusion existed under former Rule 701, which categorized a sale of property free and clear as an adversary proceeding, and successor Rule 7001, which did not specify such a sale as an adversary proceeding."); *see also* Phelan & Ernst, *supra* note 101, at 260; Vaughn, *supra* note 32, at 844.

199. Although the standard set forth in this article may strike some as being more similar to a temporary restraining order (TRO) than a preliminary injunction, TROs are normally determined at an ex parte hearing. When the non-moving party has notice of the application for a TRO, the "procedure that is followed does not differ functionally from that on an application for a preliminary injunction and the proceeding is not subject to any special requirements." 11A CHARLES ALAN WRIGHT ET AL., TEMPORARY RESTRAINING ORDERS, FEDERAL PRACTICE AND PROCEDURE § 2951 (2d ed. 1995).

200. Kuney, *supra* note 28, at 271.

201. *See* Eisenberg & Gecker, *supra* note 21, at 90; *see also supra* note 103 and accompanying text.

202. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 594 (7th Cir. 1986) (discussing factors to consider for issuing a preliminary injunction); *see also* Leubsdorf, *supra* note 32, at 525–26 (detailing the inconsistent combinations of factors considered by courts); Vaughn, *supra* note 32, at 846 (criticizing the array of different standards).

203. Vaughn, *supra* note 32, at 839.

204. *Id.* at 839 n.2.

205. *Id.*

formulated in an attempt to preserve the status quo until a full and final determination of the merits of the underlying case could occur.[206]

A. Why a Preliminary Injunction Standard?

A preliminary injunction standard is appropriate for Quick Sale objections that claim the property to be sold is not property of the estate because of the similarities between the two contexts in which courts make these decisions. In both sale objections and preliminary injunction hearings, the initial hearing will occur based on a limited evidentiary record. In the Quick Sale context, a bankruptcy court need only determine that the property to be sold is or could become property of the estate.[207] This is a "threshold inquiry," similar to the types of matters heard on a traditional motion for a preliminary injunction, whereby a party seeks an initial determination as to their likelihood of success on the merits, the amount of irreparable harm they might suffer, the effect on the public interest, and the balance of harms between the parties.[208]

Imposing a preliminary injunction standard will make it more difficult for objecting parties to delay Quick Sales and will therefore "promote the alienability of property," which promotes the policy objectives underlying § 363.[209] As suggested above, the expeditious resolution of disputes is an important function of the bankruptcy laws.[210] The bankruptcy laws are also concerned with ensuring that parties receive sufficient procedural protections.[211] In general, appropriate procedural protections include notice and the opportunity for a hearing before depriving a party of his or her use of the property.[212] Courts also recognize that, under appropriate circumstances, an after-the-fact hearing can be wholly sufficient to provide due process protections.[213] The Quick Sale context is one of those circumstances in which

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206. *See* Leubsdorf, *supra* note 32, at 546 (criticizing the notion that preserving the status quo is achievable and suggesting that deciding what constitutes the status quo is, itself, a value-laden judgment).

207. *See* Moldo v. Clark (*In re* Clark), 266 B.R. 163, 172 (B.A.P. 9th Cir. 2001).

208. *Id.* The suggested standard is stricter than the standard formulation of the preliminary injunction standard in that, under the current proposal, a prima facie showing that the property to be sold is "property of the estate" must be made, whereas a party seeking a preliminary injunction may only need to raise a serious question on the merits. *See* Vaughn, *supra* note 32, at 845 (outlining the lack of consistency in determining a standard and the avoidance of courts in doing so).

209. Kuney, *supra* note 28, at 271.

210. *Id.* at 248 (finding that § 363 returns the property to be sold to economic productivity as well).

211. Eisenberg & Gecker, *supra* note 21, at 93 (stating that notice is the most common).

212. *See, e.g.*, Mullane Special Guardian v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (discussing due process standards).

213. *See In re* Petition of KPMG, Inc., 284 B.R. 765, 769 (Bankr. W.D.N.Y. 2002) ("Expeditiousness for the benefit of the estate in such instances sometimes requires a 'contested

reserving a full and final decision for an after-the-fact hearing is appropriate, at least when a significant delay may threaten to destroy substantial value for the estate and its creditors and the objecting party receives adequate protection.[214] Due process requires nothing more.[215]

Objections to Quick Sales often threaten to cause substantial harm to the debtor and to third-party creditors. In contrast, objecting parties rarely appear likely to suffer substantial, let alone irreparable, harm if a court allows a debtor-in-possession to sell assets pursuant to § 363(f) and the court later determines that the property that was sold was not property of the estate.[216] Courts generally require that "a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be remedied by monetary damages" in order to find the creditor would be irreparably harmed.[217] One reason irreparable harm is particularly difficult to demonstrate in bankruptcy cases is because the Bankruptcy Code requires that parties whose property is to be used or sold are provided with "adequate protection."[218] Because "the right to 'adequate protection' is the right to the preservation of the value of a lien throughout the bankruptcy proceedings," adequately protected parties are unlikely to be able to demonstrate irreparable harm.[219]

The Bankruptcy Code does not limit the parties' imagination in determining how to adequately protect creditors' interests, but one of the most common methods is to grant the party with an interest in the property to be sold a

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matter' approach to the threshold question of whether the asserted adverse interest rises to the level entitled to Rule 7001, 'Adversary Proceeding' protections to accord Due Process."); *see also* WRIGHT ET AL., *supra* note 199, § 2951; Eisenberg & Gecker, *supra* note 21, at 90 (discussing statements in the Congressional Record that also recognized a full hearing may not always be available in the bankruptcy context until after the fact); *supra* notes 21, 103 and accompanying text.

214. *See* Moldo v. Clark (*In re* Clark), 266 B.R. 163, 171–72 (B.A.P. 9th Cir. 2001).

215. Eisenberg & Gecker, *supra* note 21, at 93 (describing emergency situations in which the bankruptcy matter could be resolved on short notice, but that an after-the-fact hearing could comport with traditional due process in such circumstances).

216. Leubsdorf, *supra* note 32, at 541 ("If the final judgment can remedy the plaintiff's injuries, there is no occasion to grant immediate protection which may turn out to have been based on error.").

217. D'Antonio v. Bella Vista Assocs., LLC (*In re* Bella Vista Assocs., LLC), No. 07-18134, 2007 WL 4555891, at *10 (Bankr. D.N.J. Dec. 18, 2007) (citing Adams v. Freedom Forge Corp., 204 F.3d 475, 484–85 (3d Cir. 2000)). *See contra In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *14 (Bankr. D.N.J. June 26, 2006) (stating that "the professionally crafted marketing and sale procedures . . . will provide adequate protection" despite the loss of non-economic rights because the sale proceeds will be escrowed and will remain subject to the objecting parties' interests).

218. *See supra* note 103.

219. *See* Collen, *supra* note 25, at 564.

"replacement lien" on sale proceeds.[220] In many cases, such as a claimed interest in a fungible commodity, an aggressively marketed public auction coupled with a lien on the proceeds of the sale generally ensures that the party with an interest in the property to be sold receives the benefit of its bargain.[221] Even in the case of real property, monetary relief may be sufficient to provide adequate compensation.[222] Thus, even the existence of a dispute over "unique" property will not always indicate that a Quick Sale should be delayed.[223] This is especially true if an objecting party can be granted some modified right to credit bid their claim at auction, or if the court can grant the objecting party a right of first refusal.[224] Courts may appropriately address these rights in a carefully worded adequate protection order.

220. *See e.g.*, Official Comm. of Unsecured Creditors of LTV Aerospace & Defense Co. v. LTV Corp. (*In re* Chateaugay Corp.), 973 F.2d 141, 145 (2d Cir. 1992). The Leubsdorf-Posner formulation has been criticized on the basis that it limits judicial discretion in crafting an appropriate preliminary injunction order. *See* Vaughn, *supra* note 32, at 850 (suggesting that courts focus too much on success on the merits during a preliminary injunction hearing tend to ignore the interlocutor role they play and tend to have a mini-trial when it is not appropriate). However warranted such criticism may be in the preliminary injunction context, it is not warranted in the Quick Sale context, where the flexibility advocated is available in crafting an appropriate adequate protection order. *See* Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1069 (2d Cir. 1983) ("[A] bankruptcy judge must have substantial freedom to tailor his orders to meet differing circumstances.").

221. *See In re* Bos. Generating, LLC, 440 B.R. 302, 324 (Bankr. S.D.N.Y. 2010) (finding that a "heavily marketed" sale in which "potential buyers were presented with abundant information" ensured that "the sale process reflects a true test of value").

222. *See In re Bella Vista Assocs.*, 2007 WL 4555891, at *10 (suggesting that the general rule regarding the insufficiency of monetary compensation is not a per se rule, but merely a presumption of irreparable harm); *In re NJ Affordable Homes*, 2006 WL 2128624, at *9; *In re* Balco Equities Ltd., 323 B.R. 85, 92 (Bankr. S.D.N.Y. 2005) (allowing the trustee to sell real property purportedly owned by the debtor, but subject to a third party's alleged lien so long as the proceeds were held in escrow until the adversary proceeding resolved the property interest). *But see In re* Clark, 266 B.R. at 171–72 (holding that a debtor's right to own the disputed real property "would not have been preserved had they been sold, with his interest in them transferred to proceeds").

223. Nevertheless, disputes over unique property, such as intellectual property rights, may counsel in favor of greater procedural protection or the ex ante resolution of disputes. *See In re Eastman Kodak Co.*, No. 12-10202(ALG), 2012 WL 2255719, at *3 (Bankr. S.D.N.Y. June 15, 2012) (holding that disputed Kodak patents required an adversarial proceeding). *But see* White v. Official Comm. of Unsecured Creditors (*In re* Cadkey Corp.), 317 B.R. 19, 23–24 (D. Mass. 2004) (allowing the sale in spite of a dispute over intellectual property).

224. *In re* Clark, 266 B.R. at 171–72. Such protections will be further addressed in a proposed follow-up to this article. *Cf.* Kling, *supra* note 29, at 275 (noting that the problematic implications of credit bidding and the limitations on free and clear sales suggest the need for certain portions of § 363 to be "rethought").

B. The Leubsdorf-Posner Preliminary Injunction Standard Is Appropriate for Quick Sales

Professor John Leubsdorf offered one of the most cogent criticisms of the traditional standard in his seminal article, *The Standard for Preliminary Injunctions*.[225] Leubsdorf suggests that the traditional standard for obtaining a preliminary injunction is wrong-headed in its focus on attempting to preserve the status quo.[226] Not only is it is often impossible to maintain the status quo, but determining what constitutes the status quo often involves drawing conclusions as to which party is correct.[227] In place of the traditional approach, Professor Leubsdorf suggests a revised formulation, which was subsequently championed by Judge Posner and adopted by the Seventh Circuit.[228]

The Leubsdorf-Posner formulation of the preliminary injunction standard requires a court to make two inquiries: (1) the likelihood that each side will succeed on the merits at a full hearing; and (2) the amount of irreparable harm that each side will likely suffer in the event the court acts on a view of the merits that later proves to be incorrect.[229] The court should then multiply the expected loss by the likelihood of success on the merits.[230] The Leubsdorf-Posner formulation requires that courts should adopt whichever course of action suggests the smaller probable loss.[231] Thus, a party, moving or non-moving, that faces a large potential loss can prevail even if its chances of succeeding on the merits are not as strong as the other party's chances. By weighing the expected costs and the likelihood of success on the merits, the Leubsdorf-Posner formulation is designed "to minimize the expected

225. *See generally* Leubsdorf, *supra* note 32.

226. *Id.* at 535.

227. *Id.* at 546 (suggesting that courts interfere in cases just as much when preserving the status quo as when they are not).

228. Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 594 (7th Cir. 1986) (applying the new standard).

229. Leubsdorf, *supra* note 32, at 541 (arguing that the model incorporates the most prominent features of the standard preliminary injunction formulation). *But see* Robert R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 407 (2005) (criticizing the Leubsdorf-Posner rule as unfeasible because of the impossibility of quantifying the variables the rule implicates and because the rule unduly limits judicial discretion).

230. Leubsdorf, *supra* note 32, at 541. The Leubsdorf-Posner standard can be contrasted with tests used in different jurisdictions. Despite significant variety among jurisdictions, most courts rely on some variation of the following four part standard: "(1) plaintiff's likelihood of success on the merits, (2) the amount of irreparable harm likely in the absence of the injunction, (3) a balancing of expected harms to plaintiff and those to defendant, and (4) the public interest." Brooks & Schwartz, *supra* note 229, at 389–90.

231. Leubsdorf, *supra* note 32, 541–42.

'irreparable' loss to both parties resulting from an erroneous grant or denial of the preliminary injunction."[232]

This Article suggests that courts should adopt the Leubsdorf-Posner formulation of the preliminary injunction standard when considering Quick Sale objections.[233] This particular formulation is the most appropriate because it focuses on minimizing irreparable harms caused by incorrect decisions.[234] Error minimization is an important consideration in dealing with contested Quick Sales where parties may be irreparably harmed if a sale does not occur in a timely fashion.[235]

At an initial hearing on a Quick Sale objection, each side may argue that it will suffer irreparable harm if the relief sought is (or is not) granted. A debtor-in-possession may argue that time is of the essence because, for instance, the value of the assets to be sold is deteriorating rapidly,[236] the proposed purchaser is unwilling to delay the sale,[237] because the debtor-in-possession financing the company is running out of money and no further

232. Brooks & Schwartz, *supra* note 229, at 392; *see also* Leubsdorf, *supra* note 32, at 540–41 ("[T]he preliminary injunction standard should aim to minimize the probable irreparable loss of rights caused by errors incident to hasty decision.").

233. *See* Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 594 (7th Cir. 1986) (discussing the Leubsdorf-Posner standard as a balance of harms to the plaintiff and defendant). *See generally* Leubsdorf, *supra* note 32 (discussing the preliminary injunction standard). *But see* Brooks & Schwartz, *supra* note 229, at 390 (arguing that, in deciding whether a preliminary injunction should be granted, courts should consider whether so doing would induce "socially beneficial behavior during the pendency of litigation"). *See generally* John Leubsdorf, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33 (2007) (responding to the Brooks and Schwartz critique in detail).

234. Leubsdorf, *supra* note 32, 540–41; *see also* Brooks & Schwartz, *supra* note 229, at 392 (critiquing the Leubsdorf-Posner rule for not paying sufficient attention to whether preliminary injunctions promote or discourage desirable behavior).

235. Leubsdorf, *supra* note 32, 540–41.

236. *See In re* Humboldt Creamery, LLC, No. 09-11078, 2009 WL 2820610, at *1–2 (Bankr. N.D. Cal. Aug. 14, 2009) (discussing the assets' ever-decreasing value as an overriding factor in considering sale); *see also In re* Boogaart of Fla., Inc., 17 B.R. 480, 483–84 (Bankr. S.D. Fla. 1981) ("Where . . . the value of assets is rapidly decreasing . . . liquidation of assets prior to the proposal and confirmation of plans of reorganization may be desirable because it will ultimately increase the amounts distributed to creditors after [liquidating] plans are confirmed."); Skeel, *supra* note 113, at 1189 (discussing the "no time to spare" narrative).

237. *See, e.g.*, *In re* Chrysler LLC, 405 B.R. 84, 96–97 (Bankr. S.D.N.Y. 2009), *aff'd,* 576 F.3d 108 (2d Cir. 2009); *vacated as moot,* 592 F.3d 270 (2d Cir. 2010); *In re* Thomson McKinnon Sec., Inc., 120 B.R. 301, 308–09 (Bankr. S.D.N.Y. 1990) (determining that, with "no other prospective purchaser in sight," it was appropriate to approve the sale on the terms presented rather than "comprise the debtor's only remaining substantial asset"); *cf. In re* Trans World Airlines, Inc. No. 01-00056, 2001 WL 1820326, at *4 (Bankr. D. Del. Apr. 2, 2001) (noting that "TWA had no other strategic transaction available to it and no other offer for value to which it could turn").

financing is available,[238] or there is insufficient time to allow for conversion to and liquidation under Chapter 7.[239]

By contrast, the objecting party is likely to make a more straightforward irreparable harm claim.[240] The objecting party is likely to argue that, because the property to be sold is not property of the estate, it will be deprived of due process if the debtor sells the property before the court makes a full and final determination regarding ownership.[241] In addition, the objecting party may also argue that the property to be sold is unique in some way and therefore monetary compensation is inadequate.[242]

Such arguments should be examined closely and, in appropriate cases, may be sufficient to establish irreparable harm. For example, creditors who object to the sale of intellectual property may be able to demonstrate that they cannot be adequately protected by a lien on the proceeds of a sale.[243] Additionally, in cases where irreparable harm to both sides is possible, the decision to allow or not to allow the Quick Sale may necessarily lead to some loss.[244] One advantage of adapting the Leubsdorf-Posner formulation to Quick Sales, however, is that its goal is to "chart the course likely to inflict the smallest probable irreparable loss of rights."[245]

Although a court should hesitate to deny an objecting party the right to an ex ante determination of its property rights, a court should also be equally hesitant to delay a Quick Sale and potentially inflict serious harm on third-party creditors when an objecting party cannot meet the Leubsdorf-Posner standard.[246] Imposing a clear, uniform, and strict standard on objecting parties would provide a benefit for all parties. It would increase the predictability and

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238. *See In re* Brookfield Clothes, Inc., 31 B.R. 978, 986 (Bankr. S.D.N.Y. 1983) (holding that the asserted exigency was a "deadline imposed by the purchaser for the acceptance of an apparently generous offer").

239. *See In re* Alves Photo Serv., Inc., 6 B.R. 690, 694 (Bankr. D. Mass. 1980) (holding that, just because liquidation might be in the best interests of the estate, that alone did not suffice for Chapter 7 proceedings); *see also* Bodoh et al., *supra* note 23, at 7.

240. *See supra* notes 134, 137 and accompanying text.

241. This is precisely the argument made by the Objecting Parties in *In re Eclipse Aviation Corp.* Objection of the Production Line Group, *supra* note 178.

242. *See supra* notes 223–25 and accompanying text.

243. *Cf. In re* Eastman Kodak Co., No. 12-10202(ALG), 2012 WL 2255719, at *3 (Bankr. S.D.N.Y. June 15, 2012). *But see* White v. Official Comm. of Unsecured Creditors (*In re* Cadkey Corp.), 317 B.R. 19, 23–24 (D. Mass. 2004) (allowing the sale to proceed and finding that intellectual property rights could be resolved at a later hearing).

244. Leubsdorf, *supra* note 32, at 541.

245. *Id.* The Leubsdorf-Posner formulation has been criticized for its focus on risk minimization because that focus undermines "the traditional function of interlocutory relief." *See* Vaughn, *supra* note 32, at 850. Although this may be a viable criticism in the preliminary injunction context, risk minimization seems appropriate in Quick Sales where ensuring that the standard achieves "the traditional function of interlocutory relief" is not a particular concern.

246. Leubsdorf, *supra* note 32, at 547.

efficiency of Quick Sales by decreasing the likelihood that they will be derailed by strategic creditor behavior.[247] Further, because the suggested standard requires that a debtor-in-possession make a prima facie showing that the property to be sold is property of the estate, an objecting party can expect to receive as much or more procedural protection than is typically available in a preliminary injunction hearing and certainly more than a hearing on a TRO.[248] Under the proposed standard and within the available constraints presented by the particular facts of the case at bar, the courts will be able to provide objecting parties with careful consideration of the merits of their case at the initial hearing and the benefit of a full and final determination after the fact.

V. CONCLUSION

Congress drafted § 363 with the intent to promote the "alienability of property of the estate right up to the constitutional limit of the Fifth Amendment's 'takings' clause, regardless of whoever else may have an interest in that property."[249] Requiring objecting parties to meet a standard akin to the Leubsdorf-Posner formulation of the preliminary injunction standard should ensure that most Quick Sales remain on the expeditious "motion" track without unduly limiting objecting parties' due process rights. A number of courts have already recognized this approach as correct and have allowed Quick Sales to proceed upon a prima facie showing by a debtor-in-possession that the property to be sold is property of the estate and that objecting creditors can be adequately protected. These courts have reserved the issue of the objecting party's interest in the property for a subsequent hearing where the court would determine the issue of distributing sale proceeds.[250] This Article suggests that the explicit adoption of this standard will increase predictability in Quick Sales, decrease the likelihood of strategic behavior, and lead to a more uniform application of the bankruptcy

247. *See* Brooks & Schwartz, *supra* note 229, at 387 ("[I]n the presence of legal uncertainty, a key (but largely unappreciated) function of preliminary injunctions is to promote efficiency.").

248. In some jurisdictions, a party seeking a preliminary injunction is only required to "raise a serious question on the merits," which is a substantially lower threshold than the proposal in this Article, which requires a prima facie showing. Vaughn, *supra* note 32, at 845–46; *see also* Sable et al., *supra* note 124, at 3 (noting that bankruptcy courts have wide discretion in requiring a sale to be conducted in the manner it deems most appropriate).

249. Kuney, *supra* note 28, at 271.

250. *See* Federico v. McGranahan (*In re* Federico), No. 08-2182, 2009 WL 2905855, at *3 (E.D. Cal. Sept. 8, 2009) (leaving the determination of property interests for another time); *see also In re* NJ Affordable Homes Corp., No. 05-60442, 2006 WL 2128624, at *15 (Bankr. D.N.J. June 26, 2006) ("[E]conomies of scale weigh in favor" of the proposal to sell property free and clear of the claims of other potential owners of the property because those objectors' arguments were "not responsive to the economic realities presented."); *In re* Balco Equities Ltd., 323 B.R. 85, 92 (Bankr. S.D.N.Y. 2005).

laws. A systemic approach to Quick Sale objections is the only appropriate remedy for the type of systemic problem identified by this Article.

It is problematic that some courts have denied debtors-in-possession the right to quickly sell estate assets, particularly when the delay has threatened or destroyed a debtor's ability to reorganize or unnecessarily destroyed value in the estate. In addition to preventing the estate from converting distressed assets expeditiously into either a fund for distribution to the estate's creditors or to a debtor's ongoing operations, the issues of when and in what type of proceeding to determine property interest have divided courts. This division creates unpredictability for all parties involved in Quick Sales. Adopting a preliminary injunction standard should rectify this problem going forward.