

# **A BONA FIDE DISPUTE: CAN BANKRUPT DEBTORS SELL ASSETS FREE AND CLEAR OF FEDERAL CIVIL FORFEITURE CLAIMS?**

*Joseph Peter Gomez* \*

## **ABSTRACT**

Auctions are wheeling-dealing extravaganzas in which frenzies of bidders fight over shiny objects. What would happen if the government busted down the doors of the auction house, took the shiny objects, and sold them online? An asset sale through section 363(b) of the Bankruptcy Code provides a court-supervised opportunity to maximize economic value for the bankruptcy estate. To sell estate assets, the debtor must either (1) pay off each creditor holding an interest in the assets or (2) strip the creditor's interest and attach it to the proceeds of the sale. When the government asserts a civil forfeiture claim against the asset being sold, it argues that its claim has superpriority over every other interest. If the debtor chooses option one, the government might demand the debtor pay up, or else it will seize the assets, leaving the debtor and its creditors with nothing. A debtor, naturally, might wish to choose option two: strip the government's forfeiture interest from the asset and attach it to the sale proceeds.

This Note examines the unique aspects of civil forfeiture claims and how those aspects conflict with asset sales through section 363(b). It identifies case law across jurisdictions to assist courts asked to determine whether to strip a civil forfeiture claim from assets sold through section 363(b). It proposes a three-step framework for courts to apply in analyzing this issue. Finally, this Note argues that bankruptcy courts should allow sales of assets free and clear of a federal civil-forfeiture

---

\* J.D. Candidate, 2024, Fordham University School of Law; B.S.B.A., 2017, University of Nebraska—Lincoln. Thank you to my Note Advisor, Professor Richard Squire, and to my late father, Peter Gomez. “Going home, going home, by the waterside I will rest my bones. Listen to the river sing sweet songs to rock my soul.” GRATEFUL DEAD, BROKEDOWN PALACE (Warner Chappell Music, Inc. 1970).

interest if the interest is in bona fide dispute and the government's interest can be adequately protected by attaching it to the sale proceeds.

ABSTRACT.....	587
INTRODUCTION.....	590
I. A COLLISION COURSE: INTERESTS CONFLICT WHEN BOTH THE GOVERNMENT AND THE DEBTOR WISH TO SELL THE SAME PROPERTY .....	592
A. Civil Forfeiture Allows the Government to Seize and Sell Assets .....	593
1. Civil Forfeiture and the Relation-Back Doctrine Are Powerful Tools.....	593
2. There Are Limits to the Government's Forfeiture Powers.....	595
B. Section 363(b) of the Bankruptcy Code Allows Debtors to Sell Assets Free and Clear of Interests, and Safeguards Exist to Prevent Abuse of the Code .....	597
1. Section 363 of the Bankruptcy Code Allows the Sale of Property Free and Clear of Interests .....	597
2. Interest-Holders Are Protected When Estate Property Is Sold in a 363 Sale .....	599
3. How Courts Determine Which "Interests" May be Stripped in a 363 Sale .....	601
4. How Courts Determine What Conditions Must be Satisfied for an Interest to be Stripped in a 363 Sale .....	604
a. 363(f)(5): Stripping Interests That Can be Converted to Cash .....	605
b. 363(f)(4): Stripping Interests That Are in Bona Fide Dispute.....	608
5. If an Interest Is Exempt from the Automatic Stay, Then the Interest-Holder May Attempt to Effectuate Its Interest Before a 363 Sale Is Complete .....	608
6. There Are Limits to a Debtor's Use of the Bankruptcy Code to Thwart Interest-Holders: A Bankruptcy Petition May be Dismissed If a Debtor Filed in Bad Faith .....	610
C. Forfeiture Interests Are Not Treated the Same in All Bankruptcy Contexts.....	612

1. Forfeiture Claims Are Paid Out Near the End of the Absolute-Priority Queue in Chapter 7 Liquidations .....	612
2. Section 544(a)(3) of the Code May Allow the Bankruptcy Trustee to Assert an Affirmative Defense to a Forfeiture Claim.....	613
3. Civil Forfeiture Proceedings Likely Fit the Police Power Exception to the Code’s Automatic Stay Provision .....	613
II. A SUGGESTED ANALYTICAL FRAMEWORK: COURTS SHOULD ASK THREE QUESTIONS BEFORE APPROVING A SALE FREE AND CLEAR OF A CIVIL FORFEITURE CLAIM.....	614
A. Does the Relation-Back Doctrine Affect Whether the Property in Question Is Property of the Estate Under Section 363(b)(1)? .....	614
1. Some Courts Might Find That a Forfeiture Claim Calls into Question Whether the Property Can be Sold as Property of the Estate in a 363 Sale.....	615
2. Other Courts Might Find That a Forfeiture Claim Does Not Impact Whether the Property Can be Sold as Property of the Estate in a 363 Sale.....	617
B. Is the Forfeiture Claim an Interest in That Property for Purposes of Section 363(f)? .....	619
1. Civil Forfeiture Claims Likely Meet a Narrow Definition of Interest.....	619
2. Civil Forfeiture Claims Likely Meet a Broader Definition of Interest.....	619
C. Does the Forfeiture Interest Satisfy Either Section 363(f)(5) or Section 363(f)(4) of the Bankruptcy Code?.....	622
1. Section 363(f)(5): Compelling Forfeiture Interest-Holders to Accept a Money Satisfaction of Such Interest .....	622
a. A Broad Reading of Section 363(f)(5) Permits Sales Free and Clear of Forfeiture Claims .....	622
b. A Narrow Reading of Section 363(f)(5) Does Not Allow Sales Free and Clear of Forfeiture Claims .....	624
2. Section 363(f)(4): Stripping Forfeiture Interests That Are in Bona Fide Dispute .....	626
III. COURTS SHOULD ALLOW SALES FREE AND CLEAR OF FORFEITURE INTERESTS USING SECTIONS 363(f)(4) & (5), BUT ONLY IF THE INTEREST-HOLDER RECEIVES ADEQUATE PROTECTION .....	627

A. Section 363(f)(4) Is Preferable to Section 363(f)(5) When Approving Sales Free and Clear of Civil Forfeiture Claims .....	627
B. The Bankruptcy Code Adequately Protects Forfeiture Interests if They Are Stripped in a 363 Sale .....	629
1. A Lien Against the Proceeds of the Sale Is Adequate Protection for the Government’s Civil Forfeiture Interest in the Property .....	629
2. Checks on Abuse Prevent Debtors from Pursuing a 363 Sale Solely to Frustrate a Civil Forfeiture Claim ....	631
C. Policy Concerns Support Allowing Sales Free and Clear of Forfeiture Claims Because Forfeiture Is a Penalty That Is Easily Transferred to Cash .....	632
CONCLUSION .....	634

## INTRODUCTION

In recent years, large corporations have found relief in the bankruptcy code (the “Code”) when facing significant financial liability arising from alleged criminal activities. For example, Purdue Pharma crafted a controversial settlement and plan of reorganization to resolve billions of dollars in liability for contributing to the opioid crisis.<sup>1</sup> FTX, a former titan of the cryptocurrency industry, filed for bankruptcy after committing “one of the biggest financial frauds in American history.”<sup>2</sup> As creditors, victims, and all other interest holders jockey for position in the absolute priority queue for their shares of the bankruptcy estate, one interest holder looms large over the crowd: the federal government.

The federal government might argue that its ability to seize property by forfeiture catapults the government to the front of the absolute priority queue, ahead of trade creditors, judgment creditors, and any other interest holder waiting for its share of the estate. When the government pursued

---

1. See Abbie VanSickle, *Supreme Court Appears Split over Opioid Settlement for Purdue Pharma*, N.Y. TIMES (Dec. 4, 2023), <https://www.nytimes.com/2023/12/04/us/politics/supreme-court-purdue-pharma.html> [<https://archive.ph/mIqvx>]. For a history of America’s opioid crisis, see Marie A. Chisholm-Burns et al., *The Opioid Crisis: Origins, Trends, Policies, and the Roles of Pharmacists*, 76 AM. J. HEALTH-SYS. PHARMACY 424, 424 (2019) (explaining the history of America’s opioid crisis).

2. Benjamin Weiser, *Prosecutor in Bankman-Fried Case Made a Career of White-Collar Cases*, N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/business/damian-williams-ftx.html> [<https://archive.is/Rurw5>].

forfeiture against Purdue Pharma for federal crimes associated with the distribution of opioids,<sup>3</sup> the Department of Justice argued that the forfeiture claims it asserted against the bulk of Purdue Pharma's assets were "superpriority" administrative claims because a judgment of forfeiture would give the government possession of the assets before the creation of the bankruptcy estate.<sup>4</sup> If these assets were never part of the bankruptcy estate, then estate creditors would be left with nearly nothing.<sup>5</sup>

Purdue settled with the government and pursued a plan of reorganization with all other creditors.<sup>6</sup> However, the case exposed a conflict between forfeiture law and bankruptcy law if a debtor chooses not to pursue a reorganization plan, but rather to pursue a more popular strategy: the sale of all estate assets using section 363 of the Bankruptcy Code.<sup>7</sup> This conflict is best illustrated by a hypothetical.

ACME, a hypothetical company, faces federal criminal liability and financial insolvency like FTX and Purdue Pharma. Instead of a plan of reorganization, however, ACME pursues a sale of all assets through section 363 of the Bankruptcy Code. The prevailing bidder is a senior lienholder who credit bids at the 363 sale auction. The sale, therefore, is not for cash, but rather for the elimination of the debtor's debt to the lienholder in exchange for all the debtor's assets.

The government asserts a forfeiture claim against the bulk of the debtor's assets because, before filing for bankruptcy, the debtor

---

3. See Press Release, Office of Public Affairs, U.S. Dep't of Justice, Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies (Nov. 24, 2020), <https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies> [<https://perma.cc/9DMB-3WWB>].

4. In exchange for a resolution of their civil liability, Purdue Pharma agreed to the Department of Justice's assertion that its forfeiture judgment against Purdue Pharma's assets was an "allowed superpriority administrative claim in the event of a bankruptcy distribution." See Brief for Respondent the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. at 6, *Harrington v. Purdue Pharma L.P., et al.*, \_ U.S. \_ (No. 23-124).

5. See Transcript of Oral Argument at 25, *Harrington v. Purdue Pharma L.P., et al.*, 144 S. Ct. 44 (2023) (No. 23-124) (Barrett, J., inquiring whether appellant will pursue forfeiture if the Court finds the bankruptcy plan impermissible; appellant responded it intends to use the threat of forfeiture as negotiation leverage).

6. See Brief for Respondent the Official Committee of Unsecured Creditors of Purdue Pharma L.P., et al. at 6, *Harrington*, \_ U.S. \_ (No. 23-124) ("[The Department of Justice] stipulated that it would forgo \$1.775 billion of that \$2 billion claim if a future reorganization plan met certain requirements . . . .")

7. See Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 751 (2002).

committed criminal acts that subject the assets to forfeiture under federal statute. ACME interprets section 363 of the Bankruptcy Code to allow the sale of the estate's assets free and clear of certain interests, including the government's forfeiture claim against the assets. Because there are no sale proceeds, the debtor argues, all interests that are inferior to the winning credit bid are extinguished.

The government objects to its interest being extinguished. It argues that the assets being sold are not, in fact, the property of the bankruptcy estate. Rather, the assets are the government's property because the government took ownership of the property when the criminal act was committed.

In the ACME hypothetical, it is unclear whether forfeiture claims are inferior to the senior lienholder's claims and thus could be extinguished without attachment to the sale proceeds. Moreover, it is unclear whether forfeiture claims can be stripped from assets being sold pursuant to section 363 at all.

This Note argues that section 363 of the Bankruptcy Code permits sales free and clear of federal civil forfeiture claims. Part I explores the conflict between civil forfeiture and section 363 of the Code. Part II offers an analytical framework for courts to use in evaluating whether the circumstances of a case permit a sale free and clear of civil forfeiture claims. Part III argues that section 363(f)(4) of the Code allows sales free and clear of civil forfeiture claims, and courts should utilize section 363(f)(4), rather than section 363(f)(5), to find the authority to do so.

### **I. A COLLISION COURSE: INTERESTS CONFLICT WHEN BOTH THE GOVERNMENT AND THE DEBTOR WISH TO SELL THE SAME PROPERTY**

Section I.A describes the mechanics of the federal government's civil forfeiture power, including the unique relation-back doctrine, and limits on that power.<sup>8</sup> Section I.B analyzes how interests are stripped in 363 sales, how interest-holders might attempt to pursue their claims pre-sale by avoiding the automatic stay,<sup>9</sup> and how a court might prohibit sales by a debtor who has filed for bankruptcy in bad faith.<sup>10</sup> Finally, Section I.C explores how the Code treats forfeiture claims.

---

8. See 21 U.S.C. § 881(h).

9. See 11 U.S.C. § 362.

10. See *id.* § 1112(b)(1) (allowing courts to dismiss a bankruptcy filing "for cause").

## A. CIVIL FORFEITURE ALLOWS THE GOVERNMENT TO SEIZE AND SELL ASSETS

This Section explains the relevant aspects of civil-forfeiture law that may conflict with a debtor's attempts to strip forfeiture claims from assets in a 363 sale. It describes the broad scope of property subject to civil forfeiture, the power of the relation-back doctrine, and the limits imposed on the civil forfeiture power by courts and Congress.

### *1. Civil Forfeiture and the Relation-Back Doctrine Are Powerful Tools*

Throughout history, human property has been subject to forfeiture.<sup>11</sup> The abuse of forfeiture laws by the English was a substantial contributor to the unrest that led to the American Revolution.<sup>12</sup> It appears, however, that time heals all wounds.

The federal government expanded its forfeiture power<sup>13</sup> during the 1970s and 1980s as the government's war on drugs exploded.<sup>14</sup> Previously, the federal government was only permitted to seize illicit property, such as cocaine or the property used to create and distribute cocaine.<sup>15</sup> In 1978 Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970, authorizing the government to seize the proceeds of illicit drug trafficking.<sup>16</sup> Further expansion of the forfeiture power followed.

Today, the government can effectuate forfeiture on both real and personal property for a host of criminal acts. For example, forfeiture is available when property is involved in money laundering,<sup>17</sup> drug

---

11. See LEONARD W. LEVY, *LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 1–22 (1996) (discussing the appearance of civil forfeiture in many societies such as the ancient Hebrews and the Athenians).

12. See *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118 n.10 (1993).

13. See *92 Buena Vista Ave.*, 507 U.S. at 121–22.

14. See Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–95 (2014).

15. See *id.*

16. See *id.*

17. 18 U.S.C. § 1956.

production,<sup>18</sup> drug distribution,<sup>19</sup> counterfeiting stamps,<sup>20</sup> fraud involving a computer,<sup>21</sup> forgery,<sup>22</sup> and any federal felony.<sup>23</sup> Now, instead of using forfeiture to destroy contraband, the government uses forfeiture to sell real estate on Zillow, auction off Rolex watches and famous paintings, and even offer up for adoption dogs that it rescued from dogfighting rings.<sup>24</sup>

The modern federal forfeiture power is wide-reaching and requires little proof that a wrongful act was committed before the government can seize, and sell, assets. According to the forfeiture statute, if there is “probable cause to believe that the property is subject to forfeiture,” then the government can seize assets before winning a judgment of forfeiture.<sup>25</sup> To be sure, the government is required to prove at a forfeiture hearing, by a preponderance of the evidence, that the property is subject to forfeiture.<sup>26</sup>

This is not to paint civil forfeiture in a wholly negative light. While forfeiture is ultimately a penalty,<sup>27</sup> it also provides restitution to victims of crimes. For example, the Department of Justice has distributed over four billion dollars of forfeited assets to victims of Bernie Madoff’s Ponzi scheme.<sup>28</sup> Nevertheless, some commentators express concern that civil forfeiture often fails to help victims and serves only to fill the coffers of

---

18. *Id.* § 981(a)(1)(B)(i).

19. *Id.*

20. *Id.* § 501.

21. *Id.* § 1030.

22. *Id.* § 510.

23. *Id.* § 981(a)(1)(B)(iii).

24. *See Asset Forfeiture*, DEP’T OF JUST. U.S. MARSHALS SERV., <https://www.usmarshals.gov/what-we-do/asset-forfeiture#:~:text=Through%20the%20Operation%20Goodwill%20program,public%20health%20and%20safety%20programs> [<https://archive.ph/zSOF8>] (last visited Nov. 28, 2023).

25. 18 U.S.C. § 981(b)(2)(B).

26. *Id.* § 983(c).

27. *See Austin v. United States*, 509 U.S. 602, 621–22 (1993).

28. *See Press Release*, Office of Public Affairs, U.S. Dep’t of Justice, Justice Department Announces Total Distribution of over \$4 Billion to Victims of Madoff Ponzi Scheme (Sept. 28, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-total-distribution-over-4-billion-victims-madoff-ponzi-scheme> [<https://perma.cc/XN5E-K247>].



government agencies.<sup>29</sup> The expansion of civil forfeiture has sparked concern among public interest organizations.<sup>30</sup> A low standard of proof requirement for asset seizure and a wide range of acts that spark forfeiture are not the only concerning aspects of the forfeiture power.

The relation-back doctrine, like forfeiture itself, is not a new development. Indeed, it has long been the common-law rule in the United States that if a forfeiture statute grants the federal government title to property based on the commission of a prohibited act, then the government's title relates back to the moment the act was committed.<sup>31</sup> Congress did not alter the common-law when it codified the relation-back doctrine in the federal civil forfeiture statute.<sup>32</sup> The Supreme Court found that although Congress "had the opportunity to dispense with the common-law doctrine," it "merely codified the common-law rule."<sup>33</sup> The common-law rule allows the government to benefit from the relation-back doctrine only after the government obtains a judgment of forfeiture.<sup>34</sup> While the relation-back doctrine makes forfeiture a powerful government tool, it is not without its limits.

## 2. *There Are Limits to the Government's Forfeiture Powers*

When the government begins a civil forfeiture proceeding, the property owner and all other persons with claims to the property may assert "innocent-owner" defenses.<sup>35</sup> The innocent-owner defense was a common-law defense to forfeiture that Congress codified.<sup>36</sup> This defense

---

29. See, e.g., REBECCA VALLAS ET AL., FORFEITING THE AMERICAN DREAM: HOW CIVIL ASSET FORFEITURE EXACERBATES HARDSHIP FOR LOW-INCOME COMMUNITIES AND COMMUNITIES OF COLOR 5 (2016), [https://cdn.americanprogress.org/wp-content/uploads/2016/03/31133144/032916\\_CivilAssetForfeiture-report.pdf](https://cdn.americanprogress.org/wp-content/uploads/2016/03/31133144/032916_CivilAssetForfeiture-report.pdf) [https://perma.cc/HRE4-A5ML].

30. See Letter from Institute for Justice et al., to Bob Goodlatte & Chuck Grassley, Chairmen of the Committee on the Judiciary, U.S. Senate (July 20, 2017) (on file with author) (calling for Congress to pass civil forfeiture reform).

31. See *United States v. Stowell*, 133 U.S. 1, 16–17 (1890).

32. See 21 U.S.C. § 881(h).

33. See *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 127 (1993) (interpreting 18 U.S.C. § 881).

34. See *id.* at 129 (finding "Congress . . . did not disturb the common-law rights of either owners of forfeitable property or the Government . . . . The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture").

35. 18 U.S.C. § 983(d).

36. See *id.*; see also *92 Buena Vista Ave.*, 507 U.S. at 129.

to forfeiture against one's property interest allows innocent bystanders, with no knowledge of the criminal act causing forfeiture, to retain a property interest even when the government takes ownership of property subject to forfeiture.<sup>37</sup> The party seeking to use the defense has the burden of proving, by a preponderance of the evidence, that it is an innocent owner.<sup>38</sup>

A party who held an interest in property at the time illegal conduct occurred, and still holds that property interest when the government asserts a forfeiture claim, has the option of proving one of two things to prevent the forfeiture of its interest. First, the interest-holder can try to prove that it did not know of the illegal conduct,<sup>39</sup> or, second, it can try to prove that it took all reasonable action to terminate the illegal conduct when it learned of the conduct.<sup>40</sup> A party that acquired a property interest after the illegal conduct occurred must prove two things to prevent the forfeiture of its interest. The party must show both that it was a "bona fide purchaser,"<sup>41</sup> and that it was reasonably unaware that the property was subject to forfeiture.<sup>42</sup>

The government's use of forfeiture also faces constitutional limits. A forfeiture cannot be grossly disproportionate to the offense, as then the punishment would violate the Eighth Amendment's Excessive Fines Clause.<sup>43</sup> The Excessive Fines Clause prevents the government from abusing its punishment powers.<sup>44</sup> This protection extends to both criminal and civil actions in which the government seeks to extract payment as a punishment for an illegal act.<sup>45</sup> So long as a government taking is punishment, and not solely remedial, it is subject to the Excessive Fines Clause.<sup>46</sup> Civil forfeitures are punitive, at least in part, so they are treated

---

37. See 18 U.S.C. § 983(d).

38. See *id.* § 983(d)(1).

39. See *id.* § 983(d)(2)(A)(i).

40. See *id.* § 983(d)(2)(A)(ii).

41. See *id.* § 983(d)(3)(A)(i).

42. See *id.* § 983(d)(3)(A)(ii).

43. See *id.* § 983(g); see also U.S. CONST. amend. VIII. Takings Clause concerns associated with civil forfeiture are beyond the scope of this Note.

44. See *Austin v. United States*, 509 U.S. 602, 607 (1993); see also U.S. CONST. amend. VIII.

45. See *Austin*, 509 U.S. at 607–10.

46. See *id.* at 610.

as punishments for purposes of the Excessive Fines Clause.<sup>47</sup> The existence of an innocent-owner defense also supports the conclusion that forfeiture is a punishment subject to the Excessive Fines Clause.<sup>48</sup>

B. SECTION 363(B) OF THE BANKRUPTCY CODE ALLOWS DEBTORS TO  
SELL ASSETS FREE AND CLEAR OF INTERESTS, AND SAFEGUARDS EXIST TO  
PREVENT ABUSE OF THE CODE

This Section explains the provisions of the Code which might permit asset sales free and clear of civil forfeiture interests. First, it describes asset sales made pursuant to section 363(b), the protections interest-holders have in such sales, and how courts determine which creditors have an interest in such assets. Next, it examines how courts determine whether the right conditions exist to strip an interest from assets being sold. Finally, it explains ways in which interest-holders can avoid the automatic stay and try to convert their interest to cash before the sale, and how courts prevent debtors from abusing the Code.

*1. Section 363 of the Bankruptcy Code Allows the Sale of Property Free  
and Clear of Interests*

When a debtor files a bankruptcy petition, the debtor is usually prohibited from selling big-ticket items without court approval.<sup>49</sup> Situations might arise, however, in which the sale of an asset is in the best interest of the bankruptcy estate. For example, a shipping company might have a ship in its fleet that is more valuable if sold immediately rather than retained or sold later.<sup>50</sup> Congress enacted section 363 to address these situations.<sup>51</sup>

---

47. See *id.* at 621–22 (concluding that civil forfeiture is payment, and therefore punishment, for an illegal action); see also Henry C. Kevane, *What Just Happened? How Asset Forfeiture Affects Bankruptcy Distributions*, BUS. L. TODAY, June 2012, at 1, 3. Civil forfeiture judgments, however, are not considered punishment for purposes of double jeopardy. See *United States v. Ursery*, 518 U.S. 267, 278–88 (1996) (reviewing cases of civil forfeiture in conjunction with a criminal conviction).

48. See *Austin*, 509 U.S. at 619.

49. 11 U.S.C. § 363(b)(1).

50. See generally *In re Torch Offshore, Inc.*, 327 B.R. 254, 259 (E.D. La. 2005).

51. See Leslie Berkoff & Theresa Driscoll, *Will Section 363 Become a New Chapter of the Bankruptcy Code?*, N.Y.L.J. (Dec. 7, 2015), <https://www.moritthock.com/wp-content/uploads/2015/12/NYLJ-LAB-TAD.pdf> [<https://perma.cc/SN23-5VG3>] (“Section 363 of the Bankruptcy Code originally was enacted as a tool to allow debtors

Section 363 appears in an administrative chapter of the Code.<sup>52</sup> It allows trustees to “use, sell, or lease, other than in the ordinary course of business, property of the estate” in certain circumstances.<sup>53</sup> Section 363 was intended to apply to assets “melting like ice cubes” as the debtor languished in bankruptcy trying to finalize a plan of reorganization.<sup>54</sup>

As corporations began using the newly enacted Bankruptcy Code in the late twentieth century, however, they found it immensely complicated to confirm reorganization plans.<sup>55</sup> Selling a company in parts is usually a less desirable option than reorganizing it because selling a company as a going-concern preserves value that liquidation would destroy.<sup>56</sup> Lawyers began looking for an alternate path to reorganize distressed debtors through bankruptcy.<sup>57</sup> They found it in section 363.<sup>58</sup> Lawyers began using section 363 as a side door to the Code, as an opportunity to sell companies in their entirety without effectuating a plan of reorganization.<sup>59</sup>

A 363 sale process usually resembles a corporate merger.<sup>60</sup> First, the debtor-trustee enters into an agreement with a stalking horse bidder—a

to shed unnecessary or burdensome assets in furtherance of their reorganization effort . . . .”). Congress contemplated a debtor’s need to sell property before approval of a bankruptcy plan as far back as 1937. *See In re Lionel Corp.*, 722 F.2d 1063, 1067 n.2 (2d Cir. 1983).

52. *See* 11 U.S.C. (Chapter 3 of the Bankruptcy Code is titled “Case Administration.”).

53. 11 U.S.C. § 363(b)(1).

54. *See In re Chrysler LLC*, 576 F.3d 108, 113–14 (2d Cir. 2009), *vacated*, 558 U.S. 1087 (2009) (collecting cases adopting a “melting ice cube theory” when approving 363 sales).

55. *See* 11 U.S.C. § 1129; *see also* Ashley Suarez, *An Analysis of § 363(b) Sales: Justified Deviations or Just Deviations?*, 22 U. PA. J. BUS. L. 988, 990 (2020) (discussing criticisms of traditional Chapter 11 plans and benefits to debtors “speedily selling assets” through a 363 sale).

56. *See* Joseph S. Rabianski, *Going-Concern Value, Market Value, and Intangible Value*, 64 APPRAISAL J. 183, 184–85 (1996).

57. *See* Suarez, *supra* note 55, at 997 (explaining that lawyers were drawn to Delaware in the 1990s due to the expansion of 363 sales in the Delaware Bankruptcy Court).

58. *See id.*

59. *See* Baird & Rasmussen, *supra* note 7, at 751.

60. There are, however, some notable differences, especially when comparing the debtor’s fiduciary relationship to creditors in a 363 sale with the board of directors’ fiduciary relationship to stockholders in a corporate merger. *See In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y. 1992) (finding “[a]ppellant wrongly equate[d] general

potential buyer who places the first bid.<sup>61</sup> The trustee then entertains additional bidders.<sup>62</sup> To complete the sale, the debtor holds a public auction and sells to the best bidder.<sup>63</sup> Indeed, the trustee has a fiduciary obligation to sell to the best bidder.<sup>64</sup> The sale requires court approval.<sup>65</sup> Bankruptcy courts generally approve the 363 sale if it is a proper exercise of the debtor's business judgment and the highest and best bid has won.<sup>66</sup>

Selling a whole company through section 363 is less difficult than completing a plan of reorganization.<sup>67</sup> So long as a debtor has a business justification for the sale and can convince the court the sale is not a disguised plan of reorganization,<sup>68</sup> the court will likely approve the sale.

## 2. Interest-Holders Are Protected When Estate Property Is Sold in a 363 Sale

When property is sold at auction in a 363 sale, there are two main forms of protection for interest-holders. First, lienholders are allowed to credit bid at the auction.<sup>69</sup> Second, if property is sold free and clear of an

---

principles of bankruptcy law with the fiduciary rules that apply in corporate control cases outside bankruptcy”).

61. See *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 239 n.3 (2d Cir. 2010), *abrogated by* *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023) (“A ‘stalking horse’ contract is a first, favorable bid strategically solicited by the bankrupt company to prevent low-ball offers.”).

62. See *id.* at 239.

63. *In re Borders Grp., Inc.*, 453 B.R. 477, 482–83 (Bankr. S.D.N.Y. 2011).

64. The trustee must show that they used sound business judgment to accept the “highest and best bid.” *Id.* Some courts give great deference to the trustee. See *id.* (finding trustee entitled to “great judicial deference” and the court “should not step in”) (internal citation omitted). Other courts find support in *In re Lionel* to require a debtor to “prove by a preponderance of evidence that it exercised sound business judgment in selecting . . . the highest and best bid.” *In re Flour City Bagels, LLC*, 557 B.R. 53, 88 (Bankr. W.D.N.Y. 2016) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

65. See *In re WestPoint Stevens*, 600 F.3d at 242 (discussing the bankruptcy court’s approval of debtor’s sale of assets through section 363).

66. See *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992).

67. See *supra* notes 55–59 and accompanying text.

68. See *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) (“The debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets.”).

69. See 11 U.S.C. § 363(k). Credit bidding is a bankruptcy “term of art” allowing creditors to bid at a 363 sale auction up to the dollar amount of their claims. See *In re Dalton Crane, L.C.*, 641 B.R. 850, 863 (Bankr. S.D. Tex. 2022).

interest, and that interest is in the money,<sup>70</sup> then the interest-holder receives adequate protection.<sup>71</sup>

The auction proceeding must allow lienholders to credit bid on the property.<sup>72</sup> Credit bidding is when a lienholder bids at an auction of his collateral with the debt owed, rather than with cash.<sup>73</sup> Secured creditors are allowed to credit bid to the full amount of their claim.<sup>74</sup> If a lienholder were not allowed to credit bid, then the auction of estate property could violate the lienholder's right to due process under the Fifth Amendment.<sup>75</sup> Courts are allowed to limit a creditor's right to bid, but they only do so in rare circumstances.<sup>76</sup>

Also, debtors are required to give adequate protection to interest-holders that would be "in the money" when assets are sold pursuant to section 363(b).<sup>77</sup> An interest-holder is in the money if the proceeds from the sale exceed the claims of all senior interest-holders.<sup>78</sup> Adequate protection is usually given in the form of a lien on the proceeds of the asset sale.<sup>79</sup> If all the debtor's assets are sold in a 363 sale, and there is no residual value leftover, then any interest-holder who is not in the money has no right to adequate protection; his interest is extinguished.<sup>80</sup>

---

70. An interest in property sold in a 363 sale would be "in the money" if there are remaining proceeds from the sale after the debtor satisfies all senior interests. See Joseph S. Bolnick, *Revisiting Clear Channel - Acquiring Real Property in a Section 363 Bankruptcy Sale "Free and Clear" of Liens*, 20 AM. BANKR. INST. L. REV. 517, 531 (2012).

71. See 11 U.S.C. § 363(e). Adequate protection, in a 363 sale context, is usually given to an interest-holder by attaching the interest to the proceeds of the sale. See *In re PW, LLC*, 391 B.R. 25, 45 n.24 (B.A.P. 9th Cir. 2008).

72. See 11 U.S.C. § 363(k).

73. See Vincent Buccola & Ashley C. Keller, *Credit Bidding and the Design of Bankruptcy Auctions*, 18 GEORGE MASON L. REV. 99, 100 (2010).

74. See Jacob A. Kling, *Rethinking 363 Sales*, 17 STAN. J.L. BUS. & FIN. 258, 276-77 (2012).

75. For an analysis of credit bidding jurisprudence in federal proceedings, see generally Riley Orloff, *Chapter 11 Asset Sales: Will There be a Chilling Effect on Section 363(k) Credit Bidding After In re Fisker Automotive Holdings LLC?*, 20 FORDHAM J. CORP. & FIN. L. 269 (2014).

76. See *id.* at 270.

77. See 11 U.S.C. § 363(e).

78. See Bolnick, *supra* note 70, at 531.

79. See *id.*

80. See *id.*

### 3. How Courts Determine Which “Interests” May be Stripped in a 363 Sale

One advantage of pursuing a 363 sale instead of a reorganization plan is that, if certain conditions are satisfied, section 363(f) of the Code permits stripping liens and other interests from assets when they are sold.<sup>81</sup> If an interest is stripped, then its holder will be bound by the court’s final sale order.<sup>82</sup>

Because the Code does not define “interest,” courts interpret “interest” for purposes of section 363(f).<sup>83</sup> Courts generally agree that “interests” are not limited to only *in rem* interests.<sup>84</sup> On one end of the spectrum, a general unsecured claim that does not arise out of the property being sold is not an interest in the property.<sup>85</sup> On the other end, a lien on the property is certainly an interest.<sup>86</sup> The tighter the nexus to the property in question, the more likely the party’s interest will be an “interest” for purposes of section 363(f).<sup>87</sup>

81. See 11 U.S.C. § 363(f).

82. See *In re Met-L-Wood Corp.*, 861 F.2d 1012, 1016 (7th Cir. 1988) (finding unsecured creditors who appeared at 363 sale hearing were “barred by res judicata from bringing a lawsuit to nullify the sale”).

83. The Code does, however, define “claim.”

The term ‘claim’ means—

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

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

11 U.S.C. § 101(5). Claims are not a subsegment of interests; claims may or may not be interests depending on whether the claim “flow[s] from the debtor’s ownership of the sold assets.” *In re Motors Liquidation Co.*, 829 F.3d 135, 156 (2d Cir. 2016).

84. See *In re Colarusso*, 280 B.R. 548, 556 (Bankr. D. Mass. 2002), *aff’d*, 295 B.R. 166 (B.A.P. 1st Cir. 2003), *aff’d*, 382 F.3d 51 (1st Cir. 2004) (finding most all cases support a broad interpretation of “interest”).

85. See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–89 (3d Cir. 2003).

86. See, e.g., *In re Chrysler LLC*, 576 F.3d 108, 124 (2d Cir. 2009), *vacated*, 558 U.S. 1087 (2009) (finding that liens are certainly “interests” as they are *in rem* interests).

87. See *id.* at 126 (determining whether claims are “interests” by examining how related the claims are to the assets being sold in the 363 sale).

In *In re Trans World Airlines, Inc.*, the Third Circuit interpreted “interest” broadly.<sup>88</sup> If the property being sold “g[ives] rise to the claim[,],” then it is likely an interest.<sup>89</sup> In *Trans World Airlines*, the debtor, a major airline, was able to sell assets free and clear of employment discrimination claims and travel vouchers awarded in a settlement because these claims would not have arisen but for the assets the debtor was selling in the 363 sale: the entire company.<sup>90</sup>

Although there was a split of authority at one time,<sup>91</sup> most courts interpret “interest” broadly.<sup>92</sup> Courts have pointed to the word “any” preceding “interest” in section 363(f) to expand the word’s scope.<sup>93</sup> The Sixth Circuit went so far as to find that “the bankruptcy court has clear power to approve the sale of debtors’ assets free and clear of any interest or claims that could be brought against the bankrupt estate during

88. See *In re Trans World Airlines, Inc.*, 322 F.3d at 288–89 (finding employment discrimination claims were interests and therefore stripped in a 363 sale); see also *Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 258 (3d Cir. 2000) (collecting examples of interests such as successor liability, depreciation recapture, and pre-363 sale tort claims).

89. See *In re Trans World Airlines, Inc.*, 322 F.3d at 290.

90. See *id.* (“Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Furthermore, TWA’s investment in commercial aviation is inextricably linked to . . . its ability to distribute travel vouchers as part of the settlement agreement.”).

91. Earlier cases established a narrower definition of interest, but this view fell out of favor by the turn of the century. Compare *In re New Eng. Fish Co.*, 19 B.R. 323, 326 (Bankr. W.D. Wash. 1982) (finding general unsecured claimants did not have an interest in the property being sold, therefore the purchaser had no obligation to assume the interest under a theory of successor liability), and *In re White Motor Credit Corp.*, 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987) (finding “[g]eneral unsecured claimants including tort claimants, have no specific interest in a debtor’s property. Therefore, section 363 is inapplicable for sales free and clear of such claims.”), and *In re Hutchinson*, 5 F.3d 750, 756 n.4 (4th Cir. 1993) (finding some courts do not consider general unsecured claims interests but declined to address the issue), with *In re Colarusso*, 280 B.R. 548, 556 (Bankr. D. Mass. 2002), *aff’d*, 295 B.R. 166 (B.A.P. 1st Cir. 2003), *aff’d*, 382 F.3d 51 (1st Cir. 2004) (“I was able to find only one case that had adopted a narrow interpretation of the definition of interests . . . and that decision was subsequently vacated. The remainder of the cases support a broad definition of the term.”).

92. See, e.g., *In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir. 2009), *vacated*, 558 U.S. 1087 (2009) (“We agree . . . that the term ‘any interest in property’ encompasses those claims that ‘arise from the property being sold.’”) (internal citations omitted).

93. 11 U.S.C. § 363(f); see *Precision Indus. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 545 (7th Cir. 2003) (“[T]he use of the term ‘any’ counsels in favor of a broad interpretation.”).



bankruptcy” under section 363(f).<sup>94</sup> This broad interpretation may help “effectuate the purposes of the Bankruptcy Code.”<sup>95</sup>

As claimants continue to object to 363 sales, the scope of “interest” continues to expand. At least some *in personam* claims are interests.<sup>96</sup> Adverse possession claims might be interests.<sup>97</sup> Covenants running with the land and easements might be interests.<sup>98</sup> Some successor liability claims might be interests.<sup>99</sup>

The expansion in the scope of interests that can be stripped in a 363 sale comports with the growing use of 363 sales as a mechanism for selling companies wholesale.<sup>100</sup> If a trustee attempts to sell a discrete

---

94. *Al Perry Enters. v. Appalachian Fuels, LLC*, 503 F.3d 538, 543 (6th Cir. 2007).

95. *In re Old Carco LLC*, 538 B.R. 674, 682 (Bankr. S.D.N.Y. 2015).

96. *See, e.g., In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996) (“Congress did not expressly indicate that, by employing such language [i.e., ‘interests in such property’ in § 363(f)], it intended to limit the scope of section 363(f) to *in rem* interests, strictly defined, and we decline to adopt such a restricted reading of the statute here.”).

97. *In re Cath. Bishop of N. Alaska*, 525 B.R. 723, 730 (D. Alaska 2015) (finding argument meritless that, because of adverse possession, the property sold was never actually property of the estate and thus sale was void); *In re Colarusso*, 280 B.R. 548, 558 (Bankr. D. Mass. 2002) (finding 363 sale order authorized sale free and clear of adverse possession claim, and order of sale was final under § 363(m)).

98. Whether a covenant running with the land or easement is an interest is up for debate, but the prevailing trend is towards considering these property rights “interests” for purposes of § 363(f). *Compare In re Oyster Bay Cove, Ltd.*, 196 B.R. 251, 255 (E.D.N.Y. 1996) (finding easement is not an interest), *with In re Dulgarian*, No. 06–10203 (JKF), 2008 WL 220523, at \*2 (Bankr. E.D. Pa. Jan. 25, 2008) (finding easement is an interest for purposes of § 363(f) like any other property interest), *and In re Metroplex on the Atl., LLC*, 545 B.R. 786, 795 (Bankr. E.D.N.Y. 2016), *and In re Energytec, Inc.*, 739 F.3d 215, 223 (5th Cir. 2013) (implying that covenant running with the land is an interest when § 363(f)(5) is satisfied), *and In re Jurgielewicz Duck Farm*, No. 8-10-70231-478, 2010 WL 2025503, at \*5 (Bankr. E.D.N.Y. May 20, 2010) (finding covenant running with the land is an interest).

99. For example, in *Al Perry Enterprises, Inc. v. Appalachian Fuels, LLC*, a purchaser acquired all a debtor’s assets and contracts through a 363 sale. 503 F.3d 538, 541 (6th Cir. 2007). The purchaser was not required to pay commission on a contract as previously mandated by a court judgment because the purchaser did not “expressly assume” that obligation in the 363 sale order. *See id.*

100. The use of section 363 expanded significantly after the mid-1990s. *See § 363 Sales by Year—Study Summary*, FLORIDA—UCLA—LOPUCKI BANKR. RSCH. DATABASE, [https://lopucki.law.ufl.edu/design\\_a\\_study.php?OutputVariable=Sale363](https://lopucki.law.ufl.edu/design_a_study.php?OutputVariable=Sale363) [<https://archive.is/ZGYpS>] (last visited Nov. 18, 2023) (showing little use of § 363 in Chapter 11 cases before 1995, when the percentage of Chapter 11 cases using § 363

asset, the interests in that property will necessarily be more limited than if the trustee attempted to sell every piece of property in the estate in one transaction.<sup>101</sup>

The definition of “interest,” however, is not without bounds. Not all successor liability claims, for example, are interests.<sup>102</sup> Affirmative defenses, such as rights of recoupment, are likely not interests.<sup>103</sup> Interests must still have some nexus to the property being sold to be “interests” for purposes of section 363(f).<sup>104</sup> Nevertheless, courts continue to interpret “interest” broadly on a case-by-case basis.<sup>105</sup>

#### *4. How Courts Determine What Conditions Must be Satisfied for an Interest to be Stripped in a 363 Sale*

Subsections 363(f)(1) to (5) of the Bankruptcy Code provide conditions under which an interest may be removed from an asset sold through section 363(b) and attached to the proceeds of the sale.<sup>106</sup> Subsections (1) and (3) are unlikely to provide the conditions to strip a civil forfeiture claim because there is no nonbankruptcy law allowing sales free and clear of forfeiture claims, and a forfeiture claim is not a

---

increased significantly); *see also* Tom Hals, *Quick Bankruptcy Sales Replace U.S. Reorganizations*, REUTERS (Aug. 14, 2009, 2:02 PM), <https://www.reuters.com/article/us-usa-bankruptcy-analysis/quick-bankruptcy-sales-replace-u-s-reorganizations-idUSTRE57D3VK20090814/> [<https://archive.is/2Elbe>] (describing a trend toward using § 363 to “reorganize” large corporations).

101. *See In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–89 (3d Cir. 2003) (finding if the property being sold “gives rise to the claim,” then it is an interest).

102. *See In re Motors Liquidation Co.*, 829 F.3d 135, 155–56 (2d Cir. 2016) (“[S]uccessor liability claims can be ‘interests’ when they flow from a debtor’s ownership of transferred assets . . . . But successor liability claims must also still qualify as ‘claims’ under Chapter 11.”) (internal citation omitted).

103. *See Folger Adam Sec., Inc. v. DeMatteis/MacGregor JV*, 209 F.3d 252, 260–61 (3d Cir. 2000) (holding “a right of recoupment is a defense and not an interest and therefore is not extinguished by a § 363(f) sale”); *see also In re Lawrence United Corp.*, 221 B.R. 661, 669 (Bankr. N.D.N.Y. 1998) (finding right of recoupment “does not even fall under the broadest interpretation” of interest).

104. *See In re Trans World Airlines, Inc.*, 322 F.3d at 288–89.

105. *In re PBBPC, Inc.*, 484 B.R. 860, 867 (B.A.P. 1st Cir. 2013); *see also In re Motors Liquidation Co.*, 829 F.3d at 155.

106. *See* 11 U.S.C. § 363(f)(1)–(5).

lien.<sup>107</sup> Subsection (2) only applies when the interest-holder consents to the debtor's stripping of the interest.<sup>108</sup> The following sections examine subsections (4) and (5) because they might describe conditions under which a debtor can sell assets free and clear of civil forfeiture claims.<sup>109</sup>

a. 363(f)(5): Stripping Interests That Can be Converted to Cash

Section 363(f)(5) of the Code permits sales free and clear of interests if the interest-holder "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest."<sup>110</sup> Some courts interpret this language broadly, but others apply a more tailored approach. Many bankruptcy courts interpret section 363(f)(5) loosely.<sup>111</sup> In *Trans World Airlines*, the court found that, "because claims were . . . subject to monetary valuation," the property could be sold free and clear of those claims under section 363(f)(5).<sup>112</sup>

Courts adopting the broad view of section 363(f)(5) still require that the proponent of the sale relies on a legal proceeding requiring the interest-holder to receive money satisfaction, but that proceeding can be entirely hypothetical. The Bankruptcy Court for the Eastern District of

---

107. See *id.* § 363(f)(1) ("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 . . ."); see *id.* § 363(f)(3) ("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 . . . (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 . . .").

108. See *id.* § 363(f)(2) ("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 . . . (2) such entity consents . . .").

109. See *id.* § 363(f)(4) ("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 . . . (4) such interest is in bona fide dispute . . ."); see *id.* § 363(f)(5) ("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 . . . (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.").

110. *Id.* § 363(f)(5).

111. See, e.g., *Dam v. Waldron*, No. 2:20-CV-00391-SAB, 2021 WL 6137346, at \*4 (E.D. Wash. July 30, 2021) (finding property interests were subject to monetary satisfaction because the bankruptcy court held claims were "adequately protected by the order approving sale" and objectors' proofs of claim "specified the dollar amount they were owed").

112. See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 291 (3d. Cir. 2003).

Michigan, for example, found that, although a restriction on real property was “in the form of a property restriction,” this type of restriction “easily len[t] itself . . . to monetary remedies.”<sup>113</sup> Relevant property law, in this case, offered many remedies for enforcing equitable servitudes, including money damages.<sup>114</sup> This was enough to convince the court that a monetary remedy was theoretically possible, even if the legal proceeding requiring a monetary remedy was entirely hypothetical.<sup>115</sup>

Some courts adopting the broad view do not even look beyond bankruptcy law to satisfy section 363(f)(5). Section 363 itself may provide the law that forces an interest-holder to accept a money satisfaction of its interest.<sup>116</sup> The District Court for the Eastern District of Washington, for example, found that a sale pursuant to section 363(f)(5) was proper because the alleged property interests were adequately protected and could be valued in cash.<sup>117</sup> The court recognized that a “hypothetical proceeding for money satisfaction needs to be at least legally possible.”<sup>118</sup> The objecting interest-holders argued that they owned the property pre-petition, and the debtor’s estate had no ownership interest.<sup>119</sup> The court used the 363 sale itself as an example of a legal or equitable proceeding requiring a claimant to accept money satisfaction of its interest.<sup>120</sup> The court found that “because each party . . . has filed a proof of claim asserting the right to payment of money, these claimants can be compelled to accept a monetary satisfaction . . . .”<sup>121</sup> The district court agreed: section 363(f)(5) was satisfied by the 363 sale proceeding

---

113. See *In re Signature Devs., Inc.*, 348 B.R. 758, 767 (Bankr. E.D. Mich. 2006) (finding many remedies are available to enforce servitudes, including damages, and, because damages could be calculated, a monetary remedy was an adequate substitute for an equitable remedy in this case).

114. See *id.*

115. See *id.* at 766.

116. See 11 U.S.C. §§ 363(e), (f). Section 363 permits sales free and clear of interests if those interests are adequately protected by forcing the interest-holder to receive a lien against the proceeds of the sale. See *id.* Therefore, the logic goes, a 363 sale can provide the basis to strip interest in the same 363 sale relying on 11 U.S.C. § 363(f)(5).

117. See *Dam v. Waldron*, No. 2:20-CV-00391-SAB, 2021 WL 6137346, at \*4 (E.D. Wash. July 30, 2021).

118. *Id.* (quoting *In re Love*, 553 B.R. 54, 59 (Bankr. D.S.C. 2016)).

119. See *Dam*, 2021 WL 6137346, at \*1. The case involved bitcoin data mining schemes where miners pre-purchased storage space in the debtor’s facilities. See *id.*

120. See *In re Giga Watt, Inc.*, No. 18-03197-FPC7, 2020 WL 6157104, at \*5 (Bankr. E.D. Wash. Oct. 20, 2020), *aff’d sub nom. Dam*, 2021 WL 6137346.

121. See *id.*

because the disputed interests were valued by their attachment to the proceeds of the sale.<sup>122</sup>

Other courts have taken a narrower view of section 363(f)(5).<sup>123</sup> The narrow view constrains the broad view in three ways. First, the narrow view rejects hypothetical proceedings;<sup>124</sup> it only considers available proceedings by *the instant* trustee to compel *the instant* interest-holder to accept monetary satisfaction.<sup>125</sup> Second, the money provided must be less than the interest-holder's claim.<sup>126</sup> Third, though not explicitly adopted by all courts who take the narrow view, the legal or equitable proceeding must come from non-bankruptcy law.<sup>127</sup>

The narrow interpretation of section 363(f)(5) gives it a relatively small role in 363 sales.<sup>128</sup> Narrow-view courts find this role commensurate with section 363(f)(5)'s place as merely "one of five different justifications for selling free and clear of interests."<sup>129</sup>

---

122. See *Dam*, 2021 WL 6137346, at \*4.

123. See *In re Love*, 553 B.R. at 59 (adopting the narrow view and collecting cases).

124. *In re Smith*, No. BR 13-61627-TMR7, 2014 WL 738784, at \*2 (Bankr. D. Or. Feb. 26, 2014) ("The question is not whether there is a *hypothetical* proceeding by which a *hypothetical* interest in property may be extinguished, or the entity holding such interest may be compelled to accept a money satisfaction of its interest. Such an interpretation would in most cases make the other paragraphs of § 363(f) superfluous . . .").

125. See *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 711 (S.D.N.Y. 2014) ("This Court agrees that paragraph (5) should be read to reach only those legal or equitable proceedings that could be brought by the trustee as owner of the property."); see also *In re Scott*, No. 13-51169, 2013 WL 4498987, at \*3 (Bankr. E.D. Ky. Aug. 21, 2013) (adopting the narrow view expounded in *In re PW, LLC*, 391 B.R. 25 (B.A.P. 9th Cir. 2008)).

126. See *In re PW, LLC*, 391 B.R. at 42 ("We assume that [§ 363(f)(5)] refers to a legal and equitable proceeding in which the nondebtor could be compelled to take less than the value of the claim secured by the interest."); see also *In re Terrace Chalet Apartments, Ltd.*, 159 B.R. 821, 829 (N.D. Ill. 1993) ("By its express terms, Section 363(f)(5) permits lien extinguishment if the trustee can demonstrate the existence of another legal mechanism by which a lien could be extinguished without full satisfaction of the secured debt."). Some decisions do not fit neatly into the broad-narrow split. See, e.g., *id.* (finding interest-holder must be forced to accept less than its claim to be subject to § 363(f)(5), but also finding Chapter 11 cramdown rules satisfy this requirement).

127. See *In re PW, LLC*, 391 B.R. at 46 ("Neither the Trustee nor DB has directed us to any such proceeding under nonbankruptcy law, and the bankruptcy court made no such finding."); see also *In re Hassen Imps. P'ship*, 502 B.R. 851, 859 (C.D. Cal. 2013) (adopting the view from *In re PW* that the proceeding must come from nonbankruptcy law to satisfy § 363(f)(5)).

128. See *In re PW, LLC*, 391 B.R. at 43.

129. *Id.*

## b. 363(f)(4): Stripping Interests That Are in Bona Fide Dispute

An interest may also be stripped in a 363 sale if it is in “bona fide dispute.”<sup>130</sup> For an interest to be in bona fide dispute, it does not need to be the subject of a current adversarial proceeding.<sup>131</sup> A bona fide dispute exists if there is an “objective basis” for a “factual or legal dispute” over the interest’s validity.<sup>132</sup> The bankruptcy court does not need to resolve the dispute, but it must identify that it exists.<sup>133</sup> The trustee, therefore, must present evidence demonstrating an objective basis for the bona fide dispute.<sup>134</sup>

Some courts have found that an interest is in bona fide dispute when the trustee and an objecting interest-holder disagree about whether the property is in fact property of the estate.<sup>135</sup> Other courts reject this interpretation of section 363(f)(4) and find that a “bona fide dispute” must be over something other than whether the property belongs to the estate or does not.<sup>136</sup>

*5. If an Interest Is Exempt from the Automatic Stay, Then the Interest-Holder May Attempt to Effectuate Its Interest Before a 363 Sale Is Complete*

When a debtor files a bankruptcy petition, an invisible wall encircles the bankruptcy estate, and all actions against the estate and its assets are

---

130. See 11 U.S.C. § 363(f)(4).

131. See *In re Gaylord Grain L.L.C.*, 306 B.R. 624, 627 (B.A.P. 8th Cir. 2004).

132. See, e.g., *In re Collins*, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995). The term “bona fide dispute” also appears in § 303 of the Bankruptcy Code. Courts look to interpretations of § 303 for guidance when interpreting § 363(f)(4). See, e.g., *id.* at 452; see also *In re Octagon Roofing*, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991).

133. See *In re Collins*, 180 B.R. at 452 (“Clearly this standard does not require the Court to resolve the underlying dispute, just determine its existence.”).

134. See *In re Octagon Roofing*, 123 B.R. at 590 (rejecting the argument that “merely alleging a dispute is enough to meet the burden under 11 U.S.C. § 363(f)(4)”).

135. See, e.g., *infra* Section II.A.2 (discussing *In re Fillion*, 181 F.3d 859 (7th Cir. 1999)). See *Dam v. Waldron*, No. 2:20-CV-00391-SAB, 2021 WL 6137346, at \*4 (E.D. Wash. July 30, 2021) (determining that the threshold inquiry is “whether the property to be sold is (1) property of the bankrupt estate or (2) that any alleged property interest is in bona fide dispute by the estate”) (emphasis added). The court in *Dam* found that the interest could be stripped because it was in bona fide dispute and received adequate protection. See *id.* at \*3.

136. See, e.g., *infra* Section II.A.1 (discussing *In re Clark*, 266 B.R. 163 (B.A.P. 9th Cir. 2001)).

stayed.<sup>137</sup> The automatic stay prevents foreclosures, asset seizures, and other collection efforts.<sup>138</sup> There is, however, a “police and regulatory power” exception to section 362(b)(4)’s automatic stay provision.<sup>139</sup>

A bankruptcy court conducts two inquiries to determine whether a governmental action fits the police-and-regulatory-power exception. First, the court asks if the governmental action’s primary purpose is public safety.<sup>140</sup> If the government is primarily interested in protecting its own pecuniary interests, and not public safety, then the automatic stay usually applies to the governmental action.<sup>141</sup> Second, courts ask if the governmental action aims to achieve a public policy interest, or instead serves a private interest.<sup>142</sup> Governmental actions aiming to achieve public policy interests are exempt from the automatic stay.<sup>143</sup>

Both tests are applied on a case-by-case basis, as the government may use a statute or proceeding for different purposes at different times.<sup>144</sup> For example, a lawsuit for sex discrimination brought against a debtor by the Equal Employment Opportunity Commission (“EEOC”) was exempt from the automatic stay because, while it did benefit individual interests, the suit also combatted employment discrimination: a public policy interest.<sup>145</sup> On the other hand, a suit commenced under a statute authorizing the government to enforce the federal minimum wage, where all proceeds were to be remitted to the affected employees, served primarily to effectuate private interests: repaying the affected employees.<sup>146</sup> This did not satisfy the public policy inquiry; the suit was stayed.<sup>147</sup>

---

137. See 11 U.S.C. § 362.

138. See Alice Griffin, *Bankruptcy: A Debtor’s Last Resort*, CONSUMERS’ RSCH. MAG., June 1994, at 23–24.

139. See 11 U.S.C. § 362(b)(4).

140. See *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385 (6th Cir. 2001). This is called the pecuniary purpose test. *Id.*

141. See *id.*

142. See *id.* at 385–86.

143. See *id.* at 386.

144. See *id.* at 389 (finding that, when apply the public policy test, courts must “analyze whether a particular lawsuit is undertaken by a governmental entity in order to effectuate public policy or, instead, to adjudicate private rights”).

145. See *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir. 1986).

146. See *Chao*, 270 F.3d at 391.

147. See *id.*

6. *There Are Limits to a Debtor's Use of the Bankruptcy Code to Thwart Interest-Holders: A Bankruptcy Petition May be Dismissed If a Debtor Filed in Bad Faith*

The ability to dismiss a bankruptcy filing for bad faith ensures that the Bankruptcy Code is only available to debtors “within the contemplation of the [Bankruptcy] [A]ct.”<sup>148</sup> If the debtor attempts to “step outside the ‘equitable limitations’” of the Code, it might have its petition dismissed for bad faith.<sup>149</sup> Analysis of a debtor’s good faith in filing a bankruptcy petition is equitable in nature and attempts to prevent use of the Code for an improper purpose, by parties with unclean hands, or to promote misconduct.<sup>150</sup>

Bankruptcy courts consider the totality of the circumstances when evaluating whether a debtor filed in good faith.<sup>151</sup> Courts generally analyze good faith objectively, rather than attempting to peer into the debtor’s mind.<sup>152</sup> Evidence that a debtor intended to abuse the Code, however, is often fodder for dismissing a case for bad faith.<sup>153</sup> For example, when Carol Marsch was facing the specter of a state court judgment to pay her ex-husband over two million dollars, she filed a Chapter 11 petition.<sup>154</sup> The court held that filing a bankruptcy petition primarily to stall a state court proceeding constituted bad faith.<sup>155</sup>

A petition filed primarily to delay or frustrate any creditor may be dismissed for bad faith.<sup>156</sup> For example, Phoenix Piccadilly, Ltd., an apartment complex management company, was about to have its apartment building foreclosed upon.<sup>157</sup> The company filed for bankruptcy to stay foreclosure, and the secured creditors, secured by the apartment

---

148. *In re Cosgrave*, 10 F. Supp. 672, 673 (S.D. Cal. 1935).

149. *In re LTL Mgmt., LLC*, 58 F.4th 738, 740 (3d Cir. 2023).

150. See WILLIAM COLLIER, COLLIER ON BANKRUPTCY ¶ 1112.07 (16th ed. 2023).

151. See *In re LTL Mgmt.*, 58 F.4th at 753.

152. See *id.*

153. See, e.g., *In re Phx. Piccadilly, Ltd.*, 849 F.2d 1393, 1395 (11th Cir. 1988) (where debtor’s agent advised partners he would “make whatever legal defenses are appropriate to forestall [creditor’s] actions, including, if advisable, the filing of a Chapter 11 Bankruptcy Petition”).

154. See *In re Marsch*, 36 F.3d 825, 827 (9th Cir. 1994).

155. See *id.*

156. See *In re Vascular Access Ctrs., L.P.*, 611 B.R. 742, 762 (Bankr. E.D. Pa. 2020) (finding that if a debtor files at such an advantageous time that there can be no doubt of tactical intent, the filing would be in bad faith).

157. See *In re Phx. Piccadilly, Ltd.*, 849 F.2d at 1394.



building, moved to dismiss the bankruptcy proceeding.<sup>158</sup> The bankruptcy court, district court, and Eleventh Circuit Court of Appeals all found, or upheld the finding, that filing for Chapter 11 protection on the eve of foreclosure, without more, is sufficient to support dismissal for filing in bad faith.<sup>159</sup>

Tactical advantages are permissible, but those advantages must not be the debtor's primary purpose for filing.<sup>160</sup> Bankruptcy provisions, such as the automatic stay, provide significant tactical advantages to debtors facing litigation.<sup>161</sup> When analyzing whether a debtor filed merely to obtain a tactical advantage, a court determines whether the debtor intended to thwart or frustrate a creditor's ability to enforce contractual rights.<sup>162</sup>

Courts are not quick to identify one factor as sufficient grounds to find that a debtor filed for bankruptcy in bad faith, except, in some jurisdictions, financial distress.<sup>163</sup> The Third Circuit Court of Appeals, under whose jurisdiction many large Chapter 11 petitions are filed,<sup>164</sup> has held that a debtor filing a Chapter 11 petition without being in financial distress has per se filed for an invalid purpose.<sup>165</sup> The court found that insolvency is not specifically required to file a Chapter 11 petition,<sup>166</sup> but, nevertheless, a debtor cannot file for bankruptcy in good faith unless it is close to insolvency.<sup>167</sup>

---

158. *See id.*

159. *See id.* at 1395.

160. *See Duggan v. Highland-First Ave. Corp.*, 25 B.R. 955, 962 (Bankr. C.D. Cal. 1982) ("It is the detriment to creditors, not the advantage to prior owners which has the greater relevance in determining whether creditors are fraudulently hindered or delayed by the filing.").

161. *See* 11 U.S.C. § 362.

162. *See Duggan*, 25 B.R. at 962.

163. *See In re LTL Mgmt., LLC*, 58 F.4th 738, 741 (3d Cir. 2023).

164. *See* Jeffrey P. Fuller, *Analysis: Chapter 11 Megacases Mount as Delaware Stays Dominant*, BLOOMBERG L. (Apr. 10, 2023, 12:09 PM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-chapter-11-megacases-mount-as-delaware-stays-dominant> [<https://archive.ph/C756p>] (noting that many large corporate bankruptcies are filed in Delaware).

165. *See In re LTL Mgmt.*, 58 F.4th at 746.

166. *See id.* at 755 (finding that neither balance sheet insolvency nor cash flow insolvency are required to be in financial distress).

167. *See id.* (finding the debtor's proximity to insolvency is almost always relevant to the good faith analysis).

C. FORFEITURE INTERESTS ARE NOT TREATED THE SAME IN ALL  
BANKRUPTCY CONTEXTS

The Bankruptcy Code contemplates forfeiture claims in a few different sections. Debts from civil forfeiture claims are non-dischargeable for individual debtors in a confirmed plan.<sup>168</sup> Forfeiture claims are relegated behind most other claims in the absolute-priority queue, including unsecured claims, in the event of a liquidation.<sup>169</sup> Forfeiture claims also seem to interact with the Code's strong-arm clause if the forfeiture claim is against real property.<sup>170</sup> Finally, forfeiture proceedings are likely exempt from the automatic stay.<sup>171</sup>

*1. Forfeiture Claims Are Paid Out Near the End of the Absolute-Priority Queue in Chapter 7 Liquidations*

Forfeiture claims are likely worthless in most Chapter 7 liquidations.<sup>172</sup> These claims would be paid out after all administrative claims, secured claims, timely filed unsecured claims, and tardy unsecured claims.<sup>173</sup> The only claims worse off in a liquidation than forfeiture claims are post-petition interest claims.<sup>174</sup>

There is, however, an exception to this general rule in section 726(a)(4).<sup>175</sup> Forfeiture claims that are "compensation for actual pecuniary loss suffered by the holder of such claim" are not relegated to the back of the absolute priority line.<sup>176</sup> Nevertheless, the civil forfeiture statutes most weaponized by the federal government do not compensate the government for its losses. Rather, these statutes punish criminal

---

168. See 11 U.S.C. § 523(a)(7) (for individual debtors, forfeiture debt payable to a government unit that is not compensation for actual pecuniary loss is non-dischargeable in discharge under §§ 727, 1141, 1192, 1228(a), 1228(b), or 1328(b)).

169. See *infra* Section I.C.1.

170. See *infra* Section I.C.2.

171. See *infra* Section I.C.3.

172. Because debtors file for bankruptcy protection when they are in financial distress, claimants who are near the end of the payment distribution queue are unlikely to receive much in a liquidation.

173. See 11 U.S.C. § 726(a).

174. See *id.* § 726(a)(5).

175. See *id.* § 726(a)(4).

176. See *id.* If the forfeiture were for actual pecuniary loss, the claim would likely be a general unsecured claim. See *id.* §§ 726(a)(2), 726(a)(3).

offenses and prevent wrongdoers from reaping the benefits of their ill-gotten gains.<sup>177</sup>

2. *Section 544(a)(3) of the Code May Allow the Bankruptcy Trustee to Assert an Affirmative Defense to a Forfeiture Claim*

According to section 544(a)(3) of the Bankruptcy Code, colloquially known as the strong-arm clause, the trustee who manages the bankruptcy estate gains the status of a bona fide purchaser, without knowledge that the debtor committed wrongful or fraudulent acts, for purposes of real property.<sup>178</sup> A bankruptcy trustee's status as a bona fide purchaser might prove valuable in a forfeiture proceeding against real property because interest-holders may assert "innocent-owner" defenses at forfeiture proceedings.<sup>179</sup> Innocent-owner defenses rely, at least in part, on the interest-holder's status as a bona fide purchaser.<sup>180</sup> The bankruptcy trustee could, arguably, use its status as a bona fide purchaser as an affirmative defense to the government's forfeiture claim at a forfeiture proceeding,<sup>181</sup> at least regarding claims to real property.<sup>182</sup>

3. *Civil Forfeiture Proceedings Likely Fit the Police Power Exception to the Code's Automatic Stay Provision*

Courts have found that civil forfeiture proceedings satisfy both the pecuniary purpose test and the public policy test used to determine whether a government action is excepted from the automatic stay.<sup>183</sup> At least one court has found that forfeiture proceedings are excepted from the automatic stay "even if the end result is that the [p]roceeds [from the sale of assets in a 363 sale] are not property of the estate" as would be the case if the relation-back doctrine caused ownership of the property to

---

177. See *Austin v. United States*, 509 U.S. 602, 621–22 (1993).

178. See 11 U.S.C. § 544(a)(3).

179. See Myron M. Sheinfeld et al., *Civil Forfeiture and Bankruptcy: The Conflicting Interests of the Debtor*, 69 AM. BANKR. L.J. 87, 108–09 (1995) (analyzing civil forfeiture interacting with the strong-arm provision).

180. See *supra* notes 36–42 and accompanying text.

181. See *supra* note 41 and accompanying text.

182. See 11 U.S.C. § 544(a)(3) (limiting the bankruptcy trustee's bona fide purchaser status to real property).

183. See generally Brittany Temple, *Is "Policing for Profit" Really a Police Power Exception? Civil Asset Forfeiture as an Excessive Fine and the Police Power Exception to the Automatic Stay*, 36 EMORY BANKR. DEVS. J. 215 (2020) (reviewing cases finding that civil forfeiture proceedings are exempt from the automatic stay).

transfer to the government before the bankruptcy estate was created.<sup>184</sup> Another court found that excepting forfeiture proceedings from the automatic stay does not conflict with a forfeiture claim's inferior position in the absolute priority queue because, if the wrongful act was committed pre-bankruptcy, the relation-back doctrine would prevent the asset from being estate property.<sup>185</sup>

By analyzing the interplay between applicable civil forfeiture law, the process of interest-stripping in 363 sales, and the Bankruptcy Code's treatment of forfeiture in other sections, courts can gain insight when faced with the quandary of stripping forfeiture claims from an asset sold in a 363 sale.

## II. A SUGGESTED ANALYTICAL FRAMEWORK: COURTS SHOULD ASK THREE QUESTIONS BEFORE APPROVING A SALE FREE AND CLEAR OF A CIVIL FORFEITURE CLAIM

This Part describes a split in authority that would cause certain jurisdictions to approve 363 sales free and clear of civil forfeiture claims and other jurisdictions to reject this interpretation of the Code. It provides a three-step analysis for courts on either side of the split to use in evaluating whether a debtor may sell property free and clear of a civil forfeiture claim in a 363 sale. Section A asks: Does the relation-back doctrine affect whether the property to be sold is property of the estate according to section 363(b)(1)? Section B asks: Is the forfeiture claim an interest in property for purposes of section 363(f)? Finally, Section C asks: Is at least one of the five subsections of section 363(f) satisfied?

### A. DOES THE RELATION-BACK DOCTRINE AFFECT WHETHER THE PROPERTY IN QUESTION IS PROPERTY OF THE ESTATE UNDER SECTION 363(B)(1)?

If the property sold in a 363 sale is determined not to be property of the estate, then the sale may be voidable.<sup>186</sup> When a debtor files a

---

184. *In re Chapman*, 264 B.R. 565, 572 (B.A.P. 9th Cir. 2001).

185. *See In re Winpar Hosp. Chattanooga, LLC*, 401 B.R. 289, 293–94 (Bankr. E.D. Tenn. 2009) (finding the relation-back doctrine would cause property to be non-estate property, thus never being subject to § 726(a)(4)).

186. *See In re Cath. Bishop of N. Alaska*, 525 B.R. 723, 728 (D. Alaska 2015) (where a party argued that a 363 sale was void because the party had acquired the property through adverse possession before the creation of the bankruptcy estate).

bankruptcy petition, all the debtor's interests in property, subject to a few exceptions, become property of the estate.<sup>187</sup> If the government succeeds in obtaining a judgment of forfeiture, then the relation-back doctrine grants the government title at the moment of the commission of the prohibited act.<sup>188</sup> It follows that if the act was committed before the estate was created, as is often the case,<sup>189</sup> then the property is not part of the bankruptcy estate. Therefore, the government might argue that it has superior title to the purchaser and could avoid the 363 sale.<sup>190</sup>

The bankruptcy court, however, has the authority to determine what is, and what is not, property of the estate.<sup>191</sup> If a court has approved a sale of property of the estate under section 363(b), implicit in that approval is a determination that the property is in fact property of the estate.<sup>192</sup>

*1. Some Courts Might Find That a Forfeiture Claim Calls into Question Whether the Property Can be Sold as Property of the Estate in a 363 Sale*

In at least one circuit, forfeiture would likely be addressed as a threshold question: Is this property of the estate or not?<sup>193</sup> The government's core argument in a forfeiture claim, because of the relation-back doctrine, is that the property to be sold is not property of the estate because the wrongful act was (almost invariably) committed before the debtor filed for bankruptcy.<sup>194</sup> The Bankruptcy Appellate Panel for the Ninth Circuit addressed a similar argument in *In re Clark*.<sup>195</sup>

---

187. For some examples of exceptions, see *Patterson v. Shumate*, 504 U.S. 753, 757–66 (1992) (finding ERISA trusts, due to applicable non-bankruptcy law, are not property of the estate) and *Begier v. IRS*, 496 U.S. 53, 58–67 (1990) (finding funds kept in a federally mandated trust are not estate property).

188. See *supra* Section 1.A.1.

189. See, e.g., *supra* notes 3–5 and accompanying text.

190. This argument parallels the argument made by the adverse possessors in *In re Catholic Bishop of Northern Alaska*. See 525 B.R. at 728.

191. See *In re Visser*, No. 12-8043, 2013 WL 1337327, at \*5 (Bankr. D. Idaho Apr. 1, 2013).

192. See *In re Cath. Bishop*, 525 B.R. at 730.

193. See *In re Clark*, 266 B.R. 163, 172 (B.A.P. 9th Cir. 2001) (“In other words, if the property is exempt it may not be sold by the Trustee; if it is not exempt, it may be sold. The threshold question, is it still property of the estate, must first be decided.”).

194. See *In re Winpar Hosp. Chattanooga, LLC*, 401 B.R. 289, 293–94 (Bankr. E.D. Tenn. 2009).

195. See generally *In re Clark*, 266 B.R. 163.

In *In re Clark*, the debtor claimed that five parcels of land were not part of the debtor's estate, but rather were exempt from the estate, which would allow him to retain the property after exiting bankruptcy.<sup>196</sup> The Chapter 7 trustee disagreed.<sup>197</sup> The trustee then attempted to sell the parcels through a 363 sale.<sup>198</sup> The trustee argued that selling the parcels free and clear of the debtor's interest in them was permissible because the debtor's interest in the property was in bona fide dispute, satisfying section 363(f)(4).<sup>199</sup> According to the Bankruptcy Appellate Panel of the Ninth Circuit, the trustee's argument put the cart before the horse.<sup>200</sup> Although the interest at issue was in bona fide dispute, that interest was the debtor's.<sup>201</sup> If the debtor was correct that the parcels were not property of the estate, then the trustee would have no power to sell them.<sup>202</sup> If, by contrast, the trustee was right and the parcels were estate property, then the trustee could sell them.<sup>203</sup> Because a bona fide dispute existed as to whether the parcels were property of the estate, the court found it impermissible to allow a sale free and clear of the debtor's alleged interest in the property.<sup>204</sup>

The court reasoned that, typically, stripping interests in a 363 sale is a matter of exchanging property for cash.<sup>205</sup> The interest-holder loses a claim on the property but gains a claim to the proceeds of the sale as

---

196. See *id.* at 166.

197. See *id.* at 167. Individual debtors may exempt certain property from the bankruptcy estate. See 11 U.S.C. § 522(b)(1). The primary purpose of these exemptions is to give debtors a fresh start. See Gary E. Sullivan, *A Fresh Start to Bankruptcy Exceptions*, 2018 BYU L. REV. 335, 349–53 (2018).

198. See *In re Clark*, 266 B.R. at 167. In corporate bankruptcies, the debtor is often appointed trustee of the bankruptcy estate. See *Chapter 11 – Bankruptcy Basics*, U.S. COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [<https://perma.cc/J4F3-T3DB>] (last visited Mar. 29, 2024). This type of debtor-trustee is dubbed the “debtor in possession.” See *id.* In *In re Clark*, however, the debtor and trustee were different parties, and they were very much in conflict. See *generally id.*

199. See *id.* After all, the purpose of this subsection of the Code is to prevent litigation over disputed interests from holding up the sale of estate assets. See *id.* at 171.

200. See *id.* at 171–72.

201. See *id.* at 172.

202. See *id.*

203. See *id.*

204. See *id.*

205. See *id.* at 171–72.

adequate protection of its interest.<sup>206</sup> Because debtors' exemption claims are a unique type of property interest, the court found, this debtor's exemption claim could not be preserved by transitioning the interest from property to cash.<sup>207</sup> Therefore, the trustee could not sell the parcels in a 363 sale reliant on section 363(f)(4).<sup>208</sup>

*2. Other Courts Might Find That a Forfeiture Claim Does Not Impact Whether the Property Can be Sold as Property of the Estate in a 363 Sale*

By contrast, the Seventh Circuit in *In re Fillion* concluded that a dispute over the ownership of property was insufficient to hold up a 363 sale of that property.<sup>209</sup> *In re Fillion* involved a Chapter 13 debtor attempting to consummate a plan.<sup>210</sup> The debtor's father, who was also her creditor, sued in state court to rescind his sale of the family farm to her.<sup>211</sup> The Chapter 13 plan contemplated the sale of 40 acres of the farm to pay off creditors.<sup>212</sup> The father objected to plan confirmation, claiming that a debtor cannot sell property when the debtor's interest in that property is disputed.<sup>213</sup>

The Seventh Circuit found that the dispute over the ownership of the property, rather than halting the sale, provided the basis for selling the property free and clear of the debtor's father's interest.<sup>214</sup> Section 1303 gives Chapter 13 debtors the same power that a bankruptcy trustee has to sell property using section 363.<sup>215</sup> Section 363(f)(4) permits sales of

---

206. *See id.* at 171.

207. *See id.* at 171–72.

208. *See id.*

209. *See In re Fillion*, 181 F.3d 859, 862 (7th Cir. 1999).

210. *See generally id.*

211. *See id.* at 861.

212. *See id.*

213. *Id.* Though the objecting creditor did not clearly define his objections under bankruptcy law, the Seventh Circuit found three plausible objections and rejected them all. *See id.* at 862:

We see three plausible objections under 11 U.S.C. § 1325 to confirmation of this Chapter 13 plan: 1) that the plan was not filed in good faith; 2) that the plan proposes the sale of real estate, the ownership of which is disputed; and 3) that the plan is not feasible.

214. *See id.*

215. *See* 11 U.S.C. § 1303.

property free and clear of interests in bona fide dispute.<sup>216</sup> Because there was a bona fide dispute over who owned the farm, the court found, section 363(f)(4) was satisfied.<sup>217</sup>

Although the Seventh Circuit did not conduct an in-depth analysis of whether the debtor's father held an interest in the farm, the court found that a rescission claim is an interest in property.<sup>218</sup> The Bankruptcy Code, according to the court, "specifically authorizes" sales free and clear of a claim that the debtor has no interest in the property.<sup>219</sup>

In *In re Fillion*, the creditor's rescission claim operated similarly to the relation-back doctrine in a forfeiture claim.<sup>220</sup> The father's contract to sell the farm to the debtor was performed before the debtor filed for bankruptcy.<sup>221</sup> This species of common-law rescission claim in Wisconsin "restore[s] the parties, substantially, to their original situation."<sup>222</sup> Because the creditor's rescission claim would void the sale of the farm to the debtor pre-bankruptcy, the creditor's claim was, essentially, that the farm was not property of the estate.<sup>223</sup>

It appears that the Seventh Circuit would be receptive to the argument that an asset is property of the estate even if a civil-forfeiture claimant disputes the trustee's ownership of the property.<sup>224</sup> The Ninth Circuit, by contrast, would probably require that a forfeiture claim on an asset be resolved before deciding whether the asset is property of the estate.<sup>225</sup>

---

216. See *supra* Section I.B.4.b.

217. The sale was permitted if adequate protection was given to the interest-holder. See *In re Fillion*, 181 F.3d at 862.

218. See *id.* The court does not use the word "interest," but rather uses the word "claim." See *id.* The court, however, references 11 U.S.C. § 363(f) as the authority for stripping the "claim," and section 363(f) uses the word "interest." See *id.*

219. See *id.*

220. See *supra* Section I.A.2.

221. See *In re Fillion*, 181 F.3d at 861. Moreover, the creditor sued for rescission before the debtor filed for bankruptcy. See *id.*

222. See *Wagner v. Wagner*, 80 Wis. 2d 299, 302, 259 N.W.2d 60, 62 (1977) (quoting *Glocke v. Glocke*, 113 Wis. 303, 311–12, 89 N.W. 118, 121 (1902)).

223. For a chronology of the deed from father to daughter, the subsequent falling out, the filing of a rescission claim, and the subsequent bankruptcy filing, see *In re Fillion*, 181 F.3d at 861–62.

224. See *supra* Section II.A.2.

225. See *supra* Section II.A.1.



B. IS THE FORFEITURE CLAIM AN INTEREST IN THAT PROPERTY FOR PURPOSES OF SECTION 363(f)?

1. *Civil Forfeiture Claims Likely Meet a Narrow Definition of Interest*

Civil forfeiture claims likely meet the older, narrow definition of “interest.”<sup>226</sup> Before the turn of the twenty-first century, some courts limited the section 363(f) definition of interest to *in rem* interests.<sup>227</sup> A civil forfeiture action is an *in rem* proceeding.<sup>228</sup> Because forfeiture interests are *in rem* interests, they likely satisfy the narrow definition of “interest” for purposes of section 363(f). Therefore, even if a court adopts a more constrained interpretation of “interest,” it is still likely to consider a forfeiture interest to be an interest subject to section 363(f).<sup>229</sup>

2. *Civil Forfeiture Claims Likely Meet a Broader Definition of Interest*

Civil forfeiture claims certainly fit the more widely used, and broader, definition of interest. If the claim “flows from the debtor’s ownership” of the assets being sold in a 363 sale, then it is an interest under the broader definition described in *Trans World Airlines* and adopted by many courts.<sup>230</sup> Here, the analysis is simple: but for the property to be sold, the government would have no civil forfeiture claim.<sup>231</sup>

Although no reported decision has directly addressed forfeiture claims in a section 363(f) context, claims analogous to civil forfeiture have been deemed interests for purposes of section 363(f). Adverse possession claims, for example, have similar legal characteristics to forfeiture claims.<sup>232</sup> Both claims run with the property, and courts apply

---

226. See 11 U.S.C. § 363(f).

227. See *supra* note 91 (identifying cases limiting “interest” to *in rem* interests).

228. See *Types of Federal Forfeiture*, U.S. DEP’T OF JUST. (Oct. 11, 2023), <https://www.justice.gov/afp/types-federal-forfeiture> [<https://perma.cc/7WDU-8HNQ>] (describing the difference between criminal forfeiture (*in personam*) and civil forfeiture (*in rem*)).

229. See 11 U.S.C. § 363(f).

230. *In re Motors Liquidation Co.*, 829 F.3d 135, 156 (2d Cir. 2016); see also *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290 (3d Cir. 2003) (finding employment discrimination claims “inextricably linked” to assets being sold).

231. Although forfeiture claims arise from a person’s conduct, they are *in rem* claims and do not exist without an asset to attach to. See U.S. DEP’T OF JUST., *supra* note 228.

232. For an analysis of the relation-back doctrine as applied to forfeiture claims, see *supra* notes 31–34 and accompanying text.

a relation-back doctrine to these types of claims.<sup>233</sup> At least two courts have stripped adverse possession claims in 363 sales despite arguments that, because a party's adverse possession of property began before bankruptcy was filed, the claims could not be interests in property for purposes of section 363(f).<sup>234</sup>

The Supreme Court's decision in *92 Buena Vista Avenue* supports the conclusion that the relation-back doctrine does not transform a civil forfeiture claim into something beyond the scope of an interest for purposes of section 363(f).<sup>235</sup> Although the relation-back doctrine can raise the question whether property is even property of the estate,<sup>236</sup> the relation-back doctrine only takes effect after a judgment of forfeiture.<sup>237</sup> The government is not able to "profit from [the relation back doctrine] until it has obtained a judgment of forfeiture."<sup>238</sup> Without a judgment of forfeiture, a civil forfeiture claim remains an *in rem* interest, similar to others which have been stripped in 363 sales, despite the existence of the relation-back doctrine.<sup>239</sup>

Civil forfeiture claims would likely not receive different treatment if a court found that the interest was regulatory rather than punitive. At least one court has rejected the argument that a regulatory interest should be treated differently from a punitive interest for purposes of section 363(f).<sup>240</sup> The Fourth Circuit found that a purchaser in a 363 sale was not obligated to contribute to federal regulatory programs for injured coal miners because the government's right to receive these funds was a regulatory interest attached to the property sold in a 363 sale.<sup>241</sup> The

---

233. See *In re* Cath. Bishop of N. Alaska, 525 B.R. 723, 730 (D. Alaska 2015) (rejecting attempt to collaterally attack 363 sale by weaponizing adverse possession's unique characteristics).

234. See *id.* (finding argument meritless that, because of adverse possession, the property sold was never actually property of the estate and thus sale was void); see also *In re* Colarusso 280 B.R. 548, 557 (Bankr. D. Mass. 2002) (finding 363 sale order authorized sale free and clear of adverse possession claim, and order of sale was final under § 363(m)).

235. See *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 129 (1993).

236. See *supra* Section II.A.

237. See *supra* note 34 and accompanying text.

238. *92 Buena Vista Ave.*, 507 U.S. at 129.

239. See *id.* at 125 (finding that the relation-back doctrine is "not self-executing").

240. See *In re* P.K.R. Convalescent Ctrs., 189 B.R. 90, 92-94 (Bankr. E.D. Va. 1995) (stripping a depreciation-recoupment interest after finding that "[e]ven assuming that the interest is regulatory, the court does not see this as a dispositive distinction").

241. See *In re* Leckie Smokeless Coal Co., 99 F.3d 573, 582 (4th Cir. 1996).

cornerstone of the analysis is examining the nexus between the claim and the property to be sold;<sup>242</sup> there does not appear to be any exception for governmental claims, even regulatory or punitive ones.

The treatment of forfeiture claims and judgments in other areas of the Code provides little assistance when determining whether a forfeiture claim is an “interest” in the section 363(f) context.<sup>243</sup> Individual debtors, for example, cannot discharge allowed claims for forfeiture in a confirmed plan.<sup>244</sup> Many aspects of a confirmed plan, however, do not apply to a 363 sale.<sup>245</sup> The 363 sale rose to prominence precisely because debtors wanted to avoid the cumbersome requirements of plan confirmation.<sup>246</sup>

Allowed claims for forfeiture are paid out near the bottom of the pecking order in a Chapter 7 liquidation.<sup>247</sup> The fact that forfeiture claims are prioritized in a confirmed plan, placed last in line in a liquidation, and unaddressed in a 363 sale may suggest that Congress did not intend for forfeiture claims to receive any kind of special treatment in a 363 sale. It is more likely, however, that Congress was not even thinking about civil forfeiture claims when it drafted section 363. Section 363 was never intended to be a means for debtors to sell their entire operation.<sup>248</sup> Indeed, courts have rejected textualist arguments that forfeiture claims should be treated the same way in administrative sections of the Code as they are treated in Chapter 7.<sup>249</sup> Thankfully, placing forfeiture claims within the 363(f) definition of “interest” is a simple task: Because a civil forfeiture claim is an *in rem* interest that flows from the asset being sold in a 363 sale, it is likely an interest for purposes of section 363(f).<sup>250</sup>

---

242. See *supra* note 87 and accompanying text.

243. See 11 U.S.C. § 363(f).

244. See *supra* note 168 and accompanying text.

245. See Suarez, *supra* note 55 at 990.

246. See *id.*

247. Only interest payment holders and the debtor itself are lower in the payout queue than forfeiture claimants. See *supra* note 174 and accompanying text.

248. See James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139, 161 (2004).

249. See *In re Chapman*, 264 B.R. 565, 572 (B.A.P. 9th Cir. 2001) (rejecting the argument that, because the relation-back doctrine would allow the government to circumvent the Chapter 7 distribution queue, the forfeiture proceeding should not be exempt from the automatic stay provision under § 362(b)(4)); see also *In re WinPar Hosp. Chattanooga, LLC*, 401 B.R. 289, 293 (Bankr. E.D. Tenn. 2009) (rejecting use of forfeiture claim’s placement in Chapter 7 distribution scheme to help interpret forfeiture claims in the context of an automatic stay under § 362(b)(4)).

250. See 11 U.S.C. § 363(f).

C. DOES THE FORFEITURE INTEREST SATISFY EITHER SECTION 363(f)(5)  
OR SECTION 363(f)(4) OF THE BANKRUPTCY CODE?

Two subsections of section 363(f) may allow for a sale free and clear of a forfeiture interest over the objection of the interest-holder. First, if the interest-holder could be compelled to accept a money satisfaction of its interest, then section 363(f)(5) would be satisfied.<sup>251</sup> Second, if the interest is in bona fide dispute, then the trustee may sell the property free and clear of the disputed interest using section 363(f)(4).<sup>252</sup> This subsection analyzes sections 363(f)(5) and (4) as applied to trustees attempting to sell property free and clear of civil forfeiture interests in a 363 sale.

*1. Section 363(f)(5): Compelling Forfeiture Interest-Holders to Accept a Money Satisfaction of Such Interest*

An interest may be stripped from property sold in a 363 sale if the interest-holder “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”<sup>253</sup> Some courts might find that civil forfeiture claimants could be compelled to accept cash for their forfeiture interest, especially if the forfeiture-triggering act occurred post-petition.

*a. A Broad Reading of Section 363(f)(5) Permits Sales Free and Clear of Forfeiture Claims*

If a court interprets section 363(f)(5) broadly, then it might find that civil forfeiture claims can be stripped from assets sold in a 363 sale. Many courts interpret section 363(f)(5) loosely.<sup>254</sup> If the interest is “subject to monetary valuation,” then the property may be sold free and clear of the

---

251. *See id.* § 363(f)(5).

252. *See id.* § 363(f)(4).

253. *See id.* § 363(f)(5).

254. *Dam v. Waldron*, No. 2:20-CV-00391-SAB, 2021 WL 6137346, at \*4 (E.D. Wash. July 30, 2021) (finding property interests were subject to monetary satisfaction because bankruptcy court held claims were “adequately protected by the order approving sale” and objectors’ proofs of claim “specified the dollar amount they were owed”).

interest.<sup>255</sup> The key question in this inquiry is: Can money damages adequately replace equitable relief for this type of interest?<sup>256</sup>

Forfeiture claims are subject to monetary valuation in at least three situations. First, forfeiture claims may be evaluated under the Constitution's Excessive Fines Clause by reducing the forfeiture claim to a monetary value.<sup>257</sup> Second, claims resulting from judgments of forfeiture are subject to monetary valuation in Chapter 7 of the Code.<sup>258</sup> Third, forfeiture claims may be reduced to liens if an innocent owner has a partial interest in the property according to 18 U.S.C. § 983(d)(5)(c).<sup>259</sup>

The Supreme Court articulated an individualized approach to evaluating civil forfeiture under the Excessive Fines Clause, and lower courts reference the property's market value as a relevant factor in the individual-approach analysis.<sup>260</sup> When evaluating whether a civil forfeiture claim is an excessive fine, some courts compare the market value of the asset to the dollar amount of the fine under the sentencing guidelines.<sup>261</sup> The mere fact that civil forfeiture is viewed as a fine suggests the capability of monetary valuation.

Forfeiture claims are also subject to cash valuation in the context of Chapter 7 liquidations. In *Trans World Airlines*, the Third Circuit found that the holders of EEOC claims and travel voucher claims would be

---

255. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 291 (3d Cir. 2003); *see also supra* notes 111–12 and accompanying text.

256. *See In re Signature Devs., Inc.*, 348 B.R. 758, 764 (Bankr. E.D. Mich. 2006). The inquiry involves two questions: “whether or not applicable law provides for the availability of money damages in lieu of equitable enforcement and whether or not such is appropriate in this situation.” *Id.* Because the latter is an exercise of a court's discretion, it is beyond the scope of this Note.

257. *See* U.S. CONST. amend. VIII; *infra* notes 260–61 and accompanying text.

258. *See infra* notes 262–65 and accompanying text.

259. *See infra* notes 266–68 and accompanying text.

260. On remand, after the Supreme Court articulated a facts and circumstances analysis in *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Indiana Supreme Court considered the property's market value as a relevant consideration. *See Wesley Hottot, What Is an Excessive Fine? Seven Questions to Ask After Timbs*, 72 ALA. L. REV. 581, 591 (2021) (examining *Timbs* and subsequent decisions, including the Indiana Supreme Court's actions on remand).

261. *See* Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 52 (2008) (discussing *United States v. Bajakajian*, 524 U.S. 321, 325 (1998)). Because the Supreme Court has not articulated a clear test to evaluate excessive fines, a few different tests are available to courts. *See* Lauren V. Parrottino, *The Excessive Fines Clause: Assessing Proportionality of Fines Through Civil Asset Forfeiture by Multi-Factor Tests in the Wake of Timbs v. Indiana*, 17 LIBERTY U.L. REV. 31, 60–66 (2022).

compelled to convert these interests to cash in a liquidation under Chapter 7 of the Bankruptcy Code.<sup>262</sup> This was sufficient to satisfy section 363(f)(5): the claims were stripped.<sup>263</sup> Civil forfeiture claims can also be converted to cash in a liquidation under Chapter 7.<sup>264</sup> Therefore, a court might consider looking to Chapter 7's treatment of forfeiture claims for guidance to find these interests strippable pursuant to section 363(f)(5).<sup>265</sup>

Forfeiture claims are also subject to valuation in a forfeiture proceeding. The civil forfeiture statute allows courts to convert forfeiture interests to liens.<sup>266</sup> If a court determines that an innocent owner holds a partial interest in the property, then the court may compel the government to accept a lien against the asset as satisfaction of its forfeiture interest.<sup>267</sup> A court's ability to value a forfeiture interest in cash and force the government to take a lien of that value at least demonstrates that, in certain situations, a civil-forfeiture claim may be subject to monetary valuation and thus strippable under a broad reading of section 363(f)(5).<sup>268</sup>

#### b. A Narrow Reading of Section 363(f)(5) Does Not Allow Sales Free and Clear of Forfeiture Claims

If a court interprets section 363(f)(5) narrowly, then it is unlikely to approve a sale free and clear of a forfeiture claim using section 363(f)(5).<sup>269</sup> The narrow view rejects hypothetical proceedings, requires a money satisfaction less than the claim amount, and, in some courts, requires the use of non-bankruptcy proceedings.<sup>270</sup> Under the narrow view, there is likely only one situation in which a forfeiture claim would be stripped in a 363 sale using section 363(f)(5): if the court allows the Bankruptcy Code to satisfy section 363(f)(5), and if the wrongful act triggering forfeiture occurred post-petition.

If a court rejects the use of hypothetical proceedings to satisfy section 363(f)(5), then there are only two potential proceedings available for a

---

262. See *In re Trans World Airlines, Inc.*, 322 F.3d 283, 290–91 (3d Cir. 2003).

263. See *id.* at 291.

264. See 11 U.S.C. § 726(a)(4).

265. See *id.* § 363(f)(5).

266. See 18 U.S.C. § 983(d)(5)(C).

267. See *id.*

268. See *id.*

269. 11 U.S.C. § 363(f)(5).

270. See *supra* Section I.B.4.a (discussing narrow view).

debtor to compel the government to take cash for its forfeiture interest. First, the civil-forfeiture statute, 18 U.S.C. § 983(d)(5)(C), allows a court to enter an order permitting innocent owners of property to “retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.”<sup>271</sup> The court would need to determine that the estate is an innocent owner of its interest in the property before this proceeding is available to the estate.<sup>272</sup> Though this is an actually-available, non-bankruptcy proceeding, the proceeding does not allow the court to force the government to take less than their claim against the estate as a lien.<sup>273</sup> Therefore, the innocent-owner provision of the civil-forfeiture statute is unlikely to be useful for trustees attempting to sell free and clear of civil forfeiture claims under a narrow reading of section 363(f)(5).

Second, Chapter 7 of the Code allows conversion to cash for an “allowed claim . . . for any . . . forfeiture . . . .”<sup>274</sup> In a Chapter 7 liquidation, a forfeiture claimholder could be forced to accept less than the full value of the claim, satisfying the second condition of the narrow view of section 363(f)(5).<sup>275</sup> But a forfeiture claimholder would only ever have an allowed claim for Chapter 7 purposes if the relation-back doctrine did not cause the property to be non-estate property. In most cases, the government can argue that, if it succeeds on its forfeiture claim, it would never be compelled to accept money satisfaction of the interest in a Chapter 7 proceeding because the property it claims forfeiture upon would not be property of the estate due to the relation-back doctrine.<sup>276</sup> If the relation-back doctrine is not in-play because the alleged wrongful act triggering forfeiture occurred post-petition, however, then the government would end up receiving an allowed claim against the estate.<sup>277</sup> In that fact-specific situation, it appears that a debtor could sell free and clear of a forfeiture interest using Chapter 7 to satisfy section 363(f)(5).<sup>278</sup>

---

271. See 18 U.S.C. § 983(d)(5)(C).

272. See *id.*

273. See *id.*

274. See 11 U.S.C. § 726(a)(4).

275. See *id.* Naturally, in bankruptcy liquidations, not all claimholders are paid their full claims.

276. See *supra* note 185 and accompanying text.

277. See 11 U.S.C. § 726(a)(4).

278. See *id.*; see also *id.* § 363(f)(5).

Most courts adopting the narrow view of section 363(f)(5) would not find that argument persuasive.<sup>279</sup> Many narrow-view courts reject the view that section 363(f)(5) can be satisfied by other provisions of the Bankruptcy Code, such as Chapter 7.<sup>280</sup>

Under a narrow reading, there is likely only one available way for a trustee to use section 363(f)(5) to sell free and clear of a forfeiture claim: if the court allows the Bankruptcy Code to satisfy section 363(f)(5), and if the wrongful act triggering the forfeiture claim occurred post-petition, then the trustee could rely on its power to force the government to take less than the value of the forfeiture claim in a Chapter 7 proceeding to satisfy section 363(f)(5).<sup>281</sup>

## 2. Section 363(f)(4): Stripping Forfeiture Interests That Are in Bona Fide Dispute

A civil forfeiture claim, in certain circumstances, may satisfy section 363(f)(4).<sup>282</sup> An interest is in bona fide dispute if there is an objective basis for a legal or factual dispute over the interest's validity.<sup>283</sup> Some courts have found that a bona fide dispute exists when parties dispute whether the property to be sold is property of the estate.<sup>284</sup> Others reject this view.<sup>285</sup> A forfeiture claim fits this mold. The government's position as a forfeiture-claim holder, when the relation-back doctrine is in-play, is that the property is not property of the estate.<sup>286</sup> The trustee looking to sell the property certainly believes the opposite. Therefore, a court could allow the sale of property free and clear of a forfeiture claim using section 363(f)(4) if the debtor can provide enough evidence to convince the court that there is a legal or factual basis to dispute the forfeiture claim.

While all courts would likely consider a forfeiture claim an interest in property for purposes of section 363(f),<sup>287</sup> some courts might require adjudicating a forfeiture claim before permitting a sale if the relation-back

---

279. See, e.g., *In re PW, LLC*, 391 B.R. 25, 44, 46 (B.A.P. 9th Cir. 2008) (finding this construction would render subparagraph (5) mere surplusage).

280. See *id.*; see also *supra* note 127 and accompanying text.

281. See *supra* notes 275–78 and accompanying text.

282. See 11 U.S.C. § 363(f)(4).

283. See *supra* note 132 and accompanying text.

284. See *supra* Section II.A.2.

285. See *supra* Section II.A.1.

286. See *supra* note 185 and accompanying text.

287. See *supra* Section II.B.



doctrine would cause the government to take ownership of the property before the creation of the bankruptcy estate.<sup>288</sup> Other courts would not consider this a threshold inquiry, but rather would find the sale permissible because section 363(f)(4) permits sales free and clear of interests that are in bona fide dispute.<sup>289</sup> Case law in some jurisdictions supports the position that sales free and clear of civil forfeiture claims are also permissible under a broad reading of section 363(f)(5) because money satisfaction adequately replaces equitable relief for civil forfeiture interests.<sup>290</sup> Other jurisdictions would read section 363(f)(5) narrowly and likely find that a sale free and clear of civil forfeiture interests is impermissible.<sup>291</sup>

### **III. COURTS SHOULD ALLOW SALES FREE AND CLEAR OF FORFEITURE INTERESTS USING SECTIONS 363(f)(4) & (5), BUT ONLY IF THE INTEREST-HOLDER RECEIVES ADEQUATE PROTECTION**

Section A argues that courts should not consider forfeiture claims to be a threshold issue before approving a 363 sale free and clear of such claims. Rather, courts should find that sales free and clear of civil forfeiture claims are permissible under a broad reading of section 363(f)(5) or a reasonable interpretation of section 363(f)(4). Though sales free and clear of civil forfeiture claims under both subsections are permissible in certain circumstances, section 363(f)(4) is generally preferable because it requires an evidentiary proceeding that provides more information to the bankruptcy judge before approving the sale.

Section B argues that courts should approve sales free and clear of civil forfeiture claims because a lien against cash proceeds adequately protects governmental forfeiture interests, and sufficient guardrails exist to prevent abuse of the Code. Section C argues that policy concerns support allowing sales free and clear of civil forfeiture claims.

#### **A. SECTION 363(f)(4) IS PREFERABLE TO SECTION 363(f)(5) WHEN APPROVING SALES FREE AND CLEAR OF CIVIL FORFEITURE CLAIMS**

An evidentiary proceeding in the section 363(f)(4) context is more valuable than an evidentiary proceeding regarding money satisfaction of

---

288. *See supra* Section II.A.

289. *See supra* Section II.C.2.

290. *See supra* Section II.C.1.a.

291. *See supra* Section II.C.1.b.

an interest for purposes of section 363(f)(5). The trustee must present evidence to demonstrate the existence of a bona fide dispute when attempting to sell assets free and clear of interests pursuant to section 363(f)(4).<sup>292</sup> The evidence presented to support a sale pursuant to section 363(f)(5) would likely demonstrate whether money satisfaction is an adequate replacement of the forfeiture interest, but would not examine the strength of either the trustee's ownership claim or the government's forfeiture claim to the property.<sup>293</sup>

If there is any perturbation about avoiding a 363(f)(5) evidentiary hearing that may reveal information about the value of an interest, this concern should be alleviated because a 363 sale involves an auction, and the government would receive a lien against the proceeds of the sale. A 363 sale involves at least some form of an auction seeking to achieve the highest price for the assets.<sup>294</sup> Moreover, if the government receives adequate protection in the form of a lien against the sale proceeds, then its interest would be valued by the market forces present in the auction. The benefits of a section 363(f)(5) evidentiary hearing are already baked into the 363 sale,<sup>295</sup> but a section 363(f)(4) evidentiary hearing could provide useful information.

At least one commentator has argued that courts should require a prima facie showing by the trustee that the property belongs to the estate before approving a 363 sale.<sup>296</sup> Some courts already do as much.<sup>297</sup> At an evidentiary hearing for section 363(f)(4), a prima facie showing that the debtor owns the property would be particularly useful. If the trustee makes a prima facie showing that it owns the property, then the government, logically, must present its own evidence to dispute that ownership. If the government did not dispute ownership, then it would not receive adequate protection in the sale because the court might find

---

292. See *supra* note 134 and accompanying text.

293. See *supra* Section I.B.4.a (discussing cases examining evidence of whether a legal proceeding exists to compel the interest holder to receive money satisfaction).

294. See *supra* notes 60–66 and accompanying text.

295. Any dispute regarding the dollar value of the interest would be resolved by the 363 sale auction.

296. See Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to § 363 Sales*, 62 CATH. U.L. REV. 1, 38 (2013) (suggesting a standard for approval of 363 sales that requires the debtor to make a prima facie showing that the property is in fact property of the estate).

297. See *id.* at 38 n.250.

that the government has no interest in the property at all.<sup>298</sup> In other words, the government cannot stonewall the evidentiary proceeding, neglect to provide any evidence for its forfeiture claim, then raise the forfeiture claim post-sale to invalidate the 363 sale order. Doing so would likely be considered an impermissible collateral attack on the court's judgment approving the sale.<sup>299</sup>

A hearing for section 363(f)(4) would bring evidence to the court's attention that would be useful in determining whether, in the court's discretion, it should approve the sale.<sup>300</sup> How close is the government to meeting the burden of proof at a forfeiture proceeding? Against what percentage of the assets of the estate is the government claiming forfeiture? Are any of those assets real property? The court can examine these questions to determine whether a sale pursuant to section 363(f)(4) is in the estate's best interests and a sound exercise of business judgment.<sup>301</sup> The court can also use this information to determine the amount of adequate protection that a debtor must give to the government.<sup>302</sup> If, for example, the forfeiture claim is solely against real property, then the court could determine that, because the strong-arm clause of the Code makes the trustee a bona fide purchaser of the property,<sup>303</sup> the government's forfeiture claim against the property is precluded by the Code, and therefore the government has no right to adequate protection in a 363 sale.

## B. THE BANKRUPTCY CODE ADEQUATELY PROTECTS FORFEITURE INTERESTS IF THEY ARE STRIPPED IN A 363 SALE

### *1. A Lien Against the Proceeds of the Sale Is Adequate Protection for the Government's Civil Forfeiture Interest in the Property*

A court should not approve a sale of property free and clear of a civil forfeiture interest without requiring that the debtor adequately protect the

---

298. See *supra* notes 77–80 and accompanying text.

299. See *supra* notes 82 & 233.

300. See *supra* notes 65–66 and accompanying text (discussing court approval of 363 sales).

301. The sale would be in the estate's best interest if the trustee fulfills his fiduciary obligation to achieve the best bid on the assets and the sale is a proper exercise of business judgment. See *supra* note 64 and accompanying text.

302. See *supra* notes 77–80 and accompanying text (discussing adequate protection).

303. See *supra* Section I.C.2.

interest.<sup>304</sup> If, for example, a senior lienholder credit bids to purchase the property, then the government's interest would not be adequately protected because there would be no proceeds of the sale for the government's forfeiture claim to attach to.<sup>305</sup> In the cases examined above, debtors gave adequate protection to parties who claimed that the property being sold in a 363 sale was theirs and not property of the estate.<sup>306</sup> Adequate protection would similarly be necessary to protect civil forfeiture claims. Forfeiture claimholders who do not claim ownership pre-petition due to the relation-back doctrine, however, likely would not deserve adequate protection because, in the event of a liquidation, their claims would be unlikely to be in-the-money.<sup>307</sup>

A lien against the proceeds of the sale is adequate protection for a forfeiture interest because government forfeitures are punitive in nature.<sup>308</sup> Other interests which are more challenging to value in cash receive adequate protection in the form of a lien against the proceeds of the 363 sale.<sup>309</sup> Here, the government likely intends to sell the assets for cash at its own auction if its forfeiture claim succeeds.<sup>310</sup> If a company's assets are sold as a package deal in a 363 sale, then the auction is likely to produce a higher dollar value than a government auction of a portion of the company's assets would produce because the sale preserves going-concern value.<sup>311</sup> A forfeiture interest, therefore, is arguably more valuable as a lien against the 363 sale proceeds than it would be as a forfeiture interest against the property.<sup>312</sup>

---

304. That is, if the party holding the forfeiture interest requests adequate protection. See 11 U.S.C. § 363(e).

305. See *supra* notes 72–76 and accompanying text.

306. See *supra* notes 135 & 217.

307. See *supra* note 174 and accompanying text.

308. See *supra* note 47.

309. See *supra* notes 111, 113, & 217 and accompanying text.

310. See *supra* note 24 and accompanying text.

311. See *supra* note 56 and accompanying text.

312. While this is situation-dependent, one can imagine the government preferring a forfeiture interest against a sum of cash over a forfeiture interest against an asset with wide fluctuations in value over time.

2. *Checks on Abuse Prevent Debtors from Pursuing a 363 Sale Solely to Frustrate a Civil Forfeiture Claim*

Bankruptcy Courts are well equipped to evaluate abuses of the Code. For example, a debtor may not file bankruptcy solely to frustrate or delay an interested party.<sup>313</sup> A debtor also must be near insolvency to file for bankruptcy protection.<sup>314</sup> If a debtor with sound financials files for bankruptcy and attempts a 363 sale solely to thwart a forfeiture proceeding, then the court may reject the sale and even dismiss the debtor's bankruptcy filing for having been filed in bad faith.<sup>315</sup>

Moreover, civil forfeiture proceedings are not subject to the Code's automatic stay provisions.<sup>316</sup> A debtor may file for bankruptcy, in part, to prevent other proceedings in which interest-holders are attempting to seize the debtor's assets.<sup>317</sup> Because a civil forfeiture proceeding likely fits the police and regulatory power exception to the Bankruptcy Code's automatic stay,<sup>318</sup> however, the government may continue to pursue a forfeiture proceeding while the debtor is in bankruptcy. This prevents the debtor from filing for bankruptcy to frustrate the government's attempt to enforce forfeiture upon the debtor's assets.

The federal civil forfeiture statute gives the government powerful tools to prevent debtors from thwarting their legitimate forfeiture interests in a 363 sale.<sup>319</sup> The forfeiture statute allows the government to seize property pre-forfeiture if it can show probable cause that the property is subject to forfeiture.<sup>320</sup> Because the civil forfeiture proceeding is not subject to the automatic stay,<sup>321</sup> the government can likely pursue a seizure of assets even after the debtor files for bankruptcy.<sup>322</sup>

---

313. See *supra* notes 156–62 and accompanying text.

314. See *supra* notes 163–67 and accompanying text.

315. See *supra* Section I.B.6.

316. See *supra* Section I.C.2.

317. See *supra* note 161 and accompanying text.

318. See *supra* Section I.C.3.

319. See generally 18 U.S.C. § 981; see also *supra* Section I.A.1.

320. See *supra* note 25 and accompanying text.

321. See *supra* Section I.C.3.

322. See *supra* notes 184–85 and accompanying text.

C. POLICY CONCERNS SUPPORT ALLOWING SALES FREE AND CLEAR OF  
FORFEITURE CLAIMS BECAUSE FORFEITURE IS A PENALTY THAT IS  
EASILY TRANSFERRED TO CASH

The Bankruptcy Code provides a court-supervised method of selling property to the highest bidder.<sup>323</sup> This is preferable to the government's inevitable auction of the assets that it obtains through forfeiture in two ways.<sup>324</sup> First, the trustee has a fiduciary duty to obtain the "highest and best bid" at the 363 sale auction.<sup>325</sup> The government has no such duty when auctioning assets obtained through civil forfeiture. Second, the debtor can sell more than just the assets subject to forfeiture.<sup>326</sup> In a 363 sale for an entire company, the value of the assets sold together is likely higher than the value of each asset sold separately.<sup>327</sup>

Even if the government has a claim to all the assets making up the business as a going-concern, then its only interest is *still* selling the company for cash. At least some members of the Department of Justice recognize that if the asset subject to forfeiture is an ongoing business, then it is better for the trustee to manage the asset because the government does not have the resources to manage and operate a business.<sup>328</sup> To be sure, the government's forfeiture interest may serve to benefit wronged parties who otherwise would receive nothing in a bankruptcy proceeding.<sup>329</sup> But that interest is maintained when the government receives adequate protection of its forfeiture interest in the form of a lien against the proceeds of the sale.<sup>330</sup>

The policy concerns in the cases finding that a dispute over the trustee's ownership of the property is a threshold issue are not present

---

323. See *supra* notes 60–66 and accompanying text.

324. See *supra* note 24 and accompanying text.

325. See *supra* note 64 and accompanying text.

326. The government might not have a forfeiture claim to all the assets. If some assets are beyond the government's reach, there would be no way to sell all the company's assets together.

327. See *supra* note 56 and accompanying text.

328. See Alice W. Dery, *Interplay Between Forfeiture and Bankruptcy*, 66 U.S. ATT'YS' BULL., Mar. 2018, at 117, 124 ("Forfeiture of an ongoing legitimate business can be problematic because the government typically lacks the resources to manage and operate a business . . . . The government may consider directing this type of asset to the bankruptcy trustee, who generally has greater experience in dealing with ongoing businesses.").

329. See *supra* note 28 and accompanying text.

330. See *supra* notes 77–80 and accompanying text.

when considering civil forfeiture claims. In *In re Clark*, for example, the interest-holder was the debtor himself who claimed that he had properly exempted property from the estate.<sup>331</sup> The purpose of exempting property from the estate is to allow individual debtors to retain at least some assets so that they are not left destitute post-bankruptcy.<sup>332</sup> Forfeiture claims serve no such purpose.<sup>333</sup>

Even if those policy concerns do exist when courts are presented with the question of stripping forfeiture interests, a court still should not find that disputing ownership is a threshold inquiry. The court in *In re Clark* could have found that the 363 sale was impermissible because there was no way to adequately protect the debtor's claim that he had properly exempted his property from the bankruptcy estate.<sup>334</sup> A court, therefore, could come to the same result as *In re Clark* by finding the following: (1) the asset is estate property, (2) the interest is an "interest" for purposes of section 363(f), and (3) the interest could be stripped pursuant to section 363(f)(4) if adequate protection were provided, but it is impossible to provide adequate protection in this case.<sup>335</sup>

Allowing a sale free and clear of a civil forfeiture claim using section 363(f)(4) also comports with the purposes of this subsection of the Code. Subsection 363(f)(4) intends to allow the trustee to sell property free and clear of disputed interests that would otherwise hold up the sale.<sup>336</sup> In the case of civil forfeiture, the government's interest is maintained by receiving adequate protection in place of its forfeiture claim, and its holdup value is removed.<sup>337</sup>

Allowing 363 sales free and clear of civil forfeiture claims maximizes value for both the estate and the government. It is true that the government will expend resources litigating its forfeiture claim regardless of whether it is attached to cash or tangible property.<sup>338</sup> But the 363 sale will likely result in a higher dollar value for the assets.<sup>339</sup> The government

---

331. See *supra* note 196 and accompanying text.

332. See *supra* note 197 and accompanying text.

333. Forfeiture claims are a form of punishment. See *supra* notes 43–48 and accompanying text.

334. See *supra* notes 205–08 and accompanying text.

335. This logical chain applies the three-step framework presented in Part II. See *supra* Part II.

336. See *supra* note 199.

337. See *supra* Section III.B.1.

338. That is, assuming the costs for the government to pursue a civil forfeiture claim would be equal regardless of the type of asset subject to forfeiture.

339. See *supra* note 311 and accompanying text.

will see the dollar value of the assets and be able to determine whether it is worth the time and money to pursue a forfeiture claim on the proceeds of the sale.

### CONCLUSION

Civil forfeiture can create a stressful situation for already distressed debtors seeking relief through the Bankruptcy Code. The solution in the context of a 363 sale, however, is simple: convert the forfeiture interest into a lien against the proceeds of the sale. A 363 sale changes a zero-sum game into a situation where everyone wins. The combination of court supervision, adequate safeguards, and market forces might satisfy all parties involved. Courts should not reject the sale of assets free and clear of forfeiture interests at the threshold, but rather should use the disputed claim as an opportunity to focus all interest-holders on maximizing value in a difficult situation.