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by

*George W. Kuney**

In a prior article[1] I examined the effect of broadly misinterpreting Bankruptcy Code[2] § 363(f) to include "claims" within the statute's word "interest." Specifically, I argued that the interpretation resulted in shifting Chapter 11 from a process focused on confirmation of a plan of reorganization to one making bankruptcy courts *the* forum of choice for sales of businesses, troubled or not, so that purchasers and insiders—not debtors and their creditors—can benefit. This Article examines a mirror image of that problem: what I argue is an unnecessarily *narrow* interpretation of § 363(f) that results in traditional

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[1]George W. Kuney, *Bankruptcy Code § 363(f): A Misinterpretation that Undermines the Chapter 11 Process*, 76 AM. BANKR. L.J. 235 (2002) (*hereinafter* "Misinterpretations I"). This second article on § 363 issues grew out of a series of intertwined tangents that developed in the drafting of Misinterpretations I. As a result, this Article cites back to that article in a number of places to avoid needless duplication of reasoning and authorities found in the last issue of this journal.

[2]Throughout this Article, reference is made to the "Bankruptcy Code" or the "Code." Unless otherwise noted, all such references are to Title 11 of the United States Code as in effect September 30, 2002. Additionally, all citations to "section," "sections," "§ ," or "§§ " are to the Bankruptcy Code and all citations to "Rule" or "Rules" are citations to the Federal Rules of Bankruptcy Procedure unless otherwise noted.

in rem interests that run with the land being excluded from the set of interests that can be stripped off property through a free and clear sale.[3] This second set of misinterpretations of the statute elevates *in rem* interests to a potentially immutable status, creating "bankruptcy-proofing" opportunities that run counter to the reorganizational purposes of the Code.

This misinterpretation encourages the creation and use of traditional *in rem* interests that run with the land to structure transactions and ongoing commercial relationships. By using easements, covenants, and liens to address matters that might otherwise be included in a purchase and sale, joint venture, partnership, or operating agreement, contracting parties may decrease the risk that the transaction will be unwound or modified in a later bankruptcy proceeding. If this "bankruptcy proofing"[4] technique becomes more widely understood outside of the insolvency community, its use is likely to increase.

Section I of this Article explores the statutory power to sell free and clear of traditional *in rem* interests in the preplan and plan contexts and judi-

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[3]This Article is not the first to note this problem or, as this Article does, to contend that the use of eminent domain may be one of the proceedings that should "count" for § 363(f)(5) purposes. *See* Basil H. Mattingly, *Sale of Property of the Estate Free and Clear of Restrictions and Covenants in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 431 (1996) (hereinafter "Mattingly"). Professor Mattingly's Article predates some of the authorities discussed in this Article and does not address the bankruptcy-proofing incentives to use reciprocal easement agreements and similar transactional devices that are created by the dominant interpretation of § 363(f) to exclude *in rem* interests. He "argues that section 363(f) itself permits sales free and clear of restrictions," which he analytically equates with liens, and "that Bankruptcy Code policies are furthered by this model of section 363(f)." This author does not embrace equating restrictive covenants with liens *per se*, but Professor Mattingly's article is an excellent analysis of § 363(f) issues in this context.

[4]Some may object to the use of this term, arguing that the Code prevents parties from structuring transactions to avoid application of the Code to them. *See, e.g.*, § 365(b)(2) (upon assumption of executory contract there is no need to cure a default under an *ipso facto* clause); § 541(c) (*ipso facto* clause is unenforceable with regard to property becoming property of the estate). However, it is possible to structure transactions to minimize exposure to bankruptcy risk by focusing on, for example, minimizing the property rights of a potential debtor by using an escrow or a special purpose entity, drafting charter and bylaw prohibitions to prohibit or make difficult a voluntary filing, and providing for automatic termination of rights due solely to the passage of time. *See, e.g.*, Michael D. Fielding, *Preventing Voluntary and Involuntary Bankruptcy Petitions By Limited Liability Companies*, 18 BANKR. DEV. J. 51 (2001) (discussing bankruptcy hindrance mechanisms); Lois R. Lupica, Circumvention of the Bankruptcy Process: The Statutory Institutionalization of Securitization, 33 CON. L. REV. 199 (2000) (discussing bankruptcy-proofing through asset securitization); George W. Kuney, *Intellectual Property Licenses in Bankruptcy*, 16 CEB CAL. BUS. L. PRACT. 33, 43-46 (Spring 2001) (discussing techniques to minimize bankruptcy risk in intellectual property license transactions and collecting authorities discussing similar techniques). Because of the judicial exclusion of traditional *in rem* interests from § 363(f)-type "interests," the use of traditional *in rem* interests that run with the land is yet another mechanism to accomplish the same end. Those for whom "bankruptcy proof" is too strong a term may prefer "bankruptcy resistant." *Cf. generally In re* Kingston Square Assocs., 214 B.R. 713 (Bankr. S.D.N.Y. 1997) (noting that fashion has a role in bankruptcy as well as the garment industry and analyzing provisions in corporate documents designed to create bankruptcy remote entities).

cial interpretations of those powers.[5] The section concludes that the courts have incorrectly interpreted the statute to *exclude* traditional *in rem* interests that run with the land from the set of interests that may be stripped off property under § 363(f).[6] Section II explores the likely effect of a continuation of the current, dominant interpretation: the increased use of reciprocal easement agreements[7] and other transactional devices that create traditional *in rem* interests to "bankruptcy-proof" real estate development projects and related ventures.[8] Section III proposes returning to a straightforward interpretation of the statute and using notions of adequate protection and the fair and equitable cramdown requirement to avoid the problems[9] created by the misinterpretation of § 363(f) and to alleviate concerns regarding disruption of important relationships represented by *in rem* "interests."[10]

I. THE STATE OF THE LAW REGARDING SALES FREE AND CLEAR OF *IN REM* INTERESTS WITH AND WITHOUT A PLAN OF REORGANIZATION

A. SECTIONS 363 (F) AND 1141(C)

Bankruptcy Code § 363(f)[11] permits a trustee or debtor in possession[12]

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[5]*See infra* notes 1-100 and accompanying text.

[6]*See infra* notes 94-100 and accompanying text.

[7]Reciprocal Easement Agreements are commonly referred to as "REAs" and are discussed generally in, among other places, Marvin Garfinkel's article *May all or Portions of a Recorded Shopping Center Reciprocal Easement Agreement Be Rejected as an Executory Contract under Section 365 of the Bankruptcy Code?*, 28 REAL PROP. PROB. & TR. J. 83 (1983) (hereinafter "Garfinkel") and Denise L. Savage's article *Reciprocal Easement Agreements: Assumption and Rejection in Bankruptcy*, 19 REAL EST. L.J. 99 (1990) (hereinafter "Savage"). Both articles predate the *Gouveia v. Tazbir* opinion discussed *infra* at notes 43 & 72-84 and accompanying text, which tends to refocus the analysis of REAs away from § 365 assumption and rejection issues and on to § 363(f) free and clear issues, but their discussion of the practical, real world use of REAs remains up to date. This Article uses the terms "reciprocal easement agreement" and "REA" to denote almost any transactional document or device that uses traditional *in rem* interests that run with the land to structure relationships between parcels of land and their owners. *See infra* note 106.

[8]*See infra* notes 101-82 and accompanying text.

[9]A clarification of the author's normative stance is in order. Attempts to bankruptcy-proof or create bankruptcy-resistant transactional structures are not *per se* evil or problematic. If Congress determines that some entities or transactions should not be subject to modification under the Bankruptcy Code or a particular chapter of the Code, that is perfectly appropriate. I classify bankruptcy-proofing as a problem when it is the product of (mis)interpretation of the statute rather than the legislature's intent. Here, in particular, there is no evidence that Congress ever intended § 363(f)'s term "any interest" to exclude some of the most long-standing property interests in our legal system. Therefore, a body of decisions that does so is a problem—a normative "bad" to me—that is or will be taken advantage of by sophisticated parties and their counsel.

[10]*See infra* notes 183-91 and accompanying text.

[11]The bankruptcy courts probably no longer have the power to authorize sales of assets free and clear outside the scope of § 363(f) or the plan process. *Supra* note 1 Kuney *Misinterpretations I* at note 13 ("The bankruptcy court may have the power to sell assets free and clear even without the existence of § 363(f) or the plan process." *See* MacArthur Co. v. Johns-Manville Corp. (*In re* Johns-Manville Corp.), 837 F.2d 89, 93 (2d Cir. 1988) (citing, *inter alia*, to Van Huffel v. Harkelrode, 284 U.S. 225 (1931)), for

to sell property of the estate free and clear of interests in the property if any one of five conditions is met.[13] The section provides:

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

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the proposition that "even absent express statutory authority, the Bankruptcy Court had the inherent equitable power to sell a debtor's property and to transfer third-party interests to the proceeds of the sale" and Fierman v. Seward Nat'l Bank, 37 F.2d 11, 13 (2d Cir. 1930), for the proposition that "[w]hen the bankrupt's property was sold free of liens, the liens upon the property became rights against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was." Precedent from the *Johns-Manville* case, however, is suspect under the doctrine of "good facts make bad law," *see* State v. Anderson, 580 N.W.2d 329 (Wis. 1998) (good facts form "a comfortable backdrop against which courts relax their vigilance"), and, at a minimum, should generally be confined to the facts of mass tort cases. *Cf.* Burke v. Deere & Co.,6 F.3d 497, 510 (8th Cir. 1993) (citing Chrysler Corp. v. Wolmer, 499 So. 2d 823, 826 (Fla. 1986)), regarding limiting jury instruction from *Johns-Manville* to asbestos cases. Further, more recent cases indicate little willingness to acknowledge free-standing equitable powers in the bankruptcy courts. *See, e.g.*, Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); Petro v. Mishler, 276 F.3d 375 (7th Cir. 2002) (section 105(a) could not be used to supplement Chapter 13 confirmation standards as those were explicitly set by statute). This leads to the conclusion that the present Supreme Court would be more likely to find that § 363(f) has circumscribed the limits of whatever original, broad equitable power of sale free and clear may have existed in the bankruptcy courts and that even § 105 (the all writs provision) can not be used to expand that power. *See* Celotex Corp. v. Edwards, 514 U.S. 300, 313-33 (1995) (Stevens, J., joined by Ginsburg, J., dissenting and observing problems with broad injunction issued under § 105 by non-Article III bankruptcy judge); United States v. Energy Res. Co., 495 U.S. 545, 549-50 (1990) (broad equitable powers of § § 105 and 1123(b)(5) are subject to limitation if subject matter has been addressed by other provisions of the Code or other applicable law); § 363(f) (the sale-free-and-clear-sale power may be used "only if" one of five express conditions is met).

[12] § 902(5) ("trustee" generally means "debtor" in Chapter 9 cases); § 1107(a) (granting a Chapter 11 debtor in possession the rights, powers, and duties otherwise provided for the trustee under the Bankruptcy Code); § 1203 (conferring Chapter 12 debtor in possession with many of the rights, functions, and duties of a chapter 11 debtor in possession); § 1303 (providing a Chapter 13 debtor with the rights and powers of a trustee under §§ 363(b), (d)-(f), and (l).

[13] § 363(f); Kuney, *Misinterpretations I*, *supra* note 1, at notes 13-83 and accompanying text (discussing the law relating to these five conditions in detail and collecting authorities). *See generally* Lee R. Bogdanoff, *The Purchase and Sale of Assets in Reorganization Cases—of Interest and Principal, of Principles and Interests*, 47 BUS. LAW. 1367, 1415-25 (1992) (discussing many of the issues involved in the sale of assets in bankruptcy cases that are beyond the scope of this Article, and noting, at 1371, that although the sale provisions of the Code present some of its most difficult issues of statutory construction and application, they have traditionally received little critical analysis).

> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[14]

Although § 363 can be used to implement a confirmed plan, it can also be used on a freestanding basis to authorize a preplan sale of property free and clear through a motion to sell.[15]

The Code also contains provisions that can explicitly render assets free and clear of claims and interests through the process of plan confirmation, consummation, and postconfirmation vesting:[16]

> Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of *all claims and interests of creditors*, equity security holders, and of general partners in the debtor.[17]

The postconfirmation vesting power can only be invoked under a confirmed plan.[18] Section 1141(c)'s vesting free and clear power, which, in at least some respects, is broader than § 363(f) on its face, has been largely ignored and remains largely unconstrued.[19]

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[14]§ 363(f) (emphasis added).

[15]*See* Kuney *Misinterpretations I*, *supra* note 1, at note 17 (discussing sale motion practice and relevant authorities).

[16]§ 1123(a)(5) (plan may provide for sale or transfer of property); § 1123(b)(3) (plan may settle or adjust any claim or interest); § 1123(b)(4) (plan may provide for sale of substantially all of the assets the estate); § 1141(c) (allowing postconfirmation vesting of property free and clear of all claims and interests). When a bankruptcy case is commenced—or, technically, to take account of involuntary bankruptcy cases, upon the entry of the order for relief—an estate is created and all of the debtor's rights in property pass to the estate. § 541. If the case is a Chapter 11 case, upon consummation of the confirmed plan the property is transferred out of the estate and re-vests in the debtor or other entity designated by the plan under § 1141(c). A similar provision is found in Chapter 13 cases involving adjustment of debts of an individual with regular income. *See* § 1327(c).

[17]§ 1141(c) (emphasis added). Section 1141(c) complements or enables the portion of § 1123(b) that allows a plan to contain provisions "for the sale of all or substantially all of the property of the estate." § 1123(b)(4). Confirmation standards for a plan, including the "cramdown" or nonconsensual confirmation provisions are found in § 1129.

[18]§ 1141(c). This postconfirmation vesting free and clear is independent of the issue of whether a debtor receives a discharge from prepetition claims. For example, when a debtor liquidates under a confirmed plan, or when the reorganized debtor is not an individual (i.e., is an artificial entity such as a corporation), it does not receive a discharge. § 1141(d)(3)(A). There is no reason, however, that the debtor's property that is liquidated under the plan cannot vest with *the purchaser* free and clear of the claims and interests of the debtor's creditors, equity security holders and general partners. *See* §§ 1141(c) and 1141(d)(3) (section 1141(c) does not specify with whom the property can vest; it leaves that open-ended. Section 1141(d)(3) specifies only that the debtor is not discharged from claims under certain circumstances; it does not deal with the debtor's or the estate's property or a purchaser of that property).

[19]*See* Kuney *Misinterpretations I*, *supra* note 1 note 28 ("A Chapter 11 case that has a sale free and clear as its goal will generally proceed straight to a preplan sale before, if ever, engaging in the costly and time consuming process of proposing, confirming, and consummating a plan of reorganization. In fact, it is

The term "interest"—the group of things that an asset may be sold or vested free and clear of—is not defined in the Bankruptcy Code,[20] despite detailed definitions for many other similar foundational terms.[21] Some have noted that courts seem to provide an interpretation of "interest" that is

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not uncommon for reorganization cases that began with a plan as their goal to end with a preplan sale. The plan process simply can consume too much time, generate too much expense, or fail to result in a feasible exit strategy for the debtor. *Cf. In re* APF, Co., No. 98-01596, Findings of Fact and Conclusions of Law and Order Confirming Modified Second Amended Joint Plan of Reorganization of FPA Medical Management Inc. and Certain of Its Subsidiaries and Affiliates, As Modified (Bankr. D. De. May 27, 1999) (unpublished decision on file with court, docket no. 2097) (confirmation of plan of reorganization long continued, finally plan confirmation process converted into § 363 sale with bare minimum of notice; liquidating plan followed). Further, under § 363(m) and current best practice, a sale transaction will close shortly after court approval and any appeal will be rendered moot, assuming that requisite findings of good faith were made and no stay of the order is granted prior to the closing. *See* State v. Shenandoah Realty Partners, L.P. (*In re* Shenandoah Realty Partners, L.P.), 248 B.R. 505 (W.D Va. 2000) (discussing standards for stay pending appeal and denying motion for stay); *see, e.g.*, Official Comm. of Senior Unsecured Creditors of First RepublicBank Corp. v. First RepublicBank Corp., 106 B.R. 938, 940 (N.D. Tex. 1989) (appeal dismissed; sale order entered on December 16, stayed until noon December 19, sale closed on December 19 at noon, no stay pending appeal obtained: "the dog is dead and the appeal is moot"); FED. R. BANKR. P. 8002 (orders are final and nonappealable ten days after entry). Section 363(m)of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section [which are implicated in any 363(f) sale] of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m) (2000). *See also* Hoese Corp. v. Vetter Corp.(*In re* Vetter Corp.), 724 F.2d 52, 56 (7th Cir. 1983) ("good faith" for § 363(m) purposes requires a showing that there was not "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."). This provision creates a race to close a transaction as soon after entry of the sale order as possible to prevent any stay from issuing and to moot potential appeals. *See, e.g., In re* Sax, 796 F.2d 994, 997-98 (7th Cir. 1986) (sale closed without stay of appeal; appeal was automatically mooted)). *See generally* 1 WEIL, GOTSHAL & MANGES LLP, REORGANIZING FAILING BUSINESSES 11-29 to 11-31 (ABA 1998) (describing § 363(m) authorities and practice).

[20]*See* Folger Adam Sec., Inc. v. Dematteis/MacGregor, JV, 209 F.3d 252, 257 (3d Cir. 2000) ("The term 'any interest' as used in § 363(f) is not defined anywhere in the Bankruptcy Code"); Minstar, Inc. v. Plastech Research, Inc. (*In re* Arctic Enter., Inc.), 68 B.R. 71, 78-79 (D. Minn. 1986) (construing "interests" under § 1141(c) to include liens).

[21]*See, e.g.*, §§ 101(5) (claim), (10) (creditor), (12) (debt), (15) (entity), (16) (equity security, which includes "interests of a limited partner in a limited partnership" or warrant or right to purchase, sell or subscribe, but not to convert, shares of a corporation or limited partnership interests), (17) (equity security holder), (18) (indenture), (36) (judicial lien), (37) (lien) (a charge against or interest in property to secure payment or performance), (41) (person), (43) (purchaser), (49) (security), (50) (security agreement), (51) (security interest), (54) (transfer). This definitional void may have been partially filled by Butner v. United States, 440 U.S. 48 (1979), in which the Court held that the nature and extent of property rights were to be determined by applicable nonbankruptcy law—primarily state law. This may suggest that "interest" is coextensive with "property rights recognized by applicable non-bankruptcy law." Such an interpretation is, however, somewhat broader than that applied by the courts.

broader than mere ownership interests and lien rights;[22] others have noted that the courts are perhaps unduly restrictive in their interpretation of the term.[23] Another commentator, synthesizing the holdings of two leading cases, believes that "the term 'any interest' . . . refer[s] to obligations that are connected to, or arise from, the property being sold."[24]

B. What Property Interests are "Interests" Under Section 363(f)?

The following sections address the application of § 363(f) to nonclaim interests.[25] These interests are divided into equity interests, an assortment of interests that do not qualify as traditional *in rem* interests that run with the land,[26] and traditional *in rem* interests that run with land. The analysis reveals that the courts have limited the "interests" that § 363(f) can strip off to *exclude* traditional *in rem* interests that run with the land without any overarching unified theory or legislative guidance for support.

1. *Equity Interests*

Direct ownership rights, or equity interests, are a type of interest that falls within the purview of § 363(f).[27] They can thus be stripped from property sold under the section. There is no debate over this notion.

2. *Other Interests that Fall Short of Being Traditional* In Rem *Property Interests*

A state's right to recapture depreciation upon sale or change of use of

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[22]*See* Kuney *Misinterpretations I*, supra note 1; 3 Collier on Bankruptcy § 363.06[1] (15th ed. 1997).

[23]*See* Mattingly, *supra* note 3. Although two recent commentators apparently believe that the Bankruptcy Code's use of the word "interest" means a property right in all cases, Walter W. Miller, Jr. & Maureen A. O'Rourke, *Bankruptcy Law v. Privacy Rights: Which Holds the Trump Card?*, 38 Hous. L. Rev. 777, 813 (2001), I would argue that the authority that they cite for this proposition can be construed to support a different interpretation. *See* § 541(a) (property of the estate includes "all legal and equitable interests of the debtor in property"—inclusion of the phrase "in property" is a limitation on the phrase "all legal and equitable interests" just as is "of the debtor"; that would not be necessary if "interest" was already limited to property interests).

[24]Note, *When You Can't Sell to Your Customers, Try Selling Your Customers (But not under the Bankruptcy Code)*, 8 Am. Bankr. Inst. L. Rev. 395, 408-09 (2000) (internal quotations omitted, citing *In re* Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996) and *In re* WBQ P'ship, 189 B.R. 97 (Bankr. E.D. Va. 1995)).

[25]For a discussion of the application of § 363(f) to liens and claims, particularly successor liability claims that would otherwise be assertable against a purchaser under applicable nonbankruptcy law, *see* Kuney *Misinterpretations I*, *supra* note 1 and authorities cited therein.

[26]The term "traditional *in rem* interests that run with the land" includes easements, real covenants, and equitable servitudes. *See infra* note 41.

[27]*See In re* Hickey Prop., Ltd., 181 B.R. 171 (Bankr. D. Vt. 1995) (sale of debtor's equity not equivalent to sale of assets; secured creditor with collateral interest in the debtor's equities could not object to sale of debtor's assets as it lacked an interest in those assets); *In re* Dutch Inn of Orlando, Ltd., 614 F.2d 506 (5th Cir. 1980) (minority limited partners lacked standing to object to sale of debtor-partnership's assets).

property,[28] a debtor's homestead exemption,[29] a spouse's tenancy by the entireties interest,[30] a recorded right of first refusal,[31] renters' rights to obtain leases under a rent stabilization law,[32] and a leasing broker's right to a commission when the leased property is later sold to the tenant procured by the broker[33] have all been characterized as somehow "more" than an unsecured claim but "less" than a traditional *in rem* interest than runs with the land and, thus, have been stripped off as part of a sale free and clear.[34]

This is consistent with the overall spirit of § 363, which is to promote alienability of property of the estate for the maximum price possible,[35] regard-

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[28]*In re* WBQ P'ship, 189 B.R. 97, 99 (Bankr. E.D. Va. 1995) (free and clear sale authorized; state's right to recapture prior depreciation was an "interest" that could be reduced to a money judgement); *In re* P.K.R. Convalescent Ctrs., Inc., 189 B.R. 90, 95 (Bankr. E.D. Va. 1995) (accord).

[29]*In re* Crabtree, 112 B.R. 420, 422 (Bankr. W.D. Okla. 1989).

[30]Gerdes v. Gerdes (*In re* Gerdes), 33 B.R. 860, 870-71 (Bankr. S.D. Ohio 1983); *but cf.* Cmty. Nat'l Bank & Trust Co. v. Persky (*In re* Persky), 134 B.R. 81 (Bankr. E.D.N.Y. 1991) (tenancy by the entireties interests are not amenable to sale under § 363(h) as a tenancy by the entireties is not an undivided interest, a free and clear disposition would divest the spouse not only of an ownership interest but also a survivorship interest; finding that § 363(h) is unconstitutional as it is beyond the scope of the Bankruptcy Clause of the United States Constitution and stating, at 103-04, "[w]e view section 363(h) as a mechanism for redistribution of wealth, infringing on the rights of third parties who are neither debtors nor creditors in favor of only creditors of the bankrupt's estate and feel that, under the Takings Clause, such an action does not meet the 'public use' requirement."); *see also* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 571-72 (1996) (agreeing with the *Persky* court on the issue of § 363(h)'s unconstitutionality).

[31]*In re* Fleishman, 138 B.R. 641 (Bankr. D. Mass. 1992).

[32]Cheslock-Bakker & Assoc., Inc. v. Kremer (*In re* Downtown Athletic Club), 44 Collier Bankr. Cas. 2d 342 (S.D.N.Y. 2000) (recognizing that the asserted right to obtain leases was not a "claim" under the Code's definition as it was merely a right to seek an equitable remedy, and as such the debtor's confirmation of a plan could not discharge this right, but finding that it was an "interest" and thus could be stripped off the property sold by using § 363(f) and citing, among others, *In re* Taylor, 198 B.R. 142, 162 (Bankr. D.S.C. 1996), for the proposition that "a leasehold is a type of 'interest' that fits within the plain text of § 363(f)(4)").

[33]C.H.E.G., Inc. v. Millennium Bank, 99 Cal. App. 4th 505, 511 (2002) ("More fundamentally, CHEG's right to earn a commission on the sale of building A, as set forth in the lease, is an interest that can be terminated by the bankruptcy court when approving sale of the property").

[34]There is a tension between § 363(f) and § 365(h) as applied to leases. Section 363(f), of course, provides for a sale free and clear of any interest, including a leasehold interest. Under § 365(h), however, a tenant has the right to maintain occupancy of premises after a debtor/landlord has rejected a lease. There lies the tension. Can a debtor accomplish complete divestiture of a tenant's rights by selling free and clear when it could not achieve this same end through rejection of the lease? *Compare* Precision Indust., Inc. v. Qualitech Steel SBQ, LLC (*In re* Qualitech Steel Corporation), 2001 U.S. Dist. LEXIS 8328 (S.D. Ind. 2001) (holding that the specific protection given lessees under § 365(h) controlled over the more general free and clear provisions of § 363(f)), *with* Cheslock-Bakker & Assoc., Inc. v. Kremer (*In re* Downtown Athletic Club), 44 Collier Bankr. Cas. 2d 342 (S.D.N.Y. 2000) (holding that § 365(h) applies only if the debtor retains the property and rejects the lease and § 363(f) applies to a sale free and clear). Resolution of this split of authority is beyond the scope of this Article.

[35]WBQ P'ship v. Virginia (*In re* WBQ P'ship), 189 B.R. 97, 108-09 (Bankr. E.D. Va. 1995) (discussing the purposes and objectives of Congress when enacting § 363(f) and stating "the purpose behind the 'free-and-clear' language is to maximize the value of the asset . . . . The 'free-and-clear' language . . . provid[es] the buyer with what is essentially a fully marketable title"); *see also* GREGORY M. STEIN, MORTON P.

less of who else may have an interest in that property,[36] except as specifically addressed in its subsections.[37] Courts only seem to cry "foul" when they are faced with attempts to use § 363 to strip off traditional *in rem* interests that run with the land (other than liens).[38] When faced with such an attempt,

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FISHER, JR. & GAIL M. STERN, A PRACTICAL GUIDE TO COMMERCIAL REAL ESTATE TRANSACTIONS: FROM CONTRACT TO CLOSING at § 3.06-3.31 (discussing standards for judging marketable title in relation to title policy exceptions for, *inter alia*, easements and covenants). In furtherance of this purpose and absent any countervailing policy, § 363(f) should be interpreted so as to promote sales free and clear right up to the Constitutional limit of the Fifth Amendment's prohibition on uncompensated takings. *See generally* United States v. Security Indus. Bank, 459 U.S. 70, 75 (1982) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation."); Coan v. Bernier (*In re* Bernier), 176 B.R. 976 (Bankr. D. Conn. 1995) (extensively discussing scope of Congress's bankruptcy clause power, finding it to be expansive after reviewing relevant Supreme Court cases, and quoting Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 518 (1938), to state "Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law . . . [I]f Congress is acting within its bankruptcy power, it may authorize the bankruptcy court to affect these property rights, provided the limitations of the due process clause are observed."); *In re* Creative Mgmt., Inc., 141 B.R. 173, 177 (Bankr. W.D. Mo. 1992) ("The purpose of section 363(f) . . . is to enable a debtor to liquidate its assets without adversely affecting the rights of creditors . . . . Thus, to the extent that a party has an interest in property of the estate, such property can be sold free and clear of that interest, provided the party is given the same rights in the sale proceeds as it would have in the property sold"); H.R. REP. NO. 95-595 (1977) ("... it is necessary to insure that the interest . . . is protected, and that no erosion forbidden by the Constitution takes place").

[36]Plank, *supra* note 31, at 571-72 (recognizing the expansive spirit of § 363 and concluding that the statute goes too far and is unconstitutional in that § 363(h) allows sales of nondebtor co-tenant interests in the absence of the protections of § 363(f)'s five conditions). *See also* Julia Patterson Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851, 854 (1999) ("At least some scholars feel that the Takings Clause does not limit prospective bankruptcy legislation. I disagree. The Takings Clause does limit the power of Congress to impair the rights of secured creditors in bankruptcy, even prospectively, and my purpose in this article is to explain why.").

[37]*See, e.g.*, § 363(g) (authorizing sale free and clear of "vested right[s] in the nature of dower or [sic] courtesy"); § 363(h) (authorizing sale free and clear of interests of "tenant[s] in common, joint tenant[s] by the entirety" if certain conditions are met); *but see In re* Churchill Properties, III, LP, 197 B.R. 283 (Bankr. N.D. Ill. 1996) (where attempted presale rejection of lease of real property was denied because of improper notice, but sale of real property proceeded, and lease was subsequently rejected, § 365(h)(1)(A)(ii) right of lessee to remain in possession trumped § 363(f) free and clear provision under rule of construction that specific and later enacted provisions—here § 365(h)—prevail over general, earlier enacted ones—here § 363(f)); *In re* Taylor, 198 B.R. 142, 165 (Bankr. D.S.C. 1996) (accord); *see also supra* note 34 concerning the § 363(f)/363(h) debate.

[38]*But see* Fairchild Aircraft Inc. v. Cambell (*In re* Fairchild Aircraft Corp.), 184 B.R. 910, 920 (Bankr. W.D. Tex. 1995) (grounding analysis of what may be sold free and clear of interests in property under § 363(f) in whether or not the interest is truly an *in rem* interest; if it is, the interest can be stripped off), *vacated*, 220 B.R. 909 (Bankr. W.D. Tex. 1998). Concerns about the potentially disruptive consequences of allowing a § 363 sale to strip off an *in rem* interest that would otherwise run with the land are properly addressed through the Code's "adequate protection" and "fair and equitable" requirements rather than by recharacterization of property rights as falling in or out of the definition of "interest." *See* §§ 361 (adequate protection nonexclusively described), 363(e) (adequate protection for § 363 sales), 1129(b)(2)(A)(ii) (adequate protection through attachment to proceeds for sales free and clear under a plan), 1129(b)(2)(A)(iii) (indubitable equivalent alternative for cram-down). Sale free and clear of liens is expressly permitted by § 363(f)(3), which seems to imply that "lien" is a subset of "interest" as that term is used in § 363(f), a conclusion bolstered by § 101's definition of "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation."

they constrain the interpretation of the statute to block the sale free and clear of the *in rem* interest.[39] This approach stands in marked contrast to the expansive interpretation of the statute to allow sales free and clear of successor liability claims that would otherwise exist against a purchaser under applicable nonbankruptcy law.[40]

3. *Traditional* In Rem *Interests that Run with the Land*

Nonbankruptcy law has long treated covenants, easements, and other *in rem* interests that are said to "run with the land"[41] as property interests or interests in property.[42] Although they clearly fall within the widely adopted

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[39]*See infra* notes 41 to 100 and accompanying text.

[40]*See* Kuney *Misinterpretations I, supra* note 1 (discussing the subject expansive interpretation).

[41]These interests include: real covenants, equitable servitudes, and easements. The most recent Restatement has dropped the distinction between a real covenant and an equitable servitude and includes both those terms within the term "covenant that runs with the land." *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.4 (2000). Historically, however, a real covenant is a promise about the use of land that, if certain formalities are complied with, will bind the parties to the agreement and their successors in title to the land. 20 AM. JUR. 2D, *Covenants, Conditions, & Restrictions* § 12 (2000). An equitable servitude is similar to a covenant although privity of estate between the covenantor and the covenantee is not necessary. As a result, an equitable servitude is enforceable only against those with actual knowledge of it as it fails to meet one or more of the formalities required for enforcement as a real covenant. *See* 20 AM. JUR. 2D, *Covenants, Conditions, & Restrictions* § 43 (2000). An easement is a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. A profit *a pendre* is an easement that confers the right to enter and remove timber, minerals, oil, gas, game or other substances from the land. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.3 (2000). Whether or not these *in rem* interests can be stripped off using § 363(f) does not affect whether they should be termed interests that "run with the land." The RESTATEMENT (THIRD) OF PROPERTY recognizes numerous ways that these interests can be terminated or modified, *see infra* note 57 (listing Restatement provisions), and numerous doctrines of similar effect are recognized by American jurisdictions, *see* Appendix (collecting authorities). Interpreting § 363(f) to allow modification or termination of these interests would only add one more doctrine to this already lengthy list, to be applied in appropriate circumstances.

[42]Stamford v. Vuono, 143 A. 245 (Conn. 1928) (restrictive covenants are in the nature of an easement and thus constitute an interest in the land upon which they are imposed); *see also* Adult Group Prop., Ltd. v. Imler, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987) (restrictive covenants create a property right in each grantee); Washington Suburban Sanitary Comm'n. v. Frankel, 470 A.2d 813 (Md. Ct. Spec. App. 1984) (restrictive covenants or negative easements are property rights in favor of the owner of the dominant parcel, when government took servient parcel by power of eminent domain, compensation for taking of property right from owner of dominant parcel was due); Palm Beach County v. Cove Club Invs., Ltd., 734 So. 2d 379 (Fla. 1999) (county required to pay monthly recreational fee assessments for land subject to the fee and purchased by eminent domain in an inverse condemnation action because the restrictive covenant was a compensable property right); S. Cal. Edison Co. v. Bourgerie, 507 P.2d 964 (Cal. 1973) (restriction on adjacent land was a landowner's property right; landowner entitled to just compensation for violation of the restriction); Harris County Flood Control Dist. v. Glenbrook Patio Home Owners Assn., 933 S.W.2d 570 (Tex. Ct. App. 1996) (covenants are property interests subject to condemnation and just compensation); Meredith v. Washoe County Sch. Dist., 435 P.2d 750 (Nev. 1968) (restrictive covenant is a property right that, when taken by eminent domain, entitled the party benefitted by the covenant to just compensation); Raleigh v. Edwards, 71 S.E. 2d 396 (N.C. 1952) (owners of land with negative covenants running in its favor were entitled to just compensation when those property rights were taken by inverse condemnation); Store Safe Redlands Assocs. v. United States, 35 Fed. Cl. 726 (1996) (water rights and

common legal definition of "interest," courts routinely hold them not to be strippable interests for purposes of a § 363(f) sale free and clear.[43] A court may hold these interests to be so ingrained in the asset itself that they simply cannot be separated from it.[44] This is similar to the line of reasoning that prevents debtors from cleansing accounts receivable by washing away the account debtor's defenses to payment through a § 363(f) sale and effectively establishing a buyer of the receivables as a holder in due course without meeting the UCC's requirements for that status.[45] It also resembles those cases holding that rights of recoupment are so intrinsic to a particular asset that they follow assets sold whereas rights of setoff do not.[46] Like the case-by-case, result-oriented manipulation of the interpretation of § 363(f) to limit the group of interests that can be stripped off property, these approaches are unnecessary. Properly viewed, traditional *in rem* interests, defenses to pay-

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ditch right-of-way could be property rights entitling land owner to just compensation if access was denied).

[43]*See, e.g.*, Gouveia v. Tazbir, 37 F.3d 295, 299 (7th Cir. 1994) (debtor sought to sell free and clear of equitable servitude limiting use of property to residential uses; sale free and clear denied; "since the . . . landowners cannot be forced to accept money damages in lieu of equitable relief, we conclude that § 363(f) is inapplicable . . . ."); Silverman v. Ankari (*In re* Oyster Bay Cove, Ltd.), 196 B.R. 251, 255-56 (E.D.N.Y. 1996) (considering sale free and clear of liens and road and drainage easements and holding that sale free and clear is "not intended to sever easements and other non-monetary property interests that are created by substantive state law"); *In re* McConnell, 198 B.R. 181, 185 (Bankr. E.D. Va. 1996) (reciprocal negative easement under Virginia law runs with the land and is not amenable to a sale free and clear under § 363(f)(5)); *In re* 523 East Fifth Street Hous. Pres. Dev. Fund Corp., 79 B.R. 568 (Bankr. S.D.N.Y. 1987) (attempt to sell property free and clear of restrictive covenant in favor of N.Y.C. limiting use of property to low income housing; sale free and clear denied).

[44]*See, e.g.*, Silverman v. Ankari (*In re* Oyster Bay Cove, Ltd.), 196 B.R. 251, 255-56 (E.D.N.Y. 1996) ("Clearly, 11 U.S.C.A. § 363(f) and Bankruptcy Rule 6004, which refer to the sale of land 'free and clear' of 'interests' are not intended to sever easements and other non-monetary property rights that are created by substantive state law.").

[45]*See* Folger Adam Sec., Inc. v. Dematteis/MacGregor, JV, 209 F.3d 252 (3d Cir. 2000) (holding that, if notice properly alerted parties to consequences of proposed sale, the sale free and clear of accounts receivable under § 363(f) would cleanse the accounts of previously unasserted rights of setoff but not previously asserted rights of setoff or rights of recoupment previously asserted or not).

[46]*In re* Sigman, 270 B.R. 858 (Bankr. S.D. Ohio 2001) (recoupment is neither a "claim" nor "debt" that is dischargeable; creditor need not file proof of claim or object to discharge in order to exercise recoupment right in spite of discharge injunction); *In re* Lawrence United Corp., 221 B.R. 661, 669 (Bankr. N.D.N.Y. 1998) (recoupment is not a claim and does not "fall under the broadest interpretation of an "interest" in property"); *See also* Folger Adam Sec., Inc., 209 F.3d at 266-68 (Stapleton, J, concurring) (urging a bright line standard: § 363(f) can strip off setoff rights but not rights of recoupment); *see generally* Lee v. Schweiker, 739 F.2d 870 (3d Cir. 1984) (reviewing development of recoupment doctrine and distinguishing it from setoff); *In re* B&L Oil, 782 F.2d 155 (10th Cir. 1986) (similar seminal case). The *Lawrence* court's assertion that recoupment is not a claim is questionable, at least semantically. *See* Shalom L. Kohn, *Recoupment Re-Examined*, 73 AM. BANKR. L.J. 353, 355 (1999) (citing Coplay Cement Co. v. Willis & Paul Group, 983 F.2d 1435, 1440 (7th Cir. 1993), for the proposition that the "origins of recoupment are in the ancient rules of pleading; recoupment is the ancestor of the compulsory counterclaim and setoff of the permissive counterclaim."). *But see* Marley v. United States, 381 F.2d 738, 743 (Ct. Cl. 1967) (holding that sale free and clear did not cleanse assets of set off rights that had been raised and asserted prior to the sale). Whether these cases are wrongly decided or not is beyond the scope of this Article.

ment, and rights of recoupment are property rights, protected by the Fifth Amendment, and the Code provides mechanisms for addressing them: adequate protection[47] and, in the plan context, the "fair and equitable" cramdown requirement.[48] Using these standards to protect the holder of an *in rem* interest is similar to the minority rule—adopted by the Restatement as the proper modern rule—that permits owners of estates encumbered by an easement to unilaterally relocate the easement if the relocated easement provides the benefitted estate with benefits substantially similar to those of the original easement.[49]

Courts, however, protect traditional *in rem* interests that run with the land from § 363(f) stripoff using one of two general rationales that effectively read the *in rem* interest out of the statute, both of which suffer by comparison to using an adequate protection or fair and equitable standard. First, as previously noted, the *in rem* interest can be considered so ingrained in the property that it cannot be separated or, in a shortcut to the same result, that the *in rem* interest at issue is not included in § 363(f)'s use of the term "interest."[50]

The second rationale used to protect these *in rem* interests from § 363(f) is to claim that, under nonbankruptcy law, neither § 363(f)(1) or (f)(5) is satisfied. In other words, either there is no procedure available under applicable nonbankruptcy law that allows sales free and clear[51] or when a benefitted party seeks to enforce rights under an *in rem* interest, that party enjoys a unilateral election between legal and equitable remedies or a sole right to equitable remedies.[52] Both of these approaches to the second rationale are

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[47]§ 363(e) (adequate protection requirement applicable to § 363(f)).

[48]§ 1129(b) (fair and equitable cram down requirement); *see infra* notes 160-68 & 176-80 and accompanying text regarding application of cram down requirements to holders of *in rem* interests that are to be stripped off under a plan and § 1141(c) vesting free and clear.

[49]Soderburg v. Weisel, 687 A.2d 839, 844 (Pa. Super. 1997) (court "may compel relocation of an easement if that relocation would not substantially interfere with the easement holder's use and enjoyment of the right of way and it advances the interests of justice . . . . ordering relocation is an extraordinary remedy and should be used sparingly"). The Restatement adopts this minority view as reflective of the proper modern rule. RESTATEMENT (THIRD) OF PROP. SERVITUDES § 4.8(3) (2000) ("Unless expressly denied by the terms of an easement . . . the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created."). *See also* LA. CIV. CODE ANN. art. 695 (West 2000) (easement by necessity may be unilaterally relocated); *id.* at art. 748 (other easements may be relocated unilaterally); Kline v. Bernardsville Ass'n, Inc., 631 A.2d 1263 (N.J. Super. Ct. App. Div. 1993) (nonconsensual relocation of easement recognized as extraordinary remedy).

[50]*See, e.g.*, Silverman v. Ankari (*In re* Oyster Bay Cove, Ltd.), 196 B.R. 251 (E.D.N.Y. 1996) (discussed *infra* notes 55 to 66 and accompanying text).

[51]*See, e.g.*, *In re* 523 East Fifth Street Hous. Pres. Dev. Fund Corp., 79 B.R. 568 (Bankr. S.D.N.Y. 1987) (discussed *infra* at notes 67-71 and accompanying text).

[52]*See, e.g.*, Gouveia v. Tazbir, 37 F.3d 295 (7th Cir. 1994) (discussed *infra* at notes 72-84 and accompa-

well grounded in the words of the statute. They are, however, often flawed in application and mixed with the first rationale which reads "*in rem* interests" out of the statute's coverage.[53] Only passing reference, if any, is made to determining whether or not it is true that nonbankruptcy law does not permit the sale free and clear or that a monetary satisfaction could be compelled under the particular facts and applicable nonbankruptcy law.[54] The two rationales are often muddled together, making it difficult to determine which, exactly, is at work in a particular case.

For example, in *In re Oyster Bay Cove, Ltd.*,[55] the court held that a sale "free and clear of liens and other interests" had no impact on restrictions of record that run with the land and that § 363(f) is "not intended to sever easements and other nonmonetary property interests that are created by substantive state law."[56] The court went on to state that "absent the consent of the owner of an easement or the easement being in *bona fide* dispute,[57] the

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nying text). This right to choose the remedy negates the element of "compulsion" to accept the legal damages necessary to satisfy § 363(f)(5). *See* § 363(f)(5) (the creditor or interest holder "could be compelled, in a legal or equitable proceeding, to accept a money satisfaction"). Use of this rationale is not limited to case law. In a recent note published by the American Bankruptcy Institute Law Review, a conclusory analysis is presented that states that a trustee could not sell an internet company's confidential customer list free and clear of the nonexecutory contractual privacy right (a property right) of the customers. In this note's analysis, the same leap to conclude that no (f)(5) non-bankruptcy proceeding exists is made. *See* Note, *supra* note 24, at 421 (dispensing with any potential for sale under § 363(f)(4) in three short paragraphs by analogizing the personal property privacy right to a covenant running with the land that the author assumes, always gives the benefitted party the right to insist upon equitable relief under applicable nonbankruptcy law and ignores the potential for eminent domain takings or other, similar proceedings, although displaying knowledge of Professor Mattingly's article on the subject).

[53]*See, e.g.*, Silverman v. Ankari (*In re* Oyster Bay Cove, Ltd.), 196 B.R. 251 (E.D.N.Y. 1996) (discussed at notes 55-66 and accompanying text).

[54]*See* Mattingly, *supra* note 3, at 449 (discussing Massachusetts statute that in certain circumstances, allows removal of *in rem* interest and sole remedy is award of money damages). *See, e.g., In re* Dundee Equity Corp., 1992 Bankr. LEXIS 436 (S.D.N.Y. 1992) (in an apparently poorly briefed matter, after finding that stipulation between owner and tenants created an interest that ran with the land under New York law, the court finds that the interest cannot be stripped off under § 363(f) as the court is "not aware of" any provision of New York law that would compel the tenants to accept a money satisfaction in lieu of performance. Eminent domain or proceedings under the statutes cited in *523 East Fifth Street Housing Preservation*, 79 B.R. 568, are not mentioned.).

[55]Silverman v. Ankari (*In re* Oyster Bay Cove, Ltd.), 196 B.R. 251 (E.D.N.Y. 1996).

[56]*Id.* at 255. The quoted language is without citation in the decision and lacks any support in the statute or its legislative history.

[57]It bears pointing out that § 363(f)(4) has the potential to cause much mischief. Especially with covenants and easements, which are subject to a plethora of equitable rules creating, maintaining, and destroying them, it may be fairly easy in many cases for a debtor or counsel to come up with a *bona fide* dispute after a brief consultation with the Restatement of Property and applicable state law. *See* RESTATEMENT (THIRD) OF PROP. SERVITUDES § 2.1 (2000) (creation of servitudes); *id.* at § 2.2 (intent to create servitude may be express or implied); *id.* at § 2.12 (servitude may be implied from prior use); *id.* at § 7.2 (termination on expiration of servitude); *id.* at 7.3 (modification or extinguishment by release); *id.* at § 7.4 (modification of servitude by abandonment); *id.* at § 7.5 (termination by merger); *id.* at § 7.6 (modification or extinguishment by estoppel); *id.* at § 7.7 (modification or extinguishment by prescription); *id.* at § 7.8 (modification or extinguishment by condemnation); *id.* at § 7.10 (modification and termination of a

Bankruptcy Code does not even allow the bankruptcy court to authorize a sale of the property 'free and clear' of an easement."[58] The first quoted language suggests that the court believed easements—traditional *in rem* interests that run with the land[59]—were outside the scope of § 363(f)'s term "interest." The second quotation, which immediately follows the first in the opinion, suggests that an easement is within § 363(f)'s use of the word "interest" but can only be stripped off in a § 363(f) sale when there is consent ((f)(2)) or a *bona fide* dispute ((f)(4)), and excludes consideration of the other § 363(f) alternative grounds.[60]

To further muddle matters, the court "supported" the second quoted statement with the (itself unsupported) remark that:

> Three of the five instances where property may be sold "free and clear" of an interest will never, by law, apply to an easement. Only consent or dispute, neither of which apply in this case, would have allowed the Trustee to sell the property "free and clear" of the easements.[61]

Apparently counsel had not directed the court's attention to applicable state law permitting such sales or compelling a party benefitted under an easement to accept a monetary satisfaction for the interest, although state law of that sort did exist in New York at the time.[62] The *Oyster Bay* court ultimately authorized the sale of the debtor's real property free and clear of all liens, but

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servitude because of changed conditions); *id.* at § 7.11 (modification and termination of conservation servitude based upon changed conditions); *id.* at § 7.12 (modification and termination of affirmative covenants to pay money or provide services); *id.* at § 7.13 (modification and termination of servitude held in gross); *id.* at § 7.14 (extinguishment of servitude under recording act); *id.* at § 7.15 (application of recording act to modification or termination of a servitude); *id.* at § 7.16 (servitudes not terminable under marketable title acts, including servitudes "that would be revealed by reasonable inspection or inquiry" and those 'reasonably necessary for enjoyment of the dominant estate"); *see also* Pick v. Bartel, 659 S.W.2d 636, 638 (Tex. 1983) (discussing use of parole evidence to cure inadequate description of real property to be burdened by easement); Wallis v. Luman, 625 P.2d 759, 767 (Wyo. 1981) (discussing so-called "ditch right" and its transformation into an easement through interpretation of deed after reference to terms of deed, intent of the parties, the circumstances of the transaction, the situation of the parties, and the condition of the property); Strahin v. Lantz, 456 S.E. 2d 12, 15 (W. Va. 1995) (loss of easement does not result from mere non-use but may result from adverse possession, proof of an intent to abandon, or transactional documents); *see also* Mueller v. Hoblyn, 887 P.2d 500, 505-06 (Wyo. 1994) (discussing standards for abandonment); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1258-59 (1982) (suggesting that mere non-use may—and should—terminate servitudes). Alternatively, many of these doctrines should be examined as supporting potential § 363(f)(1) or (f)(5) grounds to allow sales free and clear.

[58]*In re* Oyster Bay Cove, Ltd., 196 B.R. at 255-56. Once again, this statement is without support.

[59]*See supra* note 41.

[60]Of course, (f)(3) applies only to liens by its own terms. *See* § 363(f)(3).

[61]196 B.R. at 256 n.9.

[62]*See, e.g., In re* 523 East Fifth Street Hous. Pres. Dev. Fund Corp., 79 B.R. 568 (Bankr. S.D.N.Y. 1987) (discussing statutory provisions allowing nonconsensual removal of covenants and easements and finding them inapplicable to the governmental agency and property at issue).

held that the enforcement of a road and drainage easement would not destroy marketability of title and refused to allow a sale free and clear of that easement.[63]

To make matters worse, the *Oyster Bay* court's broad pronouncements regarding the inability of § 363(f) to affect traditional *in rem* interests that run with the land were apparently unnecessary. The sale had been proposed on terms and conditions that expressly stated that the property was being sold "subject to" *inter alia* "any covenants, restrictions, and easements of record."[64] In other words, the sale was not even structured to attempt to use § 363(f) to strip off the easement in the first place. This should ameliorate some of the negative effects of the *Oyster Bay* court's broad and muddled pronouncements—they are *dicta*.

By briefly examining whether enforcement of the easement would destroy marketability of title, the *Oyster Bay* court came very close to employing a doctrine of necessity or relative hardship, i.e., if a sale free and clear of an interest is not a necessity or not justified when balanced against the harm to other interested parties from permitting a sale free and clear of the interest, it should not be approved.[65] This analysis could have been easily supported by § 363(e), by noting that the debtor could not adequately protect those who relied upon the *Oyster Bay* easement for drainage and a roadway. The *Oyster Bay* court, however, did not adopt this route. Rather, it went far beyond the contract language and, *inter alia*, broadly pronounced a muddled *per se* prohibition on sales free and clear of *in rem* interests that run with the land and a prohibition on using any grounds other than (f)(2) or (f)(4) to address sales free and clear of easements.[66] In doing so, the court lost the opportunity to articulate a flexible rule based upon notions of adequate pro-

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[63]196 B.R. at 256.

[64]196 B.R. at 253; *see also* Grant v. Carr (*In re* Alamo), 239 B.R. 623, 625 (Bankr. M.D. Fla. 1999) (discussing the *Oyster Bay* case's "subject to" terms of sale).

[65]*Cf. In re* C.A.F. Bindery, Inc., 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996) (the "doctrine of necessity" permits the court to authorize the payment of prepetition claims prior to confirmation if the debtor can show that the payment is "critical to the debtor's reorganization"); *see also In re* Fin. News Network, Inc., 134 B.R. 732, 735-36 (Bankr. S.D.N.Y. 1991) ("The 'doctrine of necessity' stands for the principle that a bankruptcy court may allow pre-plan payments of prepetition obligations where such payments are critical to debtor's reorganization."). The doctrine of necessity arises from the equitable principle *necessitas, quod cogit, defendit* or "the necessity is a defense to what necessity compels one to do," *see* GIBSON'S SUITS IN CHANCLERY § 40, 42 (Michie 1982), and equity receivership practice. Russell A. Eisenberg & Frances F. Gecker, *The Doctrine of Necessity and its Parameters*, 73 MARQ. L. REV. 1 (1989); Charles J. Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L.J. 75 (1991); *cf. In re* 523 East Fifth Street Hous. Pres. Dev. Fund Corp., 79 B.R. 568, 572 (Bankr. S.D.N.Y. 1987) (discussing doctrine of relative hardships in the context of restrictive covenants: "the test involves a balancing of equities. Thus, restrictions would be extinguished if, in weighing the burdens of enforcement on the party seeking extinguishment against the benefit to the party seeking enforcement, it can be said that the restriction is of no actual and substantial benefit.").

[66]*See supra* note 61 and accompanying text.

tection and appropriate compensation for any "taking" at issue and demoted its promising reference to necessity and balancing of interests to mere *dicta* along with its broad pronouncements of the statute's inapplicability to *in rem* interests.

An exception to this lack of careful application of the statutory standard by counsel or the court is *In re 523 East Fifth Street Housing Preservation Development Fund Corporation*.[67] There the debtor sought authority under § 363(f)(1) (applicable nonbankruptcy law permits sale) and (f)(5) (interest holder could be compelled to accept money satisfaction) to sell property in New York City free and clear of all liens, encumbrances, and covenants.[68] The property at issue was subject to a restrictive covenant running in favor of the City of New York that required the property to be used only for low income housing.[69] The court held the covenant could *not* be extinguished under the New York statutes governing enforceability of restrictive covenants or under New York common law because the debtor and the city intended the covenant to run with the land and the covenant touched and concerned the land.[70] After a detailed analysis of the New York statutes regarding extinguishment of restrictive covenants, the court concluded that the city could not be compelled to accept a monetary satisfaction of its interests.[71] In other words, the court threw the substantive controversy back to nonbankruptcy law under § 363(f)(1), engaged in a careful examination of the

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[67]79 B.R. 568 (Bankr. S.D.N.Y. 1987).

[68]*Id.* at 570-71.

[69]*Id.* at 569. Specifically, the covenant at issue stated that the property could be used only for low income housing until its mortgage was paid off. *Id.* at 570. This was inartful drafting of the covenant in that any sale of the property, at any time, that paid the mortgage would, it would seem, extinguish the covenant. In dispensing with the debtor's textual argument that the use restriction could be stripped off under § 363(f)(1) because the proposed sale would pay off the mortgage, the court ignored the practice of simultaneously closing real estate transactions and insisted on portraying the proposed transaction as a which-came-first-the-chicken-or-the-egg problem:

> The flaw in the Debtor's assertion is that the covenant will not be extinguished until the mortgage is paid. Since twenty years have not passed, the mortgage cannot be paid until the property is sold and the property cannot be sold free and clear of the covenant unless such sale is permitted by law. Therefore, the Debtor's reliance on the clause adds nothing. The issue remains whether the sale free and clear of the covenant is permitted by law.

Id. Use of this pretzel logic saved the restrictive covenant from being rendered almost wholly illusory, the result that would have been obtained if one implemented a simultaneous closing and payoff through escrow that is common in modern real estate practice. *See generally* Gregory M. Stein et al., *A Practical Guide to Commercial Real Estate Transactions: From Contract to Closing*, 266-68 (2001) (discussing payoff letters and satisfactions of existing mortgages); *id.* at 279-81 (comparing benefits of table closings and escrow closings).

[70]79 B.R. at 571-76.

[71]*Id.* at 576.

matter under that law, and reached the correct conclusion. This case, *523 East Fifth Street*, is thus a model decision in terms of its mode of analysis.

Similarly, at least in part, *Gouveia v. Tazbir*,[72] the only federal Court of Appeals decision directly addressing the issue of whether a debtor or trustee may sell property free and clear of *in rem* interests, also illustrates the correct analysis, this time under the § 363(f)(5) compelled-to-accept-a-money-satisfaction standard. In *Gouveia*, the landowner decided to build a commercial music store on property located in a residential subdivision.[73] The property was burdened by a restrictive, reciprocal land covenant prohibiting use of the land for anything other than residential use.[74] The landowner, however, sought and obtained permission from the city zoning commission for the construction and operation of the music store.[75] Neighbors then filed suit in state court seeking to enforce the covenant and enjoin the construction of the store.[76] After a reversal on appeal, the state courts held the covenant was enforceable.[77] The landowner then instituted a Chapter 11 case and sought to sell the property free and clear of the restriction.[78] The Seventh Circuit affirmed the bankruptcy and district courts' decisions that § 363(f) did not permit the sale because, under applicable state law and § 363(f)(5), the interest holders could not be compelled to accept a money satisfaction for their interest.[79]

The *Gouveia* court further found the restriction did not constitute an executory contract that could be rejected under § 365.[80] Although it recognized the dual nature of the restriction as both a contract and a property right, the circuit court found that the covenant was primarily a property interest.[81] "[A]lthough restrictive covenants (such as the one here at issue)

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[72]37 F.3d 295 (7th Cir. 1994).

[73]*Id.* at 297.

[74]*Id.*

[75]*Id.*

[76]*Id.*

[77]*Id.*

[78]*Id.*

[79]*Id.* at 299.

[80]*Id.* This is critical. If the restriction was found to be an executory contract, it could be rejected by the debtor leaving the interest holder with only a general unsecured prepetition claim. § 365(a) (power to reject executory contract); § 365(g)(1) (effect of rejection is to create a breach of contract claim deemed to have arisen immediately prepetition). Much of the commentary regarding restrictive covenants and bankruptcy has focused on the potential for rejection as an executory contract. *See* Garfinkel, *supra* note 7; Savage, *supra* note 7. The import of the *Gouveia* court's recognition of the dominant property law, rather than contract law, character of the covenant makes much of this commentary miss its mark. It also contributes to the bankruptcy resistant features of reciprocal easement agreements discussed in this article at notes 104-50 and accompanying text.

[81]*Gouveia*, 37 F.3d 295, 299 (7th Cir. 1994). The court properly looked to state law in making this determination and cited to Adult Group Prop. v. Imter, 505 N.E. 2d 459, 464 (Ind. Ct. App. 1987), Pulos v. James, 302 N.E. 2d 768, 771 (Ind. 1973), and Wischmeyer v. Finch, 107 N.E. 2d 661 (Ind. 1952), in

may contain the characteristics of both a contract and an interest in real estate, the primary nature of such covenants is not contractual but rather a property interest."[82]

The court followed this finding with a clear, narrow ground for its holding. It held that the covenant was enforceable and the property could not be sold free of the interest because under applicable state law the benefitted parties could not be compelled to accept a monetary satisfaction.[83] Thus, the debtor failed to satisfy the § 363(f)(5) condition that could have authorized the sale free and clear (there was no argument that (f)(1) through (f)(4) might apply). On a final ground, the court quite properly rejected the justification of "necessity" for the sale to serve the goal of reorganization under the Code based upon § 105's "all writs" authority.[84]

Another appellate court, this time a South Carolina state court, was faced with the task of interpreting which covenants and restrictions had been stripped off a parcel of property on Hilton Head Island through a prior § 363(f) sale in *Marathon Finance Co. v. HHC Liquidation Corp.*[85] In that case a plaintiff argued that the covenants and restrictions at issue were not "interests" in property that could be extinguished in a bankruptcy sale, and, even if they were, none of the conditions of 11 U.S.C. § 363(f), the statute authorizing such a sale, had been met.[86] The majority opinion, however, de-

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support of its decision. By recognizing the "property right" rather than "contract" nature of the restriction, the court rendered obsolete the executory contract analysis that is generally spoken of with regard to reciprocal easement agreements. *See, e.g.*, Savage, *supra* note 7; Garfinkel, *supra* note 7.

[82]*Gouveia*, 37 F.3d at 299. If analyzed as a contract, a reciprocal negative covenant like the one at issue in the *Gouveia* case may *not* constitute an *executory* contract because there is no *affirmative*, contractual, unexecuted duty owed by each party to the other. *Cf. In re* Crummie,194 B.R. 230 (Bankr. N.D. Cal. 1996) (denying creditor's motion to compel assumption or rejection of car contract, holding that the contracts were not executory and that creditor merely held secured and unsecured claims because no performance by petitioner remained to be completed on the contracts under the payment or sale options; petitioner's sole duty was to collect payments). Rather, with reciprocal negative covenants, there is only a duty on the part of one party to *refrain* from acting inconsistently with the covenant. This means that even if treated as a contract, reciprocal negative covenants may not be rejectable under § 365(a). Not so for more complex arrangements featuring covenants requiring affirmative performances such as the reciprocal easement agreements discussed at notes 104-50 and accompanying text. Those arrangements, if analyzed as contracts, are executory and subject to rejection as affirmative duties will exist on the part of both the burdened and benefitted parcel owners. If other courts follow *Gouveia* and recognize covenants and easements as property interests (and not contract rights), they will be insulated from rejection under § 365 and the only remaining issue will be whether they can be stripped off using § 363(f). *See generally* Gregory G. Hesse, *On the Edge: Impact of Bankruptcy on Deed Restrictions and Executory Interests*, 14 AM. BANKR. INST. L.J. 20 (March 1995) (discussing, *inter alia*, unreported case involving attempt to reject a possibility of reverter).

[83]37 F.3d at 299.

[84]*Id.* at 300-01. *See supra* note 11 (discussing limitations on § 105 to augment powers already addressed and circumscribed by the Code).

[85]483 S.E.2d 757 (S.C. Ct. App. 1997).

[86]*Id.* at 760.

clined to address these contentions as they had not been raised below.[87]

Writing separately to concur in part and dissent in part, Judge Cureton took on the plaintiff's § 363(f) argument directly.[88] He first found that the restrictive covenants at issue fell squarely within § 363(f)'s use of the term "interest."[89] Thus, he (correctly) concluded that all of the "363(f) criteria"—or conditions for sale—could possibly apply to authorize a free and clear sale except for (f)(3), which applies only to liens.[90]

Then he turned to § 363(f)(1) with a somewhat cursory analysis that assumes that restrictive covenants could only be extinguished under applicable state law in the case of "a substantial change in the character of the neighborhood which would render the covenant valueless to the covenantee and oppressive to the covenantor."[91] Dismissing (f)(2) (consent) and (f)(4) (*bona fide* dispute) as factually inapplicable to the case at bar, the judge turned to (f)(5) and found it could not apply because the benefitted party

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[87]*Id.*

[88]*Id.* at 766-67.

[89]*Id.* at 767.

[90]*Id.*

[91]*Id.* In fact, South Carolina law recognizes that covenants can be extinguished in additional ways. Although the dissent does not address them with any specificity, it does note that, in addition to changed circumstances, "[r]eal covenants may be extinguished under state law by operation of doctrines similar to consent, such as modification, release, waiver, estoppel, and acquiescence. *Id.* at 767 n.6. *See generally* 20 AM. JUR. 2D Covenant, Conditions and Restrictions §§ 234-250 (1995). Other grounds for extinguishment, such as merger, also exist." *Id.* at 608 n.6. *See also* Archambault v. Sprouse, 55 S.E.2d 70, 71-72 (S.C. 1949) ("If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to incur expense or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or, if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked. It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word, silence or conduct of the plaintiff that there was no objection to his operations. Diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar when good faith requires vigilance."); Dunlap v. Beaty, 122 S.E.2d 9, 17 (S.C. 1961) ("Since he [the Referee] has held that the covenant as to the 42-foot strip is of no real benefit to plaintiff, it would appear that she has no standing to enforce same. When the plaintiff bought this property, she did so for residential purposes. Shortly thereafter she built a large home on it. She now seeks to remove the restriction as to residential use in connection with which doubtless the covenant was made. This being true, the covenant as to the 42-foot strip has, so far as the plaintiff is concerned, lost its purpose, and may not be enforced by her or anyone holding under her. We conclude that under the concurrent findings of the Referee and Circuit Judge, which we are not warranted in disturbing, that the covenant in controversy should be extinguished."). *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § § 7.1-7.14 (2000) (discussing various means of terminating or modifying servitudes, including covenants that run with the land). Perhaps importantly as well, South Carolina strictly construes covenants, supporting the use of state law in conjunction with the Bankruptcy Code to sell free and clear of them in the appropriate case. *See* South Carolina Dept. of Natural Resources v. McClellanville, 550 S.E.2d 299, 302 (S.C. 2001) ("It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property"; quoting Taylor v. Lindsey, 498 S.E.2d 862, 863-64 (S.C. 1998)).

could elect to proceed in equity rather than in an action for damages at law to enforce the interest and, thus, could not be compelled in a legal or equitable proceeding to accept a money satisfaction.[92] The judge did not address the possibility of eminent domain proceedings or state law action to cancel the covenant based upon doctrines other than the "substantial change in character" standard he had announced.[93]

What is notable about each of these cases, whether the clearest or the most muddled, is the great lengths to which courts will go to protect *in rem* interests that run with the land even as they ignore a simple, principled tool to apply in each case: § 363(e)'s requirement of adequate protection.[94] Confronting a § 363(f) request with § 363(e)'s requirement that interested parties be afforded adequate protection of their legitimate, legally cognizable interests in the property that is to be sold would seem to protect each of the interests at issue by placing the burden on the debtor or trustee, the party that is to benefit from the sale free and clear, to provide adequate protection for the interest holders.[95] Meeting this requirement should be sufficient to

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[92]483 S.E.2d at 767.

[93]One could argue that eminent domain is not available to satisfy the (f)(5) condition because it is a power of the state, not of a private entity, trustee, or debtor in possession. This argument ignores the erosion of the public purpose limitation on eminent domain. *See infra* notes 96 & 100 (discussing and collecting authorities regarding public purpose and other eminent domain standards).

[94]In fairness, the *Marathon* court did not have the tool of adequate protection as its procedural posture as that case dealt with a postbankruptcy declaratory action to determine which liens and interests had been stripped off of the parcel of property at issue in the prior § 363(f) sale. In the bankruptcy cases discussed, § 363(e) applies. That section provides in pertinent part:

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

§ 363(e). Thus, a court faced with a debtor or trustee's request to sell free and clear of an interest that meets the requirements of § 363(f) can still be denied or conditioned so as to protect holders of *in rem* interests that run with the land. In fact, that result is required. *See id.* ("shall prohibit or condition"). Although § 363(e)'s adequate protection standard would have been applicable in each of these cases given that they concerned proceedings under § 363, in a cramdown confirmation of a plan providing for vesting free and clear of an *in rem* interest, the fair and equitable requirement of § 1129(b) would apply to the same effect. *See infra* notes 154-82 and accompanying text.

[95]The potential group of interest holders may be quite large. This is especially true due to the modern trend, as represented by the RESTATEMENT (THIRD) OF PROPERTY, to liberalize the rules applicable to traditional *in rem* interests. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1, comment a ("At the beginning of the 20th century, four doctrines peculiar to servitudes law constrained landowners in the creation of servitudes: The horizontal-privity doctrine, the prohibition on creating benefits in gross, the prohibition on imposing affirmative burdens on fee owners, and the touch-or-concern doctrine. At the end of the century, little remains of those doctrines, which have gradually been displaced by doctrines that more specifically target the harms that may be caused by servitudes."). Under the liberalized view, easements and covenants in gross—i.e., where the benefitted party need not be the owner of a related estate in land—are no longer disfavored, as has historically been the case . . . Rather, they enjoy the same status as

prevent the free and clear sale from constituting an uncompensated Fifth Amendment "taking."[96]

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easements appurtenant. *See id.* ("Instead of presuming, as the old rules did, that servitudes that impose affirmative burdens, create benefits in gross, or include elements unrelated to the use of particular land are invalid, this Restatement shifts the burden to the person seeking invalidation to show that, if it is not otherwise illegal or unconstitutional, the servitude violates public policy"). Thus *in rem* interests can easily be imagined that benefit a whole community. *See* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1259-60 (1982) ("Private land use planning, which is primarily based on the utilization of servitudes, affects the lives of many Americans who live in horizontal developments and condominiums"). This presents many due process issues concerning the ability and need to identify and potentially give notice to all beneficiaries, as well as to considerations of the rights of future beneficiaries not currently existing vis-à-vis those that presently exist. These due process points are beyond the scope of this article, but similar issues have been discussed in terms of tort claimants in cases such as *In re* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986), Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988), *In re* Piper Aircraft Corp., 162 B.R. 619 (Bankr. S.D. Fla. 1994), *In re* Fairchild Aircraft Corp., 184 B.R. 910 (Bankr. W.D. Tex. 1995), and the like. *See* Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 CASE W. RES. L. REV. 435 (1999).

[96]A sale free and clear of an *in rem* property interest can be viewed as either a classic, direct taking of property by the government (acting through the Bankruptcy Code and court), *see* Julia Patterson Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851, 891-92 (1999) ("taking one strand of an owners bundle of property rights can, under some circumstances, violate the Takings Clause"), or a regulatory taking (viewing the free and clear order as one that, like a restrictive zoning ordinance, prohibits use of the *in rem* property interest). *See* Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978) (listing factors for courts to consider in determining whether a regulatory taking has occurred, including the property interest holder's investment backed expectations).

When property subject to a lien is sold free and clear of that lien, adequate protection of the lienor's property interest is generally (but not always) accomplished by attachment of the lien to the proceeds of the sale. S. Rep. No. 95-989, at 56 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5842 ("Most often adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale"). In some cases, adequate protection is provided by having the lien at issue attach to other, substitute collateral that is not proceeds of the lienholder's original collateral. Resolution Trust Co. v. Swedeland Dev. Group (*In re* Swedeland Dev. Group), 16 F.3d 552, 564 (3d Cir. 1999) ("Among the ways a debtor may demonstrate the existence of adequate protection is by supplying the prepetition lender with a new third-party guarantee [sic] or substitute collateral"). Similarly, sale of property free and clear of another's *in rem* property interest can be structured to adequately protect that party's interest, generally by arranging for just compensation or a substituted property interest.

By analogy to the just compensation case law, standards for adequate protection in the form of just compensation are well established and readily available. The compensation should be just to the estate and the *in rem* interest holder. *See* Searl v. School Dist., 133 U.S. 553 (1890) (compensation should be fair to the public and the condemnee). It should be money or money's worth, reflecting the value of the property interest taken as of the date the property interest is stripped off. United States v. New River Collieries Co., 262 U.S. 341, 343-44 (1923) (citing Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299 (1923)). Any delay in payment should be compensated for by allowing interest. *See* Jacobs v. United States, 290 U.S. 13 (1933) (interest required for payment delayed in condemnation proceedings). As to what form of value should provide the measure, circumstances should indicate the most appropriate to be market value, measured using comparable sales adjusted to reflect differences between the subject property interest and the comparable property interest, the income approach to valuation, and replacement cost. David Schultz, *The Price is Right! Property Valuation for Temporary Takings*, 22 HAMLINE L. REV. 281, 299 (1998) (discussing just compensation standards for permanent and temporary takings). The court should determine what award is needed to place the party holding the *in rem* interest to be stripped off in as good an objective, financial position as if the sale free and clear did not take place. *See* Monongahela Nav. Co. v. United States, 148 U.S. 312 (1893). Subjective emotional or sentimental values are irrelevant

Further, even the most principled decisions that carefully consider applicable nonbankruptcy law when considering proposals to sell free and clear under (f)(1) (applicable state law) and (f)(5) (compulsion to accept money satisfaction), do not really delve into those issues in much depth. The fault may lie with counsel briefing these motions to sell and the objections to those motions.[97] Every state has a number of laws and doctrines to terminate or modify *in rem* interests that run with the land such as cessation or completion of purpose, end of necessity, merger, adverse possession, prescription, abandonment, non-use, innocent purchaser, change in neighborhood character, incompatible acts, estoppel, waiver, death or dissolution, release (express or implied), latches, tax sale, and rights of relocation[98]—yet the cases typically examine only one theory or doctrine or make broad pronouncements about the ability of the benefitted party to proceed solely in equity and renounce any money satisfaction offered or ordered.[99] And all of them forget to consider one proceeding in particular: one to obtain just compensation when there has been a governmental taking under the power of eminent domain.[100]

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to the analysis. Dep. of Transp. v. Metts, 430 S.E. 2d 622, 624 (Ga. Ct. App. 1993) ("Sentimental value must be ignored. Condemnation proceedings are *in rem* and just compensation must be based upon the value of the rights taken, without regard to the personality of the owner or his personal relationship to the property taken" [internal quotations and citations omitted]). Although value controversy continues, there is a wealth of precedent on which to draw when calculating just compensation as a form of adequate protection.

[97]Courts are not expected to provide independent research regarding issues not raised by counsel, even if, as a practical matter, they had the time to do so in this age of overburdened dockets and judicial vacancies. The adversary system, which is very much at the heart of the current bankruptcy system, relies upon competent counsel doing a thorough job of identifying and briefing relevant issues for the court.

[98]*See infra* Appendix (collecting authorities on a jurisdiction-by-jurisdiction basis for the fifty states, District of Columbia, Puerto Rico, and the United States Virgin Islands).

[99]The Restatement rejects a broad right to proceed solely in equity. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 ("A servitude may be enforced by any appropriate remedy or combination of remedies . . . factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties, and to the public"); *see also* Carollsberg, A Condominium Unit Owners Ass'n v. Anderson, 791 A.2d 54 (D.C. Ct. App. 2002) (collecting cases and examining the majority and restatement views of the right of an owner of a servient estate to unilaterally relocate an easement benefitting a dominant estate); MacMeekin v. Low Income Hous. Inst., Inc., 45 P.3d 570 (Ct. App. Wash. 2002) (declining to adopt Restatement (Third)'s approach to unilateral easement relocation); *see supra* note 57 (listing sections of the Restatement providing for modification or termination of servitudes and summarizing the wide variety of grounds for doing so).

[100]The "proceeding" at issue for purposes of § 363(f)(5) is *not* the eminent domain—or actual taking—portion of the condemnation process; it is the legal or equitable proceeding to obtain "just compensation" or to challenge the government's "public purpose" justification for exercise of the eminent domain power. This distinction is critical to eliminating an argument that could otherwise sidetrack acceptance of the proceeding as a "legal or equitable proceeding" for purposes of § 363(f)(5). *See* Thomas E. Plank, *The Eire Doctrine in Bankruptcy* (forthcoming 2002-03) (manuscript on file with author; arguing that bankruptcy proceedings are neither legal nor equitable proceedings, rather they are *sui generis* in nature—Professor Plank and others like him would likely argue that the exercise of eminent domain's "taking" power is

similarly *sui generis*). Eminent domain is nothing more than the ancient power of the sovereign to take property which it needs from its subjects. PATRICK J. ROHAN, 1 NICHOLS ON EMINENT DOMAIN § 1.1 (rev. ed. 2002); *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS (Foundation Press 2002) (discussing and summarizing the United States law of takings and tracing its development from historical roots to its modern, present day state). Because of the potential for and history of abuse of the power of eminent domain, the requirement that there be "just compensation" when the sovereign "takes" property for a "public use" was included in the Fifth Amendment of the Bill of Rights. ROHAN, *supra* at §§ 1.2-1.3 (discussing history of eminent domain from its early history, through its development in England, and to its import and deployment in the United States). Similar requirements are built into the constitutions or other laws of all fifty states. ALA. CONST. art. I, § 23 (Alabama); ALASKA CONST. art. 1, § 18 (Alaska); ARK. CONST. art. 1, § 22 (Arkansas); CAL. CONST. art. 1, § 19 (California); COLO. CONST. art. 2, § 15 (Colorado); CONN. CONST. art. 1, § 11 (Connecticut); DEL. CONST. art. 1, § 8 (Delaware); FLA. CONST. art. 10, § 6 (Florida); GA. CONST. art. 1, § 3, para. 1 (Georgia); HAW. CONST. art. 1, § 20 (Hawaii); IDAHO. CONST. art. I, § 14 (Idaho); IL. CONST. art. 1, § 15 (Illinois); IND. CONST. art. 1, § 14 (Indiana); IOWA CONST. art. 1, § 18 (Iowa); KAN. STAT. ANN. § 26-513 (Kansas); KY. CONST. § 13 (Kentucky); LA. CONST. art. 1, § 4 (Louisiana); ME. CONST. art. 1, § 21 (Maine); MD. CONST. DECL. OF RIGHTS arts. 19 & 24 (Maryland); MASS. CONST. pt. 1 art. 10 (Massachusetts); MICH. CONST. art. 10, § 2 (Michigan); MINN. CONST. art. 1, § 13 (Minnesota); MISS. CONST. art. 3, § 17 (Mississippi); MO. CONST. art. 1, § 28 (Missouri); Mont. Const. art. 2, § 21 (Montana); NEB. CONST. art. 1, § 21 (Nebraska); NEV. CONST. art. 1, § 8 (Nevada); N.H. CONST. pt. 1 art. 12 (New Hampshire); Opinion of the Justices, 139 N.H. 82, 87 (1994) (despite state constitution's silence on the matter of compensation for a taking, that document should be interpreted as requiring "just compensation in the event of a taking"); N.J. CONST. art. 1, para. 20 (New Jersey); N.M. CONST. art. 2, § 20 (New Mexico); N.Y. CONST. art. 1, § 7 (New York); N.C. CONST. art. I, § 19 (in takings, follow law of land) and N.C. STATS. § 40A-64 (compensation for taking is fair market value) (North Carolina); N.D. CONST. art. 1, § 16 (North Dakota); OHIO CONST. art. I, § 19 (Ohio); OKLA. CONST. art. 2, § 23 (Oklahoma); OR. CONST. art. I, § 18 (Oregon); PA. CONST. art. 1, § 10 (Pennsylvania); R.I. CONST. art. 1, § 16 (Rhode Island); S.C. CONST. art. I, § 13 (South Carolina); S.D. CONST. art. 6, § 13 (South Dakota); TENN. CONST. art. 1, § 21 (Tennessee); TEX. CONST. art. 1, § 17 (Texas); UTAH CONST. art. 1, § 22 (Utah); VT. CONST. ch. I art. 2d (Vermont); VA. CONST. art. 1, § 11 (Virginia); WASH. CONST. art. 1, § 16 (Washington); W.VA. CONST. art. 3, § 9 (West Virginia); WIS. CONST. art. 1, § 13 (Wisconsin); WYO. CONST. art. 1, § 33 (Wyoming). Actions to challenge the state's exercise of the power of eminent domain on the basis that the taking is not for a public purpose or to seek compensation for a taking are unquestionably legal or equitable in nature, thereby meeting the requirements of § 363(f)(5). Monterey v. Del Monte Dunes, 526 U.S. 687, 709 (1999) (actions to recover compensation for a taking are legal proceedings; § 1983 suit to recover for uncompensated taking is an action at law); Heller v. South Williamsport Borough, 74 Pa. D. & C. 2d 745, 798 (Ct. Com. Pl. 1976) (the eminent domain proceedings may themselves be reviewed by a court in an equitable proceeding); Lone Star Gas Co. v. Ft. Worth, 98 S.W. 2d 799 (Tex. Comm'n App. 1936) (accord). An action to seek compensation for a taking resulting from a bankruptcy proceeding is brought in the Court of Federal Claims. *See, e.g.,* Ultimate Sportsbar, Inc. v. United States, 48 Fed. Cl. 540, 549 (Fed. Cl. 2001) (denying claim but recognizing that such claims were cognizable and within its jurisdiction).

But the hypothetical proceeding comes with all its baggage—if a debtor or trustee were to seek to sell property free and clear of a property interest using the "just compensation" proceeding of a particular jurisdiction, the burden would be upon the debtor or trustee to show that the taking was for (i) a valid public purpose and (ii) that the interest holder would receive just compensation.

In terms of item (i), "public use," in the bankruptcy setting this might be recast as "a valid reorganizational purpose" or "a benefit to the estate," both of which fit within the broad, modern, post Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984), scope of public use, which is more realistically viewed as "public advantage" or whatever the legislature could determine to be a public purpose (in its almost complete discretion). *See* Berman v. Parker, 348 U.S. 26 (1954). *See also* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 (2002) (asserting that "efforts to find a "public use" limitation on the power of expiration are a relatively recent

II. THE EFFECT OF UNWARRANTED PROTECTION OF TRADITIONAL *IN REM* INTERESTS THAT RUN WITH THE LAND

As discussed above, these dominant analyses that protect traditional *in rem* interests from being stripped off property in sales free and clear are often superficial and result oriented.[101] They too often assume that the interest cannot be removed under applicable nonbankruptcy law (defeating sale under § 363(f)(1)) or that the party benefitted by the *in rem* interest cannot be compelled to accept a money judgment in full satisfaction of the interest (defeating sale under § 363(f)(5)). However, outside of bankruptcy, *in rem* interests that run with the land may often be terminated under state law, such as when their purpose is no longer being served.[102] As a result, in the appropriate case, a sale free and clear should be permitted under § 363(f)(1) or § 363(f)(5) if the nonbankruptcy law standard for termination is met. Existing case law also often fails to explain the distinction between these immu-

misreading of the constitutional history and text."). Extending the holdings of courts finding that elimination of economic blight is a public purpose to cover reorganization or liquidation of troubled businesses and possibly granting a fresh start to debtors seems a small extension, if any. *See, e.g.*, City of Urbana v. Paley, 368 N.E.2d 915 (Ill. 1977) (upholding public purpose of taking land to redevelop blighted area as part of downtown redevelopment scheme); Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981) (upholding public purpose of taking land and reconveying it to General Motors for use as a for-profit business as part of redevelopment program). Interpreting § 363(f)(5) as granting the trustee or debtor in possession standing to assert eminent-domain-like powers with regard to *in rem* interests that would otherwise run with the land, subject to eminent-domain-like limitations, is consistent with the Code's rehabilitative and reorganizational purposes.

In terms of item (ii), "just compensation," in bankruptcy terms, is a question of either "adequate protection" or "fair and equitable" treatment. *See* § 363(e); § 1129(b)(2); *infra* notes 178-82 and accompanying text.

[101]They lack careful reasoning and a strong foundation. *See, e.g.*, Gouveia v. Tazbir, 37 F.3d 295, 299 (7th Cir. 1994) (debtor sought to sell free and clear of equitable servitude limiting use of property to residential uses; sale free and clear denied); Silverman v. Ankari (*In re* Oyster Bay Cove, Ltd.), 196 B.R. 251, 255-56 (E.D.N.Y. 1996) (considering sale free and clear of liens and road and drainage easements and holding that sale free and clear is "not intended to sever easements and other non-monetary property interests that are created by substantive state law"); *In re* McConnell, 198 B.R. 181, 185 (Bankr. E.D. Va. 1996) (reciprocal negative easement under Virginia law runs with the land and is not amenable to a sale free and clear under § 363(f)(5)); *In re* 523 East Fifth Street Hous. Pres. Dev. Fund Corp., 79 B.R. 568 (Bankr. S.D.N.Y. 1987) (attempt to sell property free and clear of restrictive covenant in favor of N.Y.C. limiting use of property to low income housing; sale free and clear of covenant denied—focused on elements of intent of the parties that covenant run with the land and that covenant "touched and concerned" the land). This is largely because Congress left the courts without any foundation or guidance on this issue in the Bankruptcy Code or its legislative history.

[102]*See* Mattingly, *supra* note 3, at 447-48 (citing RESTATEMENT (FIRST) OF PROP. § 564 at 3311 (1994) and discussing doctrine of changed conditions laws in various jurisdictions, including some that constrain the formerly "benefitted" parties from seeking equitable relief and compelling them to accept a monetary satisfaction). The doctrine of changed circumstances or changed conditions has historically been confined in application to covenants and equitable servitudes. Easements, occupying a more exalted status, were immune to its effects. See also infra Appendix (collecting authorities regarding termination of *in rem* interests in United States jurisdictions).

table interests and others—which are often equally or more important to the parties involved and equally as longstanding in the eyes of the law.[103] Nonetheless, the state of the law is what it is, and it has important repercussions arising out of the incentives it creates for structuring transactions.

A. Reciprocal Easement Agreements and Other Modern Transactional Devices Will Increasingly be Used to Insulate Real Estate Development Projects From Bankruptcy Risk

Insulating traditional *in rem* interests that run with the land from § 363(f) will have a predictable effect if maintained. Savvy transactional attorneys will seek to insulate as many rights and remedies for their clients using these immutable interests as possible. This will reduce their clients' exposure to the uncertainties of bankruptcy.[104]

A brief example from a land purchase and sale transaction is illustrative. Consider a transaction in which a seller of real property wishes to give the buyer—a developer planning on building a multi-use facility—a credit against the purchase price in exchange for the buyer's promise to convey to seller two condominiums, 25,000 square feet of street-level retail space, and four underground parking spaces in the resulting project once it is developed. There are a number of methods that could be used to document this deal: The terms could be included in a master purchase and sale agreement, a separate contract to convey in the future could be used with the obligations secured by a lien on the property, or the parties could enter into a partnership, joint venture, or similar agreement. When analyzed for seller downside risk potential,[105] however, each of these mechanisms is inferior to the use of a reciprocal easement agreement ("REA") or similar devise that creates a present *in rem* property interest that runs with the land for the seller.[106]

If any of the contractual methods are used, including the partnership

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[103]*See* notes 28-34 and accompanying text, listing examples.

[104]*Cf.* Sheryl A. Gussett, *On the Edge: Bankruptcy Remote Entities in Structured Financings*, 15-MAR Am. Bankr. Inst. J. 14 (1996) ("Structured financing is designed to separate the credit quality of the assets upon which the financing is based from the credit and bankruptcy risk of any entity involved in the financing.").

[105]"Downside risk potential" refers to the likely outcome and expected value of the transaction assuming that the project fails. "Seller downside risk potential" then, is the potential value and risk of buyer failure.

[106]In this Article, the terms "REA" and "reciprocal easement agreements" are used to refer not only to documents that are so titled but also to all other forms of transactional documents that create obligations between parcels of land and parties using *in rem* interests that run with the land such as easements and covenants. There seem to be an almost infinite variety of titles for such documents, including "Declaration of Easements, Covenants, Conditions and Restrictions," *see infra* note 114 (Walgreen REA), "Easements with Covenants and Restrictions Affecting Land," *infra* note 113 (Wal-Mart REA), and "Construction, Operation and Reciprocal Easement Agreement," *infra* note 114 (Park Meadows REA).

agreement, the resulting transactional documents stand a good chance of being construed as, at best, executory contracts in the buyer's subsequent bankruptcy case,[107] subject to rejection under § 365, leaving the seller with only a prepetition claim that may be secured, unsecured, or undersecured.[108] Adding a lien in the seller's favor to the transaction improves it only marginally—any outside source of financing for the property's development is likely to require subordination of the lien as a condition to financing,[109] and a subordinate lien on a half-developed project that is property of the buyer/developer's bankruptcy estate is tantamount to illusory in terms of the protection that it provides.[110] But under the dominant interpretations of § 363(f) reviewed above, a non-severable REA or similar document recorded against the property will not be stripped off the property absent consent or a *bona fide* dispute in a subsequent bankruptcy proceeding. Assuming careful transactional lawyering when the REA is prepared and recorded, § 363(f)(4)'s bona fide dispute ground will not arise, and § 363(f)(2)'s consent

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[107]"While the term 'executory contract' is not defined in the Bankruptcy Code, the legislative history of and case law under section 365 rely on the Countryman definition, i.e., 'contracts on which performance remains due to some extent on both sides.'" Madlyn Gleich Primoff & Erica G. Weinberger, *E-Commerce and Dot Com Bankruptcies: Assumption, Assignment and Rejection of Executory Contracts Including Intellectual Property Agreements and Related Issues Under Sections 365(c), 365(e) and 365(n) of the Bankruptcy Code*, 8 AM. BANKR. INST. L. REV. 307, 310 (2000) (internal citations to this well known definition omitted). Under this definition, a contract that has been fully performed on either side is not executory. *Id.* Some courts have held that a contract must be substantially unperformed on both sides to be executory. *Id.* In determining whether an agreement is an executory contract, courts will typically examine the unperformed duties and obligations of each party. *Id.* Partnership agreements have been found to be executory contracts, see, e.g., *In re* Cardinal Industries, Inc., 116 B.R. 964, 972 (Bankr. S.D. Ohio 1990) (accepting movants' statement that every out of state court to have considered the issue in a published opinion—six in all—had held that partnership agreements were executory contracts and noting that the movants had concluded that the *Cardinal* court had already so concluded, but suggesting that the matter had not yet been decided), and the case seems especially clear when considering a general partnership, such as the one postulated in the text of this Article, as opposed to limited partnerships which can feature one general partner with executory duties and limited partners who are passive and lack substantial executory duties after funding their investment, such as those at issue in *Cardinal Industries*. Land sale contracts have also been found to be executory contracts. *See, e.g.*, Shaw v. Dawson (*In re* Shaw) 48 B.R. 857 (D.N.M. 1985), *but see In re* Britton 43 B.R. 605 (Bankr. E.D. Mich. 1984) (land sale contract was disguised security device, not executory contract). *See also* David B. Epstein & Steve H. Nickles, *The National Bankruptcy Review Commission's Section 365 Recommendations and the "Larger Conceptual Issues,"* 102 DICK. L. REV. 679 (1998) (discussing National Bankruptcy Review Commission proposal that the word "executory" be dropped from § 365 and, instead, advocating the notion "that assumption (or election to perform) is limited to situations in which the debtor would not have any right to the other party's continued performance if the debtor ceased its performance"); *see generally* Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989) (discussing Countryman definition of executory contract and proposing to abolish the requirement of executoriness).

[108]§ 365(g) (effect of rejection).

[109]*See, e.g.*, Resolution Trust Corp. v. Bus. Dev. Inc., 42 F.3d 1206, 1209-10 (9th Cir. 1994) (Appellant junior lienholders sold land for a development project in exchange for deeds of trust. The savings and loans, which financed the project, required subordination of appellants' interests).

[110]*See, e.g., id.* (when fly-in development failed, seller/subordinated lienholders were wiped out).

is not at issue if the matter is being litigated. Thus the REA and its traditional *in rem* interests are protected and the transaction is "bankruptcy-proofed" in the sense that it remains intact, encumbering the property despite the buyer/developer's bankruptcy. Further, as REAs in mixed-use developments are the norm in the industry,[111] they are likely to be accepted, if not embraced, by the construction lender in such a project, making their uniform adoption that much more likely. Finally, as added protection for the seller and the buyer's source of development financing, the REA can dictate exactly the form and operation of the development so that the buyer may only deviate from the master plan with the consent of the other interest holders, often with the proviso that this consent shall not be unreasonably withheld.[112]

The following subsections examine REAs and their bankruptcy-proofing function in greater detail.

1. *Reciprocal Easement Agreements*

A reciprocal easement agreement or "REA" is an agreement that applies to multiple parcels of land that are generally part of a single, joint development project or development scheme.[113] It is recorded in state or county real estate records along with deeds and other grants and conveyances of record.[114] Reciprocal easement agreements commonly contain affirmative and restrictive covenants and negative and affirmative easements including cross-

[111]*See infra* notes 130-32 and accompanying text.

[112]*See, e.g.*, Easements with Covenants and Restrictions Affecting Land, Misc. Book 129, Page 640, Blount County Register's Office, Tennessee § 6 (1995) (hereinafter the "Wal-Mart REA"; on file with author, accessible via website as explained below); Construction, Operation and Reciprocal Easement Agreement, Document 980529-02358, Clark County Recorder's Office, Nevada § 3.1 (1998) (hereinafter the "Aladdin REA"; on file with author, accessible via website as explained below). The Wal-Mart REA and the Aladdin REA introduced in this footnote, and the Walgreen REA and the Park Meadows REA introduced in the next, were selected for this Article because they are useful examples of REAs employed by businesses with a national scope and manner of doing business—the Wal-Mart REA and the Walgreen REA—as well as from projects involving a traditional shopping center, the ovular industry incubator for REAs—the Park Meadows REA—and a complex hotel/casino/theater/parking/power-generation project—the Aladdin REA. Copies of these documents are available from the applicable governmental office where they are filed or by accessing the author's section of the "faculty" portion of the website of The University of Tennessee College of Law (www.law.utk.edu). The Aladdin development is currently the subject of a chapter 11 case pending in the United States Bankruptcy Court for the District of Nevada (*In re* Aladdin Gaming, LLC, case no. 01-20141-rcj, filed September 28, 2001). The author understands that the Aladdin REA's enforcability, characterization, and degree of bankruptcy resistance has not been and is unlikely to be the subject of litigation in that case, at least in its present posture. The author is not involved in the case except as an academic observer.

[113]*See, e.g.*, Declaration of Easements, Covenants, Conditions and Restrictions, Book 1989, Page 1000, Williamson County Register's Office, Tennessee, 1 (2000) (hereinafter the "Walgreen REA"; on file with author, accessible via website as explained in note 112); *supra* note 112 Wal-mart REA at 1-2; Construction, Operation and Reciprocal Easement Agreement, Book 1283, Page 746, Reception Number 9539126, Douglas County Recorder's Office, Colorado 1 (1995) (hereinafter the "Park Meadows REA"; on file with author, accessible via website as explained in note 112).

[114]Garfinkel, *supra* note 7, at 1 n.2.

easement arrangements;[115] easements to construct, use, or maintain improvements on another parcel;[116] easements pertaining to improvements on the parcel itself such as lateral support, encroachment, party wall, and access arrangements;[117] shared utility or facility arrangements;[118] operating covenants typically requiring businesses to be open certain days and hours,[119] to use certain trade names,[120] and to restrict the sort of business use;[121] and cost sharing arrangements.[122] Typical cross-easement agreements relate to joint parking facilities, roadways, and sidewalks contained in a project such as a mall or a hotel, casino, entertainment complex.[123] They are generally coupled with affirmative covenants regarding lighting, cleaning, and maintenance.[124] Joint projects often include joint infrastructure and improvements such as utility lines and circuits, water, sewer and storm drain systems, joint signage, and foundational retaining walls.[125] All need to be maintained, and covenants to do so coupled with necessary easements are common.[126] Encroachment and party wall agreements are common; consider a department store constructed against the balance of a mall with cross-access on multiple levels.[127] All these obligations may be supported by provisions in the REA that give rise to a lien in the amount of damages or cost of performance that

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[115]*Id.* at 95-99. *See, e.g.,* Walgreen REA, *supra* note 113, at § 2.1, Grant of Reciprocal Easements; Aladdin REA, *supra* note 112, at 22-39; Park Meadows REA, *supra* note 113, at 18-22.

[116]Garfinkel, *supra* note 7, at 95-96. *See, e.g.,* Walgreen REA, *supra* note 113, at § 2.1(b); Aladdin REA, *supra* note 112, at § 2.4-2.5; Wal-Mart REA, *supra* note 112, at § 7.1; Park Meadows REA, *supra* note 113, at 20.

[117]Garfinkel, *supra* note 7, at 95-96. *See, e.g.,* Wal-Mart REA, *supra* note 112, at § 5.4; *id.* at § 7; Aladdin REA, *supra* note 112, at § 2.8.

[118]Garfinkel, *supra* note 7, at 96. *See, e.g.,* Wal-Mart REA, *supra* note 112, at § 10.3. Of the four REA's featured as authorities in this Article, *see supra* notes 112 & 113 (listing four REAs involved), the Aladdin REA contains perhaps the most detailed shared utility arrangements in the form of provisions calling for the construction, operation and maintenance of a power plant. *See* Aladdin, *supra* note 112.

[119]*See, e.g.,* Aladdin REA, *supra* note 112, at 49-56 (provisions detailing use of floor area, first and second opening dates, permitted uses, limitations on detrimental characteristics, gaming activities and the like).

[120]*See, e.g.,* Park Meadows REA, *supra* note 113, at at 100-01 (providing for Nordstrom and Dillards to operate stores under those trade names).

[121]Garfinkel, *supra* note 7, at 98. *See, e.g.,* Walgreen Rea, *supra* note 113, at § 5.2; *id.* at § 5.1.

[122]*See, e.g.,* Walgreen REA, *supra* note 113, at § 9.2-9.3 (upon failure of one party to cure a breach of the REA within thirty days of notice of that default, the non-defaulting party can cure the default and perform the obligation and be reimbursed by the defaulting party for the costs of doing so plus interest and the nondefaulting party can secure this payment obligation with a lien on the defaulting party's parcel); Aladdin REA, *supra* note 112, at § 9.9-9.10 (provisions for self-help cure of maintenance and restoration defaults and lien to secure payment of expenses of same).

[123]*See, e.g.,* Aladdin REA, *supra* note 112, at § 2.2; Wal-Mart, *supra* note 113, at § 10.1.

[124]*See, e.g.,* Wal-Mart REA, *supra* note 112, at § 11.2; Walgreen REA, *supra* note 113, at § 3.1; *id.* at § 3.2.

[125]*See supra* note 114.

[126] *See, e.g.,* Wal-Mart REA, *supra* note 112, at § 11.2; *see also supra* note 114.

[127]Garfinkel, *supra* note 7, at 96.

encumbers the burdened parcel in favor of the benefitted party or parcel if the obligation is not met and, instead, is performed by some other party.[128] Individual lease and operating agreements and the rights of mortgagees may be respectively subordinated to the rights conferred in an REA.[129]

REAs are common in the shopping center industry, where, for example, the anchor store would rather own its store as opposed to leasing it, but where the center developer wants to ensure that the anchor remains tied to the rest of the center as if it were a tenant subject to the restrictive use clauses and joint access and use of common area provisions of a lease.[130] They are also common in other mixed use projects, including office tower/residential condominium projects and resorts that include different components such as a hotel/casino/shopping mall/theater/parking complex.[131] In these mixed-use developments, each business segment can be owned and operated by a separate entity whose business background and skills make it qualified to conduct that aspect of the project.[132]

Because each business segment is dependent upon the others for support, use of common areas, attraction of customers and the like, some form of ar-

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[128]*See, e.g.*, Walgreen REA, *supra* note 113, at § 9.2 (self-help provision; after notice and opportunity to cure default in, *inter alia*, maintenance provisions, nondefaulting party may cure default at its own expense and gain right of reimbursement against defaulting party); *id.* at § 9.3 (affording nondefaulting party lien recordation rights to secure payment of reimbursement amounts assessed under § 9.3); Aladdin REA, *supra* note 112, at § 4.3 (accord). An interesting variation of such a provision would be one that, instead of merely allowing for recordation of a lien after default and cure by the nondefaulting party, actually provided that the lien arose automatically upon cure by the nondefaulting party with the priority of the lien relating back to the priority and date of recording of the REA itself. A provision of that sort could prime all subsequent liens and interests by functioning much like a deed of trust that secures a stand-by letter of credit: Until the letter of credit is drawn down, the lien secures an obligation of zero—but upon a letter of credit draw, the lien "inflates" to secure the amount of the draw, priming other, subsequently recorded interests by shoving them down in the lien stack, potentially to the point where they are not supported by any value in the collateral. *See, e.g.*, First Fidelity Bank N.A. v. Prime Motor Inns, Inc. (*In re* Prime Motor Inns), 130 B.R. 610 (S.D. Fla. 1991) (postpetition draws on letters of credit secured by Debtor's property were not subject to automatic stay and would not be enjoined based upon importance of independence principle). Providing for a lien of this sort in an REA for each party's obligations to the venture would be a useful mechanism to protect the parties, their expenditures needed to cure defaults by other parties and the venture itself. This would be especially true in the case of a bankruptcy by one of the parties: Without such a lien that relates back to a prepetition REA creating mutual obligations that is not rejectable under 11 U.S.C. § 365, self-help expenditures by the nonbankrupt parties would be mere unsecured claims against the estate. Although they might be entitled to administrative priority if found to be "actual, necessary costs and expenses of preserving the estate," 11 U.S.C. § 503(b), senior secured status for those claims is far preferable, especially in the case of an administratively insolvent estate.

[129]Savage, *supra* note 7, at 100 n.4.

[130]Garfinkel, *supra* note 7, at 94; *id.* Savage at 100. *See, e.g.*, Park Meadows REA, *supra* note 113.

[131]*See, e.g.*, Aladdin REA, *supra* note 112. *See also* Garfinkel, *supra* note 7, at 1 n.1 (discussing shopping center partition to create out-parcels and pads for future or ancillary development).

[132]Savage, *see supra* note 7, at 101 (The goal of the REA is to allow "several owners of land to use the aggregate land owned by them as a unified, functionally integrated shopping center, thereby enhancing the individual retailer's opportunities to generate business by collectively providing a more complete retailing menu for the consumer appetite.").

rangement is necessary to ensure that the rights, duties, and remedies of all the participants are spelled out.[133] Although this could take the form of a partnership, joint venture, or operating agreement,[134] because courts have insulated *in rem* interests that run with the land, transactional counsel increase the future stability of these mutually dependent relationships when the parties' obligations are cast as a recorded REA.[135]

An REA has the same qualities and purposes as traditional easements and covenants that run with the land. It is a modern transactional device consisting of a set of traditional *in rem* interests that address the needs of modern real estate developments. The basic requirements for a real covenant to run with the land are that it (a) conforms with the statute of frauds, (b) "touches and concerns" some estate in land, and (c) exhibits an intent of the parties that the covenant should bind the estate.[136] The clearest example of a covenant that "touches and concerns" an estate in land "is one calling for the doing of a physical thing to the land."[137] That a typical REA meets these basic requirements is demonstrated by the discussion and exemplary provisions dis-

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[133]The Aladdin REA, *supra* note 112, is over 100 pages long and spells out the joint development and operations of the resulting hotel/casino multi-use development with reference to additional governing documents that are incorporated by reference. Similarly, the Park Meadows REA, *supra* note 113, is over 128 pages long and governs the development and operation of an initially-two-anchor tenant enclosed mall. The Walgreen REA, *supra* note 113, and the Wal-Mart REA, *supra* note 112, are more succinct at eighteen and thirty-two pages, respectively, reflecting the more limited scope of the arrangements involved.

[134]All of which could be rejected as executory contracts in subsequent bankruptcy cases. *See* § 365(a); *see, e.g., In re* Norquist, 43 B.R. 224 (Bankr. E.D. Wash. 1984) (approving rejection of partnership agreement and excusing performance of covenant not to compete); *In re* E.C. Ernst, Inc., 20 B.R. 583, 586 (Bankr. S.D.N.Y. 1982) (discussing potential rejection of joint venture agreement); *In re* Wilson, 69 B.R. 960, 962-63 (Bankr. N.D. Tex. 1987) (determining that oil and gas operating agreement was executory and could be assumed or rejected).

[135]Although the title of a document is not dispositive as to its nature, *see* 780 LLC v. DiPrima, 611 N.W.2d 637, 644 (Neb. Ct. App. 2000), it would not be wise for counsel to continue to title these agreements "Construction, Operation and Reciprocal Easement Agreement" and the like. *See, e.g.*, Aladdin REA, *supra* note 112 (titled consistent with the first quotation in the preceding sentence); Walgreen REA, *supra* note 113 (titled "Declaration of Easements, Covenants, Conditions and Restrictions"—much more consistent with the generic titling suggested here to maximize bankruptcy resistance). Rather, consistent with the bankruptcy resistant strategy described in this Article, they should be generically titled "Reciprocal Easement Agreement" to indicate what they are: indivisible, mutual grants of easements, covenants and other *in rem* interests that run with the land which establish an interrelated system of estates that govern mixed use or joint development projects. Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 20.1(b) (West 2002) (a contract should "be unmistakable in its meaning, since whenever a disagreement arises the parties will have a conscious or unconscious incentive to interpret the contract in their favor. Unlike most documents, contracts can be subjected to willful perversions of meaning. So the wordings must be so clear that they foreclose frivolous positions about what they mean.").

[136]WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY §§ 8.14-8.16 (West 2000). *See supra* notes 113-31 and accompanying text (discussing particular clauses of REAs).

[137]STOEBUCK & WHITMAN, *supra* note 136, at § 8.15.

cussed above.[138]

2. *Using REAs to Capitalize on the Misinterpretation of Section 363(f)*

Most of the prior analysis of the Bankruptcy Code's effect, if any, on an REA has focused on whether an REA is an executory contract that is subject to assumption or rejection under § 365.[139] This is questionable in light of the Seventh Circuit's holding in *Gouveia v. Tazbir* that, although having some contract characteristics, restrictive covenants are property rights, not contracts.[140] Unless faced with an REA that is founded upon a lease,[141] the § 365 approach appears incorrect. The REA represents a collection of easements, covenants and lien provisions that embody the parties' rights and remedies and constitute *in rem* interests that run with the land.[142] These are property interests in a fundamental sense.[143] Therefore, they must be analyzed, like all other interests in real property, under the standards of § 363, unless they can be severed into multiple agreements and some of these are then characterized as executory contracts (rather than property rights) that are subject to separate assumption or rejection.[144] If they are found to be a nonseverable package of property rights, then the only issue becomes whether the REA can be stripped off the land using section 363(f).[145] As this Article has shown, the courts have generally not been persuaded to do so (although the analysis is often flawed or superficial). Further analysis of the potential "bankruptcy-proofing" qualities of REAs in the face of § 363(f) motions must largely await courts faced with the innovations of skilled transactional counsel that have recognized the power of the contract versus property right distinction arising out of the Bankruptcy Code and the courts'

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[138]*See supra* notes 113-35 and accompanying text. *See, e.g.*, STUART M. SAFT, WEST'S LEGAL FORMS § 37.10 FORM OF RECIPROCAL EASEMENT AGREEMENT (2002).

[139]*See* Garfinkel, *supra* note 7 (the article's analysis may be somewhat flawed by the erroneous conclusion at its note 84 and accompanying text that the term "claim" includes equitable rights that do *not* give rise to a right to payment, contrary to the Code's definition of "claim" and the Court's analysis in *Ohio v. Kovacks*, 469 U.S. 274 (1985)); *id.*, Savage, *supra* note 7 (discussing unreported Texas case in which the Debtor threatened to reject a possibility of reverter in a grant deed. The parties settled before the court could rule on the propriety of the attempt. Savage assumes that a reciprocal easement agreement is a contract.).

[140]*See supra* notes 72-84 and accompanying text.

[141]*See, e.g., In re* Arden & Howe Assoc., Inc., 152 B.R. 971 (Bankr. E.D. Cal. 1993) (restrictive use covenant in lease unenforcable once lease was rejected).

[142]*See* Gouveia v. Tazbir, 37 F.3d 295 (7th Cir. 1994), discussed *supra* at notes 72-84.

[143]This is why they are the subject of their own segment of the restatement. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1-8.

[144]*See generally* Michael St. James, *Slicing and Dicing Executory Contracts*, 22 CAL. BANKR. J. 227 (1995) (collecting cases and criticizing loose or misapplied standards for severability such as those of *In re* Gardinier, Inc., 50 B.R. 491, 493 (Bankr. M.D. Fla. 1985), *rev'd.*, No. 85-1208-CIV-T-15, *rev'd* 831 F.2d 974 (11th Cir. 1987)).

[145]Or § 1129(b) in conjunction with § 1141(c). *See infra* notes 154-82 and accompanying text.

overly narrow interpretation of the term "interest" in the context of § 363(f). If prior treatment of traditional *in rem* interests is any indicator, however, the potential for successful bankruptcy-proofing of real estate developments with REAs is great indeed.

Once one recognizes that the prevailing interpretation of § 363(f) has immunized traditional *in rem* interests from being stripped off in a § 363(f) sale—and probably under § 1141(c) in the plan context[146]—the incentive for transactional attorneys is obvious. Knowledgeable practitioners will structure real estate transactions to rely upon these interests whenever possible, assuming that the parties desire to avoid the flexibility and uncertainty that the Bankruptcy Code provides for future restructuring of relationships.[147] This is already being done in the nonbankruptcy context.[148] By elevating such *in rem* interests to immutable status under the Bankruptcy Code as well, REAs will lock down real estate developments in their original forms and prevent nonconsensual reorganization or modification of the benefits and burdens of the relationship under the Code. In putting this strategy into action, counsel will likely turn to and expand the use of REAs, and by recording REAs against parcels as they are assembled or subdivided, both payment and performance obligations and structures will be rendered largely bankruptcy-proof under current law.[149] Of course, this approach would be ineffective if courts were to interpret REAs as executory contracts susceptible to rejection under § 365 or "interests" subject to strip off under § 363(f) and § 1141(c) in appropriate circumstances. To date, however, they have not done so.[150]

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[146]*See infra* notes 166-77 and accompanying text.

[147]*Cf.* Lynn M. LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz*, 52 STAN. L. REV. 55 (1999) (discussing, *inter alia*, the use of securitization to judgment proof companies); Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999) (discussing, *inter alia*, the use of the proceeds of securitization as dividends to equity holders in order to accomplish judgment proofing of a company); Lynn M. LoPucki, *The Death of Liability*, 106 YALE L. J. 1 (1996) (discussing judgment proofing).

[148]*See, e.g.*, Sofran Peachtree City, LLC v. Peachtree City Holdings, LLC, 550 S.E.2d 429, 431-33 (Ga. Ct. App. 2001) (interpreting reciprocal easement agreement as a covenant running with the land and refusing to allow current owner and other interested parties from avoiding enforcement of no-build covenant in face of opposition by prior, benefitted owner).

[149]I do not mean to suggest that the use of an REA structure will cause payment obligations to be met during a bankruptcy case involving one of the REA parties. This may or may not be the case depending upon, *inter alia*, the particular structure at issue, the need for adequate protection payments, and the availability of funds. The "bankruptcy-proofing" accomplished by a unitary, integrated REA governing adjoining parcels of property is the sort that prevents the relative rights of the parties from being stripped off or restructured either through a Bankruptcy Code process such as a § 363(f) sale, a § 365(a) rejection, or a § 1129(b) cramdown.

[150]Oddly enough, the reverence that the courts show for traditional *in rem* interests that run with the land thus creates an incentive for transactional attorneys to embrace a system of ordering social and business relationships that, while once pervasive, has been in decline for centuries. A mixed use development held together with a series of REAs and *in rem* interests that run with the land bears strong

3. *Other Transactional Devices are Subject to the Same Analysis*

REAs may be the *in rem* transactional device of choice in commercial mixed-use real estate projects, but they are by no means the only such devices. Other examples are residential community covenants, codes, and restrictions ("CC&Rs")[151] and conservation[152] or environmental[153] easements. These and other modern assemblages of *in rem* interests are subject to the same analysis and same conclusions regarding their bankruptcy-proof nature

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resemblance to the feudal estate system in which a chain of burdened and benefitted parcels and estates comprised the source of duties and revenue in a chain from peasant to king that provided the basic social order. *See* George W. Liebmann, *The Modernization of Zoning: Enabling Act Revision as a Means to Reform*, 23 URB. LAW. 1, 3-4 (1991) (arguing that Prof. Bernard Siegan's deregulation approach to zoning laws would lead to modernized feudalism via enforcement of private restrictive covenants); *see generally* Cornelius J. Moynihan & Sheldon F. Kurtz, *Introduction to the Law of Real Property* 1-32 (3d ed. 2002) (describing the estate system imposed in England in the Norman Conquest after the Battle of Hastings in 1066).

[151]CC&Rs are commonly the documents that govern what can and cannot take place in a residential development. *See* Diamond Bar Dev. Corp. v. Superior Court, 60 Cal. App. 3d 330 (1976) (interpreting CC&Rs and provisions allowing for modification or cancellation of various CC&R provisions, demonstrating that drafters of CC&Rs desired to provide more flexibility and potential for change than might be provided for in otherwise governing law concerning modification of *in rem* interests). *See generally* Wayne S. Hyatt, *Symposium: Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998) (discussing the evolution and future of community associations and noting that, with regard to the governance and impact of these associations the "response from scholars and thoughtful practitioners, however, has not kept pace with the acceleration . . . the subject has not received the depth of coverage in a fully informed manner that is required to assure that the legal evolution will keep pace with the practical evolution.").

[152]A conservation easement is one that is recorded against a tract of land and which governs its future development. *See* CALIFORNIA REAL ESTATE GUIDE: LITIGATION AND TRANSACTIONS § 240.12 (Mathew Bender 2000) ("A conservation easement is any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, executed by or on behalf of the owner of the land subject to the easement, binding on successive owners of the land, and for the purpose of retaining land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition [Civ. Code § § 815.1]. A conservation easement is an interest in real property of perpetual duration that is voluntarily created and freely transferable in whole or in part for the purposes mentioned above [Civ. Code § § 815.2]. All interests not transferred or conveyed by the instrument creating the easement remain in the grantor, including the right to engage in all uses of the land not affected by the easement or not prohibited by law or by the easement [Civ. Code § § 815.4]. . . . A conservation easement may be acquired and held only by (1) a tax-exempt nonprofit organization [see generally I.R.C. § § 501(c)(3) (income tax exemption)] qualified to do business in California and having as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition, or (2) the state, any city, county, city and county, district, or other state or local governmental entity, if that entity is otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed [Civ. Code § § 815.3]"). *See, e.g.*, Friends of Shawangunks v. Knowlton, 64 N.Y.2d 387 (1985) (discussing conservation easement on 240 acres of land that limited development to one single family house, a water storage pond, and maintenance of an existing golf course).

[153]An environmental easement is, generally speaking, a negative easement that limits or prohibits certain activities on the land in order to control development and maintain open space. 4 POWELL ON REAL PROPERTY § 34A.08 ("States are Developing Environmental Easements in Order to Restrict More Intensive Use of Remediated or Recycled Properties"); *see, e.g.*, Village of Ridgewood v. The Bolger Foundation, 517 A.2d 135 (N.J. 1986) (discussing perpetual conservation easement to foster and preserve open space).

as REAs and show just how wide the impact of the dominant interpretations of § 363(f) insulating *in rem* interests may be.

B. Can a Cram-Down Confirmation Affect Traditional *in rem* Interests When a Sale Free and Clear Cannot?

There is no direct case law concerning extinguishment or modification of *in rem* interests through a § 1129(b)(2)(A) cramdown plan confirmation followed by § 1141(c) vesting free and clear of the interest in question.[154] The cases that come close to addressing the issue are those involving an attempted sale free and clear under § 363(f)(5) based upon a hypothetical cramdown under 1129(b)(2)(a)[155] or those involving modification of contractual covenants and substantive terms within a mortgage or note, such as due-on-sale clauses and prepetition penalties.[156] The bare statute itself provides little guidance.

Courts have, however, allowed substantial modification of *lien-holders'* rights through cramdown. For example, courts have confirmed plans that allow debtors to extinguish due-on-sale clauses,[157] modify notes to include a thirty-day cure period for monetary defaults, and limit or eliminate nonmonetary defaults unrelated to collateral to eliminate prepayment penalties, default interest, late payment charges, and reporting requirements.[158]

Although most courts appear to take a flexible approach in determining whether the cramdown provisions are satisfied under proposed plans of reor-

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[154]Cramdown is the colloquial expression for confirming a plan that has not been accepted by all classes of creditors as required for consensual confirmation under § 1129(a). A nonexclusive list of the standards for cramdown is found in § 1129(b). *See also infra* notes 159-62 and accompanying text.

[155]*See* Kuney, *Misinterpretations I*, *supra* note 1, at notes 66-73 and accompanying text (discussing this theory and citing, as examples, *inter alia*, *In re* Perroncello, 170 B.R. 189, 191 (Bankr. D. Mass. 1994) ("the 'tools' provided by Congress to accomplish that end are valuation proceedings under § 506(a) and cramdown . . . under § 1129(b)(2)"); Mutual Life Ins. Co. v. Red Oak Farms, Inc. (*In re* Red Oak Farms, Inc.), 36 B.R. 856, 858-59 (Bankr. W.D. Mo. 1984) (finding that indubitable equivalent would not be realized and, thus, declining to approve sale), and Scherer v. Fed. Nat'l Mfg. Assoc. (*In re* Terrace Chalet Apts., Ltd.), 159 B.R. 821 (N.D. Ill. 1993) (authorizing sale free and clear of lien based upon hypothetical cramdown)).

[156]*See infra* notes 157 & 158 and accompanying text.

[157]*See, e.g.*, *In re* Coastal Equities, Inc., 33 B.R. 898, 905 (Bankr. S.D. Cal. 1983) ("a due-on-sale clause is not something so sacrosanct that it is immune from modification in a bankruptcy setting"). The *Coastal Equities* court did not comment on what might be so sacrosanct.

[158]*See, e.g.*, *In re* Western Real Estate Fund, Inc., 75 B.R. 580 (Bankr. W.D. Okla. 1987). In the spirit of *Whiting Pools*, 462 U.S. 198 (1983), the *Western Real Estate Fund* court stated that these modifications did not individually nor collectively rise to a level of deprivation of the creditor's lien securing its claim. The court also failed to demark the outer boundary of permitted "modification." An example of a case where the court held the borrower had attempted to go too far is *In re* P.J. Keating Co., 168 B.R. 464, 473 (Bankr. D. Mass. 1994). There, the court refused to confirm a plan of reorganization that struck from a lender's loan documents a prohibition on stock redemptions while the loan remained outstanding. In the court's view, requiring a lender to "sit back and do nothing" as its borrower redeems stock with money which could have been used to pay the lender "is hardly fair and equitable." Arguably it also violates the absolute priority rule.

ganization, the substantive changes to lien rights that have been permitted do not include termination.[159] Instead, they focus on *modification of* contract provisions and rights which underlie liens. Combined with the case law concerning liens rather than other interests, complete elimination of an *in rem* interest using § 1129(b) appears unlikely at first blush.[160] Careful analysis reveals otherwise, however.

In analyzing the matter under § 1129(b) itself, the Code's failure to define the word "interest" again rears its (ugly) head.[161] While a party benefitted by an *in rem* interest holds a property interest in a debtor's property, the party is also likely to be a "creditor" as defined by the Code as well. If, under applicable nonbankruptcy law, the interest holder has a prepetition contingent claim for future noncompliance with the terms of the property interest that can be converted into a right to payment—in other words, a right to sue

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[159]This is not surprising. The cramdown statute itself generally favors retention of the lien. Section 1129(b)(2)(A)'s three alternative formulations for the minimum fair and equitable treatment for a class of secured claims are:

> With respect to a class or secured claims, the plan provides-
>
> (i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

§ 1129(b)(2). The first is incompatible with termination because the lien must be retained. § 1129(b)(2)(A)(i)(I). The second is incompatible with termination because the lien must survive to be transferred to the proceeds of the sale of the collateral. § 1129(b)(2)(A)(ii). Only the third, the inscrutable indubitable equivalent standard, § 1129(b)(2)(A)(iii), would seem to apply. Given this Article's focus on adequate protection and the fair and equitable cram-down standard as tools to temper unreasonable application of § 363(f)'s sale free and clear power, it is worth noting that the Code's definition of adequate protection, like the fair and equitable standard for secured claims, contains a third, catch-all alternative, "indubitable equivalence." *See* § 361(3)(adequate protection may be provided by the court "granting such other relief . . . as will result in the realization . . . of the indubitable equivalent of such party's interest"). *See generally* MICHAEL A. GERBER, BUSINESS REORGANIZATIONS, 730-31 (2000) (discussion of origin of indubitable equivalence in Judge Learned Hand's *Murel Holding Co.* opinion and later decisions dealing with the concept). The parallel nature of these two standards reinforces their usefulness as twin protections or limitations on the sale free and clear power.

[160]Although lack of support has not stopped development of various doctrines and practices in the field of bankruptcy law. *See, e.g.*, Kuney, *Misinterpretations I supra* note 1 (discussing expansive interpretation of § 363(f)'s term "interest" to include "claims" with little or no support in the statute or legislative history).

[161]*See supra* notes 21 & 22 and accompanying text.

for money damages if denied the right to exercise the *in rem* interest—then the interest-holder is also a creditor, and probably an unsecured creditor at that.[162] Section 1129(b) addresses itself to unsecured claims and interests as part of its statement of the absolute priority rule.[163] In order to cram down a plan over the objection of a class of unsecured creditors,[164] one of two requirements must be met. Either:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a

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[162]*See* § 101(5) (definition of "claim"); § 101(10)(definition of creditor). Note that it is *not* important for purposes of determining if the interest holder is a creditor whether the interest holder can be compelled to accept a money satisfaction of the interest, a question that affects the analysis under § 363(f)(5). Rather, as long as the interest holder has the *option* of seeking a monetary satisfaction for nonperformance, he holds a claim and is a creditor. Without more, the claim would be an unsecured claim. However, conceivably, the *in rem* interest could be coupled with a lien-upon-default provision, in which case the interest-holder would be a secured creditor. *See supra* note 125 and accompanying text (discussing lien provision securing performance and payment obligations under the Aladdin REA and exploring springing lien provisions in REAs for failure of the burdened parcel to perform obligations that are later performed by the benefitted parcel or its owner).

[163]§ 1129(b)(2)(B),(C). If the creditor is a secured creditor, then the standards of § 1129(b)(2)(A) would apply and the creditor would either have to (i) retain the lien on the property in question and receive full payment of its secured claim over time, with appropriate interest, (ii) receive a lein on the proceeds of any sale of the collateral, or (iii) receive the indubitable equivalent of the claim. 11 U.S.C. § 1129(b)(2)(A)(i),(ii).

[164]It is important to distinguish between the interest holder's interest in the estate's property, which gives rise to creditor status, and an interest that the interest holder could hold in the debtor itself. The two are quite different, and holding an interest in the property does not make one an interest holder in the debtor. *See In re* Hickey Props., Ltd., 181 B.R. 171 (Bankr. D. Vt. 1995) (creditor holding security interest in substantially all of debtor's assets could not exercise credit bid right at sale of debtor's equity interests—sale of the equity interests was not the same as sale of the assets themselves). However, even if it did, *essentially the same cramdown requirement would be applicable to the creditor as an interest holder.* In order to cram down a plan over the objections of a class of interest holders, one of two requirements must be met:

> (i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or
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> (ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

§ 1129(b)(2)(C). Properly understood, this section addresses itself to those traditionally considered to be interest holders: stockholders, partners, and other equity holders. But even if the interest holder/creditor is viewed as a pure interest holder, removing the superfluous text (for these *in rem* purposes) regarding liquidation preferences from the statute, then, in order to cram down a plan on a class of holders of *in rem* interests, the plan would only have to provide them (i) with the present value of their interest or (ii) less than that value—even zero—and no distributions to junior classes. This is *exactly* the same formulation applicable to interest holders viewed as unsecured creditors. *Compare* § 1129(b)(2)(B) (minimum fair and equitable treatment for unsecured creditors facing cramdown) *with* § 1129(b)(2)(C) (minimum fair and equitable standard for interest holders facing cramdown).

> value, as of the effective date of the plan, equal to the allowed amount of such claim; or
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such interest any property.[165]

Thus, cramdown requires either (i) providing interest holders with the present value of their claim/interest, which can include providing them with a note providing for deferred principal payments with appropriate interest over time or (ii) less than that value—even zero—and no distributions to junior classes. Coupled with § 1141(c), which provides for postconfirmation vesting of property pursuant to the plan free and clear of "all claims and interests of creditors, equity security holders, and of general partners in the debtor,"[166] cramdown may provide an avenue for stripping off *in rem* interests in a Chapter 11 case.

Cramdown under alternative (i)—by providing the holder of an *in rem* interest with the present value of that interest[167]—is simply a matter of providing just compensation for what may be viewed as the government's taking of that interest through the bankruptcy reorganization process, a public use.[168] But cramdown under alternative (ii)—payment of less than the full present value of the claim and providing no distribution to junior classes—runs smack into the Constitutional prohibition on takings without just compensation. If cramdown is to be accomplished by giving the holder of an *in rem* interest less than the present value of that interest, a taking without just compensation is what is being proposed and the fact that junior classes of interest holders receive nothing under the absolute priority rule is no salve for this uncompensated injury.[169] There are two alternatives in such a circumstance: either confirmation must be denied by the bankruptcy court upon objection by the interest holder or the interest holder may proceed in the appropriate court with a "takings" claim against the United States.[170]

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[165]§ 1129(b)(2)(B).

[166]§ 1141(c).

[167]The difficulty of valuation of *in rem* interests should not be minimized. However, there is a large body of law that is beyond the scope of this Article on which to draw in this regard. *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 169-90 (Foundation Press 2002) (providing overview of just compensation standards and noting, at 185-87, that "[o]ne of the most analytically difficult issues in determining just compensation arises when the government takes property where the title is divided among two or more persons or includes legal restrictions on the use of the property . . . [T]he issue . . . arises when the property has restrictions on use built into the title . . . through easements or servitudes . . . The government must therefore pay the fair market value of the thing acquired, not the value of the various bundles of rigts that have been taken from the previous owners.").

[168]*See supra* note 100 (discussing eminent domain and liberally construed public use standard).

[169]*See id.*

[170]*See supra* note 100 (discussing compensation claim jurisdiction of Court of Federal Claims and the *Ultimate Sports Bar* case).

C. Post-Confirmation Vesting Free and Clear of Covenants Under Section 1141(c)

The case law and commentary on postconfirmation plan property being received free and clear of covenants that run with the land and other traditional *in rem* interests under § 1141(c) is sparse to nonexistent.[171] Courts faced with the issue of § 1141(c) vesting do not need to attribute the same meaning to "interest" as they attribute to the term under § 363(f).[172] All that is clear from the case law is that a lien is an "interest" within the meaning of § 1141(c) and may be stripped off by vesting property free and clear under a confirmed plan, at least if the lienholder "participates" in the reorganization.[173] There is a lack of authority on whether traditional *in rem* interests

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[171]A review of applicable case law discloses little other than cases involving vesting free and clear of liens which, despite the holding of *In re* Bowen, *infra*, note 172, has been held valid in the case of mortgage liens, *see, e.g.*, Simon v. Tip Top Credit Union *(In re* Simon), 1996 U.S. App. Lexis 8733 (10th Cir. 1996) (unpublished opinion), and has withstood a Tenth Amendment sovereign immunity challenge in the case of vesting free and clear of the portion of state tax liens securing penalties, fees, and costs (but not the basic tax due), *see* Bondholder Committee v. Williamson Cty, Tn. *(In re* Brentwood Outpatient, Ltd.), 43 F.3d 256 (6th Cir. 1994). *See also* Universal Suppliers, Inc. v. Regional Building Sys., Inc. (In re Regional Building Sys., Inc.), 254 F.3d 528, 530-31 (4th Cir. 2001) (rejecting challenge to vesting free and clear of a lien based upon § 1327(c)—the Chapter 13 analog to § 1141(c)—precedent and stating "The bankruptcy court properly determined that all of the elements needed to invoke § § 1141(c)'s 'free and clear of all claims' language had been satisfied in this case. First, RBS submitted a Chapter 11 reorganization plan to the court. Second, the plan was confirmed by an order of the court, without any objection from Universal. Third, the property to which Universal now seeks to attach its lien was 'dealt with by the plan.' Specifically, the plan stated that after certain other claims had been paid, Universal and the other unsecured creditors would receive a pro rata share of the remainder of the estate, including any amounts left in the $ 5 million settlement fund. And fourth, neither the plan nor the order confirming the plan preserved Universal's lien rights. Rather, the plan classified Universal as a general unsecured creditor. By the plain terms of § 1141(c), therefore, confirmation of RBS's Chapter 11 plan rendered the $ 5 million settlement fund 'free and clear of all claims' not expressly preserved. Since Universal's lien was not preserved, it was extinguished by operation of law upon confirmation of RBS' plan. And we note that every other circuit court of appeals to have addressed this issue has reached the same conclusion. *See* Matter of Penrod, 50 F.3d 459, 463 (7th Cir. 1995) (holding that under § § 1141(c), "unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation."); *In re* Be-Mac Transport Co., 83 F.3d 1020 (8th Cir. 1996) (following Penrod); *In re* Barton Indus., Inc., 104 F.3d 1241 (10th Cir. 1997) (same)).

[172]This potential for inconsistency is consistent with the Code. *See* § 102(8) ("a definition, contained in a section of this title that refers to another section of this title does not, for the purpose of such reference, affect the meaning of a term used in such other section"). One case demonstrating the use of the term "interest" in § 1141(c) in a manner inconsistent with its use in § 363(f), where it includes a lien, § 101(37) ("lien" means charge against or interest in property to secure payment of a debt or performance of an obligation); § 363(f)(3) (condition of sale free and clear of an interest that is a lien), is Bowen v. I.R.S. *(In re* Bowen), 174 B.R. 840 (Bankr. S.D. Ga. 1994) (finding that a lien cannot be released pursuant to § 1141(c) because, *inter alia*, a lien is not an interest, and citing in support Relihan v. Exchange Bank, 69 B.R. 122 (S.D. Ga. 1985) and "a long line of cases beginning with the Supreme Court's decision in Long v. Bullard, 117 U.S. 617 (1886)," and holding that any release of a lien must occur via § 506(d)).

[173]*See* Matter of Penrod, 50 F.3d 459, 563 (7th Cir. 1994) (§ 1141 (c) must cover liens); Dever v. I.R.S. *(In re* Dever), 164 B.R. 132 (Bankr. C.D. Cal. 1994) ("interests" includes "liens"). *See supra* notes 88-92. The Seventh Circuit appears to have originated or revived the "participation" requirement as an

that run with the land are included in the word "interest" as used in § 1141(c), but for the reasons discussed in this article's analysis of the question under § 363(f), the answer should be yes.

Applying the § 1141(c) lien precedents to *in rem* interests running with the land, however, is likely to prove difficult. Looking to § 363(f) cases involving nonlien interests, courts will likely be inclined to view these interests as sacrosanct and to immunize them from proposed extinguishment through § 1141(c) vesting free and clear. This need not be the case, however. Section 1141(c) itself expressly refers to vesting property free and clear of "all claims and interests," indicating an even more unlimited free and clear vesting power than that of § 363(f), which, on its face, only refers to sale free and clear of interests, not claims.[174] Although § 1141(c) limits the claims and interests that can be stripped from property through postconfirmation vesting to those held by "creditors, equity security holders, and . . . general part-

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additional gloss to Bankruptcy Code § 1141(c). That circuit requires that "before a lien will be deemed extinguished, not only must it [the property or claim] be dealt with in the plan, but the creditor must have 'participated in the reorganization.'" 8 COLLIER ON BANKRUPTCY para. 1141.04[1] (citing F.D.I.C. v. Union Entities (*In re* Be-Mac Transp. Co.), 83 F.3d 1020, 1026 (7th Cir. 1994), in which the court agreed with Collier on this point and described § 1141(c) as a "default rule" for secured creditors who file claims for which provision is made in the plan of reorganization for the extinguishing of the claim). *Id.* It is unclear what that final phrase means, but it indicates something more than simply being on the service list and receiving service of pleadings. Filing a proof of claim, voting to accept or reject a plan, or objecting to plan confirmation probably qualifies. Under this formulation, if the lienholder does not participate in the reorganization, its lien would not be dealt with properly in the plan, § 1141(c) would not apply, and the lien will pass through the bankruptcy unaffected. *Id.* On the other hand, if a secured creditor has participated in the reorganization, e.g., by filing a proof of claim, then the creditor must remain vigilant to § 1141(c) provisions in the plan that could otherwise wipe out or modify the lien. Assumedly similar rules would apply to nonlien *in rem* interests as well.

This inconsistent use of identical terms under the same statute and inclusion of an additional requirement for invoking § 1141(c) is probably due to the varying context in which the question arises. Plans typically include a boilerplate vesting provision which states that, on the effective date of the plan, all estate property revests in the reorganized debtor free and clear of all claims and interests except as otherwise explicitly provided for in the plan. A secured creditor may not object to the plan prior to confirmation, only to be shown the postconfirmation vesting provision when attempting to enforce the lien postpetition. If the court is convinced that the debtor has somehow "pulled a fast one" using plan boilerplate, the court is more likely to assist the victimized creditor in wriggling out of the pro-debtor result mandated by strict statutory interpretation. It is these creative efforts to do justice that create bad precedent.

Such cases are ones in which the courts should consider issuing decisions that are not for publication and can not be cited under the local rules. Some have, however, questioned the constitutionality of such local rules and procedures. *See, e.g.*, Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated on grant of rehearing en banc*, 235 F.3d 1054 (8th Cir. 2000); *but see* Hart v. Massanari, 266 F.3d 1155, 1158-59 (9th Cir. 2001) (rejecting the *Anastasoff* rationale). If that view is correct, then the courts should reject the creative approach and interpret the statute literally, creating good precedent and raising the issue to a level where the practicing bar and Congress can deal with the effects of the statute directly.

[174] § 1141(c). *See* Kuney, *Misinterpretations I*, *supra* note 1 (discussing and collecting authorities examining both § 363(f) and § 1141(c) vesting free and clear issues).

ners in the debtor,"[175] the first of these categories will generally apply in the context of *in rem* interests.[176] This would also constrain the free and clear power within even the most narrow constitutional limits.[177]

Questioning whether to interpret § 1141(c) as allowing vesting free and clear launches courts on a course of muddled reasoning that has led to the overly narrow and conclusory analysis of § 363(f) to exclude *in rem* interests from its free and clear sweep. As with this § 363(f) issue, the question is better considered in terms of *what standard should be applied* before property is vested free and clear rather than whether it can be so vested at all.

In § 363(f)'s case, the answer lies in the principled application of § 363(e)'s adequate protection standard to avoid a Fifth Amendment taking. For § 1141(c), the answer lies in § 1129(b)'s "fair and equitable" cramdown standard.[178] In judging whether cramdown is fair and equitable, the effects of property vesting free and clear of the interest holder's interest must be taken into account.[179] Assuming the interest holder is separately classified,[180] and

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[175]*Id.* This nicely dovetails with § 363(f)(5)'s requirement that interests be stripped in a sale only if the party holding the interest could be compelled to accept a money satisfaction. Because the Code defines a "creditor" as one holding a "claim"; while claim is defined broadly, it does not include a "right to an equitable remedy for breach or performance if such breach" does not "give rise to a right to payment." § 101(5)(B). Equitable rights that do not also give rise to a legal claim are generally not affected by the Bankruptcy Code and ride through bankruptcy unaffected. *See* Ohio v. Kovacs, 469 U.S. 274 (1985).

[176]*See supra* note 161-62 and accompanying text (discussing an interest holder in property's status as a creditor of the debtor).

[177]*See* Plank, *supra* note 31 (finding that Article 1, Section 8, Clause 4 (the bankruptcy clause) of the United States Constitution limits Congress to legislating on the subject of bankruptcies to adjusting the relative rights of debtors and creditors and that when it goes beyond this scope, Congress acts unconstitutionally); Forrester, *supra* note 37 (asserting that the takings clause limits Congress's power under the bankruptcy clause).

[178]*See* § 1129(b)(2). The fair and equitable standard is broader that just the statutory statement of the minimum treatment to be afforded dissenting classes of secure creditors, unsecured creditors, and interest-holders found in § 1129(b)(2). *In re* Manion, 127 B.R. 887, 890 (Bankr. N.D. Fla. 1991) (citing *In re* D & F Construction, Inc., 865 F.2d 673, 675 (5th Cir. 1989), and stating "Technical compliance with all the requirements in § 1129(b)(2) does not ensure that the plan is 'fair and equitable' . . . . A court must consider the entire plan in the context of the rights of the creditors under state law and the particular facts and circumstances when determining whether a plan is 'fair and equitable'.").

[179]*See In re* Manion, 127 B.R. 887 (Bankr. N.D. Fla. 1991).

[180]Like the claims of secured creditors, the interests of *in rem* interest holders should generally be separately classified as each such interest is likely to be unique. *See* § 1122(a) ("a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class"). The exception to this general rule would be those interests that inure to the identical benefit of a number of entities or parcels, in which case, like secured creditors holding individual fractionalized interests in a single undivided secured claim, the interest holders could be classified together. *See id.*; *In re* Okura & Co., 249 B.R. 596 (Bankr. S.D.N.Y. 2000) (discussing participations, interbank loans, and syndications and their relative effects on the direct and indirect creditors rights in bankruptcy vis-à-vis the debtor and each other, collecting cases, and citing W.H. Knight, Jr., *Loan Participation Agreements: Catching Up With Contract Law*, 1987 COLUM. BUS. L. REV. 587, 592 (1987) and Billie J. Ellis Jr. *et al.*, *"Easy Street" or "Risky Business"? - Why Loan Participants Can't Afford To Be Passive Investors*, SC78 A.L.I.-A.B.A. 547 (1998)).

objects to confirmation,[181] then only by providing the interest holder with the present value of its interest, which should equal the amount of its soon-to-be-non-contingent claim for deprivation of its *in rem* interest, can the plan be confirmed without creating an uncompensated taking in violation of the Fifth Amendment. Applying this fair and equitable standard provides the plan proponent with great flexibility to address the propriety of postconfirmation vesting free and clear. Dealing with these issues in the plan context avoids the tortured or confused analysis attendant to the use of § 363(f).[182] Similarly, interpretation of § 363(f) in the case of *in rem* interests can be simplified by focusing on the adequate protection standard of § 363(e).

III. A PROPOSAL FOR REVERTING TO A STRAIGHTFORWARD AND STEP-BY-STEP ANALYSIS ROOTED IN THE STATUTE AND APPLICABLE NONBANKRUPTCY LAW

Reverting to a straightforward interpretation of the statutes involved and focusing on standards for approval rather than the absolute scope of the sale and vesting free and clear power provides a principled way to avoid the unintended and sometimes muddled deification of *in rem* interests and development of yet another form of bankruptcy-proofing that is not expressly authorized by statute. Courts should recognize that the word "interest" as used in §§ 363(f), 1122, 1123(a)(2)-(3), 1129(b), and 1141(c) is a broad term that should be consistently interpreted across the Bankruptcy Code.[183] Further, they should recognize that the term includes traditional *in rem* interests that run with the land. Requests to sell free and clear of traditional *in rem* interests should be analyzed first in terms of the specific grounds under § 363(f) that may apply. Although consent ((f)(2)) and *bona fide* dispute ((f)(4)) are often recognized, enablement under applicable state law ((f)(1)) and compulsion to accept a monetary satisfaction ((f)(5)) are too often ignored[184] or as-

[181] Assuming adequate notice, failure to object will be deemed consent to the vesting and other provisions of the plan. *See* Andersen v. UNIPAC-NEBHELP (*In re* Andersen), 179 F.3d 1253 (10th Cir. 1999) (failure of creditor to object to Chapter 13 plan that provided that student loan debt was dischargable as an undue hardship constituted waiver of right to object to the discharge of claim for repayment of student loan). This stands in marked contrast to a sale free and clear under § 363(f)(1), where actual affirmative expressions of consent are required. *See In re* Roberts, 249 B.R. 152, 153 (Bankr. W.D. Mich. 2000) ("the consent required by Section 363(f)(2) [footnote omitted] may not be implied from the lienholder's failure to object. The lienholder must actually give its assent"). The difference in the standard for consent can be justified by the time generally required by the sale-by-motion procedure (very little) versus the plan confirmation process (typically involving multiple hearings, multiple mailings of notice, and lots of time).

[182] *See supra* notes 41-100 and accompanying text.

[183] *But cf.* § 102(8) ("a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section").

[184] *See, e.g., supra* notes 91 & 92 and accompanying text.

sumed away.[185] Only § 363(f)(3), which on its face only applies to liens, will generally not be implicated.[186] After identifying the proper ground that may support the sale free and clear, the particular interest at issue must be examined as must the applicable nonbankruptcy law regarding sales free and clear or the legal or equitable proceedings in which a benefitted party may be forced to accept a monetary satisfaction of the interest.

Concerns regarding the necessity of the sale free and clear, the harm to the interest holder, or constitutional claims of a "taking" can be addressed through the mechanisms of adequate protection in the case of a nonplan § 363(f) sale and the "fair and equitable" cramdown standard in the case of vesting free and clear under a plan of reorganization and § 1141(c). If the debtor cannot design a mechanism to satisfy these requirements, the sale free and clear or plan confirmation will be denied.[187]

Courts should also recognize the possibility of eminent domain as a hypothetical proceeding that may satisfy the condition set out in § 363(f)(5).[188] Doing so will focus the parties and the bankruptcy court on the compensatory and Constitutionally-mandated nature of adequate protection.[189] Further, explicitly evaluating the sale free and clear process with reference to a Fifth Amendment taking will also focus all involved on the process that is due to holders and potential holders of claims and interests.[190]

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[185]*See supra* note 66 and accompanying text.

[186]*See* § 363(f)(3).

[187]§ 363(e). Holders of *in rem* property interests, unlike many potential successor liability claimants, are often disclosed in public records or are otherwise intimately involved with the asset in question. As a result, it is reasonable to assume that the more summary preplan sale procedure of § 363 can satisfy the due process rights of those holding *in rem* interests although it may fall short for holders of successor liability claims. *See generally* Kuney, *Misinterpretations I, supra* note 2 (discussing due process ramifications upon successor liability claimants when § 363 preplan sales rather than sales under confirmed plans are used to reorganize a business through sale of substantially all its assets).

[188]*See supra* notes 4 & 100 and accompanying text.

[189]*See supra* notes 100, 163-68 and accompanying text.

[190]*See* Kuney, *Misinterpretations I, supra* note 1, at note 131 (discussing notice and due process problems associated with § 363 motions and stating "Of course, notice to interested parties would need to be adequate, a real issue in this context as those benefitted by an *in rem* interest may not otherwise appear as creditors in the debtor's schedules or records although they would seem to have sufficient pre-sale relationships with the debtor to satisfy the *Piper* test for determining where to cut off the debtor's right to affect future claimants. *Cf. In re Fairchild Aircraft Corp.*, 184 B.R. 910 (discussing notice problem in context of unknown claimants); *see generally* Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620 (10th Cir 1984) (due process requires adequate notice to those whose rights are to be affected in the bankruptcy proceeding). Further exacerbating the notice problem is the fast track process often used for § 363(f) sales. They are usually merely contested matters and approval of the sale is sought by simple motion, *see* Fed. R. Bankr. P. 4001, 6006, 9014, although in practice a two-step motion process is generally used: the first step is to preliminarily approve the opening bid and procedures, the second to approve the final buyer. Approval can be obtained in as little as twenty days, and often is granted in no more than 60 or 90 days, although this will vary with the size and complexity of the case and the degree of exigency of the "articulated business justification" for the preplan sale under § 363(b). *See* FED. R. BANKR. P. 4003(d); *see also supra* note 30 (discussing the articulated business justification standard). If no objections are received, a

Adopting this straightforward interpretation gives effect to the intent behind §§ 363 and 1141 as enacted. Further, addressing attempts to sell free and clear of *in rem* interests with the flexible standards of adequate protection and the fair and equitable cramdown standard and a principled application of nonbankruptcy law, including eminent domain concepts, will prevent the development of bankruptcy-proof transactional structures using REAs, CC&Rs, and conservation and environmental easements that may frustrate later legitimate reorganizations.[191]

CONCLUSION

This Article is laced with tensions. It recognizes that the dominant interpretations of § 363(f) remain inconsistent with its plain language as applied to traditional *in rem* interests that run with the land. Attempts at sales free and clear of these *in rem* interests are generally dismissed with too little analysis. Whether the fault of counsel who have inadequately briefed the matters or judges who too readily accept the constraints of binding precedent or persuasive authority, none of these results are dictated by the language of the statute. In the absence of courts revisiting and correcting these misinterpretations, transactional lawyers increasingly will use REAs and other forms of traditional *in rem* interests that run with the land to structure and bankruptcy-proof transactions. To avoid a triumph of form over substance, courts should carefully apply the statute and its standards and address the objections of parties benefitted by *in rem* interests that may be stripped off of property through the flexible tools of adequate protection and the fair and equitable cramdown standard. The alternative is to encourage formation of rigid property-rights-based transactions that are, essentially, bankruptcy-proof or, at least, very bankruptcy resistant.

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hearing is not even necessary. FED. R. BANKR. P. 4003; see also 11 U.S.C. § 102(1) (2000) (defining "notice and a hearing" as including no hearing at all absent objection or if time does not permit)"). Of course, if personal jurisdiction is otherwise lacking in the main bankruptcy case over a party that the 363(f) sale seeks to impact, an adversary proceeding may need to be instituted in order to gain jurisdiction over that entity in order to obtain effective relief. Because of the additional procedures required in adversary proceedings, this ameliorates, somewhat, the due process concerns of the otherwise potentially summary process. *See, e.g.*, FED. R. BANKR. P. 7001-7087 (rules governing adversary proceedings generally parallel and incorporate by reference the Federal Rules of Bankruptcy Proceedure, making adversary proceedings largely resemble ordinary federal lawsuits in terms of practice and procedure, although some methods of streamlining the process in adversary proceedings remain).

[191] *See supra* notes 101-52 and accompanying text. That is, unless Congress revises the Bankruptcy Code to provide for such bankruptcy proofing, which would be entirely proper. The point is that it should be the legislature, not the courts, that make law of this fundamental sort.

APPENDIX

A Non-Exclusive List of Laws of American Jurisdictions Permitting Termination or Modification of Easements and Covenants Under Theories Other Than Eminent Domain and Summary Chart Summarizing Applicability

	Easements											Covenants								
	Abandonment	Servient Estate Change	End of Necessity	Merger	Adverse Possession	Innocent Purchaser	Equity	Release	Condition	Misuse	Miscellaneous	Public Policy	Estoppel	Waiver / Laches	Release	Change in Conditions	Easement Doctrines	Statutory period	Overbreadth	Miscellaneous
Alabama	●	●	●	●	●	●						●		●		●	●			
Alaska	●		●								●			●						
Arizona	●			●	●	●	●									●				
Arkansas	●		●	●	●	●	●							●		●				●
California	●	●	●	●	●	●		●		●						●	●			
Colorado	●			●			●	●	●					●		●	●			
Connecticut	●		●		●	●		●	●			●	●	●	●	●				
Delaware	●		●		●		●					●	●	●		●				
D.C.	●		●	●	●	●	●	●				●		●		●				
Florida	●		●	●	●	●	●	●	●		●			●		●				
Georgia	●		●	●	●	●	●					●		●				●		●
Hawaii	●			●	●	●	●									●	●			
Idaho	●	●	●	●	●		●									●				
Illinois	●		●	●	●			●				●		●		●				
Indiana	●	●	●	●	●			●			●	●	●	●		●				
Iowa	●		●	●	●					●			●	●	●	●	●	●		
Kansas	●				●	●					●			●		●				
Kentucky	●		●	●	●		●	●				●		●		●				
Louisiana	●		●	●	●	●		●						●	●	●				●
Maine	●	●	●	●			●	●						●		●				
Maryland	●		●	●	●		●					●	●	●		●			●	
Massachusetts	●	●	●	●	●	●	●	●	●			●	●	●		●				
Michigan	●	●	●	●			●					●		●		●				
Minnesota	●	●		●	●		●	●								●		●		
Mississippi	●		●	●	●									●					●	
Missouri	●		●	●	●			●						●		●				
Montana	●	●	●	●	●					●		●		●			●			
Nebraska	●		●	●									●			●	●			●
Nevada	●			●	●											●				
New Hampshire	●		●	●	●									●		●				
New Jersey	●		●	●	●	●	●						●	●		●				
New Mexico	●		●				●	●								●				
New York	●		●	●	●	●	●	●				●	●	●		●				●
North Carolina	●			●	●	●	●	●				●		●		●		●		
North Dakota	●	●	●	●						●				●			●			
Ohio	●		●	●	●	●		●	●	●		●		●		●				
Oklahoma	●	●	●	●						●	●			●		●	●			
Oregon	●		●	●	●			●								●				
Pennsylvania	●		●	●	●		●					●	●	●		●				●
Puerto Rico			●	●	●	●		●								●	●			
Rhode Island	●	●	●		●		●									●				
South Carolina	●			●	●	●							●	●	●	●	●			
South Dakota	●		●		●					●				●		●	●			
Tennessee	●		●	●	●			●	●		●	●	●	●		●				
Texas	●		●	●	●	●			●		●			●		●				
Virgin Islands					●						●			●						
Utah	●		●	●	●						●			●		●				
Vermont	●			●	●		●		●			●		●	●		●			
Virginia	●		●			●						●		●		●				
Washington	●		●	●	●	●		●	●				●	●		●				
West Virginia	●			●	●		●							●		●				
Wisconsin	●		●	●	●	●		●		●		●	●	●		●				
Wyoming	●				●		●				●			●		●				

EASEMENTS

Abandonment - Termination of an easement by abandonment requires an act demonstrating intent of owner of dominant tenement to abandon. See *Chatham v. Blount County*, 789 So. 2d 235, 241 (Ala. 2001) (Alabama); *Swift v. Kniffen*, 796 P.2d 296, 303 (Alaska 1985) (Alaska); *Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 547 P.2d 1065, 1071 (Ariz. Ct. App. 1976) (Arizona); *Bank of Fayetteville, N.A. v. Matilda's, Inc.*, 803 S.W.2d 549, 550 (Ark. 1991) (Arkansas); *McCormick v. McNally*, 220 P.2d 780, 781 (Cal. Ct. App.) (California); *Upper Harmony Ditch Co. v. Carwin*, 539 P.2d 1282, 1285 (Colo. 1975) (Colorado); *Friedman v. Town of Westport*, 717 A.2d 797, 799 (Conn. 1998); *Pencader Associates, Inc. v. Glasgow Trust*, 446 A.2d 1097, 1100 (Del. 1982) (Delaware); *Kogod v. Cogito*, 200 F.2d 743, 745 (D.C. 1953) (District of Columbia); *Estate of Johnston v. TPE Hotels, Inc.*, 719 So.2d 22, 26 (Fla. Dist.Ct. App. 1998) (Florida); *Weaver v. Henry*, 473 S.E.2d 495, 498 (Ga. Ct. App. 1996) (Georgia); *Goo Leong Shee v. Young Hung*, 36 Haw. 132, 141 (1942) (Hawaii); *Perry v. Reynolds*, 122 P.2d 508, 510 (Idaho 1942) (Idaho); *Brunotte v. De Witt*, 196 N.E. 489, 495 (Ill. 1935) (Illinois); *Seymour Water Co. v. Lebline*, 144 N.E. 30, 33 (Ind. 1924); *Schwartz v. Grossman*, 173 N.W.2d 57, 60 (Iowa 1969) (Iowa); *Miller v. St. Louis, Southwestern Ry. Co.*, 718 P.2d 610, 612 (Kan. 1986) (Kansas); *Jennings v. Dunn*, 68 S.W.2d 13, 13 (Ky. 1934); *Laird v. Board of Com'rs of Fifth Levee Dist.*, 704 So.2d 404, 408 (La. Ct. App. 1997) (citing LA CIV. CODE ANN. arts. 706, 753, 771, 773, 793, 794, 796, 798, 799) (Louisiana); *Chase v. Eastman*, 563 A.2d 1099, 1102 (Me. 1099) (Maine); *Stewart v. May*, 85 A. 957, 960 (Md. 1912) (Maryland); *Sindler v. William M. Bailey Co.*, 204 N.E.2d 717, 719 (Mass. 1965) (Massachusetts); *Jones v. Van Bochove*, 61 N.W. 342, 343 (Mich. 1894) (Michigan); *United Parking Stations Inc. v. Calvary Temple*, 101 N.W.2d 208, 212 (Minn. 1960) (Minnesota); *Bivens v. Mobley*, 724 So. 2d 458, 461 (Miss. Ct. App. 1998) (Mississippi); *Eureka Real Estate & Investment Co. v. Southern Real Estate & Financial Co.*, 200 S.W.2d 328, 330 (Mo. 1947) (Missouri); *Shammel v. Vogt*, 396 P.2d 103, 106 (Mont. 1964) (Montana); *Hillary Corp. v. U.S. Cold Storage, Inc.*, 550 N.W.2d 889, 900 (Neb. 1996) (Nebraska); *City Motel, Inc. v. State*, 336 P.2d 375, 379 (Nev. 1959) (Nevada); *Downing House Realty v. Hampe*, 497 A.2d 862, 864 (N.H. 1985) (New Hampshire); *Nuzzi v. Corcione*, 51 A.2d 357, 361 (N.J. Ch. 1947) (New Jersey); *Sitterly v. Matthews*, 2 P.3d 871, 877 (N.M. Ct. App. 2000) (New Mexico); *DeCessare v. Feldmeier*, 584 N.Y.S.2d 803, 803 (N.Y. App. Div. 1992) (New York); *Moore v. Shore*, 175 S.E. 117, 118 (N.C. 1934) (North Carolina); *Harry E. McHugh, Inc. v. Haley*, 237 N.W. 835, 837, (N.D. 1931) (North Dakota); *Snyder v. Monroe Twp. Trustees*, 674 N.E.2d 741, 750 (Ohio Ct. App. 1996) (Ohio); *Kansas,*

O. & G. Ry. Co. v. Rogers, 191 P.2d 209, 211 (Okla. 1948) (Oklahoma); *Shields v. Villareal,* 33 P.3d 1032, 1036 (Or. Ct. App. 2001) (Oregon); *Ruffalo v. Walters,* 348 A.2d 740, 741 (Pa. 1975) (Pennsylvania); *Jackvony v. Poncelet,* 584 A.2d 1112, 1114 (R.I. 1991) (Rhode Island); *Immanuel Baptist Church of North Augusta v. Barnes,* 264 S.E.2d 142, 144 (S.C. 1980) (South Carolina); *Cleveland v. Tinaglia,* 582 N.W.2d 720, 725 (S.D. 1998) (South Dakota); *Edminston Corp. v. Carpenter,* 540 S.W.2d 260, 262 (Tenn. Ct. App. 1976) (Tennessee); *Milligan v. Niebuhr,* 990 S.W.2d 823, 826 (Tex.App.1999) (Texas); *Dahnken v. George Romney & Sons Co.,* 184 P.2d 211, 215 (Utah 1947) (Utah); *Nelson v. Bacon,* 32 A.2d 140, 146 (Vt. 1943) (Vermont); *Hudson v. Pillow,* 541 S.E.2d 556, 560 (Va. 2001) (Virginia); *Lawson v. State,* 730 P.2d 1308, 1311 (Wash. 1986) (Washington); *Walls v. DeNoone,* 550 S.E.2d 653, 657 (W. Va. 2001) (West Virginia); *Burkman v. City of New Lisbon,* 19 N.W.2d 311, 313 (Wis. 1945) (Wisconsin); *Carney v. Board of County Cmm'rs of Sublette County,* 757 P.2d 556, 562 (Wyo. 1988) (Wyoming).

Change in Servient Tenement - When servient tenement is partially or totally destroyed the dominant tenement's right to any easements may be extinguished. See *Pizitz-Smolian Co-op. Stores v. Randolph,* 129 So. 26, 32 (Ala. 1930) (Alabama); *Cohen v. Adolph Kutner Co.,* 171 P. 424, 424 (Cal. 1918) (California); *Amlea (Florida), Inc. v. Smith,* 567 So. 2d 981, 981 (Fla. Dist. Ct. App. 1990) (Florida); *Farber v. State,* 693 P.2d 469, 469 (Idaho Ct. App. 1984); *Shirley v. Crabb,* 37 N.E. 130, 132 (Ind. 1894) (Indiana); *Ballard v. Butler,* 30 Me. 94, 94 (1849) (Maine); *Union Nat. Bank of Lowell v. Nesmith,* 130 N.E. 251, 252 (Mass. 1921) (Massachusetts); *Hasselbring v. Koepke,* 248 N.W. 869, 873 (Mich. 1933) (Michigan); *Brect v. Johnson Hardware Co.,* 166 N.W. 1070, 1071 (Minn. 1918) (Minnesota); MONT. CODE. ANN. § 70-17-111(2) (1947) (Montana); N.D. CENT. CODE § 47-05-12 (2) (1943) (North Dakota); OKLA. STAT. TIT. 60 § 59(2) (1994) (Oklahoma); *Rudderham v. Emery Bros.,* 125 A. 291, 292 (R.I. 1924) (Rhode Island).

End of Necessity/Cessation of Purpose - When an easement is created by necessity or for a particular purpose, it is extinguished at the end of such necessity or purpose. See *Oyler v. Gilliland,* 351 So. 2d 886, 887 (Ala. 1977) (Alabama); *Norken Corp. v. McGahan,* 823 P.2d 622, 631 (Alaska 1991) (Alaska); *Mettetal v. Stane,* 227 S.W.2d 636, 637 (Ark. 1950) (Arkansas); CAL.CIVIL CODE § 811(4) (1982) (California); *Collins v. Prentice,* 15 Conn. 39, 41 (1842) (Connecticut); *Whitfield v. Whittington,* 99 A.2d 196, 198 (Del. Ch. 1953) (Delaware); *Kogod v. Cogito,* 200 F.2d 743, 745 (D.C. Cir. 1953) (District of Columbia); *Russell v. Napier,* 9 S.E. 746, 747 (Ga. 1889) (Georgia); *Cordwell v. Smith,* 665 P.2d 1081, 1089 (Idaho Ct. App. 1983) (Idaho); *Oswald v. Wolf,* 21 N.E. 839, 841 (Ill. 1889) (Illinois); *Wilson v.*

Glasrock, 126 N.E. 231, 233 (Ind. Ct. App. 1920) (Indiana); *Chicago & N.W. Ry. Co. v. Sioux City Stock Yards Co.*, 158 N.W. 769, 779 (Iowa 1916) (Iowa); *Dennis Long & Co. v. City of Louisville*, 32 S.W. 271, 277 (Ky. Ct. App. 1895) (Kentucky); *Dallas v. Farrington*, 490 So.2d 265, 271 (La. 1986) (Louisiana); *Whitehouse v. Cummings*, 21 A. 743, 745 (Me. 1890) (Maine); *Condry v. Laurie*, 41 A.2d 66, 68 (Md. 1945) (Maryland); *Comeau v. Manzelli*, 182 N.E.2d 487, 492 (Mass. 1962) (Massachusetts); *Feldman v. Court*, 146 N.W.2d 99, 101 (Mich. Ct. App. 1966) (Michigan); *Thornton v. McLeary*, 137 So. 785, 786 (Miss. 1931) (Mississippi); *St. Louis-San Francisco Ry. Co. v. Silver King Oil & Gas Co.*, 127 S.W.2d 31, 33 (Mo. Ct. App. 1939) (Missouri); MONT. CODE. ANN. § 70-17-111(4) (1947) (Montana); *Badura v. Lyons*, 23 N.W.2d 678, 685 (Neb. 1946) (Nebraska); *Haserick v. Boulia-Gorell Co.*, 88 A. 998, 999 (N.H. 1913) (New Hampshire); *Adams v. Cale*, 137 A.2d 92, 100 (N.J. Super. Ct. App. Div. 1958) (New Jersey); N.M. STAT. ANN. § 70-3A-7 (1988) (New Mexico); *Palmer v. Palmer*, 44 N.E. 966, 967 (N.Y. 1896) (New York); N.D. CENT. CODE § 47-05-12 (4) (1943) (North Dakota); *Waibel v. Schleppi*, 62 N.E.2d 897, 898 (Ohio Ct. App. 1945) (Ohio); OKLA. STAT. TIT. 60 § 59(4) (1994) (Oklahoma); *Rose v. Denn*, 213 P.2d 810, 812 (Or. 1950) (Oregon); *Riefler & Sons v. Wayne Storage Water Power Co.*, 81 A. 300, 301 (Pa. 1911) (Pennsylvania); 31 P.R. LAWS ANN. § 1681 (1955) (Puerto Rico); *Fusaro v. Varrecchione*, 150 A. 462, 462 (R.I. 1930) (Rhode Island); S.D. CODIFIED LAWS §§ 43-13-13, 15-3-1 (Michie 1968) (South Dakota); *McGiffin v. City of Gatlinburg*, 260 S.W.2d 152, 154 (Tenn. 1953) (Tennessee); *Steele v. Ainsworth*, 249 S.W.2d 656, 658 (Tex.Civ.App.1952) (Texas); *Dahnken v. George Romney & Sons Co.*, 184 P.2d 211, 216 (Utah 1947) (Utah); *Reed v. Dent*, 72 S.E.2d 255, 258 (Va. 1952) (Virginia); *Lawson v. State*, 730 P.2d 1308, 1311 (Wash. 1986) (Washington); *Millen v. Thomas*, 550 N.W.2d 134, 136 (Wis. Ct. App. 1996) (Wisconsin).

Merger - When one person or entity owns both the dominant and servient tenements, all easements are extinguished. See *Stanley v. Barclay*, 46 So. 2d 210, 212 (Ala. 1950) (Alabama); *Palermo v. Allen*, 369 P.2d 906, 911 (Ariz. 1962) (Arizona); *Massee v. Schiller*, 376 S.W.2d 558, 559 (Ark. 1964) (Arkansas); CAL.CIVIL CODE § 811(1) (1982) (California); *Scott v. Powers*, 342 P. 2d 664, 666 (Colo. 1959) (Colorado); Robinson v. Hillman 36 App.D.C. 241, 241 (D.C. Cir 1911) (District of Columbia); *Tyler v. Price*, 821 So.2d 1121, 1125 (Fla. Dist. Ct. App. 2002) (Florida); *Wallace v. City of Atlanta*, 184 S.E.2d 576, 577 (Ga. 1971) (Georgia); *S. Utsunomiya Enterprises, Inc. v. Moomuku Country Club*, 866 P.2d 951, 968 (Hawaii 1994) (Hawaii); *Davis v. Gowen*, 360 P.2d 403, 406 (Idaho 1961) (Idaho); *Village of Lake Bluff v. Dalitsch*, 114 N.E.2d 654, 659 (Ill. 1953); *Enderle v. Sharman*, 422 N.E.2d

686, 693 (Ind. Ct. App. 1981) (Indiana); *Tamm, Inc. v. Pildis,* 249 N.W.2d 823, 836 (Iowa 1976) (Iowa); *Cameron v. Barton,* 272 S.W.2d 40, 41 (Ky. 1954) (Kentucky); LA CIV. CODE ANN. arts. 776, 805, 3478 (1991); *Smith v. Dickson,* 225 A.2d 631, 636 (Me. 1967) (Maine); *Orfanos Contractors, Inc. v. Schaefer,* 582 A.2d 547, 552 (Md. App. 1990) (Maryland); *Krinsky v. Hoffman,* 95 N.E.2d 172, 175 (Mass. 1951) (Massachusetts); *Von Meding v. Strahl,* 30 N.W.2d 363, 367 (Mich. 1948) (Michigan); *Pergament v. Loring Properties, Ltd.,* 599 N.W.2d 146, 148 (Minn. 1999) (Minnesota); *Thornton v. McLeary,* 137 So. 785, 786 (Miss. 1931) (Mississippi); *Johnston v. Bates,* 778 S.W.2d 357, 362 (Mo. Ct. App. 1989) (Missouri); MONT. CODE. ANN. §§ 70-17-105, 70-17-111(1) (1947) (Montana); *Lackaff v. Bogue,* 62 N.W.2d 889, 896 (Neb. 1954) (Nebraska); *Breliant v. Preferred Equities Corp.,* 918 P.2d 314, 318, 319 (Nev. 1996) (Nevada); *D. Latchis, Inc. v. Borofsky Bros., Inc.,* 343 A.2d 637, 640 (N.H. 1975) (New Hampshire); *Landy v. Cahn,* 792 A.2d 544, 554 (N.J. Super. Ct. App. Div. 2002) (New Jersey); *Beeman v. Pawelek,* 96 N.Y.S.2d 204, 221 (N.Y. Sup. Ct. 1949) (New York); *Patrick v. Jefferson Standard Life Ins. Co.,* 97 S.E. 657, 661 (N.C. 1918) (North Carolina); N.D. CENT. CODE § 47-05-12 (1) (1943) (North Dakota); *Civilian Defense, Inc. V. Egan-Ryan Undertaking Co.,* 153 N.E.2d 351, 354 (Ohio Ct. App. 1957) (Ohio); OKLA. STAT. TIT. 60 § 59(1) (1994) (Oklahoma); *Dressler v. Isaacs,* 343 P.2d 714, 719 (Or. 1959) (Oregon); *Obringer v. Minnotte Bros. Co,* 42 A.2d 413, 414 (Pa. 1945) (Pennsylvania); 31 P.R. LAWS ANN. § 1681(1) (1955) (Puerto Rico); *Boorom v. Rau,* 640 A.2d 963, 964 (R.I. 1994) (Rhode Island); *Haselden v. Schein,* 166 S.E. 634, 635 (S.C. 1932) (South Carolina); *Vanderbilt University v. Williams,* 280 S.W. 689, 691 (Tenn. 1926) (Tennessee); *Howell v. Estes,* 12 S.W. 62, 62 (Tex. 1888) (Texas); *Bertolina v. Frates,* 57 P.2d 346, 350 (Utah 1936) (Utah); *Plimpton v. Converse,* 42 Vt. 712, 714 (Vt. 1870) (Vermont); *Coast Storage Co. v. Schwartz,* 351 P.2d 520, 524 (Wash. 1960) (Washington); *Pingley v. Pingley,* 95 S.E. 860, 861 (W. Va. 1918) (West Virginia); *Millen v. Thomas,* 550 N.W.2d 134, 136 (Wis. Ct. App. 1996) (Wisconsin).

Prescription/Adverse Possession - An easement may be extinguished by adverse use over a statutorily prescribed period of time. See *Jesse French Piano & Organ Co. v. Forbes,* 29 So. 683, 685 (Ala. 1901) (Alabama); ALASKA STAT. § 09.10.030 (Michie 1962) (Alaska); *Sabino Town & Country Estates Ass'n v.Carr,* 920 P.2d 26, 29 (Ariz. Ct. App. 1996) (Arizona); *Fulcher v. Dierks Lumber & Coal Co.,* 261 S.W. 645, 650 (Ark. 1924) (Arkansas); *Sevier v. Locher,* 272 Cal. Rptr. 287, 288 (1990) (California); *Public Storage, Inc. v. Eliot Street Ltd. Partnership,* 567 A.2d 389, 390 (Conn. App. Ct. 1989) (Connecticut); *Lickle v. Frank W. Diver, Inc.,* 238 A.2d 326, 329 (Del. 1968) (Delaware); *Smith v. Tippett,* 569 A.2d 1186, 1190 (D.C. 1990)

(District of Columbia); *Wiggins v. Lykes Bros., Inc.*, 97 So. 2d 273, 276 (Fla. 1957) (Florida); *City of Savannah v. Barnes*, 96 S.E. 625, 626 (Ga. 1918) (Georgia); *Suzuki v. Garvey*, 39 Haw. 482, 486 (1952) (Hawaii); *Winn v. Eaton*, 917 P.2d 1310, 1313 (Idaho Ct. App. 1996) (Idaho); *Luthy v. Keehner*, 412 N.E.2d 1091, 1095 (Ill. App. Ct. 1980) (Illinois); *Panhandle Eastern Pipe Line Co. v. Tishner*, 699 N.E.2d 731, 736 (Ind. Ct. App. 1998) (Indiana); *Page v. Cooper*, 53 N.W.2d 765, 767 (Iowa 1952) (Iowa); *Mid-America Pipeline Co. v. Wietharn*, 787 P.2d 716, 723-724 (Kan. 1990) (Kansas); *Angel v. Rowette*, 264 S.W.2d 68, 69 (Ky. 1954) (Kentucky); LA CIV. CODE ANN. arts. 796-98 (1991) (Lousiana); *Chevy Chase Land Co. V. U.S.*, 733 A.2d 1055, 1081 (Md. 1999) (Maryland); *Brennan v. DeCosta*, 511 N.E.2d 1110, 1111 (Mass. App. Ct. 1987) (Massachusetts); *Hickerson v. Bender*, 500 N.W.2d 169, 171 (Minn. Ct. App. 1993) (Minnesota); *Cummins v. Dumas*, 113 So. 332, 333, 334 (Miss. 1927) (Mississippi); *Frain v. Brda*, 863 S.W.2d 17, 19-20 (Mo. Ct. App. 1993) (Missouri); *Public Lands Access Ass'n Inc. v. Boone and Crockett Club Foundation, Inc.*, 856 P.2d 525, 531-532 (Mont. 1993) (Montana); *Brooks v. Jensen*, 483 P.2d 650, 652 (Nev. 1971) (Nevada); *Titcomb v. Anthony*, 492 A.2d 1373, 1375 (N.H. 1985) (New Hampshire); *Gera v. Szenzenstein*, 21 A.2d 679, 680 (N.J. Ch. 1941) (New Jersey); *Speigel v. Ferraro*, 541 N.E.2d 15, 16 (N.Y. 1989) (New York); *McFayden v. Olive*, 366 S.E.2d 544, 546 (N.C. Ct. App. 1988) (North Carolina); *J.F. Gioia, Inc. v. Cardinal American Corp.*, 491 N.E.2d 325, 333 (Ohio Ct. App. 1985) (Ohio); *Faulconer v. Williams*, 964 P.2d 246, 250 (Or. 1998) (Oregon); *Sabados v. Kiraly*, 393 A.2d 486, 490 (Pa. Super. Ct. 1978) (Pennsylvania); 31 P.R. LAWS ANN. § 1681(2) (1955) (Puerto Rico); *Thomas v. Ross*, 477 A.2d 950, 953 (R.I. 1984) (Rhode Island); *State v. Pettis*, 41 S.C.L. (7 Rich.) 390, 391 (1854) (South Carolina); *Kougl v.Curry*, 44 N.W.2d 114, 118 (S.D. 1950) (South Dakota); *Shearer v. Vandergriff*, 661 S.W.2d 680, 682 (Tenn. 1983) (Tennessee); *City of Galveston v. Williams*, 6 S.W. 860, 862 (Tex. 1888) (Texas); *Smith v. Benjamin*, 30 V.I. 51 (1994) (Virgin Islands); *Bertolina v. Frates*, 57 P.2d 346, 350 (Utah 1936) (Utah); *Timney v. Worden*, 417 A.2d 923, 925 (Vt. 1980) (Vermont); *Beebe v. Swerda*, 793 P.2d 442, 446 (Wash. Ct. App. 1990) (Washington); *Norman v. Belcher*, 378 S.E.2d 446, 448 (W. Va. 1989); WIS STAT. § 893.25 (1996) (Wisconsin); *Mueller v. Hoblyn*, 887 P.2d 500, 506 (Wyo. 1994) (Wyoming).

Innocent Purchaser - Generally, states with notice statutes consider all easements extinguished when the servient tenement is purchased by a bona fide purchaser without notice. See *Johnston v. Harsh*, 93 So. 451, 452 (Ala. 1922) (Alabama); *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682, 691 (Ariz. Ct. App. 1984) (Arizona); *French v. Richardson*, 438 W.W.2d 714, 714 (Ark. 1969) (Arkansas); *Mesmer v. Uharriet*, 174 Cal. 110, 116 (Cal.

1916) (California); *Hawley v. McCabe*, 169 A. 192, 195 (Conn. 1933) (Connecticut); *Rives v. Hickey*, 1 MacArthur 83, 83 (D.C. Cir. 1873) (District of Columbia); *Wise v. Quina*, 174 So. 2d 590, 593 (Fla. Dist. Ct. App. 1985) (Florida); *Smith v. Parlier*, 152 Ga. 100, 100 (1921) (Georgia); *Clog Holdings, N.V. v. Bailey*, 992 P.2d 69, 80 (Hawaii 2000) (Hawaii); *Jobling v. Tuttle*, 89 P. 699, 703 (Kan. 1907) (Kansas); *Phillips v. Parker*, 483 So. 2d 972, 975 (La. 1986) (Louisiana); *Butler v. Haley Greystone Corp.*, 198 N.E.2d 635, 639 (Mass. 1964) (Massachusetts); *Wolek v. Di Feo*, 159 A.2d 127, 131 (N.J. Super. Ct. App. Div. 1960) (New Jersey); *Corning v. Gould*, 16 Wend. 530 (N.Y. 1837) (New York); *Clark v. Atlantic Coast Line R. Co.*, 135 S.E. 26, 27 (N.C. 1926) (North Carolina); *Tiller v. Hinton*, 482 N.E.2d 946, 953 (Ohio 1985) (Ohio); *United States v. 127.03 Acres of Land, More or Less, in Wards of Maleza Alta*, 148 F.Supp. 904, 905 (P.R. 1957) (Puerto Rico); *Beck v. Northwestern R. Co. of South Carolina*, 89 S.E. 1018, 1020 (S.C. 1916) (South Carolina); *Lesley v. City of Rule*, 255 S.W.2d 312, 315 (Tex. Ct. App. 1953) (Texas); *Ricks v. Scott*, 84 S.E. 676, 681 (Va. 1915) (Virginia); *Roe v. Walsh*, 135 P. 1031, 1032 (Wash. 1913) (Washington); *Taggert v. Warner*, 53 N.W. 33, 34 (Wis. 1892) (Wisconsin).

Equity - The equitable doctrines, such as estoppel, may provide equitable relief from excessively burdensome easements. See *Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co.*, 547 P.2d 1065, 1074 (Ariz. Ct. App. 1976) (Arizona); *Owners Assoc. of Foxcroft Woods, Inc. v. Foxglen Associates*, 57 S.W.3d 187, 196 (Ark. 2001) (Arkansas); *Romberg v. Slemon*, 778 P. 2d 315, 318 (Colo. Ct. App.1989) (Colorado); *Betley v. Gordy Const. Co.*, 115 A.2d 475, 478 (Del. Ch. 1955) (Delaware); *McPherson v. Acker*, 11 D.C. 150 (D.C. Cir. 1879) (District of Columbia); *Wiggins v. Lykes Bros., Inc.*, 97 So. 2d 273, 275 (Fla. 1957) (Florida); *Rolleston v. Sea Island Properties, Inc.*, 327 S.E.2d 489, 492 (Ga. 1985) (Georgia); *Clog Holdings, N.V. v. Bailey*, 992 P.2d 69, 79 (Hawaii 2000) (Hawaii); *Winn v. Eaton*, 917 P.2d 1310, 1315 (Idaho Ct. App. 1996) (Idaho); *Cox v. Colossal Cavern Co.*, 276 S.W. 540, 544 (Ky. Ct. App. 1925) (Kentucky); *Stickney v. City of Saco*, 770 A.2d 592, 608 (Me. 2001) (Maine); *Potomac Elec. Power Co. v. Lytle*, 328 A.2d 69, 75 (Md. App. 1974) (Maryland); *Boston, & P.R. Corp. v. Doherty*, 28 N.E. 277, 278 (Mass. 1891) (Massachusetts); *Longton v. Stedman*, 148 N.W. 738, 741 (Mich. 1914) (Michigan); *Davidson v. Kretz*, 149 N.W. 652, 652 (Minn. 1914) (Minnesota); *Velasco v. Goldman Builders, Inc.*, 225 A.2d 148, 155 (N.J. Super. App. Div. 1966) (New Jersey); *Luevano v. Maestras*, 874 P.2d 788, 792 (N.M. 1994) (New Mexico); *Corning v. Gould*, 16 Wend. 530 (N.Y. 1837) (New York); *Baptist Church in Great Valley v. Urquhart*, 178 A.2d 583, 587-588 (Pa. 1962) (Pennsylvania); *Nahabedian v. Jarcho*, 510 A.2d 425, 429 (R.I. 1986) (Rhode Island); *Lague, Inc. v. Royea*, 568 A.2d 357, 359 (Vt.1989)

(Vermont); *Harrison et al. v. Miller, Exec.*, 21 S.E.2d 674, 675 (W. Va. 1942) (West Virginia); *Mueller v. Hoblyn,* 887 P.2d 500, 506 (Wyo. 1994) (Wyoming).

Release - Voluntary release by the holder or holders of the easement over a servient tenement can extinguish such an easement. See *Westlake v. Silva,* 121 P.2d 872, 873 (Cal. Ct. App. 1942) (California); *Durkee v. Jones,* 60 P. 618, 620 (Colo. 1900) (Colorado); *Richardson v. Tumbridge,* 149 A. 241, 242 (Conn. 1930) (Connecticut); *May v. Smith,* 14 D.C. 55 (D.C. Cir. 1884) (District of Columbia); *Sewell v. Burdine,* 87 So. 143, 144 (Fla. 1921) (Florida); *Beloit Foundry Co. v. Ryan,* 192 N.E.2d 384, 391 (Ill. 1963) (Illinois); *Book v. Hester,* 695 N.E.2d 597, 600-601 (Ind. Ct. App. 1998) (Indiana); *Helton v. Jones,* 402 S.W.2d 694, 696-97 (Ky. 1966) (Kentucky); LA CIV. CODE ANN. art. 771 (1991) (Lousiana); *Great Cove Boat Club v. Bureau of Public Lands,* 672 A.2d 91, 94 (Me. 1996) (Maine); *Richards v. Attleborough Branch R. Co.*, 26 N.E. 418, 419 (Mass. 1891) (Massachusetts); *Flaten v. Moorehead City,* 59 N.W. 1044, 1044 (Minn. 1894) (Minnesota); *Midella Enterprises, Inc. v. Missouri State Highway Commission,* 570 S.W. 2d 298, 300 n.1 (Mo. Ct. App. 1978) (Missouri); *Sedillo Title Guaranty, Inc. v. Wagner,* 457 P.2d 361, 364 (N.M. 1969) (New Mexico); *Board of Educ., Rye Neck Union Free School Dist. v. Ryewood Farms, Ltd.*, 533 N.Y.S.2d 998, 999 (1988) (New York); *Hine v. Blumenthal,* 80 S.E.2d 458, 463-64 (N.C. 1954); *Junction Ry. Co. v. Ruggles,* 7 Ohio St. 1, 3 (1857) (Ohio); *Tusi v. Jacobsen,* 134 Or. 505, 511 (1930) (Oregon); 31 P.R. LAWS ANN. § 1681(5) (1955) (Puerto Rico) *La Rue v. Greene County Bank,* 166 SW2d 1044, 1048 (Tenn. 1942) (Tennessee); *Cowan v. Gladder,* 206 P. 923, 924 (Wash. 1922); *Wausau Theatres Co. v. Genrich,* 29 N.W.2d 502, 503 (Wis. 1947).

Happening of a Condition - Deeds conveying express easements may specify a condition upon the happening of which, the easement will terminate. See *Brown v. McDavid,* 676 P.2d 714, 718 (Colo. Ct. App. 1983) (Colorado); *Eis v. Meyer,* 555 A.2d 994, 996 (Conn. App. Ct. 1989) (Connecticut); *Shiner v. Baita,* 710 So. 2d 711, 712 (Fla. Dist. Ct. App. 1998) (Florida); *Akasu v. Power,* 91 N.E.2d 224, 226 (Mass. 1950) (Massachusetts); *Krieger v. Cassis,* 9 Ohio L. Abs. 326 (Ohio Ct. App. 1930) (Ohio); 31 P.R. LAWS ANN. § 1681(4) (1955) (Puerto Rico); *Shaw Industries v. Grizzell,* 1995 WL 70570 (Tenn.Ct.App. 1995) (Tennessee); *St. Louis Southwestern Ry. Co. v. Temple Northwestern Ry. Co.,* 170 S.W. 1073, 1075 (Tex. Ct. App.1914) (Texas); *Percival v. Williams,* 74 A. 321, 324 (Vt. 1909) (Vermont); *Zobrist v. Culp,* 627, P.2d 1308, 1311 (Wash. 1981) (Washington).

Misuse - When owner of the dominant tenement substantially and willfully uses an easement in a way contrary to its enjoyment, it will be extinguished. See CAL.CIVIL CODE § 811(3) (1982) (California); *Paul v. Blakely,* 51

N.W.2d 405, 408 (Iowa 1952) (Iowa); MONT. CODE. ANN. § 70-17-111(3) (1947) (Montana); N.D. CENT. CODE § 47-05-12 (3) (1943) (North Dakota); *Young v. Thedieck*, 8 Ohio App. 103 (1918) (Ohio); OKLA. STAT. TIT. 60 § 59(3) (1994) (Oklahoma); S.D. CODIFIED LAWS §§ 43-13-12(3) (Michie 1968) (South Dakota); *Stenz v. Mahoney*, 89 N.W. 819, 820 (Wis. 1902) (Wisconsin).

MISCELLANEOUS:

Ambiguity in Conveyance - *Methonen v. Stone,* 941 P.2d 1248, 1251 (Alaska 1997) (Alaska); *Ross, Inc. v. Legler*, 199 N.E.2d 346, 348 (Ind. 1964) (Indiana).

Death and Dissolution - KAN. STAT. ANN § 58-3811 (2001) (Kansas); *Thar v. Edwin N. Moran Revocable Trust,* 905 P.2d 413, 414 (Wyo. 1995) (Wyoming).

Tax Sale/ Foreclosure - In some cases, a tax or foreclosure sale will terminate an easement. Also, foreclosure under a mortgage or deed of trust recorded before the instrument creating the easement will extinguish the easement and all subsequently created interests. See *Wolfson v. Heins*, 6 So. 2d 858, 861 (Fla. 1942) (Florida); IND. CODE § 6-1.1-25-4(d) (Supp. 1994) (Indiana); *Cousins v. Sperry*, 139 S.W.2d 665 (Tex.Civ.App.1940, no writ) (Texas); *Saastopankkien Keskus-Osake Pankki (Skopbank) v. Allen-Williams Corp.*, 7 F.Supp. 2d 601, 607 (V.I. 1998) (Virgin Islands).

Partition of Dominant Tenement - Partitioning of a dominant tenement that creates a greater burden on the servient tenement extinguishes the easement. *Alvey Development Corp. v. Mackelprang,* 51 P.3d 45, 49 (Utah 2002) (Utah).

Noncompliance with Conditions Subsequent - An easement granted by deed may be extinguished when it fails to comply with subsequent conditions. See *Shaw Industries v. Grizzell,* 1995 WL 70570 (Tenn. Ct. App. 1995); *St. Louis Southwestern R. Co. v. Temple Northwestern Ry. Co.* 170 S.W. 1073, 1075 (Tex. Ct. App.1914) (Texas).

Public Easements - These may only be terminated by the statutory procedures specified in 11 OKLA. STAT. ANN. tit. 11 § 42-101 et. seq. (1994) (Oklahoma).

Death of Grantor of Conservation Easement - A conservation easement shall be limited in duration to the lifetime of the grantor and may be revoked at grantor's request. KAN.STAT. ANN § 58-3811 (2001) (Kansas).

COVENANTS

Public Policy - Generally, states will not enforce restrictive covenants that

violate public policy. See *Fugazzoto v. Brookwood One*, 325 So.2d 161, 163 (Ala. 1976) (Alabama); *Cawthon v. Anderson*, 84 S.E.2d 66, 68 (Ga. 1954) (Georgia); *Hurd v. Hodge* , 68 S.Ct. 847, 853 (U.S. 1948) (District of Columbia); 740 ILL. COMP. STAT. 35/1 (2002) (Illinois); *Holliday v. Crooked Creek Villages Homeowners Assoc., Inc.*, 759 N.E.2d 1088, 1092 (Ind. Ct. App. 2001) (Indiana); *Flatt v. Flatt*, 225 S.W. 1067, 1068 (Ky. Ct. App. 1920) (Kentucky); *Eisenstadt v. Barron*, 250 A.2d 85, 87 (Md. 1969) (Maryland); *Hurwitz v. Summers Massachusetts Family LLC*, 2002 WL 1923869 (Mass.Super. 2002) (Massachusetts); *Terrien v. Zwit*, 648 N.W.2d 602, 608 (Mich. .2002) (Michigan); MONT. CODE. ANN. § 28-2-703 (1947) (Montana); *Youshah v. Staudinger*, 604 N.Y.S.2d 479, 480 (N.Y.Sup. Ct. 1993) (New York); *United Laboratories, Inc. v. Kuykendall*, 370 S.E.2d 375, 380 (N.C. 1988) (North Carolina); *Postiy v. Richards*, Slip Copy Ohio App. (5 Dist. 2001) (Ohio); *Capozzi v. Latsha & Capozzi, P.C.*, 797 A.2d 314, 317 (Pa. Super. Ct. 2002) (Pennsylvania); *Greene County Tire & Supply, Inc. V. Spurlin*, 338 S.W.2d 597, 599 (Tenn. 1960) (Tennessee); *Fine Foods, Inc. v. Dahlin*, 523 A.2d 1228, 1230 (Vt. 1986) (Vermont); *Sussex Comty. Serv. Ass'n v. Virginia Soc'y. for Mentally Retarded Children, Inc.*, 467 S.E.2d 468, 471 (Va.1996) (Virginia); *Heyde Companies, Inc.. v. Dove Healthcare, LLC*, 637 N.W.2d 437, 439 (Wis. Ct. App. 2001) (Wisconsin).

Estoppel - the equitable doctrine of estoppel can be applied to terminate covenants running with the land in many states. See *Lunn v. Tokeneke Ass'n, Inc.*, 630 A.2d 1335, 1338 (Conn.1993) (Connecticut); *Modisett v. Jolly*, 286 N.E.2d 675, 680 (Ind. Ct. App. 1972) (Indiana); *Thodos v. Shirk*, 79 N.W.2d 733, 739 (Iowa 1956) (Iowa); *Simko, Inc. v. Graymar Co.*, 464 A.2d 1104, 1109 (Md.App.1983) (Maryland); *Cole v. Hadley*, 39 N.E. 279, 280 (Mass. 1895) (Massachusetts); *Harrigan v. Mulcare*, 22 N.W.2d 103, 105 (Mich. 1946) (Michigan); *Beaver Lake Ass'n v. Sorensen*, 434 N.W.2d 703, 706 (Neb. 1989) (Nebraska); *Bridgewater v. Ocean City Ass'n*, 96 A. 905, 907 (N.J. Ch. 1915) (New Jersey); *White v. La Due & Fitch*, 100 N.E.2d 167, 169-70 (N.Y. 1951) (New York); *Tonge v. Item Pub. Co.*, 91 A. 229, 231 (Pa. 1914) (Pennsylvania); *Marathon Finance Co. v. HHC Liquidation Corp.*, 483 S.E.2d 757, 767 (S.C. Ct. App. 1997) (South Carolina); *Jones v. Haynes*, 1998 WL 331311 (Tenn.App. 1998) (Tennessee); *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 849 (Wash. 2000) (Washington); *Harms v. Harms*, 498 N.W.2d 229, 231 (Wis. 1993) (Wisconsin).

Waiver/Laches - When a restrictive covenant is not enforced, it may be waived and therefore unenforceable. See *Tubbs v. Brandon*, 374 So.2d 1358, 1360 (Ala. 1979) (Alabama); *Kalenka v. Taylor*, 896 P.2d 222, 226 (Alaska 1995) (Alaska); *Goforth v. Smith*, 991 S.W.2d 579, 586 (Ark. 1999) (Arkansas); *Cole v. Colorado Springs Co.*, 381 P.2d 13, 17 (Colo. 1963) (Colorado);

Gage v. Schavior, 124 A. 535, 536 (Conn. 1924) (Connecticut); *Entrepreneur, Ltd. v. Yasuna*, 498 A.2d 1151, 1155-56 (D.C. 1985) (District of Columbia); *Ortega Co. v. Justiss*, 175 So. 2d 554, 561 (Fla. Dist. Ct. App. 1965) (Florida); GA CODE ANN. § 9-3-29 (1995) (Georgia); *Ellis v. George Ryan Co.*, 424 N.E.2d 125, 127 (Ind. Ct. App. 1981) (Indiana); *Thodos v. Shirk*, 79 N.W.2d 733, 739 (Iowa 1956) (Iowa); *N.P. Dodge Corp. v. Calderwood*, 101 P.2d 883, 885 (Kan 1940) (Kansas); *Hardesty v. Silver*, 302 S.W.2d 578, 582 (Ky. 1957) (Kentucky); LA CIV. CODE ANN. arts. 776,781 (1991) (Lousiana); *Lane v. Derocher*, 360 A.2d 141, 142 (Me. 1976) (Maine); *Schlosser v. Creamer*, 284 A.2d 220, 223 (Md. 1971) (Maryland); *Whitney v. Union R. Co.*, 77 Mass. 359, 361 (Mass. 1858) (Massachusetts); *Gibbs v. Cass*, 431 S.W.2d 662, 668 (Mo. Ct. App. 1968) (Missouri); *Porter v. K & S Partnership*, 627 P.2d 836, 842 (Mont. 1981) (Montana); *Varney v. Fletcher*, 213 A.2d 905, 908 (N.H. 1965) (New Hampshire); *Hoffman v. Perkins*, 67 A.2d 210, 218-19 (N.J. Super. Ch. 1949) (New Jersey); *Flint v. Charham*, 39 N.Y.S. 892, 894 (N.Y. App. Div. 1896) (New York); *Rodgerson v. Davis*, 218 S.E.2d 471, 475 (N.C. Ct. App. 1975) (North Carolina); *Allen v. Mino Amusement Corp.*, 312 N.W.2d 698, 702 (N.D. 1981) (North Dakota); *Russell v. Harpel*, 10 Ohio Cer. Dec. 732, 737 (1900) (Ohio); *Parrish v. Flinn*, 925 P.2d 89, 93 (Okl. Ct. App. 1996) (Oklahoma); *Hansell v. Downing*, 17 Pa.Super. 235, 236 (1900) (Pennsylvania); *Rabon v. Mali*, 344 S.E.2d 608, 610 (S.C. 1986) (South Carolina); *Vaughn v. Eggleston*, 334 N.W.2d 870, 873 (S.D. 1980) (South Dakota); *Indian Hills Club Homeowner's Assn., Inc. v. Cindy Cooper* 1995 WL 763823 (Tenn.App. 1995) (Tennessee); *Cox v. Melson-Fulsom*, 956 S.W.2d 791, 794 (Tex. Ct. App. 1997) (Texas); *Havensight Hills Estates Property Owners Ass'n, Inc. v. Brown*, 1999 WL 317124 (Terr.V.I.,1999) (Virgin Islands); *Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256, 1260 (Utah 1975) (Utah); *Blanchard v. Stone*, 15 Vt. 271 (1843) (Vermont); *Wright v. Castles*, 349 S.E.2d 125, 129 (Va. 1986) (Virginia); *Sandy Point Imp. Co. v. Huber*, 613 P.2d 160, 162 (Wash. 1980) (Washington); *Ballard v. Kitchen*, 36 S.E.2d 390, 394 (W. Va. 1945) (West Virginia); *Burden v. Doucette*, 2 N.W.2d 204, 206 (Wis. 1942) (Wisconsin); *Keller v. Branton*, 667 P.2d 650, 654 (Wyo. 1983) (Wyoming).

Change in Conditions - Often referred to as "change in character of neighborhood" this is the most common method of covenant termination and requires a severe change in the character of a neighborhood. See *Johnson v. H.J. Realty*, 698 So. 2d 781, 784 (Ala. Civ. App. 1997) (Alabama); *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 688 P.2d 682, 691 (Ariz. Ct. App., 1984) (Arizona); *Owens v. Camfield*, 614 S.W.2d 698, 699 (Ark. Ct. App. 1981) (Arkansas); *Wedum-Aldahl Co. v. Miller*, 64 P.2d 762, 766 (Cal. Ct. App. 1937) (California); *Zavislak v. Shipman*, 362 P.2d 1053, 1055 (Colo. 1961) (Colo-

rado); *Shippan Point Ass'n, Inc. v. McManus*, 641 A.2d 144, 146 (Conn. App. Ct. 1994) (Connecticut); *1.77 Acres of Land v. State ex rel. State Highway Dept.*, 241 A.2d 513, 515 (Del. 1968) (Delaware); *Mays v. Burgess*, 152 F.2d 123, 125 (D.C. Cir. 1946); *Barton v. Moline Properties*, 164 So. 551, 555 (Fla. 1935) (Florida); *Sandstrom v. Larsen*, 59 Haw. 491, 498 (1978) (Hawaii); *Ada County Highway Dist. By and Through Silva v. Magwire*, 662 P.2d 237, 240 (Idaho 1983) (Idaho); *Storke v. Penn Mut. Life Ins. Co.*, 61 N.E.2d 552, 556 (Ill. 1945) (Illinois); *Hrisomalos v. Smith*, 600 N.E.2d 1363, 1366 (Ind. Ct. App. 1992) (Indiana); *Thodos v. Shirk*, 79 N.W.2d 733, 739 (Iowa 1956) (Iowa); *Hecht v. Stephens*, 464 P.2d 258, 261-62 (Kan. 1970) (Kansas); *Goodwin Bros. v. Combs Lumber Co.*, 120 S.W.2d 1024, 1025 (Ky. Ct. App. 1938) (Kentucky); LA CIV. CODE ANN. arts. 782 (1991) (Lousiana); *Bates Mfg. Co. v. Franklin Co.*, 218 A.2d 366, 368 (Me. 1966) (Maine); *Adams v. Plaza Const Co.*, 145 A. 483, 484 (Md. 1929) (Maryland); MASS. GEN. LAWS ANN. ch. 184 § 30 (West 1991) (Massachusetts); *Gomah v. Hally*, 113 N.W.2d 896, 898 (Mich. 1962) (Michigan); *Batinich v. Harvey*, 277 N.W.2d 355, 359 (Minn. 1979) (Minnesota); *Rose v. Houser*, 206 S.W.2d 571 (Mo. Ct. App. 1947) (Missouri); *Lund v. Orr*, 148 N.W.2d 309, 310-11 (Neb. 1967) (Nebraska); *Western Land Co. v. Truskolaski*, 495 P.2d 624, 626 (Nev. 1972) (Nevada); *Goldberg v. Al Tinson, Inc.*, 338 A.2d 556, 557 (N.H. 1975) (New Hampshire); *Welitoff v. Kohl*, 147 A. 390, 392 (N.J. Super. Ct. App. 1929) (New Jersey); *Mason v. Farmer*, 456 P.2d 187, 192 (N.M. 1969) (New Mexico); *111 Bloomingdale Realty Corp. v. Town of Oyster Bay*, 383 N.Y.S.2d 648, 649 (N.Y. App. Div. 1976) (New York); *Medearis v. Trustees of Meyers Park Baptist Church*, 558 S.E.2d 199, 203 (N.C. Ct. App. 2001) (North Carolina); *Olberding v. Smith*, 34 N.E.2d 296, 298 (Ohio Ct. App. 1934) (Ohio); *Thompson v. Rorschach*, 416 P.2d 898, 901 (Okla. 1966) (Oklahoma); *Ludgate v. Somerville*, 256 P. 1043, 1045 (Or. 1927) (Oregon); *Peoples-Pittsburgh Trust Co. v. Mckinley-Gregg Auto Co.*, 44 A.2d 295, 295 (Pa. 1945) (Pennsylvania); *Assoc. v. Villa Caparra v. Catholic Church*, 117 D.P.R. 346 (1986) (Puerto Rico); *Duffy v. Mollo*, 400 A.2d 263, 266 (R.I. 1979) (Rhode Island); *Dunlap v. Beaty*, 122 S.E.2d 9, 15 (S.C. 1961) (South Carolina); *Hyde v. Liebelt*, 394 N.W.2d 888, 893 (S.D. 1986) (South Dakota); *Oliver v. Marbut*, 123 S.W.2d 859, 863 (Tenn. Ct. App. 1938) (Tennessee); *Meyerland Community Imp. Ass'n v. Temple*, 700 S.W.2d 263, 268 (Tex. Civ. App. 1985) (Texas); *Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256, 1261 (Utah 1975) (Utah); *Marks v. Wingfield*, 331 S.E.2d 463, 465 (Va. 1985) (Virginia); *St. Luke's Evangelical Lutheran Church v. Hales*, 534 P.2d 1379, 1381 (Wash. Ct. App. 1975) (Washington); *Carr v. Michael Motors, Inc.*, 557 S.E.2d 294, 299 (W. Va. 2001) (West Virginia); *Burden v. Doucette*, 2 N.W.2d 204, 206 (Wis. 1942) (Wisconsin).

Doctrines Applied to Easements - some states continue to refer to "servitudes" in general, which includes both covenants and easements, and thus the methods applied to easements are applicable to covenants as well. See *Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 311 (Ala. 1926) (Alabama); CAL.CIVIL CODE § 811 (1982) (California); *Hottell v. Farmers' Protective Ass'n*, 53 P. 327, 330 (Colo. 1898) (Colorado); *S. Utsunomiya Enterprises, Inc. v. Moomuku Country Club*, 866 P.2d 951, 968 (Hawaii 1994) (Hawaii); *Sandstrom v. Larsen*, 59 Haw. 491, 497 (1978) (Hawaii); *Watts v. Fritz*, 194 N.E.2d 276, 279 (Ill. 1963) (Illinois); *Thodos v. Shirk*, 79 N.W.2d 733, 739 (Iowa 1956) (Iowa); MONT. CODE. ANN. § 70-17-111 (1947) (Montana); N.D. CENT. CODE § 47-05-12 (1943) (North Dakota); OKLA. STAT. TIT. 60 § 59 (1994) (Oklahoma); 31 P.R. LAWS ANN. § 1681 (1955) (Puerto Rico); *Marathon Finance Co. v. HHC Liquidation Corp.*, 483 S.E.2d 757, 762 (S.C. Ct. App. 1997) (South Carolina); S.D. CODIFIED LAWS §§ 43-13-12 et seq. (Michie 1968) (South Dakota);

Release - Physical release of a restrictive covenant will void the covenant. See *Cappello v. Ciresi*, 691 A.2d 42, 44 (Conn. Super. Ct. 1996) (Connecticut); *Thodos v. Shirk*, 79 N.W.2d 733, 739 (Iowa 1956) (Iowa); LA CIV. CODE ANN. arts. 780 (1991) (Lousiana); *Marathon Finance Co. v. HHC Liquidation Corp.*, 483 S.E.2d 757, 761 (S.C. Ct. App. 1997) (South Carolina); *Albright v. Fish*, 394 A.2d 1117, 1121 (Vt. 1978) (Vermont).

Statutory period - Some states have set statutory limits on the duration of a covenant running with the land. See GA CODE ANN. § 29-301 (1995) (Georgia); IOWA CODE. ANN. § 614.24 (West 1998) (Iowa); MINN.STAT.ANN. § 500.20 (West 2002) (Minnesota); *Allen v. Sea Gate Ass'n, Inc.*, 460 S.E.2d 197, 200 (N.C. Ct. App. 1995) (North Carolina).

Overbreadth/Ambiguity - Overbroad and ambiguous covenants are unenforceable. See *Holloway v. Faw, Casson & Co.*, 572 A.2d 510, 522 (Md.1990) (Maryland); *Sullivan v. Kolb*, 742 So.2d 771, 776 (Miss. Ct. App. 1999) (Mississippi).

MISCELLANEOUS

Failure to Create a Plan of Development - "That is important because if no general plan of development exists, the general rule is that restrictive covenants cannot be enforced." *Constant v. Hodges*, 730 S.W.2d 892, 894 (Ark. 1987) (Arkansas).

Original Title Invalid - If the covenantor has no title to the land, the covenant can not run with the land. *Martin v. Gordon*, 24 Ga. 533, 536 (Ga. 1858) (Georgia).

Confusion - LA CIV. CODE ANN. arts. 783 (1991) (Lousiana) states that

"Doubt as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable."

Failure to give notice to subsequent purchasers - Failure to meet statutory requirements for filing a covenant renders the filing ineffective only as to those without actual or constructive notice. NEB. REV. STAT. § 76-238 (2001) (Nebraska).

No Further Purpose - When the purpose of a restriction is eliminated, that restriction is extinguished. See *Grossbaum v. Dil-Hill Realty Corp.*, 395 N.Y.S.2d 246, 247 (N.Y.App. Div. 1977) (New York).

Insufficient consideration - The court invalidated the restrictive covenant for failure of adequate consideration in *Kistler v. O'Brien,* 347 A.2d 311, 316 (Pa. 1975) (Pennsylvania).