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LET'S MAKE IT OFFICIAL: ADDING AN EXPLICIT PREPLAN SALE PROCESS AS AN ALTERNATIVE EXIT FROM BANKRUPTCY

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*1266 I. Introduction

In two previous articles, I have criticized dominant interpretations of Bankruptcy Code [1] § 363(f) as being contrary to the plain meaning of the statute. [2] Those articles also detailed the consequences of those misinterpretations--a shift from the plan- and-disclosure statement-focused process that Congress envisioned when it enacted Chapter 11 toward a process of nonplan sales free and clear of claims and interests, as well as the use of in rem property interests rather than contracts to minimize bankruptcy risk in real estate transactions. [3] The articles also posited that the shift from plan-based reorganization to reorganization by sale was, if anything, detrimental to unsecured, nonadministrative priority creditors and slow-moving governmental agencies. [4] Those articles were based on, among other things, the thesis that the courts ought to follow the statute's plain and straightforward meaning and implement Congress's plan-focused scheme for Chapter 11 as enacted. [5] If adding either a preplan sale focus or a bankruptcy-proofing mechanism to Chapter 11 is to occur, Congress should be the body that makes the addition.

This Article presents a concise series of statutory amendments that would, if enacted, establish a balanced process for implementing nonplan sales of substantially all the assets of ***1267** a business. [6] The market forces [7] that have driven the use of nonplan sales are strong and valid indicators of a need for the less expensive and less time-consuming method of reorganization via sale of substantially all the assets of a business. [8] This Article provides a proposal for an explicit procedural nonplan sale alternative to the traditional plan and disclosure statement reorganization in Chapter 11. [9] The Bankruptcy Code should be ***1268** amended to include an explicit process for a sale or sales of substantially all the assets of a business free and clear

of all claims and interests subject to specific protections regarding adequate disclosure, an appropriate opportunity for parties in interest to be heard in support and opposition, and adequate protection for those holding a legally cognizable interest [10] in the assets sold. [11] This alternative process for a business to successfully exit Chapter 11 would increase the efficiency of the reorganization process. [12] It would also provide an additional mechanism for judges to address problematic single-asset real estate (SARE) cases in a fair and meaningful manner. [13] Rather ***1269** than allowing the extra-statutory, ad hoc processes for nonplan sales that have developed across the country [14] to continue, Congress should address the matter in a statute that balances the interests of all parties and the need for a fluid, efficient process through which businesses can reorganize through sales of substantially all their assets. Drawing on the experience of the various courts and their experiments with a variety of procedures, Congress can establish a uniform nonplan sale process to serve the needs of reorganizing businesses.

The way in which Chapter 11 practice has developed over the last twenty or so years indicates a clear demand for a process of reorganization by nonplan sale. [15] Debtors and their counsel have sought it, the courts have allowed it when possible (arguably in derogation of the plan-focused original intent of Chapter 11), [16] and Congress and the Rules Committee should now step in and expressly provide for proper procedural protections to enhance the fairness and efficiency of the nonplan sale process. This would provide national uniformity to a process that is now governed by a variety of local rules as well as, in some instances, requirements laid down by individual bankruptcy judges. [17]

***1270** Part II of this Article reviews the practical benefits of reorganization by sale over reorganization by plan, noting developments early in the Enron bankruptcy cases as illustrative. Part III contains a series of proposed amendments to the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure to provide for a uniform nonplan sale process nationwide, and Part IV concludes the argument. The Appendix consists of a collection and categorization of bankruptcy courts' local rules that have sought, in part, to address the procedural gap left by a dearth of provisions in the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure that deal with the nonplan sale process. [18]

II. The Sale Alternative Plays to the Bankruptcy System's Strengths

Although not explicitly provided for by statute, [19] the insolvency community [20] has embraced the nonplan sale of substantially all the assets of a debtor's business as an efficient alternative to the costly and lengthy plan confirmation process. [21] By selling the assets of a business as a unit, rather than in a piecemeal liquidation, going concern value can be captured for the benefit of the estate. [22] Further, by reducing the assets of the estate to cash, [23] a note secured by ***1271** the assets sold, [24] the stock of the purchaser, or some other similar form of fungible valuable consideration, [25] the tasks and costs of postsale management and administration of a debtor and its estate can be dramatically reduced. [26] In turn, this allows for a reduction in the amount of a debtor's value that is redistributed from prepetition creditors to postpetition administrative claimants as a case drags on. [27] It takes little in the way of a management team to preside over an estate comprised solely of liquid assets. Further, once reduced to liquid assets, proposal and confirmation of a strict or absolute priority plan [28] or conversion of the case to one under Chapter ***1272** 7 [29] should lead to speedy distributions to creditors and a minimum of haggling and litigation over proper priorities.

Essentially, the nonplan sale route capitalizes on one of the most powerful reorganization qualities of the Chapter 11 scheme: separating assets from liabilities. In the classic, voluntary, Chapter 11 reorganization-by-plan scenario, this process begins with the filing of the bankruptcy petition, [30] the creation of the bankruptcy estate, [31] the transfer of all of the debtor's nonexempt property to the estate, [32] and the imposition of the automatic stay. [33] At that point, the first stage of separating the assets from prepetition liabilities has begun; the assets have been isolated and provided with sanctuary from the activities of prepetition

creditors.[34] The second stage of this separation under the ***1273** traditional reorganization-by-plan scenario is completed upon confirmation and consummation of a plan of reorganization[35] that specifies how the assets are to be deployed[36] and how the product and proceeds of those assets will be applied to pay prepetition and postpetition claims, if at all.[37] A nonplan sale completes the separation of the assets from the liabilities much sooner and in a more complete fashion, replacing the assets with their proceeds and allowing a business--but not the debtor, its former owner--to emerge from the bankruptcy estate and escape the negative effects of the administrative expense, uncertainty, and social stigma that is attendant upon doing business as a debtor.[38] That accomplished, the creditors and interest holders can then sort out their relative claims to the proceeds and the means by which value will be divided and distributed among them. By compartmentalizing these reorganization functions into two stages-- asset redeployment and distributional categorization/treatment--the reorganization process is made more efficient: operating assets are returned to the nonbankruptcy world with lower transaction costs than under the reorganization-by-plan scenario.[39]

***1274** The Enron bankruptcy cases provide a clear example of the potential benefits of the sale process. Enron filed its petitions for relief beginning on December 2, 2001.[40] The events immediately preceding the commencement of these cases created much confusion and outrage and gave rise to extensive criticism of Enron's accountants, management, retirement account policies, and related matters.[41] But, from a bankruptcy perspective, all ***1275** that was the past; apart from recoveries of prepetition avoidable transfers such as preferences and fraudulent conveyances, the events of the past would not affect the amount of value that the Enron companies could generate in order to fund distributions to creditors and interest holders.[42]

Enron's insolvency professionals realized this. As a result, as early in the case as possible, in light of the public, media, and congressional uproar, they began a two-stage process that sought to maximize the value of the companies' assets through sales of business units as going concerns.[43] Stage one was to explore sales to third parties.[44] Stage two was to organize an internal sale ***1276** process that would separate the companies' productive assets not sold from their liabilities and from the costs and delays of bankruptcy administration.[45]

Stage one sales have included, most notably, the sale of Enron's once-vaunted energy trading business.[46] Stage two was ***1277** formally announced in early spring 2002[47] and involved the proposed formation of a subsidiary, “OpCo,” that would be available to buy assets in exchange for its own stock.[48] In other words, OpCo, a wholly owned subsidiary of the Enron companies, at least initially, would be available to buy assets free and clear in exchange for its equity interests.[49] There would be no question ***1278** of fair value, because Enron was only moving the assets from an operating company--one in bankruptcy--to another and, in the process, converting the old operating company into a holding company.[50] In this way, if attractive outside sales of assets did not materialize, OpCo could provide a means for segments of Enron's businesses to continue without the supervision, administration, and direct oversight of the bankruptcy court and ***1279** system.[51] Isolating the business units in a separate entity and reducing the debtor to a mere holding company could also decrease the stigma of both bankruptcy and the “Enron debacle,” both of which management found were creating problems with customers, vendors, and regulators.[52] Aptly put by Enron and its counsel, OpCo is a process for maximizing value.[53]

This two-stage process makes a great deal of sense in the appropriate case, even in the case of Enron, where a group of companies were allegedly brought to bankruptcy by mismanagement, questionable accounting practices, insider looting and/or trading, and even fraud.[54] All of these alleged bad ***1280** acts took place largely apart from the operations level of the companies' businesses.[55] Those core businesses would not benefit from being hamstrung by the intricate, costly, and time-consuming

bankruptcy process. [56] While investigation of prior bad ***1281** acts and other circumstances could take place in the bankruptcy case and other fora, [57] in order to maximize value for stakeholders, it was imperative to separate the ongoing viable operating businesses from the reorganizing debtors. [58] OpCo stock could then be divided among the debtor companies and held for appreciation or expected dividends or buybacks or, alternatively, the stock could be sold on the open market to generate value to fund distributions to creditors under plans of reorganization. [59] If ***1282** such a strategy makes sense in the Enron situation, [60] where allegations of wrongdoing suggest that more, not less, oversight may be needed, [61] in the appropriate garden-variety Chapter 11 case where the need for a heightened scrutiny is not present, the potential efficiencies and benefits are obvious. [62]

Because both a confirmed plan of reorganization and a nonplan sale of substantially all the assets garner going concern value (at least theoretically), [63] the least expensive and time- ***1283** consuming of the two processes is preferable, assuming that the process in question is appropriately transparent [64] and allows ***1284** parties in interest to examine the transaction and voice their support or objections in a meaningful way. [65] Further, rather than involving the bankruptcy court in the difficult process of valuing a business, evaluating a business plan, and generally speculating on the future of the enterprise based on the briefs of attorneys and the reports of hired-gun professional experts, [66] the nonplan ***1285** sale process allows the court to concentrate on tasks for which it is well suited. These involve review and approval of the procedure for exposing a debtor's assets to the market, including adequate disclosure, appropriate notice and the opportunity for objecting parties or competing bidders to be heard, and generally ensuring a fair sale process and resolving legal disputes. [67] The market can then function to optimize value. [68]

***1286** Further, there is very little in the way of reorganization that cannot be accomplished through a sale. [69] As examples of what can be accomplished through either a nonplan sale or a plan, [70] consider the traditionally plan-based transactional possibilities contained in § 1123(a)(5) covering what a plan may provide and that are easily accomplished by sales of substantially all the assets of the business: sales to new or preexisting entities, [71] merger or consolidation with another entity, [72] sale of assets subject to or free and clear of liens, [73] satisfaction of liens, [74] or sale of substantially all the assets of the debtor. [75] Issuance of securities in the reorganized debtor is the primary exception, [76] and given that the process for issuance of securities under a confirmed plan is already greatly foreshortened and simplified when compared to that under the otherwise applicable securities law, [77] there is little need to further shorten that process.

Interestingly, very few statutory amendments are needed to put an explicit nonplan sale procedure into effect. The key is to properly define a “nonplan sale” and then to amend the substantive statutes and rules involved, providing a process for such a sale that mimics the plan confirmation process enough to satisfy due and appropriate process requirements at the least possible expense in terms of time and money. [78] By using a process ***1287** that is procedurally parallel to the plan confirmation process, this nonplan sale process would be familiar to, and draw upon, well-developed precedent from bankruptcy courts and practitioners nationwide. But by focusing on just the disposition of certain assets in the process, rather than the plethora of issues, transactions, and distributions implicated in a full-blown plan of reorganization, the process should be efficient enough to avoid becoming the murky, sticky bog that the Chapter 11 plan process often becomes. [79]

Finally, rather than confine the nonplan sale process to Chapter 11 cases, it should be included in other chapters, and especially Chapter 7 cases, to provide a uniform process for Chapter 7 trustees to sell a business as a going concern. The amendments would also make it clear that a Chapter 7 or other trustee can sell assets free and clear of interests and claims, rather than just interests, a term that is not defined under the Bankruptcy Code.

III. The Proposed Amendments [80]

This Part proposes amendments to the Bankruptcy Code and the Rules of Bankruptcy Procedure and their sequence in order to implement a nationally uniform and comprehensive process for § 363(b) and (f) sales. Providing explicit statutory authority for these sales will remove whatever objections may be made based upon the lack of such provisions under the existing statute. [81] ***1288** Explicit statutory authority would also promote national uniformity and predictability for nonplan sales of substantially all the assets of an estate or a business. Implementation of this uniform process would help to level out the disproportionate impact of preplan sales on various constituencies. [82] These goals are desirable considering that the nonplan sale method of effectuating a reorganization or exiting from Chapter 11 is the only method not covered specifically by the statute. Conversion to Chapter 7, dismissal, and plan confirmation are all provided for, and the result has been the development of a nationwide body of authority addressing their permutations. [83] Given the importance of nonplan sale practice today, it makes no sense to have this fourth route out of Chapter 11 undefined except by the patchwork of local rules formulated on the local district and division levels nationwide.

The first amendment is a new definition in § 101 for this procedure, a nonplan sale:

> § 101(40A)"nonplan sale" means a sale of all or a substantial portion of the assets of the estate pursuant to section 363(b) and, if appropriate, section 363(f) of this title, other than pursuant to a confirmed plan in a case under chapter 9, 11, 12, or 13 of this title.

Next, the power of the court section of the statute should be amended to give bankruptcy judges the whip hand to control cases by ordering a sale. [84]

***1289** § 105(d)(2)(B). Power of court

(d) The court, on its own motion or on the request of a party in interest, may --

. . . .

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that --

. . . .

(B) in a case under Chapter 11 of this title --

. . . .

(vii) sets a date by which the debtor or trustee shall seek approval of a nonplan sale or notice of a nonplan sale; or

(viii) sets a date on which there will be a nonplan sale and specifies the appropriate form of notice of that sale and the appropriate means of dissemination of such notice.

Turning to the heart of the matter, § 363 also would need to be amended. In order to achieve the goal of making the sale process parallel to the plan process as an exit strategy for Chapter 11, it is appropriate to focus on adequate disclosure, notice, and approval of the sale. Thus, it appears prudent to borrow from the plan and disclosure statement process to import § 1125(a)'s "adequate information" standard[85] and its established precedent.[86]

***1290** § 363. Use, sale, or lease of property

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate. If a nonplan sale is proposed, the court shall only approve the sale after appropriate dissemination of notice of the sale that has been approved, after notice and a hearing, by the court as containing adequate information as that term is defined in section 1125(a) of this title.

Current practice in sales of substantially all the assets of a debtor is often to use a two-step, two-hearing or two-opportunity-for-a-hearing sale procedure.[87] The first step is presentation of an offer to purchase the assets. The offer takes the form of an asset purchase agreement containing a request that at the first hearing the court (1) conditionally approve the sale, the overbidding process, the means and manner of notice for the sale, the process for objecting to the sale, and (2) set a second hearing at which to consider the merits of the sale proposal and any objections, bids, or other comments received from parties in extent.[88] In the second step, at the second hearing, objections to the sale and any overbids that have been received are entertained and the court either approves or denies the motion to sell.[89] This is the general outline of the process nationwide, but there is great diversity in practice from one district to another.[90] Because the Code and the Rules were not drafted with a nonplan sale of substantially all the assets of a business in mind as a Chapter 11 reorganization strategy,[91] no cohesive regimen or ***1291** bright-line rules regarding the substance or procedure of such a sale have emerged on the following questions: what is proper notice of the sale[92] and opportunity to object or overbid;[93] what are proper overbidding procedures and limitations;[94] and, when and what kind of break-up fees and other stalking-horse protections[95] are appropriate. Formalizing nonplan sale practice and importing the concept of "adequate information" from § 1125 should increase uniformity and the understanding of the standards to be applied to address procedural and substantive concerns.

In the same section of the Code (§ 363), subsection (f) should be amended to (1) make it clear that nonplan sales can be free and clear of claims as well as interests and (2) augment the five conditions for sales free and clear with an explicit reference to the adequate protection standard of § 363(e).[96] This will also ***1292** specifically authorize Chapter 7 trustees to sell free and clear of claims and interests,[97] a desirable result if maximization of realized asset value in Chapter 7 cases is the goal.[98] When ***1293** Congress is alerted to a need to fix the Bankruptcy Code, it knows just how to do so.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any claim or interest to or in such property of an entity other than the estate subject to the provisions of subsection (e) above only if-<current list of 5 conditions for sale>.

With the amendment of § 363(b) and (f) to allow nonplan sales of the business free and clear of interests and claims, Rule 4001 will also require revision. Again, in order to reduce confusion and draw upon an existing body of law, the procedure for approving nonplan sales should, as much as possible, parallel that for obtaining credit under Rule 4001(c).[99]

***1294** Rule 4001(c). Obtaining Credit or Approving a Nonplan Sale.

(1) Motion; Service. A motion for authority to obtain credit or to approve a nonplan sale shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or

its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Hearing. The court may commence a final hearing on a motion for authority to obtain credit or to approve a nonplan sale no earlier than 30 [15] days after service of the motion. If the motion so requests, the court may conduct a hearing before such 30 [15] day period expires, but the court may authorize the obtaining of credit or the nonplan sale only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

Rule 4001(d). Agreement Relating to Relief From the Automatic Stay, Prohibiting or Conditioning the Use, Sale, or Lease of Property, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit or Approving a Nonplan Sale.

(1) Motion; Service. A motion for approval of an agreement (A) to provide adequate protection, (B) to prohibit or condition the use, sale, or lease of property, (C) to modify or terminate the stay provided for in § 362, (D) to use cash collateral, [or] (E) between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the ***1295** entity's lien or interest in such property, or (F) to approve a nonplan sale shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

Presently, Rule 4001(c)(2) provides for a fifteen-day notice period for a final hearing on a motion to obtain credit. [100] However, the court can hold and make rulings based on an interim hearing with as little as one day's notice (or less) [101] in order "to avoid immediate and irreparable harm to the estate pending a final hearing." [102] Immediate and irreparable harm in the context of Rule 4001(c)(2) is a broad and elastic standard--in essence, anything that could threaten the loss of the business, including the threatened loss of consumer, customer, employee, and/or vendor confidence--and is often ubiquitous in Chapter 11 cases. [103] Thus, the Author recommends that the fifteen-day period of Rule 4001(c)(2) be lengthened to thirty days to allow better opportunity for all affected parties to review and respond to the motion to obtain credit or for approval of the sale before the interim order can become final. [104] The loan or sale documents and ***1296** their attendant authorizing orders and supporting findings of fact and conclusions of law, not to mention supporting motions, affidavits and declarations, run in the hundreds, often thousands of pages. Given current case loads for judges and lawyers, it is simply not reasonable to expect meaningful review and critical analysis of those documents in anything less than thirty days. [105] This is achieved through the proposed amendments.

Indeed, substantial potential for abuse exists in any system of fast-track approval. [106] Here, the debtor, proposed purchasers, proposed lenders, and insiders can create an emergency giving them access to the "immediate and irreparable harm" interim approval procedure of Rule 4001(c)(2). Express collusion is not needed; the emergency may arise from an "invisible hand" guiding the different parties and their professional actors as they engage in brinkmanship and delay in reaching a final agreement or bringing the motion for approval. [107] Given this avenue for speedy relief, the fifteen-day period of Rule 4001(c)(2) should be lengthened to thirty days to allow better opportunity for affected parties to review and respond to the motion for final approval of the sale.

The balance of the amendments needed to carry out this proposal is straightforward and requires little explanation. They all position a nonplan sale parallel to a plan in terms of procedure, substance, and effect. As with a confirmed plan, there is a need for finality in a nonplan sale; thus, it is appropriate to amend the definition of "substantial consummation" to apply to ***1297** those sales as well as to plans to provide finality and protection for the purchaser. This is in addition to the protections afforded the purchaser by § 363(m) and the doctrine of equitable mootness. [108]

§ 1101. Definitions for this chapter

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(2) "substantial consummation" means --

(A) transfer of all or substantially all of the property proposed by the plan or the nonplan sale to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan or the nonplan sale of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

§ 1103. Powers and duties of committees

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(c) A committee appointed under section 1102 of this title may --

. . . .

(3) participate in the formulation of a plan or the nonplan sale, advise those represented by such a committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

§ 1106. Duties of trustee and examiner

(a) A trustee shall --

. . . .

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan or propose a nonplan sale, or recommend conversion of the case to a case under Chapter 7, 12, or 13 of this title or dismissal of the case;

The inability to achieve either confirmations of a plan or approval of a nonplan sale should be cause to force the debtor ***1298** through the other two exits from Chapter 11--conversion to Chapter 7 or dismissal. [109]

§ 1112. Conversion or dismissal

. . . .

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including --

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan or a nonplan sale;

(3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 or a nonplan sale under sections 363(b) and, as appropriate, (f) of this title within any time fixed by the court;

(5) denial of confirmation of every proposed plan or failure to obtain approval of every proposed nonplan sale and denial of a request made for additional time for filing another plan or proposing another nonplan sale or a modification of a plan or nonplan sale;

(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

(7) inability to effectuate substantial consummation of a confirmed plan or an approved nonplan sale;

(8) material default by the debtor with respect to a confirmed plan;

(9) termination of a plan or a nonplan sale by reason of the occurrence of a condition specified in the plan;

Retiree benefits are of increasing importance in public policy.[110] Recognizing this, amending § 1114 to extend the same protections to retirees under a nonplan sale as they would enjoy ***1299** under plan confirmation only makes good sense.[111] It would also close the loophole that the present nonplan sale procedure allows.[112]
§ 1114. Payment of insurance benefits to retired employees

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(e)(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title or a nonplan sale is approved under sections 363(b) and, as appropriate, (f) of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

. . . .

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title or a nonplan sale is approved under sections 363(b) and, as appropriate, (f) of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

Again, in keeping with the goal of making the two procedures as parallel as possible, those who are authorized to file a plan should also be able to file a motion to approve a proposal for a nonplan sale. Those that cannot, should not.

§ 1121. Who may file a plan

(a) The debtor may file a plan or a proposal for a nonplan sale with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan or a proposal for a nonplan sale until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security ***1300** holders' committee, a creditor, an equity security holder, or any indenture trustee, may file plan or a proposal for a nonplan sale if and only if --

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan or proposals for a nonplan sale before 120 days after the date of the order for relief under this chapter; [or]

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan[.]; or

(4) the court, for cause, so orders.

. . . .

(e) In a case which the debtor is a small business and elects to be considered a small business --

(1) only the debtor may file a plan or a proposal for a nonplan sale until after 100 days after the date of the order for relief under this chapter;

(2) all plans or a proposal for nonplan sales shall be filed within 160 days after the date of the order for relief; and

Improving and standardizing the method of evaluating disclosure associated with a nonplan sale is at the heart of this proposal for statutory reform. Drawing on twenty years of precedent under § 1125 appears wise. The standards developed in the caselaw may be susceptible to different interpretations, but this flexibility allows those standards to work in a multitude of factual settings and is a strength. [113] Despite the use of the same disclosure standard for both a plan and a nonplan sale, disclosure for the nonplan sale will be dramatically less burdensome and complicated than that for a plan. Plan disclosure statements typically cover the following: the history of the debtor; the debtor's operation and finances; the debtor's assets; the debtor's creditors, interest holders, and insiders; the plan's system of classification of claims and interests; the plan's proposed treatment of each class of claims and interests; the ***1301** plan's means of implementation; an analysis of plan alternatives, including liquidation; and other matters. [114] Adequate information regarding a proposed sale would not require this universal-in-scope discussion of the debtor's past, present, and proposed future. Rather, it would be a sale-specific disclosure that would encompass the assets being sold, prior marketing efforts, the terms of the proposed sale, and a discussion of the consideration to be received. This is only a fraction of plan disclosure to which even the least complex debtor is subject. Thus, although importing the adequate

information standard into nonplan sale practice should ensure proper notice and an opportunity for parties in interest to be heard on the subject, the nonplan sale process should remain relatively streamlined when compared with the plan disclosure process, which has many opportunities for parties in interest to raise objections over matters that they are not really or terribly concerned with in order to wrest some advantage from the debtor and the terms of the plan. [115] Thus, § 1125(a) should be amended to include the proper nonplan sale.

§ 1125. Postpetition disclosure and solicitation

(a) In this section and in section 363(b)(1) --

(1) “adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan or proposed nonplan sale but adequate information need not include such information ***1302** about any other possible or proposed plan or nonplan sale . . . .

Further, extending the same protections to those that appropriately solicit support or opposition to a plan to those doing so for a nonplan sale makes good sense. The carrot, insulation from liability, is an incentive for solicitation of support or objections in good faith and in compliance with the Code.

§ 1125. Postpetition disclosure and solicitation

. . . .

(e) A person that solicits acceptance or rejection of a plan or that seeks or supports or objects to approval of a nonplan sale, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

Section 1126 should be amended to make it clear that it is the court that approves or disapproves a nonplan sale and that the substance and procedure of the process is that of § 363(b) and, if applicable, (f). [116] Continuing with the goal of paralleling the plan process, the postconfirmation vesting powers and the plan implementation statutes should be amended to include nonplan sales. This, combined with the modification of § 363(f) to expressly allow nonplan sales free and clear of claims as well as interests, will bring nonplan sale practice into line with plan sale practice.

***1303** § 1126. Acceptance of plan & approval of nonplan sales

. . . .

(h) A nonplan sale shall be approved or disapproved by the court pursuant to sections 363(b) and, as appropriate, (f) of this title.

§ 1141. Effect of plan confirmation or approval of nonplan sale

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan or an approved nonplan sale bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan or the nonplan sale,

and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan or the nonplan sale and whether or not such creditor, equity security holder, or general partner has accepted the plan or supported the nonplan sale.

. . . .

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan, the nonplan sale, or in the order confirming the plan or the order approving the preplan, after confirmation of a plan or approval of a nonplan sale, the property dealt with by the plan or nonplan sale is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

§ 1142. Implementation of plan or nonplan sale

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan or nonplan sale shall carry out the plan or nonplan sale and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan or approved nonplan sale, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan or nonplan sale.

Finally, § 1146 should be amended in two places to ensure that the nonplan sale process offers the same substantive and ***1304** procedural benefits as the plan process. The amendment to § 1146(c) conforms the statute to the increasingly employed--but statutorily unauthorized--practice of exempting nonplan sales from stamp or similar taxes. [117]

§ 1146. Special tax provisions

. . . .

(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 or a nonplan sale approved under section 363(b) and, if appropriate, section 363(f) of this title, may not be taxed under any law imposing a stamp tax or similar tax.

(d) The court may authorize the proponent of a plan or a nonplan sale to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan or the nonplan sale. In the event of an actual controversy, the court may declare such effects after [timing provisions omitted] . . . .

This concludes the amendments necessary to achieve the goal of establishing a comprehensive statutory basis for nonplan sales as an alternative exit strategy from Chapter 11. The amendments are modest in form, but their effect can be huge. The existing national patchwork of nonplan sale procedures and the failure of Congress and the Rules Committee to address the practice is an invitation for abuse and confusion. [118] Adopting these or similar statutory and rules amendments can establish an efficient, uniform process to establish the nonplan sale as an explicit exit strategy for businesses reorganizing under Chapter 11.

IV. Conclusion

Currently, nonplan sale practice occurs nationwide under a variety of locally developed procedure and without clear statutory or ***1305** national rule-based authorization and guidance. This Article proposes institution of a uniform national procedure for nonplan sales that would authorize sales of substantially all of a business's assets free and clear of claims and interests and addresses the need for certainty, predictability, and due process for those affected by these sales. It is time to recognize that the reorganization market has demanded this process, and it is time for Congress to provide for a uniform, national procedure that suitably accommodates the competing interests involved.

V. Appendix

The following sections detail the myriad approaches taken across the country in local rules addressing § 363(b) and § 363(f) sales and then summarizes this information in chart form. This listing may not be all-inclusive; it demonstrates the variety of local practice and procedures nationwide.

A. Local Rules Applicable to § 363(b) Sales

1. Notice Provisions.

a. No Court Order Required if No Objection. Some courts allow sales outside the ordinary course of business without a court order if there is no objection to a notice of intent to sell or similar document served on interested parties. The time of the notice ranges from fifteen to thirty days depending on the jurisdiction. [119]

b. Negative Notice: Court Order Required. Some local courts allow sales outside the ordinary course of business by filing an ex parte order for the sale followed by an opportunity for ***1306** interested parties to object to the sale and obtain a hearing; others require any objectors to file a response within a certain number of days. [120]

c. Specific Notice Text: Terms of Sale. For sales outside the ordinary course of business, many local rules require a declaration in the notice of the proposed terms of the sale including what fees will be paid in connection with the sale, what effect the sale will have on the debtor's operations, the identity of ***1307** the purchaser, the consideration paid, and the amount of any claims against the property. [121]

d. Specific Notice Text: Procedure. Some local rules require the notice of a sale of the debtor's property to contain specific notice provisions that explain the procedure for the sale. [122]

***1308** e. Specific Notice Text: Valuation Method. Some local rules require that the notice contain valuation information such as estimated fair market value, appraised value, or scheduled value of the property to be sold and the basis for the valuation. [123]

f. Disclosure of Connections, Relationships, and Compensation. Information regarding relationships among buyer and debtor, trustee, or other interested parties (usually in the case of a private sale) as well as compensation derived from the sale must be disclosed under some courts' local rules. Generally, the disclosure must be in the notice of intent to sell. [124]

***1309** g. Notice to Specific Parties Beyond the Federal Rules of Bankruptcy Procedure. Some courts have specific notice requirements that require notice to more parties than required by the Federal Rules of Bankruptcy Procedure. [125]

h. Notice of Justification for the Sale. Some local rules require the notice of a § 363(b) sale to make a statement justifying the sale outside of any proposed plan of reorganization. [126]

i. Identity of Creditors and Interests. Some courts require ***1310** specific notice measures that identify creditors and the amount of creditors' interests. [127]

j. Advertisement of the Sale. The District of Rhode Island, for example, requires an advertisement to be placed in a local newspaper of general circulation. [128]

2. Procedural Requirements.

a. Specific Documents Required. Some courts require production or filing of documents from auctions, a report of sale, or other documents to complete a sale outside the ordinary course of business. [129]

b. Use of General Motion Practice. Some courts have no specific rules in place for motions for a sale outside the ordinary course of business, but rather simply follow the Federal Rules of Bankruptcy Procedure and the requirements of general motion practice in that court. [130]

***1311** c. Distinction Between Public and Private Sales. Some courts have different rules for private sales versus public sales. [131]

d. De Minimis Sales. Some local rules set up different ***1312** methods for selling property outside the ordinary course of business when the value of the property is minimal. [132]

e. Special Rules for Objection. Some local rules have specific procedures that must be followed when an objection is made, including who must file the notice of hearing and by what date the objection, if any, must be filed. [133]

f. Special Rules for Orders Approving Sales Outside the Ordinary Course of Business. The District Court for Vermont, for example, has specific rules that govern orders granting a sale outside the ordinary course of business. [134]

g. Formal Hearing Required for Sale of All or Substantially All of the Debtor's Assets. Some local rules require a hearing for a sale of all or substantially all of the debtor's assets. [135]

h. Prohibition of Certain Terms of Sale. Some courts ***1313** prohibit the use of defensive measures such as break-up fees when a sale of a debtor's property is being made without prior court approval. [136]

i. Separate Order Required for Distribution of Proceeds. The Northern District of Indiana requires that the distribution of the proceeds of a sale outside the ordinary course of business be made pursuant to a court order. [137]

j. Special Rule for Complicated Sales. The Western District of Pennsylvania requires the seller of property to notify the court if the sale hearing will take more than the limited time for general motion hearings so that the court can allow enough time to dispose of the motion to sell the property. [138]

3. Other.

The Districts of Connecticut, New Jersey, and Utah set forth numerous guidelines for conducting auction sales but are silent regarding notice or motion procedures pertaining to sales. [139] The District of Kansas prohibits certain persons--bankruptcy judges, clerks, trustees and other officers in bankruptcy, and spouses and employees of same--from purchasing property from the estate, but otherwise does not address sales. [140] The Central District of Illinois has no local bankruptcy rules. [141] The Middle District of Alabama has proposed local rules drafted in May 2002, but otherwise appears to operate via memoranda from the Chief Bankruptcy Judge. [142]

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***1316 B. Local Rules Applicable to § 363(f) Sales**

Each provision listed under this section has been expressly adopted for use in sales free and clear of all claims and interests. The majority of the bankruptcy courts have no specific provisions for sales free and clear as distinct from other sales. Where there are rules, some are used in all sales outside of the ordinary course of business (§ 363(b)), but all provisions contained in the chart below and described in the following sections specifically apply to sales free and clear. Probably the most comprehensive example of the methods adopted by local courts for dealing with sales free and clear can be found in the District of Oregon. [143]

1. Notice Provisions.

a. Specific § 363(f)(1)-(5) Grounds. To make a sale free and clear of liens, some local rules require that the notice of a sale free and clear contain a competent declaration of the specific § 363(f)(1)-(5) provision that authorizes the sale and a factual basis demonstrating that the moving party comes within that code section. [144]

***1317** b. Specific Notice Text: Terms of Sale. For a sale outside the ordinary course of business that is free and clear of liens and interests, many local rules require notice of the terms of the sale including that it is a sale free and clear of liens or encumbrances, the identity of affected creditors, any liens or encumbrances that will not be paid from the proceeds, and other specific details. [145]

c. Specific Notice Text: Procedure. Some local courts require the notice of a sale free and clear to contain specifics of the sale procedure. [146]

***1318** d. Specific Notice Text: Valuation Methods. Some local rules require that the notice contain valuation information such as estimated fair market value of the property to be sold and the basis for the estimate. [147]

e. Disclosure of Connections, Relationships, and Compensation. Many courts require a statement of connections, relationships, and compensation related to the sale. [148]

f. dentify Claims and Interests. Some local rules require disclosure of the amount of each lien or encumbrance claimed against the property and the identity of the lienholders. [149]

***1319** g. Minimum Notice of Intention to Sell. The District of South Carolina allows the trustee to give minimum notice of intention to sell property free and clear without a hearing so long as no party objects to the sale. [150]

2. Procedural Requirements.

a. Specific Documents Required. Some district courts require attachment of documents including a Uniform Commercial Code financing statement report, a title report, and other documents evincing the status of the title to the property proposed to be sold free and clear. [151]

b. Formal Hearing Required. Some courts require a hearing for a sale free and clear and provide that their rules for sales without hearings do not apply. [152]

c. Court Order with a Negative Notice Procedure. A court ***1320** may grant an order approving the sale free and clear upon failure of interested parties to object within a minimum notice period. [153]

d. Necessity of a Sale. Because a sale free and clear of liens and other interests does not always result in complete repayment of creditors from the sale proceeds, some courts require notice of the debts that will not be paid as well as why such a sale is necessary under the circumstances. [154]

e. Special Rules for Orders Approving a Sale. Some courts' local rules create special rules governing an order to approve the sale of the debtor's property. Generally, the courts apply these rules for sales both outside the ordinary course of business and free and clear of liens and interests. [155]

f. Special Form. To have a sale free and clear, the District of Oregon requires a person to use a form prescribed by that court to file a motion for a sale free and clear. [156]

g. Distinction Between Public and Private Sales. Some courts' local rules require the notice of the proposed sale to state whether the sale is to be private or public. [157]

***1321** h. Advertisement of the Sale. The District of Rhode Island requires an advertisement to be placed in a local newspaper of general circulation. [158]

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Footnotes

a1 Associate Professor of Law and Director of the James L. Clayton Center for Entrepreneurial Law at the University of Tennessee College of Law. The Author thanks all those who assisted him in preparing this Article, including Gena Lewis, Stephanie Pierce, and Jacqulyn Wilson for their research assistance. The Author also thanks Professors John D. Ayer and Thomas E. Plank and attorney Robert Barnes for their helpful comments and attorney Donna C. Looper for her analytic, research, and editorial assistance.

1 Unless otherwise noted, all references to the “Code” or the “Bankruptcy Code” are to Title 11 of the United States Code, and all references to the “Rules,” the “Bankruptcy Rules,” or a particular “Rule” within them are references to the Federal Rules of Bankruptcy Procedure.

2 George W. Kuney, Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process, 76 Am. Bankr. L.J. 235, 236-37 (2002) [hereinafter Kuney, Misinterpretations I]; George W. Kuney, Further Misinterpretation of Bankruptcy Code Section 363(f): Elevating In Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Developments, 76 Am. Bankr. L.J. 289, 290-91 (2002) [hereinafter Kuney, Misinterpretations II].

3 Kuney, Misinterpretations I, supra note 2, at 236-37, 258-59, 261, 263-65, 272-73, 286; Kuney, Misinterpretations II, supra note 2, at 289-91, 313, 320, 331; see also In re Trans World Airlines, Inc., 322 F.3d 283, 288-90, 293 (3d Cir. 2003) (considering the same policy arguments discussed in Misinterpretations I and holding that the sale of TWA assets was free and clear of presale employment discrimination and travel voucher claims connected to or arising out of those assets); Douglas G. Baird & Robert K. Rasmussen, The End of Bankruptcy, 55 Stan. L. Rev. 751, 751 (2002) ("Corporate reorganizations have all but disappeared. Giant corporations make headlines when they file for Chapter 11, but they are no longer using it to rescue a firm from imminent failure. Many use Chapter 11 merely to sell their assets and divide up the proceeds.").

4 See Kuney, Misinterpretations I, supra note 2, at 277-82; Kuney, Misinterpretations II, supra note 2, at 289.

5 Kuney, Misinterpretations I, supra note 2, at 237, 286; Kuney, Misinterpretations II, supra note 2, at 329.

6 Other commentators have favored a sale or auction process for reorganization. See Omer Tene, Revisiting the Creditor's Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganizations, 19 Bankr. Dev. J. 287, 288 & nn. 2-3, 289 (2003) (discussing the academic debate regarding sale alternatives for the existing Chapter 11 system and citing, inter alia, Douglas G. Baird, Revisiting Auctions in Chapter 11, 36 J.L. & Econ. 633 (1993), Mark J. Roe, Backlash, 98 Colum. L. Rev. 217 (1998), and Mark J. Roe, Bankruptcy and Debt: A New Model for Corporate Reorganization, 83 Colum. L. Rev. 527 (1983)).

7 Anecdotally, in 2002 the Author attended the National Conference of Bankruptcy Judges' annual meeting in Chicago due to a fellowship generously awarded to him by that organization. The meeting took place in October, shortly after the publication of Kuney, Misinterpretations I, supra note 2. Reactions to that article varied, but one repeated over and over in various forms by attending practitioners was "that is pretty academic--my clients need to be able to sell their businesses without a plan." Reactions from judges were more reserved and tended to focus on the tension between the words of the statute and the common law of nonplan sales that has developed over time.

8 The Third Circuit Court of Appeals, with jurisdiction over the popular bankruptcy jurisdiction of Delaware, confirmed its support of the nonplan sale free and clear technique in the TWA bankruptcy case despite the problems in finding explicit, clear statutory support for the process. In re Trans World Airlines, 322 F.3d at 290-91, 293 (citing, inter alia, Collier on Bankruptcy).

9 Two other exit strategies exist in Chapter 11 besides plan confirmation or sale of substantially all the assets of a business: dismissal of the case or conversion to Chapter 7. See Lisa Hill Fenning & Craig A. Hart, Measuring Chapter 11: The Real World of 500 Cases, 4 Am. Bankr. Inst. L. Rev. 119, 131 (1996). Neither is very controversial, and both appear adequate in practice under the statute as currently drafted. See id. at 147, 149 (demonstrating that dismissal and conversion to another chapter frequently occur within the current bankruptcy system). Further, both may represent processes that lead to or culminate in a successful bankruptcy case, despite their unsuccessful-sounding names. See id. at 152-53 & n.103 (noting that dismissal after resolution of a precipitating dispute is often a pattern in successful cases and that the low plan confirmation rate in Chapter 11 should not be equated with a low success rate in Chapter 11); see also Leif M. Clark et al., What Constitutes Success in Chapter 11? A Roundtable Discussion, 2 Am. Bankr. Inst. L. Rev. 229, 229-32 (1994) (discussing various types of success in Chapter 11); Lynn M. LoPucki & William C. Whitford, Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies, 78 Cornell L. Rev. 597, 598-600, 602, 611 (1993) (critically examining types of success in reorganization and classifying sale transactions as successful reorganizations only if the core businesses remain intact in a single entity). Note that it is the business that exits Chapter 11 through a sale, not the debtor. The debtor continues to exist in Chapter 11 holding the proceeds of the sale. These proceeds can then be distributed to claim- and interest-holders through a confirmed plan of reorganization or, perhaps more efficiently, by a trustee after conversion of the case to one under Chapter 7. Although the Code already provides for an out-of-the-ordinary-course-of-business sale in § 363(b), little in the way of procedure is specified in the statute or the Bankruptcy Rules. See 11 U.S.C. §363(b) (2000); Fed. R. Bankr. P. 2002, 4001, 6004. As a result, as demonstrated in the Appendix to this Article, the local rules of the nation's bankruptcy courts contain a variety of procedures for § 363(b) and § 363(f) sales.

10 The subject of what, exactly, are or should be the boundaries of an "interest" in property or assets is beyond the scope of this Article. See Kuney, Misinterpretations I, supra note 2, at 240 & n.21 (citing Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 257 (3d Cir. 2000), for the proposition that "interest" in property under § 363(f) is not defined in the Bankruptcy Code).

11 Cf. Nat'l Bankr. Review Comm'n, Bankruptcy: The Next Twenty Years §2.1.5, at 348 (1997) ("Preserving the value of an enterprise is not always accomplished by a reorganization in a traditional sense. In some cases, selling certain assets to third parties may be the most sensible and economically beneficial way to proceed."). This Article proposes changes to the Code to promote such a procedure. The focus has been to keep it simple and to attempt to graft the nonplan sale process into the Code and Rules with as little disruption as possible, wedding the process to existing law and procedure to incorporate as much existing precedent as possible.

12 Refer to text accompanying note 21 infra (discussing the nonplan sale process as an efficient alternative to the costly and lengthy plan confirmation process).

13 Although earlier small business and other amendments to Chapter 11 were designed, in part, to address SARE cases, they have not solved the problem, in part because their drafters failed to adequately constrain the discretion of the bankruptcy courts. See George W. Kuney & Jeffrey R. Patterson, Single Asset Real Estate Under 11 U.S.C. § 362(d)(3): A Narrower Construction than You Might Expect (Or, Why Every Hotel Should Have a Gift Shop and Troubled Golf Courses Should Keep Their Bars Open), 26 Cal. Bankr. J. 123, 131 (2002) ("[I]f Congress hopes to create special 'hard and fast' protections for lenders and to prevent perceived abuses in the Chapter 11 process, it will have to completely and explicitly remove vague adjectives such as 'substantial' and 'incidental' and judicial discretion from the working of the statute."). The amendments discussed in this Article would instead play to the discretion of bankruptcy courts by providing a process that they can invoke. This is likely to be a better received and used way to address a SARE problem. Although abusive SARE cases are less of a problem today than in years past, the time to prepare the bankruptcy system for the next real estate downturn is now, before the downturn occurs. See generally Dean Baker, The Run-Up in Homes Prices: Is It Real or Is It Another Bubble?, Center for Economic and Policy Research, at http://www.cepr.net/Housing_Bubble.htm (Aug. 5, 2002).
The recent plunge in stock prices has finally forced most policy analysts and economists to acknowledge that the stock market had a bubble at its 1998-2000 peaks. Similarly, the recent fall in the dollar has increased the recognition that the dollar was also over-valued....[T]he economy has now developed a third bubble, the collapse of which also poses a serious danger to the economy.
The third bubble is the housing market.
Id.; see also generally Richard Freeman, "Fannie and Freddie Were Lenders": U.S. Real Estate Bubble Nears Its End, Executive Intelligence R., June 21, 2002, http://www.larouchepub.com/other/2002/2924fannie_mae.html.
The U.S. financial system is now dependent to an unprecedented degree upon one prop: the greatest housing-real estate bubble in human history. A hyperinflationary spiral has sent home prices shooting up by 10-40% annually in recent years--depending on the region of the country--and artificially pushed the price of millions of homes into the $400,000 to $1 million range or above.
Id.; see also generally Tim Schooley, Retailers React to Recession with Bankruptcy Filings, Store Closings, Pittsburgh Bus. Times, Feb. 22, 2002, http://pittsburgh.bizjournals.com/pittsburgh/stories/2002/02/25/story3.html (noting that "2001 saw the most Chapter 11 filings by publicly traded retail companies ever" and "a [potentially unprecedented] growing increase in vacant space for big-box retailers" that could "'force rental rates down significantly"' (quoting an industry insider)). But see Kenneth N. Klee, One Size Fits Some: Single Asset Real Estate Bankruptcy Cases, 87 Cornell L. Rev. 1285, 1287-89, 1316-22 (2002) (arguing that removal of the $4,000,000 cap on the definition of SARE cases will negatively impact the bankruptcy system, and differentiating between large and small SARE cases statistically in a meaningful manner). Although at least one commentator has posited that the 1994 amendments to the Bankruptcy Code have returned bankruptcy judges to the level of administrative control they enjoyed under the prior Bankruptcy Act, Harvey R. Miller, The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play, 69 Am. Bankr. L.J. 431, 438-40 (1995), their control is far from complete. Providing them with the power to order a sale of estate property in SARE cases would increase their ability to motivate the parties to reach consensus or, alternatively, dispose of the case efficiently.

14 The Appendix to this Article gathers, categorizes, and summarizes the local rules of bankruptcy courts across the country and its territories. It demonstrates the wide variety of procedural approaches that these courts have developed in the absence of congressional rules or committee action in this area. Of course, these rules are just the beginning. Each large volume practitioner or firm has its own preferred practice and forms and can bring a motion in each individual case to tailor the process further.

15 Refer to note 7 supra.

16 See Kuney, Misinterpretations I, supra note 2, at 235-37, 242-44, 272-73.

17 Refer to Appendix (collecting and categorizing local rules of bankruptcy courts nationwide on the subject).

18 Refer to note 9 supra (discussing the procedural gap).

19 See 11 U.S.C. § 363(b) (2000) (referring generically to sales out of the ordinary course of business, which include sales of substantially all the assets of the business).

20 The "insolvency community" denotes all those involved in the liquidation and reorganization of assets and businesses, including debtors, creditors, turnaround specialists, investment bankers, accountants, attorneys, trustees, bankruptcy judges, bankruptcy court clerks, and United States Trustees and their attorney-advisors and analysts.

21 Kuney, Misinterpretations I, supra note 2, at 273, 275-77, 280, 285. Refer also to note 7 supra.

22 See William T. Bodoh et al., The Parameters of the Non-Plan Liquidating Chapter Eleven: Refining the Lionel Standard, 9 Bankr. Dev. J. 1, 10-12 (1992); see also In re Naron & Wagner, Chartered, 88 B.R. 85, 90 (Bankr. D. Md. 1988) (discussing sale to realize going concern value and comparing sale proceeds to liquidation value); John D. Ayer, Bankruptcy as an Essentially Contested Concept: The Case of the One-Asset Case, 44 S.C. L. Rev. 863, 869 (1993) ("A third purpose, perhaps somewhat more difficult to grasp, but nonetheless essential to modern bankruptcy law, is the preservation of going-concern values....[T]he idea of preserving going-concern values seems particularly linked to the developing notion of bankruptcy as a device for reorganizing, as distinct from merely liquidating, a debtor.").

23 Cf., e.g., In re Ames Dep't Stores, Inc., 287 B.R. 112, 119 (Bankr. S.D.N.Y. 2002) ("Using that power conferred under section 365 to assign leases even without lessor consent, debtor lessees can sell the lessee's interests in such leases to those willing to pay for them--converting, for their creditors, into the much more liquid asset of cash, the economic value in the leases.").

24 See, e.g., In re Taylor, 198 B.R. 142, 144 (Bankr. D.S.C. 1996) (describing a debtor who sought to sell five nursing home facilities for a combination of cash, assumption of debt, and two promissory notes).

25 Id. ("Delta South Carolina, Inc., a corporation recently formed, would be the purchaser of the properties, and its stock would be pledged to secure the two notes to Taylor [the debtor].").

26 See, e.g., In re Auto Parts Club, Inc., 224 B.R. 445, 449 (Bankr. S.D. Cal. 1998) (disallowing a request for fees that were deemed excessive in light of the decision to sell substantially all the assets of business via a nonplan sale).

27 The evil of a Chapter 11 case that drags on longer than it should is borne primarily by unsecured creditors and, to the extent that they are "in the money," equity holders as their priority is "primed" by the growing mass of administrative claims of management insiders and bankruptcy professionals such as accountants, attorneys, examiners, and trustees. See In re Taxman Clothing Co., 49 F.3d 310, 316 (7th Cir. 1995).

> The result [disgorgement of professional fees] is harsh. But being a creditor and seeing your claim get eaten by a lawyer is a harsh fate as well. Even after the passage of 11 U.S.C. § 330(a)(1), bankruptcy is not intended to be a feast for lawyers. As we read in In re Toney, "absent extraordinary circumstances, bankruptcy estates should not be consumed by the fees and expenses of court-appointed professionals."

Id. (citation omitted) (quoting In re Toney, 171 B.R. 414, 415 (Bankr. S.D. Fla. 1994)); Samuel L. Bufford, Chapter 11 Case Management and Delay Reduction: An Empirical Study, 4 Am. Bankr. Inst. L. Rev. 85, 90 (1996) ("Creditors in general are the principal beneficiaries of shorter chapter 11 cases. Creditors suffer the expenses and losses resulting from delay in a chapter 11 case. Their point of view is generally that they are better off if a case reaches disposition sooner, rather than later."). Barring a declining market for their collateral, secured creditors are largely immune from these detrimental effects at least to the extent of their secured claim. But see id. at 90-92 (noting that "[s]ecured creditors are the clearest beneficiaries of the early disposition of a chapter 11 case"). Of course, as interest continues to accrue on the secured claims up to the value of the creditors' collateral, any previously "free" value in that collateral is converted into part of the secured claims, making it unavailable to unsecured creditors. 11 U.S.C.

§ 506(a), (b) (2000); see also David Gray Carlson, Adequate Protection Payments and the Surrender of Cash Collateral in Chapter 11 Reorganization, 15 Cardozo L. Rev. 1357, 1368-69 (1994).

28 These plans are sometimes referred to as “pot plans” in practice, evoking the image of a soup kitchen in which claimants and interest holders line up in groups according to priority to have their bowls filled pro rata. When the soup runs out, distributions cease. Plans of this sort would not face the bugaboo of expensive litigation regarding the existence and application of the new value exception to the absolute priority rule or the reorganization value of an enterprise. See, e.g., In re PWS Holding Corp., 228 F.3d 224, 228, 231, 237-42 (3d Cir. 2000) (addressing a confirmation order detailing expensive litigation involving, inter alia, the absolute priority rule, the new value exception, and reorganization value); In re Bonner Mall P'ship, 2 F.3d 899, 901 (9th Cir. 1993) (discussing and upholding the new value exception to the absolute priority rule). Because a nonplan sale would permit old equity to participate in the bidding process for the sale of the business, there will be no question that, when control of a business is reacquired by old equity, it has been purchased with money or money's worth after exposure to the market. See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. La Salle St. P'ship, 526 U.S. 434, 442-44, 458 (1999) (discussing the new value exception to the absolute priority rule and determining that, if the exception exists, it is not met when old equity has the exclusive right to contribute the new value without exposing that opportunity to the market). Exposure to the market, rather than a judge's estimate, would also determine reorganization value. Refer to note 66 infra (discussing the difficulty of asset valuation without a market).

29 Conversion to the Chapter 7 route for postsale distributions would have the support of panel trustees nationwide. See, e.g., Michael J. Herbert & Domenic E. Pacitti, Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987, 22 U. Rich. L. Rev. 303, 311 (1988) (finding that nothing was distributed to creditors in 95.6% of Chapter 7 cases). Of course, it is probable that courts will recognize the ease with which these trustees may administer cases in which assets have already been marshaled and reduced to money or money's worth by their former owners and operators, who presumably were farther up the learning curve than any panel trustee could ever be and were thus able to generate value that would have been unobtainable in traditional Chapter 7 practice. This should lead to awards of far less than the maximum allowable trustees' fees to reflect the level of actual services provided. See 11 U.S.C. § 326(a) (detailing maximum trustee compensation on a sliding scale, but not requiring that the maximum be awarded); see also 28 C.F.R. § 58 app. A (2003) (setting out “Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330”). The availability of funds in those postsale Chapter 7 cases would also make it possible for the trustees to explore and pursue appropriate avoidable transfers, a job that former management may be ill prepared or unmotivated to do. Success in this regard could increase distributions to unsecured creditors.

30 11 U.S.C. § 301.

31 Id. § 541.

32 Id. § 542.

33 Id. § 362.

34 See id. (detailing the automatic stay); id. § 541 (defining what comprises property of the estate); 5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy P 541.01 (15th ed. rev. 2003) (“Property belonging to the estate is protected from the piecemeal reach of creditors....It is this central aggregation of property that promotes the effectuation of the fundamental purposes of the Bankruptcy Code....”).

35 See 11 U.S.C. § 1129 (listing confirmation requirements); id. § 1141 (discussing the effect of plan confirmation); see also id. § 1127 (discussing the modification of a plan and the concept of substantial consummation).

36 See id. § 1123(a) (requiring, among other things, that a plan shall designate classes of claims, specify treatment of impaired and unimpaired claims, and provide adequate means for the plan's implementation and payment of claims).

37 See, e.g., In re Channel One Communications, Inc., 125 B.R. 236, 236-37 (Bankr. E.D. Mo. 1991) (discussing postsale confirmation of a plan to distribute proceeds of sale of substantially all the debtor's assets).

38 See Bufford, supra note 27, at 89-90. Judge Bufford writes:

The reduction of delay in chapter 11 cases should be a noncontroversial goal. After all, the uncertainty of conducting business while in chapter 11 is a cloud that looms over both creditors and debtors. For example, suppliers are less willing to do business with a debtor in chapter 11, and may require cash on delivery or advance deposits. Customers may be less willing to buy the debtor's products, for fear that they may not receive service when needed at a later date. In addition, creditors may eventually want the debtor to pay their professional fees for dealing with the bankruptcy. As competitors sense that a kill is available, they too will get involved by increasing pressure on the market place. To limit these and other problems, a reduction of chapter 11 delays seems to be a beneficial objective for all involved. This is not, however, always the case.
Id. (footnotes omitted).

39 See, e.g., In re Brookfield Clothes, Inc., 31 B.R. 978, 986 (S.D.N.Y. 1983).
Simply put, the wasting asset in this instance may be characterized as the "going concern" value of the fully stopped business.
In sum, we conclude that an "emergency sale" of substantially all of the assets of a debtor-in-possession is permitted under § 363(b) and that Brookfield met its burden of showing sufficiently exigent circumstances to warrant the immediate sale to Zion.
Id.; see also Robert G. Hansen & Randall S. Thomas, Auctions in Bankruptcy: Theoretical Analysis and Practical Guidance, 18 Int'l Rev. L. & Econ. 159, 164 (1998).
Auctions have a well-deserved reputation as efficient mechanisms for simultaneously transferring ownership of an asset and determining the price at which the transfer will occur. In a bankruptcy proceeding, auctions of the insolvent company could be an efficient method for accomplishing the valuation of assets and the reallocation of control of assets that are at the heart of the current bankruptcy procedures.
Id.; Erica M. Ryland, Note, Bracing for the "Failure Boom": Should a Revlon Auction Duty Arise in Chapter 11?, 90 Colum. L. Rev. 2255, 2277 (1990).
A requirement that managers "auction" the entity as part of the process of formulating a plan of reorganization could insure that opportunism in the valuation process will be minimized. An established fair market price for the reorganized entity can then be used by the bankruptcy court for evaluation of various alternatives, insuring that the claimants receive at least this price. This would simultaneously block creditors from their tendency to undervalue the firm and block shareholders from their tendency to overvalue it.
Id. (footnote omitted).

40 See Voluntary Petition, In re Enron Corp. (Bankr. S.D.N.Y. 2001) (No. 01-16034 (AJG)); Press Release, Enron Corp., Enron Files Voluntary Petition for Chapter 11 Reorganization; Sues Dynegy for Breach of Contract, Seeking Damages of at Least $10 Billion (Dec. 2, 2001), http:// www.enron.com/corp/pressroom/releases/2001/ene/PressRelease11-12-02-01*l*etterhead.html [hereinafter Enron Files for Chapter 11]. Enron did not eventually effect the OpCo business plan as initially conceived and discussed in this Article. The OpCo reorganization strategy remains pertinent, however, illustrating the use of § 363 to separate assets from liabilities and remove operating enterprises from the bankruptcy estate while retaining their benefits and proceeds.

41 See, e.g., Second Interim Report of Neil Batson Court-Appointed Examiner at 11, In re Enron Corp. (Bankr. S.D.N.Y. 2003) (No. 01-16034 (AJG)) [hereinafter Batson Report] ("In the months immediately following Enron's disclosures, allegations surfaced of securities fraud, accounting irregularities, energy market price manipulation, money laundering, breach of fiduciary duties, misleading financial information, ERISA violations, insider trading, excessive compensation and wrongdoing by certain of Enron's bankers."); see also Permanent Subcomm. on Investigations, The Role of the Board of Directors in Enron's Collapse, S. Rep. No. 107-70, at 11 (2002). [hereinafter Report on Board of Directors].
Steady revelations since October 2001 have raised questions about numerous aspects of the company's operations, from its extensive undisclosed off-the-books dealings, often with companies run by Enron personnel, to an April 2002 SEC filing announcing that the company's financial statements were unreliable and the book value of its assets would have to be written-down as much as $24 billion, to its apparent intention to manipulate the California energy market, to tax strategies which apparently included Enron's ordering its tax department to produce billions of dollars in company earnings through the use of complex tax shelters.
Id. Enron's crisis of reputation has lived on past the company's bankruptcy filing to be identified by management as one of the risk factors involved in the success of the once-proposed subsidiary "OpCo." See OpCo Energy Company, Business Plan 37 (May 2002) (unpublished document, on file with the Houston Law Review) [hereinafter OpCo Business Plan].
The success of OpCo as a going concern will depend on its ability to separate reputationally from Enron.
The OpCo businesses are currently impaired in their ability to deal with partners, suppliers, customers and regulators due to the liquidity issues and reputational cloud resulting from the Enron collapse....In addition, there can be no assurance that counterparties

and regulators will be adequately comforted to accept OpCo--which will initially be under common control with Enron--as a new and truly independent entity. Similarly, OpCo's ability eventually to become a publicly-traded entity and/or raise outside equity will be impaired if the market and applicable regulatory authorities do not accept OpCo as a separate entity.
Id.; see generally Enron: Corporate Fiascos and Legal Implications (Nancy B. Rapoport & Bala G. Dharan eds., forthcoming 2004) (manuscript on file with the Houston Law Review) (using Enron as a teaching example for law and business students).

42 This stands in sharp contrast to, for example, the corporate or accounting perspective. Those involved in nonbankruptcy fields may have much to learn from the Enron story, both prepetition and postpetition. But from a bankruptcy perspective, as is always the case, unless the prepetition activities generate a cause of action under the Bankruptcy Code or applicable nonbankruptcy law against defendants who are able to respond to a judgment, the past is dead and largely irrelevant to the prospects for liquidation or reorganization and distributions to creditors.

43 See Press Release, Enron Corp., Enron Commences Auction Process to Maximize Value of Core Assets (Aug. 27, 2002), http:// www.enron.com/corp/pressroom/releases/2002/ene/29-082702ReleaseLtr.html [hereinafter Enron Core Assets Press Release] (announcing sale of "certain major assets").

44 Enron alluded to these sales when it announced it was filing for Chapter 11 Bankruptcy. See Enron Files for Chapter 11, supra note 40 ("In addition, the company will continue its accelerated program to divest or wind down non-core assets and operations. Details of the units to be affected will be communicated shortly."). Since filing for bankruptcy, Enron has sold over $5 billion in assets. See Rebecca Smith, Enron May Split Off Pipeline Units, Wall St. J., Mar. 20, 2003, at A8. In the context of these asset sales, Enron's management has argued that as opposed to reorganization or liquidation, the § 363 bidding process would both minimize risk and maximize value, by allowing greater flexibility for acceptance of higher and better offers, keeping all sale options open, and avoiding a "fire sale" perception by the market. See OpCo Business Plan, supra note41,at6.
[A]n OpCo § 363 sale on the other hand, accomplishes two objectives for the Estate--it mitigates risk and maximizes value.
....
While the company believes there will be considerable interest in OpCo or its individual assets by unaffiliated third parties through the market-driven §363 bidding process, it is possible that the bids received may not necessarily maximize value to, or be in the best interest of the Estate. Conforming bids might be received that are substantially below the Estate's view of market value or numerous, non-conforming market-based bids may be received for only portions of the OpCo asset base that, upon consideration of the discrete valuations of remaining assets, are detrimental to the going concern value of OpCo as an integrated, regionally focused energy company.
Id. On August 27, 2002, Enron announced its intention to auction the core assets referred to in the OpCo Business Plan. See Enron Core Assets Press Release, supra note 43.
Consistent with a plan outlined in May to maximize the value of its core assets, Enron Corp. announced today that it has commenced a formal sales process for its interests in certain major assets. The company is extending invitations to visit electronic data rooms containing information on 12 of Enron's most valuable businesses to a broad universe of potential bidders with whom the company has executed confidentiality agreements.
Id; see also Jim Kennett, Enron Opens Bids on 12 Businesses to Pay Creditors, detnews.com, at http://www.detnews.com/2002/ business/0208/28/b03-572726.htm (Aug. 28, 2002).
Enron Corp., the former energy trader that owes creditors more than $50 billion, put a dozen remaining businesses up for sale as the company seeks to raise money and get out of bankruptcy.
....
Enron may yet keep the businesses together, said Martin Bienenstock, the company's bankruptcy lawyer.
"We're going to find out whether the pieces together are worth more than they are separately," Bienenstock said. "We need bids to determine that."
Id.; see also Eric Berger, Enron Tests Waters For Big Assets: Bids May Fetch More than Group Sale, Hous. Chron., Aug. 28, 2002, at 1B ("Enron asked Tuesday [August 27, 2002] for bids on 12 of its most valuable remaining assets....The court is using this process to see if the creditors can raise more money by selling these operations piecemeal than by putting them together to build a new company.").

45 See OpCo Business Plan, supra note 41, at 2.

Taking into consideration Enron's core competencies, the market's post-petition dynamics, and the nature of the individual assets comprising the Enron Estate, Enron believes there is significantly more value in a combined company comprised of certain key assets that regionally form an integrated asset portfolio versus separate discrete asset sales. As such, Enron proposes the formation of OpCo Energy Company...to effectuate the separation of an integrated asset portfolio from the bankruptcy Estate. Management believes that such an approach will maximize the value of the business and will allow it to prosper as a going concern. The remaining Estate assets will continue to be liquidated in an orderly process.
Id.

46 See Enron Hopes to Rise From the Ashes, World Gas Intelligence, May 8, 2002, at P4, http://www.energyintel.com/DocumentDetail.asp? ppvorderid=26709&document_id=66634 ("The trading operation has already been sold to Swiss investment bank UBS Warburg....").

47 See Press Release, Enron Corp., Enron Presents Process to Creditors' Committee for Separating Power, Pipeline Company, from Bankruptcy, (May 3, 2002), http://www.enron.com/corp/pressroom/releases/2002/ene/23-050302releaseltr.html.
Enron Corp. (ENRNQ) presented today [May 3, 2002] a process to its Unsecured Creditors' Committee to maximize recoveries through the exploration of a variety of alternatives for moving the company's core energy assets out from under its Chapter 11 case.
....
Under the proposal, which will be facilitated through Section 363 of the Bankruptcy Code, the new company would be an energy infrastructure business focused on the transportation, distribution, generation and production of natural gas and electricity primarily in North, Central and South America.
Id.; see also Week in Review, Enron Asset Sale Could Doom Company's Restructuring, Hous. Bus. J. (Sept. 2002), http://houston.bizjournals.com/houston/stories/2002/09/02/weekinbiz.html.
In May, Enron unveiled a strategy for emerging from bankruptcy that included shedding its name and donning the OpCo moniker to focus on being a mover of electricity and natural gas. The new company would have more than 15,000 miles of pipeline, $10.8 billion in total assets and projected earnings in excess of $1.3 billion in 2003 before interest, income taxes, depreciation and amortization.
Id.

48 For a more detailed enumeration of OpCo's proposed financing, see OpCo Business Plan, supra note 41, at 25. "OpCo assumes that it (or a subsidiary) acquires certain receivables (principal plus accrued interest) held by Enron or its affiliates and payable by unconsolidated subsidiaries of OpCo by issuing equity." Id. "OpCo consolidates investments in investees in which OpCo maintains more than 50% of the voting control of the investees and reflects minority ownership interests accordingly." Id. "OpCo uses the equity method to account for investments in investees in which OpCo does not maintain more than 50% of the voting control (directly or indirectly) of the investees." Id. "Intercompany account balances as of December 31, 2001 between consolidated OpCo subsidiaries and Enron and its affiliates have been netted and reclassified as equity of OpCo." Id.

49 Indeed OpCo's ability to purchase assets was seen by management as one way of ensuring that Enron got a fair or good price for the assets it auctioned. Id. at 3.
OpCo itself will be the stalking horse in an auction process that ensures the market the opportunity to create the highest value for the creditors of the Estate. The market can bid for all or specified segments of OpCo in a transparent auction process. Any qualifying topping offers will be considered.
....
Formation of OpCo will provide support to the auction process, given an energy asset marketplace already overloaded with properties for sale.
Id. Management also believed that the assets were worth more combined as OpCo than they would be were they individually liquidated. See id. ("The expected value of OpCo as a going concern significantly exceeds the expected value resulting from a liquidation of the separate assets."); see also Berger, supra note 44.
Since becoming CEO, Cooper has said he believes the assets have more value as a whole.
To that end, he has proposed that a new business, tentatively called OpCo Energy Co., make a bid on all the assets as a unit. He says that would offer creditors a stream of future revenues worth more than the cash in hand.
Id.

50 See Northwest Natural Gas Co., Form 10-Q, at 14 (2002), available at http://biz.yahoo.com/e/020514/nwngm10-q.html.

On May 3, 2002, Enron publicly announced that it had presented a process to its Unsecured Creditors' Committee which contemplated the establishment of a new energy infrastructure company focused on the transportation, distribution, generation and production of natural gas and electricity. Enron disclosed that the new company, currently called OpCo Energy Company, would be a holding company....

Id. On March 19, 2003, Enron announced that there was no successful bidder for its pipelines, and that consequently it was forming a new entity, PipeCo. Although smaller in scale than the original OpCo, which was to include among other things utilities such as Portland General Electric (PGE), PipeCo follows the same basic plan as OpCo. See Press Release, Enron Board Approves Proposal to Create New Pipeline Company (Mar. 19, 2002), http:// www.enron.com/corp/pressroom/releases/2003/ene/031903releasepdf.html. The new company, temporarily referred to as "PipeCo," would include Enron's interests in Transwestern Pipeline Company, Citrus Corp., and Northern Plains Natural Gas Company.

PipeCo is expected to be a new corporate entity governed by an independent board of directors. Upon resolution of Enron's Chapter 11 bankruptcy case, it is anticipated that shares of PipeCo would be distributed to creditors in connection with Enron's plan of reorganization. The formation of PipeCo will require various Board, bankruptcy court and other regulatory approvals, as well as the consent of the Official Unsecured Creditors' Committee.

Id.; see also Enron Corp., Form 8-K, at 2 (2003), available at http:// www.enron.com/corp/investors/sec/2003/2003-03-19-8-K.pdf. The Company no longer proposes to combine its North American and international energy infrastructure business under one umbrella, as contemplated by the OpCo Energy Company proposal. However, as a result of the auction process and analysis described above, the Company's Board of Directors has determined that it is in the best interests of the Company's stakeholders, including its creditors, to hold the North American Pipeline Interests in a new pipeline operating entity (temporarily referred to as "PipeCo") and to terminate the sales efforts with respect to such interests. PipeCo is expected to be a new corporate entity, governed by an independent Board of Directors and afforded protection from joint and several Enron group liabilities associated with the Enron bankruptcy case.

Id.; see also Michael Rose, PGE Might Go Public-Private: The Willamette Valley Power Proposal Gains Ratepayer Support, Statesman J., June 12, 2002, at 8B ("In May, Enron told creditors it wanted to hew out a new holding company from Enron assets to salvage the most value from its bankruptcy.").

51 Some earlier reviewers of this Article have objected to this technique of removing the debtor's operations from the "fish bowl" of Chapter 11--a place where full disclosure and intense scrutiny are the norm. New Millennium Research Council, A WorldCom Phoenix: Is Bankruptcy a Tool for Competitive Advantage?, at http:// www.newmillenniumresearch.org/archive/summary-09272002.html (Sept. 27, 2002) (reiterating that David Lynn "noted that under Chapter 11, a company must operate in a fishbowl environment--with courts, a trustee, and creditors monitoring [its] every move"). The proposal in this Article is for a procedure to enable such a sale if appropriate under the facts and circumstances of a particular case, not in every case. Bankruptcy courts and professionals will be able to recognize when such a sale structure is appropriate and can design safeguards to provide adequate protection for creditor interests. The structure discussed here is not so very different from a sale to a third party of substantially all the assets of a business where all or a substantial part of the purchase price is paid in stock, promissory notes, or a contingent future interest in property. Nor is it that different from a case consumed by a holding company whose operating company subsidiaries remain outside of bankruptcy.

52 In the OpCo business plan, Enron management claimed that the "'[t]aint' of bankruptcy tarnishes reputation," and that "[c]ustomers are often not willing to enter into new long-term contracts with the Company [Enron]." OpCo Business Plan, supra note 41, at 7. Management also claimed that the "[r]egulatory environment is difficult and can be hostile," but that "OpCo can overcome regulators' tendencies to become distracted with Enron bankruptcy matters, and thus deal more expeditiously with important Company regulatory issues." Id. OpCo would also "be able to share commercial risk with joint venture and alliance partners and employ less capital in the process." Id.

53 Id. at 6 ("[A]n OpCo § 363 sale...accomplishes two objectives for the Estate--it mitigates risk and maximizes value."). The OpCo Business Plan claims that OpCo would maximize value in the following ways: "Significantly More Value Combined vs. Separate ('Going Concern Value')"; "Provides for Value Recovery Opportunity as Market Strengthens"; "Avoids Change in Control Provisions"; "Avoids 'Fire Sale' Perception by the Market ('Hold' scenario is Acceptable)"; "Minimizes Bankruptcy Related Value Erosion"; "Capitalizes on Core Competencies"; and "Governance Remains in Control of Creditor's Committee." Id.

54 See, e.g., Bill Murphy, "Isn't it disgusting?": Kopper Case Angers Many, Hous. Chron., Sept. 1, 2002, at 1A.

Though long accustomed to negative news developments, current and former Enron employees were nonetheless stunned and incensed by one ex-executive's admission that he had simply looted the company.

....

Others also were taken aback that Fastow and Kopper, brilliant financiers and creators of labyrinthine strategies to hide debt, would take part in a criminal enterprise as transparent as a kickback scheme.

Id.; see also William C. Powers et al., Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. 4 (2002).

This personal enrichment of Enron employees, however, was merely one aspect of a deeper and more serious problem....Many of the most significant transactions apparently were designed to accomplish favorable financial statement results, not to achieve bona fide economic objectives or to transfer risk.

Other transactions were implemented--improperly we are informed by our accounting advisors--to offset losses. They allowed Enron to conceal from the market very large losses resulting from Enron's merchant investments by creating an appearance that those investments were hedged--that is, that a third party was obligated to pay Enron the amount of those losses--when in fact that third party was simply an entity in which only Enron had a substantial financial stake.

Id.; see also Report on Board of Directors, supra note 41, at 11.

Steady revelations since October 2001 have raised questions about numerous aspects of the company's operations, from its extensive undisclosed off-the-books dealings, often with companies run by Enron personnel, to an April 2002 SEC filing announcing that the company's financial statements were unreliable and the book value of its assets would have to be written-down as much as $24 billion, to its apparent intention to manipulate the California energy market, to tax strategies which apparently included Enron's ordering its tax department to produce billions of dollars in company earnings through the use of complex tax shelters.

Id. (footnotes omitted).

55 Enron Examiner Neil Batson summarizes the accusations against Enron to include everything from accounting irregularities to money laundering. The list does not include, however, any accusation that Enron mismanaged or poorly ran its asset based businesses at the operations level. See Batson Report, supra note 41, at 11 (“In the months immediately following Enron's disclosures, allegations surfaced of securities fraud, accounting irregularities, energy market price manipulation, money laundering, breach of fiduciary duties, misleading financial information, ERISA violations, insider trading, excessive compensation and wrongdoing by certain of Enron's bankers.”). This is essentially the argument management makes in urging the formation of OpCo. See OpCo Business Plan, supra note 41.

However, Enron historically has had a substantial and profitable asset-based business. These assets have the potential to provide the core of an integrated energy company.

The financial collapse of Enron has not changed the fundamental nature of its physical assets, which management believes are high quality, strategically located and efficiently operated gas and power assets.

Id. at 2.

56 See OpCo Business Plan, supra note 41, at 2.

The constraints of the chapter 11 process have severely hampered the ability of operating management to compete in the marketplace. In order to avoid further deterioration in the value of these assets, the Company believes it is now necessary to consider options for separating these assets from the bankruptcy process on an expedited basis.

....

OpCo minimizes the value erosion that will occur as Enron's assets, customers, partners, employees and others are subjected to the uncertainty of bankruptcy.

OpCo affords a convenient means to preserve the operations of the Estate's most valuable assets. OpCo has a strong operating management team in place with extensive regional and regulatory expertise that would be difficult to replicate.

....

Operating under chapter 11 destroys value. Regulators are distracted, customers are concerned, joint venture partners are distressed, company personnel are dismayed, and many other stakeholders are each adversely impacted by a chapter 11 reorganization. In addition, while in chapter 11, there is no access to the capital markets. Without access to capital it is difficult to compete. The assets of OpCo cannot operate profitably in a chapter 11 environment for an extended period of time and the risk of loss of customers, employees, and in certain cases the right to operate, is high.

Id. at 2-4.

57 Indeed, ongoing litigation and investigations were some of the considerations that led Enron management to conclude that "the probability of successful emergence from a reorganization is limited." See id. at 4.
Enron's business, capital structure and related financings are extremely complex. Many of the resultant financial structures are likely to be contested in the bankruptcy court. This situation, coupled with the sheer magnitude of the value of claims against the Enron Estate, and the significant number of debtors, ensures a lengthy reconciliation process.
...Litigation associated with Enron's complexity and unprecedented issues is not anticipated to be resolved in the near future. There are a substantial number of lawsuits against the Estate for a variety of different reasons; likewise, material litigation exists against others on behalf of the Estate.
...Unlike a typical chapter 11 proceeding, Enron's is clouded and made more difficult and confusing by a series of investigations. The investigations by regulatory, governmental and law enforcement agencies distract management from operations and further concern partners, customers and employees of Enron's still functioning power and gas businesses.
....
Given these factors, among others, Enron believes the probability of successful emergence from a reorganization is limited.
Id.

58 Id. at 6.
The company believes that regardless of the outcome of the §[ ]363 bidding process, value to the Estate is maximized through the prompt separation of OpCo or its businesses from the Estate's chapter 11 burdens. The Company believes the OpCo value proposition is compelling and that any lengthy delay in separation will significantly deteriorate the going concern value of these assets.
Id.

59 See Enron Hopes to Rise From the Ashes, supra note 46 ("By creating the new company, creditors might be able to preserve value, presumably allowing for a disposal of discrete assets or equity in the company as the market picks up again."); see also Creditors to Gain if Enron Trading Arm Is Split Off, Wkly. Petroleum Argus, June 10, 2002, at 7 ("Last month, interim chief executive Steve Cooper proposed pooling $11 billion of power and pipeline assets in the Americas into a new company, Opco, which could be sold to a third party or spun off to creditors."); Steve Jordan, Unlike Parent Company Enron, Omaha, Neb.-Based Natural Gas Firm Survives, Knight-Ridder/Trib. Bus. News, May 20, 2002 ("The company, with the interim name OpCo Energy Co., could belong to Enron's creditors or be sold in a multibillion-dollar auction....The creditors and the Bankruptcy Court are evaluating the proposal and will ask for bids on all of OpCo or its pieces.").

60 Whether the OpCo strategy is actually implemented in the Enron case is beside the point. What is important is that its formulation and announcement recognized the benefits of reorganization by sale and the value of removing operating assets from the administrative costs and stigma of the bankruptcy estate.

61 See, e.g., Patty Reinert & Karen Masterson, Bankruptcy Triggers Legislative Proposals: Congress Eyes Auditing, Retirement Bills, Hous. Chron., Jan. 26, 2002, at 20A.
Reacting to the Enron-Arthur Andersen scandal, lawmakers returned to Capitol Hill this week armed with legislation to protect investors and crack down on corporate misconduct.
....
Some of the proposed legislation would tighten federal oversight of auditing and retirement plan management, cap the amount of company stock employees can hold in their 401(k)s and reduce conflicts of interest between businesses and the accountants policing their books.
Id.

62 But see Daniel B. Bogart, Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back--Something May Be Gaining on You," 68 Am. Bankr. L.J. 155, 159 (1994) ("[A] heightened scrutiny of DIP decisions creates the necessary motivation for the DIP to avoid practices that may have led to the filing. This heightened scrutiny encourages active monitoring of management behavior and fosters a proper level of director and management loyalty."); id. at 236 ("The basic requirement of the 'heightened scrutiny' standard, applied to decisions of directors in prepetition corporate control contests, should be considered the minimum necessary activity by a DIP in meeting its duty of care.").

63 See Leonard P. Goldberger & Harvey L. Tepner, A Guide for Acquiring Businesses in Bankruptcy, 10 J. Bankr. L. & Prac. 521, 533 (2001).

Further, if an expedited transaction is required for strategic business purposes or to preserve the going concern value of the entity being acquired, an acquirer may not have to wait for the more lengthy plan confirmation process to occur.

A sale of assets is generally "out of the ordinary course of business" and may be accomplished by either a negotiated private sale or by a public auction in bankruptcy court.

Id.; see also Ted Janger, Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design, 43 Ariz. L. Rev. 559, 589 (2001) ("At the very least, the Bankruptcy Code seeks to facilitate reorganizations that preserve the going concern value of businesses."); 9D Am. Jur. 2d Bankruptcy § 2600, 164-65 (1999).

Chapter 11 enables a business to reorganize itself and continue as a going concern; it allows the debtor to restructure its business debts so that the business can continue to operate and creditors can receive the going concern value of estate assets as opposed to the liquidation value, which is generally considered to be far less.

Id. (footnotes omitted); see also Baird & Rasmussen, supra note 3, at 777-78.

Even if control rights are not allocated coherently, there is still no need for a collective forum that decides the fate of the firm if the firm can be sold in the marketplace as a going concern. The rise of such markets further undercuts the need for a traditional law of corporate reorganization. Indeed, the ability of modern bankruptcy judges to take advantage of these markets explains many of the Chapter 11 filings in recent years.

Id.; see also In re 4 C Solutions, Inc., 289 B.R. 354, 365-66 (Bankr. C.D. Ill. 2003).

The likelihood that the debtor will find a "white knight" is almost entirely dependent upon the saleability of iWarranty, the true value of which is unknown and the subject of wide-ranging speculation. With two modules nearly market-ready, the debtor is entitled to use the protections afforded by Chapter 11, for a reasonable period of time, to facilitate its search for an investor/ purchaser....This in all likelihood, is the only hope that the debtor has of preserving its going concern value and maximizing the property available for distribution to creditors.

Id.; see also In re Brookfield Clothes, Inc., 31 B.R. 978, 986 (S.D.N.Y. 1983).

Simply put, the wasting asset in this instance may be characterized as the "going concern" value of the fully stopped business.

....

In sum, we conclude that an "emergency sale" of substantially all of the assets of a debtor-in-possession is permitted under § 363(b) and that Brookfield met its burden of showing sufficiently exigent circumstances to warrant the immediate sale to Zion.

Id.

64 See, e.g., In re Eng'g Prods., Inc., 121 B.R. 246, 249 (Bankr. E.D. Wis. 1990) ("Of paramount importance is the existence of good faith--of full disclosure and fair dealing on the part of all interested parties."); In re Indus. Valley Refrigeration & Air Conditioning Suppliers, Inc., 77 B.R. 15, 21 (Bankr. E.D. Pa. 1987).

We therefore conclude that the standards for allowance of a pre-confirmation sale pursuant to § 363(b)(1) are that the sale proponent must show not only that there is both a "sound business purpose" why the sale should be allowed to take place outside of the ordinary course of Subchapter II of Chapter 11, taking into account the factors suggested by Lionel, but that the proponent must also make a strong showing that all of the requirements for any § 363(b)(1) sale are met....These elements are the provision of accurate and reasonable notice; a showing that the price to be paid is adequate, i.e., fair and reasonable; and establishing that "good faith," i.e., the absence of any lucrative deals with insiders, is present. The strength of the showing necessary to satisfy each of these elements is heightened by the fact that the protections of Subchapter II of Chapter 11 are absent, and such agreements are typically considered on an expedited basis, thus impeding interested parties from making the complete investigation and amassing of contrary evidence which otherwise would be possible.

Id. Some courts have held that appropriate notice is a requirement for avoiding a violation of creditors' due process rights. See, e.g., In re F.A. Potts & Co., 86 B.R. 853, 860-61 (Bankr. E.D. Pa. 1988), aff'd, 93 B.R. 62 (E.D. Pa.), aff'd, 891 F.2d 280 (3d Cir. 1989).

Appearing more than 130 times in the Rules, the term "notice" and the related procedures are a cornerstone of bankruptcy practice. The notice requirement is the fulcrum we use to balance a debtor's title 11 protections against the Fifth Amendment guarantee that creditors will not be deprived of "life, liberty or property" without "due process of the law."

Id. Concerns about transparency and disclosure have led some courts to express reservations about some types of nonplan asset sales. See, e.g., In re N. Atl. Millwork Corp., 155 B.R. 271, 283 (Bankr. D. Mass. 1993).

The failure on the part of the Debtor, Creditors' Committee, and Fleet to disclose the extent and gross value of preference claims (over $3 million) in the Joint Motion to Sell and, particularly, at the May 28, 1991 hearing, is precisely why sales of all assets are disfavored, at least by this Court, in the absence of full disclosure, a plan, and the vote of all creditors entitled to vote on a plan.
Id.

65 See, e.g., In re Eng'g Prods., 121 B.R. at 249 ("In addition, due process requirements must be addressed. Persons in interest must be given adequate notice of the sale and an opportunity to be heard and object."); In re Naron & Wagner, Chartered, 88 B.R. 85, 88 (Bankr. D. Md. 1988).
Basic to the structure of the Bankruptcy Code is that debtors are provided a fresh start through liquidation, adjustment of debts, or reorganization, while creditors and other parties in interest are protected by the requirement they receive notice and an opportunity to be heard on matters which affect their positions.
Id.

66 Courts are simply not well equipped for these tasks. Nor is the adversarial system of traditional American litigation, which tends to leave the court faced with two or more extreme positions on any disputed issue, from which it may choose one or adopt its own middle ground. Again, the market is the best alternative mechanism for resolving the question of value, and the court and the parties' efforts should be directed at perfecting the market to enhance its operation rather than simulating or forecasting it. See Lucian Arye Bebchuck & Jesse M. Fried, A New Approach to Valuing Secured Claims in Bankruptcy, 114 Harv. L. Rev. 2386, 2388 (2001) ("One of the most difficult problems in business bankruptcies is valuing the individual assets...."); John M. Czarnetzky, Time, Uncertainty, and the Law of Corporate Reorganizations, 67 Fordham L. Rev. 2939, 2993 (1999).
It ought not to be the province of a government official--though that official is stipulated to be diligent, intelligent, and honest--to assess the economic value or viability of entrepreneurial plans. The bankruptcy judge is ill-equipped to process the information necessary to make decisions regarding the "feasibility" of a proposed plan, or to make any judgments about value beyond setting the liquidation price.
Id.; see also Lisa Hill Fenning, Dicta: Business Management: The Heart of Chapter 11, Am. Bankr. Inst. J., Oct. 1996, at 35 ("Whether a confirmable plan is likely depends largely upon business risks and probabilities. Most bankruptcy judges are understandably uneasy about making determinations of business viability, lacking the background and training to assess those risks and probabilities.").

67 Czarnetzky, supra note 66, at 2994.
[I]t might fairly be asked: What should be the role of the court in a chapter 11 case? Simply put, the bankruptcy court should do what any court does best--settle the legal disputes brought before it. Chapter 11 should limit such disputes to the extent possible to those that safeguard (but do not meddle with) the process itself. Such litigation would, of course, include disputes over some of the core legal constructs necessary to the bankruptcy process--for example, the bankruptcy estate, order and priority of distribution and litigation over the viability and scope of claims. In sum, the court should recognize that a chapter 11 primarily is not a lawsuit, it is a forced workout of a troubled business. As such, chapter 11 ought to restrict the court's role as much as possible to questions of law, and permit the business people to take care of business.
Id. In the Author's view, replacing the plan process with a sale process would be even more preferable as it would go far in eliminating the opportunity for insiders and others with superior knowledge or lower cost of obtaining knowledge from influencing the reorganization process to their own benefit. The common practice of granting the executives and directors that presided over a business's slide into financial ruin with large "incentive" and "retention" bonuses, and including releases of all liability for those nondebtor insiders in plans of reorganization, are examples of these abuses. See George W. Kuney, The Hijacking of Chapter 11 (2003) (unpublished manuscript, on file with the Houston Law Review) [hereinafter Kuney, Hijacking Chapter 11]. The Author believes that de facto replacement of the plan process may be the end result if a nonplan sale procedure is enacted as a result of "natural selection" between the two processes. Because of lower transaction costs and greater efficiencies, businesses reorganizing by nonplan sale are likely to be the "strong" that survive. See Charles J. Tabb, The Future of Chapter 11, 44 S.C. L. Rev. 791, 850 (1993) ("A sale establishes a precise and hopefully accurate value and can often be accomplished much more rapidly and inexpensively than a negotiated plan. An actual sale neatly bifurcates the issues of how the assets should be deployed and how the value of those assets should be distributed to claimants.").

68 See Brett Rappaport & Joni Green, Calvinball Cannot Be Played on This Court: The Sanctity of Auction Procedures in Bankruptcy, 11 J. Bankr. L. & Prac. 189, 193 (2002) ("Public auctions are preferred over private auctions to ensure a market price, so that optimal

return can be realized for creditors."). Indeed, some commentators have argued that the market is now sophisticated enough to make Chapter 11 reorganization an anachronism. See Baird & Rasmussen, supra note 3, at 755-56.
Today's investors allocate control rights among themselves through elaborate and sophisticated contracts that already anticipate financial distress. In the presence of these contracts, a law of corporate reorganizations is largely unnecessary.
...Today, both small and large firms can be sold as going concerns, inside of bankruptcy and out. The ability to sell entire firms and divisions eliminates the need for a collective forum in which the different players must come to an agreement about what should happen to the assets. That decision can be left to the new owners.
Id.

69 See 11 U.S.C. § 1123(a)-(b) (2000) (detailing what a plan shall and may do).

70 This excludes matters directly affecting the debtor's relations with and distributions to its creditors that shall or may be included in a plan. See id. § 1123(a)(1) (requiring plan to designate classes of claims); id. § 1123(a)(2) (requiring plan to specify unimpaired classes); id. § 1123(a)(3) (requiring plan to specify treatment of impaired classes); id. § 1123(a)(4) (requiring plan to provide for same treatment among claims in a class); id. § 1123(a)(5)(F) (requiring the "cancellation or modification of any indenture or similar instrument"); id. § 1123(a)(5)(G) (requiring the cure or waiver of any default); id. §1123(a)(5)(H) (changing terms of outstanding securities); id. § 1123(a)(5)(I) (amending the debtor's charter); id. § 1123(a)(5)(J) (addressing the issuance of securities); id. §1123(a)(6) (addressing the amendment of debtor's charter regarding nonvoting securities); id. § 1123(b)(1) (allowing plan to impair, or not, any class); id. § 1123(b)(3) (allowing plan to provide for the settlement or prosecution of a claim or cause of action); id. § 1123(b)(5) (allowing the plan to modify rights of secured creditors). This also excludes matters that would be addressed in a Chapter 7 case to which Chapter 11 was converted. See id. § 726 (detailing Chapter 7 distribution system); id. § 1112(a) (allowing the conversion of Chapter 11 case to Chapter 7 case).

71 See id. § 1123(a)(5)(B).

72 See id. § 1123(a)(5)(C).

73 See id. § 1123(a)(5)(D).

74 See id. § 1123(a)(5)(E).

75 See id. § 1123(b)(4).

76 See id. § 1123(a)(5)(J).

77 See George W. Kuney, Going Public Via Chapter 11: 11 U.S.C. Sections 1125(a) and 1145, 23 Cal. Bankr. J. 3, 13 (1996).

78 Refer to Part III infra. See Kuney, Misinterpretations I, supra note 2, at 272-82 (analyzing the effects of reorganization by sale rather than by plan on parties in interest and suggesting that unsecured, nonadministrative priority creditors are probably damaged by the less-involved process for sale rather than plan proposal and confirmation); see also D.S.C. Bankr. R. 6004 (detailing extensive disclosures required for nonplan sales in first sixty days of case).

79 See Kuney, Misinterpretations I, supra note 2, at 242 n.30 (describing the murky, sticky bog described in the text and evolution of more lenient nonplan sale requirements in response to recognition of that bog). As the Appendix of this Article demonstrates, the courts have turned to their local rules to address the lack of legislative guidance for the prevalent practice of reorganization by nonplan sale. The treatment of these sales by local rules has been of various degrees and various rigidity and vigor, perhaps reflecting a proper judicial reluctance to engage in what is essentially a legislative function. Refer to Appendix infra. It would appear that the local rules are developed by the courts to fill gaps in the statute and national procedural rules left by Congress and the Rules Committee and either made necessary or requested by the attorneys practicing before the courts involved. If these other bodies acted to fill the gaps, the local rules--beyond general practices regarding how to place a motion on a particular judge's calendar and the like--would not be needed.

80 Given that Chapter 11 is a creature of statute, the easiest way of demonstrating this Article's proposal is to present blacklined amendments to the existing Code. It is surprising how little in the way of amendment implementing this proposal would require. Additions to the statute are shown with underlined text. [Deleted text is enclosed in square brackets.]

81 See Kuney, Misinterpretations I, supra note 2, at 286-87 (asserting that action by Congress and the courts is needed to overcome the dominant interpretation of § 363(f) "that Congress did not intend"); Kuney, Misinterpretations II, supra note 2, at 331 (viewing court action as necessary to return to the original intent of §§ 363 and 1141).

82 See Kuney, Misinterpretations I, supra note 2, at 273-82 (analyzing the impact of the rise in reorganization via § 363 sales as opposed to reorganization via plans of reorganization and finding that the trend benefits secured creditors and priority creditors to the detriment of junior creditors, equity holders, suppliers and customers, the surrounding community and the public, and slow-moving governmental units).

83 11 U.S.C. §§ 1112, 1129 (2000) (addressing procedures for conversion to Chapter 7, dismissal, and plan confirmation).

84 See generally Miller, supra note 13, at 438-40 (noting that the 1994 amendments to § 105 restored bankruptcy judges to many of their pre-Code administrative powers and concluding that this causes a laudable change). Under the current § 105 (as amended in 1994), although the court is empowered to take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process, and can also hold status conferences and set deadlines for assumption or rejection of contracts or the plan confirmation process, the court has no ability to directly set a deadline for or order a sale. See 11 U.S.C. § 105. Of course, an indirect deadline can be set by the court sua sponte or on motion ordering dismissal or conversion of a case if a sale does not take place within a particular period of time. See id. § 105(d). Thus, this amendment merely gives the court the power to do directly what it can currently do indirectly.

85 11 U.S.C. § 1125(a) provides:
(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan;....
Id. Of course, under this proposal for explicit recognition of nonplan sales, § 1125 would itself have to be amended to reflect its applicability to nonplan sales as well as plans of reorganization. Refer to notes 113-15 infra and accompanying text.

86 Weil, Gotshal & Manges, Reorganizing Failing Businesses: A Comprehensive Review and Analysis of Financial Restructuring and Careful Reorganization 11-9 (ABA 2003) ("Notice of a sale should provide adequate information about the proposed sale because it is the functional substitute for the information that would be required in a disclosure statement if the transaction were proposed under a chapter 11 plan.").

87 Although the process usually has at least two steps, as described, it may require more than two hearings, especially when multiple bidders appear offering differing mixes of consideration as the purchase price, and careful evaluation of the highest and best purchase price must take place. It is also possible for the sale to be approved in a single hearing or with no hearing at all. See Kuney, Misinterpretations I, supra note 2, at 239 n.17. In the large corporate case, however, at least two hearings are typically held due to the interest of various constituencies and potential alternative bidders in the sale and business opportunity that it presents.

88 See Donald S. Bernstein, Practical Guide to Acquiring the Troubled Company, SC78 A.L.I.-A.B.A. Course of Study 317, 330 (1998).
If the acquisition will occur while the target is in Chapter 11...notice of the proposed sale must be sent to creditors and other parties-in-interest and the Bankruptcy Court will hold a hearing to consider the proposed sale....The terms of the buyer's offer will be publicized, "higher and better" offers typically will be solicited and objections to the sale and any competing offers will be considered....
Id.

89 Id.

90 Refer to Appendix infra (collecting and analyzing local rules relating to § 363(b) and (f) sales nationwide).

91 See Kuney, Misinterpretations I, supra note 2, at 242 n.30.

92 See In re Ex-Cel Concrete Co., 178 B.R. 198, 200, 202-05 (B.A.P. 9th Cir. 1995) (engaging in lengthy discussion and analysis to determine if notice of a proposed asset sale provided to counsel for a secured creditor in an unrelated matter who was on vacation

at the time constituted "effective notice" and finding, ultimately, that it did not); In re Moberg Trucking, Inc., 112 B.R. 362, 363 (B.A.P. 9th Cir. 1990) (holding that lack of notice to federal government lienholder made § 363(m) mootness argument unavailable upon appeal). See generally Philip A. Schovanec, Comment, Bankruptcy: The Sale of Property Under Section 363: The Validity of Sales Conducted Without Proper Notice, 46 Okla. L. Rev. 489, 498-503 (1993) (reviewing notice requirements of Bankruptcy Code §§102(1) and 363 and Federal Rules of Bankruptcy Procedure 2002 and 6004).

93 See C.R. Bowles & John Egan, The Sale of the Century or a Fraud on Creditors?: The Fiduciary Duty of Trustees and Debtors in Possession Relating to the "Sale" of a Debtor's Assets in Bankruptcy, 28 U. Mem. L. Rev. 781, 805-36 (1998) (discussing overbidding issues from a practical and ethical perspective).

94 Id. at 805-08 (discussing overbidding procedures and incentives).

95 See In re Am. W. Airlines, Inc., 166 B.R. 908, 912-13 (Bankr. D. Ariz. 1994) (discussing varying standards by which to evaluate whether or not to approve break-up fee provisions); Bowles & Egan, supra note 93, at 808-27 (summarizing then-current judicial analysis of bidding incentives in bankruptcy cases); Robert T. Kugler & Douglas R. Boettge, In Search of the Elusive Break-Up Fee, 19 Am. Bankr. Inst. J., Sept. 2000, at 14 (reviewing standards for approval of break-up fees including the "modified business judgment standard," the "'best interest of the estate"' test, and the "§ 503(b) standard"); Bruce A. Markel, The Case Against Breakup Fees in Bankruptcy, 66 Am. Bankr. L.J. 349, 352-80 (1992) (collecting and analyzing cases addressing break-up fees; the article remains fresh and relevant over eleven years after publication); Houlihan Lokey Howard & Zukin, 1999 Transaction Termination Fee Study (Apr. 2000) (privately published, copy on file with Author) (summarizing termination fees that were part of 322 announced transactions in calendar year 1999 of publicly traded target companies with an aggregate transaction value of at least $50 million and finding that those fees ranged from 0.2% to 8.2% with a mean and median of 2.9%).

96 Kuney, Misinterpretations I, supra note 2, at 238-45, 261-67 (illustrating that in practice, sales are free and clear of claims and interests). One reviewer of a draft of this Article reacted extremely negatively to the proposed revision of § 363(f). He read it even more broadly than is intended and passed over the cross-references to § 363(b), (c), and (e). This led him to believe that, under the proposed language, a trustee could sell, for example, land owned by a nondebtor over which the debtor had, prepetition, only an easement. This is not correct for at least two reasons. First, the proposed amended statute is not a stand-alone power of sale. Rather, it refers to sales of property under § 363(b) and (c). Both of those subsections speak only to sales of "property of the estate." 11 U.S.C. §363(b) (2000) ("The trustee...may...sell...other than in the ordinary course of business, property of the estate."); id. § 363(c) ("[T]he trustee may enter into transactions, including the sale...of property of the estate, in the ordinary course of business...."). In the posited hypothetical, the land is not property of the estate, see 11 U.S.C. § 541 (defining property of the estate broadly, but confining it to prepetition property interests of the debtor, property interests of the debtor's spouse, property recovered by the trustee under various sections of the Code, certain postpetition property interests that the debtor may acquire, proceeds and products of property of the estate, and any interest in property that the estate acquires postpetition), and therefore the trustee could not sell it. Even in the case of a § 363(f)(4) sale of property over which there is a bona fide dispute, and therefore could conceivably be a sale of property that is not property of the estate, courts require a showing that the debtor or estate has an interest in the property in question before exercising their sale jurisdiction. Kuney, Misinterpretations I, supra note 2, at 250-51 (stating this proposition and citing authorities). Second, even if the trustee could somehow manage to sell the land, the trustee could only do so if able to provide the owners and others holding property interests in the land with adequate protection of their interests. This is true even without the specific reference to § 363(e) included in the proposed amendment, see 11 U.S.C. § 363(e), but the explicit cross-reference makes it even more clear, precisely to prevent this overbroad interpretation.

97 See Kuney, Misinterpretations I, supra note 2, at 261 & n.101.

98 In re Trans World Airlines, Inc., 322 F.3d 283, 292 (3d Cir. 2003).

> "An additional difficulty with the plaintiff's position is that it would seriously impair the trustee's ability to liquidate the bankrupt's estate. If the trustee in a liquidation sale is not able to transfer title to the bankrupt's assets free of all claims, including civil rights claims, prospective purchasers may be unwilling to pay a fair price for the property, leaving less to distribute to the creditors."

Id. (quoting Forde v. Kee-Lox Mfg. Co., 437 F. Supp. 631, 633-34 (W.D.N.Y. 1977)). Here the Third Circuit solves the problem by reliance upon practice rather than the language of the statute. Refer to note 7 supra (discussing reactions of practitioners to the

suggestion that nonplan sales free and clear of claims were not authorized by the Code). This is similar to the same court's approach in Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003), where, in a lengthy opinion, it held that nontrustees and nondebtors in possession may be authorized to bring avoidance actions despite lack of express authorization by the Code, again validating a practice rather than hewing to the language of the statute. The opinion states at one point:

While the question in Hartford Underwriters [U.S. Supreme Court precedent seemingly mandating a holding opposite from the one adopted by the Cybergenics majority, see 530 U.S. 1 (2000)] was one of a nontrustee's right unilaterally to circumvent the Code's remedial scheme, the issue before us today concerns a bankruptcy court's equitable power to craft a remedy when the Code's envisioned scheme breaks down. We believe that Sections 1109(b), 1103(c)(5), and 503(b)(3)(B) of the Bankruptcy Code evince Congress's approval of derivative avoidance actions by creditors' committees, and that bankruptcy courts' equitable powers enable them to authorize such suits as a remedy in cases where a debtor-in-possession unreasonably refuses to pursue an avoidance claim. Our conclusion is consistent with the received wisdom that "[n]early all courts considering the issue have permitted creditors' committees to bring actions in the name of the debtor in possession if the committee is able to establish" that the debtor is neglecting its fiduciary duty.

Id. at 552-53 (alteration in original). Regardless of one's conclusion on the merits of Cybergenics, this passage is not the most convincing. The easy fix for the problem of a debtor in possession that neglects its fiduciary duties and unreasonably refuses to pursue an avoidance action is appointment of a trustee for cause, in this case, neglect of fiduciary duty. Drawing on an analogy suggested by a group of law professors, the Cybergenics court characterizes the trustee remedy as substituting a chainsaw for a scalpel. Id. at 577. But this is the mechanism that the Code provides. The fix, if one is to be had, should be had in Congress, not the courts, as the dissent in Cybernetics recognized. Id. at 580-87 (Fuentes, J., dissenting).

Perhaps the Cybernetics court could have better approached the issue by observing that the plain language Justices on the Supreme Court can approach reading the Code with the ease and imagination of a computer, but that, in the trenches, the Code as written does not always work. It could then have either refused to extend Hartford Underwriters beyond its specific facts or could have followed that precedent and included a statement to the effect that it had to do so based upon stare decisis but, if writing on a clean slate, it would not do so. This would then leave the matter where it should be addressed, in Congress or the Supreme Court. Both bodies are properly empowered to make corrections to applicable law, Congress to the Code, the Supreme Court to its own precedent.

On June 26, 2003, Congressman Conyers introduced H.R. 2609 with the somewhat confusing claim that it is a bill "[t]o amend title 11, United States Code, to provide for the avoidance of certain transfers, and the alternate prosecution of certain actions, relating to certain retirement benefits." H.R. 2609, 108th Cong. (2003). Far from being confined to actions involving retirement benefits, the bill contains a section that would provide firm legislative authority for the Cybergenics result:

If the trustee consents or fails to commence a proceeding authorized under section 506, 543, 544, 545, 547, 548, 549, 550, 552, 553, or 724, on request of a party in interest or a committee of creditors appointed under section 1102 of this title, after notice and a hearing, the court may authorize such party in interest or committee of creditors to commence and prosecute such proceeding if the court finds that commencing and prosecuting such proceeding is in the best interest of the estate and for the benefit of the estate.

Id. § 2.

99 After all, obtaining secured credit is very similar to a sale, albeit a contingent sale. When a debtor grants a lien or security interest in exchange for loaned funds, the debtor is transferring a present property interest to the lender (the lien or the pledge) that confers a contingent future ownership right as part of the consideration to obtain funds. Should the debtor fail to repay the loan according to its terms, the creditor's rights to the collateral become present possessory ownership rights subject to any senior liens or other interests through the process of foreclosure. The transaction thus can be characterized as a conditional sale of the collateral or an interest in the collateral. Understanding that hypothecation and outright sale involve similar considerations suggests that the same procedures may be used to approve each type of transaction.

100 Fed. R. Bankr. P. 4001(c)(2).

101 See, e.g., In re Payless Cashways, Inc., 268 B.R. 543, 544-45 (Bankr. W.D. Mo. 2001). In Payless, the day the case was filed, the debtor filed a motion to grant administrative expense priority to critical vendors for postpetition credit, which the court, sua sponte, treated as a motion to obtain credit, heard and preliminarily granted that day on "emergency notice" under Rule 4001(c)(2). Id.; Marcus Cole, "Delaware Is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy, 55 Vand. L. Rev. 1845, 1910 app. 1 (2002) (reprinting Open Letter from Judge Peter J. Walsh to the Delaware Bankruptcy Bar that discusses first day DIP financing

orders under Rule 4001(c)(2)); see also 4 William L. Norton, Norton Bankr. L. & Prac. 2d § 87:18, at 87-88 (2002) (collecting and analyzing cases).

102 Fed. R. Bankr. P. 4001(c)(2).

103 See, e.g., In re Payless Cashways, 268 B.R. at 547 (implying that debtor's need for lumber from critical vendors in order to supply customers who would otherwise go elsewhere for all their construction products satisfied the immediate and irreparable harm standard under Rule 4001(c)(2)); In re Pan Am. Corp., Nos. 91 CIV. 8319 (LMM) to 91 CIV. 8324 (LMM), 1992 WL 154200, at *4, *6 (S.D.N.Y. June 18, 1992) (holding that potential loss of routes and passenger confidence satisfied immediate and irreparable harm standard); In re Ames Dep't Stores, Inc., 115 B.R. 34, 36, 38 n.4 (Bankr. S.D.N.Y. 1990) (noting that "[t]he need for cash is usually immediate" and that the need for "[t]rade credit is crucial" to an ongoing business).

104 See Cole, supra note 101, at 1910 app. 1 (reprinting Open Letter from Judge Peter J. Walsh to the Delaware Bankruptcy Bar; noting, inter alia, that proposed orders for obtaining credit under Rule 4001(c)(2) "should not state that the parties in interest have been given 'sufficient and adequate notice' of the motion").
Nine times out of ten this is simply not true. Rule 4001(c)(2) contemplates an expedited hearing with little or no notice (at least not the type of notice that would be sufficient to prepare for an effective participation by third parties). Consequently, the order should simply recite that the hearing is being held pursuant to the authorization of Rule 4001(c)(2).
Id. at 1912.

105 See id.; see also In re Ames Dep't Stores, 115 B.R. at 38 n.4 (noting "[t]here are few reported decisions" regarding motions to obtain credit because of the workload of the bench, the volume of such motions, and the time that would be necessary to write such opinions).

106 See, e.g., In re Indus. Valley Refrigeration and Air Conditioning Suppliers, Inc., 77 B.R. 15, 21 (Bankr. E.D. Pa. 1987).
The strength of the showing necessary to satisfy each of these elements is heightened by the fact that the protections of Subchapter II of Chapter 11 are absent, and such agreements are typically considered on an expedited basis, thus impeding interested parties from making the complete investigation and amassing of contrary evidence which otherwise would be possible.
Id.

107 This invisible hand, among other things, is the subject of another article. See Kuney, Hijacking of Chapter 11, supra note 67.

108 See Kuney, Misinterpretations I, supra note 2, at 241 n.28 (discussing § 363(m) and equitable mootness authorities). See generally John Collen, Bankruptcy Sales of Real Estate: Section 363(m) Title Endorsements, 26 Real Est. L.J. 126 (1997) (exploring the meaning of § 363(m)).

109 Refer to note 9 supra (discussing these two exit strategies).

110 See generally Colleen E. Medill, Challenging the Four "Truths" of Personal Social Security Accounts: Evidence from the World of 401(K) Plans, 81 N.C. L. Rev. 901 (2003) (evaluating critically the final recommendations of the President's Commission to Strengthen Social Security).

111 See Kuney, Misinterpretations I, supra note 2, at 278-80 (discussing how reorganization by sale rather than by plan of reorganization bypasses statutory protections for retiree benefits that are part of the plan process).

112 Id.

113 Congress deliberately defined "adequate information" in an open-ended manner, trusting the courts to make particular case-by-case decisions, without requiring burdensome, unnecessary, and cumbersome detail. In re Dakota Rail, Inc., 104 B.R. 138, 143 (Bankr. D. Minn. 1989). The current statute expressly provides that a disclosure statement need not include a valuation or appraisal of the debtor or its assets. 11 U.S.C. §1125(b) (2000). The same standards should apply to disclosure regarding a proposed nonplan sale.

114 In re Metrocraft Publ'g Servs., Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984) (reviewing disclosure statement approval standards and setting out a nineteen factor list of items of information, including some of those listed in the text of this Article).

115 This is not to say that objecting to a disclosure statement on factually or legally valid grounds which a party does not really care about in order to gain an unrelated or distantly related concession from the debtor is inappropriate or should be prohibited. That is a hallmark of Chapter 11 practice. Cf., e.g., Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987) (rejecting the establishment of an emergency treatment fund for tubal reconstructive surgery or in vitro fertilization to eligible Dalkon Shield claimants on the ground that Chapter 11 disbursements-- other than under a confirmed plan of reorganization--violated the Bankruptcy Code, even though the cost to the estate of delaying payment to the claimants would dramatically increase their claims to the detriment of equity holders and other creditors). However, by limiting the scope of disclosure regarding a nonplan sale to issues relating to the sale itself, as opposed to an entire reorganization, the scope of these objections can be narrowed, resulting in a process that is more streamlined than the plan confirmation process, which is exactly the result that the insolvency community seeks to obtain through nonplan sales.

116 Thus, consistent with existing law, under nonplan sales and plan sales alike, a secured creditor's § 363(k) credit bid rights will be preserved. Section 363(k) provides: “At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may offset such claim against the purchase price of such property.” Thus, by its own terms, 363(k) applies to 363(b) sales. Under § 1129(b)(2)(A)(ii), covering cram down upon a secured creditor whose collateral is to be sold, the sale is also subject to the 363(k) credit bid right.

117 See In re Automationsolutions Int'l, LLC, 274 B.R. 527 (Bankr. N.D. Cal. 2002) (reviewing proposed order approving sale of substantially all the assets for a business and rejecting as unsupportable a § 1146(c) tax exemption provision). But see In re Hechinger Inv. Co., 276 B.R. 43 (D. Del. 2002) (upholding the § 1146(c) exemption provision in a sale order because the sale was substantially similar in effect to a plan and limiting §1146(c) to postconfirmation transactions would undermine the purpose of facilitating chapter 11 plans), rev'd, 335 F.3d 243 (3d Cir. 2003).

118 Refer to Appendix infra.

119 See C.D. Cal. Bankr. R. 6004-1(b) (fifteen days); D. Colo. Bankr. R. 604 (fifteen days); D.D.C. Bankr. R. 2002-1(b) (twenty days); M.D. Fla. Bankr. R. 6004-1(a) (twenty days); S.D. Ill. Bankr. R. 2002-1(A) (not specifying the number of days, but allowing for sale without involvement of the court); N.D. Iowa Bankr. R. 6004-1(a) (twenty days); E.D. La. Bankr. R. 9013-1(B)(b) (twenty to thirty days); D. Md. Bankr. R. 2002-1(a) (twenty days); E.D. Mich. Bankr. R. 6004-1(a) (fifteen days); D.N.H. Bankr. R. 6004-1(a)(3) (twenty days negative notice when the sale is not of all or substantially all of the assets); S.D.N.Y. Bankr. R. 2002-2(b) (twenty days); E.D.N.C. Bankr. R. 6004-1 (fifteen days); D.N.D. Bankr. R. 2002-1 (fifteen days if notice of sale filed by trustee; court order required if notice of sale filed by the debtor); S.D. Ohio Bankr. R. 6004-1(b)(1)(F) (twenty days); N.D. Okla. Bankr. R. 2002(a), 6004 (twenty days and objections must be served and filed not less than five days before the proposed sale); D.S.C. Bankr. R. 6004-1, 9014-2 (referring to Clerk's Instruction 9014-2(d), which stipulates that the time period is fifteen days); N.D. Tex. Bankr. R. 2002.1(a)(2), 6004.1(a) (twenty days); D. Vt. Bankr. R. 6004-1(b)-(c) (follows the minimum notice period in the Federal Bankruptcy Rules of Procedure); E.D. Wash. Bankr. R. 2002-1(c)(1) (twenty-three days).

120 See S.D. Ala. Bankr. R. 9007-1(a)(3), (b)(4) (requiring twenty days negative notice for objections to motions to use, sell, or lease property not in the ordinary course of business); S.D. Cal. Bankr. R. 2002-2(d) (after debtor in possession files a notice of intended action, persons opposing have twenty-eight days (if personal service) or thirty-one days (if service by mail) to file a request and notice for hearing); M.D. Fla. Bankr. R. 2002-4(a)(3), (b)(3) (allowing a trustee to file a notice of hearing on proposed sale with an opportunity to object twenty days prior to the hearing date); S.D. Fla. Bankr. R. 9013-1(D)(2) (twenty days negative notice, and stating that failure to respond will be deemed consent to the entry of the order in the form attached to the motion); D. Haw. Bankr. R. 9013-1(c) (requiring movant to serve notice and opportunity to be heard stating that if there is no response within fifteen days of service the court may grant relief by default); D. Me. Bankr. R. 6004-1 (requiring a minimum twenty day period for filing objections, which may be shortened by a court order, and allowing the court to issue an order following the minimum notice period for sales of the debtor's estate); D. Mass. Bankr. R. 6004-1(a)(3) (allowing the court to approve a private sale when no objections have been filed); E.D. Mo. Bankr. R. 9061-1(A)-(B) (a response and request for hearing must be filed within twenty days of service of motion to sell estate property); D. Mont. Bankr. R. 9013-1(d) (general motion practice provides for ten day negative notice from date of service of motion for sale); D.N.M. Bankr. R. 9013-1(c)(1) (general motion practice provides for twenty day negative notice from date of service of motion); E.D.N.Y. Bankr. R. 2002-1(b) (requiring twenty day notice after filing a notice of sale); W.D.N.C. Bankr.

R. 9013-1(e) (objectors have fifteen days to respond after service of the motion); D.N.D. Bankr. R. 2002-1 to 2002-2 (fifteen day negative notice and court order required if notice and motion for sale filed by the debtor; no order required if filed by trustee); M.D. Pa. Bankr. R. 6004(a)-1(b)(1)(L) (requiring notice of twenty days for objection); D.R.I. Bankr. R. 6004-1(b) (although not officially termed a negative notice procedure, motion for a sale outside the ordinary course of business can be ordered and made without a formal hearing if there are no objections to the notice of the sale); D.S.C. Bankr. R. 6004-1(b), 9014-2, CI-9014-2(c) (providing for twenty day "passive" (negative) notice); M.D. Tenn. Bankr. R. 9013-1(a) (general motion procedure provides for twenty day negative notice from date of service of the motion); W.D. Tenn. Bankr. R. 9013-1(b) (same); E.D. Tex. Bankr. R. 9007(a) (twenty day negative notice procedure from date of service of the motion and notice of sale); S.D. W. Va. Bankr. R. 8.01(d)(2) (twenty day negative notice required).

121 D. Alaska Bankr. R. 6004-1(a)(2) (requiring the notice to contain the terms of sale including the name of the purchaser); D. Ariz. Bankr. R. 6004(a) (requiring the notice of sale to set forth the terms and conditions of the offer, whether higher or better bids can be entertained, a description of the property, the date by which objections must be filed, whether there is an appraisal and, if so, the value stated therein, all entities known to have an interest in the property, and whether the sale is free and clear of liens and interests or subject to them and a description of any such interests); D.D.C. Bankr. R. 6004-1(a)(3), (5) (requiring notices to identify the purchaser, state all consideration paid and to be paid by the purchaser, and the terms of payment); M.D. Ga. Bankr. R. 6004-1(b), (d) (requiring the name and address of the proposed buyer to be in the notice, as well as a description of the property); D. Idaho Bankr. R. 2002.1(b)(1)(A)-(D) (requiring a description of the property, time and place of sale, terms of sale, and whether the sale is free and clear of liens to be included in the notice); N.D. Iowa Bankr. R. 6004-1(e) (requiring a reasonable description of the property); E.D. Ky. Bankr. R. 6004-1 (requiring notice to state whether the sale is subject to liens and interests); D. Me. Bankr. R. 6004-1 (requiring the notice to disclose the terms and conditions of the sale); D. Md. Bankr. R. 6004-1(a)(3), (a)(5), (b) (requiring the name of purchaser and payment terms of the sale and limiting certain types of charges paid in connection with the sale unless included in the notice); W.D. Mich. Bankr. R. 6004(a) (requiring a description of the property to be sold); E.D.N.Y. Bankr. R. 6004-1(b)(i)-(v) (requiring a general description of the property and the terms of sale); S.D.N.Y. Bankr. R. 6004-1(a) (requiring notice of the terms and conditions of the sale); W.D.N.Y. Bankr. R. 6004-1(A) (requiring the notice to contain terms of sale sufficient to inform creditors as to the wisdom of the proposed sale); S.D. Ohio Bankr. R. 6004-1(b)(1)(A)-(C) (requiring a description of the property and the terms of the sale); D. Or. Bankr. R. 2002-1(B)(2) (requiring the notice to contain a description of the property and the terms and conditions of the sale); M.D. Pa. Bankr. R. 6004(a)-1(b)(1) (requiring the terms and conditions of the sale to be included in the notice); D.R.I. Bankr. R. 6004-1(b) (requiring the notice to give a summary of the terms and conditions of the proposed sale); D.S.D. Bankr. R. 6004-1 (requiring a description of the property and the terms and conditions of the proposed sale); E.D. Tex. Bankr. R. 6004(b) (requiring notice of sale to state the name and address of the proposed buyer, the proposed sale price, the estimated cost of the sale, including commissions and fees, the names and addresses of all those claiming an interest in the property, and 20 day negative notice language); W.D. Tex. Bankr. R. 6004(b)(1) (requiring the name of the buyer on the notice); D. Vt. Bankr. R. 6004-1(e)(2) (requiring terms of sale regarding bidding, form of funds, and other sale particulars); E.D. Wis. Bankr. R. 6004 (sales of substantially all of the assets require myriad disclosures in the notice of sale including term of the sale, valuation methods, identity of creditors and interest holders, and disclosure of relationships).

122 See D. Ariz. Bankr. R. 6004-1 (listing provisions including the time and place of sale, filing date for objections, and offer terms and conditions); C.D. Cal. Bankr. R. 6004-1(b) (requiring the notice to state the time for objections and stating that if there is no timely objection, the trustee may take the action described in the notice of intent); N.D. Iowa Bankr. R. 6004-1(c) (requiring the notice to state that objections to the proposed sale must be filed and served within twenty days of the notice, that objections to the sale will be served with separate notice, and that if there are no timely objections the sale will proceed); E.D. La. Bankr. R. 9013-1(B)(d) (requiring the notice to contain contact information of the movant and information on how to object); D. Me. Bankr. R. 6004-1(c)-(d) (requiring the date and time of the hearing and the method for objection to be contained in the notice of a proposed sale); D. Mass. Bankr. R. 6004-1(a) (requiring notice of a private sale to outline the procedures for bidding and objecting to the sale); E.D.N.Y. Bankr. R. 6004-1(b) (requiring notice of the time to examine the property and the date by which objections must be filed); N.D.N.Y. Bankr. R. 6004-1(c) (requiring a conspicuous statement that the sale is proposed under § 363(b)); D.N.D. Bankr. R. 2002-1 (requiring instruction that any objection must be filed in fifteen days); S.D. Ohio Bankr. R. 6004-1(b)(1)(F) (requiring the notice to disclose the process for objections); D. Or. Bankr. R. 2002-1(B)(2)(c)-(d) (requiring the notice to provide where the property description can be obtained, how it can be previewed, and the method for submitting competing bids); M.D. Pa. Bankr. R. 6004(a)-1(b)(1)(F)-(G), (M) (requiring the notice to state how to obtain a description of the property, where it can be examined, to whom to direct inquiries, and

other procedural information); D.P.R. Bankr. R. 6004 (requiring the notice of sale to contain a description of any chattels and to state as to sales of real property that documents regarding sale procedure are available in the clerk's office); D.R.I. Bankr. R. 6004-1(b) (allowing the notice of intent to sell to state that "absent timely objection, the proposed sale be considered without a formal hearing"); E.D. Tex. Bankr. R. 6004(b) (stating that the notice must contain the names and addresses of proposed buyers and judgment creditors and details regarding the sale); E.D. Wash. Bankr. R. 2002-1(a) (requiring the notice to state what must be done to object to a proposed sale and the time limit for making such an objection); S.D. W. Va. Bankr. R. 8.01(d)(2) (requiring notice to state that any objections must be filed within twenty days of service); see also S.D. Fla. Bankr. R. 9013-1(D)(2) (allowing but not requiring notice to state that any objections must be filed within twenty days of service).

123 See D. Alaska Bankr. R. 6004-1(A)(2)(D) (requiring the notice to list the fair market value of the property); D. Ariz. Bankr. R. 6004-1(a)(11) (requiring the appraisal value, if available, to appear in the notice); D.D.C. Bankr. R. 6004-1(a)(1) (requiring notice of private sales to include the appraised value of the asset being sold, the date of appraisal, and the name of the appraiser); D. Idaho Bankr. R. 2002.1(b)(1)(E) (requiring the notice of sale to include the estimated fair market value and a brief statement of the basis for the estimate); D. Md. Bankr. R. 6004-1(a)(1), (2) (requiring the notice to contain the appraised value or scheduled value of an asset being sold); D. Neb. Bankr. R. 6004-1(a) (notices of private sales must list the tax basis of the property, the tax consequences of the sale, and the anticipated taxable income or loss from the sale); S.D. Ohio Bankr. R. 6004-1(b)(1)(E) (requiring disclosure of the basis for the suggested sale price); D. Or. Bankr. R. 2002-1(B)(2)(e) (requiring a statement concerning what independent appraisals have been made); D.R.I. Bankr. R. 6004-1(b) (requiring a statement that the proposed sale price is at least equal to or more than the value of the property); D.S.D. Bankr. R. 6004-1 (requiring the notice to contain the value of the property and how that value was determined).

124 See D. Alaska Bankr. R. 6004-1(a)(2)(C), (E)-(F) (requiring disclosure of the relationship of the purchaser to the debtor, the anticipated fees related to the sale, and whether the sale will affect the debtor's ability to continue operating as a going concern); D.D.C. Bankr. R. 6004-1(a)(4) (requiring disclosure of the relationship between the purchaser and the debtor, the trustee, or any other party in interest); M.D. Ga. Bankr. R. 6004-1(b) (requiring disclosure of the costs of sale, including commissions, auctioneer's fees, cost of document preparation and recordation, and other expenses); D. Idaho Bankr. R. 2002.1(b)(1)(G) (requiring disclosure of the compensation to brokers, auctioneers, or other professionals); D. Md. Bankr. R. 6004-1(a)(4), (b) (requiring a full statement of any relationship between the purchaser and any party in interest and listing the types of compensation that must be included in the notice); D. Neb. Bankr. R. 6004-1-A(1) (notices of private sales must disclose name of purchaser and any direct or indirect relationship the purchaser or its agents or employees have with the case); S.D. Ohio Bankr. R. 6004-1(b)(1)(D) (requiring disclosure of the relationship of the buyer to the debtor); D. Or. Bankr. R. 2002-1(B)(2)(b) (requiring disclosure of the relationship of interested parties to the debtor); M.D. Pa. Bankr. R. 6004(a)-1(b)(1)(J) (requiring the notice of private sale to identify any affiliation with or relationship between the debtor, any insiders, and the purchaser); W.D. Tex. Bankr. R. 6004(b)(2)-(3) (requiring disclosure of the consideration received by the estate, including the costs of the auctioneer's fees, document preparation, tax liabilities, and other customary closing costs); D. Vt. Bankr. R. 6004-1(e)(4) (requiring the notice to state the extent to which the proceeds shall be used to benefit each class of creditors).

125 See D. Idaho Bankr. R. 2002.2(b)(2)(A) (requiring notice to all "creditors, equity security holders, trustees and indenture trustees, the debtor, the chairman of any committee appointed in the case, U.S. Trustee, and any other parties in interest"); N.D. Ind. Bankr. R. B-6004-1(a)-(b) (requiring notice to all parties found through reasonable inquiry to hold liens or have interests in the property to be sold); D. Mass. Bankr. R. 6004-1(a)(1)(A) (requiring notice to potential purchasers in addition to the creditors, parties in interest, and the U.S. trustee); D. Minn. Bankr. R. 2002-1(b)(3) (requiring notice to all equity security holders); E.D.N.Y. Bankr. R. 2002-1(c) (requiring notice to any party having or claiming an interest); E.D.N.C. Bankr. R. 6004-1 (requiring notice to creditors and affected parties); M.D. Pa. Bankr. R. 6004(a)-1(b)(2) (requiring notice to indenture trustees, all creditors, and other parties not specifically mentioned in the Federal Rules of Bankruptcy Procedure); D.P.R. Bankr. R. 6004 (requiring the notice of sale to be sent to all lien holders); D. Vt. Bankr. R. 6004-1(b)(4) (requiring the names of all parties in interest found by "reasonable investigation").

126 See D. Idaho Bankr. R. 2002.1(c) (requiring a motion for an order to be supported by an affidavit showing the necessity of the ordered sale); D. Mass. Bankr. R. 6004-1(a)(2)(A) (requiring notice of a private sale to include the reason why the sale must be made outside of the Chapter 11 plan); D. Neb. Bankr. R. 6004-1-A(3) (notice of sales of all or substantially all of the assets must state the business justification for disposing of the estate assets before a disclosure statement has been approved or a plan confirmed); E.D.N.Y. Bankr. R. 2002-1(a)(i) (requiring the reasons for the proposed action); N.D.N.Y. Bankr. R. 6004-1(c) (requiring a business justification for disposing of the assets of the estate); D. Or. Bankr. R. 2002-1(B)(2)(f)-(g) (requiring a statement concerning the equity in the

estate and why the sale is "proposed in advance of approval of a plan of reorganization"); D. Vt. Bankr. R. 6004-1(e)(7) (requiring a business justification for disposal of the estate assets before the disclosure statement or plan confirmation).

127 See D. Ariz. Bankr. R. 6004-1(a)(4) (requiring the notice of sale to, among other things, list all entities known to have an interest in the property); M.D. Ga. Bankr. R. 6004-1(d) (requiring the motion to sell to identify the creditors and the amounts of all claims and interests attached to the property to be sold); D. Idaho Bankr. R. 2002.1(b)(1)(F) (requiring the notice to include the amounts of each lien or encumbrance and to identify each lienholder); D. Mass. Bankr. R. 6004-1(a)(2)(A) (requiring identification of the holder of any lien or interest); N.D.N.Y. Bankr. R. 6004-1(c) (requiring identification of the creditors and the extent to which their interests will be satisfied by the proceeds of the sale); D.P.R. Bankr. R. 6004(A)(2), (4) (requiring notice to list the amount of any liens or encumbrances and the holders of same).

128 D.R.I. Bankr. R. 6004-1(c).

129 See C.D. Cal. Bankr. R. 6004-2 (requiring an additional document to be filed with the notice of intent to sell that is to be used for publication); S.D. Cal. Bankr. R. 6004-3 (requiring debtor-in-possession to file a report of sale and serve on the U.S. Trustee and any official creditors' committee); D.D.C. Bankr. R. 6004-1(d) (requiring an itemized statement of the property sold with specific statements to aid in the identification of the property); N.D. Ind. Bankr. R. B-6004-1(c) (requiring the debtor-in-possession to file a report of sale and serve it upon interested parties); M.D.N.C. Bankr. R. 9013-1(b) (requiring documents to be attached "evidencing the related indebtedness and perfected lien status" of the property); S.D. Ohio Bankr. R. 6004-1(b)(2)(A) (requiring a report of sale to be filed); D. Or. Bankr. R. 6004-1(B) (requiring a report of sale to be filed); E.D. Pa. Bankr. R. 9014-3(f)(1) (requiring a proposed order to be attached to the motion for sale); D.S.C. Bankr. R. 6004-1(d) (requiring the moving party to file a report of sale within ten days of closing); M.D. Tenn. Bankr. R. 6004-1(a) (requiring the trustee to file and serve a copy of the report of sale on the debtor and U.S. Trustee); E.D. Va. Bankr. R. 6004-2(D) (requiring the trustee or debtor to file a report of sale within thirty days after the sale).

130 See E.D. Cal. Bankr. R. 9014-1 (general motion practice for all bankruptcy proceedings); D. Colo. Bankr. R. 913 (general motion practice for all bankruptcy proceedings); D. Del. Bankr. R. 5011-1 to 7001-1 (the table of contents in the local rules shows specifically that there are no local rules pertaining to Part VI of the Federal Rules of Bankruptcy Procedure (Collection and Liquidation of Estate)); N.D. Ga. Bankr. R. 9013-1 to 9013-3 (general motion practice; no rules specifically addressing sales); S.D. Ga. Bankr. R. 7.1-7.5 (general motion practice; no rules specifically addressing sales); N.D. Ill. Bankr. R. 402 (general motion practice for sales outside the ordinary course of business); S.D. Iowa Bankr. R. 5, 10, 11, 14 (general motion practice; no rules specifically addressing sales); E.D. Ky. Bankr. R. 6004-1 (using general motion practice with the exception of requiring a statement in the notice of whether the sale is to be free and clear or subject to interests); E.D. La. Bankr. R. 9013-1(B) (no rules specifically addressing sales, movant must provide at least twenty days notice of the hearing, and written objections must be filed at least eight days prior to the date set for hearing); M.D. La. Bankr. R. 9013-1(a)(2), 9014-1(a) (general motion practice calls for notice to get tentative hearing date or state that such hearing will be held only if an objection is timely filed and served by noon on the Monday before the hearing (hearings are held on Friday of each week)); W.D. La. Bankr. R. 9013-1 to 9013-3 (general motion practice; no rules specifically addressing sales); N.D. & S.D. Miss. Bankr. R. 13 (no rules addressing sales specifically; general motion practice varies with particular judge); W.D. Mo. Bankr. R. 6004-1, 9013-1 (general motion practice, excepting sales of assets worth less than $1000, which do not require notice); D. Mont. Bankr. R. 9013-1(a)-(b), (d) (no rules specifically addressing sales; general motion practice provides for negative notice); D. Nev. Bankr. R. 9014 (general motion practice; no rules specifically addressing sales); D.N.M. Bankr. R. 9013-1 (no rules specifically addressing sales; regular motion procedure provides for twenty day negative notice); E.D. Okla. Bankr. R. 9013-1 (no rules specifically apply to sales, general motion practice provides for fifteen day negative notice); E.D. Pa. Bankr. R. 9014-3(a) (distinguishing between motions determined with and without hearings); D.P.R. Bankr. R. 9013 (no rules specifically addressing sales, general motion practice provides for eleven day negative notice); E.D. Tenn. Bankr. R. 7007-1 (general motion practice; no rules specifically addressing sales); M.D. Tenn. Bankr. R. 6004-1(b) (stating that motions to sell or lease property must comply with Rule 9013-1 which provides for twenty day negative notice); W.D. Tenn. Bankr. R. 9013-1(a)-(b) (general motion practice applies and provides for twenty day negative notice); S.D. Tex. Bankr. R. 6004 (stating that motions for sale of property must conform to the notice standards of general motion practice); W.D. Va. Bankr. R. 9013-1 (general motion practice; no rules specifically addressing sales); W.D. Wash. Bankr. R. 9013-1(a) (general motion practice; no rules specifically addressing sales); N.D. W. Va. Bankr. R. 3.09 (general motion practice; no rules specifically addressing sales); E.D. Wis. Bankr. R. 9014 (general motion practice with fifteen day negative notice); D. Wy. Bankr. R. 9013-1 (general motion practice; no rules specifically addressing sales). Note that the Northern District of Alabama and the Western District of Wisconsin have no local rules for general motion practice and no local rules for sales

outside of the ordinary course of business or sales free and clear. See N.D. Ala. Bankr. R.; W.D. Wis. Bankr. R. The Eastern and Western Districts of Arkansas have no local rules pertaining to sales, and their one local rule pertaining to motion practice states only that attorneys submitting orders must list the complete name and address of everyone who should receive a copy. E.D. & W.D. Ark. Bankr. R. 9013-1.

131 See D.D.C. Bankr. R. 6004-1(a) (listing specific requirements for a private sale); N.D. Iowa Bankr. R. 6004-1(d) (making a higher bid in a private sale the equivalent of an objection); D. Me. Bankr. R. 6004-1(c) (requiring the terms of a private sale or the date and time of a public sale to be included in the notice); D. Md. Bankr. R. 6004-1(a) (requiring appraisal information or the scheduled value to be disclosed for a private sale); D. Mass. Bankr. R. 6004-1 (distinguishing private sales from public auctions with separate rules under subsections (a) and (b)); D. Neb. Bankr. R. 6004-1A(1) (requiring additional information about the purchaser in the event of a private sale or lease); E.D.N.Y. Bankr. R. 6004-1 (distinguishing private sales under subsection (b) of the rule); D.S.D. Bankr. R. 6004-1 (requiring the notice to contain the names of the proposed buyers for private sales).

132 See D. Colo. Bankr. R. 604 (allowing the trustee to seek authority to sell all of the nonexempt tangible property with an aggregate gross value of less than $2500 prior to the meeting of creditors); W.D. Mo. Bankr. R. 6004-1 (allowing sales of items or groups of items worth $1000 or less without the filing of a notice of intent to sell); S.D.N.Y. Bankr. R. 6004-1(a) (requiring notice of a proposed sale having an aggregate gross value of at least $2500 to include the time and place of the sale, whether it is public or private, and the terms and conditions of the sale); D.N.D. Bankr. R. 2002-1 (allowing sale without court approval absent objection when the value of the property is less than $5000); M.D. Pa. Bankr. R. 6004(d)-1 (allowing general notice for a sale where the aggregate gross value of the property is less than $2500); D.S.C. Bankr. R. 6004-1(a) (allowing the trustee to give general notice of a proposed sale when the aggregate gross value of the property is less than $2500); E.D. Va. Bankr. R. 6004-2(C) (allowing the trustee to give general notice of a proposed sale when the aggregate gross value of the property is less than $2500).

133 See C.D. Cal. Bankr. R. 6004-1(c) (requiring, after a timely objection, the trustee to obtain a hearing date and give notice of the hearing date to the objecting parties within twenty days of the date the objection is filed); E.D. La. Bankr. R. 9013-1(B)(d) (requiring objections to be filed eight days prior to a proposed hearing date); M.D. La. Bankr. R. 9014-1(d) (requiring the filing of a written objection on the Monday before the scheduled hearing); E.D.N.Y. Bankr. R. 2002-1(d) (requiring objections to be in writing and filed three days prior to proposed action or court order); E.D. Va. Bankr. R. 6004-2(B) (requiring objecting party to file the objection with the court five business days prior to the proposed sale and to obtain a hearing date from the court); E.D. Wash. Bankr. R. 2002-1(f)(1)-(2) (requiring the objecting party to state the grounds for the objection in writing or have the objection stricken).

134 See D. Vt. Bankr. R. 6004-1(d) (requiring the order to identify the buyer, the property sold, the amount of the sale, and any differences between the property actually sold and listed on the notice of sale).

135 See W.D.N.Y. Bankr. R. 6004-1(c) (requiring a hearing when a sale is of all or substantially all of the debtor's assets); M.D. Pa. Bankr. R. 6004(a)-1(b)(1)(D) (requiring the notice to state the date of hearing once court approval has been attained); E.D. Wis. Bankr. R. 6004 (requiring a hearing and myriad notice and disclosure requirements before court approval of the sale of substantially all of the debtor's assets within sixty days of the filing of the petition).

136 See D.D.C. Bankr. R. 6004-1(c) (prohibiting a buyer's premium, break-up fee, topping fee, or similar arrangement without court approval).

137 N.D. Ind. Bankr. R. B-6004-1(d).

138 See W.D. Pa. Bankr. R. 6004-1 (referencing the Western District of Pennsylvania's Court Procedures Manual).

139 D. Conn. Bankr. R. 6004-1; D.N.J. Bankr. R. 6004-1; D. Utah Bankr. R. 6005. But see D. Utah Bankr. R. 6005-1(i) (proposed) (provides that a hearing scheduled on a sale to be conducted by a standing auctioneer may be stricken if no objections to the sale are timely filed).

140 D. Kan. Bankr. R. 6004.1; see also N.D. Ohio Bankr. R. 6004-1(b) (prohibiting sale to any person closely related to the professional appointed by the court in a sale).

141 Central District of Illinois Bankruptcy Court, General Information, http://www.ilcb.uscourts.gov/manual/general_information.htm (last visited Jan. 22, 2004).

142 See William R. Sawyer, A Note on Motion Practice in the United States Bankruptcy Court for the Middle District of Alabama, http://www.almb.uscourts.gov/Announcements/sawyer_memo_on_motion_practice.pdf (Aug. 28, 2002).

143 See D. Or. Bankr. Form 760.5.

144 See D. Alaska Bankr. R. 6004-1(b)(3)(E) (requiring the disclosure of the subparagraph of § 363(f) that authorizes the sale); N.D. Cal. Bankr. R. 6004-1(b) (requiring a motion to sell free and clear to be supported by the declaration of an individual competent to testify that sets forth the factual basis demonstrating that the moving party comes within § 363(f) and which subsection of § 363(f) the party comes within); D. Haw. Bankr. R. 6004-1(b) (requiring a motion to sell free and clear to be supported by the declaration of an individual competent to testify that sets forth the factual basis demonstrating that the moving party comes within § 363(f) and which subsection of § 363(f) the party comes within); D. Idaho Bankr. R. 2002.1(b)(1)(H) (requiring the notice to list the subdivision of § 363(f) that authorizes the sale); D. Mass. Bankr. R. 6004-1(a)(2)(A) (requiring notice and accompanying motion for a private sale of all of a debtor's assets to include the reason why the sale must be made outside of the Chapter 11 plan); E.D.N.Y. Bankr. R. 2002-1(a) (requiring the reasons for the proposed action); D. Or. Bankr. Form 760.5 (requiring the "specific subsections of 11 U.S.C. §363(f) on which the movant relies for authority to sell the property free and clear of liens"); E.D. Tex. Bankr. R. 6004(b)(4) (requiring the notice to state the provision of § 363 upon which the motion relies); E.D. Wash. Bankr. R. 6004-1(b)(1) (requiring the notice to state the paragraph of 363(f) that authorizes the sale).

145 See D. Alaska Bankr. R. 6004-1(b)(3)(C) (requiring notice to state that the property is to be sold free and clear of liens and encumbrances); D. Ariz. Bankr. R. 6004 (notice must state whether the sale is free and clear of liens and interests); D. Idaho Bankr. R. 2002.1(b)(1)(A)-(D) (requiring a description of the property, time and place of sale, terms of sale, and whether the sale is free and clear of liens to be included in the notice); E.D. Ky. Bankr. R. 6004-1 (requiring notice to state whether property to be sold is free and clear of liens and encumbrances); D. Me. Bankr. R. 6004-1(c) (requiring the notice to disclose the terms and conditions of the sale); E.D. Mich. Bankr. R. 6004-1(b)(1) (requiring a statement in the notice that the sale is to be free and clear); D.N.H. Bankr. R. 6004-1(a)(1) (the notice must contain "the requisite information regarding the sale"); D. Or. Bankr. Form 760.5 (requiring that the notice contain a description of the property to be sold, the terms and conditions of the sale, and the gross sales price); M.D. Pa. Bankr. R. 6004(a)-1(b)(1) (requiring the terms and conditions of the sale to be included in the notice); D.S.C. Bankr. Form 6004-1(a) (requiring the notice to list the type of sale, price, buyer, and other terms of the sale); E.D. Wash. Bankr. R. 6004-1(b)(1) (requiring a statement that the sale is free and clear of liens, the amount of those liens, and any liens that will not be paid with the proceeds of the sale).

146 See D. Alaska Bankr. R. 6004-1(b)(3)(A)-(B) (requiring the notice to state the time within which objections may be filed and the date of the hearing on the motion); D. Ariz. Bankr. R. 6004 (requiring the notice of sale to set forth a description of the property, all entities known to have an interest in the property, whether the sale is free and clear of or subject to interests and a description of such, the terms and conditions of the offer, whether higher or better bids can be entertained, the date by which objections must be filed, and whether there is an appraisal of the property, and if so, the value stated therein); S.D. Ill. Bankr. R. 6004-1 (requiring the notice to contain the text "Any higher bids must be stated in writing and received by (proponent of the motion) not later than (The same date as the last date to object to the motion.)"); N.D. Iowa Bankr. R. 6004-1(c) (requiring the notice to state that objections to the proposed sale must be filed and served within twenty days of the notice, that objections to the sale will be served with separate notice, and that if there are no timely objections the sale will proceed); D. Me. Bankr. R. 6004-1(c)-(d) (requiring the date and time of the hearing and the method for objection to be contained in the notice of a proposed sale); E.D. Mich. Bankr. R. 6004-1(b)(1) (requiring the notice to state that absent objections, the authority to sell may be granted without a hearing and that upon objection, a notice of the hearing will be sent to the objecting party); D.N.H. Bankr. R. 6004-1(a)(4) (requiring the text "Hearing Contingent Upon Objections Being Filed"); N.D. Okla. Bankr. R. 6004(b) (movant must first obtain a hearing date, and notice must state that if objections are not filed and served at least five days prior to the scheduled hearing the court may strike the hearing and grant the requested relief without further notice); D. Or. Bankr. Form 760.5 (requiring the notice to state "IF YOU WISH TO OBJECT TO ANY ASPECT OF THE SALE OR FEES DISCLOSED IN PTS. 12 OR 19 YOU SHALL BOTH: (1) ATTEND THE HEARING NOTED IN PT. 20 BELOW AND, (2) WITHIN 20 DAYS OF THE MAILING DATE BELOW, FILE WITH THE CLERK OF THE COURT"); E.D. Pa. Bankr. R. 6004-1 (requiring notice of sales free and clear to contain the date of the hearing and the opportunities for objection);

M.D. Pa. Bankr. R. 6004(a)-1(b)(1)(F)-(G), (M) (requiring the notice to state how to obtain a description of the property, where it can be examined, who to direct inquiries to, and other procedural information); E.D. Tex. Bankr. R. 6004(b) (requiring in the notice of sale specific negative notice language, the name and address of the proposed buyer, the proposed sale price, the estimated cost of the sale including commission and fees, and the names and addresses of all those claiming an interest in the property); E.D. Wash. Bankr. R. 2002-1(a)(1)(B) (requiring the notice to state what must be done to object to a proposed sale and the time limit for making such an objection); S.D. W. Va. Bankr. R. 8.01(d)(3) (allowing movant to file either a motion with a request for hearing or a negative twenty day notice that contains blanks for the hearing date and time should an objection or request for hearing be filed).

147 See D. Idaho Bankr. R. 2002.1(b)(1)(E) (requiring the notice of sale to include the estimated fair market value and a brief statement of the basis for the estimate); D. Or. Bankr. Form 760.5 (requiring a "[s]ummary of all available information regarding valuation, including any independent appraisals"); W.D. Pa. Bankr. R. 9013.2B(1)(b) (requiring the notice to state the market value of the property to be sold and the basis for the valuation); D.R.I. Bankr. R. 6004-1(b) (requiring a statement that the proposed sale price is at least equal to or more than the value of the property); D.S.C. Bankr. Form 6004-1(a) (requiring the notice to contain the appraised value of the property); E.D. Wash. Bankr. R. 6004-1(b)(1) (requiring the notice to state the estimated fair market value of the property to be sold).

148 See D. Idaho Bankr. R. 2002.1(b)(1)(G) (requiring disclosure of the compensation to brokers, auctioneers, or other professionals); D. Or. Bankr. Form 760.5 (requiring disclosure of the relationship between the buyer and debtor as well as between other parties to the transaction and the debtor); M.D. Pa. Bankr. R. 6004(a)-1(b)(1)(J) (requiring the notice of private sale to identify any affiliation with or relationship between the debtor, any insiders, and the purchaser); D.S.C. Bankr. Form 6004-1(a) (requiring, under Local Rule 6004-1(b), the notice to disclose the relationship of debtor to buyer, auctioneer's compensation, trustee's compensation, and the amount of proceeds that will be paid to the estate).

149 See D. Alaska Bankr. R. 6004-1(b)(3)(D) (requiring disclosure of the amount of each lien or encumbrance claimed against the property); D. Ariz. Bankr. R. 6004-1(a)(4) (requiring the notice of sale to set forth all entities known to have interests in the property); N.D. Cal. Bankr. R. 6004-1(a), (d) (requiring the motion to identify all parties affected by the order of sale); D. Haw. Bankr. R. 6004-1(a) (requiring the motion for authority to sell free and clear of liens to identify by name the holders of a lien or other interest whose property rights are or may be affected by the motion); D. Idaho Bankr. R. 2002.1(b)(1)(F) (requiring the notice of sale to include the amounts of each lien or encumbrance claimed against the property and the identity of each lienholder); D. Mass. Bankr. R. 6004-1(a)(2)(A) (requiring identification of the holder of any lien or interest); E.D. Mich. Bankr. R. 6004-1(b)(2)(B) (requiring the motion for sale to be served on, and identify by name and address, all parties who have liens and interests); D. Or. Bankr. Form 760.5 (requiring the names and addresses of lienholders, the amounts of all liens on the property to be sold, and the amount sought by secured creditors); M.D. Pa. Bankr. R. 6004(c)-1(d) (requiring the movant to name as respondents all parties against whom relief is sought); W.D. Pa. Bankr. R. 9013.2(B)(1)(d)-(e) (requiring the "identity of each and every lien" as well as the "type, priority, face amount and the best information of the balance, and record location of each and every lien on the property subject to the [sale]"); E.D. Tex. Bankr. R. 6004(b)(3) (requiring notice of sale to state the names and addresses of all those claiming an interest in the property, the nature of the claimed interest, and the balance due).

150 See D.S.C. Bankr. Clerk's Instruction 9014-2 (allowing a minimum of fifteen days to object to passive motions which include motions for a sale free and clear, referenced by Local Rule 6004(1)(b)).

151 See D. Haw. Bankr. R. 6004-1(b) (requiring that a Uniform Commercial Code financing statement report, a current title report, or other satisfactory evidence of the status of the title to real or personal property, be attached to the motion); E.D. Pa. Bankr. R. 9014-3(f) (requiring a proposed order to be attached to the motion for sale); D.S.C. Bankr. R. 6004-1(d) (requiring the moving party to file a report of sale within ten days of closing).

152 See S.D. Ala. Bankr. R. 9007-1(a)(3) (excluding sales free and clear from the process for sales without a hearing); D. Alaska Bankr. R. 6004-1(b)(2) (requiring a hearing before a sale free and clear); M.D. Fla. Bankr. R. 2002-4(a)(3) (excluding sales free and clear from types of motions that can be made without an actual hearing); D. Or. Bankr. Form 760.5 (requiring the notice to state the date of the hearing for the proposed sale free and clear); M.D. Tenn. Bankr. R. 9013-1(b)(7) (excluding sales free and clear from types of motions that can be made without a hearing); N.D. Tex. Bankr. R. 9007.1(b) (excluding sales free and clear from negative notice procedure).

153 See D. Me. Bankr. R. 6004-1 (allowing the court to issue an order following the minimum notice period for sales of the debtor's estate); D. Mass. Bankr. R. 6004-1(a)(3) (allowing the court to approve a private sale when no objections have been filed); E.D. Mich. Bankr. R. 6004-1(b)(1) (allowing the court to grant a motion to sell free and clear when no objections have been filed); D.N.H. Bankr. R. 6004-1(a)(3) (requiring twenty days notice of the contingent hearing to creditors and interested parties); E.D. Pa. Bankr. R. 6004-1 (requiring a fifteen day negative notice procedure); M.D. Pa. Bankr. R. 6004(c)-1(c) (providing that after the clerk issues an order fixing an answer date, a hearing will be held only if objections are brought); D.R.I. Bankr. R. 6004-1(b) (allowing a motion for sale free and clear, although not officially termed a negative notice procedure, presumably to be ordered and made without a formal hearing if there are no objections to the notice of the sale).

154 See D. Alaska Bankr. R. 6004-1(b)(3)(F) (requiring disclosure of the necessity of the sale and the liens and encumbrances that may be unpaid when the proceeds of the sale appear to be insufficient to pay all the liens and encumbrances claimed against the property); D. Idaho Bankr. R. 2002.1(c) (requiring a motion for an order to be supported by an affidavit showing the necessity of the ordered sale); D. Or. Bankr. Form 760.5 (requiring a reason for the sale if the proceeds will not satisfy all claims and the reason for proposing the sale prior to the plan of reorganization); W.D. Pa. Bankr. R. 9013.2(B)(2) (requiring an allegation of the necessity of the sale or consent of the lienholders if there is or may be no equity in the property for the creditors); E.D. Wash. Bankr. R. 6004-1(b)(1) (requiring a brief statement of the necessity for the sale).

155 See D.S.C. Bankr. R. 6004-1 (requiring terms of the sale and a process that can override the automatic stay pursuant to Federal Rule of Bankruptcy Procedure 6004(g)); E.D. Wash. Bankr. R. 6004-1(c) (requiring an order approving an unopposed sale of estate property to be supported with an affidavit showing the necessity of the order).

156 See D. Or. Bankr. R. 2002-1(B)(3).

157 See D.S.C. Bankr. Form 6004-1(a) (containing on the notice for sale free and clear two blanks, which must state whether the sale is to be public or private).

158 See D.R.I. Bankr. R. 6004-1(c).

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