Settlements as Sales under the Bankruptcy Code

Peter J. Davis†

INTRODUCTION

When a debtor enters bankruptcy, the Bankruptcy Code gives the trustee (or debtor in possession) control over managing the assets of the estate. The trustee can sell or use these assets only after meeting requirements laid out in the Code. To sell an asset of the estate, the trustee must meet the requirements found in 11 USC § 363, which include providing notice to affected parties and a bankruptcy court hearing.

The trustee has more than just the power to sell assets of the estate. When a debtor has an outstanding cause of action against a third party, the Code gives the trustee the power to litigate or settle.[1] Circuit courts disagree over whether a settlement of a cause of action should be classified as a sale under § 363. One circuit always treats settlements as sales,[2] reasoning that § 363 is implicated because a cause of action is an asset of the estate that is sold by the trustee. Other circuits sometimes treat settlements as sales.[3] Still another circuit never treats settlements as sales, reasoning that reaching a compromise to settle a cause of action is fundamentally different from selling an asset.[4]

The Code favors settlements,[5] because settling disputes saves parties the time, money, and uncertainty of litigation.[6] It is, therefore, important to know what level of court involvement in settlements the Bankruptcy Code requires—that is, whether courts need to approve settlements. When the trustee does settle, creditors want some assurance that the trustee bargained for the best deal possible, and court approval of the settlement serves this function. But whether bankruptcy courts can review settlement agreements depends on how the Bankruptcy Code is interpreted. However, construing the Code is

† BA 2009, Cornell University; JD Candidate 2012, The University of Chicago Law School.

1 11 USC § 323(b).

2 See, for example, *In re Martin*, 91 F3d 389, 394–95 (3d Cir 1996).

3 See, for example, *In re Mickey Thompson Entertainment Group, Inc*, 292 BR 415, 422 (BAP 9th Cir 2003).

4 See, for example, *In re Healthco International, Inc*, 136 F3d 45, 49 (1st Cir 1998).

5 See *In re A & C Properties*, 784 F2d 1377, 1380–81 (9th Cir 1986).

6 See *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc v Anderson*, 390 US 414, 424 (1968) ("Compromises are 'a normal part of the process of reorganization.'"), quoting *Case v Los Angeles Lumber Products Co*, 308 US 106, 130 (1939).

problematic because it does not directly address whether settlements require court approval. Settlements may be reviewed by the bankruptcy court at the trustee's discretion and do not have the same procedural protections of sales under § 363.

This Comment adopts the position that settlements are sometimes sales. Furthermore, this Comment provides a framework to determine when settlements are sales, something courts have failed to do. This framework is based on a settlement's characteristics outside bankruptcy law because the law inside bankruptcy deviates from nonbankruptcy law only when there is a sufficient justification requiring the change.[7] Some settlements have qualities distinct from sales and so do not require similar treatment in the Bankruptcy Code. These settlements do not require a departure from the nonbankruptcy baseline, because the procedures of § 363 do not advance the purpose of the provision to maximize the value of the estate. Instead, a change from the nonbankruptcy baseline for these settlements has the opposite effect by adding to the administrative costs of settling a dispute. When settling a dispute has the legal qualities of a sale outside bankruptcy, courts should review it under § 363. When a settlement does not resemble a sale outside bankruptcy, courts should leave it to the trustee's discretion.

Part I of this Comment provides an overview of the Code as well as the structure and purposes of § 363. Part II describes the current split among the circuit courts over whether settlements should be considered "sales" for purposes of § 363. Part III argues that the nonbankruptcy baseline should be the starting point for characterizing settlements for the purposes of the Code. Finally, Part IV proposes a framework that uses the nonbankruptcy baseline and then applies it to a case in the split that this Comment argues should have come out differently.

I. Overview of the Bankruptcy Code and § 363

When a corporation owes more than it can repay, a familiar problem presents itself: the debtor cannot pay back all of its creditors in full. Without bankruptcy law, creditors would react to this problem by racing to the debtor's assets and attempting to get what was owed to them before rival creditors could do the same. As with any race, some creditors would win and some would lose. Bankruptcy law, however, understanding that this race would make everyone worse off,

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7 See *Butner v United States*, 440 US 48, 55 (1979).

solves this collective action problem.[8] It stops the race by staying each creditor's individual debt remedies and provides a single forum for an efficient division and distribution of the debtor's assets. This Part first provides relevant background on the structure of bankruptcy law. It then discusses the substantive rule governing sales and the procedural rule governing settlements.

A. The Bankruptcy Structure

In 1978, Congress passed the Bankruptcy Reform Act,[9] which codified the substantive law governing bankruptcy proceedings in the Bankruptcy Code. The Code is divided into chapters, and the most common bankruptcy petition is filed under Chapter 7.[10] Chapter 7 provides for the liquidation of the debtor's estate and distribution of the proceeds to the estate's creditors. In short, Chapter 7 provides a "fresh start" for the debtor.[11] In a Chapter 11 bankruptcy, however, the debtor's estate is administered with the purpose of reorganizing and preserving the debtor's business, allowing it to continue for the benefit of the creditors.[12]

When a debtor enters bankruptcy, a bankruptcy estate is created consisting of all of the debtor's legal or equitable interests, including some causes of action.[13] The debtor in possession or a court-appointed trustee is then charged with administering the estate. In a Chapter 7 bankruptcy, the trustee's main objective is to liquidate the estate efficiently while acting in the best interest of the creditors.[14] A debtor entering bankruptcy may have many outstanding claims against third parties, and because litigation is slow and costly, bankruptcy favors

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8 See Douglas G. Baird, *The Initiation Problem in Bankruptcy*, 11 Intl Rev L & Econ 223, 223 (1991) ("The premise of American bankruptcy law is that sometimes the creditors and others who contributed capital to the firm are better off as a group than they would be if this avenue of debt collection did not exist."); Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 10 (Harvard 1986) ("Because creditors have conflicting rights, there is a tendency in their debt-collection efforts to make a bad situation worse.").

9 Pub L No 95-598, 92 Stat 2549, codified as amended at 11 USC § 101 et seq.

10 See DOJ, United States Trustee Program, *Annual Report of Significant Accomplishments: Fiscal Year 2009* 11 table 2.1, online at http://www.justice.gov/ust/eo/public_affairs/annualreport/docs/ar2009.pdf (visited Apr 17, 2011) (showing that over 70 percent of filings are under Chapter 7).

11 See *Marrama v Citizens Bank of Massachusetts*, 549 US 365, 367 (2007); Jackson, *Logic and Limits* at 4 (cited in note 8) (noting that two roles of bankruptcy law are to provide a clean slate for individuals and to provide an efficient forum for creditors).

12 See Alan N. Resnick and Harry J. Sommer, eds, 7 *Collier on Bankruptcy* ¶ 1100.01 at 7-1100 (Matthew Bender 15th rev ed 2010).

13 11 USC § 541(a)(1). See also *In the Matter of Seven Seas Petroleum, Inc*, 522 F3d 575, 584 (5th Cir 2008) (noting that "whether a particular state-law claim belongs to the bankruptcy estate depends on . . . applicable state law").

14 See *In re Riverside-Linden Investment Co*, 925 F2d 320, 322 (9th Cir 1991).

settlement of these claims.[15] The roles of the trustee and the bankruptcy court in settling these disputes depend on whether they fall within § 363.

B. The Structure and Purposes of § 363(b) Sales of Assets

The Bankruptcy Code is designed for the efficient disposition of the debtor's estate. A § 363(b) sale is one example of the Bankruptcy Code's promotion of this purpose. Section 363(b) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." Under § 363, when the trustee sells an asset of the estate, the proceeds from the sale flow back to the estate for division and distribution among the creditors. The following provisions of § 363 ensure that the trustee receives the highest value for every asset he sells.

1. The notice and hearing requirements.

When a trustee sells an asset of the estate under § 363(b), notice of the sale must be provided to the relevant parties, and a hearing must be held in front of a bankruptcy judge. These provisions protect the creditors by giving each interested party the right to object to the sale, thereby increasing the likelihood that the trustee will obtain the highest value for the asset being sold.[16] Adequate notice from the trustee provides the relevant parties with information on "(1) the nature of the claims being sold under the Sale Motion, (2) how to participate in the bidding process, if interested, and (3) the date by which any objections were to be filed and served."[17]

The hearing requirements give the bankruptcy judge an opportunity to ensure that the trustee is receiving the highest value for the asset. The obligations of the trustee are provided by the Bankruptcy Code, which states that "[t]he Trustee shall collect and reduce to money the property of the estate . . . and close such estate as expeditiously as is compatible with the best interest of [the] parties."[18] When reviewing a sale, courts enforce this obligation by placing a burden on the trustee to

15 See *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc v Anderson*, 390 US 414, 424 (1968) ("In administering reorganization proceedings . . . it will often be wise to arrange the settlement of claims."); *In re Martin*, 91 F3d 389, 393 (3d Cir 1996) (noting the high frequency of settlements in bankruptcy proceedings).

16 See *In re Continental Air Lines, Inc*, 780 F2d 1223, 1226 (5th Cir 1986) ("[I]mplicit in § 363(b) is the further requirement of justifying the proposed transaction. . . . [T]here must be some articulated business justification for using, selling, or leasing the property."). See also Resnick and Sommer, 2 *Collier on Bankruptcy* ¶ 363.02 at 10-363 (cited in note 12).

17 *In re Nicole Energy Services, Inc*, 385 BR 201, 234 (Bankr SD Ohio 2008).

18 11 USC § 704(a)(1).

demonstrate that the sale maximizes the value of the estate.[19] A trustee is required to justify the terms of the sale: "As a general matter, the trustee must demonstrate that the proposed sale price is the highest and best offer, though a bankruptcy court may accept a lower bid in the presence of sound business reasons."[20] This proceeding assures both the debtor and creditor that the trustee is receiving the highest value for the asset sold.

2. Making sales final.

Section 363(m) maximizes the value of the estate by making asset sales final. This provision assures that purchasers of the debtor's assets will not be dragged into litigation when creditors challenge the terms of the sale. If the notice and hearing requirements of § 363(b) are met, and the purchaser of the asset is acting in good faith, then § 363(m) precludes appeal of the sale by the estate's creditors.[21] By protecting sales from drawn-out litigation, § 363(m) encourages the highest possible bid on assets of the estate.[22] If a potential purchaser knows that § 363(m) will preclude subsequent challenges to the sale of the asset, then the purchaser will not discount the purchase price in anticipation of future litigation costs or the possibility of the sale being declared invalid on appeal. This security incentivizes potential purchasers to enter into dealings with the estate when they otherwise would not. It also incentivizes higher bids.

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19 See *Commodity Futures Trading Commission v Weintraub*, 471 US 343, 352 (1985). See also *Toibb v Radloff*, 501 US 157, 163 (1991) (noting that an underlying purpose of the Bankruptcy Code is to maximize the value of the estate); Resnick and Sommer, 2 *Collier on Bankruptcy* ¶ 363.02 at 10-363 (cited in note 12).

20 *In re Moore*, 608 F3d 253, 263 (5th Cir 2010). See also *In re the Lionel Corp*, 722 F2d 1063, 1071 (2d Cir 1983) (holding that the judge must find a good business reason for a § 363(b) sale); Robert E. Ginsberg and Robert D. Martin, *Ginsberg & Martin on Bankruptcy* § 5.05 at 5-51–5-58 (Aspen 5th ed 2010).

21 See *In re Trism, Inc*, 328 F3d 1003, 1006 (8th Cir 2003) ("[S]ection 363(m) enhances the value of the debtor's assets sold in bankruptcy. Section 363(m)'s finality also . . . produc[es] value for the estate and prevent[s] any modification or reversal of the bankruptcy court's authorization of the sale from affecting the validity of the sale.") (citations omitted); Resnick and Sommers, 2 *Collier on Bankruptcy* ¶ 363.11 at 85-363 (cited in note 12).

22 See *In re Abbotts Dairies of Pennsylvania, Inc*, 788 F2d 143, 150 (3d Cir 1986) (noting that one purpose of § 363(m) is to provide "finality of the bankruptcy court's judgments under section 363(b)(1)"); *In re Sax*, 796 F2d 994, 998 (7th Cir 1986) ("Finality is important because it minimizes the chance that purchasers will be dragged into endless rounds of litigation to determine who has what rights in the property. Without the . . . finality provided by the stay requirement, purchasers are likely to demand a steep discount for investing in the property."); *In re Exennium, Inc*, 715 F2d 1401, 1403 (9th Cir 1983).

3. Not imposing judicial intervention.

The Bankruptcy Code does not impose the administrative costs and court involvement of § 363 on all sales of the estate's assets.[23] Section 363(c) limits court involvement by not imposing judicial intervention on sales that would have occurred during the "ordinary course of business."[24] There is less need for judicial oversight when a sale is made in the ordinary course of business. These kinds of sales should already be getting the highest price available, so it would not be useful to impose costly hearing and notice requirements.[25] Thus, the Bankruptcy Code gives the trustee discretion to handle these more routine sales without requiring the bankruptcy court's involvement.

C. When § 363 Does Not Apply

Not all actions taken by the trustee fall within the purview of § 363.[26] If § 363 does not apply to settlements of litigation claims, then the bankruptcy court must look elsewhere for guidance to determine whether there should be judicial oversight and, if so, what the extent of judicial intervention should be. As noted earlier, the Code comprises all substantive law governing bankruptcy proceedings. When Code provisions are unclear, however, courts will also look to the Federal Rules of Bankruptcy Procedure for guidance. The Rules establish the processes for the execution of the Code's substantive provisions.[27] They do not, however, add substantive rights to the Bankruptcy Code.[28] If the Rules conflict with the Bankruptcy Code, the Bankruptcy Code trumps.[29]

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23 See *Weintraub*, 471 US at 352 (stressing that "[t]he powers and duties of a bankruptcy trustee are extensive").

24 See *In re Selgar Realty Corp*, 85 BR 235, 240 (Bankr EDNY 1988) ("The purpose behind the ordinary course of business rule in § 363 is to allow a business to continue its daily operations without incurring the burden of obtaining court approval or notifying creditors for minor transactions.").

25 See *In re Miller Mining, Inc*, 219 BR 219, 222–23 (Bankr ND Ohio 1998) (noting that transactions made in the ordinary course of business would not benefit from court approval because they do not expose creditors to a risk of unfair terms).

26 See, for example, 11 USC § 544(a)(1) (detailing the trustee's power to avoid transfers as a hypothetical lien creditor); 11 USC § 548(a)(1) (providing the trustee's power to avoid fraudulent transfers).

27 See FRBP 1001; *In re Fesq*, 153 F3d 113, 116 (3d Cir 1998).

28 28 USC § 2075.

29 See *In re Pacific Atlantic Trading Co*, 33 F3d 1064, 1066 (9th Cir 1994); Ginsberg and Martin, *Ginsberg & Martin on Bankruptcy* § 1.05 at 1-95 (cited in note 20).

Although the Code's substantive provisions do not address settlements,[30] Rule 9019(a) does: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The discretionary language of Rule 9019(a) delegates to the trustee the decision to seek court approval. Although Rule 9019(a) is a rule of procedure only, many courts have interpreted this provision to require court approval of settlements.[31] These courts often rely on the pre–Bankruptcy Code provisions of the Bankruptcy Act of 1898,[32] which had a substantive provision requiring approval of settlements,[33] and they fail to account for the changes made to the Code's text.[34] The Bankruptcy Code's legislative history supports the position that less judicial intervention was intended: "The bill removes many of the supervisory functions from the judge in the first instance, transfers most of them to the trustee and to the United States trustee, and involves the judge only when a dispute arises."[35] Additionally, courts have recognized many other instances in the Bankruptcy Code, besides the § 363(c) ordinary-course-of-business exception, in which the trustee is granted wide discretion without mandatory court intervention.[36] Accordingly, many courts hold

30 See 11 USC § 323(b). See also *In re Lee Way Holding Co*, 120 BR 881, 890 (Bankr SD Ohio 1990) ("The Code does not set forth any parameters with which a Trustee is to be guided in evaluation or negotiation of a settlement.").

31 See, for example, *Reynolds v Commissioner of Internal Revenue*, 861 F2d 469, 473 (6th Cir 1988) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable."); *In re The Leslie Fay Companies*, 168 BR 294, 305 (Bankr SDNY 1994) ("Compromises may not be made in bankruptcy absent notice and a hearing and a court order."); *In re Pugh*, 167 BR 251, 254 (Bankr MD Fla 1994); *In re Rothwell*, 159 BR 374, 379 (Bankr D Mass 1993).

32 30 Stat 544, superseded by Bankruptcy Reform Act of 1978, Pub L No 95-598, 92 Stat 2549.

33 30 Stat at 553–54.

34 See *In re Novak*, 383 BR 660, 666–67 (Bankr WD Mich 2008) ("Congress' decision not to incorporate former Section 27 into the Bankruptcy Code certainly suggests that the approval of settlements is not to be among those activities under the Code where court intervention is still required. The inference instead is that the trustee can now resolve disputes on his own."); *In re Telesphere Communications, Inc*, 179 BR 544, 551 (Bankr ND Ill 1994) ("[Cases holding that court approval is required] appear to be grounded in pre-Code decisions. . . . The Code itself rejects this view of the role of the bankruptcy court; indeed, one of the express purposes of the Code was to remove the bankruptcy judge from general estate administration.").

35 Bankruptcy Law Revision, HR Rep No 95-595, 95th Cong, 1st Sess 4 (1977). As the House Report explains, the Bankruptcy Code revisions were intended, in part, to place additional limits on judicial intervention: "[The new Bankruptcy Code] will accomplish the separation of judicial and administrative functions currently performed by the bankruptcy judges. The judges will become passive arbiters of disputes . . . . [T]rustees will assume the bankruptcy judges' current supervisory roles over the conduct of bankruptcy cases." Id at 107.

36 See, for example, *In re Dawnwood Properties/78*, 209 F3d 114, 117 (2d Cir 2000) (acknowledging that, under 11 USC § 323(b), "[u]ltimately, it was within the trustee's discretion to pursue [claims against third parties], let them lie, or abandon them"); *In re STN Enterprises*, 779 F2d 901, 904 (2d Cir 1985) (noting that, "[u]nder [the Bankruptcy Code], it is clear that a

that judicial approval of settlements is not required by Rule 9019 and apply a less demanding standard when approving a settlement of a litigation claim under Rule 9019.[37] This issue, however, is beyond the scope of this Comment and does not speak to the threshold question that has split the circuits: Does § 363 apply to settlements?

II. THE CIRCUIT SPLIT: ARE SETTLEMENTS "SALES" REQUIRING § 363 APPROVAL?

Courts disagree whether settlements are the equivalent of sales of assets that require court approval under § 363(b). The Third Circuit has held that settlements are sales and require § 363 analysis, because a cause of action is an asset of the estate and a settlement is the means by which the trustee sells the asset. The Fifth Circuit and the Ninth Circuit Bankruptcy Appellate Panel have held that settlements sometimes trigger § 363. Finally, the First Circuit has concluded that settlements are fundamentally distinct from sales of assets and do not implicate § 363.

A. The Third Circuit: Settlements Are Always Sales

In *In re Martin*,[38] the Third Circuit analyzed a settlement as a sale under § 363. The Martins had contracted to sell their house to the Myerses, but after the contract was executed the Myerses refused to pay.[39] The parties initiated actions against each other for breach of contract. The Martins later filed for bankruptcy, and the trustee settled the dispute with the Myerses without court approval.[40] The Martins, unaware of the settlement negotiations between the Myerses and the trustee, had been granted an expedited trial date to bring the breach of contract suit to court.[41] The trustee realized that the estate could

trustee can initiate suit without court approval to avoid a preferential transfer of assets"); *In re V. Savino Oil & Heating Co*, 91 BR 655, 656–57 (Bankr EDNY 1988) (noting the discretion granted to the trustee in pursuing avoidance actions under § 544).

37 See, for example, *LeCompte v Sparks*, 1997 WL 156488, *4 (ND Ill) (noting that "there would be no need for court approval for a settlement agreement if the compromise did not involve an action for which the Code requires court approval"); *In re Novak*, 383 BR at 667; *In re Fortran Printing, Inc*, 297 BR 89, 96 (Bankr ND Ohio 2003) (emphasizing that court approval for settlements is "not [ ] necessary in every instance" and that the bankruptcy judge is "to stay removed from the administration of the bankruptcy or reorganization case, and to become involved only when there is a dispute about a proposed action"); *In the Matter of Dalen*, 259 BR 586, 603–04 (Bankr WD Mich 2001) ("Rule 9019(a) is nothing more than a free pass for the trustee to secure declaratory relief regarding her personal exposure with respect to compromises and settlements made by her on behalf of the estate."); *In re Telesphere*, 179 BR at 552.

38 91 F3d 389 (3d Cir 1996).

39 See id at 391.

40 See id.

41 See id at 392.

receive more money if the Martins went to trial. Consequently, she did not argue for the court to approve the settlement, and the judge decided to wait for the trial's result. At trial, the Martins were awarded money damages greater than the trustee's original settlement agreement. The bankruptcy judge then denied the settlement stipulation in order to allow the larger damages award to become part of the estate. The issue on appeal was whether the bankruptcy judge abused his discretion by denying the original settlement that the trustee had proposed. The Third Circuit held that he had not abused his discretion.[42]

The Third Circuit explained that the proposed settlement was a § 363 sale: "The instant agreement compromised an asset of the debtors' estate. . . . [T]his act ventured beyond the domain of transactions that the Martins encountered in the ordinary course of business prior to the filing of bankruptcy, thereby implicating Section 363."[43] The court further criticized the district court opinion for failing to analyze this issue under the § 363 lens.[44] Although it did not explicitly announce that all settlements require § 363(b) analysis as sales, the Third Circuit's decision, which relies heavily on the assumption that § 363 applies to settlements, suggests this result: "The import of Section 363 is that a trustee is prohibited from acting unilaterally."[45]

Following *Martin*, the Third Circuit decided *Northview Motors, Inc v Chrysler Motors Corp*,[46] affirming its position "that Section 363 of the Code is the substantive provision *requiring* court approval."[47] The debtor, Northview Motors, had filed a civil action against Chrysler asserting various claims, including tortious interference with contract and breach of contract. The trustee settled the claims that it held against Chrysler in exchange for both cash and the withdrawal of various claims that Chrysler held against the estate. The debtor and a secured creditor objected to the settlement, forcing the trustee to abandon the claim, so the bankruptcy court never approved the settlement agreement.[48] After a counteroffer by Chrysler was rejected by Northview and its secured creditor, Chrysler moved to enforce the

42 See *Martin*, 91 F3d at 393, 396.

43 Id at 394–95. The Third Circuit concluded that the cause of action was an asset of the estate under 11 USC § 541(a)(1), see id at 395, which defines the estate as consisting of "all legal or equitable interests of the debtor in property."

44 Id at 395 n 3.

45 Id at 395.

46 186 F3d 346 (3d Cir 1999).

47 Id at 351 n 4 (emphasis added).

48 See id at 347–48 (acknowledging that the bankruptcy court never approved the proposed settlement agreement "[b]ecause of its order regarding abandonment" of the claim by the trustee to the secured creditor).

previous settlement agreement, which was never approved by the bankruptcy court, between Chrysler and the trustee. The district court enforced the settlement agreement, and Northview appealed to the Third Circuit.[49]

The Third Circuit held that the proposed settlement must meet the § 363 requirements. It reasoned that "the Trustee's act of agreeing to settle Northview's claims against Chrysler constituted a sale of that claim. . . . Thus, the Bankruptcy Code contemplates notice, a hearing, and bankruptcy court approval in this situation."[50] The Third Circuit felt bound by *Martin* to hold that § 363 did require court approval of the settlement.[51] Because the lower court never approved the agreement as required by § 363, the Third Circuit held that the settlement was unenforceable.

The Third Circuit takes the position that a cause of action is an asset of the estate under 11 USC § 541(a)(1), so that when the trustee settles a cause of action, she is selling this asset. The transaction therefore implicates § 363. Under this reasoning, a trustee must gain court approval for every settlement under § 363.

B. The Ninth Circuit Bankruptcy Appellate Panel and the Fifth Circuit: Some Settlements Are Sales

1. The Ninth Circuit Bankruptcy Appellate Panel.

The Ninth Circuit Bankruptcy Appellate Panel takes the position that settlements are sometimes sales. In *In re Mickey Thompson Entertainment Group, Inc*,[52] the trustee sought approval of a fraudulent transfer claim settlement under Rule 9019.[53] A creditor objected to the settlement amount because a third party sought to purchase the claims for an amount higher than the proposed agreement. In response to this offer, the trustee proposed an auction for the claims. At the hearing, however, the bankruptcy court granted the motion to approve the original settlement agreement proposed by the trustee.[54]

49 Id at 347–48.

50 *Northview*, 186 F3d at 350–51, citing *In re Telesphere Communications, Inc*, 179 BR 544, 552 n 7 (Bankr ND Ill 1994) ("The settlement of a cause of action held by the estate is plainly the equivalent of a sale of that claim. There is no difference in the effect on the estate between the sale of a claim . . . to a third party and a settlement of the claim.").

51 *Northview*, 186 F3d at 351 n 4 (conceding that "Chrysler is correct that, as a matter of law, Bankruptcy Rule 9019(a), a rule of procedure, cannot, by itself, create a substantive requirement of judicial approval of the Trustee's settlement").

52 292 BR 415 (BAP 9th Cir 2003).

53 See id at 417.

54 See id at 418–19.

On appeal, the court considered whether the bankruptcy court abused its discretion by approving the original settlement.[55] The court held that the settlement was a sale of an asset because of the higher offer, which implicated the substantive requirements of § 363.[56] The court, however, did not go so far as to say that the substantive provisions of § 363 would be implicated in every settlement by the estate. Instead, it left the standard for deciding when settlements would implicate § 363 to the lower courts, directing only that they consider whether the settlement would "draw a higher price through a competitive process and be the proper subject of a section 363 sale."[57] This result requires consideration of § 363 procedures for some settlements, but provides little guidance for distinguishing which types of settlements would require the formal procedures of § 363 and which would be sufficiently handled under the trustee's discretion.[58]

2. The Fifth Circuit.

The Fifth Circuit's decision in *In re Moore*[59] follows the intermediate position of *Mickey Thompson*. This case concerned a dispute between the debtor, James H. Moore III, and the debtor's major creditor, the Cadle Company. Pre-petition, Moore owed the Cadle Company $12.5 million, and the Cadle Company initiated a suit against Moore alleging that Moore had hidden his personal assets through various business mechanisms to avoid paying back the antecedent debt. The Cadle Company asserted reverse veil-piercing and fraudulent conveyance claims against Moore to reach the funds. When Moore filed for bankruptcy, the litigation was stayed, and the trustee, acting on behalf of the creditors, inherited the claim.[60] The

55 In the bankruptcy court's view, the trustee had met his burden of proving that the settlement was fair and equitable pursuant to the requirements of Rule 9019. Id at 419–20. This standard is less stringent than the requirements of § 363(b) approval. Id at 420.

56 See *Mickey Thompson*, 292 BR at 421 ("We agree with the Third Circuit that the disposition by way of 'compromise' of a claim that is an asset of the estate is the equivalent of a sale . . . which transaction simultaneously implicates the 'sale' provisions under section 363 . . . and the 'compromise' procedure of Rule 9019(a).").

57 Id at 421–22 (emphasizing that the implication of sale procedures would "depend[] upon the dynamics of the particular situation"). But this gives only vague guidance to lower courts looking to apply the Bankruptcy Code to these settlements. Determining whether a settlement would be the proper subject of § 363 requires a detailed analysis. See Part III.

58 See *Mickey Thompson*, 292 BR at 422 n 7 ("We are not suggesting that every compromise . . . must pass muster as a sale under section 363. We are sensitive to the different considerations that come into play. But the inescapable fact in this case is that the label 'compromise' does not accurately characterize the transaction.").

59 608 F3d 253 (5th Cir 2010).

60 See id at 255–56. When a debtor enters bankruptcy, fraudulent transfer claims that would be brought by a single creditor outside bankruptcy are instead brought by the trustee. See

trustee was then charged to act on behalf of the general creditors in bringing money or assets back to the estate that were improperly hidden by the debtor Moore. The Cadle Company offered to purchase the claim from the trustee so that it could pursue the litigation itself, but the trustee refused. The trustee then settled the litigation claims with Moore for $37,500, bringing that money into the estate for the benefit of the creditors.[61] Moore also agreed to waive a substantial claim against the estate as part of the settlement, eliminating a liability of the estate for the benefit of the creditors.[62]

When the Cadle Company learned of the settlement, it offered $50,000 for the claims and filed an objection to the settlement as a violation of the trustee's obligation to maximize the value of assets sold.[63] If the trustee had accepted the Cadle Company's offer, $50,000—as opposed to $37,500—would have flowed to the estate, and the Cadle Company could have pursued the litigation claim against Moore for its own benefit. Moore's claim, however, would still be pending against the estate instead of being disposed of in the settlement. The trustee refused the offer from the Cadle Company, and the district court upheld the settlement between the trustee and the defendants, stating in part that the trustee was legally unable to sell the claims to a third party.[64] On appeal, the Fifth Circuit concluded that the district court had abused its discretion.

The Fifth Circuit held that the proposed settlement constituted a sale and implicated § 363. The court reasoned that the higher offer by the Cadle Company required the court to use § 363's formal procedures of notice and a hearing.[65] The Fifth Circuit rejected the trustee's argument that, because the settlement constituted a mutual release of claims, it was not a § 363 sale.

Moore aligns with *Mickey Thompson* and stands for the proposition that settlements of causes of action may sometimes be sales and therefore require consideration of whether the § 363 requirements apply.[66] Neither court, however, sufficiently explains how to distinguish between settlements that trigger § 363 and those that do not.

11 USC § 544(b) (providing trustees with the power to avoid fraudulent transfers for the interests of creditors).

61 See *Moore*, 608 F3d at 256.

62 See id at 265.

63 See id at 256.

64 See id at 256–57.

65 See *Moore*, 608 F3d at 263–65, quoting *Mickey Thompson*, 292 BR at 422 ("[E]ntertaining overbids often triggers a bidding sequence that may lead to a much higher price.").

66 See *Moore*, 608 F3d at 266 ("In the event an auction is held and the trustee selects defendants' offer, the bankruptcy court must assess the transaction . . . under § 363. Procedures under that rule would not be invoked, however, were the trustee to accept Cadle's bid.").

C. The First Circuit: Settlements Are Never Sales

In *In re Healthco International, Inc*,[67] the First Circuit held that settlements are never sales. There, the trustee had a fraudulent transfer claim and a state law tort claim. The trustee proposed a settlement: the estate would drop its claims in return for both monetary compensation and the waiver of several claims that the third party had against the estate. The court approved the settlement under Rule 9019 with only a slight modification. Several codefendants objected to the settlement and one appealed. The trustee looked to have the appeal dismissed on the ground that the settlement was a § 363 sale. Though § 363(b)'s notice and hearing requirements had been met, and the settlement was entered into in good faith, the trustee argued that § 363(m)—which precludes the appeal of sales meeting the above conditions—should apply in this case.[68] The court disagreed.

The First Circuit gave three reasons why § 363 was inapplicable. First, "[b]y its very nature a settlement resolves adversarial claims *prior* to their definitive determination by the court. In contrast, a 'sale' effects a '[t]ransfer of ["the title . . . "] [to] property for [a] consideration.'"[69] In the First Circuit's view, a settlement was a fundamentally different transaction from a sale of an asset. Because of the differences between a settlement and a sale, applying § 363 to settlements was not a logical step. Second, the court found the purpose of the good faith protection of § 363(m), which is to encourage the highest bids possible for assets, inapplicable to the settlement. The Bank Group "in no sense qualified as an outside bidder eligible for the extraordinary 'finality' guaranties afforded by section 363(m)."[70] The fact that § 363(m) added no value to these settlements—unlike the typical sale—was further proof that § 363 was inapplicable. Third, the court used the fact that Rule 9019 lacked a substantive analogue requiring the court to approve settlements as evidence that § 363 was inapplicable.[71] Because the Rules recognize the distinction between sales and settlements, § 363 should not be read to ignore this distinction.[72] The court then affirmed the approval of the settlement under Rule 9019.

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67 136 F3d 45 (1st Cir 1998).

68 See id at 47–49.

69 Id at 49 (alterations in original) (citation omitted).

70 Id.

71 See *Healthco*, 136 F3d at 49–50.

72 This distinction is highlighted by the existence of Rule 6004, which is the procedural rule for approving § 363 sales. While Rule 6004 has its substantive analogue in § 363, Rule 9019 does not. This is a distinction that would be ignored if § 363 were to apply to all settlements.

By holding that a settlement is never a sale for the purposes of § 363, the First Circuit placed itself in the minority. Importantly, the case highlights the potential problems of mapping § 363 considerations on to settlements. The court recognized that the analogy between sale and settlement does not always hold true and could lead to unintended consequences, such as granting good faith protection when none is needed or requiring a court to approve a settlement when no such approval is required.

* * *

As it stands, the lower courts are divided. The Third Circuit holds that settlements are always sales, while the Fifth Circuit and Ninth Circuit Bankruptcy Appellate Panel hold that settlements can be sales but left little guidance for lower courts to determine when § 363 applies. Finally, the First Circuit holds that settlements are not sales and that § 363 does not apply.

III. THE NONBANKRUPTCY BASELINE PROVIDES A SOLUTION

This Comment rejects both the position of the Third Circuit (that settlements are always sales) and the position of the First Circuit (that settlements are never sales). Instead, this Comment adopts the intermediate position of the Fifth Circuit and the Ninth Circuit Bankruptcy Appellate Panel (that settlements can sometimes be sales), because this position aligns with the nonbankruptcy baseline. To determine the nonbankruptcy baseline, a court must first identify the law outside bankruptcy and then ask whether a change in this background rule is justified by the purposes of bankruptcy law. This Part first shows that the nonbankruptcy baseline framework is well established in bankruptcy and identifies the nonbankruptcy rule with regard to settlements and sales. It then argues that the Third and First Circuits' positions would result in consequences contrary to the text and purposes of § 363.

A. Analysis of the Bankruptcy Code Should Begin with the Nonbankruptcy Baseline

Outside bankruptcy, a holder of a litigation claim may settle that claim without formal court procedures akin to those required by § 363 of the Bankruptcy Code. The nonbankruptcy rule, however, should be modified, and the protections of § 363 imposed in certain cases that would benefit from these protections. But there should be a change from the background rule only when a specific bankruptcy purpose requires the change. The framework suggested below is based on identifying distinctions between transactions that do not require a change in this nonbankruptcy rule to maximize the value of the estate and those that do require, or would benefit from, § 363.

1. The nonbankruptcy baseline is well established in case law and the academic literature.

Identifying the nonbankruptcy rule and the purposes for changing this rule in bankruptcy is an intuitive approach favored by the tradition of case law and academic literature. In *Butner v United States*,[73] the Supreme Court first recognized the general principle that bankruptcy law should mirror state law unless there is a significant justification for a departure. The Court stressed that, "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."[74] This general principle—that a change from state law is unwarranted unless a specific problem associated with bankruptcy requires a change—has also been recognized by the academic literature.[75] One scholar notes that "[a] rule change unrelated to the goals of bankruptcy creates incentives for particular holders of rights in assets to resort to bankruptcy in order to gain for themselves the advantages of that rule change."[76]

Bankruptcy courts have applied the nonbankruptcy framework when determining whether § 363 should apply in other contexts, including the payment of "break-up fees." To incentivize bidders to bid on an asset from the estate, debtors often agree to pay fees to potential purchasers to protect them against the risk of a higher bid that causes the bidder's potential agreement to fall through.[77] When bankruptcy courts have to determine what standard of review to apply to the payment of break-up fees, they begin with state law. Under the applicable state law outside bankruptcy, a court reviews payments of break-up fees in the merger and acquisitions context under the business

73 440 US 48 (1979).

74 Id at 55.

75 See Douglas G. Baird, *Elements of Bankruptcy* 5 (Foundation 5th ed 2010) ("*Butner* thus allows us to draw from a complicated statute a single organizing principle. Knowing the outcome under nonbankruptcy law can go a long way toward understanding the problem in bankruptcy."); Juliet M. Moringiello, *A Tale of Two Codes: Examining § 522(f) of the Bankruptcy Code, § 9-103 of the Uniform Commercial Code and the Proper Role of State Law in Bankruptcy*, 79 Wash U L Q 863, 911 (2001).

76 Jackson, *Logic and Limits* at 33 (cited in note 8). See also Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J Legal Stud 73, 89 (1985).

77 See *In re Integrated Resources, Inc*, 135 BR 746, 750 (Bankr SDNY 1992) (noting some possible reimbursements that a seller would make as part of a break-up fee agreement).

judgment rule.[78] The bankruptcy courts, therefore, must determine whether there is a justification warranting deviation from the business judgment rule when these payments are made during bankruptcy. Some courts have held that the nonbankruptcy standard of reviewing break-up fees under the business judgment rule is sufficient.[79] Other courts, however, have found a deviation from the nonbankruptcy baseline appropriate and impose a more stringent standard of review. These courts justify the departure on the grounds that break-up fees present a risk to creditors as an "unwarranted expense upon the Debtor's estate."[80] The cases and literature reveal a consistent approach to interpreting ambiguities in the Bankruptcy Code: courts will apply the nonbankruptcy baseline unless there is a strong interest that warrants a deviation.[81]

2. The nonbankruptcy baseline for settlements and sales.

Section 363 is a response to a particular problem that a debtor faces in bankruptcy that is not present outside bankruptcy. When a debtor enters bankruptcy, selling assets of the estate can be difficult because purchasers are hesitant to deal with an insolvent party and may fear the prolonged litigation that could accompany the purchase.[82] Furthermore, because multiple creditors now have an interest in seeing the asset obtain the highest value for the estate, it may be desirable to set up a formal auction procedure. These concerns, however, are not present in a normal asset sale outside bankruptcy. Instead, it is only inside bankruptcy that these problems occur. Section

78 See, for example, *Cottle v Storer Communication, Inc*, 849 F2d 570, 578–79 (11th Cir 1988).

79 See, for example, *In re 995 Fifth Avenue Associates, LP*, 96 BR 24, 28 (Bankr SDNY 1989) (holding that the nonbankruptcy standards for reviewing break-up fees were applicable in the bankruptcy context); *In re Integrated Resources, Inc*, 147 BR 650, 656 (SDNY 1992).

80 *In re Hupp Industries, Inc*, 140 BR 191, 195–96 (Bankr ND Ohio 1992) ("In the bankruptcy context, however, bidding incentives . . . are carefully scrutinized in § 363(b) asset sales to insure that the debtor's estate is not unduly burdened and that the relative rights of the parties in interest are protected."). See also *In the Matter of Tiara Motorcoach Corp*, 212 BR 133, 137 (Bankr ND Ind 1997) ("[The break-up fee was part of a] sale pursuant to § 363 . . . and the business judgment of the debtor should not be solely relied upon.").

81 See, for example, *In re S.N.A. Nut Co*, 186 BR 98, 104 (Bankr ND Ill 1995) (holding that a deviation from the business judgment rule is necessary because "bidders in a § 363 asset sale enjoy several benefits not available to bidders operating outside of the Code"). See also Paul B. Lackey, *An Empirical Survey and Proposed Bankruptcy Code Section Concerning the Propriety of Bidding Incentives in a Bankruptcy Sale of Assets*, 93 Colum L Rev 720, 737–38 (1993) (comparing the purposes that bidding incentives serve in bankruptcy asset sales with the merger-and-acquisition context to argue for a change in how bidding incentives like break-up fees are analyzed under the Bankruptcy Code); Bruce A. Markell, *The Case against Breakup Fees in Bankruptcy*, 66 Am Bankr L J 349, 377 (1992) (noting that the nonbankruptcy standard does not adequately account for benefits that the Bankruptcy Code already provides to asset sales).

82 See text accompanying notes 21–22.

363 and its formal procedures respond to these specific problems:[83] "[B]ankruptcy takes nonbankruptcy rights as it finds them. Only the procedures change, and these change only to solve the particular problems bankruptcy is designed to address."[84] To properly determine how to treat settlements, it is important to identify the qualities of the transaction that require a change from the nonbankruptcy rule and those that do not. When deciding whether to analyze a settlement under § 363, a bankruptcy court should identify the settlement's particular qualities and make the changes from the background rule only when the protections of § 363 would serve the purpose that they were intended to serve.

Applying the *Butner* principle to the current split provides a resolution true to the Code's underlying goals. The background rule that applies when the debtor sells an asset is that a debtor would be able to sell the claim without cause for concern outside bankruptcy. When a debtor enters bankruptcy, however, there is sometimes ample reason to change the background rule to serve the interests of the creditors and the estate. For example, a sale of an asset outside the ordinary course of business presents a risk to creditors that the estate is not receiving fair value, while a sale within the ordinary course of business should not present as strong of a risk. The Code recognizes this difference, and the protections of § 363 apply only to sales outside the ordinary course of business. For settlements, the background nonbankruptcy rule is that a debtor would be able to unilaterally settle a claim against a third party. The settling of claims inside bankruptcy, however, does not necessarily require a change in the background rule in all circumstances. In fact, a change in the background rule for some settlements would result in harm to the estate by increasing litigation costs and reducing the value of the settlement. This Comment uses the *Butner* principle to show when bankruptcy law should deviate from the nonbankruptcy baseline.

B. The Third Circuit's Position That All Settlements Require § 363 Analysis Should Be Rejected

This Part rejects the Third Circuit's holding that all settlements require court approval under § 363, because it unnecessarily changes the nonbankruptcy baseline rule in some cases. Applying § 363 to all settlements would impose costs on the bankruptcy process by mandating judicial intervention and restricting the trustee's discretion.

83 See Part I.B.

84 See Baird, *Elements of Bankruptcy* at 5 (cited in note 75).

These costs would not be offset by any gain to the estate, because the protections of § 363 do not increase the value of some settlements.

1. The costs of increased court involvement.

Treating all settlements as sales under § 363(b) would require all settlements to get court approval. This would slow down the process of administering the estate and increase administrative costs. By requiring settlements of miniscule amounts to gain court approval under § 363, the administrative costs could outstrip the settlement amount.[85]

Moreover, recent changes to the Code and the Rules indicate a move away from requiring court approval of settlements. First, when it revised the Code, Congress removed the requirement in the Bankruptcy Act of 1898 that settlements be reviewed by the court.[86] Bankruptcy courts should respect congressional action. As the Supreme Court has said, "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[87] Second, the discretionary language of Rule 9019 further supports Congress's intent to leave discretion to the trustee. It notes that "the use of 'may' in the rule as opposed to 'shall' creates ambiguity at the very least, especially in light of . . . Congress' express decision to remove the court from case administration."[88] This suggests that Congress intended to move away from requiring court approval of settlements.[89]

85 See *S.N.A. Nut*, 186 BR at 105–06 (noting the costs of § 363(b) sales and observing that one purpose of providing bidders with break-up fees is to compensate parties for the expenses in participating in the sale). See also *In the Matter of Dalen*, 259 BR 586, 599 n 18 (Bankr WD Mich 2001) ("It is unlikely that Congress intended the bankruptcy courts to micro-manage trustee settlements and the court is unwilling to read into Rule 9019(a) an ordinary course exception to trustee settlements."); *In re Novak*, 383 BR 660, 668–69 (Bankr WD Mich 2008):

> [I]nterpreting Rule 9019(a) as requiring approval without some type of ordinary course exception could easily lead to the incongruous situation of a trustee being empowered to independently sell under Section 363(c) a very expensive item . . . yet having to run back to court to approve the settlement of even the most inconsequential of warranty claims arising from the very same sale.

86 30 Stat 544, superseded by Bankruptcy Reform Act of 1978, Pub L No 95-598, 92 Stat 2549.

87 *City of Chicago v Environmental Defense Fund*, 511 US 328, 338 (1994) (quotation marks omitted). See also *BFP v Resolution Trust Corp*, 511 US 531, 549–55 (1994) (Souter dissenting).

88 *Novak*, 383 BR at 668.

89 See id at 664–65. For an alternative view, see Reynaldo Anaya Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 Or L Rev 425, 449–50 (1999) (arguing that compliance with Rule 9019 is mandatory for all settlements). Reynaldo Valencia notes that, under the Bankruptcy Act of 1898, court approval was required of all settlement agreements but that, "[f]or some unexplainable reason," the Code had not included a substantive provision requiring court approval of settlements. Id at 449. The

2. Harm to the estate's bargaining power.

Requiring a trustee to come to court and hold a § 363 hearing forces the trustee to disclose publicly information about the estate. The availability of this information may affect how future creditors of the estate bargain with the trustee or negotiate future settlements.[90] If a trustee must disclose the estate's prospects before any settlement agreement can be confirmed, then the current defendant and future parties would have access to this information and would be in a better position to negotiate with the estate. With this information available to the public, parties might decide to litigate a claim that they would otherwise settle, thus forcing the estate to incur these costs. This would counteract § 363's purpose of gaining the highest value possible for each claim.

The potential for harm to the estate's bargaining power has been acknowledged in the context of Rule 9019. Courts have noted that one benefit of the Rule's discretionary nature allows the trustee to decide not to seek court approval if doing so might harm the estate's bargaining position: "If [the] Trustee is truly concerned about disclosure, then she should withdraw her Rule 9019(a) motion and rely instead upon her own experience as to whether the settlement passes muster or not."[91] If § 363 applied to all settlements, then this advantage would be lost, as the trustee would have to come to court to gain approval, thus defeating § 363's purpose.

3. The § 363(m) finality provision does not apply to settlements.

Sales under § 363 enjoy the protections of § 363(m), which grants finality of sales to good faith purchasers. This is done to grant legitimacy to the estate and encourage bidders by eliminating the threat that future litigation would arise from the purchase.[92] The

omission, however, may be explained by the Bankruptcy Code's preference for limiting court involvement and is consistent with the discretionary language of Rule 9019 itself. Further, courts have been hesitant to attribute no meaning to congressional changes to statutory language. See *TRW Inc v Andrews*, 534 US 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotation marks omitted); *In re Reasonover*, 236 BR 219, 228 & n 8 (Bankr ED Va 1999) (noting that the Bankruptcy Code is complicated and that drafting errors have happened but—absent clear errors—"[w]hen Congress speaks, the court must assume that it does so for a purpose").

90 See Brad B. Erens and Kelly M. Neff, *Confidentiality in Chapter 11*, 22 Emory Bankr Dev J 47, 86–90 (2006) (arguing that not all settlements should require court approval because mandatory court approval would impose costs on the debtor by forcing public disclosures).

91 *Novak*, 383 BR at 676.

92 See *In re Mark Bell Furniture Warehouse, Inc*, 992 F2d 7, 8 (1st Cir 1993) (noting that § 363(m) good faith protection is beneficial because "finality and reliability of judicial sales enhance the value of assets sold in bankruptcy"). See also text accompanying notes 21–22.

purpose of § 363(m) has been recognized to give "finality to judgments by protecting good faith purchasers, the innocent third parties who rely on the finality of bankruptcy judgments in making their offers and bids."[93] This benefit of § 363 is unnecessary in the context of settlements, however, because the defendant is not debating whether it should enter into business with the debtor. With the threat of costly litigation already present, a potential defendant needs no further incentive to enter into negotiations with the debtor. In this sense, it is not a typical "purchaser" for the purposes of § 363(m).

Further, it is unclear how the bankruptcy court would determine if a settling defendant was a "*good faith* purchaser" as required by § 363(m).[94] When deciding whether a purchaser acted in good faith, courts have looked at "the integrity of his conduct in the course of the sale proceedings," finding bad faith when there is "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."[95] It would be difficult to map this analysis on to the negotiations between a trustee and a settling defendant. Unlike a § 363(b) auction, where there is a bidding process, the defendant and a trustee will come to mutually agreeable terms, typically on their own. The interests of other bidders may not be present, and it would be hard to determine when hard bargaining or a quick agreement between the trustee and the defendant would constitute "bad faith" for the purposes of this provision. This element of § 363 might result in courts considering all settling defendants "good faith purchasers," which would preclude the appeal of all settlement agreements. This would essentially read the "good faith" requirement out of § 363 when applied to settlements.

Alternatively, whether a settling defendant acted in good faith could be contested in front of the bankruptcy court. If this were the case, then the negotiations between a trustee and a settling defendant will be impacted by efforts to look more like a good faith purchase. Defendants will be concerned with justifying the agreement in court as one made in "good faith," and because of this added cost, defendants will be more likely to litigate. Both of these results would alter settlement negotiations, revealing the problems of applying § 363 to settlements. Accordingly, no court has applied the good faith protections to settlements of a debtor's cause of action against a third party.[96]

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93 See *In re Motors Liquidation Co*, 430 BR 65, 79 n 8 (Bankr SDNY 2010).

94 11 USC § 363 (emphasis added).

95 *In re Abbotts Dairies of Pennsylvania, Inc*, 788 F2d 143, 147 (3d Cir 1986).

96 See *Healthco*, 136 F3d at 49 (noting the inapplicability of § 363(m) protections to settlements).

4. Restricting the discretion of the trustee.

Settlements examined under Rule 9019 require a showing that the proposed agreement is fair and equitable, while settlements examined under § 363 require the trustee to show a sound business judgment and that the sale maximizes the value of the estate.[97] The Rule 9019 standard is less rigorous than the § 363 standard, as shown in *Moore*.[98] Unlike in *Moore*, however, there may be many circumstances in which a trustee would like to settle a claim, but fear of having the settlement voided if the more rigorous § 363 standards were to apply will cause the trustee to wait unnecessarily to see if there will be any overbids. Accordingly, to maximize the value of the estate, a trustee will have to adjust her priorities when negotiating settlements to accord with the § 363 requirements. This may potentially eliminate or delay some settlement agreements that would have passed muster had § 363 been inapplicable.

C. The First Circuit's Position That Settlements Never Require § 363 Analysis Should Be Rejected

The First Circuit held that settlements are not the equivalent of sales and therefore do not trigger § 363 analysis. This position overlooks a class of settlements that could benefit from the bidding procedures of § 363. That is, some causes of action belonging to the estate may be sold to a third party.[99] When there are multiple potential purchasers for the claim, the § 363 protections are appropriate because of their value-maximizing function. First, by setting up the bidding process in a single forum, the formal sales procedures help the trustee easily value various bids on the litigation claim. Second, the § 363(m) finality provisions induce third parties who would normally not deal with an estate in bankruptcy to bid on the asset, which increases the value brought to the estate.[100] A blanket rule rejecting

97 See *Moore*, 608 F3d at 263.

98 See id at 264 (noting that a trustee would not need to consider overbids when relying solely on Rule 9019 for approval but would have to consider these higher offers under § 363).

99 See text accompanying note 110.

100 Section 363 has other provisions that increase the sale price for assets of the estate. Section 363(f) permits the sale of property "free and clear of any interest in such property of an entity other than the estate." This provision is inapplicable to settlements, however, as the asset—that is, the cause of action—is unencumbered by any interest other than that of the holder of the claim, the estate. For a discussion of what constitutes an "interest in property" that is removed when the property is sold free and clear under § 363(f), see *In re Trans World Airlines, Inc*, 322 F3d 283, 288–90 (3d Cir 2003). Section 363(k) also increases the sales price by allowing a secured creditor to bid the face value of its secured claims. See *In re SubMicron Systems Corp*, 432 F3d 448, 459 (3d Cir 2006). This process is known as "credit bidding," and it ensures that the secured creditor is protected because he can bid up to the value of his claim and guarantee that, if the asset is sold, he will still be paid in full or receive the asset. Both of these provisions are

§ 363 analysis for all settlements fails to account for these features and will limit the estate's ability to maximize the value of its assets.

IV. THE NONBANKRUPTCY BASELINE FRAMEWORK

Always or never requiring the application of § 363 to settlements results in outcomes inconsistent with § 363's purposes. This Comment therefore adopts the intermediate approach that settlements should sometimes be examined under § 363. Courts currently taking this position, however, fail to articulate a framework for determining when § 363 should apply. This Part proposes a framework in which courts deviate from the nonbankruptcy treatment of settlements—which requires no court review—only when doing so would serve § 363's intended purpose. First, the court should consider the threshold issue of whether the claim is alienable outside bankruptcy. If so, the court should then balance various factors, including whether the terms of the settlement agreement include a mutual release of claims, the consequences of making the terms of the settlement public, and whether there are multiple potential purchasers of the claim.

A. Threshold Question: Is the Cause of Action Alienable or Assignable outside Bankruptcy?

The first step is a threshold determination: if the claim is inalienable outside bankruptcy, then it should not trigger § 363. The provisions of § 363 correct for the difficulty of selling an asset in bankruptcy when purchasers would otherwise be scared off by the debtor's insolvency and potential bidders need to be located. Inalienable claims require the holder of the claim to negotiate directly with the trustee. The purposes underlying § 363 are therefore inapplicable to inalienable claims, and there is no need to deviate from the nonbankruptcy baseline rule allowing the cause of action to be settled without court intervention.

There are certain causes of actions, such as personal injury lawsuit claims, that are inalienable outside bankruptcy.[101] At common law, causes of action were held to be inalienable based on whether the cause of action was descendible; if a claim did not survive the death of the holder, then it was not assignable.[102] But courts retained the ability to deem a cause of action inalienable based on public policy,

inapplicable to settlements and are evidence of the incongruity of the protections of § 363 and settlement agreements.

101 See Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J Legal Stud 329, 330–33 (1987).

102 See *State Mutual Life Assurance Co of America v Deer Creek Park*, 612 F2d 259, 265 (6th Cir 1979) (noting that tort actions were traditionally inalienable at common law).

regardless of the claim's ability to survive the holder.[103] Additionally, some states codify the common law tradition by prohibiting the sale of certain claims by statute.[104] This state-law distinction has not been lost on bankruptcy courts.[105] For example, the distinction between alienable and inalienable claims was noted when deciding what constitutes property of the estate at the commencement of a bankruptcy proceeding: "The most significant interest which may not be assigned or transferred is a cause of action for personal injury. The proscription on the aliening of personal injury actions existed at common law and . . . personal injury actions are exempt from creditor process."[106] The alienability of the cause of action was identified by the Fifth Circuit in *In re Moore*, when it reviewed the lower court's approval of a settlement without § 363 procedures.[107]

There are differences from state to state over which causes of action are alienable.[108] The trustee should not gain a right that was unavailable to the debtor outside bankruptcy law when there is no justification for the departure from the nonbankruptcy baseline. Therefore, the trustee should not gain the ability to make inalienable claims alienable just because of the happenstance of bankruptcy. Inalienable claims do not require the protections of § 363's notice and hearing requirements, because there is no need to encourage the defendant to deal with the debtor. Unlike a sale, in which a purchaser has a choice to buy from the debtor but may be hesitant to do so because of the seller's insolvency, a defendant already has the incentive to settle because he is faced with the costs of future litigation. The justifications for the departures from nonbankruptcy

103 See, for example, *Joos v Drillock*, 338 NW2d 736, 739 (Mich App 1983) (holding that a legal malpractice claim was nontransferable "[i]n view of the personal nature of the attorney–client relationship" and attendant public policy considerations).

104 See, for example, NY Gen Oblig Law § 13-101 (McKinney) (providing that any cause of action is transferable subject to three limitations).

105 See, for example, *In re Schauer*, 835 F2d 1222, 1225 (8th Cir 1987) ("Sections 363(b)(1) and 704 do not [ ] authorize the trustee to sell property contrary to the restrictions imposed by state and contract law. These sections . . . give the trustee the authority to sell or dispose of property if the debtors would have had the same right under state law."); *Integrated Solutions, Inc v Service Support Specialties, Inc*, 124 F3d 487, 494 (3d Cir 1997).

106 *In re Sheets*, 69 BR 542, 543 n 4 (Bankr WDNY 1987) (citation omitted). See also *In re Mucelli*, 21 BR 601, 603 (Bankr SDNY 1982) (noting that "an assignment or transfer of a personal injury is prohibited").

107 *Moore*, 608 F3d at 257–58.

108 A good example is a legal malpractice claim. Compare *Joos*, 338 NW2d at 739 (holding a legal malpractice claim inalienable); *Goodley v Wank & Wank, Inc*, 133 Cal Rptr 83, 87 (Cal App 1976) ("It is the unique quality of legal services . . . that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment."), with *Greevy v Becker, Isserlis, Sullivan & Kurtz*, 658 NYS2d 693, 694 (NY App 1997) (holding that legal malpractice claims are assignable).

rules are not present with these claims. When there is no justification to depart from the nonbankruptcy laws, state law should apply.[109]

Moreover, a settlement of an inalienable claim, by nature, has only one potential "bidder." This renders the notification provisions of § 363 useless for inducing a higher price for the settlement. There can be no auction with only one available bidder. Analysis under § 363 would, in fact, lower the settlement amount because of the increased cost to the settling parties of the court hearing, which includes the risk of the court's rejecting the settlement. In these situations, the trustee should be permitted to settle the case on her own, outside § 363's requirements.

Many states, however, hold that litigation claims are alienable as a general rule.[110] Even where a cause of action is freely assignable and alienable, there are still reasons why § 363's analysis would be inappropriate. For instance, if there is only one potential purchaser of the asset, and that potential purchaser is a creditor of the estate, then the formal sale requirements of § 363 are unnecessary because there is no need for an auction to attract additional bidders. Therefore, a claim can be alienable and still be a poor fit for § 363. On the other hand, a cause of action with multiple potential purchasers would benefit from § 363's auction procedures. An initial finding of alienability thus does not end the analysis, nor does it cut one way or the other. The suggested framework for the classification of settlements requires a balancing of the next three factors.

B. Does the Settlement Agreement Include a Mutual Release of Claims?

Section 363 treatment should be disfavored when the settlement agreement involves a mutual release of claims.[111] This factor should be weighed the most heavily when characterizing the settlement, because deviating from the nonbankruptcy rule and applying § 363 would

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109 See Jackson, *Logic and Limits* at 33 (cited in note 8) (arguing that a "rule change unrelated to the goals of bankruptcy creates incentives for particular holders of rights in assets to resort to bankruptcy in order to gain for themselves the advantages of that rule change"); Barry E. Adler, Douglas G. Baird, and Thomas H. Jackson, *Cases, Problems and Materials on Bankruptcy* 30 (Foundation 4th ed 2007) ("The most sensible approach to interpreting the Bankruptcy Code is usually one that begins by assuming that Congress intended to vindicate the policy in question with as little disturbance as possible to the nonbankruptcy baseline."). See also Part III.A.

110 See *Smith v Endicott-Johnson Corp*, 192 NYS 121, 123 (NY App 1921) ("The general rule is that all rights of action in tort, which do not apply to the person strictly, but are for injury to one's property or estate, are assignable. A right of action for the wrongful conversion of personal property is assignable.") (citation omitted).

111 See, for example, *Moore*, 608 F3d at 265 (discussing a mutual release of claims but then deciding to apply § 363 to a settlement).

override the trustee's discretion, and the trustee is in the best position to value the assets and liabilities of the estate. By invoking § 363, the trustee's knowledge of the estate is ignored in favor of a bidding war designed to gain the highest possible cash offering for the asset. The highest cash offering may not, however, provide the best result for the estate because it fails to account for the trustee's valuation of the release of the claim against the estate. For instance, imagine a case in which $100 is the highest bid that the trustee can receive for a cause of action, but that there is a settlement offer of $50 accompanied by a release of a claim against the estate that is potentially worth anywhere from $45 to $75, depending on the merits of the claim against the estate. The trustee is in a better position than the bankruptcy judge to assess litigation strategies and evaluate the strength of the pending claim and thus the value of obtaining a release of that claim. Therefore, if she has reason to believe that the claim against the estate is worth only $45, then she can reject the offer. But, if the claim against the estate is more likely to be worth $75, then she can accept the $50 settlement for both claims. Applying § 363 to these settlements would be harmful because it would take this decision out of the trustee's discretion.

Applying § 363 to these agreements would add unnecessary layers of speculation when determining what value to accord the agreement. When a trustee settles a claim against a third party, the trustee is measuring the likelihood of success in the litigation, the cost of the litigation, and the amount of damages potentially gained. When it settles a litigation claim against the estate, the trustee is making a similar calculation of those uncertainties to determine the potential liability to the estate. By negotiating a release of litigation claims against the estate, the trustee is eliminating a potential liability of the estate and therefore increasing the pool left for creditors. If § 363 is applied to these agreements, then the bankruptcy court will either fail to account for the value of the release of claims against the estate or determine the value of the claim itself. Either way, analyzing a mutual release of claims under § 363 fails to account for the trustee's analysis of the liability avoided through the settlement. If not convinced by the trustee that the mutual release is a good use of assets under § 363, then the court will favor a creditor's absolute bid over the potential value of the cause of action by itself.

The normal § 363 overbid cases include multiple cash bids on one asset. In a settlement agreement for the mutual release of claims, however, the trustee is best positioned to consider the contingent legal claim against the estate because he alone will have to defend the suit. Ignoring the trustee's knowledge of the claim may produce a result that is inefficient in the aggregate. The court in *Mickey Thompson* suggested that the mutual release of claims would take a settlement out of the definition of sale under § 363,[112] but the Fifth Circuit in *Moore* rejected this distinction.[113] The court in *Mickey Thompson* has the better of this argument; the more personal the agreement between the individual defendant and the estate, the more it looks like the traditional settlement agreement. These agreements would benefit from the trustee's expertise and closeness to the dispute and do not need the § 363 sale protections.

Additionally, many bankruptcy courts have required the review of settlements that include mutual releases of claims under Rule 9019 instead of § 363.[114] The circuit courts, however, have failed to give this consideration its proper weight when classifying settlements. Courts understand that the urgency of settlements requires different treatment from sales.[115] Speed is essential for the formulation of a plan of reorganization in Chapter 11, and in some cases settlements are the first step toward getting a plan formed or approved.[116] Further, in *In re*

112 See *Mickey Thompson*, 292 BR at 421.

113 See *Moore*, 608 F3d at 265–66. The court identified the contingent nature of the indemnity claim as reason to find it unimportant to the classification of the settlement. It explained, "Brunswick's indemnity claim is a contingent claim that would be triggered only if the reverse veil-piercing claims against it were to prevail." Id at 265. This court's discounting of the mutual release of litigation claims, however, was informed by the court's own judgment of the value of the claim: "Bankruptcy courts should not allow defendants to settle estate claims at a discount and avoid § 363 scrutiny by filing large, frivolous claims against the estate." Id. The court did not believe that the indemnity claim was worth much to the estate, stating that "[e]ven if Brunswick's indemnity claim is legally viable, its value would be limited to Brunswick's maximum exposure in the alter-ego action. No one has ever valued that action at $12 million; Cadle's most optimistic estimates value it at no more than $2 million." Id at 265 n 23. While the court's valuation of the indemnification claim may be correct, the trustee is given wide discretion to make this determination for the estate. See FRBP 9019; cases cited in note 37. Further, even if the court's valuation aligned perfectly with the trustee's valuation, the mutual release of claims was in the best interests of the estate. The Cadle Company's bid was only $12,500 more than the cash flowing to the estate in the proposed settlement. This additional money is worth far less to the estate than the release of the $2 million dollar claim that the trustee bargained for in the settlement.

114 See, for example, *In re Edwards*, 228 BR 552, 568–71 (Bankr ED Pa 1998); *In re Kay*, 223 BR 816, 820–22 (Bankr MD Fla 1998) (invalidating a mutual release of claims under the Rule 9019 standard of review); *In re Pennsylvania Truck Lines, Inc*, 150 BR 595, 598–99 (Bankr ED Pa 1992) (holding that Rule 9019, not § 363, governs the approval of a settlement of mutual claims).

115 *Pennsylvania Truck Lines*, 150 BR at 599. This is an example of a case that would have been overturned by *Martin*. If all settlements are sales, then this distinction would not matter and the stricter requirements of § 363 would apply. The court in *Pennsylvania Truck Lines* disagreed with this interpretation: "I stand by [the] distinction between settlements of pre-petition claims and post-petition sales of assets." Id, citing *In re Neshaminy Office Building Associates*, 62 BR 798, 805 (Bankr ED Pa 1986) ("I do not believe it is proper to equate the settlement of this controversy over conflicting claims to Neshaminy Plaza with the sale of that property.").

116 See, for example, *In re Grant Broadcasting of Philadelphia, Inc*, 71 BR 390, 398 (Bankr ED Pa 1987).

Edwards,[117] the court analyzed a settlement under Rule 9019 despite its being part of a large § 363 sale.[118] The court upheld the trustee's judgment in settling the claims despite the debtor's wish to hold out for a higher amount: "While no one will ever know whether any additional dollars would have been forthcoming . . . the prejudice to creditors in rejecting the settlement in favor of more costly and protracted litigation . . . is too great."[119] The complexity and urgency of settlements involving mutual release of claims therefore makes it best to leave discretion in the hands of the trustee and not to require § 363 analysis.

C. Would Court Involvement Harm the Bargaining Position of the Estate?

The circuit courts did not consider how deviating from the nonbankruptcy baseline rule and applying § 363's notice and hearing requirements could harm an estate's bargaining power. For example, when the trustee settles one of many similar claims against the estate, the other claimants could benefit from knowledge of the settlement. There is an inherent tradeoff when a trustee comes to court to gain approval of a settlement: the court validates the action, but the terms of the sale or settlement become public.[120]

This tradeoff was recognized in *In re Alterra Healthcare Corp*.[121] The court was presented with a motion by a third party to disclose records of a settlement made by the debtor, Alterra, with third parties. The court modified a seal order and made public the terms of a settlement that would have remained private in the absence of court involvement. The debtor claimed that it "would not have filed the settlements with the Court if it had known the Court may unseal them later."[122] The debtor asserted that the unsettled claimants would want to go to trial after the disclosure instead of settling their claims.[123] The court held that the debtor had not shown enough prejudice, because there were multiple claimants who would want to "seek an early settlement to ensure they receive[d] a significant share of the shrinking pie."[124]

117 228 BR 552 (Bankr ED Pa 1998).

118 Id at 568–71.

119 Id at 571.

120 See 11 USC § 107(a)–(b). Sections 107(a) and 107(b) provide that all filings with the bankruptcy court become public records with a few limited exceptions—none of which encompass the bargaining power lost for future negotiations.

121 353 BR 66 (Bankr D Del 2006).

122 Id at 72.

123 Id at 73.

124 Id at 72–73 (reasoning that the possibility of future settlements was not prejudiced by publication of the records).

Although the debtor and the court disagreed whether the disclosure of information changed the parties' bargaining positions, it is possible to imagine a slightly different situation in which the other claimants would benefit from the settlement's disclosure. In such cases, the debtor would be harmed by § 363's mandatory court approval because the other claimants would have improved their bargaining positions. Further, this may cause a chilling effect on settlements, because the trustee may be hesitant even to entertain the possibility of a settlement if she knows that the settlement will become public. This results in more costly litigation and a higher ultimate cost to the estate as the trustee foregoes cost-justified settlements in favor of litigation. Memorializing a settlement in open court under § 363 may affect bargaining with future claimants, even if its terms are sealed. Accordingly, when disclosure of a settlement's terms would harm the estate's bargaining position with future claimants, the court should be less willing to require notice and a hearing under § 363 and should be receptive to the trustee's judgment to settle the case outside the purview of the court.

D. Are There Potential Purchasers for the Claim?

Finally, courts should consider whether there are multiple potential purchasers of a claim. If there is a market for the claim, then the settlement looks more like a sale, and the auction procedures of § 363 should be used. In this case, a deviation from the nonbankruptcy rule is warranted to maximize the value retrieved from the claim for the estate.

In *In re Resource Technology Corp*,[125] the court looked closely at the number of potential purchasers of an alienable claim when deciding to apply § 363(m)'s good faith protections to a settlement. "[I]n this case," the court found, "there was, in effect, a 'bidding' process, thus bringing into play § 363(m)'s policy of encouraging better offers by ensuring finality."[126] When multiple bidders are seeking to buy an alienable claim, the court has an interest in supervising the proceedings and applying the requirements of § 363. When third parties show interest in purchasing the claim, it makes the settlement look more like a sale that should be removed from the discretion of the trustee in favor of the formal requirements of § 363.

125 2005 WL 1155683 (Bankr NDNY).

126 Id at *3. See also *In re Lahijani*, 325 BR 282, 288–89 (BAP 9th Cir 2005) (noting that the auction procedures of § 363 are meant to attract higher bids and ensure that the "optimal value is realized by the estate").

* * *

In sum, a settlement's nonbankruptcy characteristics should be examined to determine whether review under § 363 is appropriate. These characteristics include (1) whether the cause of action is alienable, (2) whether the settlement agreement involves a mutual release of claims, (3) the implications of requiring disclosure on future litigation by the estate, and (4) the presence or likelihood of multiple potential purchasers. The presence of these characteristics suggests that a settlement is more like a sale and would benefit from § 363 protections. Their absence suggests that a settlement is best left to the trustee's discretion.

E. The Fifth Circuit Revisited

This section applies the above framework to the facts of the Fifth Circuit's decision in *In re Moore*. The Fifth Circuit held that settlements are sometimes sales but failed to articulate a framework. Applying this Comment's framework shows that the case should have come out the other way.

In *In re Moore*, the Fifth Circuit held that the settlement of reverse veil-piercing and fraudulent transfer claims by the trustee required § 363 analysis by the bankruptcy court.[127] The court reasoned that a major creditor's offer to buy the cause of action for $50,000 would bring a higher value to the estate than a $37,500 settlement offer that included the release of a potential $12 million indemnity claim held against the estate. The court simply noted that the trustee was required to maximize the value of the estate under § 363.[128] Analysis under this Comment's framework suggests that the trustee's settlement should have been upheld without requiring § 363 analysis.

As a threshold matter, these causes of action were alienable under state law, so there is no automatic exception from the requirements of § 363. This determination does not end the analysis, however, because the settlement of an alienable claim may still require § 363 procedures.[129]

Under this Comment's proposed framework, the court would next balance the remaining three factors. The second factor—whether there was a mutual release of claims—cuts against requiring § 363 analysis in this case. The trustee was in a better position than the court to determine the value of the $12 million claim against the estate

127 See *Moore*, 608 F3d at 266.
128 See id.
129 See Part IV.B.

when negotiating the settlement. The mutual release of claims frustrates the mechanics of § 363 because the settlement includes the dismissal of a contingent claim against the estate. The trustee has better information about the claim against the estate and is better able to weigh competing interests about how to proceed, such as accounting for the disclosure costs of seeking court approval. This informational and decisionmaking advantage supports the primary position that the Bankruptcy Code gives the trustee in a bankruptcy proceeding. By applying § 363, the Fifth Circuit's decision seems to give more weight to the major creditor's interest in the specific cause of action rather than the trustee's discretion and relative competence to make decisions for the estate as a whole. It is just as likely that the settlement of the claims against the estate was worth more on an expected value basis than the $13,000 overbid by the major creditor.[130] This type of agreement would benefit from the expertise and independent decisionmaking authority of the trustee.[131]

The third factor, whether court involvement would harm the estate's bargaining power in future litigation, does not seem implicated by the facts in *Moore* because there was no future litigation pending between the parties and no similar litigation claims. This factor, therefore, is indeterminate. The fourth factor, whether there were potential bidders, strongly influenced the Fifth Circuit's decision. This should not have been determinative, however, because there was only one other potential "bidder" in this case. Therefore, the auction procedures of § 363 would be less useful than if there were a wider market with many bidders seeking the claim. Because the major creditor was the only bidder, this factor cuts against § 363 analysis.

Applying this Comment's framework shows that this decision should probably not have been examined under § 363. The threshold test would not automatically exempt § 363 analysis because the claims were alienable at state law. The court would then consider the other three factors. The second factor militates strongly against § 363 analysis as there was a mutual release of claims. The third factor is indeterminate because the estate's bargaining power was not jeopardized. Finally, the fourth factor cuts slightly against § 363 analysis because there was not a market of multiple potential bidders who would benefit from the § 363 protections. In sum, two factors, the second and fourth, cut against § 363 analysis, while the third factor is insufficient on its own to support analysis under § 363. Accordingly, the

130 See note 113.

131 See Part IV.B. This analysis would also require a reconsideration of the Third Circuit's opinion in *In re Martin*. That case also dealt with a mutual release of claims, and therefore the factors would seem to cut against § 363's application.

settlement had qualities distinct from a sale, and there was no justification for deviating from the nonbankruptcy rule by applying the § 363 sale requirements.

CONCLUSION

Circuit courts are split on how to analyze settlements of claims under the Bankruptcy Code. This Comment resolves the split by using the nonbankruptcy baseline framework as the method for courts to categorize settlements. In deciding how to review specific settlements, a court should look at the qualities of the settlement outside bankruptcy—whether the litigation claim is alienable outside bankruptcy, whether the settlement includes a mutual release of litigation claims, whether court involvement would harm the estate's future bargaining position, and whether there are multiple potential purchasers for the claim—and then match those qualities with the purposes of § 363 of the Bankruptcy Code.