

**SALES FREE AND CLEAR OF AN INTELLECTUAL  
PROPERTY LICENSEE'S INTERESTS IN BANKRUPTCY—  
LOOKING TO *IN RE TEMPNOLOGY* FOR GUIDANCE**

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ABSTRACT

*Uncertainty surrounds many issues that exist at the intersection of bankruptcy law and intellectual property law. Section 363(f) of the Bankruptcy Code permits the debtor to sell assets free of a third party's interest in such assets, provided one or more preconditions is satisfied. When a debtor rejects a license agreement pertaining to the debtor's intellectual property, however, § 365(n) of the Bankruptcy Code allows the licensee to choose to retain its rights to use the intellectual property that was the subject of the rejected license agreement. One unsettled question is whether a debtor may sell intellectual property pursuant to § 363(f) and thereby extinguish any interest a nondebtor licensee might have otherwise retained under § 365(n). This Article seeks to bring clarity to this important question. The Article first examines this question in light of the Supreme Court's decision in *Mission Prod. Holdings, Inc. v. Tempnology, LLC*. It concludes that the Court's analysis in *Tempnology*, buttressed by principles of statutory construction and the relevant legislative history, supports the conclusion that the protections of § 365(n) should not be construed as trumping the free and clear sale power of § 363(f). The Article then examines this result against the backdrop of two competing visions for the role of bankruptcy law—the proceduralist account and the traditionalist account. The Article determines that both theoretical frameworks support the conclusion that the free and clear sale power of § 363(f) should not be curtailed by the protections afforded to licensees in the context of the rejection of an intellectual property license agreement.*

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## INTRODUCTION

Intellectual property is often critical to the financial stability and well-being of a company. When a debtor enters bankruptcy, the Bankruptcy Code<sup>1</sup> contains several provisions

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1. Title 11 of the United States Code is commonly referred to as the “Bankruptcy Code.” *US Bankruptcy Code*, CORP. FIN INST., <https://corporatefinanceinstitute.com/resources/knowledge/>

that may impact rights held by the debtor,<sup>2</sup> or others, in the debtor's intellectual property. Given the important role that intellectual property often plays in the life of a business, disputes pertaining to a debtor's intellectual property frequently surface in the context of the debtor's bankruptcy case.<sup>3</sup> Unfortunately, significant uncertainty continues to surround many of the issues that exist at the intersection of bankruptcy law and intellectual property law.

One area of confusion arises when the debtor-licensor<sup>4</sup> of intellectual property seeks to sell intellectual property it owns in bankruptcy free of a third-party licensee's interests in the intellectual property.<sup>5</sup> In that context, two arguably conflicting provisions of the Bankruptcy Code are implicated. Under § 363(f) of the Bankruptcy Code, assuming one or more preconditions are satisfied, the debtor is permitted to sell property of the estate "free and clear of any interest in such property."<sup>6</sup> This provision of the Bankruptcy Code suggests that a debtor may sell intellectual property assets free of the

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other/us-bankruptcy-code/ (Oct. 18, 2022); *see also* 11 U.S.C. §§ 101–112, 301–306, 501–562, 701–784, 901–946, 1101–1195, 1201–1232, 1301–1330, 1501–1532.

2. A debtor in a case under Chapter 11 of the Bankruptcy Code is referred to as the "debtor in possession." *The Chapter 11 Debtor in Possession*, USLEGAL.COM, <https://bankruptcy.uslegal.com/chapter-11-bankruptcy/the-chapter-11-debtor-in-possession/> (last visited Jan. 7, 2023); *see US Bankruptcy Code*, *supra* note 1. This distinction is not relevant for purposes of the matters discussed in this Article. As such, for ease of discussion, this Article will simply refer to the "debtor."

3. Marcelo Halpern, *Intellectual Property Licenses in Bankruptcy: Can Lubrizol, § 365(n), and Sunbeam Be Reconciled?*, 6 LANDSLIDE 22, 23 (2013); *see infra* Parts IV–V.

4. Under 11 U.S.C. § 363(f), the "trustee" may, under some circumstances and with court approval, sell property of the debtor "free and clear of any interest in such property." 11 U.S.C. § 363(f). In a case under Chapter 11 of the Bankruptcy Code, the debtor generally manages the case and continues to operate its business as a debtor in possession. *Id.* § 1107(a). The debtor in possession largely holds the powers that would otherwise be held by a bankruptcy trustee, including the power to sell assets under § 363 of the Bankruptcy Code. *See id.* For ease of reference, this Article will generally refer to the "debtor" when discussing the party taking action in the case with respect to the debtor's intellectual property, recognizing however, that in cases in which a bankruptcy trustee has been appointed—such as in a Chapter 7 case—it would be the trustee who would be managing the bankruptcy case and making the relevant decisions pertaining to the debtor's intellectual property. *Id.* §§ 701, 704(a)(1)–(2).

5. *See id.* § 365(n).

6. *Id.* § 363(f).

interests of nondebtor licensees.<sup>7</sup> When a debtor rejects a license agreement pertaining to the debtor's intellectual property, however, § 365(n) of the Bankruptcy Code allows the nondebtor licensee to choose to retain its rights under the rejected license agreement, subject to the caveat that the licensee may not demand specific performance by the debtor under such rejected license.<sup>8</sup> Given these differing results, we are presented with a question: may a debtor sell its intellectual property pursuant to § 363(f) and thereby extinguish any interest a licensee might have otherwise retained under § 365(n)? This Article seeks to bring clarity to this important question.

The only court that has squarely addressed the purported interplay between §§ 363(f) and 365(n) is the U.S. Bankruptcy Court for the District of New Jersey in *In re Crumbs Bake Shop, Inc.*<sup>9</sup> The *Crumbs Bake Shop* court found that the nondebtor licensees of the debtors' trademarks were entitled to the protections offered under § 365(n), notwithstanding the free and clear sale power of § 363(f).<sup>10</sup> As a result, the buyer of the debtors' assets in that case was required to take those assets subject to the interests of the debtors' licensees.<sup>11</sup> Relatedly, in 2019, the Supreme Court issued its decision in *Mission Product Holdings, Inc. v. Tempnology, LLC*.<sup>12</sup> In *Tempnology*, the Court considered the effect of a debtor's rejection of an executory contract pursuant to § 365.<sup>13</sup> Although the Court's opinion did not address the purported interplay between §§ 363(f) and 365(n), the Court's analysis of the effect of rejection and its discussion of the legislative history of § 365(n) provides

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7. *See id.*

8. *See id.* § 365(n)(1)(B).

9. *See In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 777 (Bankr. D.N.J. 2014).

10. *Id.* at 780 (first citing 11 U.S.C. § 365(n); and then citing 11 U.S.C. § 363(f)); *see infra* Part V (discussing *In re Crumbs Bake Shop* decision).

11. *See In re Crumbs Bake Shop, Inc.*, 522 B.R. at 774, 780; *see also infra* Part V.

12. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019).

13. *Id.* at 1657–58.

guidance as to how courts should think about the purported interplay between §§ 363(f) and 365(n).<sup>14</sup>

This Article examines the *Crumbs Bake Shop* decision, considering the guidance gleaned from the Supreme Court's analysis in *Tempnology*.<sup>15</sup> This Article concludes that, contrary to the position taken by the court in *Crumbs Bake Shop*, principles of statutory construction and the relevant legislative history support the conclusion that the protections offered to licensees under § 365(n) should not be construed as trumping the free and clear sale power of § 363(f).<sup>16</sup> This Article then examines this conclusion against the backdrop of two competing visions for the role of bankruptcy law—the proceduralist account of bankruptcy, represented by the so-called creditors' bargain theory of bankruptcy, and the traditionalist account of bankruptcy.<sup>17</sup> This Article ultimately concludes that both theoretical frameworks for the role of bankruptcy support the conclusion that the protections offered to licensees under § 365(n) in the context of the rejection of an intellectual property license agreement should not be construed as usurping the free and clear sale power of § 363(f).<sup>18</sup>

Part I of this Article describes the impact of intellectual property on the United States economy. As a backdrop to the discussion, Part II presents both the proceduralist account and the traditionalist account of the purpose of corporate bankruptcy. Part III then provides an overview of bankruptcy law, focusing on the treatment of license agreements as executory contracts in bankruptcy and explaining the basis upon which assets may be sold free of third-party interests. Part IV discusses the Supreme Court's decision in *Tempnology*, highlighting how that decision provides guidance for considering the purported interplay between §§ 363(f) and

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14. See *id.* at 1652; see also *infra* Part IV.

15. See *infra* Parts IV–V.

16. See *infra* Conclusion.

17. See *infra* Part II.

18. See *infra* Conclusion.

365(n). Part V presents the court's decision in *Crumbs Bake Shop*. Part VI discusses the courts' approaches to addressing the perceived interplay between §§ 363(f) and 365(h), a provision that has been viewed as analogous to § 365(n). Part VII examines the *Crumbs Bake Shop* decision in light of the guidance offered by the Supreme Court in *Tempnology* and concludes, both as a matter of legislative history and statutory interpretation, that § 365(n) should not be interpreted as usurping the free and clear sale power of § 363(f). Part VII also concludes that both the proceduralist justification for corporate bankruptcy and the traditionalist justification for corporate bankruptcy support the conclusion that § 363(f) should operate unimpeded by § 365(n).

#### I. ECONOMIC CONTEXT AND THE ROLE OF INTELLECTUAL PROPERTY

Intellectual property plays an increasingly significant role in the economy of the United States.<sup>19</sup> Essentially every segment of the U.S. economy uses some type of intellectual property.<sup>20</sup> Focusing on the economic impact of industries that rely heavily on intellectual property helps illustrate the important role of intellectual property more broadly. The United States Patent and Trademark Office (the "USPTO") identifies eighty-one industries, from among 313 total industries, as "IP-Intensive

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19. In 2019, the United States Patent and Trademark Office issued more than 390,000 patents, setting a record for the number of patents granted in a single year and surpassing the prior year by approximately 50,000 patents. *U.S. Patent Statistics Chart Calendar Years 1963-2020*, U.S. PAT. & TRADEMARK OFF., [https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us\\_stat.htm](https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm) (Oct. 11, 2022). In the fiscal year 2018, the United States Copyright Office issued more than 560,000 copyright registrations. U.S. COPYRIGHT OFF., ANNUAL REPORT FOR FISCAL 2018, at 21 (2018), <https://www.copyright.gov/reports/annual/2018/ar2018.pdf>. Trademark application filings with the USPTO totaled 673,233 in the fiscal year 2019. U.S. PAT. & TRADEMARK OFF., PERFORMANCE AND ACCOUNTABILITY REPORT: FY 2019, at 29, <https://www.uspto.gov/sites/default/files/documents/USPTOFY19PAR.pdf>. This amount represents an increase of 5.4 percent, as compared to the prior year. *Id.*

20. See generally Andrea Tosato, *Secured Transactions and IP Licenses: Comparative Observations and Reform Suggestions*, 81 L. & CONTEMP. PROBS. 155, 155-60 (2018) (discussing the increasing significance and proliferation of intellectual property and collecting supporting data).

Industries.”<sup>21</sup> To determine whether an industry should be designated as an IP-Intensive Industry, the USPTO identified the industries that rely most heavily on patents, trademarks, or copyrights.<sup>22</sup>

These IP-Intensive Industries play an important role in the economy of the United States, both in terms of job creation and generation of revenue. In 2014, IP-Intensive Industries directly and indirectly accounted for 45.5 million jobs in the United States.<sup>23</sup> This number represents approximately thirty percent of all employment.<sup>24</sup> Of these 45.5 million jobs, IP-Intensive Industries directly account for 27.9 million jobs.<sup>25</sup> Further, IP-Intensive Industries indirectly supported 17.6 million more supply chain jobs throughout the U.S. economy.<sup>26</sup> The wages earned by individuals employed in IP-Intensive Industries are higher on average than the wages earned in other industries.<sup>27</sup> In 2014, the average weekly wage of an employee in an IP-Intensive Industry was \$1,312.<sup>28</sup> This amount is forty-six percent higher than the average weekly wage earned by employees in other industries.<sup>29</sup>

IP-Intensive Industries contribute significant value to the gross domestic product (“GDP”) of the United States.<sup>30</sup> In 2014, IP-Intensive Industries accounted for some \$6.6 trillion in value

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21. JUSTIN ANTONIPILLAI & MICHELLE K. LEE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE, at ii, 2 (2016), <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>. IP-intensity for an industry was determined by considering “the count of its intellectual property for a given period of time relative to the industry’s total employment. An industry is designated as IP-intensive if its IP-count to employment ratio is higher than the average for all industries considered.” *Id.* at 7.

22. *See id.* at 7–9. Some of the industries that rely most heavily on intellectual property include software publishers, sound recording industries, audio and video equipment manufacturing industries, cable and other subscription programming industries, performing arts companies, and radio and television broadcasting industries. *See id.* at 47–48, 50.

23. *Id.* at 12–13.

24. *Id.* at 13.

25. *Id.* at 12–13.

26. *Id.* at 12.

27. *Id.* at 19.

28. *Id.*

29. *Id.*

30. *See id.* at i.

added to the GDP.<sup>31</sup> The value of the GDP attributable to IP-Intensive Industries represented 38.2% of the total GDP of the United States in 2014.<sup>32</sup> This amount is an increase of more than \$1.5 trillion since 2010, an increase of some thirty percent.<sup>33</sup> In addition, exports from IP-Intensive Industries represent a significant share of total exports from the United States.<sup>34</sup> The total value of merchandise exports of IP-Intensive Industries was \$842 billion in 2014, an increase from \$775 billion in 2010.<sup>35</sup> Merchandise exports from IP-Intensive Industries accounted for more than half of all merchandise exports from the United States in 2014.<sup>36</sup>

A holder of rights in intellectual property “may license rights in the intellectual property—such as the right to use, manufacture, sell or distribute that intellectual property—to third parties through a stand-alone license agreement.”<sup>37</sup> Alternatively, the owner of such rights may license these rights through a license agreement that the parties interweave into a more comprehensive agreement, such as a franchise agreement.<sup>38</sup> In 2012, revenue derived specifically from the licensing of intellectual property rights totaled more than \$115 billion.<sup>39</sup> An intellectual property license may be exclusive or nonexclusive.<sup>40</sup> In an exclusive license, the owner of the intellectual property grants the licensee the exclusive authority

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31. *Id.* at 22.

32. *Id.*

33. *Id.*

34. *Id.* at 27.

35. *Id.*

36. *Id.*

37. BEVERLY A. BERNEMAN, B. SUMMER CHANDLER & STEVEN S. FLORES, CHOPPY WATERS: NAVIGATING THE INTERSECTION OF BANKRUPTCY AND INTELLECTUAL PROPERTY 79, 79 (B. Summer Chandler, ed., 2021); *see, e.g.*, James Creekmore & Andrew P. Connors, *Understanding Intellectual Property: A Guide for Artists*, 7 LIBERTY U. L. REV. 317, 323–24 (2013) (discussing copyright license agreements and noting that they may be written, oral, or implied).

38. *See In re Tempnology, LLC*, 879 F.3d 389, 392–93 (1st Cir. 2018).

39. ANTONIPILLAI & LEE, *supra* note 21, at 26.

40. *Exclusive and Non-Exclusive Licenses*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-transfers/exclusive-vs-non-exclusive-licenses/> (last visited Jan. 7, 2023).



to exercise one or more rights with respect to the intellectual property that is the subject of the license.<sup>41</sup> For example, a license that gives the licensee the exclusive right to utilize a patent within a given territory would be considered an exclusive license.<sup>42</sup> In a nonexclusive license, the owner of the intellectual property grants the licensee the authority to exercise one or more rights with respect to the intellectual property, but it does not commit to giving that right exclusively to the licensee.<sup>43</sup> For example, a license that gives a licensee the authority to play a song at an event, but does not also promise to prohibit others from potentially playing that same song at other events would be a nonexclusive license.<sup>44</sup>

In addition to holding monetary value as assets that may be liquidated or otherwise used to generate revenues, intellectual property and intellectual licenses are valuable because they may be used as collateral that the holder may use to obtain secured financing.<sup>45</sup> The owner of the intellectual property might use the intellectual property itself as collateral.<sup>46</sup> Similarly, the licensee under an intellectual property license might use that license as collateral.<sup>47</sup>

Intellectual property plays an important and significant role in the United States economy. As such, the laws governing and impacting any rights attendant to intellectual property, whether held by the owner of the intellectual property, a licensee of intellectual property, a creditor that holds a collateral

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41. See *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (“In an exclusive license, the copyright holder permits the licensee to use the protected material for a specific use and further promises that the same permission will not be given to others.”).

42. See *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1552 (Fed. Cir. 1995).

43. See *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617–18 (2d Cir. 2001) (describing a non-exclusive license as a right to use the licensed intellectual property without the right to exclude others); see also *U.S. Philips Corp. v. ITC*, 424 F.3d 1179, 1189 (Fed. Cir. 2005) (“A nonexclusive patent license is simply a promise not to sue for infringement.”).

44. See *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 752–53 (11th Cir. 1997).

45. See Tosato, *supra* note 20, at 159.

46. See Xuan-Thao Nguyen, *Financing Innovation: Legal Development of Intellectual Property as Security in Financing*, 1845-2014, 48 *IND. L. REV.* 509, 510 (2015).

47. See Tosato, *supra* note 2020, at 159 (analyzing comparatively the use of IP licenses as collateral).

interest in the intellectual property, or another interested party, should be clear.

## II. BANKRUPTCY THEORY

Numerous scholars have attempted to answer a central and persistent question: why does bankruptcy law exist at all? Some scholars assert that this question must be considered before one can properly make normative proclamations regarding how certain questions under bankruptcy law *should* be resolved.<sup>48</sup> This Part of the Article presents two opposing schools of thought regarding the purpose of corporate bankruptcy: the “proceduralist” camp, represented by the “creditors’ bargain” theory, and the “traditionalist” camp, also referred to as the redistributive theory of bankruptcy.

### A. *The Proceduralist’s Account of Bankruptcy — the Creditors’ Bargain Theory*

The proceduralist account of corporate bankruptcy views the role of bankruptcy law as limited.<sup>49</sup> Under this approach, the focus of bankruptcy should be on protecting the interests of creditors and maximizing the return to them.<sup>50</sup> Professor Douglas Baird has explained that under the proceduralist view, “[f]irms must live or die in the market. All bankruptcy can do is ensure that fights among creditors and other investors of

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48. See, e.g., Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 99 (1984) [hereinafter Baird & Jackson, *Adequate Protection*]; Thomas H. Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L. J. 399, 399 (1986) [hereinafter Jackson, *Of Liquidation, Continuation, and Delay*] (“The proper first step in bankruptcy analysis is to focus on what bankruptcy exists to do and to conduct one’s analysis in light of those goals.”); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 336 (1993) [hereinafter Warren, *Bankruptcy Policymaking in an Imperfect World*].

49. See Baird & Jackson, *Adequate Protection*, *supra* note 48, at 97–98.

50. See *id.* at 103 (explaining how bankruptcy law should focus only on “the interest of those . . . who, outside of bankruptcy, have property rights in the assets of the firm”).

capital do not accelerate a firm's liquidation."<sup>51</sup> The proceduralist view of bankruptcy is most notably represented by the creditors' bargain theory.

Under the creditors' bargain theory, corporate bankruptcy law is best understood as a tool to address a collective action problem,<sup>52</sup> that is, the lack of cooperation among a group of actors with their own diverse interests the tendency by creditors to engage in actions that benefit their own interests, rather than taking actions that are beneficial to creditors as a group.<sup>53</sup> Bankruptcy law should be viewed as reflecting an implicit bargain among creditors, aimed at creating and fostering a collective process to address all claims and doing away with a race amongst creditors to dismember the debtor estate.<sup>54</sup> This perspective requires imagining the bargain that would be struck among the creditor group at the beginning of the creditors' dealings with the debtor, assuming the creditors are rational actors and none are aware of what their position will be should the debtor become insolvent.<sup>55</sup> Under such circumstances, this theory posits that creditors would agree to

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51. Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 578 (1998) [hereinafter Baird, *Bankruptcy's Uncontested Axioms*]. Professor Douglas Baird and Professor Thomas H. Jackson are widely viewed as the architects of the creditors' bargain theory of bankruptcy. Robert E. Scott, *Through Bankruptcy with the Creditors' Bargain Heuristic*, 53 U. CHI. L. REV. 690, 691-92 (1986). They have presented, refined, and defended this conceptual framework through a series of articles, some of which were jointly authored and others of which were individually authored. See *id.* at 691-92, 692 nn.6-7 (discussing the then recent works of Baird and Jackson and asserting that "they have set the terms of the scholarly debate for the next decade").

52. See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 8 (Beard Books 2001) (1986) [hereinafter JACKSON, *LOGIC AND LIMITS*]; see also Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 827 (1987) [hereinafter Baird, *Loss Distribution, Forum Shopping, and Bankruptcy*].

53. Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 53 (2002) ("Without bankruptcy law, creditors would engage individually in actions that are not beneficial to creditors as a group.").

54. See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 861-64 (1982).

55. See Edward J. Janger, *The Creditors' Bargain Reconstituted: Comments on Barry Adler's The Creditors' Bargain Revisited*, 167 U. PA. L. REV. ONLINE 47, 48 (2019) [hereinafter Janger, *The Creditors' Bargain Reconstituted*].

a system that would be aimed at value maximization, thereby benefiting all creditors.<sup>56</sup>

Under this view, bankruptcy law should be tailored to force cooperation amongst individual creditors with diverse interests. To achieve this collective approach, “bankruptcy law at its core should be designed to keep individual actions against assets, taken to preserve the position of one investor or another, from interfering with the use of those assets favored by the investors as a group.”<sup>57</sup> As such, “bankruptcy law necessarily overrides the remedies of individual [creditors] outside of bankruptcy, for those ‘grab’ rules undermine the very advantages sought in a collective proceeding.”<sup>58</sup> Although bankruptcy law may alter nonbankruptcy entitlements under some circumstances, “[c]hanges in substantive rules unrelated to preserving assets for the collective good of the investor group . . . run counter to the goals of bankruptcy.”<sup>59</sup> Under the creditors’ bargain theory, “the distributional baseline should be set at the moment of bankruptcy by reference to existing state law entitlements. Deviations from the state law baseline should be allowed only if they [are] both efficiency enhancing and made no claimant worse off.”<sup>60</sup>

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56. *Id.* at 49.

57. Baird & Jackson, *Adequate Protection*, *supra* note 48, at 100.

58. *Id.* at 100–01.

59. *Id.*

60. Janger, *The Creditors’ Bargain Reconstituted*, *supra* note 55, at 51. This principle is derived from dicta in *Butner v. United States*, 440 U.S. 48 (1979). *Id.* In *Butner*, the Supreme Court stated, “[p]roperty interests are created and defined by state law. Unless 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.” *Butner v. United States*, 440 U.S. 48, 55 (1979). As Professor Juliet Moringiello has observed, at its core, this principle admonishes that bankruptcy law alters substantive rights only when it serves a bankruptcy purpose. See Juliet M. Moringiello, *When Does Some Federal Interest Require a Different Result?: An Essay on the Use and Misuse of Butner v. United States*, 2015 U. ILL. L. REV. 657, 659 (2015). It does not tell us what that purpose is or how it should be discerned. See *id.*

### B. *The Traditionalist's Account of Bankruptcy*

The traditionalists hold a more expansive view of the role that bankruptcy law can, and should, play in the economy and society.<sup>61</sup> Under this framework, bankruptcy law should advance significant and distinct substantive goals.<sup>62</sup> Bankruptcy judges, exercising judicial discretion, play an important role in shepherding a case through the reorganization process, working with the parties to arrive at a solution that addresses the needs of all affected parties.<sup>63</sup>

Unlike the proceduralists, traditionalists do not view the protection of creditor interests as the sole, or even primary, goal of bankruptcy.<sup>64</sup> Rather, the traditionalists believe that the interests of a variety of constituencies should be considered in any bankruptcy.<sup>65</sup> Under the traditionalist framework, bankruptcy law and policy should also consider the needs and interests of other constituencies, such as the employees of the debtor and members of the community in which the debtor's business operates.<sup>66</sup>

Senator Elizabeth Warren, a widely recognized proponent of the traditionalist account of corporate bankruptcy, describes bankruptcy as “an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors.”<sup>67</sup> In Warren's view, “[b]ankruptcy encompasses a number of competing—and sometimes conflicting—values in this distribution [and] no one value

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61. See, e.g., Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 783–85 (1987) [hereinafter Warren, *Bankruptcy Policy*] (discussing the unique policy concerns in bankruptcy in contrast to the interests that exist under state collection law).

62. See *id.*

63. Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 564 (2001) (“The traditionalists' judge . . . is a hero, working with the parties to achieve a consensual, collective solution to a common problem.”).

64. See, e.g., Warren, *Bankruptcy Policy*, *supra* note 61, at 777.

65. See *id.*

66. See *id.*

67. *Id.*; see also Baird, *Bankruptcy's Uncontested Axioms*, *supra* note 51, at 576 n.9; Sharon Cohen, *Elizabeth Warren's Rise Started by Looking at the Bottom*, ASSOCIATED PRESS (Aug. 25, 2019), <https://apnews.com/article/8bbb0cbe763a407db4a9b5d563dc56ca>.

dominates, so that bankruptcy policy becomes a composite of factors that bear on a better answer to the question, ‘How shall the losses be distributed?’”<sup>68</sup> Following this approach, nonbankruptcy entitlements may be disrupted or extinguished to serve a broader distributional scheme.<sup>69</sup> This distributional scheme prioritizes protecting impacted parties who may be less able to bear the costs of default and making distributional decisions that benefit the bankruptcy estate, even at the cost of impairing nonbankruptcy entitlements.<sup>70</sup> As Warren explains:

To the extent that it reallocates assets from a particular party to the group as a whole, thereby enabling the sale of an intact business or a reorganization effort, the Code carries out a deliberate distributional policy in favor of all those whom a business failure would have hurt. The choice to make bankruptcy “rehabilitative” represents a desire to protect these parties along with the debtor and creditors who are more directly affected.<sup>71</sup>

Under the traditionalist account, bankruptcy judges exercise significant discretion and play an important role in implementing substantive bankruptcy policy.<sup>72</sup> Acting as “impartial decision makers,” bankruptcy judges “balance the competing interests of the parties according to statutory guidelines” by making decisions about “lifting stays, approving plans of reorganization, and the like—decisions requiring an understanding of the interests of the debtor and all the creditors and a willingness to search the statute to follow its distributional scheme.”<sup>73</sup>

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68. Warren, *Bankruptcy Policy*, *supra* note 61, at 777.

69. *See id.* at 790–93.

70. *See id.*

71. Warren, *Bankruptcy Policymaking in an Imperfect World*, *supra* note 48, at 355.

72. *See id.* at 351–52.

73. Warren, *Bankruptcy Policy*, *supra* note 61, at 805. Regarding bankruptcy’s distributional scheme, Elizabeth Warren points to the Bankruptcy Code’s treatment of labor contracts and observes,

### III. STATUTORY FRAMEWORK OF BANKRUPTCY LAW

The Bankruptcy Code presents the entity that is experiencing financial distress with a variety of tools to address its financial challenges. An important tool in the bankruptcy toolbox is the ability to sell some, or all, of the debtor-entity's assets.<sup>74</sup> To provide context and background for the discussion, this Part of the Article will present an overview of bankruptcy for business and lay out the statutory framework of §§ 363 and 365 of the Bankruptcy Code.<sup>75</sup>

#### A. Overview of Corporate Bankruptcy

Each year, thousands of businesses in the United States seek bankruptcy protection.<sup>76</sup> Businesses typically file under Chapter 11 of the Bankruptcy Code, often referred to as business reorganization bankruptcy, or Chapter 7 of the Bankruptcy Code, known as liquidation bankruptcy.<sup>77</sup> Bankruptcy under Chapter 7 is the most common type of bankruptcy protection sought.<sup>78</sup> Given that issues pertaining to intellectual property in bankruptcy generally arise in the

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[b]y requiring that a "balance of the equities" dictate the status of a labor contract, the Code suggests that the distributional aim of bankruptcy should be tailored to the facts of the case—permitting impairment of labor contracts if it is essential for a successful reorganization and rejecting it if it is not.

*Id.* at 792.

74. See generally 11 U.S.C. §§ 363, 726–27, 1121–29, 1141.

75. See *id.* §§ 363, 365.

76. For example, in the twelve months prior to June 30, 2020, there were 753,333 nonbusiness bankruptcy filings in the United States. ADMIN. OFF. OF THE U.S. COURTS, U.S. BANKR. CTS. BUS. AND NONBUS. CASES COMMENCED, BY CHAPTER OF THE BANKR. CODE, DURING THE 12-MONTH PERIOD ENDING JUNE 30, 2018: TABLE F-2 (2018), [https://www.uscourts.gov/sites/default/files/bf\\_f2\\_0630.2018.pdf](https://www.uscourts.gov/sites/default/files/bf_f2_0630.2018.pdf).

77. See *Chapter 7 vs. Chapter 11 Bankruptcy: What's the Difference?*, BLOOMBERG L. (Feb. 25, 2022), <https://pro.bloomberglaw.com/brief/chapter-7-vs-chapter-11-bankruptcy/>; see also Charles J. Tabb, *The Law of Bankruptcy*, in BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE (2d ed. 2009).

78. *Chapter 7 vs. Chapter 11 Bankruptcy: What's the Difference?*, *supra* note 77. Of the 753,333 non-business bankruptcy filings in the 12 months prior to June 30, 2018, 61.8% of those cases were filed under Chapter 7. *Id.*

context of business bankruptcies, this discussion will focus on business bankruptcies.<sup>79</sup>

The legislative history of Chapter 11 states that, “[t]he purpose of a business reorganization case . . . is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders.”<sup>80</sup> A Chapter 11 case, however, may involve the sale of some, or all, of the assets of the debtor pursuant to § 363.<sup>81</sup> In these instances, the Chapter 11 filing may be focused on liquidating the debtor business as an operating business or liquidating the debtor entity’s assets.<sup>82</sup> Under either approach, bankruptcy proceedings may, and often do, involve selling some or all of the debtor’s assets pursuant to § 363 of the Bankruptcy Code.<sup>83</sup>

When a case is filed under Chapter 7 of the Bankruptcy Code, a Chapter 7 trustee is appointed.<sup>84</sup> The trustee is charged with marshalling and liquidating the debtor’s assets.<sup>85</sup> The trustee then uses the proceeds from the sale of the assets to pay the debtor’s debts in accordance with the provisions of the Bankruptcy Code.<sup>86</sup> General unsecured creditors often receive nothing or “pennies on the dollar” in Chapter 7 cases.<sup>87</sup>

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79. See Halpern, *supra* note 3.

80. Tabb, *supra* note 77; see also *In re LTL Mgmt., LLC*, 637 B.R. 396, 410 (Bankr. D.N.J. 2022) (pointing to “successful case outcomes where large and small businesses are reorganized, productive business relationships are maintained, jobs preserved and, most importantly, meaningful returns distributed to creditors”).

81. See Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. Ill. L. Rev. 831, 842–45 (2015) (discussing the frequency with which section 363 sales occur in Chapter 11 cases).

82. See *id.* at 1352; 11 U.S.C. § 1123(b)(4).

83. See Amir Shachmurove, *Escape from Pandemonium: Reconciling § 363(f) and § 365(h) in Qualitech’s Shadow and Spanish Peaks’ Wake*, 27 AM. BANKR. INST. L. REV. 181, 207–14 (2019) (discussing the prevalence of asset sales in bankruptcy); § 363.

84. § 701(a)(1).

85. *Id.* § 704.

86. *Id.*

87. See, e.g., *In re Wright*, 300 B.R. 453, 462–63 (Bankr. N.D. Ill. 2003) (observing that general unsecured creditors in Chapter 7 cases usually only receive “pennies on the dollar” for their claims); *In re Macomb Occupational Health Care*, 300 B.R. 270, 288 (Bankr. E.D. Mich. 2003) (explaining how “an unsecured, non-priority claim . . . may be paid pennies on the dollar, if



### B. Selling Assets Pursuant to § 363

Some commentators have observed that sales pursuant to § 363 have become a common occurrence in large business bankruptcy cases.<sup>88</sup> This Section will provide an overview of the statutory framework of § 363 and will present the statutory limitations on the 363-sale power.

#### 1. Sales free and clear of interests pursuant to § 363(f)

Section 363(f) provides that, under certain circumstances and subject to court approval, the debtor may sell an asset of the estate “free and clear of any interest in such property.”<sup>89</sup> The power of the bankruptcy court to order the sale of an asset free and clear of the interests third parties claim in that asset is a power that has long been recognized in bankruptcy proceedings in the United States.<sup>90</sup> This power authorizes the liquidation of estate assets without first sorting through competing or disputed claims.<sup>91</sup> When proposing a sale of assets, the debtor “has a duty to maximize the value of the

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anything at all” in a Chapter 7 case); see also Jessi D. Herman, *Pay to Stay, Pay to Perform, or Pay to Go?: Construing the Threshold Terms of Sec. 503(c)(1) and (2)*, 23 EMORY BANKR. DEV. J. 319, 335 (2006) (noting that “general . . . unsecured claims typically receive little to no payment in a [C]hapter 7 liquidation”); Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 805–06 (2009) (highlighting that in the context of the consumer bankruptcy studied, “[t]he median distribution to general unsecured creditors who filed claims was eight cents on the dollar on their claims” and that, “only 11% of all allowed general unsecured claims were ever paid anything”). It should be noted that general, unsecured claimants may experience the same fate in Chapter 11. See, e.g., *Yoder v. OH Bureau of Workers’ Comp. (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338, 342 (6th Cir. 1993) (noting in the context of Chapter 11 cases, “the possibility, even the probability of receiving pennies on the dollar of what the [debtor owed”).

88. See, e.g., Kimon Korres, *Bankrupting Bankruptcy: Circumventing Chapter 11 Protections Through Manipulation of the Business Justification Standard in § 363 Asset Sales, and a Refined Standard to Safeguard Against Abuse*, 63 FLA. L. REV. 959, 960 (2013) (observing that “in the last twenty-five years, § 363(b) asset sales have become standard practice in large corporate bankruptcies”); Douglas G. Baird, *Lessons from the Automobile Reorganizations*, 4 J. LEGAL ANALYSIS, 271, 272 (2012) (noting that section 363 sales are now “the norm in large [Chapter 11] reorganizations”).

89. § 363(f).

90. See *Ray v. Norseworthy*, 90 U.S. 128, 131–32 (1874).

91. See *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 528 (Bankr. E.D. Va. 2004).

estate,' and he '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.'"<sup>92</sup> Allowing the sale of a debtor's asset free of interests may serve to maximize the asset's value by permitting a potential buyer to price its offer without the concern of possible protracted litigation to obtain clear title to an asset.<sup>93</sup>

The Bankruptcy Code does not provide a definition for "any interest in such property."<sup>94</sup> Rather, courts generally address the phrase "on a case-by-case basis."<sup>95</sup> The free and clear sale power of § 363(f) has been applied to "permit[] the sale of [real] property free and clear of *in rem* interests in the property, such as liens."<sup>96</sup> In addition, "any interest in such property" has been given a "broader definition that encompasses other obligations that may flow from ownership of the property."<sup>97</sup> As such, the

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92. *Gluckstadt Holdings, L.L.C. v. VCR I, L.L.C.* (*In re VCR I, L.L.C.*), 922 F.3d 323, 327 (5th Cir. 2019); see *In re Nine W. Holdings, Inc.*, 588 B.R. 678, 686 (Bankr. S.D.N.Y. 2018).

93. See Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to § 363 Sales*, 62 CATH. U. L. REV. 1, 2 (2012) (noting that "[s]ection 363(f) is a 'powerful tool' that permits a debtor-in-possession to maximize the estate's recovery from an asset without becoming unduly entangled in controversies concerning the existence, validity, and priority of third-party interests in the property to be sold").

94. *Mass. Dep't of Unemployment Assistance v. OPK Biotech, LLC* (*In re PBBPC, Inc.*), 484 B.R. 860, 866–67 (B.A.P. 1st Cir. 2013) (citing 11 U.S.C. § 363(f)).

95. *Id.* at 867. Courts have taken differing approaches to construing the claims and interests to which § 363(f) may apply. Some courts have construed these terms narrowly, limiting their applications to liens, security interests, and mortgages. See, e.g., *Volvo White Truck Corp. v. Chambersburg Beverage, Inc.* (*In re White Motor Credit Corp.*), 75 B.R. 944, 948–49 (Bankr. N.D. Ohio 1987); *Rubinstein v. Alaska Pac. Consortium* (*In re New England Fish Co.*), 19 B.R. 323, 326–29 (Bankr. W.D. Wash. 1982); *In re Royal Bistro, L.L.C.*, 26 F.4th 326, 326–29 (5th Cir. 2022) (holding construing claims narrowly to apply to mortgages). Other courts have taken a broader approach with respect to the claims and interests that may be eliminated pursuant to a free and clear sale under § 363, including successor liability claims and other "claims" within the meaning of § 101(5) of the Bankruptcy Code. See, e.g., *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289 (3d Cir. 2003) ("[T]he trend seems to be toward a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.'" (internal citations omitted)); *WBQ P'ship v. Va. Dep't of Med. Assistance* (*In re WBQ P'ship*), 189 B.R. 97, 105 (Bankr. E.D. Va. 1995). The resolution of this issue is outside the scope of this article.

96. *Elliot v. Gen. Motors LLC* (*In re Motors Liquidation Co.*), 829 F.3d 135, 154 (2d Cir. 2016) (citing *In re Trans World Airlines, Inc.*, 322 F.3d at 288).

97. *Id.* at 155 (quoting 3 *Collier on Bankruptcy* ¶ 363.06 (16th 2022)) (internal quotations omitted); see *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC* (*In re Qualitech Steel Corp.*), 327

free and clear sale power of § 363(f) has been applied to vitiate a wide range of interests held by nondebtor parties.<sup>98</sup> Notably, § 363(f) has been applied to extinguish a nondebtor licensee's interests in certain intellectual property when the licensee failed to object to the sale.<sup>99</sup>

2. *Limitations on sales free and clear of interests pursuant to § 363(f)*

Despite the seemingly broad scope of the power to sell assets free and clear of interests under § 363(f),<sup>100</sup> Congress has created express limitations on this power. First, before the free and clear sale power of § 363(f) may be used to sell a debtor's property free of a third party's interest in that asset, at least one of five conditions must be satisfied. Those conditions include: (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest;<sup>101</sup> (2) the third party consents to the sale;<sup>102</sup> (3) the third party's interest is a lien on the property

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F.3d 537, 545 (7th Cir. 2003) (quoting *Russello v. United States*, 464 U.S. 16, 21 (1983)) (“[T]he term ‘interest’ is a broad term no doubt selected by Congress to avoid ‘rigid and technical definitions drawn from other areas of the law.’”).

98. See, e.g., *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie*), 99 F.3d 573, 581–82 (4th Cir. 1996) (holding that an “interest” for purposes of § 363(f) might encompass successor liability claims under the Coal Act such that these obligations are not placed upon a purchaser of coal assets); *In re Trans World Airlines, Inc.*, 322 F.3d at 288 (holding that in the context of the sale of airline assets, § 363(f) would apply to permit the assets to be sold free of travel voucher obligations); *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC* (*In re Spanish Peaks Holding II, LLC*), 872 F.3d 892, 899–901 (9th Cir. 2017) (holding that notwithstanding the tenant protections set forth in § 365(h)(1), real property can be sold by a debtor-lessor free and clear of a leasehold interest under § 363(f)).

99. *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 285–86 (7th Cir. 2002) (finding that a bankruptcy asset sale, free and clear of all liens, claims, interests, and encumbrances, extinguished a party's intellectual-property license with the debtor where that party did not object to the sale).

100. See 11 U.S.C. § 363(f).

101. See, e.g., *In re Daufuskie Island Props., LLC*, 431 B.R. 626, 644–45 (Bankr. D.S.C. 2010) (permitting sale free and clear of restrictive covenant where state law permitted such a sale under the changed circumstances doctrine).

102. Courts are divided on the question of whether the third party's consent may be implied by the third party's failure to object to a proposed free and clear sale after receiving notice of such sale. Compare *In re Arch Hosp., Inc.*, 530 B.R. 588, 591 (Bankr. W.D.N.Y. 2015) (“Consent and failure to object are not synonymous.”), with *FutureSource LLC*, 312 F.3d at 285 (holding that

to be sold and the price at which the property is to be sold “is greater than the aggregate value of all liens on such property”;<sup>103</sup> (4) the third party’s interest is in bona fide dispute;<sup>104</sup> or (5) the third party “could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.”<sup>105</sup> If the proponent of a proposed sale under § 363(f) is unable to show that one of the five conditions is satisfied, the sale free and clear of the third party’s interests will not be permitted.<sup>106</sup>

Even when one of the five conditions necessary for evoking the § 363(f) power has been satisfied, that power may nonetheless be curtailed or denied altogether. In 2005, Congress amended § 363 of the Bankruptcy Code to add § 363(o).<sup>107</sup> Under § 363(o), the purchaser of interests in certain consumer credit transactions or consumer credit contracts does not take that asset free and clear of all claims and interests.<sup>108</sup> Rather, that purchaser “remain[s] subject to all claims and defenses” that would have existed had the sale occurred outside of bankruptcy.<sup>109</sup> As such, the sale under § 363 of an interest in a qualifying consumer credit transaction or consumer credit contract expressly does not transfer these interests “free and clear” of certain potential successor liability claims.<sup>110</sup>

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lack of objection after proper notice is consent by an interest holder within the meaning of § 363(f)(2)).

103. See, e.g., *In re Boston Generating, LLC*, 440 B.R. 302, 331 (Bankr. S.D.N.Y. 2010) (quoting § 363(f)).

104. *In re Revel AC, Inc.*, 802 F.3d 558, 573 (3d Cir. 2015) (stating that a “[b]ona fide” dispute in the § 363(f)(4) context means that there is an objective basis—either in law or fact—to cast doubt on the validity of the third party’s purported interest). Section 363(f)(4) permits the debtor to liquidate assets without first resolving any disputes with respect to potential third party interests in the asset. *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 171 (B.A.P. 9th Cir. 2001); § 364(f)(4).

105. § 363(f).

106. See, e.g., *In re Revel AC, Inc.*, 802 F.3d at 573 (“[N]othing in the record casts doubt on the validity of [the lessee’s] lease with [the debtor], thus prohibiting the latter from invoking § 363(f) and selling its assets free of IDEA’s lease.”).

107. § 363(o).

108. *Id.*

109. *Id.*

110. See *id.*

Similarly, under § 363(h), Congress expressly curtailed the ability of the debtor to sell the interests of a person or entity who is the co-owner of property with the debtor to certain limited circumstances.<sup>111</sup> The debtor is required to prove, among other things, that

(1) partition . . . of such property among the estate and . . . co-owner is impracticable; (2) sale of the estate's undivided interest in [the] property would realize significantly less for the estate than sale of such property free of the interests of such co-owners; [and] (3) the benefit to the estate of a sale of [the] property free of the interests of co-owners outweighs the detriment, if any, to such co-owners.<sup>112</sup>

In addition to the specific limitations set forth in § 363(o) and § 363(h), the § 363(f) power is subject to the right of the third party who holds the interest in question to demand “adequate protection” of its interests.<sup>113</sup> The provisions of § 363(f) and the Bankruptcy Rules applicable to sales free and clear are designed to provide parties that hold an interest in the property to be sold with notice of the debtor's intent to sell property free and clear of liens and interests.<sup>114</sup> When a party with an interest in the property to be sold receives notice of a proposed sale of the property, that party may demand “adequate protection” of its interests in such property.<sup>115</sup>

Section 361 provides that adequate protection may be provided by: (1) “periodic cash payments;” (2) “additional or replacement lien[s];” or (3) granting “other relief” that will provide the interested party with the “indubitable equivalent of

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111. See § 363(h).

112. *Id.*

113. § 363(e).

114. See § 363(f); see also FED. R. BANKR. P. 2002(a)(2), 6004(a), (c).

115. § 363(e). The proponent of the sale has the burden of proof on the question of whether the debtor is proposing “adequate protection” of a third party's interests in an asset proposed to be sold free and clear of that asset under § 363(f). *Id.* § 363(p).

such [party's] interest."<sup>116</sup> The concept of "adequate protection" is intended to be flexible.<sup>117</sup> Determining the nature and extent of adequate protection to be given to a particular third party is context driven.<sup>118</sup> It often involves an analysis of multiple factors, such as the "particular interest's ascertainable value and jeopardy and its likelihood and degree of prospective depreciation, the pertinent debtor's prospects and performance, and the relevant parties' relative hardships."<sup>119</sup> If the court determines that it is unable to provide "adequate protection" of the objecting party's interests in the asset to be sold, the sale may be prohibited or made subject to the interests of the third party.<sup>120</sup>

### C. Executory Contracts in Bankruptcy and § 365

A license agreement pursuant to which the debtor licenses rights in its intellectual property to a third party is generally construed as an executory contract in bankruptcy.<sup>121</sup> As such, it may be subject to the provisions of § 365 of the Bankruptcy Code.<sup>122</sup> Acting pursuant to § 365, a debtor may pursue one of

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116. *Id.* § 361.

117. *MBank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396–97 (10th Cir. 1987) (observing that "'adequate protection' [is] a concept which is to be decided flexibly on the proverbial 'case-by-case' basis").

118. J. Eric Wise and Matthew K. Kelsey, *Obtaining Adequate Protection: An Analysis Pertaining to Real Estate Projects*, 22 NORTON J. BANKR. L. & PRAC. 247, 252 (2013) (discussing the distinction between an "[a]nalysis of adequate protection in the context of financing of a project, as distinguished from adequate protection in the context of a going concern business," and the unique features of each undertaking). In the context of a creditor that holds a lien against property owned by the debtor, the Bankruptcy Code specifically provides that the value of such creditor's interest, "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property." § 506(a).

119. Shachmurove, *supra* note 83, at 246.

120. *In re Dewey Ranch Hockey, LLC*, 414 B.R. 577, 579–80, 590–93 (Bankr. D. Ariz. 2009) (prohibiting the sale of a professional sports team franchise where the court could not provide adequate protection of the league's interest in its bylaws restrictions on a team franchise transfer).

121. *See, e.g.,* BEVERLY A. BERNEMAN, B. SUMMER CHANDLER & STEVEN S. FLORES, CHOPPY WATERS: NAVIGATING THE INTERSECTION OF BANKRUPTCY AND INTELLECTUAL PROPERTY 85–114 (providing a detailed discussion of courts' tests for analyzing purported license agreements to determine whether they should be classified as "executory contracts" in bankruptcy).

122. *Id.*

three options with respect to the debtor's executory contracts— assumption, both assumption and assignment, or rejection.<sup>123</sup> The ability to reject the debtor's executory contracts allows the estate to avoid the additional expenses of performance when performance would be unprofitable for the estate.<sup>124</sup> Conversely, assuming valuable executory contracts under § 365 allows the estate to retain the contract and the corresponding benefits, or assign the assumed contract to a third party in exchange for some remuneration.<sup>125</sup>

Courts generally “approve motions to assume, assume and assign, or reject executory contracts or unexpired leases upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment.”<sup>126</sup> Given the potential liability associated with contractual obligations, the success of the debtor's reorganization or liquidation may depend on the ability to avoid or assign the debtor's contractual obligations.<sup>127</sup> Similarly, the debtor's ability to continue to operate under and to receive the benefits of valuable contracts may be critical to the debtor's continued operations.<sup>128</sup>

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123. 11 U.S.C. § 365(a), (b)(3). Section 365 also applies to the debtor's unexpired leases. *Id.* For purposes of this discussion, however, this Article will focus on executory contracts.

124. *See* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1658 (2019).

125. *See id.*

126. *In re* MF Global Holdings Ltd., 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012); *see also* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (holding that the court will typically apply the “business judgment” standard to § 365 cases).

127. *See* Mirant Corp. v. Potomac Elec. Power Co. (*In re* Mirant Corp.), 378 F.3d 511, 517–18 (5th Cir. 2004) (quoting *In re* Nat'l Gypsum Co., 208 F.3d 498, 504 (5th Cir. 2000)) (“The authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.”).

128. *See* Frito-Lay, Inc. v. LTV Steel Co. (*In re* Chateaugay Corp.), 10 F.3d 944, 954–55 (2d Cir. 1993) (quoting *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985)) (stating how § 365 provides the debtor with the ability to “relieve the estate of burdensome obligations while at the same time providing ‘a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so’”).

Upon rejection of an executory contract, the debtor is relieved from future performance under the contract.<sup>129</sup> By providing debtors with the power to reject executory contracts, a principal aim of Congress was to “release the debtor’s estate from burdensome obligations that can impede a successful reorganization.”<sup>130</sup> Importantly, however, the rejection of an executory contract is not a termination of that contract.<sup>131</sup> As such, rejection does not necessarily prohibit the nondebtor party from enjoying the benefits of such contract or lease, provided the nondebtor party does not attempt to compel the debtor to perform.<sup>132</sup>

Rather than effecting a termination, “rejection of an executory contract ‘constitutes a breach of [the] contract’ and gives the counter-party a claim for damages resulting from the failure to perform under § 365(g).”<sup>133</sup> The Bankruptcy Code treats this breach as having occurred prior to the bankruptcy filing.<sup>134</sup> Because the breach is deemed to have occurred prior to the filing of the bankruptcy case, the nondebtor party to the rejected contract holds a pre-petition claim against the estate.<sup>135</sup> By giving the nondebtor party to the rejected contract a pre-petition claim, “[§] 365(g) places that party in the same boat as the debtor’s unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar.”<sup>136</sup>

#### IV. ANALYZING *IN RE TEMPNOLOGY*

Pursuant to § 365(n), when a rejected contract is a contract “under which the debtor is a licensor of a right to intellectual property,” the nondebtor licensee to such contract has the option to elect to “retain its rights . . . to such intellectual

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129. See *In re Mirant Corp.*, 378 F.3d at 517–18.

130. See *Bildisco & Bildisco*, 465 U.S. at 528.

131. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1657–58 (2019).

132. See *id.*

133. *Id.* at 1658.

134. *Id.*; 11 U.S.C. § 365(g)(1).

135. *Tempnology, LLC*, 139 S. Ct. at 1657–58; § 365(g)(1).

136. *Tempnology, LLC*, 139 S. Ct. at 1658 (italics in original omitted).



property . . . as such rights existed immediately before the case commenced.”<sup>137</sup> Section 365(n) was Congress’s response to the Fourth Circuit’s opinion in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*<sup>138</sup> In *Lubrizol*, the court approved the debtor’s rejection of a technology license the debtor had granted to a licensee.<sup>139</sup> In approving the rejection, the court held that the rejection of the technology license terminated the right of the licensee to use the technology process, the right that had been granted under the licensing agreement.<sup>140</sup>

By enacting § 365(n), Congress intended “to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to § 365 in the event of the licensor’s bankruptcy.”<sup>141</sup> Congress also explained that § 365(n) “corrects the perception of some courts, [including the *Lubrizol* court] that

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137. § 365(n)(1). Section 365(n)(1) provides, in full, that “[i]f the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property,” the non-debtor licensee to such contract may either (A) treat the contract as terminated, or (B) may elect

to retain its rights (including a right to enforce any exclusivity provision of such contract but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable non-bankruptcy law), as such rights existed immediately before the case commenced.

*Id.*

138. See *Tempnology, LLC*, 139 S. Ct. at 1664 (citing *Lubrizol Enter., Inc. v. Richmond Mental Finishers, Inc.*, 756 F.2d 1043, 1045–48 (4th Cir. 1985)).

139. See *Lubrizol*, 756 F.2d at 1044.

140. *Id.* at 1048. Numerous courts rejected the reasoning of *Lubrizol*, holding that, based on the language of § 365(g)(1), the rejection of a contract or lease by the debtor in possession constitutes only a breach of the rejected contract or lease and does not terminate the rejected contract or lease. See, e.g., *In re SIMA Int’l, Inc.*, 65 Bankr. Ct. Np. 17-21761, LEXIS 1455, at \*8 (Bankr. D. Conn. May 17, 2018); *Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 559 B.R. 809 (B.A.P. 1st Cir. 2016), *aff’d in part, rev’d in part*, 879 F.3d 389 (1st Cir. 2018), *rev’d and remanded*, 139 S. Ct. 1652 (2019); *Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372, 377–78 (7th Cir. 2012). Accordingly, these courts reasoned that the non-debtor party may choose to continue to enjoy its rights under the rejected contract or lease, subject to the limitation that the non-debtor party may not compel the debtor to perform under the rejected contract or lease. See *In re SIMA Int’l, Inc.*, LEXIS 1455, at \*8; *In re Tempnology, LLC*, 559 B.R. at 809; *Sunbeam Prods., Inc.*, 686 F.3d at 377–78.

141. S. REP. NO. 100-505, at 1 (1988).

[§] 365 was ever intended to be a mechanism for stripping innocent licensee[s] of rights.”<sup>142</sup>

Because trademarks, trade names, and service marks are not included in the definition of “intellectual property” under the Bankruptcy Code, courts disagreed on the question of whether licensees to these types of intellectual property retain any rights to use this intellectual property, whether under § 365(n) or otherwise, following the rejection of the relevant license agreement.<sup>143</sup> The Supreme Court ultimately addressed the effect of a debtor-licensor’s rejection of a trademark license in *Mission Product Holdings, Inc. v. Tempnology LLC*.<sup>144</sup>

In *Tempnology*, the Court considered the effect of rejection on the rights of the nondebtor licensee to a rejected trademark license.<sup>145</sup> The Court held that, although the protections of § 365(n) do not apply to trademarks, the rejection of a trademark license agreement by the debtor-licensor does not terminate the underlying license agreement, thereby

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142. *Id.* at 4.

143. The Bankruptcy Code defines “intellectual property” to mean “trade secret[s];” “invention, process, design, or plant protected under title 35;” “patent application[s];” “plant variet[ies];” “work[s] of authorship protected under title 17;” or “mask work protected under [C]hapter 9 of title 17.” 11 U.S.C. § 101(35A). Although the issue has not been addressed extensively by the courts, it should be noted that foreign patents and copyrights are also categories of intellectual property that may not be covered by § 365(n). *See* § 365(n). Commentators who take the position that § 365(n) does not apply to foreign patents and copyrights note that the definition of “intellectual property” in the Bankruptcy Code specifically refers to “invention, process, design, or plant ‘protected under title 35’ [of the U.S. Code],” and “work[s] of authorship ‘protected under title 17’ [of the U.S. Code].” *See* Halpern, *supra* note 3. Accordingly, some insolvency professionals reason that, as a result of the specific reference to U.S. law, foreign patents and copyrights must be outside of the scope of § 365(n). *Id.* It should also be noted that § 365(n) may be applied to U.S. intellectual property in cross-border insolvency cases. Chapter 15 of the Bankruptcy Code provides a process by which assets in the United States may be addressed by U.S. bankruptcy courts in proceedings that operate as ancillary to a primary insolvency proceeding that is pending in another country. *See* § 15. A foreign representative of a company that obtains rights in a Chapter 15 case may request that the bankruptcy court apply the § 365(n) protections, and the court may find that such protections are warranted. *See* Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 31–32 (4th Cir. 2013) (ruling that § 365(n) would apply to U.S. patents in the estate in a cross-border insolvency case in circumstances where the patent licensor was a German corporation that went into bankruptcy in Germany and German law did not include a provision that was equivalent to § 365(n)).

144. *See Tempnology, LLC*, 139 S. Ct. at 1661.

145. *See id.* at 1652.

eliminating any interests in the subject intellectual property already held by the licensee.<sup>146</sup> Rather, the Court explained, rejection of an executory contract, “constitutes a breach of such contract.”<sup>147</sup> Outside of bankruptcy, the breach of an agreement by a party does not permit that party to void the contract it has breached, thereby taking away any rights under the contract held by the non-breaching party.<sup>148</sup> Similarly, a rejection in bankruptcy does not permit the debtor to void the rejected contract and thereby terminate all rights of the nondebtor party to the rejected contract.<sup>149</sup>

In concluding that rejection of an executory contract does not serve to take away any rights previously granted to the nondebtor party, the Supreme Court reasoned that permitting rejection to affect a rescission of the rejected contract “would circumvent the Code’s stringent limits on ‘avoidance’ actions—the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process. The most notable example is for fraudulent

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146. *Id.* at 1666.

147. *Id.* at 1657–58 (citing § 365(g)).

148. *Id.* at 1659.

149. *Id.* Importantly, the Court explained that any rights that may continue following the rejection of an executory contract must be understood in conjunction with the fact that specific performance against the debtor-licensor is not available following the rejection. *Id.* at 1662–63 (“The debtor can stop performing its remaining obligations under the agreement. But the debtor cannot rescind the license already conveyed. So the licensee can continue to do whatever the license authorizes.”). As such, under any circumstance under which the terms of the rejected contract require the debtor party to take action as a condition to the non-debtor licensee exercising its rights under the agreement, the non-debtor licensee will be unable to enjoy those rights, absent voluntary action by the debtor licensor. *See id.* The American Intellectual Property Law Association provides an illustration: Consider as an example a contract containing a trademark license. The contract requires the licensee to submit a prototype for a product to the licensor for approval before manufacture can begin and, if the licensor fails to respond within a set period, the prototype will be rejected, preventing the product’s manufacture. If the licensor does not respond, the licensee may not manufacture the product and, if the license so provides, is left only with a claim against the licensor for breach. Brief for American Intellectual Property Law Association as Amicus Curiae Supporting Neither Party at 23, *Mission Prod. Holdings, Inc. v. Tempnology LLC*, 879 F.3d 389 (2019) (No. 17-1657). Because the non-debtor party cannot force the debtor to act under a rejected license agreement, any non-debtor licensee under a rejected license agreement, the terms of which require action by the debtor before the non-debtor is permitted to enjoy its rights under the license agreement, is, in practice, left only with a claim for damages. *Tempnology, LLC*, 139 S. Ct. at 1661.

conveyances.”<sup>150</sup> Expounding on this point, the Court observed that avoidance powers are contained in discrete sections of Article 5 of the Bankruptcy Code and “can be invoked in only narrow circumstances—unlike the power of rejection, which may be exercised for any plausible economic reason.”<sup>151</sup>

The debtor also pointed to the fact that § 365 contains provisions that identify specific categories of contracts or leases under which a counterparty may retain certain specified rights after rejection.<sup>152</sup> It asserted that because the rights that exist under certain contracts or leases are expressly protected, the consequence of rejecting a contract that does *not* fit into one of these specifically protected categories must be the termination of the contractual rights previously granted under that contract.<sup>153</sup> The Supreme Court rejected this contention, pointing to the fact that § 365(g) specifically provides that rejection “constitutes a breach” of the rejected contract, which is not a termination of the contract.<sup>154</sup> The Court also observed that “the provisions Tempnology treats as a reticulated scheme of exceptions each emerged at a different time and responded to a discrete problem—as often as not, correcting a judicial ruling of just the kind Tempnology urges.”<sup>155</sup> In sum, the Court observed, the legislative history reflected that when Congress has been presented with the view that rejection terminates all contractual rights, it has “expressed its disapproval” and “enacted the provisions, as and when needed, to *reinforce* or *clarify* the general rule that contractual rights survive rejection.”<sup>156</sup>

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150. *Tempnology, LLC*, 139 S. Ct. at 1663 (emphasis added).

151. *Id.*

152. *Id.*

153. *See id.* at 1663–64.

154. *Id.* at 1659.

155. *Id.* at 1657.

156. *Id.* at 1664 (emphasis added); see Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding “Rejection”*, 59 U. COLO. L. REV. 845, 911–12, 916–19 (1988) (discussing judicial decisions that § 365(h), § 365(i), or § 365(n) each overturned).

Additionally, the Court observed that § 365(n) does not apply to trademark license agreements.<sup>157</sup> Justice Sotomayor's concurring opinion then highlights that the nondebtor licensee under a trademark license may have post-rejection rights that are in fact *more expansive* than the rights held by licensees whose intellectual property license agreements *are* covered by § 365(n).<sup>158</sup> Justice Sotomayor explains that when a nondebtor licensee under a rejected license agreement that is covered by § 365(n) elects to retain its rights following the rejection, the licensee,

must make all of its royalty payments . . . [and] has no right to deduct damages from its payments even if it otherwise could have done so under nonbankruptcy law. This provision and others in § 365(n) mean that the covered intellectual property types are governed by different rules than trademark licenses.<sup>159</sup>

The nondebtor party under a rejected license agreement covered by § 365(n) will have to abide by the requirements and restrictions of § 365(n), whereas the nondebtor party to a license agreement not covered by § 365(n), such as a trademark license agreement, will not.<sup>160</sup>

Although the power to reject an executory contract pursuant to § 365 is an important tool to a debtor because it permits the estate to shed affirmative ongoing obligations under burdensome agreements, rejection does not serve to terminate

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157. *Tempnology, LLC*, 139 S. Ct. at 1664.

158. *Id.* at 1666–67 (Sotomayor, J., concurring) (“[T]he Court’s holding confirms that trademark licensees’ postrejection rights and remedies are more expansive in some respects than those possessed by licensees of other types of intellectual property.”). If a licensee elects to retain its rights to use the intellectual property that is subject to the rejected license agreement, it must continue to make any required royalty payments under the rejected contract. 11 U.S.C. § 365 (n)(2)(B). In addition, it is deemed to have waived any rights to setoff that it may have held under the contract and any administrative claims that it may have held from the performance of the rejected contract. § 365(n)(2)(C).

159. *Tempnology, LLC*, 139 S. Ct. at 1666–67 (Sotomayor, J., concurring) (internal citations omitted) (italics in original omitted) (discussing § 365(n)).

160. *See id.* at 1663–67 (majority opinion and Sotomayor, J., concurring).

the rejected contract.<sup>161</sup> As such, the nondebtor party to any rejected contract is not automatically prohibited from using an asset subject to that rejected contract, provided the debtor is no longer required to act under the terms of the rejected contract.<sup>162</sup> As *Tempnology* makes clear, this fact is true, regardless of whether such asset constitutes “intellectual property” for purposes of § 365(n).<sup>163</sup>

Moreover, the Supreme Court in *Tempnology* highlights one critical point—§ 365(n) should not be read as a legislative attempt to place the nondebtor licensees in a sacrosanct and uniquely protected position.<sup>164</sup> Rather, § 365(n) was the legislature’s narrow response to a broader misunderstanding of the effect of rejection on the nondebtor party’s interests to the rejected executory contract.<sup>165</sup> Section 365(n) was Congress’ immediate and targeted response to the *Lubrizol* decision and merely *reaffirmed* the rule that rejection does not terminate the nondebtor party’s ability to use intellectual property already transferred under the contract.<sup>166</sup> Further, the effect of § 365(n) might be to leave the nondebtor licensee in a position that is *less* advantageous as compared to nondebtor parties to other forms of executory contracts.<sup>167</sup> Moreover, while rejection under § 365 does not impact nondebtor property rights, other provisions of the Bankruptcy Code may nonetheless do so.<sup>168</sup> As the Court explains in *Tempnology*, while rejection “cannot rescind rights that the contract previously granted,” other provisions of the Bankruptcy Code, such as the avoidance powers set forth in

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161. *Id.* at 1662 (majority opinion).

162. *Id.* at 1662–63.

163. *Id.* at 1666–67 (Sotomayor, J., concurring).

164. *See id.* at 1667.

165. *See id.* at 1664–65 (majority opinion).

166. *Id.*

167. *See id.*

168. *Id.* at 1663 (contrasting the effect of rejection with the avoidance powers laid out in other sections of the Bankruptcy Code by noting that avoidance powers “are laid out in a discrete set of sections in the Code, *see* §§ 544–553, far away from Section 365. And they can be invoked in only narrow circumstances—unlike the power of rejection, which may be exercised for any plausible economic reason”).

various sections of Chapter 5, may serve to rescind rights previously transferred to a nondebtor.<sup>169</sup>

V. DÉJÀ VU — *IN RE CRUMBS BAKE SHOP, INC.*

In *In re Crumbs Bake Shop, Inc.*, the court considered whether a sale of the debtors' assets pursuant to § 363(f) extinguishes the rights of third-party licensees under § 365(n).<sup>170</sup> Although other courts have touched on the purported interplay between these two provisions of the Bankruptcy Code, the *Crumbs Bake Shop* opinion is the only one that has addressed this issue squarely and in detail.<sup>171</sup>

Crumbs Bake Shop, Inc. (collectively with related debtor entities, "Crumbs") "specialized in the retail sales of cupcakes, baked goods, and beverages."<sup>172</sup> In addition to selling its products through retail stores, catering, and e-commerce, Crumbs "entered into licensing agreements with [various] third parties" (collectively, the "Licensees"), "which allowed [the Licensees] to utilize the Crumbs trademark and trade secrets, and sell products under the Crumbs brand" (the "License Agreements").<sup>173</sup> Crumbs also entered into a Representation Agreement with Brand<sup>2</sup> Squared Licensing ("BSL") under which BSL "agreed to provide certain [brand licensing] services related to the license agreements."<sup>174</sup>

After experiencing extended liquidity issues, Crumbs ultimately filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code.<sup>175</sup> Finally, Crumbs engaged in

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169. *Id.* at 1656, 1663.

170. *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 768 (Bankr. D.N.J. 2014). The court also considered "[w]hether trademark licensees . . . fall under the protective scope of 11 U.S.C. § 365(n), notwithstanding that 'trademarks' are not explicitly included in [the definition of 'intellectual property' under] the Bankruptcy Code." *Id.* The Supreme Court has subsequently recognized in dicta that trademarks are not included among the "intellectual property" covered by § 365(n) of the Bankruptcy Code. See *Tempnology, LLC*, 139 S. Ct. at 1663.

171. See discussion *infra* Section VII.C.; see *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 773–79.

172. *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 768.

173. *Id.* at 769.

174. *Id.*

175. *Id.*

negotiations with Lemonis Fischer Acquisition Company, LLC (“LFAC”) “for financing in a last-ditch effort to maximize value of the Debtors’ assets through a sale thereof.”<sup>176</sup> The negotiations resulted in LFAC providing \$1,133,000.00 in debtor-in-possession financing to Crumbs to “enable them to pursue an expedited sale of the Debtors’ assets pursuant to [§] 363 of the Bankruptcy Code.”<sup>177</sup> LFAC had also taken an assignment of a pre-petition debt owed by Crumbs.<sup>178</sup> Crumbs and LFAC also negotiated a credit-bid asset purchase agreement pursuant to which substantially all of Crumbs’ assets would be auctioned and LFAC would credit-bid the amount of the secured debt owed to it.<sup>179</sup> When no other potential buyers qualified to bid on Crumbs’ assets, the bankruptcy court entered an order approving the sale of Crumbs’ assets to LFAC (the “Sale Order”).<sup>180</sup> The Sale Order provided that the assets were transferred to the LFAC free and clear of liens, claims, encumbrances, and interests.<sup>181</sup>

LFAC subsequently filed a motion, asking the court to clarify the respective rights of the parties regarding the intellectual property.<sup>182</sup> In response, BSL asserted, among other things, that

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176. Verified Application in Support of Debtors’ Motion for an Ord. Pursuant to 11 U.S.C. §§ 363 and 365 and Fed. R. Bankr. P. 2002, 6004 and 6006: (1) Approving “Stalking Horse” Asset Purchase Agreement for the Sale of Substantially All the Debtors’ Assets; (2) Approving Bidding Procs. and Form, Manner and Sufficiency of Notice; (3) Scheduling (A) an Auction Sale and (B) a Hearing to Consider Approving the Highest and Best Offer; (4) Authorizing the Debtors to Sell Substantially all their Assets Free and Clear of Liens, Claims, Encumbrances, and Ints. and to Assume and Assign Certain Related Executory Conts. and Unexpired Leases; and (5) Granting Other Related Relief at 5, *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (No. 14-24287), ECF No. 195 [hereinafter Verified Application in Support of Debtors’ Motion].

177. *Id.*

178. *See id.* at 4.

179. *See id.* at 5–6.

180. Order Under 11 U.S.C. §§ 105(a), 363 and 365 (I) Authorizing and Approving the Sale of Substantially All of the Debtors’ Assets Free and Clear of Liens, Claims, Encumbrances, and Ints., (II) Authorizing and Approving the Assumption and Assignment of Certain Unexpired Leases of Non-Residential Real Prop. in Connection with the Sale, and (III) Granting Related Relief at 2, *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (No. 14-24287), ECF No. 195 [hereinafter Order Under 11 U.S.C. §§ 105(a), 363, and 365].

181. *Id.* at 11.

182. Application of Lemonis Fischer Acquisition Company, LLC in Support of Motion for an Order in Aid of the Court’s Order Under 11 U.S.C. §§ 105(a), 363 and 365 (I) Authorizing and



the Licensees could elect, under § 365(n), to retain their rights under their respective License Agreements.<sup>183</sup> LFAC, however, took the position that the sale of Crumbs' assets pursuant to § 363(f) effectuated a sale of those assets free and clear of any rights the Licensees may have under § 365(n).<sup>184</sup> The court disagreed and "rule[d] that the interests held by Licensees were *not* extinguished by the sale because in the absence of consent, a sale under [§] 363(f) does *not* trump the rights granted to Licensees by [§] 365(n)."<sup>185</sup>

Before addressing the purported interplay between §§ 363(f) and 365(n), the court first dismissed LFAC's contention that the Licensees had "impliedly consented" to the sale free of the Licensees' interests because the Licensees failed to object to the § 363 Sale Motion.<sup>186</sup> In finding that the Licensees had not been provided with adequate notice of the sale, the court observed that the Sale Motion contained "no clear discussion as to what rights were purported to be taken away as a result of the sale."<sup>187</sup> "Thus, [the] Licensees had no apparent reason to believe that an objection would be necessary in order to retain their rights under section 365(n)."<sup>188</sup>

In addressing the interplay between §§ 363(f) and 365(n), the court first noted that because "there has been little discussion on the interplay between §§ 363 and 365(n), the Court is guided by cases that have interpreted the relationship between § 363

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Approving the Sale of Substantially All of the Debtors' Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, (II) Authorizing and Approving the Assumption and Assignment of Certain Unexpired Leases of Non-Residential Real Property In Connection With the Sale, and (III) Granting Related Relief [Docket # 195], dated August 27, 2014 at 2, *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (No. 14-24287), ECF No. 268-1.

183. See Response of Brand<sup>2</sup> Squared Licensing ("BSL") to the Motion, Dated October 10, 2014 [Docket Number 268] ("Motion") of Lemonis Fischer Acquisition Company ("LFAC") to Motion for an Order in Aid of the Court's Order Authorizing and Approving Sale, and for Related Relief, Dated August 27, 2014 [Docket Number 195] ("Sale Order") at 2, *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766 (No. 14-24287), ECF No. 282.

184. See *In re Crumbs Bake Shop Inc.*, 522 B.R. at 774.

185. *Id.*

186. *Id.*

187. *Id.* at 775.

188. *Id.* (italics omitted).

and § 365(h), as there are notable similarities between §§ 365(n) and 365(h).<sup>189</sup> In determining that “nothing in [§] 363(f) trumps, supersedes, or otherwise overrides the rights granted to Licensees under [§] 365(n),”<sup>190</sup> the court’s “conclusion [was] based on two factors: the principle of statutory construction that the specific governs the general; and the legislative history of § 365.”<sup>191</sup>

The court addressed the language of the statute through the well-accepted principle of statutory construction that “[g]eneral language of a statute does not prevail over matters specifically dealt with in another part of the same enactment”<sup>192</sup> and that “[w]hen there is potential for conflict, specific provisions should prevail over the more general.”<sup>193</sup> The court then pointed to the opinion in *In re Churchill Properties III, Ltd. P’ship*, where it considered this principle of statutory construction in the context of analyzing the perceived interplay between §§ 363(f) and 365(h).<sup>194</sup> In *Crumbs Bake Shop*, the court observed that the *Churchill* court “recognized that § 365(h) is specific, as it grants a particular set of clearly stated rights to lessees of rejected leases. That is, Congress specifically gave lessees the option to remain in possession after a lease rejection.”<sup>195</sup> Thus, according to the *Crumbs Bake Shop* court, the *Churchill* court determined “it would make little sense to permit a general provision, such as [§] 363(f), to override [§ 365’s] purpose.”<sup>196</sup> Applying this analysis to the provision at issue before the court, § 365(n), the *Crumbs Bake Shop* court concluded that “[t]he specific language in § 365(n) should not be overcome by the

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189. *Id.* at 777 (italics omitted).

190. *Id.* (italics omitted).

191. *Id.* (italics omitted).

192. *Id.* (quoting *In re Nobelman*, 968 F.2d 483, 488 (5th Cir.1992), *aff’d sub nom.* *Nobelman v. Am. Sav.*, 508 U.S. 324 (1993)).

193. *Id.* (quoting *In re Nadler*, 122 B.R. 162, 166 (Bankr. D. Mass. 1990)) (internal quotations omitted).

194. *Id.* at 778.

195. *Id.* (italics omitted).

196. *Id.* (quoting *In re Churchill Props. III, Ltd. P’ship*, 197 B.R. 283, 288 (Bankr. N.D. Ill. 1996)) (italics omitted).

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broad text of § 363(f). Accordingly, the general provision of § 363(f) does not wipe away the rights granted to Licensees by § 365(n).<sup>197</sup>

The second factor the *Crumbs* court considered was the legislative history of § 365.<sup>198</sup> The court analyzed the legislative history of § 365(h), specifically the provision preserving certain rights of nondebtor lessees.<sup>199</sup> The court observed that “the legislative history of § 365(h) evinces that Congress had the desire to protect the rights of tenants.”<sup>200</sup> The court also cited with approval a separate case in which the bankruptcy court had:

“noted the legislative history to § 365(h)” and denied the debtor’s motion to sell [its] real property “free and clear of a leasehold interest under § 363(f) because such a sale would permit the debtor to achieve under § 363 what it was proscribed from achieving under § 365(h), namely, stripping the lessee of its rights to possession.”<sup>201</sup>

Following these observations, the *Crumbs Bake Shop* court concluded that § 363(f) does not extinguish the rights of a lessee under § 365(n).<sup>202</sup> The court asserted that “[t]his line of reasoning fits squarely with Congressional intent, and with the principle of statutory construction that the specific governs over the general.”<sup>203</sup>

Based on this reasoning, the *Crumbs Bake Shop* court concluded that, despite the debtor’s sale to LFAC under the free and clear sale power of § 363(f), pursuant to § 365(n), the Licensees were entitled to continue to use the trademarks.<sup>204</sup>

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197. *Id.* (italics omitted).

198. *Id.*

199. *See id.*

200. *Id.* (italics omitted).

201. *Id.* (italics omitted).

202. *Id.*

203. *Id.*

204. *Id.* at 769–80.

Thus, in the event the Licensees were to continue using the subject licensed trademarks, LFAC's purchase of those trademarks would be subject to the rights of the Licensees to use the intellectual property.<sup>205</sup> In its discussion of the issue, the court acknowledged that the likely result of holding that a licensee's rights under § 365(n) survive a sale of the subject intellectual property assets pursuant to § 363(f) will be that the price obtained for the sale of those assets will be reduced.<sup>206</sup> The court, however, was undeterred by this potential result, proclaiming that such "monetary recoveries primarily benefit the pre-petition and post-petition lenders and administrative claimants . . . . It is questionable that Congress intended to sacrifice the rights of licensees for the benefit of the lending community."<sup>207</sup> It is worth observing, however, that LFAC was both the buyer and the secured lender to Crumbs.<sup>208</sup> According to Crumbs, Crumbs was only able to offer its assets for sale on the open market through the 363-auction process because LFAC was willing to offer financing to Crumbs to support those efforts.<sup>209</sup>

#### VI. A HARBINGER OF THINGS TO COME — THE PROBLEMATIC INTERPLAY OF §§ 363(F) AND 365(H)

Although relatively few courts have touched on the intersection of §§ 363(f) and 365(n) of the Bankruptcy Code, several courts have addressed the interplay between §§ 363(f) and 365(h), a provision of the Bankruptcy Code that is somewhat analogous to § 365(n).<sup>210</sup> Section 365(h)(1) provides that if the debtor rejects an unexpired lease for commercial real

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205. *Id.*

206. *See id.* at 772.

207. *Id.*

208. Verified Application in Support of Debtors' Motion, *supra* note 176.

209. *See id.*

210. 11 U.S.C. §§ 363(f), 365(h), (n); see Michael St. Patrick Baxter, *Section 363 Sales Free and Clear of Interests: Why the Seventh Circuit Erred in Precision Industries v. Qualitech Steel*, 59 BUS. LAW. 475, 477 (2004); see, e.g., *IDEA Boardwalk, LLC v. Revel Ent. Grp.*, 532 B.R. 216, 228 (Bankr. D.N.J. 2015) ("[T]here are notable similarities between § 365(n) and § 365(h).").

property under which the debtor is the lessor, the nondebtor lessee may choose to continue in possession of the real property for the remainder of the lease term.<sup>211</sup> As the *Crumbs Bake Shop* opinion evidences, when considering the purported interplay between §§ 363(f) and 365(n), courts will likely look to opinions that have considered the intersection between §§ 363(f) and 365(h) for guidance.<sup>212</sup> After decades before the courts, the question of whether a debtor may sell its real property pursuant to § 363(f) free and clear of the possessory rights of a nondebtor tenant, notwithstanding the protections contained in § 365(h), remains unresolved.<sup>213</sup>

The majority view on this issue<sup>214</sup> is that a tenant's possessory rights under § 365(h) survive a "free and clear" sale under § 363(f).<sup>215</sup> Courts following this approach have found that §§ 363(f) and 365(h) conflict.<sup>216</sup> Relying on the axiom of statutory construction that provides the more specific of the two conflicting provisions should control, courts adopting the majority approach find that the protections provided to tenants under § 365(h) trump the free and clear sale power of § 363(f), thus preserving the lessee's possessory interest even after a sale under § 363(f).<sup>217</sup> Courts adopting this view also assert that the

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211. § 365(h)(1)(A); see generally Nancy A. Peterman, Ryan A. Wagner & Kai Zhu, *The Interplay of Sections 363(F) and 365(H): Can These Provisions of the Bankruptcy Code Be Reconciled?*, 28 NORTON J. BANKR. L. & PRAC. (2019) (discussing the history of § 365(h) and its predecessor).

212. See *supra* Part V.

213. See *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 898–900 (9th Cir. 2017) (collecting cases); *In re Zota Petrols., LLC*, 482 B.R. 154, 159–63 (Bankr. E.D. Va. 2012) (collecting cases).

214. See *In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 898.

215. See *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 702 (Bankr. S.D.N.Y. 2014) (describing the majority view and collecting cases); *In re Zota Petrols., LLC*, 482 B.R. at 160–62 (describing the majority view and its rationale); see, e.g., *In re Haskell, L.P.*, 321 B.R. 1, 9–10 (Bankr. D. Mass. 2015) (adopting the majority view); *In re Churchill Props. III, Ltd. P'ship*, 197 B.R. 283, 286–88 (Bankr. N.D. Ill. 1996) (adopting the majority view); *In re Taylor*, 198 B.R. 142, 165–67 (Bankr. D.S.C. 1996) (adopting the majority view).

216. *Dishi & Sons*, 510 B.R. at 702; see, e.g., *In re Zota Petrols., LLC*, 482 B.R. at 160–62; *In re Haskell L.P.*, 321 B.R. at 7–10; *In re Churchill Props. III, Ltd. P'ship*, 197 B.R. at 286–87; *In re Taylor*, 198 B.R. at 165.

217. See, e.g., *Dishi & Sons*, 510 B.R. at 703; *In re Zota Petrols., LLC*, 482 B.R. at 161; *In re Churchill Props. III, Ltd. P'ship*, 197 B.R. at 288; *In re Taylor*, 198 B.R. at 164–65.

legislative history of § 365(h) indicates that Congress intended to protect the lessee's possessory interest in the event of rejection in bankruptcy and take the position that debtors should not be permitted to circumvent this protection by selling the subject real property under § 363(f).<sup>218</sup>

Under the minority approach to the issue, courts hold that the debtor may use § 363(f) to sell real property free of any rights a nondebtor lessee might otherwise hold under § 365(h).<sup>219</sup> Nearly two decades ago, the Seventh Circuit addressed the issue in *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.)*.<sup>220</sup> In that case, real property owned by the debtor was sold, pursuant to § 363(f), to a group of the debtor's pre-petition lenders.<sup>221</sup> The sale order provided that the sale was free of the interests of third parties.<sup>222</sup> The tenant asserted that pursuant to § 365(h), its possessory rights survived the sale.<sup>223</sup> The Seventh Circuit disagreed, holding that the transfer of the real property to the buyers was free of the tenant's possessory interests, notwithstanding § 365(h).<sup>224</sup>

In reaching this conclusion, the Seventh Circuit took the position that § 365(h), a provision that addresses the effect of the rejection of an executory contract, has no bearing on the sale of assets of the debtor under § 363(f).<sup>225</sup> The court also pointed to the fact that there are no cross references between §§ 365(h) and 363(f), indicating that selling estate property free of "any interest" is subject to the protections given to tenants under

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218. See *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, No. IP00-0247, 2001 WL 699881, at \*46 (S.D. Ind. Apr. 24, 2001), *rev'd*, 327 F.3d 537 (7th Cir. 2003); *Dishi & Sons*, 510 B.R. at 702-03; *In re Zota Petrols., LLC*, 482 B.R. at 161-62; *In re Haskell L.P.*, 321 B.R. at 6-7; *In re Churchill Props. III, Ltd. P'ship*, 197 B.R. at 288; *In re Taylor*, 198 B.R. at 165-66.

219. See *In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 898; see, e.g., *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC (In re Qualitech Steel Corp.)*, 327 F.3d 537, 548 (7th Cir. 2003).

220. *In re Qualitech Steel Corp.*, 327 F.3d at 540.

221. *Id.*

222. *Id.* at 541.

223. See *id.*

224. See *id.* at 548.

225. *Id.* at 547-48 (observing that § 365(h) "says nothing at all about sales of estate property, which are the province of section 363") (italics omitted).

§ 365(h), despite the fact that other cross references are contained within §§ 365 and 363.<sup>226</sup> Finally, the court observed that § 363(f) provides its own mechanism for protecting the interests of the tenants of a lease the debtor has rejected.<sup>227</sup> The court explained that pursuant to § 363(e), an entity with an interest in property that is to be sold may demand “adequate protection” of its interests, and, when such a demand is made, the court must “prohibit or condition such . . . [a] sale . . . as is necessary to provide adequate protection of such interest.”<sup>228</sup> Thus, for all these reasons, the Seventh Circuit concluded that § 365(h) does not obviate the power to sell assets free of the lessee’s interests pursuant to § 363(f).<sup>229</sup>

Some fourteen years after the Seventh Circuit issued its decision in *Qualitech*, the same issue reached the Ninth Circuit in *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions (In re Spanish Peaks Holdings II, LLC)*.<sup>230</sup> As was the case in *Qualitech*, in *Spanish Peaks*, the debtor’s largest creditor purchased real property and other assets owned by the debtor.<sup>231</sup> The buyer asked the court to find that the sale was free of any interests held by two debtor-affiliates that had each leased parcels of real property from the debtor.<sup>232</sup> Adopting the reasoning of the Seventh Circuit in *Qualitech*, the Ninth Circuit held that the rights of the debtor’s real property had been sold free and clear of the lessees’ interests in the real property.<sup>233</sup> Although the court’s conclusion was based “principally on the reasons given by the Seventh Circuit,” it added, “observations to mitigate the

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226. *Id.*

227. *Id.*

228. *Id.*

229. *See id.*

230. *See id.*; *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions (In re Spanish Peaks Holdings II, LLC)*, 872 F.3d 892, 894 (9th Cir. 2017).

231. *See In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 895–96.

232. *See id.* at 895.

233. *Id.* at 898–901.

concern that an attempt to harmonize the two statutes ‘arguably results in the effective repeal of § 365(h).’<sup>234</sup>

The *Spanish Peaks* court first noted that, pursuant to § 363(e), a bankruptcy court is compelled to provide adequate protection for an interest that will be terminated by a sale if the holder of such interest requests adequate protection.<sup>235</sup> Further, the court explained, adequate protection “includes any relief—other than compensation as an administrative expense—that will ‘result in the realization by such entity of the indubitable equivalent’ of the terminated interest.”<sup>236</sup> This “broad definition of adequate protection makes it a powerful check on potential abuses of free-and-clear sales.”<sup>237</sup> In fact, the necessary “adequate protection” may consist of the continued possession by the tenant of the real property the debtor is proposing to sell.<sup>238</sup>

The *Spanish Peaks* court next noted that § 363(f) “authorizes free-and-clear sales only in certain circumstances.”<sup>239</sup> In the case before the court, it observed that § 363(f)(1) “authorizes a sale if ‘applicable nonbankruptcy law permits sale of such property free and clear of such interest.’”<sup>240</sup> The court then explained that applicable state law would have permitted a foreclosure sale of the property to satisfy a mortgage and that foreclosure sale would terminate a subsequent lease on the mortgaged property.<sup>241</sup> By recognizing that the power to sell the property free of the leasehold interest, the court was respecting a state-law entitlement.

After more than two decades before the courts, the question of whether a debtor may sell its real property free of a nondebtor tenant’s possessory interests in the real property,

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234. *Id.* at 899 (quoting *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 704 (Bankr. S.D.N.Y. 2014)).

235. *Id.*

236. *Id.* at 899–900 (quoting 11 U.S.C. § 361(3)).

237. *Id.* at 900.

238. *Id.*

239. *Id.*

240. *Id.* (quoting 11 U.S.C. § 363(f)(1)).

241. *Id.*



notwithstanding the protections afforded to such tenants under § 365(h), remains hotly contested.<sup>242</sup> This long and unsettled history portends a similar fate for the equally important question of whether the debtor may sell its intellectual property free of a nondebtor licensee's interest in that intellectual property, notwithstanding the protections of § 365(n).

#### VII. EXAMINING THE *CRUMBS BAKE SHOP* DECISION

The *Crumbs Bake Shop* court asserted that the texts of §§ 365(n) and 363(f), along with the legislative history, led to the conclusion that the protections of § 365(n) override the free and clear sale power of § 363(f).<sup>243</sup> This Part of the Article examines this decision in light of the Supreme Court's analysis in *Tempnology*. It concludes that the *Crumbs Bake Shop* decision was misguided and that the protections of § 365(n) should not be construed as usurping the free and clear sale power of § 363(f).<sup>244</sup> It then considers this result against both the proceduralist account and the traditionalist account of corporate bankruptcy.<sup>245</sup> The Article determines that both theoretical frameworks for the role of corporate bankruptcy support the conclusion that the protections offered to licensees under § 365(n) in the context of the rejection of an intellectual property license agreement should not be construed as usurping the free and clear sale power of § 363(f).<sup>246</sup>

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242. Compare *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696, 708 (Bankr. S.D.N.Y. 2014) (holding that a tenant's possessory rights under § 365(h) survive a "free and clear" sale under § 363(f)), with *In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 900–01 (holding that the debtor may use § 363(f) to sell real property free of any rights a non-debtor lessee might otherwise hold under § 365(h)).

243. *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 777–78 (Bankr. D.N.J. 2014).

244. See discussion *infra* Sections VII.A–B.

245. See discussion *infra* Section VII.C.

246. See discussion *infra* Section VII.C.

A. *Analyzing § 365(n) in Statutory Context in Light of Tempnology*

Following the majority approach to the question of whether the protections of § 365(h) override the free and clear sale power of § 363(f), the court in *Crumbs Bake Shop* relied on the oft-cited canon of statutory construction that specific terms contained within a statute will control over general terms contained within that same statute.<sup>247</sup> Relying on this canon of statutory construction, the *Crumbs Bake Shop* court reasoned that because § 365(n) addresses specifically the rights of an intellectual property licensee under a rejected license agreement, it should not be “overcome by the broad text of § 363(f).”<sup>248</sup> The Supreme Court’s textual analysis in *Tempnology*, however, suggests that this conclusion is in error.<sup>249</sup>

In considering the effect generally of the rejection of an executory contract, the Supreme Court in *Tempnology* considers both the text of § 365 and the role of rejection in the broader context of the Bankruptcy Code.<sup>250</sup> First, the court considers the text of § 365(g) and its clear proclamation regarding the effect of rejection.<sup>251</sup> Based on this language, the Court concludes that rejection does not equate to termination of the rejected contract and, as such, rejection does not necessarily serve to prohibit the counterparty to the rejected contract from using an asset that is the subject of that rejected contract.<sup>252</sup> In this regard, § 365(n) provides no special protections to the licensee of a rejected license agreement.<sup>253</sup> Moreover, the licensee under a license agreement, that is not covered by § 365(n), may have post-rejection rights that are in fact more expansive than the

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247. See *In re Crumbs Bake Shop*, 522 B.R. at 777; see also *supra* Part V.

248. See *In re Crumbs Bake Shop*, 522 B.R. at 778 (italics omitted).

249. See *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019).

250. See *id.* at 1661–63.

251. See *id.* at 1661–62.

252. *Id.* at 1661–64.

253. See *id.* at 1662–66.

rights held by licensees whose intellectual property license agreements *are* covered by § 365(n).<sup>254</sup>

Beyond construing the language of § 365(g) to determine the effect of rejection, the Court construes the effect of § 365 by reference to other provisions of the Code.<sup>255</sup> The Court explains that construing the rejection of an executory contract as the equivalent of a termination of that contract would constitute an improper intrusion upon the purview of other provisions of the Bankruptcy Code—provisions that proscribe the limited circumstances under which a debtor may “unwind pre-bankruptcy transfers that undermine the bankruptcy process.”<sup>256</sup> Stated otherwise, the mere rejection of an executory contract, which is permitted “for *any plausible economic* reason,” does not result in the termination or unwinding of that contract.<sup>257</sup> That very same contract, however, might be terminated or unwound, if the “stringent” requirements of an avoidance action under the Code are satisfied.<sup>258</sup> Although the Court focuses its discussion on the Bankruptcy Code’s avoidance powers, the analysis is similarly applicable to the free and clear sale power of § 363(f).<sup>259</sup> Just as rejection under § 365, generally speaking, should not be construed in a manner that causes it to intrude upon the provisions of the Code that allow pre-bankruptcy transfers to be unwound,<sup>260</sup> the protections offered under § 365(n) to the licensees of intellectual property should not be read to supplant the free and clear sale power of § 363(f). If the more stringent requirements for a free and clear sale under § 363(f) are satisfied, § 365(n) should not impede that sale or its effect. The standards for acting under each provision differ and they each play different roles and serve different purposes.

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254. *See id.* at 1666–67 (Sotomayor, J., concurring); *supra* Part IV.

255. *See Tempnology, LLC*, 139 S. Ct. at 1663.

256. *See id.*

257. *Id.* (emphasis added).

258. *Id.*

259. *See* 28 U.S.C. § 363(f).

260. *See Tempnology, LLC*, 139 S. Ct. at 1666; 11 U.S.C. § 365(n).

In addition to the guidance that may be gleaned from the Supreme Court's statutory analysis in *Tempnology*, two long-accepted canons of statutory construction buttress the conclusion that §§ 365(n) and 363(f) operate independently. First, a court "must read [two allegedly conflicting] statutes to give effect to each if [it] can do so while preserving their sense and purpose."<sup>261</sup> In considering whether it could give effect to both §§ 363(f) and 365(h), the Ninth Circuit in *In re Spanish Peaks Holding II, LLC* determined, "[w]e can easily do so here. Based on our reading—and, in particular, a proper understanding of the concept of 'rejection'— . . . [§§] 363 and 365 do not conflict."<sup>262</sup> The *Spanish Peaks* court observed that "a 'rejection' is universally understood as an affirmative declaration by the trustee that the estate will not take on the obligations of a lease or contract made by the debtor."<sup>263</sup> By contrast, the court notes, "[a] sale of property free and clear of a lease may be an effective rejection of the lease in some everyday sense, but it is not the same thing as the 'rejection' contemplated by section 365."<sup>264</sup> The court stated, "[i]n sum, [§] 363 governs the sale of estate property, while [§] 365 governs the formal rejection of a lease. Where there is a sale, but no rejection (or a rejection, but no sale), there is no conflict."<sup>265</sup> Similarly, in instances that involve the proposed sale of intellectual property pursuant to § 363(f), but do not also involve the proposed rejection of any license agreements pertaining to such intellectual property, there is no conflict.<sup>266</sup>

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261. *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see, e.g., Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 451–56 (2001) (considering the purported conflict between the saving to suitors clause and the Limitation of Liability Act); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017–19 (1984) (rejecting a contention that the Federal Insecticide, Fungicide, and Rodenticide Act repealed by implication, a Tucker Act remedy for governmental taking of property without just compensation and reconciling the two statutes by implying a requirement that remedies under FIFRA must be exhausted before relief under the Tucker Act could be obtained).

262. *In re Spanish Peaks Holding II, LLC*, 872 F.3d 892, 899 (9th Cir. 2017) (italics omitted).

263. *Id.* at 899 (citing *In re Austin Dev. Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994)).

264. *Id.* (italics omitted).

265. *Id.* (italics omitted).

266. As noted above, with respect to its executory contracts and unexpired leases, a debtor is not mandated to act under § 365. 11 U.S.C. § 365. Section 365(a) provides that, the debtor,

A second relevant canon of statutory construction that supports the conclusion that §§ 365(n) and 363(f) should be read as operating independently of each other, is the principle that Congress will address major issues directly, rather than indirectly.<sup>267</sup> Pursuant to this principle, the reader should assume that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes.”<sup>268</sup> Eliminating the free and clear sale power with respect to intellectual property that is subject to a license agreement could certainly be construed as altering a “fundamental detail[]” of bankruptcy.<sup>269</sup> Here, Congress did not expressly provide, in either §§ 363 or 365(n), that the protections of § 365(n) should be construed as superseding the free and clear sale power of § 363(f).<sup>270</sup> Congress has, however, expressly curtailed the free and clear sale power of § 363(f) with respect to other assets.<sup>271</sup> As such, Congress has demonstrated that it has the ability to

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“subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” *Id.* § 365(a). Similarly, regarding the components of a plan of reorganization, § 1123 of the Bankruptcy Code provides that the plan of reorganization in a Chapter 11 case “may . . . subject to section 365 of this title . . . provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section.” *Id.* § 1123(b)(2). Thus, a debtor may arguably choose not to reject an executory license agreement, while nonetheless moving forward with a sale pursuant to § 363(f) of the intellectual property that is the subject of that license agreement. *Id.* § 363(f).

267. *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *see, e.g., MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (noting that conferral of authority to “modify” rates was not a cryptic conferral of authority to make filing of rates voluntary); *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323–24 (2001) (“[I]t would be surprising, indeed, if Congress” had effected a “radical” change in the law *sub silentio* via “technical and conforming amendments.”).

268. *Whitman*, 531 U.S. at 468. Stated differently, the Supreme Court has observed that, “it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.” *United States v. Fausto*, 484 U.S. 439, 453 (1988).

269. *See Whitman*, 531 U.S. at 468.

270. *See* 11 U.S.C. §§ 363, 365(n).

271. Section 363(o) provides that, “[n]otwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract . . . then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract.” § 363(o). Similarly, under § 363(h), “[n]otwithstanding subsection (f),” Congress expressly curtailed the ability of the debtor to sell the interests of a person or entity who is the co-owner with the debtor of property to certain specified circumstances. *See id.* § 363(h).

protect interests from the reach of the free and clear sale power of § 363(f) when it chooses to do so. Without clear direction from Congress, the Bankruptcy Code should not be read to carve out special protections for licensees when the debtor is acting under § 363(f).<sup>272</sup>

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272. As discussed more fully below, beyond its obvious impact on the free and clear sale power of § 363(f), the implications of construing the licensee's rights under § 365(n) as absolute can, in fact, undermine state law established entitlements. See discussion *infra* Section VII.C.

Even though a debtor is not mandated to act under § 365, § 365(n) includes language—which is absent from 365(h)—that, arguably, necessitates a debtor to reject an executory license agreement pertaining to intellectual property prior to, or contemporaneously with, seeking permission to sell the intellectual property that is subject to that license agreement free and clear of the licensee's interests pursuant to § 363(f). See §§ 365(n), (h), 363(f). Subsection 365(n)(4) provides:

“(4) *Unless and until* the trustee [or debtor] rejects such contract, on the written request of the licensee the trustee [or debtor] shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) *not interfere* with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.”

*Id.* § 365(n)(4) (emphasis added).

Unlike the lessee under § 365(h), the licensee under § 365(n) has affirmative protections; specifically, a debtor is instructed: “not [to] interfere with the rights of the licensee as provided in such contract” “unless and until” the debtor rejects a license agreement for the license of rights in intellectual property. *Id.* § 365(h), (f), (n). An attempt to sell intellectual property free and clear of the licensee's interests pursuant to § 363(f) may arguably be construed as an attempt to “interfere” with the licensee's rights, as provided in the relevant license agreement. See *id.* § 365(n). It is this language in § 365(n)(4) that best supports the *Crumbs Bake Shop* court's apparent presumption that a debtor must first move to reject any intellectual property license agreements before it proposes to sell that intellectual property pursuant to § 363(f). See *id.* §§ 363(f), 365(n)(4); *In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 778 (Bankr. D.N.J. 2014). If the debtor is required to first reject such license agreements, following such rejection, the licensee gains the protections of § 365(n) as a licensee under a “rejected” license agreement, thereby leading to the conclusion that under the free and clear power of § 363(f), a licensee's interests may not be extinguished without the licensee's consent. §§ 363(f), 365(n); see *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 778.

Whether an attempt to take an otherwise lawful action to sell assets under § 363(f) would be construed as an attempt by the debtor to “interfere” such that it is prohibited under § 365(n)(4), however, seems unlikely. See §§ 363(f), 365(n)(4).

As discussed above, an accepted canon of statutory construction is the principle that Congress will address major issues directly, rather than indirectly. See *supra* notes 267–68 and

*Tempnology's* statutory analysis of the effect of rejection highlights that § 365(n) did not place the rights of licensees of intellectual property in an absolute and uniquely protected position that supersedes the other powers and protections established and recognized in the Bankruptcy Code.<sup>273</sup> The *Tempnology* Court's reasoning, buttressed by long-standing canons of statutory construction, supports the conclusion that § 365(n) should not be construed as superseding the free and clear sale power of § 363(f).<sup>274</sup>

### B. *Reassessing the Legislative History in Light of Tempnology*

In addition to construing § 363(f) as conflicting with the “more specific” § 365(n), the *Crumbs Bake Shop* court pointed to legislative history to support its conclusion that the rights of the licensee under § 365(n) trump the free and clear sale power granted under § 363(f).<sup>275</sup> Touting Congressional intent to protect such interests in the context of rejection, the *Crumbs Bake Shop* court appears to view this protection as absolute.<sup>276</sup> In *Tempnology*, the Supreme Court discusses the legislative history surrounding Congressional amendments to § 365, including the addition of § 365(n).<sup>277</sup> Rather than supporting the *Crumbs Bake Shop* outcome, the Court's discussion of the relevant legislative history supports the conclusion that the protections offered to

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accompanying text. To read “interfere” in the context of § 365(n)(4) to prohibit the debtor from moving to sell intellectual assets under § 363 without first moving to reject any license agreements with respect to those assets—given that debtors are not otherwise required to act under § 365—would “alter the fundamental details” of the statutory scheme of § 363 in a manner that is exceedingly vague. §§ 363(f), 365(n)(4); see *Whitman*, 531 U.S. at 468. As such, rather than concluding that § 365(n)(4) mandates action under § 365 before a sale under § 363, a better reading of § 365(n)(4) would be that the debtor may not “interfere” in a manner that is not permitted by a separate express provision of the Bankruptcy Code. See §§ 363(f), 365(n)(4). Under this analysis, the debtor would be free to move to sell intellectual property assets free and clear of the licensee's interests, notwithstanding § 365(n)(4). See *id.*

273. *Mission Prod. Holdings v. Tempnology, LLC*, 139 S. Ct. 1652, 1661–66 (2019).

274. See *id.*; *supra* notes 250–72.

275. See *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 777–78 (quoting *In re Zota Petrols., LLC*, 482 B.R. 154, 161 (Bankr. E.D. Va. 2012)).

276. See *id.* at 777–79.

277. *Tempnology, LLC*, 139 S. Ct. at 1664–66.

licensees under § 365(n) should not be construed as usurping the free and clear sale power of § 363(f).<sup>278</sup>

In *Tempnology*, the Supreme Court rejects the assertion that § 365(n), and other protective provisions of § 365, constitute Congress's attempt to carefully protect specific assets.<sup>279</sup> Rather, the Court observes, the legislative history reflects nothing more than Congress's effort to "whack[]" the erroneous assertion that rejection, of any executory contract, affects a termination of the rejected contract and the related, previously transferred interests.<sup>280</sup> With this understanding of the relevant legislative history, § 365(n) is more accurately understood as Congress's effort to reinforce the interpretation that rejection does not equate to termination, even in the context of intellectual property licenses.<sup>281</sup> It underscores that the protections of § 365(n) should not be construed as unique and absolute.<sup>282</sup>

In addition to the discussion offered by the Supreme Court, an independent examination of the legislative history of § 365(n) further supports that its protections should not be viewed as usurping the free and clear power sale of § 363(f).<sup>283</sup> The legislative history of § 365(n) provides that the provision is intended "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off *as a result of the rejection* of the license pursuant to Section 365."<sup>284</sup> Although the legislative history of § 365(n) clearly indicates a concern for intellectual property

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278. See 11 U.S.C. §§ 363(f), 365(n); *In re Crumbs Bake Shop, Inc.*, 522 B.R. at 777–79; *Tempnology, LLC*, 139 S. Ct. at 1664–66.

279. See *Tempnology, LLC*, 139 S. Ct. at 1652, 1663–66; *supra* notes 145–69 and accompanying text.

280. *Tempnology, LLC*, 139 S. Ct. at 1664–65; see also *supra* notes 150–56.

281. See SEN. JOSEPH BIDEN, INTELLECTUAL PROPERTY BANKRUPTCY PROTECTION ACT, S. REP. NO. 100–505, at 1, 8 (1988), as reprinted in 1988 U.S.C.A.N. 3200, 3200; *Tempnology, LLC*, 139 S. Ct. at 1661, 1664; Andrew, *supra* note 156, at 919, 928.

282. See Richard M. Cieri & Michelle M. Morgan, *Licensing Intellectual Property and Technology from the Financially-Troubled or Startup Company: Prebankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment*, 55 BUS. L. 1649, 1652–53, 1675–76 (2000).

283. See S. REP. NO. 100–505, at 1, 8, 10; 11 U.S.C. § 363(f).

284. S. REP. NO. 100–505, at 1 (emphasis added).



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licensees in the context of *rejection*, it is not clear that this same protective stance was intended by Congress to apply to debtors who choose to sell intellectual property pursuant to the free and clear sale power of § 363(f)—thereby transferring the intellectual property assets out of the hands of the debtor entirely.<sup>285</sup>

C. *What is the Point of it All Anyway? Considering Crumbs  
Bake Shop in Light of Bankruptcy Theory*

The creditors' bargain theory of bankruptcy, on the one hand, and the redistributive theory of bankruptcy, on the other, represent two opposing schools of thought regarding the purpose of corporate bankruptcy.<sup>286</sup> Both conceptual approaches to understanding the purpose of corporate bankruptcy law, however, support the conclusion that the protections offered to licensees under § 365(n) should not be viewed as usurping the free and clear sale power of § 363(f).<sup>287</sup>

Under the creditors' bargain theory, bankruptcy law "should be designed to keep individual actions against assets, taken to preserve the position of one investor or another, from interfering with the use of those assets favored by the investors as a group."<sup>288</sup> This collective approach is believed to allow actions in bankruptcy that result in value maximization, thereby benefiting the creditor group, subject to the limitation that no individual creditor should be left worse off.<sup>289</sup>

Section 363(f) is one means by which the Bankruptcy Code addresses the collective action problem. In many circumstances, the only viable option for the debtor may be the liquidation of the debtor's assets.<sup>290</sup> Section 363(f) addresses the potential

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285. *See id.* at 1.

286. *See discussion supra* Sections II.A–.B.

287. *See discussion supra* Sections II.A–.B.

288. Baird & Jackson, *Adequate Protection*, *supra* note 48, at 100.

289. *See discussion supra* Section II.A.

290. *See, e.g., In re Chrysler LLC*, 405 B.R. 84, 96 (Bankr. S.D.N.Y. 2009), *aff'd*, 576 F.3d 108 (2d Cir. 2009).

collective action problem by allowing the debtor to move forward with a sale, even over the objections of a single creditor, when one or more of certain prerequisites are satisfied.<sup>291</sup> Giving a single constituency the power to stymie a sale by asserting its rights under § 365(n) would run directly contrary to addressing the collective action problem because it would place the interests of the single creditor (the licensee) above the interests of the creditor group as a whole.

Promoting the interests of the creditor body as a whole is not the sole, or even primary, concern of the creditors' bargain theory. The creditors' bargain theory is deeply concerned with respecting nonbankruptcy entitlements.<sup>292</sup> Under the creditors' bargain theory, nonbankruptcy entitlements should be respected, unless the alteration of those rights advances the

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291. See 11 U.S.C. § 363(f); *supra* Sections II.A, III.B.2. Section 363 is one mechanism by which the Bankruptcy Code addresses the "collective action" or "common pool" problem. See JACKSON, LOGIC AND LIMITS, *supra* note 52, at 52–54. While the disposition of an asset from the perspective of one creditor or creditor group might be desirable, it may be undesirable to another creditor group. See *id.* Under the prescribed circumstances, § 363 permits action to be taken, even in contravention of nonbankruptcy rights, when that action is beneficial to the creditor body as a whole, provided the debtor gives the objecting creditor "adequate protection" that compensates the creditor for its nonbankruptcy rights. See *id.* at 139, 139 n.37.

Professor Anthony Casey describes free and clear sales pursuant to § 363(f) as "solv[ing] a very specific cooperation problem." Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1720 (2020). Professor Casey asserts that contracts the debtor entered prior to sliding into financial distress are necessarily incomplete. *Id.* at 1711–12. He posits that the purpose of corporate bankruptcy law is not to, "mimic some hypothetical ex ante bargain among creditors." *Id.* at 1711. Rather, Professor Casey asserts, the purpose of corporate bankruptcy law is better understood as providing a framework for the renegotiation of incomplete contracts, "[a]nd Chapter 11 of the United States Bankruptcy Code implements that purpose—perhaps imperfectly—by facilitating a structured renegotiation that allows parties to preserve value in the face of hold-up threats." *Id.* Professor Casey applies his "New Bargaining Theory" to the question of whether the protections offered to tenants under § 363(h) should be viewed as trumping the free and clear sale power of § 363(f) and concludes that it should not, observing that "[t]o give one lessee the ability to veto that sale would create an enormous hold-up opportunity. Moreover, the sale through a competitive auction—which is itself a market-price test—reduces any risk that the debtor is attempting to hold up the lessee." *Id.* at 1764–65.

Providing a completely different perspective, Professor Barry Adler asserts that creditors may not actually be looking to bankruptcy law to force a collective process. Barry Adler, *The Creditors' Bargain Revisited*, 166 U. PA. L. REV. 1853, 1853–57 (2018). Rather, he asserts, it may be the cleansing effect of bankruptcy sales that creditors desire, proclaiming that, "bankruptcy's principal function may be asset laundering, not collectivization." *Id.* at 1865.

292. See *supra* Section II.A.

interests of the collective and no creditor is made worse off.<sup>293</sup> Importantly, as noted, for the free and clear sale power to be used, one of five preconditions must be satisfied.<sup>294</sup> Of course, the party whose interests are to be extinguished by a § 363 sale may consent to the sale.<sup>295</sup> Absent consent however, the conditions that constrain the free and clear sale power are largely aimed at respecting nonbankruptcy entitlements.<sup>296</sup> A free and clear sale is permitted, for instance, if the interest is a lien that will be satisfied by the sale.<sup>297</sup> Under this condition, the interest is satisfied, rather than extinguished.<sup>298</sup> Similarly, a free and clear sale may also be permitted if “applicable *nonbankruptcy law* permits the sale of such property free and clear of such interest”<sup>299</sup> or if the nondebtor party could be compelled to “accept a money satisfaction of such interest.”<sup>300</sup> These conditions require looking to the rights the parties hold under other applicable law to determine whether a sale free of the nondebtor’s interest will be permitted.<sup>301</sup> A final condition under which a sale free of an interest may be permitted is when “such interest is in bona fide dispute.”<sup>302</sup> Under this condition, a sale free and clear of a nonbankruptcy entitlement may be permitted when the existence of that entitlement is in question.<sup>303</sup>

The protection of the creditors’ nonbankruptcy entitlements does not end here. Rather, even when one of the five preconditions to a free and clear sale is satisfied, the licensee can demand “adequate protection of its interests.”<sup>304</sup> Providing

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293. *See supra* Section II.A.

294. *See* § 363(f); *supra* Section III.B.2.

295. § 363(f)(2).

296. *Id.* § 363(f).

297. *Id.* § 363(f)(3).

298. *Id.*

299. *Id.* § 363(f)(1) (emphasis added).

300. *Id.* § 363(f)(5).

301. *See id.* § 363(f)(1), (5).

302. *Id.* § 363(f)(4).

303. *See id.*

304. *Id.* § 363(e); *see supra* Section III.B.2.

“adequate protection” is a mechanism by which the Bankruptcy Code respects the interests to which the nondebtor would be entitled outside of bankruptcy.<sup>305</sup> In many instances, the adequate protection that is provided may be a substitute for the interests the nondebtor would have enjoyed outside of bankruptcy.<sup>306</sup> In some instances, however, the adequate protection required may be that the nondebtor licensee is permitted to continue exercising its rights under the applicable license agreement.<sup>307</sup> As such, even without relying on the protections of § 365(n), the nondebtor licensee may ultimately be permitted to continue to use the intellectual property that is being sold.<sup>308</sup>

Through the lens of the creditors’ bargain theory, the free and clear sale power of § 363(f) should be viewed as unimpeded by

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305. See § 363(e).

306. *Id.* § 361. Section 361 provides that adequate protection of a party’s interests may be provided by giving the interested party: (1) “periodic cash payments”; (2) “additional or replacement lien[s]”; or (3) “other relief” that will provide the interested party with the “indubitable equivalent of such party’s interest.” *Id.*; see *supra* Section III.B.2.

307. Cf. *In re Spanish Peaks Holdings II, LLC*, 872 F.3d 892, 899–900 (9th Cir. 2017) (noting that the necessary “adequate protection” in the context of the sale of real property subject to a lease might consist of continued leasehold possession of the subject real property).

308. It is worth noting that, as the *Spanish Peaks* court observes, the fact that § 363(f) offers its own mechanism to protect the rights of the non-debtor party to the agreement at issue suggests that the protections of § 365(n) should not be grafted into the provisions of § 363. See *In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 899; *supra* Part VI.

While “adequate protection” provides a mechanism by which nonbankruptcy entitlements may be respected, the effect of construing § 365(n) to supersede the free and clear sale power of § 363(f) may in fact serve to undermine those entitlements. See §§ 363(f), 365(n). If the protections of § 365(n) are construed as absolute, in some circumstances, they would essentially serve to reorder the priority scheme of the Bankruptcy Code and its state-law underpinnings. See *id.* § 365(n); *In re Spanish Peaks Holdings II, LLC*, 872 F.3d at 899–901; *supra* Part VI. For example, outside of bankruptcy, subordinate interests in an asset are generally extinguished by a senior lienholder’s foreclosure sale of the asset and the asset is transferred to the buyer free of that subordinate interest. See *supra* Section VII.A; see, e.g., *U.S. Bank Nat’l Ass’n v. Collins-Fuller T.*, 831 F.3d 407, 410 (7th Cir. 2016) (applying Illinois law); *Mastan v. Salamon (In re Salamon)*, 854 F.3d 632, 636–37 (9th Cir. 2017) (applying California law); *Ballantrae Homeowners Ass’n v. Fed. Nat’l Mortg. Ass’n*, 203 So. 3d 938, 940–41 (Fla. Dist. Ct. App. 2016) (holding that the foreclosure of a senior mortgage extinguishes the liens of any junior mortgages listed in the final judgment). Such a result is denied in bankruptcy when the § 365(n) power is construed to trump the free and clear sales power of § 363(f) and a senior lender is not granted the benefit of stripping off subordinate interests. See §§ 363(f), 365(n).

the protections afforded to the licensee under § 365(n).<sup>309</sup> Under this approach, no single interested party (here, the licensee) is able to pursue its own interests to the disadvantage of the collective.<sup>310</sup> At the same time, nonbankruptcy entitlements are protected by the restraints imposed on the free and clear sale power in the form of the conditions that must be satisfied to permit such a sale and the requirement that the nondebtor party be given adequate protection of its interests.<sup>311</sup>

Similarly, the traditionalists', or redistributive, approach to understanding the purpose of corporate bankruptcy, suggests that traditionalists would favor treating the free and clear sale power of § 363(f) as unimpeded by the protections of § 365(n). Under the traditionalists' view of bankruptcy, bankruptcy law and policy should consider the needs and interests of a variety of constituencies, rather than focusing only on the interests of the debtor and its creditors.<sup>312</sup> Following this approach, nonbankruptcy entitlements may be disrupted or extinguished to serve a distributional plan that promotes a broader range of interests.<sup>313</sup>

Section 363(f) is designed to balance the interests of the collective against the interests of any individual party that may have an interest in an asset or assets owned by the debtor.<sup>314</sup> It recognizes that, in some instances, nonbankruptcy entitlements may need to be adjusted to better serve the collective interests.<sup>315</sup> At the same time, however, it allows, and even requires, the judge to take the licensee's interests into account when determining the adequate protection that should be provided to the licensee under the particular circumstances before the court in a given case.<sup>316</sup> Reading § 365(n) as usurping the free

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309. See *supra* notes 290–91 and accompanying text.

310. See *supra* notes 290–91 and accompanying text.

311. See *supra* notes 292–308 and accompanying text.

312. See *supra* notes 64–66 and accompanying text.

313. See discussion *supra* Section II.B.

314. See discussion *supra* Part III.B.

315. See discussion *supra* Part III.B.

316. See discussion *supra* Part III.B.

and clear sale power of § 363(f), by contrast, serves to elevate the interests of a single constituency (the licensee) above the interests of all other affected parties.

#### CONCLUSION

Understanding the interplay, if any, between §§ 363(f) and 365(n) of the Bankruptcy Code is critical to understanding and navigating the relationship between the debtor-licensor and nondebtor-licensee in bankruptcy.<sup>317</sup> The *Crumbs Bake Shop* court analogized the protections offered to nondebtor licensees under § 365(n) to the protections offered to nondebtor lessees under § 365(h).<sup>318</sup> The decision followed courts that have preserved the rights of nondebtor lessees by considering what impact, if any, a sale of intellectual property under § 363(f) would have on the protections afforded to a nondebtor licensee under § 365(n).<sup>319</sup> Under this approach, the intellectual property sold is burdened with the rights of the licensee, notwithstanding the free and clear sale power of § 363(f).<sup>320</sup>

Courts grappling with the purported interplay between §§ 363(f) and 365(n) need not take the path forged by the courts in the context of §§ 363(f) and 365(h).<sup>321</sup> Rather, the guidance offered by the Supreme Court in *Tempnology*, as well as sound principles of statutory interpretation and relevant legislative history, serve as a guide through the fog and lead to the conclusion that § 365(n) does not annul the power to sell intellectual property assets free of a licensee's interests in that intellectual property.<sup>322</sup> Two primary schools of thought regarding the purpose of bankruptcy also support this conclusion.<sup>323</sup> Nonetheless, given the path forged by courts that

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317. See 11 U.S.C. §§ 363(f), 365(n).

318. See *supra* Part V.

319. See *supra* Part V.

320. See *supra* Part V.

321. See *supra* Part VI.

322. See *supra* Parts IV, VII.

323. See *supra* Section V.II.C.

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have grappled with understanding the perceived interplay between § 365(h) and § 363(f), and as illustrated by the *Crumbs Bake Shop* decision, disagreement and confusion surrounding this issue is likely.<sup>324</sup>

As bankruptcy courts across the country reach contrary results regarding the relationship between § 365(n) and § 363(f), debtor-licensors, their creditors, and nondebtor licensees will be left to wonder about the security of their respective positions.<sup>325</sup> Given the vital role that intellectual property plays in most businesses and the United States economy, the potential for protracted disagreement and uncertainty is untenable.<sup>326</sup> Congress should address the issue by amending the Bankruptcy Code to expressly provide that the free and clear sale power of § 363(f) is independent of, and is not impeded by, the protections of § 365(n). In advance of Congress taking this action, however, judges who face this issue should construe these provisions in line with the guidance offered by *Tempnology* and conclude that the free and clear sale power of § 363(f) is not curtailed by the protections afforded to licensees in the context of the rejection of an intellectual property license agreement.<sup>327</sup>

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324. See *supra* Parts V–VI.

325. See *supra* Part VI.

326. See *supra* Part I.

327. See *supra* Part IV.